IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL GREENLAW, AKA, :

MIKEY, :

Petitioner :

v. : No. 07-330

UNITED STATES. :

- x

Washington, D.C.

Tuesday, April 15, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 a.m.

APPEARANCES:

AMY HOWE, ESQ., Washington, D.C.; on behalf of the Petitioner.

DEANNE E. MAYNARD, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent, supporting the reversal.

JAY T. JORGENSEN, ESQ., Washington, D.C.; for amicus curiae, support of the judgement below; Appointed by this Court.

C O N T E N T S

P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first today in Case 07-330, Greenlaw versus United States.

Ms. Howe.

ORAL ARGUMENT OF AMY HOWE

ON BEHALF OF THE PETITIONER

MS. HOWE: Mr. Chief Justice, and may it please the Court:

For over 200 years, this Court has held, without exception, that an appellate court may not modify a judgment in a party's favor unless that party has filed a notice of appeal. Such a rule, this Court has explained, serves important interests in notice and finality.

In 1984, Congress enacted the Sentencing Reform Act against the backdrop of this well settled rule. In 18 U.S.C. section 3742, Congress provided for limited appellate review of sentencing errors. Nothing in the text, structure, or history of section 3742 reflects any intent by Congress to deviate from the inveterate and certain cross-appeal rule, nor is there any reason why sentencing appeals should be treated any differently from other appeals. Instead, section 3742

reflects traditional principles of appellate jurisdiction. In --

JUSTICE STEVENS: Can I ask you this question? I've been thinking about this case. Supposing your client prevailed on appeal and they held a resentencing. Could the district judge have increased the sentence?

MS. HOWE: No. It could not have because the government --

JUSTICE STEVENS: The district judge could not have increased it? If they sent it back for a new sentencing, a fresh hearing on what the sentencing should be, would the district judge have been foreclosed from giving a higher sentence than he gave the first time?

MS. HOWE: If -- he would have been foreclosed, yes, Your Honor.

JUSTICE STEVENS: What's the authority for that proposition?

MS. HOWE: Simply that the -- the district --

JUSTICE STEVENS: Say, if it was a capital case and he won on appeal, he could get the death sentence the time -- the second time around, which is a little bit -- be a little more serious sentence.

Why couldn't he have gotten a higher sentence.

MS. HOWE: This is a -- the case actually in United States versus Harvey, which was a case out of the Third Circuit, and, although the district court could order the same sentence, it can't increase the sentence. It -- you know, would be circumventing the cross-appeal rule.

JUSTICE GINSBURG: Is that based on any -- any precedent of this Court?

MS. HOWE: No. It's based on the cross-appeal rule.

JUSTICE GINSBURG: So just on the cross-appeal rule? That's --

CHIEF JUSTICE ROBERTS: I would have thought it would depend on what the mandate from the court of appeals said. If the mandate said the sentence is vacated and the case is remanded for resentencing, it seems to me that leaves open the full range of legitimate sentencing.

MS. HOWE: Certainly. I mean, our argument would be that the -- you know, if the court of appeals can't order the sentence increased, that on remand the district court couldn't circumvent the cross-appeal rule by increasing the sentence as well.

CHIEF JUSTICE ROBERTS: Well, but the court of appeals -- if your argument is correct, the court of appeals is limited solely by virtue of the failure to file a notice of cross-appeal. That -- that's a limitation that wouldn't apply in the district court.

MS. HOWE: No, that's -- that's certainly true, that it would be circumventing the cross-appeal rule to allow the district court to do something that --

JUSTICE KENNEDY: And it would also, I take it, be circumventing what could happen in the district court. You have to move very -- seven days in the district court for mathematical error, and that's it.

MS. HOWE: Yes, under this rule.

JUSTICE KENNEDY: Other than for assistance --

MS. HOWE: Yes, the district court has, I believe, seven days to correct the sentence.

JUSTICE GINSBURG: This would not be a mathematical error?

MS. HOWE: No. This would be -- this would not be a mathematical error, but --

JUSTICE SCALIA: I could have sworn that I've seen more than one petition for certiorari in which the claim is that the sentence was increased on remand vindictively. I'm sure I've seen cert petitions like

that. And you're telling me that the assertion of -- of vindictiveness is unnecessary, and it just can't be increased on remand?

But all you have is a court of appeals case for that.

MS. HOWE: Yes, we do --

JUSTICE KENNEDY: Perhaps that's after a new trial.

MS. HOWE: Perhaps.

JUSTICE KENNEDY: What happens if it's -- what happens if the sentence is five years, reversed on appeal, error in evidence, same -- same offense, same indictment? Then you have to comply with the vindictiveness rules before you can give a higher sentence?

MS. HOWE: I think it might be different if they were -- if there were a new trial on the same indictment. But -- you know, going back to the cross-appeal rule, I mean, the court of appeals could -- the district court could certainly impose the same sentence.

JUSTICE KENNEDY: What do you think is the rule if there's a new trial and the judge says, you know, what about this, I heard the evidence again; I think I'm going to increase the sentence?

MS. HOWE: Well, our argument would be that the government had -- had forfeited the right to make that argument and that the district court would not be -- you know, that would essentially be sua sponte ordering --

JUSTICE KENNEDY: But what's sua sponte --

MS. HOWE: You know, if the government had --

JUSTICE KENNEDY: It's a resentence. There's a new judgment, a new conviction. What happens there?

MS. HOWE: New judgment and new conviction -- it -- the rule may be different. You know, double jeopardy may apply as well.

JUSTICE GINSBURG: Double jeopardy if it's a new judge? Is that what you said?

MS. HOWE: I -- I'm not sure.

JUSTICE SCALIA: Who asked this question? We're going to get a totally different case here.

(Laughter.)

JUSTICE GINSBURG: But let's go back to where you started, and that was with the statute, 37 -- what is it? 42?

MS. HOWE: 42.

JUSTICE GINSBURG: -- (f). And the -- that

has two subparts, and the first part just says the court of appeals can decide whether a sentence was imposed in violation of law, period.

And (2) has two subparts that refer to the party appealing. So why doesn't the first one cover both sides when the second one is distinctly divided into (a) and (b) parts?

MS. HOWE: Certainly, Justice Ginsburg. And that -- this is reprinted on page 5a of the government's brief. And the inference that I think, Justice Ginsburg, you're drawing and that the amicus would have you draw is that the fact that the subsection (f)(2), which is on page 6a, subsection (f)(2)(A) and (b) refer to whether the appeal has been filed; whereas, subsection (f)(1) does not, which means that, in some circumstances, the cross-appeal rule does not apply and in some circumstances it does.

But our interpretation, which we think is the correct one, is that the only reason that subsection (f)(1) does not refer to whether an appeal has been filed is because subsection (f)(1) refers to the kind of claims that both defendants and the government can bring; whereas, subsection (f)(2) parallels subsections(a)(3) and (b)(3), but (c), only the defendant can appeal an upward departure; only the

government can appeal a downward departure.

And our interpretation, again, which we think is the correct one, is that subsection (f)(1) doesn't need to refer to whether an appeal has been filed, because -- because both the defendant and the government can bring those kinds of appeals.

And even if you don't agree with that interpretation, I think it's worth noting that the amicus -- that the amicus's construction is further flawed for three reasons. And the first is that that would cause subsection (f)(2) to operate illogically. There's no reason why the -- for example, if you had a case in which the defendant had appealed and the government had not appealed, under this interpretation the court of appeals could increase a sentence if it found there had been a misapplication of the Guidelines that would result in an increase in the defendant's sentence; but the court of appeals would not be allowed to increase the defendant's sentence if it found that there was an unwarranted downward departure, because the government had filed a notice of appeal. We don't think -- that doesn't make any sense. We don't think there's any reason why Congress would have intended to it to operate this way.

The second reason is that this is a very

thin reed to rest this construction of the statute on, given that Congress must have been aware of the cross-appeal rule. There's no reason to think that it would have departed from two centuries of appellate practice in this way, based on this -- this very thin reed, and in fact we know from the Organized Crime Control Act of 1970 that Congress was aware of the cross-appeal rule because in that case it expressly carved out an exception to the --

JUSTICE BREYER: What happens if it's just the converse case? The same thing, I take it.

MS. HOWE: I'm sorry?

JUSTICE BREYER: We -- we have a government appeal. The sentence was 10 years. The government thinks it should be 20.

On appeal, the appellate court thinks the government is wrong, and moreover, the appellate court discovers an error: It should have been one year. And you're saying, well, according to you, not only is the court of appeals helpless, but the district court is helpless. So this person is in jail for nine years where he shouldn't have been. That's your -- that's your position here?

MS. HOWE: That's correct, Justice Breyer.

JUSTICE BREYER: Well, that's a pretty tough

position. It -- it seems to me there could be errors -- and I guess if he's sentenced to death, it's the same. I mean, you know, the -- the -- it's a pretty tough position, isn't it? That there is no authority in the courts of appeals, or in the district court, or anywhere in the system to create -- to correct a serious error where a person could, in fact, be in prison for a long time contrary to the law.

MS. HOWE: Well --

JUSTICE BREYER: How is it supposed to work in your system that we get those errors corrected?

MS. HOWE: I have three points, Justice Breyer.

The first is that Congress must have been aware of this scenario in particular because in the Organized Crime Control Act of 1970, when the government appealed, that under -- in those provisions, that brought up the defendant's sentence and his conviction for review. And Congress decided, for whatever reason, not to continue that -- that exception to the cross-appeal rule when it enacted the Sentencing Reform Act.

The second point, Justice Breyer, is that we're not aware that there's actually any body of case law in which this happens. No one has pointed to any cases in which this has actually happened. The --

JUSTICE STEVENS: I believe you say it has decided not to make an exception to the cross-appeal rule. Of course, the cross-appeal rule itself is not statutory, is it?

MS. HOWE: The cross-appeal rule itself is -- is not statutory, but --

JUSTICE STEVENS: It's an arguable rule among the courts of appeal as to whether there is such a rule.

MS. HOWE: It is indeed, Justice Stevens, but --

JUSTICE STEVENS: So it's not surprising that Congress didn't make exception to a rule that isn't that firmly established.

MS. HOWE: It is not surprising, but we know from the Organized Crime Control Act that Congress certainly was aware of the cross-appeal rule, because in that case it did carve out a limited exception.

And my third point, Justice Breyer, returning to your question, is that the defendant in that case may well have an argument, may be able to seek post-conviction relief under section 2255, as the Government acknowledges in its brief.

And so he may be able to go back to the district court under section 2255 and obtain relief in

that manner.

JUSTICE SCALIA: I thought you -- I thought it was sort of an important part of your case that the cross-appeal rule was an established rule. You -- you now acknowledge that it's not an established rule?

MS. HOWE: Well, we do believe it is jurisdictional, Justice Scalia. In the Morley case, which we think is our most --

JUSTICE SCALIA: Not just jurisdictional but -- but well-established.

MS. HOWE: We believe it is both well-established and jurisdictional. And we believe, in particular, when you're talking about sentencing, even if you don't agree -- agree with us that the cross-appeal rule generally is jurisdictional, we believe that it -- that section 3742 is jurisdictional. Because it sets out in subsections A and B, the kinds of errors that defendants and the government can bring.

But we also believe that it ultimately doesn't matter in this case, Justice Scalia, because even if, as amicus concedes, it is merely a rule of practice, it is a rule of practice that is not subject to exceptions, and Mr. Greenlaw timely invoked it at his earliest opportunity.

JUSTICE SCALIA: But you say it is a

well-established at least rule of practice.

MS. HOWE: Absolutely.

JUSTICE SCALIA: And what's to be said against that? How many courts of appeals do not apply it?

MS. HOWE: The Eighth Circuit in this case certainly does not apply it. The Tenth Circuit --

JUSTICE SCALIA: Well, they --

MS. HOWE: They acknowledge --

JUSTICE SCALIA: They didn't apply it under this statute. I am saying, apart from this statute, what -- what courts of appeals in other cases deny the existence of a cross-appeal rule?

MS. HOWE: Well, the District of Columbia Circuit and the Ninth Circuit both regard it is a rule of practice that -- that may be subject to exceptions and exceptional circumstances. But, even if it is a rule of practice, Justice Scalia, we still prevail because Mr. Greenlaw timely invoked it at his earliest opportunity and because in a sentencing context it is not subject to any exceptions.

JUSTICE GINSBURG: What difference does it make? Now, you said this is a jurisdictional rule because its no rule. What difference does it make if it is labeled "jurisdictional," or if it is just regarded

as a tight procedural requirement?

MS. HOWE: It makes a difference, Justice Ginsburg, in the sense that it can be -- it cannot be waived if it is jurisdictional. The Court can raise it at any time. If it is a rule of practice, it is subject to exceptions, although in this -- in this -- as in this case with this rule, the Court has not found an exception in over 200 years. The -- in the sentencing context in particular, it is not subject to -- to exceptions.

And Mr. Greenlaw timely invoked it. If this Court has no further questions, I'd like to reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Howe.

Ms. Maynard.

ORAL ARGUMENT OF DEANNE E. MAYNARD

ON BEHALF OF THE RESPONDENT

MS. MAYNARD: Mr. Chief Justice, and may it please the Court:

The Court of Appeals erred in increasing Petitioner's sentence for two reasons:

First, it lacked jurisdiction to do so in the absence of a notice of appeal by the Government under 18 USC 3742(b).

Second, even assuming it did not strictly lack jurisdiction, it nevertheless violated the

mandatory claim-processing rule that a judgment may not be increased in favor of an appellee in the absence of a timely --

JUSTICE ALITO: Now, if the cross-appeal rule is jurisdictional, how do you account for the sentencing-package -- the sentencing-package cases? The court makes a mistake on count 1 -- the district court makes a mistake on count 1, the court of appeals vacates the entire sentence for the development of a new sentencing package.

MS. MAYNARD: Those cases are not inconsistent with the finding of jurisdictional, Justice Alito, because in those cases the court of appeals has granted the defendant's requested relief, and it has vacated the judgment at the request of the defendant.

And then, once it goes back to the district court, what the district court may lawfully do would turn on the scope of the mandate, not on principles of the cross-appeal rule.

JUSTICE STEVENS: But in this very case could the court of appeals said: We will -- we will grant the appellant a new sentencing hearing and send the case back to the district for resentencing; and, by the way, district judge, when you do the resentencing, take a look at the section that imposes a mandatory minimum?

Could they have done that?

MS. MAYNARD: If the court of appeals had found an error at the defendant's request, yes, Justice Stevens, and remanded it, depending on the scope of the mandate and under the scope of the mandate --

JUSTICE STEVENS: And they could have ended up with precisely the same result that they ended up with in this case.

MS. MAYNARD: But it would have been a key difference in the sense that they would have found some of the defendant's claims on appeal correct. Here the court of appeals rejected all of the defendant's claims; and, nevertheless, in the absence of a government appeal, increased the Petitioner's sentence.

JUSTICE ALITO: So if the district court -- court of appeals had said that the sentence that was imposed by the district court was unreasonable by two months and accepted the defendant's argument to that extent and then remanded, on remand the district court could have corrected the sentence on the gun counts.

MS. MAYNARD: It would have depended on how the mandate was worded. But if they vacated the sentence in its entirety and remanded it, the district court could have imposed a lawful sentence at that point. Yes.

JUSTICE GINSBURG: Even though -- even though the prosecution didn't ask for it? I thought that you were relying on the division of authority between the executive, the prosecutor, and the court. And that is that a court reacts to the charges that the prosecutor brings, and if the prosecutor isn't asking for a higher sentence, the court has no authority to grant it.

MS. MAYNARD: Yes, Your Honor. In the court of appeals that is true. But I understood Justice Alito's hypothetical to posit a situation where at the defendant's request his sentence was vacated. And then what the district court could do on remand would depend on the scope of the mandate.

JUSTICE GINSBURG: Why not? Why wouldn't the prosecutor still have control and say: Judge, the government is asking for ten years, no more?

MS. MAYNARD: Before the district court, Justice Ginsburg, the government would be required to press the law. And, as it did here, the law is that under -- under 924(c) this is a second, or subsequent, conviction in count 10; and it is error. Petitioner should have been sentenced to a second, or subsequent, sentence of 25 years on count 10.

So if it were back in the district court and the district court were free under the scope of the

court of appeals mandate to impose sentence, then the government would be obligated to argue the law before the district court. What --

CHIEF JUSTICE ROBERTS: Well, usually the mandate in these cases simply says, you know, the case is remanded to the district court.

If that's all the mandate says, does that authorize the district court to do the right thing under the law?

MS. MAYNARD: The courts of appeals have different rules, Your Honor, about whether or not a general mandate of the type that you posit should be assumed to open up all issues for sentencing or not.

And there's actually some disagreement in the circuits on what one assumes from a general mandate.

JUSTICE KENNEDY: Well, actually rule 35 was changed because it used to be based on the mandate. But now rule 35 says you can reopen within seven days after the verdict or finding of guilty. So that would indicate under the rules that the mandate is irrelevant.

MS. MAYNARD: Well, no, Your Honor. I think rule 35 speaks to what the district can do within seven days of announcing the sentence. Once a sentence is timely appealed, if the defendant were to prevail or if the government were to prevail in a case in which the

government had actually appealed and it were to be remanded, then -- then the defendant --

JUSTICE KENNEDY: Within the scope of the appeal, which brings us right back to this case.

MS. MAYNARD: Within the scope of the mandate.

JUSTICE SOUTER: I don't understand your mandate rule as being consistent with your general theory of the case. Because if the court of appeals cannot order this kind of relief, how could it be that the court of appeals' mandate would authorize the relief?

It would seem to me that you've either got to take the position that the mandate is, in effect, a -- a kind of neutral order. The district courts may or may not have authority to do something after the mandate comes down. But I don't see how you can take the position that the mandate, itself, by the court of appeals will, itself, determine what the district court can do.

MS. MAYNARD: Well --

JUSTICE SOUTER: Because, in effect, I think you are saying, by structuring the mandate in a certain way, the court of appeals can open the door to something that the court of appeals, itself, could not do. But by

structuring the mandate in a different way, the court of appeals can cut off the possibility of district court orders of a sort that the court of appeals couldn't do. And that seems -- that is what seems to me inconsistent with your -- with your theory of the limited court of appeals jurisdiction.

MS. MAYNARD: I don't think it is anomalous, Your Honor, in a case in which the court of appeals has jurisdiction over a claim, grants the requested relief, and vacates the sentence. For then, what the district court can do can turn on the -- on the scope of the court of appeals mandate.

JUSTICE SOUTER: All right. Now, let's consider -- assuming that the mandate leaves the -- open -- the question open entirely for the district court.

You said ultimately what the district court can do depends on the mandate. Can the court of appeals also by mandate say: And by the way, district court, because we couldn't increase the sentence here, you can't do it either? Is that open to the court of appeals?

MS. MAYNARD: I don't know there's any court of appeals that has held that it could do that. It --

JUSTICE SOUTER: Then what is the play in the mandate that -- that you are assuming when you say it

depends on the mandate? What the -- what the district court can do would depend on the mandate.

MS. MAYNARD: Well, I'm not sure I understand the --

JUSTICE SOUTER: Where is the -- what option does the court of appeals -- given the limits on what the court of appeals itself can order, what are the options that the court of appeals has in writing the mandate that will determine what the district court can do? What are you getting at.

MS. MAYNARD: I'm not sure that that's -- I don't know the precise contours of that, Justice Souter, but if the court of appeals grants the Petitioner's request to vacate the sentence --

JUSTICE SOUTER: Yes.

MS. MAYNARD: -- and then remands for resentencing, in a general way, that could leave open to the district court the ability to resentence.

JUSTICE SOUTER: Okay.

MS. MAYNARD: For example --

JUSTICE SOUTER: Now let's -- you say that could leave open -- if the mandate is general, that could leave open. Can the mandate be specific in precluding?

MS. MAYNARD: Given the lack of an appeal here.

JUSTICE SOUTER: Yes.
MS. MAYNARD: By the government?
JUSTICE SOUTER: Yes.
MS. MAYNARD: I -- I suppose it -- it might do that. I suppose it -- it might be able to do that. Here --
JUSTICE KENNEDY: I don't know about your initial premise. I -- I take it the policy here is that the defendant who appeals ought to know what's at stake in the appeal. He shouldn't be surprised.
MS. MAYNARD: That's right.
JUSTICE KENNEDY: The government cross-appeals, fine; if he doesn't cross-appeal, he knows what the stakes are.
MS. MAYNARD: That's right.
JUSTICE KENNEDY: But now you're saying that if the sentence is -- is vacated, they can start all over? That the district court can't start all over if it's down -- if still in the district court. Why should the court of appeals have any more authority than the district court does?
MS. MAYNARD: Well, because it -- once the court -- if the court -- if the Petitioner -- I mean -- at any risk in any appeal, and this is true in civil cases, too, you know, if you seek a new trial on damages,

for example, in a civil case, because of instructional error, and you go back, I think, you know, the jury who decides the damages a second time isn't bound by the first jury's decision. Any time --

CHIEF JUSTICE ROBERTS: So the -- the defendant who is appealing has to be very careful about the relief he requests? He says I don't want the sentence vacated; I want the sentence reduced to five years instead of 10.

And nothing else? That's the only relief I seek?

MS. MAYNARD: Well, I think if the court of appeals finds error in the sentence it vacates under the -- the remedial provisions in 3742 for the -- for the court -- for the district court to resentence the Petitioner.

For example --

JUSTICE SOUTER: Well -- if that's the case, if the -- if the -- if it cannot be structured by the request for relief as the Chief Justice is suggesting, then on the Government's theory, in a case like this, if the defendant wins on appeal, he is in serious trouble when that case goes back to the district court; whereas if he loses, he can't be any worse off than he is now.

That's a strange -- that's a strange rule.

MS. MAYNARD: Well, if the defendant wins in the sentencing appeal, there -- there's always a chance that on -- on remand, the -- the district court will reconfigure the sentence. If the sentence --

JUSTICE SOUTER: But in effect that means then -- and this -- I didn't understand this to be your position -- but that means, in effect, that the cross-appeal rule is essentially, as you're arguing for it, a -- a formality. It limits what the district court can do, but it is not a rule that embodies the notion that when a defendant appeals the defendant ought to know, in effect, what he can gain and what he can lose; because if, on your theory, if the defendant wins and there's a mandate back to the district court, it is wide open.

MS. MAYNARD: Well, I think, you know, if you look at cases -- recent -- I think post-Booker for example --

JUSTICE SOUTER: Well, I -- I want to look at them but I want to know what your position is first. And I take it your position is that if the defendant wins, and he cannot by his request for relief limit the relief, as the Chief Justice suggested, then when the case goes back to the district court, in effect, the slate is totally blank and he's starting all over again and he is subject to -- to whatever outer limits he

would have been subject to in the first instance.

MS. MAYNARD: Right. I was going to use the Booker case as an example. Post-Booker, you know, defendants have appealed, saying I was innocent, or mandatory Guidelines regime, and I want to be sentenced under the advisory Guidelines regime. And when those is cans have gone back, this -- courts of appeals have -- most of the courts of appeals have held that the district court is not bound by its original sentence once freed from the mandatory Guidelines. It can consider all the factors as instructed by this Court, and can potentially decrease the sentence. And I think --

JUSTICE SOUTER: Then the cross-appeals rule is essentially a rule of appellate court procedure and nothing more.

MS. MAYNARD: Well, I think in this situation, actually -- it definitely is a rule of appellate court procedure.

JUSTICE SOUTER: Yes. But --

MS. MAYNARD: And it's definitely a mandatory --

JUSTICE SOUTER: But it doesn't go beyond that?

MS. MAYNARD: I think that's correct. If you succeed on your appeal you may end up in the

district court worse off than when you began. But the issue before this Court is what can a court of appeals do in the absence of a party pressing a claim before it. And --

CHIEF JUSTICE ROBERTS: In that context, aren't -- aren't you concerned about enlisting the court of appeals in doing something illegal? I mean, they know that what they're authorizing, or imposing really, as a sentence is illegal.

MS. MAYNARD: No. All they -- all they're doing, Your Honor, as we requested, is rejecting the Petitioner's claims on appeal.

CHIEF JUSTICE ROBERTS: Well, I know, but I'm reminded of what we do in statutory cases. If one party says this is -- it should be read A, and the other party says it should be read B, we've had cases where we say, well, they're both wrong, and we're going to read the statute as -- as C because we the Court want to do the right thing.

MS. MAYNARD: Well, the Government is not agreeing that there was -- with the Petitioner there was no deal error. What the Government is saying -- the question is -- so this is not a situation like you're positing, where the parties are trying to agree to the governing law. This is a question of which issues are

properly in the court of appeals to start with.

CHIEF JUSTICE ROBERTS: No -- no, in my hypothetical they weren't agreeing. They were -- one side was saying B, the other side was saying A.

MS. MAYNARD: Fair enough.

CHIEF JUSTICE ROBERTS: And the right answer was C.

MS. MAYNARD: Fair enough, but here there's -- there's no disagreement about what the merits of the governing law is; the question is, is that question properly before the court of appeals.

JUSTICE GINSBURG: Why didn't the Government cross-appeal in this case?

MS. MAYNARD: There's nothing in the record to indicate why the Government didn't cross-appeal, Justice Ginsburg. But there are good reasons why the Government wouldn't cross-appeal in any given case. There are 8,000 plus adverse decisions against the Government in 2007, and reasons why the Government might not cross-appeal or appeal in a given case include the length of the sentence the person has already received, whether there's a need for clarification of a particular question of law, whether this is a recurring error --

CHIEF JUSTICE ROBERTS: Getting -- the difficulty -- getting the Solicitor General's office to

authorize the appeal?

(Laughter.)

JUSTICE SCALIA: Ms. Maynard --

MS. MAYNARD: But the -- may I -- yes, Justice Scalia.

JUSTICE SCALIA: It seems to me many of these horribles really exist, however we decide this case. I don't know that anybody says that if there is not a firm rule requiring the -- a cross-appeal, I don't know that anybody says that the court of appeals must search the record and correct any errors below.

MS. MAYNARD: Well, the amicus is arguing that's the meaning of 3742 --

JUSTICE SCALIA: The statute -- I'm talking about the general --

MS. MAYNARD: In general --

JUSTICE SCALIA: The general cross-appeal rule --

MS. MAYNARD: But there --

JUSTICE SCALIA: It happens all the time, that there's an error in the judgment which the court of appeals does not -- does not reach because there's been no court -- no cross-appeal. It's -- it's totally unexceptionable.

MS. MAYNARD: Exactly, Your Honor. And that

-- the danger to parties, in particular to the Government in having courts reach out and arrogate to themselves the decision -- thank you -- the decision to appeal is -- is illustrated by this particular case. In footnote 6 of the court of appeals opinion it recognizes a second error that aggrieves the government, deciding it was plain --

JUSTICE STEVENS: May I just ask this one question? This problem has been around for a long, long time; and sometimes cross-appeals -- courts of appeals have corrected what they thought was plain error, and without a cross-appeal there.

Has that generated a whole lot of problems over the years? I mean there are isolated cases that you've all been able to find searching 30 or 40 years of jurisprudence, but I don't see any wide -- widespread problem being generated by the courts of appeals who have disagreed with your view.

MS. MAYNARD: Well, if I could make two points. The court of appeals actually found two errors that aggrieved the government here, Justice Stevens, and ruled for us only on one. So in a case where we didn't notice an appeal, on an issue we did not brief, the court of appeals ruled against us.

And second, I'm aware of no case in this

Court where this Court has reached out to find plain error on behalf of a nonpetitioning respondent or a non-appealing appellate.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Maynard.

Mr. Jorgensen.

ORAL ARGUMENT OF JAY T. JORGENSEN,
AS AMICUS CURIAE,
IN SUPPORT OF THE JUDGMENT BELOW

MR. JORGENSEN: Mr. Chief Justice, and may it please the Court:

There are three questions really in this case, and the Court need not resolve all of them depending upon how it resolves the others, but some of them get lost sometimes, so I would like to state what the three are.

The three are first, does section 3742 provide an answer? Is it an affirmative grant of power to the court of appeals to the Eighth Circuit to give the right answer when the -- when the Petitioner asked them is my sentence imposed in violation of law? Or is it a limit on the court's power telling them they cannot provide him with relief? That's the first question.

If the Court concludes that it's neither -- if a Court concludes either that it is a grant of

jurisdiction, or rather of power -- or that it's not, that it's an affirmative limit, then the Court can end there.

If the Court concludes that 3742 is more like 1291, just a general appellate statute that does not give the answer here, then the Court has to go on to decide is this case -- is this rule, this cross-appeal rule, in the criminal context not the civil context that is -- that is the subject of this 200 years of discussion, but in the criminal context is it a jurisdictional limit on what the courts can do or is it a rule of practice.

And then finally, if the Court concludes -- if the Court concludes it is a jurisdictional limit, then that's the end. If the Court concludes that it is a rule of practice, the final third question is: Is it a waivable rule of practice or is it a firm and inflexible rule of practice? I think what often gets assumed. But, of course, in Kontrick, in Bowles, the Court addresses the issue in that case -- in those cases and decides whether the rule of practice at issue in that case is indeed --

JUSTICE GINSBURG: Mr. Jorgensen, suppose I think there's a larger anterior question to all of this?

MR. JORGENSEN: Yes.

JUSTICE GINSBURG: And that is what I

suggested in the colloquy with Ms. Howe, we have a system in which the prosecutor can bring charges. The judge may think, my goodness, looking at this set of facts, you could have charged much more.

The judge can't do that, he can't tell the prosecutor you have to charge "Y" -- as -- in addition to "X". The government chooses not to appeal. By what right does the court say, I know you didn't appeal, Government, but you should have so we're going to take care of it for you?

It seems to me that our system rests on a principle of party presentation as many systems do not. In many systems, the court does shape the controversy and can intrude issues on its own. But in our adversarial system, we rely on counsel to do that kind of thing. So, my problem with your whole position, without getting down to particular statutory provisions, is what business does the court have to put an issue in the case that counsel chose not to raise?

MR. JORGENSEN: That's a --the answer to that question, Justice Ginsburg, is -- is multi-part, and I'll try to move through it quickly. This Court had said -- made the very point that you made at the charging stage. That at the charging stage the court -- the district court cannot decide what a -- what a criminal will be

charged with; but that once the trial has proceeded to judgment, that prosecutorial discretion is at an end. I wish I could remember the name of the case, but Justice Scalia was the author.

JUSTICE SCALIA: Me, too.

(Laughter.)

MR. JORGENSEN: The point being that once a crime has been proven, the law kicks in, and the -- the defendant must be sentenced in accordance with law. The same is true on appeal. I'm not advocating here for, I think, what your question would assume, which would be a roving court of jurisdiction -- a roving court of appeals that could reach out and take jurisdiction over a case that has not been brought to it.

Under 3742 no one questions that the court has jurisdiction over the case -- over the very sentencing issues because somebody has filed a notice of appeal and brought it to the court. The only question is when the defendant says to the court under 3742(a)(1) was my -- was my sentence imposed and the statutory language is: in violation of law, can the Eighth Circuit provide the right answer or is it powerless to provide the right answer to only provide an answer that benefits him?

JUSTICE SCALIA: Could we discuss -- let's --

could leave aside for the moment what the background rule of law is and discuss whether -- I guess it was your first point -- whether this particular statute proscribes the answer, and therefore, we don't have to go any further.

Why do you say it proscribes the answer?

MR. JORGENSEN: I believe that it does, Justice, because everybody agrees that the Sentencing Reform Act was a clean break with the past and imposed an entirely new regime. So, the talk about the regime of the past is somewhat beside the point.

So then you get down to the language itself of section 3742. Under (a), it provides that a defendant may ask the court of appeals was my sentence imposed in violation of law; and under (b)(1), the government can raise same appeal. Then under (d), the parties certify to the court or rather bring to the court the record that they think addresses the issue that either side raised; and then in (e), the court -- (e) says the court shall decide whether it was imposed in violation of law; and then (f) (1) says if the court determines that it was imposed in violation of law, it shall send it back with instructions.

Now, the main answer to that is well, (f)(1) -- you have to get all the way to (f)(1) before

you have got the answer. And that's unsurprising. I don't think any member of the court would say that the Eighth Circuit lacks the power, is barred from noticing the 924(c) error here.

Certainly the Eighth Circuit could see it; certainly the Eighth Circuit could say it. I see the error here. The only question is, can it provide the remedy? And that's what (f)(1) says. Not only can't you --

JUSTICE SCALIA: Well, why would -- why would Congress want a different disposition for (f)(1) than for (f)(2)? It's clear that under (f)(2) if the sentence is outside the applicable guidelines and the -- or if the departure is based on an impermissible factor or is to an unreasonable degree or the sentence was imposed for an offense for which there is no applicable guideline and its plainly unreasonable, for that, it is clear that if it hasn't been raised by one or the other party, the court doesn't get into it.

Why -- why would it want a different rule for those too? In other words, I'm saying that far from supporting your case, as your brief suggests, (f)(2) (a) and (b) seems to me harms your case.

MR. JORGENSEN: Well, if I can give a two-part answer, Justice. First, the court is not in the

practice of overturning what the plain language says on a -- a sort of legislative history or surmising what Congress may have been motivated by. But even if it were, there is a clear answer.

(F)(1) subsumes (a)(1) and (a)(2) and (b)(1) and (b)(2). And the questions under those statutes or rather those provisions are legal questions. The kind of questions -- was this sentence imposed under (a)(1), (b)(1) in violation of law or (a)(2), (b)(2), was it an incorrect application of Sentencing Guidelines?

If the court of appeals gets that wrong, that's the kind of thing that's going to be imposed in everybody else's case. But under (3) and (4) it's this -- this defendant's case.

JUSTICE BREYER: Wait, (2)(a) and (b) I thought -- do I not have this right, (2)(a) and (b) say the same thing as (1)? It says if -- if the sentence is too high says the defendant's appeal, then what you do is you vacate it and send it back with such instructions as the court considers appropriate.

MR. JORGENSEN: Indeed.

JUSTICE BREYER: Subject to (g), which has to do with the district court.

Then the other part says if it is too low and it was the Government that appealed, the court shall

set it aside and send it back with such instructions as it considers appropriate, again subject to (g).

So all three say the same thing.

JUSTICE SCALIA: No. But not if it's too high and the defendant has appealed.

JUSTICE BREYER: That's what --

JUSTICE SCALIA: Not if it's too high and the Government has appealed.

JUSTICE BREYER: That's right.

JUSTICE SCALIA: If it's too high and the Government has appealed, you don't get any relief under -- under --

JUSTICE BREYER: Yes, do you. If it's too high -- wait. Wait. If it is too -- ah.

(Laughter.)

JUSTICE BREYER: I see.

MR. JORGENSEN: You're exactly right, Justice Scalia. So the question is, why would Congress say what it plainly said, which is under (f)(1) violations of law and incorrect applications of the Sentencing Guidelines, the court gives the right answer no matter who appeals. But under (f)(2) Congress specifies it matters under this who appeals. And the reason is, in those instances, it is too high in this defendant's case, and this defendant can be entrusted to

forward his own cause; but under (a)(1) and (a)(2), then you get a court of appeals precedent that -- that gives the wrong answer, if a question of law or the application of the Sentencing Guidelines.

So there is a difference between (a)(1), (a)(2), (b)(1), (b)(2) and 2 and 3 under --

JUSTICE SCALIA: Of course, you know, that difference disappears if you say that -- that, in fact, the whole thing assumes that the -- the factor complained of has been brought to the court's attention by the proper person. So that (f)(1) assumes that if it's the government appealing in violation of law because the defendant was given too little, or if it's the defendant appealing because in violation of law that he was given too much, it makes much more sense that way, it seems to me.

MR. JORGENSEN: That -- that -- if the Court were to go there, Justice, I believe that goes back to you previous question of: Would -- should we assume or should the Court believe that Congress was aware of its history and I think --

JUSTICE BREYER: The way to do this then is -- is -- I see -- this section foresees basically what the other side is saying. It foresees it, because it's a very unusual case what happened here.

MR. JORGENSEN: It is a very --

JUSTICE BREYER: So the way you should handle it, given this section, is the court of appeals would send -- I'm trying this on -- the court of appeals says, well, it's the defendant that appealed -- who appealed. He says the sentence is too high. Given what we have in front us in the issues, he's right; now we've noticed that there's is other problems here. So what we do is send it back for resentencing. And, Judge, when you resentence, look at it. And see if maybe we're right. That would be a perfectly fair way to handle it, and a normal way to handle it. Is that right?

MR. JORGENSEN: Well, importantly, Justice, one, two, three, and four, one being: Is it posed in violation of law? Two: Is it a correct application of Sentencing Guideline (c)(3)? Or is it too high? There's a body of case law as to what kind of a field -- appeals fit within what category. And the parties and the courts of appeals are united in believing that the Petitioner's question in this case fits within (a)(1): Was his sentence imposed in violation of law.

But, as you know, the Court created the reasonableness question in Booker, and then the courts of appeals have agreed that that fits in within(a)(1).

JUSTICE BREYER: But you don't have --

JUSTICE SCALIA: Except -- except it's not enough to say, well, we've noticed by the way we're -- you know, in looking at the proper appeal by the proper -- my goodness, look what we've noticed.

It's not that. You're saying the court of appeals has to search the record. It has to make sure that there were no errors in favor -- or harming the other party who has not cross-appealed.

And that's a considerable burden, as Judge Boudin's opinion on the court of appeals makes clear.

MR. JORGENSEN: Indeed.

JUSTICE SCALIA: And it's extraordinary.

MR. JORGENSEN: Indeed, although it is what 3742 says, and I believe it's actually not that different than what happens with jurisdictional issues. The court must resolve those that are brought to it.

JUSTICE SCALIA: Precisely so.

MR. JORGENSEN: And then the court notices the ones that are obvious, has a duty to look for them but that doesn't --

JUSTICE SCALIA: Which is why we have tried to pare down what is jurisdictional.

MR. JORGENSEN: And on that question, I -- before the time runs out, I want to, Justice Scalia, follow up on your question, which is: What if the Court

assumes that 3742 does not provide the answer? Which is I -- I believe where you're going.

Then the Court confronts the question of, is the cross-appeal rule jurisdictional or a rule of practice? Now, the Court has provided the answer to that once in, I believe it said, Langnes, and said that it is a rule of practice. And then since then, there's been obviously a long period of time. And then the Court has had its series of cases contra Bowles, Arbaugh. And under those cases, there is no good argument that it's jurisdictional. The teachings of those cases is that the Court has used the phrases "power" and "jurisdiction" too broadly, too loosely, and is now, as you say, trying to cut back on those jurisdictional limits. And a rule like this can only be jurisdictional if it's based on a statute, and I believe all the parties agree this rule is not based on a statute.

So then that gets us finally to the question of, if 3742 does not provide the answer and it is a rule of practice, is it a mandatory rule of practice, an inflexible rule of practice? Or one where the Court can use discretion as to whether or not to apply it when it's invoked?

And the -- there can be no question that there are discretionary rules of practice. Indeed, in

Bowles, the one issue on which all nine Justices agreed is just that: Justice Souter, writing for the dissent, would have found that that rule of practice was discretionary. Justice Thomas, writing for --

CHIEF JUSTICE ROBERTS: If it's -- well, if it's discretionary, how would you -- I assume it's reviewable for abuse of discretion.

MR. JORGENSEN: Indeed.

CHIEF JUSTICE ROBERTS: How would you know whether it's an abuse of discretion or not? I mean, the issue is going to be the same in every case. There was no cross-appeal. If there had been, we would have increased the sentence, and one court of appeals says, well, we're not going to do it; and the other court of appeals says, yes, we're going to do it.

Which one is reversed for abuse of discretion?

MR. JORGENSEN: I believe the one that refused to -- to correct such a plain error, obviously.

CHIEF JUSTICE ROBERTS: I thought you might say that. But I mean --

(Laughter.)

MR. JORGENSEN: But the -- your question was, what is the standard? If I -- if I may, I believe that's the question. And the Court has, I think, provided the

-- several formulations of what the standard is. In Langnes, the Court said good cause was the standard. In Reynolds, which contrary to what Petitioner said was a case where this Court afforded relief on a sentence to a criminal Petitioner who had not brought that issue to this --

JUSTICE BREYER: Would you -- could do you this? Because this is quite helpful to me. Reading, I started out where Justice Scalia was at the beginning of this argument. I thought the district court normally has it open, to the judge, to resentence. Resentence is resentence. You can't be vindictive, but that's the limit. That's how it works normally, I thought.

And given -- if that's so, then you look at the three sections we just saw, try to read them together, and say they certainly are written with the notion that the noticing of a plain error on the other side is going to be few and far between if ever.

So the normal way to handle it is just what we said: The judge decides on the record and the appeal -- I decide this for the defendant here. Says I decide. But I've noticed something, says the writing judge. And, of course. it's open on resentencing to go into that.

MR. JORGENSEN: I --

JUSTICE BREYER: So if you were going to do

something other than that, in the court of appeals, you'd have to have a reason, and it would have to be a fairly good reason. So you don't close off the escape hatch because we can't all foresee the future perfectly, but you say it's going to be few and far between.

Now does that work?

MR. JORGENSEN: I believe it does work, Justice Breyer.

JUSTICE BREYER: All right.

MR. JORGENSEN: And I believe it --

JUSTICE SCALIA: This argument is not an argument under the statute? This is an argument giving your interpretation of what the background rule is?

MR. JORGENSEN: I believe that's right.

JUSTICE SCALIA: And you would limit the background rule to plain error?

MR. JORGENSEN: Yes -- yes, Your Honor, I would. And that does not really contradict what the Eighth Circuit did here. Rule 52(b) is really another formulation of the very same thing that the court said in Langnes; that's good cause. In Neztsosie, it -- the Court phrased it "countervailing considerations" which outweigh the institutional interests in fair notice and repose. And, of course, rule 52(b) talks about "fairness, integrity, and public reputation of judicial

proceedings." They're all different formulations of the same --

CHIEF JUSTICE ROBERTS: But if it's such a --

MR. JORGENSEN: -- of the same --

CHIEF JUSTICE ROBERTS: If it's such a plain error, it's fair to ask why -- why the Government didn't cross-appeal. Isn't it?

MR. JORGENSEN: There is nothing in the record here, Justice, on that. The Government has been very careful not to say -- I urge you on reply -- to ask. I believe it was a blunder, and so to adopt --

JUSTICE SOUTER: A blunder?

MR. JORGENSEN: A blunder. So, to adopt the Government's rule is to adopt a new -- a new exclusionary rule that the defendant goes free when the constable blunders.

JUSTICE KENNEDY: Well, if -- if this were to be a more frequent occurrence, i.e., plain errors, then we were to rule for you and court of appeals generally would do this, then a defendant might think twice about -- about appealing in a complex case.

MR. JORGENSEN: That's true, Justice.

JUSTICE KENNEDY: Because there's nothing that could happen -- once the district court rules and

the seven days for error goes by, there's nothing that anybody can do to raise it.

MR. JORGENSEN: Well, the first part of your question was true, Justice Kennedy, but respectfully the second part was not.

In the -- the way it currently works, under the rules, a defendant must file his notice of appeal before the Government files. And so, as it currently stands, he makes his choice before he ever knows. There is no extra burden that would be placed on him.

JUSTICE GINSBURG: Well, he doesn't have to pursue it if the Government appeals.

MR. JORGENSEN: That's exactly right. And the Government makes that point that at some point, if the Government raises its appeal, he could strike a deal with them. Now, it's not correct to assume that he could then unilaterally walk away because there is a notice of appeal, the Government's notice of appeal. So he has to strike a deal with the Government at that point. That's no different in this case -- than in this case. At oral argument, the Eighth Circuit asked both parties about this error. He could have struck a deal then.

If this case turns on notice, there isn't a notice problem here. It's all over the record. It's

raised at sentencing. It's raised on appeal. It's discussed in the briefs. It's discussed at oral argument. This error was -- was known -- known to all. Now --

JUSTICE GINSBURG: I didn't -- I didn't understand that a party couldn't voluntarily withdraw a notice of appeal.

I mean, suppose -- the only way that the court of appeals can get into this is because the defendant has pursued an appeal.

Suppose this comes up and the defendant says, oh, my goodness, I stand to get 15 more years in prison; I'm withdrawing my notice of appeal. There's nothing before the court of appeals then. Nothing.

MR. JORGENSEN: That's a critical difference, Justice Ginsburg. You're exactly right that the court of appeals must have, under 3742, a notice of appeal, or it has no jurisdiction.

JUSTICE GINSBURG: Yes.

MR. JORGENSEN: But under the hypothetical we were discussing, I -- I perhaps assumed incorrectly. I thought we were talking about the defendant files his notice of appeal before the Government ever files; then subsequently the Government files as well. Now, if the defendant withdraws, there's still a notice of appeal

before the court.

JUSTICE GINSBURG: Right.

MR. JORGENSEN: But if there -- if the government had never filed, you're exactly right that the defendant could take his back. But the problem is it doesn't answer Justice Kennedy's question. His question was: Isn't a defendant entitled to know that he's -- that he's -- that the Government might appeal, that he might be at risk, that there might be a problem here? And my point is he doesn't know under the current system anyway. He has to make his choice before the Government ever makes its choice. Now --

JUSTICE SOUTER: Mr. Jorgensen, may I take you back to something you mentioned earlier in the argument? And I thought I followed it at the time, and I -- I may not have understood you.

As I recall, you were explaining the difference between (f)(1) and (f)(2)(A) and (B) by saying that in (f)(1), which was -- which does not embody any condition on who has appealed --

MR. JORGENSEN: Right.

JUSTICE SOUTER: -- the concern is that, if there is an error, it's an error which will in effect infect all cases. It's a circuit error and is potentially there for any case that comes along for

sentencing; whereas, in (f)(2), the -- if there's an error, the limited damage is simply to the case itself, to the particular defendant.

Where I don't follow that reasoning is in the fact that (f)(1) refers not only to an incorrect -- to a violation of law, but incorrect application of sentencing guidelines, which would seem to include a -- the particulars of a given case. So am I either misunderstanding your argument or maybe misunderstanding subsection 1?

MR. JORGENSEN: Well, Justice Souter, the -- the lines between A 1, 2, 3, and 4 are not as bright as they might be. But when Congress enacted it, in response to Justice Scalia's question of why might Congress have done this -- when it wrote it, which was before Booker, which introduced some additional theory as to which of those four does an appeal fit within, one was: Is it imposed in violation of law?

And, using that clear language, you can imagine the Congress would be concerned that violations of law not go unremedied.

JUSTICE SOUTER: If that's all it said, I would certainly understand your distinction.

MR. JORGENSEN: And then 2 is an incorrect application of the Sentencing Guidelines, which, again,

at the time of the Sentencing Reform Act was -- were intended to be, I believe, mandatory.

JUSTICE SCALIA: So that it was a violation of law?

MR. JORGENSEN: Indeed. Indeed, there isn't that much of a difference between 1 and 2. But then when you get to 3 and 4, then you get into the language that addresses the particulars of this case: Was this defendant's -- was the application to this defendant too high based on an unreasonable fact or to an unreasonable degree, I believe is the --

JUSTICE SOUTER: But the -- I guess the problem I still have is some incorrect applications of the sentencing guidelines pre-Booker were, in fact, violations of law. But not all of them were, any more than all of them are now. But forget the situation now. Not all of them were.

And I don't see how you can draw the sort of -- the nonporous distinction that you are drawing. I mean it's a -- it is a good try; but I -- I -- there -- even pre-Booker there are some incorrect applications that could have been corrected on an abuse standard that were not properly described as violations of law per se.

MR. JORGENSEN: I think that's right, Justice Souter. And I could only say that what we're

doing here is we are hypothesizing why would Congress have said what they said; and it is a -- it is a dangerous game to play. But that is my best -- my best hypothesis. But it does say what it says.

Now, if I can return -- and I hope this is helpful -- to the questions that began the entire argument, which is the sentencing -- the sentence-packaging rule or the sentencing package rule which Justice Breyer addressed, I believe the right answer to your question, Justice Stevens, is that there -- that under the way the sentencing-package rule works, which is applied, I believe, by all circuits, is that if any part of a --

JUSTICE SCALIA: What do we mean by the "sentencing packaging rule"?

MR. JORGENSEN: That's a very good question, Justice Scalia. Under section 3553(a) after the Sentencing Reform Act was imposed, judges were -- district judges were empowered and given the obligation to build a sentence that took into consideration a number of competing factors such that you might, if you were a judge, a district judge, reduce a sentence under one count of an indictment if you were going to give more under -- under another; and you put together a sentencing package; and then that's the -- that's the

sentence that the defendant receives.

And then when that goes up on appeal, if any part of that package is undone, the whole package is undone. This is the rule that the circuits follow.

To your question, Justice Ginsburg, I don't believe they have a precedent of this Court to fall -- to base that on. But it is the -- it is the rule that is nearly uniformly followed. So then when the case goes back to the district court, the district court is free to -- to construct a new sentence.

So as -- here, if the defendant had prevailed in any way, then back on remand the district judge could have imposed the same sentence.

Now, a limit on that, Justice Scalia, is the vindictiveness cases. That if there is any evidence that -- that the increased sentence, making the sentence the same or more is as a -- you know, it's a pay back --

JUSTICE SCALIA: The punishment for getting him reversed, right?

MR. JORGENSEN: Exactly. And that can't be done. But, otherwise, with that narrow exception, the sentence can be exactly the same, even though the defendant prevailed on appeal.

Now, that played out exactly in this case. In this case, when it went back to the district court,

the defendant said to the district court: Don't give me more. You can fit the new fifteen years within what I already have. Give me what I already had.

And the District Judge said: No. I'm going to give you more.

Now, the answer clearly, I think, cannot turn on the fact that the Seventh -- excuse me -- the Eighth Circuit knew the answer. Well, there was -- we had some questions about what if the Eighth Circuit said: Well, I see an error here, but I don't know how it affects your sentence, so I am sending you back. Would that be okay?

But it can't turn on the -- that the Seventh Circuit knew in this instance that he would get an increased sentence as versus it would be okay to send it back without saying what the effect would be for the district judge to impose.

And, Justice Kennedy, your question was: What happens if there's a new trial? As my children would say, it is a complete do-over. When the -- when the trial starts all over again, new facts are found or not found, and the sentence is completely constructed all over again based on the facts as found by the jury in the second trial.

If I can end, Justices, I would end by

saying that I believe section 3742 does provide the answer here. Congress provided a clean break with the past. The idea that Congress was aware of a clear rule that they would have followed, I think, is contradicted by Reynolds, where this Court did the opposite; Langnes, where this Court said that the cross-appeal rule was a -- was a rule of practice, not a jurisdictional limit; and the confusion in the courts of appeals.

I believe the answer to your question, Justice Scalia, on whether it is well-established is that in the civil context I believe the D.C. Third, Fourth, Eighth, and Ninth Circuits say that this is a rule of practice while -- while the Senate has debated it back and forth.

And in Neztsosie the Court noted this confusion and noted, indeed, that some of the circuits are internally inconsistent as to what the rule is.

It is slightly different in the criminal context. I believe the Eighth and the Tenth Circuits have not followed -- have not followed the cross-appeal rule, while the Second, Third, Fourth and Seventh have; and the Fifth is internally inconsistent. I may -- I may have some error, honestly, in that recitation. I did it from memory when you asked.

But my point, I think, comes through no

matter what, which is: How could Congress have assumed this is a clear rule and, when we write these words, the courts will know that's what we mean, when there's all this confusion amongst the courts?

Thank you, Your Honors.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Howe, you have two minutes remaining.

REBUTTAL ARGUMENT OF AMY HOWE

ON BEHALF OF THE PETITIONER

MS. HOWE: Mr. Chief Justice, I have two points. The first is that the amicus argues that subsection (e) of section 3742 provides the answer in this case: That upon a review of the record the Court of Appeals shall determine. And so his argument is that this authorizes and, in fact, requires the court of appeals to determine whether any of the errors that are outlined in subsection (e) have occurred. But (e) can't possibly be this sort empowering, roving, free-standing authority that the amicus believes it is.

Because if you look at the language of subsection (e), all it provides -- and this Court has -- has recognized that it merely provides the scope of review -- that, upon review of the record, the court of appeals shall determine. It doesn't say anything about whether a notice of appeal has been filed, how the record

got there. And to figure out those things you have to look at the structure of the statute.

And when you look at the structure of the statute, it is clear that subsections (a) and (b) are the provisions that provide for appellate jurisdiction in sentencing cases.

The amicus also tries to argue that, you know --

JUSTICE SCALIA: (E) also contradicts (f) --

MR. HOWE: (F)(2)and then --

JUSTICE SCALIA: -- (2)(A) and (B) because in -- in some of those cases it doesn't determine that if the appeal has been brought by the wrong party.

MS. HOWE: That's absolutely right. (F) merely provides the remedy, Justice Scalia.

And the amicus tries also to argue that this is not some sort of free-standing, roving appellate authority. That, you know, for example, if the case is brought under (A)(1), a violation of law, the court of appeals only needs to determine whether it is a violation of law. But he also argues that the court of appeals is not obligated to scour the record for errors. It is only to notice plain error.

But if one should start placing these limits, these limits come from subsections (a) and (b)

and the background of traditional appellate practice. And once you start placing these limits which do not appear in the text on subsection (e), the entire construction falls apart.

The second point I would make is that the amicus argues that, somehow, section 3742 represents as a break from the past; that Congress did not have in mind that this -- the background of this well-established appellate procedure. But in section 3742 Congress made clear -- may I finish -- that it was only providing for limited appellate review.

And if you are going to treat sentencing cases differently in light of this court's historic practice of construing the availability of government appeals narrowly, you need to treat -- you need to be even more reluctant to deviate from the cross-appeal rule.

CHIEF JUSTICE ROBERTS: Thank you, Miss Howe.

Mr. Jorgensen, you have briefed and argued this case as an amicus curiae in support of the judgment below on appointment by the Court. We thank you for undertaking and discharging that assignment.

The case is submitted.

(Whereupon, at 11:09 a.m., the case in the

above-entitled matter was submitted.)

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