No. 07-330

In the Supreme Court of the United States

MICHAEL J. GREENLAW, AKA MIKEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, where petitioner appealed his criminal 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.

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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 jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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, includ-

ing two separate violations of 18 U.S.C. 924(c)(1). The district court sentenced petitioner to 442 months of imprisonment, to be followed by five years of supervised release. Petitioner appealed the sentence as unreasonably high; the government did not cross-appeal. On appeal, the court of appeals vacated and remanded for imposition of a higher sentence, holding that the district court's imposition of a 10-year, rather than 25-year, consecutive sentence for the second of petitioner's two Section 924(c)(1) convictions was erroneous and that, despite the government's failure to cross-appeal, the court of appeals should correct the error because it seriously affected substantial rights of the government and the public. Pet. App. 1a-15a, 19a.

1. Petitioner and approximately 26 others were members of a gang known as the "Family Mob," which operated a cohesive drug trafficking organization that controlled the sale of crack cocaine in a neighborhood on the south side of Minneapolis. From 1996 to 2003, the gang sold an estimated two to three kilograms of crack cocaine per week. Pet. App. 2a-3a; Gov't C.A. Br. 3-6.

The presence and use of firearms were ubiquitous features of the gang's distribution activities. A member of the Family Mob "would carry a gun for security purposes" in connection with transactions. Pet. App. 2a. Additionally, members 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; Gov't C.A. Br. 9. In addition to providing protection from robbery and other threats, the Family Mob used the firearms (as well as violence and intimidation generally) to prevent rival dealers from moving into their territory. Pet. App. 3a; Gov't C.A. Br. 6-9; see also *id.* at 11-12 (discussing ex-

amples of specific acts of violence by petitioner). As a result of arrests and the execution of search warrants, the police recovered numerous weapons used by the Family Mob. See Pet. App. 3a-4a; Gov't C.A. Br. 13-14.

2. On November 16, 2004, a federal grand jury in the District of Minnesota returned a sixth superseding indictment against petitioner and others. 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, 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, 10). Sixth Superseding Indictment; see Pet. App. 4a.

Following a two-week trial, a jury found petitioner guilty on seven of the eight counts, including two of the three Section 924(c)(1) counts, Counts 4, 10. The jury acquitted petitioner on the third Section 924(c)(1) count, Count 9.

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 Gov't Resp. to Def.'s Position Regarding Sentencing 5; Sent. Tr. 9-10. The district court rejected the government's

argument. The court held that Count 10 was not "a second or subsequent conviction" based on its understanding that that language did not encompass a situation in which two violations of Section 924(c)(1) are "charged in the same indictment." Sent. Tr. 7, 9-10; 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 pursuant to 18 U.S.C. 924(c)(1)(A)(iii). Sent. Tr. 7-8.

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, 8, and 36 months on Count 5, to be served concurrently with each other and the sentence on Count 1; 60 months on Count 4, to be served consecutively to the total imposed on Counts 1, 2, 5, 6, 8; and 120 months on Count 10, to be served consecutively to all other sentences. *Id.* at 18a. Because the statutory minimum sentence for the Count 1 drug conspiracy was ten years, see 21 U.S.C. 841(b)(1)(A) (2000 & Supp. V 2005), if the district court had applied five-year and 25-year minimum consecutive sentences to Counts 4 and 10, the minimum statutory sentence to which petitioner could have been sentenced would have been 480 months, rather than the 442 months the district court imposed.

4. Petitioner appealed, challenging both his convictions and sentence. See Pet. App. 2a. The government

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[1] At the time of sentencing, government counsel was unable to call to mind this Court's decision in *Deal* v. *United States*, 508 U.S. 129 (1993), see Sent. Tr. 9-10, which held that Section 924(c)(1) applies to second or subsequent convictions under Section 924(c)(1) that occur in the same trial as the first such conviction. See *Deal*, 508 U.S. at 137.

did not appeal or cross-appeal. After considering petitioner's claims, the court of appeals rejected them as without merit. See *id.* at 4a-7a. The court *sua sponte* vacated petitioner's sentence, however, and remanded with instructions that the district court impose on petitioner a new sentence that would include the statutory minimum 25-year sentence for Count 10. *Id.* at 15a. Citing this Court's decision in *Deal* v. *United States*, 508 U.S. 129 (1993), the court of appeals held that the district court had plainly erred in failing to treat Count 10 as "a second or subsequent conviction" and, as a result, in not imposing a mandatory, 25-year, consecutive sentence under 18 U.S.C. 924(c)(1)(C). Pet. App. 7a-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) to Count 10, the United States had not appealed the district court's sentence. Pet. App. 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 & n.5. Applying plain-error analysis, the court concluded that the sentence was directly and plainly contrary to the Court's decision in *Deal*. *Id.* at 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, 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 rep-

utation of judicial proceedings. *Id.* at 9a-10a. The court therefore 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.

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. Pet. for Reh'g 1-11. 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, 867, cert. denied, 546 U.S. 966 (2005): "Because the government did not raise an appeal or cross-appeal, [petitioner's] sentence should have been left alone." Pet. for Reh'g 10. On May 10, 2007, the court of appeals denied the petition. Pet. App. 28a.

5. 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. Resentencing J.

DISCUSSION

Petitioner contends (Pet. 6-11) that the court of appeals erred in increasing the length of his sentence absent a cross-appeal by the government. Petitioner further contends (Pet. 5-6, 11-12) that this case presents an opportunity for the Court to determine whether the filing of a timely cross-appeal is a jurisdictional prerequisite to the court of appeals' authority to enter a judgment expanding a non-appealing party's rights, or whether the cross-appeal requirement is a rule of practice.

In the United States' view, this case does not warrant this Court's plenary review, but the Court should grant, vacate, and remand the case for further consideration by the court of appeals. The government agrees that under the "inveterate and certain" rule against "modifying judgments in favor of a nonappealing party," *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479, 480 (1999) (*Neztsosie*) (quoting *Morley Constr. Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 191 (1937)), the court of appeals erred in vacating the district court's judgment and remanding with instructions to increase petitioner's sentence. This case, however, does not provide an appropriate opportunity for the Court to address the nature of that rule. The cross-appeal requirement was not briefed by the parties in their principal briefs and was addressed only in passing in petitioner's petition for rehearing. In particular, the court of appeals did not address, and the petition for rehearing did not raise, the question whether the rule respecting cross-appeals is a jurisdictional limitation. Nor did the court of appeals have the benefit of this Court's June 14, 2007, decision in *Bowles* v. *Russell*, 127 S. Ct. 2360, which post-dates both the panel's decision and the denial of rehearing.

See Pet. App. 1a, 28a. Therefore, the Court should grant the petition, vacate the judgment of the court of appeals, and remand for further proceedings. See generally *Lawrence* v. *Chater*, 516 U.S. 163 (1996) (per curiam).

1. a. In *Neztsosie*, this Court considered whether the court of appeals had erred in finding an exception to "the prohibition on modifying judgments in favor of a nonappealing party." 526 U.S. at 480. 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 request for preliminary injunctions "'except to the extent' that [the Tribal-Court plaintiffs] sought relief in the Tribal Courts under the Price-Anderson Act." *Id.* 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, 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 regarding 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 a conflict in the circuits on whether the cross-appeal requirement is jurisdictional or a rule of practice, *id.* at 480 & n.2, but concluded that it "need not decide the theoretical status of such a firmly entrenched rule" in order to hold that the interest relied on by the court of appeals was "clearly inadequate to

defeat the institutional interests in fair notice and repose that the rule advances," *id.* at 480. In so holding, the Court noted that by 1796 it had already recognized that a cross-appeal was required to obtain expanded relief, *id.* at 479 (citing *McDonough* v. *Dannery*, 3 U.S. (3 Dall.) 188, 198 (1796)), and that "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. Rather, the Court explained, it had "repeatedly expressed the rule in emphatic terms," *id.* at 481 n.3, and "more than 60 years ago * * * spoke of [the rule] as 'inveterate and certain.'" *Id.* at 479 (quoting *Morley Constr. Co.*, 300 U.S. at 191).

Recent decisions of this Court confirm that even claims-processing rules that are not "jurisdictional" are to be strictly enforced when the party who is benefitted by a rule properly invokes it. In those cases, the Court has repeatedly noted the inflexible, mandatory nature of such rules. See, *e.g.*, *Eberhart* v. *United States*, 546 U.S. 12, 19 (2005) (per curiam) (stating that "Rule 33, like Rule 29 and Bankruptcy Rule 4004, is a claim-processing rule—one that is admittedly inflexible because of Rule 45(b)'s insistent demand for a definite end to proceedings."); *id.* at 18 (noting that *United States* v. *Robinson*, 361 U.S. 220 (1960), was correctly decided, even if the decision's language was imprecise, because "the court's duty to dismiss the appeal was mandatory"); *Kontrick* v. *Ryan*, 540 U.S. 443, 456 (2004) (observing that a claims-processing rule is "unalterable on a party's application," but differs from a jurisdictional rule because it "can nonetheless be forfeited if the party asserting the rule waits too long to raise the point"). Thus, whether or not it is jurisdictional, the cross-appeal requirement is at

least a claims-processing rule that must be strictly enforced by the courts when, as here, the appellant invokes the rule in a timely fashion. See, *e.g.*, *Neztsosie*, 526 U.S. at 480; *Morley Constr. Co.*, 300 U.S. at 191; *Eberhart*, *supra*; *Kontrick*, *supra*.

b. In this case, the government did not file a timely notice of appeal. Federal Rule of Appellate Procedure 4(b)(1)(B)(ii) provides that, in the event a defendant files a notice of appeal, the government must file a notice of cross-appeal within 30 days of when any defendant files his notice. The government's failure in this case to file any notice of cross-appeal necessarily qualifies as a failure to meet the timing requirement under Rule 4(b)(1)(B)(ii). Petitioner also raised the objection in a timely fashion. The government did not seek in its appellee brief or at oral argument a remand for an enhanced sentence on the second of petitioner's Section 924(c)(1) convictions. Rather, after rejecting petitioner's arguments, the court of appeals *sua sponte* ordered the district court on remand to impose a 25-year minimum sentence on Count 10. Thus, the petition for rehearing was the first opportunity at which petitioner could object to such a remand on the basis of the government's failure to cross-appeal. Although the petition for rehearing did not develop extensively the argument that the government's failure to file a cross-appeal precluded the court of appeals from ordering an enhanced sentence, it did address the issue sufficiently to avoid waiving it. See Pet. for Reh'g. 10 ("Because the government did not raise an appeal or cross-appeal, [petitioner's] sentence should have been left alone.").

c. Even assuming that sufficiently extraordinary circumstances might justify creating an exception to the cross-appeal requirement, Federal Rule of Criminal

Procedure 52(b) should not be read as creating such an exception. Nothing in the specific language of the rule or its history purports to address the effect of a failure to file a timely cross-appeal. Moreover, if that rule did qualify as an exception, it would swallow the cross-appeal requirement for criminal cases, a result that is nowhere suggested in, and would instead 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, 437 (1973) ("[I]n the absence of a cross-petition for certiorari, questioning the holding that petitioner was denied a speedy trial, the only question properly before us for review is the propriety of the remedy.").

Additionally, Congress has expressly recognized the role of high-ranking Department of Justice officials in determining whether or not a sentencing appeal should be pursued. 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). More generally, 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.*, *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). And 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.

2. Although the government agrees with petitioner that the court of appeals erred in *sua sponte* remanding the case with directions to enhance petitioner's sentence, the question presented in the petition for a writ of certiorari does not warrant this Court's plenary review in this case. The court of appeals addressed the issue without the benefit of briefing. Nor have the courts of appeals had the opportunity to consider whether the cross-appeal requirement is jurisdictional in nature in light of this Court's recent decision in *Bowles*. Given the government's confession of error in the judgment and the court of appeals' lack of consideration of the issue below, there is a reasonable probability that the court of appeals will alter its decision, if given the opportunity. Accordingly, the Court should grant the petition, vacate the judgment of the court of appeals, and remand for further proceedings. See, *e.g.*, *Lawrence*, 516 U.S. at 167-168; *Stutson* v. *United States*, 516 U.S. 193, 195-196 (1996) (per curiam).

a. Without any substantial discussion of the significance of the government's failure to file a cross-appeal, the court below asserted that it would "exercise [its] discretion under Fed. R. Crim. P. 52(b) and find that the district court plainly erred." Pet. App. 9a-10a (footnote omitted). The court received no briefing or argument on the issue before rendering that decision. Moreover, its opinion did not address this Court's decision in *Neztsosie*, 526 U.S. at 479-480, nor the Court's recent decisions discussing the mandatory nature of other non-jurisdictional claims-processing rules, see *Eberhart,* 546 U.S. at 13-19; *Kontrick*, 540 U.S. at 456. The court instead relied principally on a series of cases involving the

application of plain-error review where parties have timely filed notices of appeal, but have failed to identify an issue in their appellate briefs. See Pet. App. 9a n.5 (citing, *e.g.*, *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam)). Those cases do not speak to the scope or application of the cross-appeal requirement.

The court of appeals did reference (Pet. App. 9a-10a n.5) *United States* v. *Moyer*, 282 F.3d 1311 (10th Cir. 2002), and *United States* v. *Rivera*, 411 F.3d 864 (7th Cir.), cert. denied, 546 U.S. 966 (2005), both of which involved the government's failure to cross-appeal. It is far from clear, however, that the court's citation of those cases reflects full consideration of the cross-appeal requirement. In *Moyer*, the parties agreed that the issue was subject to plain-error review, and there was no discussion of the court's authority beyond reciting the parties' position. See 282 F.3d at 1318. And although *Rivera*, 411 F.3d at 867, involves consideration of the cross-appeal requirement, the court below cited it with respect to the proposition that "fairness concerns run both ways" in evaluating the fourth prong of plain-error review, not as part of a discussion of whether the cross-appeal requirement barred review. Pet. App. 9a n.5.[2]

We are aware of no other criminal case in which the Eighth Circuit has held that it may increase a defendant's sentence in the absence of a government cross-appeal. The Eighth Circuit has held, in a single *civil* case, that the cross-appeal requirement is a rule of prac-

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[2] As noted above, although petitioner raised the issue in his petition for rehearing and rehearing en banc, the focus of the petition was his claim that the error did not satisfy the fourth prong of plain-error review under Rule 52(b). The government was not asked to file a response to the petition and thus never submitted briefing on the issue below.

tice that is subject to exceptions. See *Chicago, Burlington & Quincy R.R.* v. *Ready Mixed Concrete Co.*, 487 F.2d 1263, 1268 n.5 (8th Cir. 1973). But that case predates *Neztsosie*, and the only Eighth Circuit decision to address *Neztsosie* cited it in support of a holding that the court would not address a claim because of the appellee's failure to file a cross-appeal. See *Nitsche* v. *CEO of Osage Valley Elec. Coop.*, 446 F.3d 841, 845 n.4 (2006). More broadly, the Eighth Circuit has generally followed the rule that "an appellee that has not filed a cross-appeal * * * may not obtain from us relief more extensive than it received in the District Court." *Benson* v. *Armontrout*, 767 F.2d 454, 455 (1985).[3]

b. It is also likely that the Tenth Circuit, the other Circuit petitioner identifies (Pet. 6-7) as clearly holding that a court may increase a sentence in the absence of a government cross-appeal, see *Moyer*, 282 F.3d at 1317-1319, will be amenable to reconsidering that decision in a future case. As discussed above, the parties in *Moyer* "both assert[ed] that th[e] court should review Moyer's illegal sentence for plain error," and there is no indication that the court went beyond the position of the parties in determining whether to review the issue. *Id.* at 1318. We are not aware of any other cases in which the Tenth Circuit has increased a sentence in the absence of

[3] In another civil case, the Eighth Circuit held that a defendant who had not filed a notice of appeal nevertheless benefitted from the court's order vacating a judgment on the appeal of a co-defendant. See *Hysell* v. *Iowa Pub. Serv. Co.*, 559 F.2d 468, 476 (1977). As petitioner notes (Pet. 16-17), the holding in *Hysell* is incompatible with this Court's later decision in *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), that a court of appeals lacks jurisdiction over parties who (even by attorney error) are omitted from the notice of appeal. The Eighth Circuit has not applied *Hysell* to excuse the failure to file a notice of appeal (or cross-appeal) in other cases, let alone cases since *Torres* and *Neztsosie*.

a government cross-appeal. Indeed, *Moyer* appears to be contrary to the weight of Tenth Circuit precedent, which describes the cross-appeal requirement as jurisdictional. See, *e.g.*, *Savage* v. *Cache Valley Dairy Ass'n*, 737 F.2d 887, 888-889 (10th Cir. 1984) (per curiam) (noting that the Tenth Circuit "has previously held that the filing of a timely cross-appeal is mandatory and jurisdictional"); *D.J. Simmons Inc.* v. *Broaddus*, 116 Fed. Appx. 964, 970 (10th Cir. 2004) (citing cases); but cf. *Daniels* v. *Gilbreath*, 668 F.2d 477, 480 (10th Cir. 1982) (holding, pre-*Torres*, that a non-appealing defendant may get the benefit of a co-defendant's appeal, where the appellate decision necessarily resolved an issue in favor of the non-appealing defendant).[4]

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[4] Contrary to petitioner's contention, the case law in the Fifth Circuit does not create "the untenable proposition that a court of appeals may revise a sentence in favor of the Government without a cross-appeal, but may not remedy a sentencing error to benefit a non-appealing criminal defendant." Pet. 11. As petitioner notes, in *United States* v. *Schmeltzer*, 960 F.2d 405, 407-409, cert. denied, 506 U.S. 1003 (1992), a Fifth Circuit panel vacated and remanded a sentence for failure to apply a mandatory minimum, even though the government had not cross-appealed. The opinion, however, does not discuss the absence of a government cross-appeal or any effect it might have on the court's ability to address the issue. *Ibid.* Subsequently, the Fifth Circuit sitting en banc held that the cross-appeal requirement is "mandatory and jurisdictional" and that the court therefore could not provide affirmative relief to a defendant who had not filed a cross-appeal. *United States* v. *Coscarelli*, 149 F.3d 342, 342-344 (1998) (quoting *Robinson*, 361 U.S. at 229). As an en-banc decision, *Coscarelli* necessarily supersedes the contrary result in *Schmeltzer*. There is no reason to believe, as petitioner suggests, that *Coscarelli* applies only to cases in which a defendant has failed to appeal or cross-appeal. Indeed, *Coscarelli* describes the rule as being "as applicable to a defendant's cross-appeal as it is when the government does not appeal." *Id.* at 343.

c. Nor does this case warrant plenary review to address the broader question whether the cross-appeal requirement is jurisdictional or a rule of practice. As discussed above, the court of appeals erred in increasing defendant's sentence absent a government cross-appeal regardless of whether the cross-appeal requirement is jurisdictional or a rule of practice. Accordingly, as was the case in *Neztsosie*, the Court's resolution of the case would not require it to "decide the theoretical status of such a firmly entrenched rule." 526 U.S. at 480. Cf. *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191-1192 (2007) (court may properly decline to exercise jurisdiction without first determining whether it possesses jurisdiction).[5]

Nor was petitioner's "jurisdictional" argument raised in his petition for rehearing in the court of appeals. The petition urged that "the panel *did not have to* address an issue that was not raised on appeal by the government," and the court "*could have, and should have*" refused to correct the sentence, Pet. for Reh'g 10, but did not assert that the court of appeals lacked jurisdiction to do so. To the contrary, the petition suggested that the analysis might have been different "[h]ad Appellant received a lesser sentence at the district court level." *Ibid.* Because petitioner never raised his "jurisdictional" argument in the court of appeals, that court never had the opportunity to consider it.

Moreover, the courts of appeals have not yet had the opportunity to consider the assertedly jurisdictional

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[5] For the same reasons, there would be no need for the Court to reach petitioner's contention (Pet. 12-13, 19-20) that plain-error review is unavailable for errors forfeited by the government because, *inter alia*, the government has no "substantial rights" within the meaning of Rule 52(b).

nature of the cross-appeal requirement in light of this Court's decision last term in *Bowles*, a month after rehearing was denied in this case. In *Bowles*, the Court held that the requirement of a timely notice of appeal in civil cases is a jurisdictional requirement because it is embodied in statute. 127 S. Ct. at 2365. The Court noted that time limits that are rule-based only are not jurisdictional. *Ibid.* No federal statute specifies the time for filing a notice of cross-appeal. No court of appeals has had the opportunity to address petitioner's argument (Pet. 16) that *Bowles* applies with equal force to cross-appeals, because "[t]he federal statutes governing appellate jurisdiction make no distinction between appeals and cross-appeals." In the view of the United States, the Court would benefit from consideration of that question in the courts of appeals before addressing it itself.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further proceedings.

Respectfully submitted.

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