Truth or Unintended Consequences: Reining in Appellate Court Action in the Absence of a Government Appeal

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INTRODUCTION

Sentencing jurisprudence has been continuously evolving since the establishment of the United States Sentencing Guidelines ("the Guidelines"). The Supreme Court has worked to limit the influence of the Guidelines while lower courts have attempted to apply them. One particular area in flux is appellate review of sentencing. Under the now-advisory Guidelines, courts of appeals are still expected to review sentences. But the Supreme Court has curtailed appellate court authority by repeatedly emphasizing that lower courts have discretion in sentencing, even when courts impose sentences outside the Guidelines. Continuing its efforts to clarify the scope of review, the Court recently held in *Greenlaw v United States*[1] that an appellate court cannot increase a defendant's sentence when the defendant has appealed and the government has neither appealed nor cross-appealed.[2]

Despite *Greenlaw*, appellate courts have continued to issue orders resulting in increased sentences, even when they do not directly impose the increases themselves. Mechanisms used to implement such increases include reinstating previously imposed sentences, remanding to the district court with the requirement of providing an additional justification for the sentence imposed, and remanding for recalculation of the Guidelines range—all without a government appeal. While these actions do not violate the express holding of *Greenlaw*, they can lead to the same troubling result that *Greenlaw* aims to avoid: the imposition of unanticipated sentence increases on a defendant's appeal.

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1 554 US 237 (2008).

2 Id at 240.

These cases call for an inquiry into whether *Greenlaw* prohibits all forms of sentence increases in the absence of a government appeal, rather than only those increases that appellate courts directly impose sua sponte. Further, language from *Greenlaw* introduces uncertainty as to district courts' ability to increase sentences under similar circumstances, such as when resentencing follows a defendant's successful appeal.

These issues implicate various legal principles governing limitations on review authority, including the cross-appeal rule and the doctrines of waiver and forfeiture. These issues also raise questions about the power of the Guidelines themselves. Whether courts can impose sua sponte increases may even directly influence a defendant's decision to appeal. If an appeal might result in an increased sentence, a defendant will be discouraged from bringing appeals based on otherwise-valid errors when there is the potential for exposing unaddressed error in the defendant's favor. However, there is some question as to how the creation of this disincentive should be balanced against the judiciary's interest in accurately applying the Guidelines.

While *Greenlaw*'s formal holding only prevents appellate courts from ordering an increase sua sponte, this Comment advocates a functionalist interpretation of *Greenlaw* as necessary to fully restrict sentencing authority in the way the Court has implied. Further, this Comment argues that under a functionalist interpretation, various appellate court actions violate *Greenlaw*.

Part I of this Comment reviews the relevant background law, including the Guidelines and related statutory authority. Part II describes in detail the precedent established by the Supreme Court in *Greenlaw* as well as the doctrinal concerns raised by the dissent in that case. Part II also presents examples of appellate courts employing alternative mechanisms to increase sentences and then discusses whether these mechanisms run counter to *Greenlaw*. Part III discusses implications of these cases, both for future appellate review of sentencing and for district court discretion in resentencing. Finally, Part III proposes a more concerted application of the mandate rule as a solution.

I. THE SENTENCING GUIDELINES AND APPELLATE REVIEW AUTHORITY

Appellate review of sentencing determinations is governed by a combination of statutory provisions and common-law

principles. The Guidelines serve as the "statutory" foundation for initial sentencing and appellate review. The general scope of appellate authority is codified in 28 USC § 2106, and Federal Rule of Criminal Procedure (FRCrP) 52(b) extends this authority in the context of criminal cases. However, the crux of the sentencing-review issue is the interaction between *Greenlaw* and legal principles that, while not codified, pervade every area of the law. These include the cross-appeal rule, the doctrines of waiver and forfeiture, and the mandate rule. This Part first discusses the statutory authorities for appellate review and then reviews the doctrines that are crucial to understanding why a formalist interpretation of *Greenlaw* is the wrong approach.

A. Sentencing in the District Court

In 1984, Congress enacted the Sentencing Reform Act,[3] which established a commission to develop a standardized sentencing system to reduce unwarranted disparities in sentencing decisions.[4] The United States Sentencing Commission developed the Guidelines, which went into effect in 1987 and "provided detailed guidance for federal judges in the exercise of their sentencing authority."[5] Courts were directed to use preestablished characteristics to determine a "criminal history category" as well as an "offense level" for each defendant.[6] The Guidelines assign defendants to one of six criminal history categories on the basis of their past conduct.[7] Base offense level is determined by the type of offense.[8] The Guidelines then provide a number of "specific offense characteristics," which can be used to increase the offense level.[9] For example, monetary offenses often require certain increases based on the amount involved.[10] The use of a gun

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3 Pub L No 98-473, 98 Stat 1987 (1984), codified as amended at 18 USC § 3551 et seq and 28 USC § 991 et seq.

4 28 USC § 991(b)(1)(B). See also William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-branch Power Struggles*, 26 J L & Polit 305, 311–14 (2011) (discussing the "noble purposes" of the Sentencing Reform Act, including reducing sentencing disparities).

5 Sessions, 26 J L & Polit at 315 (cited in note 4).

6 United States Sentencing Commission, *Guidelines Manual* § 1B1.1(a) (2014) ("USSG").

7 USSG §§ 4A1.1, 5A.

8 USSG § 2A1.

9 USSG ch 2, Introductory Commentary.

10 See USSG § 2B1.1(b) (providing for an increase in offense level based on the amount of the loss resulting from larceny, embezzlement, or other forms of theft).

in the commission of the crime can also support an increase.[11] Certain general factors can be applied to justify an adjustment in offense level, such as whether the offender was a minimal participant.[12] A prescribed sentencing range can be found by locating the intersection of the criminal history category and the adjusted offense level on a matrix provided in the Guidelines.[13]

The Guidelines initially provided mandatory sentence ranges, and district courts could depart from these ranges only under circumstances expressly laid out in the Guidelines or the Sentencing Act of 1987.[14] Since this system was enacted, the Supreme Court has taken numerous steps to reduce its influence—most significantly by holding in *United States v Booker*[15] that mandatory application of the Guidelines is unconstitutional.[16] However, courts are still required to consider the Guidelines along with other sentencing goals, and as such, the Guidelines "remain extremely influential."[17]

The Sentencing Reform Act contains express provisions governing appellate review of sentencing decisions for appeals by either the defendant or the government.[18] Section 3742(f) lays out the relevant procedures for appellate review and outlines different steps based on the appellate court's findings. For example, if the sentence was "imposed in violation of law" or based on "an incorrect application of the sentencing guidelines," the appellate court must remand with appropriate instructions.[19] If the appellate court finds that the district court failed to provide adequate reasons for a departure or departed from the Guidelines by considering an impermissible factor, the statute

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11 See USSG § 2B3.1(b) (providing for an increase in offense level if a firearm was discharged, used, brandished, or possessed during the commission of a robbery).

12 See USSG § 3B1.2.

13 See USSG § 5A.

14 Pub L No 100-182, 101 Stat 1266, codified as amended at 18 USC § 3551 et seq and 28 USC § 991 et seq. See also Carissa Byrne Hessick and F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 Ala L Rev 1, 5 (2008) (noting the limited circumstances in which a judge was permitted to depart from the Guidelines under the Sentencing Act of 1987).

15 543 US 220 (2005).

16 Id at 245. The basis for the Court's holding was its conclusion that any facts used to justify a sentence increase "must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Id at 244.

17 Timothy J. Coley, Comment, *Disputed Deductions:* Delfino *and the Fourth Circuit's Prudent Adoption of the Restrictive Approach to Tax Evasion Sentencing*, 87 NC L Rev 234, 253 (2008).

18 18 USC § 3742(a)–(b).

19 18 USC § 3742(f)(1).

categorizes appellate court authority into two scenarios requiring remand: (1) when the court finds that the sentence is too high, and the defendant has appealed,[20] and (2) when the court finds that the sentence is too low, and the government has appealed.[21] Section 3742 distinguishes between two categories of error. The first category includes errors based on a violation of law or an incorrect application of the Guidelines; the second includes errors made when departing from the Guidelines.[22] For the latter type of error, but not for the former, the statute appears to require correlation between the direction of the error and the identity of the appealing party.[23] For example, if the appellate court finds that a sentence was based on a violation of law or an incorrect Guidelines range, it is permitted to correct the discovered errors to the detriment of the appealing party.[24] However, if the appellate court finds that the sentence contained errors in departure proceedings, the court is able to correct only those errors whose rectification would benefit the appealing party.[25]

While § 3742 clearly grants authority for appellate review of sentences, it does not articulate a particular standard under which this review should occur.[26] In 2003, Congress amended the statute to require de novo appellate review.[27] However, after finding mandatory application of the Guidelines unconstitutional in *Booker*, the Court severed this provision to make the Guidelines advisory and thereby avoid the constitutional problem.[28] The remaining provisions regarding appellate review were left intact.

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20 18 USC § 3742(f)(2)(A).

21 18 USC § 3742(f)(2)(B).

22 18 USC § 3742(a)(1)–(3), (b)(1)–(3).

23 If this interpretation is accurate, it might imply that appellate courts are permitted to correct sentences sua sponte based on the first type of error, regardless of whether this correction favors a nonappealing party. However, this interpretation was explicitly rejected in *Greenlaw*. See Part II.A.1.

24 See 18 USC § 3742(f)(1).

25 See 18 USC § 3742(f)(2).

26 See *Booker*, 543 US at 260–61.

27 See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 § 401(d)(2), Pub L No 108-21, 117 Stat 650, 670, codified at 18 USC § 3742(e).

28 *Booker*, 543 US at 259–60. The provision on appellate review was severed because it contained cross-references to § 3553(b)—the section of the statute that required sentencing within the Guidelines range—which was the main source of the statute's constitutional problem and was excised by the Court. See id.

After *Booker*, the Court inferred a new standard of appellate review based on the Guidelines' now-advisory nature.[29] This standard requires that courts review sentences to determine whether they are reasonable, which has led to confusion in the standard's application.[30] Sentences are analyzed for two types of reasonableness: procedural and substantive.[31] Procedural reasonableness requires that the district court consider all of the factors outlined in § 3553(a) and any nonfrivolous arguments made by the defendant with respect to these factors.[32] The circuits have been inconsistent in their development of procedural review, but they have generally held procedural reasonableness to require accurate calculation of the Guidelines range as well as clear articulation of the district court's reasons for imposing the sentence in relation to the defendant's specific characteristics and arguments.[33] Substantive-reasonableness review is even less clearly defined but focuses on whether the final term of the sentence seems appropriate in light of the committed offense.[34]

The Supreme Court has done little to define the standards governing procedural and substantive reasonableness.[35] The

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[29] See id at 260–61 ("We infer appropriate review standards from related statutory language, the structure of the statute, and the sound administration of justice.") (quotation marks omitted).

[30] See Hessick and Hessick, 60 Ala L Rev at 8, 11–13 (cited in note 14).

[31] See Anna Elizabeth Papa, Note, *A New Era of Federal Sentencing: The Guidelines Provide District Court Judges a Cloak, but Is* Gall *Their Dagger?*, 43 Ga L Rev 263, 280 (2008).

[32] See id at 280–81. These factors include the character of the offense, the character of the defendant, the need for deterrence and promotion of respect for the law, the kinds of sentences available, the recommended sentencing range, and the need to avoid unwarranted disparities in sentencing similar defendants. See 18 USC § 3553(a).

[33] See Papa, Note, 43 Ga L Rev at 281 (cited in note 31).

[34] See id at 282. The Court's holding and analysis in *Greenlaw* may bear on or be affected by the distinction between these two types of reasonableness review. For a discussion of the confusion created by the lack of clarity in the reasonableness-review standard, see generally Craig D. Rust, Comment, *When "Reasonableness" Is Not So Reasonable: The Need to Restore Clarity to the Appellate Review of Federal Sentencing Decisions after* Rita*,* Gall*, and* Kimbrough, 26 Touro L Rev 75 (2010). Because procedural reasonableness requires accurate calculation of the Guidelines, further analysis could evaluate whether this type of reasonableness mandates appellate review and correction of procedural errors regardless of who has appealed and whom the error favors. In contrast, following *Greenlaw*, substantive-reasonableness review seems to clearly fall in the category of review that courts should not engage in absent a request by either party to do so. While the Court's holding in *Greenlaw* did not distinguish between these types of review, analysis of the Guidelines' purpose—even after their demotion to advisory status—may suggest that a distinction should be made. However, that analysis is outside the scope of this Comment.

[35] See Rust, Comment, 26 Touro L Rev at 75–77 (cited in note 34).

Court has expressly prohibited certain practices in some instances, such as a practice requiring that departures from the Guidelines be justified by exceptional circumstances.[36] But for the most part, appellate courts have been left to create their own standards.[37] Some circuits have chosen to give substantial deference to lower courts as long as the procedural sentencing requirements have been met, while other circuits engage in what is practically a "re-weighing of the facts."[38] In some cases, appellate courts employ disparate standards even while citing language from the same Supreme Court precedent.[39] The result is a procedure of appellate review with vague boundaries, mostly exercised on a trial-and-error basis while awaiting a response from the Court.[40]

B. Appellate Review of Criminal Sentences

Appellate review is defined generally by 28 USC § 2106 and subsequently limited by various common-law doctrines.[41] Section 2106 is a general provision that confers jurisdiction on courts of appeals and provides that an appellate court "may affirm, modify, vacate, set aside or reverse any judgment . . . lawfully brought before it for review."[42] Interpretation of § 2106 alone is insufficient to determine whether an appellate court is authorized to be the first to address an issue.[43]

Courts generally operate under the limitation of party presentation, in which the court relies on parties to raise the

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36 See *Gall v United States*, 552 US 38, 47 (2007).

37 For a discussion of the variance in appellate court standards and the Supreme Court's response, see Alison Siegler, *Rebellion: The Courts of Appeals' Latest Anti*-Booker *Backlash*, 82 U Chi L Rev 201, 202–05 (2015).

38 Rust, Comment, 26 Touro L Rev at 90–91 (cited in note 34).

39 See id at 101.

40 See Hessick and Hessick, 60 Ala L Rev at 33 (cited in note 14) (describing how the Court's failure to provide "clear legal guidance" in sentencing is responsible for "the unsettled nature of appellate review of sentences"); Rust, Comment, 26 Touro L Rev at 89 (cited in note 34) ("How post-*Booker* appellate review should be implemented, and even what its goals are, is unclear. . . . As a result, appellate courts currently bear the burden of reading their own meaning into what makes a given criminal punishment 'reasonable.'").

41 See Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 Notre Dame L Rev 1521, 1558 (2012) (providing examples of limits on appellate court authority under § 2106).

42 28 USC § 2106.

43 See Steinman, 87 Notre Dame L Rev at 1560 (cited in note 41).

relevant issues for review.[44] This principle "discourages judges from raising new legal claims missed by the parties"[45] and is grounded in a desire to maintain an adversarial system as opposed to an inquisitorial one.[46] Similarly, the cross-appeal rule prohibits an appellate court from "alter[ing] a judgment to benefit a nonappealing party."[47] This rule is meant to encourage "the orderly functioning of the judicial system" by providing parties with notice of the issues to be litigated.[48] Both of these principles require that courts refrain from evaluating or ruling on errors that the parties themselves have not raised.

Certain common-law principles also limit the issues that can be addressed by appellate courts. Courts cannot revisit arguments that parties may want to present but have otherwise forfeited or waived.[49] An argument is forfeited if the party fails to make a timely assertion of a right before the appropriate court.[50] An argument is waived only through the "intentional relinquishment or abandonment of a known right."[51] While arguments can be forfeited through inadvertence or inaction, waiver requires an affirmative act.[52]

FRCrP 52(b) provides an exception to these limitations.[53] This rule, known as the plain error rule, states that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[54] The Court has indicated that this rule gives appellate courts the limited ability to correct errors that were forfeited.[55] However, it does

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44 See Amanda Frost, *The Limits of Advocacy*, 59 Duke L J 447, 449, 455–56 (2009).

45 Id at 456.

46 See id at 458 ("As Justice Scalia declared in a concurrence: 'The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.'").

47 *Greenlaw*, 554 US at 244.

48 *El Paso Natural Gas Co v Neztsosie*, 526 US 473, 481–82 (1999).

49 See *Yakus v United States*, 321 US 414, 444 (1944).

50 See *United States v Olano*, 507 US 725, 731 (1993).

51 Id at 733 (quotation marks omitted).

52 See Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich L Rev 1214, 1214–15 (1977).

53 See *Henderson v United States*, 133 S Ct 1121, 1124 (2013) (indicating that "[a] federal court of appeals normally will not correct a legal error made in criminal trial court proceedings unless the defendant first brought the error to the trial court's attention . . . [b]ut Federal Rule of Criminal Procedure 52(b) creat[es] an exception to the normal rule").

54 FRCrP 52(b).

55 See *Olano*, 507 US at 731.

not permit appellate courts to revisit errors based on rights that were waived.[56]

A separate doctrine imposes a limitation on *district courts* following remand: the mandate rule.[57] This rule was recognized by the Court in some of its earliest cases and has been repeatedly reaffirmed.[58] When remanding a case, appellate courts can choose to restrict the issues for review.[59] Lower courts on remand are required to remain within the boundaries of the issues that were addressed on appeal.[60] Limited remands are those that explicitly lay out issues to be resolved by the lower court, whereas general remands give lower courts the "authority to address all matters as long as [they] remain[ ] consistent with the remand."[61] Courts have typically interpreted general remands to permit de novo review of sentencing.[62] If the appellate court does not make explicit limitations on remand, the lower court is free to revisit any issues that the appellate court did not decide.[63] Whether an issue was "actually decided" is often subject to interpretation.[64] Courts have been inconsistent when deciding whether "opaque appellate dispositions" create binding limitations on the lower courts.[65]

As this Comment shows, these doctrines help demonstrate the flaws created by a formalist approach to *Greenlaw*. The

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56 See id at 733–34 ("Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b).").

57 Commentators have suggested that § 2106 serves as statutory confirmation of this rule. See, for example, Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, 18B *Federal Practice and Procedure: Jurisdiction and Related Matters* § 4478.3 at 733 (West 2d ed 2002).

58 See, for example, *Briggs v Pennsylvania Railroad Co*, 334 US 304, 306 (1948) ("In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. . . . We do not see how [the rule] can be questioned at this time.").

59 See *United States v Obi*, 542 F3d 148, 154 (6th Cir 2008) (explaining that § 2106 gives appellate courts "broad discretion" to define the scope of remand).

60 See *Briggs*, 334 US at 306.

61 *Obi*, 542 F3d at 154 (quotation marks omitted).

62 See, for example, id.

63 See id. See also Wright, Miller, and Cooper, 18B *Federal Practice and Procedure* § 4478.3 at 757 (cited in note 57) ("The reach of the mandate is generally limited to matters actually decided.").

64 See Wright, Miller, and Cooper, 18B *Federal Practice and Procedure* § 4478.3 at 759–60 (cited in note 57) (comparing the difficulties of determining whether an issue was actually decided for purposes of the mandate rule to the same determination for purposes of issue preclusion).

65 Id at 755 & nn 45–46 (collecting cases).

mandate rule, in combination with a functionalist interpretation of the Court's holding, is presented as a possible solution.

II. LIMITING APPELLATE AUTHORITY IN SENTENCING REVIEW

In *Greenlaw*, the Court created yet another limitation on appellate court authority when it held that courts of appeals may not increase a sentence when the government has not appealed or cross-appealed. Part II.A begins with a thorough discussion of *Greenlaw*. A detailed discussion is necessary to understand the basis for the Court's rejection of sua sponte error correction and the ways in which the arguments the Court relied on in its decision might affect other appellate court responses. Part II.B then reviews examples of subsequent cases in which appellate courts have taken actions that, while not constituting the sua sponte review prohibited by *Greenlaw*, might lead to similar results. Finally, Part II.C discusses the potential implications of permitting these appellate court actions despite a functionalist understanding of *Greenlaw*. Part II.D gives a brief introduction to the consequences for district court authority, discussed in greater detail in Part III.

A. *Greenlaw*

In *Greenlaw*, the defendant was convicted in federal court for his involvement in the sale of crack cocaine.[66] His convictions included two counts of carrying a firearm during a drug trafficking crime in violation of 18 USC § 924(c).[67] Under the statutory scheme, a first conviction carries a mandatory minimum sentence of five years and any subsequent conviction carries a mandatory minimum of twenty-five years.[68] These sentences must run consecutively.[69] However, the district court did not count the defendant's second charge as a "subsequent conviction" within the meaning of the statute.[70] The court imposed a sentence of 262 months for 5 other offenses, 5 years for the initial § 924(c) offense, and 10 years for the second offense, with a total sentence imposed of 442 months.[71]

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66 *Greenlaw*, 554 US at 240–41.

67 Id at 241.

68 18 USC § 924(c)(1)(A)(i), (C)(i).

69 18 USC § 924(c)(1)(D)(ii).

70 *Greenlaw*, 554 US at 241 (quotation marks omitted).

71 Id at 241–42.

Greenlaw appealed his sentence, arguing that he should have received a total of only 15 years (or 180 months).[72] The Government did not appeal or cross-appeal, but it noted to the appellate court that Greenlaw's sentence should actually have been fifteen years higher based on the district court's failure to count the second conviction as "subsequent" within the meaning of § 924(c).[73] Despite this potential argument, the Government requested only that the appellate court affirm the original sentence.[74] Citing the plain error rule from FRCrP 52(b), the Eighth Circuit held that it had the discretion to raise and correct the error on its own.[75] The court vacated Greenlaw's sentence and remanded the case to the district court with instructions to impose the fifteen-year increase.[76] Though the Eighth Circuit seemingly granted Greenlaw's own request for remand, the only possible option at resentencing was an increase in his sentence. After being denied a rehearing, Greenlaw filed a petition for certiorari.[77]

1. The majority opinion.

The Supreme Court held that this sua sponte increase by the appellate court exceeded the scope of its review authority, finding that "absent a Government appeal or cross-appeal, the sentence Greenlaw received should not have been increased."[78] The majority indicated that the Eighth Circuit's reliance on FRCrP 52(b) was misplaced and instead grounded its reasoning in the cross-appeal rule.[79] The Court stated that nothing in the text or history of FRCrP 52(b) suggested that it was intended to override the cross-appeal rule.[80] Further, the Court acknowledged that it had never applied the plain error rule to the detriment of an appealing party, noting that "[r]ather, in every case in which correction of a plain error would result in modification of a judgment to the advantage of a party who did not seek [the]

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72 Id at 242.

73 Id.

74 *Greenlaw*, 554 US at 242 ("Having refrained from seeking correction of the District Court's error by pursuing its own appeal, the Government simply urged that Greenlaw's sentence should be affirmed.").

75 Id at 242–43.

76 Id at 243.

77 Id.

78 *Greenlaw*, 554 US at 240.

79 Id at 244, 247.

80 Id at 247, citing FRCrP 52, Advisory Committee Notes (1944).

Court's review, [the Court has] invoked the cross-appeal rule to bar the correction."[81]

On appeal, the Government conceded that the appellate court erred in increasing Greenlaw's sentence.[82] The Court invited a practitioner, Jay Jorgensen, to serve as amicus curiae in support of the Eighth Circuit's position.[83] Jorgensen presented a number of textual arguments, all of which the Court rejected.[84] First, he argued that the increase was authorized by the appellate court's authority under § 2106 to modify or set aside any judgment brought before it.[85] The Court found this argument unpersuasive for the same reason it had rejected the Eighth Circuit's FRCrP 52(b) argument, concluding that § 2106 was also not intended to override the cross-appeal rule.[86]

Another argument was based on the plain language of 18 USC § 3742. Jorgensen argued that § 3742(f)(1) specifically linked permissible adjustments by appellate courts to both the party appealing and the direction of the error.[87] This reading of the statute dictates that excessively high sentences can be corrected only in response to a defendant's appeal, and that excessively low sentences can be corrected only in response to a government appeal. Section 3742(f)(2), which provides for the correction of sentences imposed "in violation of the law," does not have the same textual limitations of linking the identity of the appealing party to the direction of the error.[88] Jorgensen argued that this discrepancy gives courts the authority to correct sentences that violate the law regardless of which party appealed and which party the correction would favor.[89] The Court found this argument unpersuasive, reasoning that when Congress has previously wanted to create an exception to the cross-appeal rule (and Jorgensen argued that § 3742(f)(2) creates such an exception), it has done so explicitly. The Court concluded that the statutory language in this case was not explicit.[90]

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81 *Greenlaw*, 554 US at 247.

82 Id at 243.

83 Id.

84 Id at 248–52.

85 *Greenlaw*, 554 US at 248–49, citing Brief of Court-Appointed *Amicus Curiae* in Support of the Judgment Below, *Greenlaw v United States*, No 07-330, *40–43 (US filed Mar 14, 2008) (available on Westlaw at 2008 WL 727813).

86 *Greenlaw*, 554 US at 249.

87 Id at 249–50. See also text accompanying notes 20–23.

88 *Greenlaw*, 554 US at 249–50.

89 Id at 249.

90 Id at 250–51.

The Court made a point to acknowledge that this holding does not affect sentencing-package cases—cases that "involve multicount indictments and a successful attack by a defendant on some but not all of the counts of conviction."[91] Following a defendant's appeal, an appellate court may vacate the entire aggregate sentence; on remand, the district court can then increase the sentences for the remaining charges.[92] As long as the new aggregate sentence is not longer than the original sentence, the practice is acceptable because the defendant "will [ ] lose nothing [on appeal], as he will serve no more time than the trial court originally ordered."[93]

This conclusion emphasizes the validity of a functionalist interpretation of *Greenlaw*. The Court found it necessary to indicate that increases of individual sentences in sentencing-package cases are permissible despite the cross-appeal rule only because they do not result in a net loss for the defendant. This exception implies that district courts should never increase sentences following a defendant's appeal. Increases in sentencing-package cases comply with this functional ban only because they are offset by other reductions in the sentence. These offsets would not be available in cases involving individual sentences for individual counts, and therefore district courts should be prohibited from making such increases.

2. The dissenting opinion.

Justice Samuel Alito's dissent and the majority's response to the concerns he raised highlight the conflicts created by the majority opinion. Alito identified the disparity produced by the majority's holding and the Court's prior holding in *North Carolina v Pearce*[94] forty years earlier.[95] In *Pearce*, the Court held that a sentencing court confronted with new facts may impose a longer sentence on remand after a defendant's successful appeal.[96] This holding suggests that district courts are not limited by the same restrictions that the *Greenlaw* majority imposes on appellate courts and that they can therefore modify sentences to the

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91 Id at 253.

92 See *Greenlaw*, 554 US at 253.

93 See id at 254.

94 395 US 711 (1969), overruled on other grounds by *Alabama v Smith*, 490 US 794 (1989).

95 *Greenlaw*, 554 US at 264–65 (Alito dissenting).

96 *Pearce*, 395 US at 723.

detriment of a successful appellant. Alito pointed out that "new circumstances" justifying a change by the sentencing court could include the court's discovery, through appellate review, of its own earlier error.[97] This discovery would permit the district court to disadvantage the appealing party by correcting the error, though the appellate court could not do the same. Alito found this to be an inconsistent result.[98]

The majority responded by indicating that the district court would be confined by the doctrines of default and forfeiture. It also stated that "[i]t would therefore be hard to imagine a case in which a district court, after a court of appeals vacated a criminal sentence, could properly increase the sentence based on an error the appeals court left uncorrected because of the cross-appeal rule."[99]

This apparent dictum of the Court, tucked away into a simple responsive footnote, encapsulates the spirit of *Greenlaw*, a principle more expansive than its stated holding and supported by other statements throughout the opinion. For example, the Court noted that although it has ordered the correction of errors not raised by defendants in the past, it has done so "only to benefit a defendant who had himself petitioned the Court for review on other grounds."[100] The Court reasoned that "Greenlaw might have made different strategic decisions had he known soon after filing his notice of appeal that he risked a 15-year increase in an already lengthy sentence."[101] This strategic impact is likely to take place regardless of whether the threat of an increase occurs at the appellate or resentencing stage, which supports the argument that the Court intended a broader prohibition that would prevent these unanticipated increases at any stage.

Formally, the *Greenlaw* majority prohibited only an express appellate command for a sentence increase in response to a defendant's appeal. The language discussed above, however, indicates that the Court contemplated a functional prohibition on any appellate court actions that result in these unrequested increases on the grounds that defendants should not suffer further as a result of their own appeals. Cases following *Greenlaw* demonstrate that Alito's fears were well founded: Appellate

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97 *Greenlaw*, 554 US at 265 (Alito dissenting).

98 See id at 265 n 2 (Alito dissenting).

99 Id at 254 n 8.

100 Id at 247.

101 *Greenlaw*, 554 US at 253.

courts are enabling district courts to correct errors that appellate courts left uncorrected to the detriment of appealing defendants. Appellate courts are employing a formalist interpretation to effectuate unrequested increases, a violation of *Greenlaw*'s functional principle.

B. Appellate Action after *Greenlaw*

Following *Greenlaw*, it does not appear that any court has attempted to impose its own harsher sentence sua sponte in response to a defendant's appeal. However, some courts have taken other actions that effectively lead to (or are likely to lead to) the same result: an increase in sentence without a government appeal. In doing so, some courts have addressed and distinguished *Greenlaw*, while others have not mentioned it.

The following sections discuss the various mechanisms appellate courts have employed that are in tension with a functionalist interpretation of *Greenlaw*. This Section begins with a discussion of the judicial action most similar to the one formally prohibited by *Greenlaw* (and therefore the most egregious): reinstating a previous sentence. This Section then addresses two appellate actions that are less egregious but much more common: requesting additional explanation and requiring recalculation of the Guidelines. While the latter two responses appear on the surface to be more legitimate responses to a defendant's appeal, the fact that these types of appeals occur with greater frequency suggests that they provide a greater opportunity to violate *Greenlaw*'s functional prohibition.

1. Reinstating a previous district court sentence.

One form of appellate action that has resulted in sentence increases is the reinstatement of a sentence previously imposed by the district court. In *United States v Sevilla-Oyola*,[102] the defendant was charged with various drug trafficking offenses.[103] Sevilla-Oyola pleaded guilty with a negotiated offense level of twenty-nine.[104] At his plea colloquy, the judge failed to inform him that he faced the possibility of a life sentence, but later imposed a sentence of 327 months on the first count and life

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[102] 770 F3d 1 (1st Cir 2014).

[103] Id at 4.

[104] Id.

imprisonment on the second.[105] Following that hearing, the district court judge adjusted Sevilla-Oyola's sentence sua sponte to 960 months on the first count and 60 months on the second.[106] After the defendant made a series of motions, the judge again adjusted his sentence, this time to 345 months on the first count and 60 months on the second.[107] Sevilla-Oyola appealed all of his sentences and challenged the judge's authority to make the adjustments, even though the final result was a sentence lower than the one originally imposed.[108]

During the First Circuit's initial hearing of this case, the court decided that the trial judge lacked the authority to make the two adjustments to the sentence and accordingly remanded with instructions to reinstate the original life sentence.[109] The First Circuit acknowledged that the resulting increase from 405 months to life imprisonment "may seem harsh" but found it acceptable because Sevilla-Oyola "chose to proceed with this appeal knowing he risked a higher sentence."[110] Sevilla-Oyola then requested rehearing on the grounds that his counsel had warned only that he might receive a higher sentence on remand and not that the appellate court itself might impose a higher sentence.[111] Sevilla-Oyola also argued that the original appellate court decision conflicted with the Court's holding in *Greenlaw*.[112]

On rehearing, the First Circuit reiterated that the result of the appeal—reinstatement of the life sentence—was fair because at that time the court had believed that Sevilla-Oyola's counsel had followed its instructions to ensure that Sevilla-Oyola was aware of the risk.[113] But because Sevilla-Oyola's counsel subsequently claimed that he had not fully complied with the court's

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105 Id at 4, 6–7. The first count charged Sevilla-Oyola with conspiring to possess narcotics with intent to distribute in violation of 21 USC §§ 841(a) and 860. The second count charged Sevilla-Oyola with aiding and abetting coconspirators in the use of firearms in relation to a drug trafficking crime in violation of 18 USC § 924(c)(1)(A). Id at 4.

106 *Sevilla-Oyola*, 770 F3d at 7.

107 Id at 9. Following his second sentence, Sevilla-Oyola moved for the recusal of the sentencing judge, a hearing to determine whether the Government had breached the plea agreement, and vacatur of the sentence. Id at 8. The district court set aside Sevilla-Oyola's original guilty plea and the second sentence, and it denied Sevilla-Oyola's requests for recusal and a hearing on the plea agreement. Id at 8–9.

108 Id at 9.

109 Id at 15.

110 *United States v Sevilla-Oyola*, 753 F3d 309, 325 (1st Cir 2014), withdrawn and superseded by 770 F3d 1.

111 *Sevilla-Oyola*, 770 F3d at 15.

112 Id at 16 n 26.

113 Id at 15.

instructions, the court on rehearing modified the judgment to vacate and remand for resentencing by the district court judge to avoid the warning problem.[114] In doing so, the rehearing court indicated that because it was simply remanding the case, it was not required to address Sevilla-Oyola's *Greenlaw* argument.[115]

The action in the initial First Circuit decision is clearly prohibited by the express holding of *Greenlaw*. By reinstating the original sentence, the appellate court ordered an increase in Sevilla-Oyola's sentence despite the fact that the Government had not appealed. The court did not acknowledge, let alone consider, *Greenlaw*. If it had, it might have concluded that the action at hand was distinguishable, because the court was actually granting the defendant's requested relief (vacating the adjustments) and the ultimate sentence following appeal was one already imposed by the district court—as opposed to the newly created sentence in *Greenlaw*. Yet the fact remains that the appellate court ordered an increase in the sentence without a government appeal.

Because the First Circuit revoked the first remand, this potential violation of *Greenlaw* loses some, but not all, of its potency. The court's reason for revocation was that the defendant had not been warned that the appellate court might increase the sentence, not that the appellate court lacked the authority to do so.[116] This reasoning suggests that, had the defendant been properly warned, the First Circuit would have found nothing wrong with reinstating the original sentence itself.[117] Yet while the majority in *Greenlaw* indicated that notice to defendants is one of the protections offered by the cross-appeal rule,[118] the Court did not suggest that its ban on sua sponte appellate error correction could be overcome by merely informing defendants that such error correction might occur.

Even the result reached at the rehearing can be seen as violating the functionalist approach to *Greenlaw*. None of the findings made during the course of the rehearing was to Sevilla-Oyola's benefit. The First Circuit first found no authorization for any of the district court's modifications to the original

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114 Id at 15–16.

115 *Sevilla-Oyola*, 770 F3d at 16 n 26.

116 See id at 15–16.

117 Had the court done so, it would have been required to address the defendant's argument that this action violates *Greenlaw*, but instead the argument went untouched.

118 *Greenlaw*, 554 US at 252–53 ("The firm deadlines set by the Appellate Rules advance the interests of the parties and the legal system in fair notice and finality.").

sentence—modifications that actually reduced Sevilla-Oyola's sentence.[119] The court then determined that Sevilla-Oyola's challenge to the original (life) sentence based on an inadequate plea colloquy was waived due to his failure to "adequately challenge these errors on appeal."[120] Despite the fact that the court made no findings in the defendant's favor, it remanded the case for resentencing in an effort to correct the potential problem created by its previous reinstatement of the life sentence. However, the only sentence the appellate court's reasoning left intact was the initial life sentence, and the First Circuit remanded the case to the same district court judge for resentencing.[121] Although the district court ultimately imposed a lower sentence of three hundred months' imprisonment,[122] this reduction was not required by the appellate court's remand. When resentencing, the district court could have interpreted *Greenlaw* in a formalist fashion and concluded that it retained the power to increase the defendant's sentence despite the absence of a government appeal. The possibility of courts taking such actions in the future is increased by the fact that the waiver and forfeiture doctrines would likely have prevented the defendant from arguing against the life sentence based on the inadequate plea colloquy.[123] Although the defendant in this case escaped a sentence increase following remand for resentencing, a formalist interpretation of *Greenlaw* makes it possible that similar defendants may not be so lucky.

2. Requiring additional explanation of sentencing decisions.

Other appellate courts have required sentencing courts to provide additional explanation for sentences that appear too low, despite the fact that only the defendant appealed. In *United States v Anderson*,[124] the defendant was sentenced to forty-eight months in prison for money-laundering in connection

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119 *Sevilla-Oyola*, 770 F3d at 11, 13.

120 Id at 14.

121 Id at 15–16.

122 Amended Judgment in a Criminal Case, *United States v Sevilla-Oyola*, Criminal Action No 10-00251, *2 (D Puerto Rico filed Dec 16, 2014).

123 It is not clear what arguments the defendant presented at resentencing in favor of a reduced prison term. But a formalist interpretation of *Greenlaw* suggests that the district court would have been within its authority to deny this avenue of argument to the defendant.

124 526 F3d 319 (6th Cir 2008).

with her son's multistate methamphetamine operation.[125] After the district court calculated Anderson's base offense level, it applied a two-level increase, a four-level decrease, and a three-level decrease, resulting in an offense level of twenty-five.[126] The court then granted the Government's motion for an additional three-level decrease, resulting in a final offense level of twenty-two and a sentencing range of forty-one to fifty-one months.[127] On appeal, Anderson argued that the base offense level should have been lower or, alternatively, that Anderson (1) should have received an additional two-level decrease and (2) should not have received the two-level increase.[128] The Government opposed Anderson's request for resentencing, agreeing that Anderson should have received an additional two-level decrease but also noting that the four-level decrease granted to Anderson was incorrect.[129] The Government ultimately requested that the sentence remain unchanged.[130]

The Sixth Circuit rejected Anderson's arguments. It held both that the base offense level was calculated correctly and that the two-level increase was appropriate.[131] The court also found, as the Government argued, that Anderson should not have received the four-level decrease.[132] Based on these determinations, the court concluded that the final offense level should have been twenty-four and the recommended sentencing range should have been fifty-one to sixty-three months.[133] In holding that this error was not harmless, the Sixth Circuit pointed to *Gall v United States*,[134] which requires sentencing courts to adequately explain the reasons for a sentence when imposing terms outside of the recommended Guidelines range.[135] The Sixth Circuit recognized that, because of the errors made in the defendant's favor, the

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125 Id at 321.

126 Id at 323. The Sixth Circuit indicated that the district court began with a base offense level of thirty-two. Id. There is some ambiguity in the calculations used, but what matters for the purposes of this Comment is that the Sixth Circuit ultimately concluded that the district court's final offense-level calculation and the corresponding Guidelines range were too low. Id at 328–29.

127 Id at 323.

128 *Anderson*, 526 F3d at 323.

129 Id.

130 Id.

131 Id at 324, 328.

132 *Anderson*, 526 F3d at 328.

133 Id at 329.

134 552 US 38 (2007).

135 Id at 50.

lower court in *Anderson* had actually imposed a sentence outside of the recommended range and was therefore required to provide an additional explanation of its sentence given the actual range of fifty-one to sixty-three months.[136]

As in *Sevilla-Oyola*, the Sixth Circuit's actions did not violate the formal holding of *Greenlaw*. The appellate court did not require the district court to impose a sentence within the corrected range of fifty-one to sixty-three months. In fact, at resentencing the district court ultimately imposed the same forty-eight month sentence.[137] However, this result was by no means a foregone conclusion based on the appellate court's remand. It was presumably more difficult for the district court to impose the same sentence, as the district court was required to provide additional explanation for the given prison term. Imposing a sentence within the corrected (higher) range would have been simpler. It is likely that courts in similar circumstances will take this route in the future even when the government has not advocated for a higher sentence on appeal. The Sixth Circuit even acknowledged this "perverse result," stating that Anderson was "likely to receive only a greater sentence on remand because the Guidelines range will be higher."[138] The court then noted that this is a risk that defendants take on appeal,[139] a premise that clearly contradicts the characterization of *Greenlaw* as a functional ban on any unrequested increase in response to a defendant's appeal.

Requiring explanation of a sentence imposed outside of the Guidelines is a recognized component of procedural-reasonableness review.[140] However, this type of appellate court mandate inherently implies that the sentence imposed might not be appropriate based on the record as presented. While Anderson's arguments on appeal (regarding an incorrect calculation of the Guidelines range) all revolved around procedural reasonableness, she did not request additional explanation of her sentence. *Greenlaw*'s prohibition against appellate courts acting to benefit a nonappealing party should prevent the Sixth

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136 *Anderson*, 526 F3d at 329–30, citing *Gall*, 552 US at 49–52.

137 Amended Judgment, *United States v Anderson*, Criminal Action No 05-92, *2 (ED Tenn filed Dec 1, 2008).

138 *Anderson*, 526 F3d at 331 n 7.

139 Id.

140 See Michael M. O'Hear, *Explaining Sentences*, 36 Fla St U L Rev 459, 460–61 (2009) (describing the development of an explanation requirement as an aspect of procedural reasonableness). See also text accompanying notes 32–34.

Circuit from remanding based on a new range that benefits the Government when it does not find merit in any of the defendant's arguments. Had the court determined that the original range used by the district court was too high, it would have been within the scope of appellate review to require further explanation since the lack of reasoning would then operate to the detriment of the defendant. Based on *Greenlaw*, appellate courts should remand for additional explanation only when they find merit in the *appealing* party's argument that an error was made. When none of the defendant's arguments supports the conclusion that a sentencing error occurred, and the government has not advanced any arguments of its own, the appropriate appellate court response is to let the original sentence stand.

3. Requiring recalculation of the Guidelines range.

Appellate courts have also required recalculation of the Guidelines range based on errors that, if corrected, would disadvantage defendants. In *United States v Rushton*,[141] the defendant pleaded guilty to one count of mail fraud and one count of money-laundering.[142] The district judge sentenced Rushton to ninety-six months in prison after applying a four-level enhancement for using a commodity pool to commit fraud and a two-level enhancement for abuse of trust.[143] Rushton appealed on the grounds that the Guidelines prohibit applying these two enhancements simultaneously; the Government agreed.[144]

In its appellate brief, the Government argued that the error in sentencing was harmless because the district court also failed to apply a two-level vulnerable-victim enhancement.[145] However, the Government withdrew this argument based on Seventh Circuit precedent that "forbid[s] the government to seek additional sentencing enhancements on remand from an unrelated sentencing appeal."[146] The Government then argued that the district court erred in basing the Guidelines calculation on only the

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141 738 F3d 854 (7th Cir 2013).

142 Id at 855–56.

143 Id at 856.

144 Id.

145 *Rushton*, 738 F3d at 857. The Guidelines provide for a two-level increase if the defendant knew or should have known that the victim was "vulnerable." USSG § 3A1.1(b)(1). The accompanying commentary defines a vulnerable victim as someone who is "unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." USSG § 3A1.1, Application Note 2.

146 *Rushton*, 738 F3d at 857.

fraud plea, as opposed to considering both the fraud and money-laundering pleas.[147] The Government indicated that this added consideration would make the correct Guidelines range the same as the incorrectly calculated range used to obtain the original sentence, and as a result the Government did not request a sentence increase from the appellate court.[148]

The Seventh Circuit found that the errors raised by the parties (the inappropriate double counting, raised by the defendant, and the sentence's failure to reflect the money-laundering plea, raised by the Government) offset each other.[149] This finding could have supported a determination that the error raised by the defendant was harmless and therefore not grounds for remand.[150] Yet the Seventh Circuit nevertheless remanded the case for resentencing based on the need for the district court to consider the previously unapplied vulnerable-victim enhancement—an argument withdrawn by the Government that could have only increased the defendant's sentence.[151] The court said:

> The alternative to ordering resentencing would be to pronounce the errors not plain because they were offsetting: the enhancement for abuse of trust was wrong, but so was the judge's failure to sentence under the money laundering guideline. But that ignores the judge's failure to impose a further enhancement, or enhancements, for the presence of a vulnerable victim, or vulnerable victims. That was another error.[152]

The court further indicated that a higher sentence on remand would not be per se unreasonable as long as its imposition were not vindictive.[153]

In this case, like the others before it, the appellate court itself did not explicitly impose an increased sentence. One

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147 Id at 858.

148 Id at 858–60.

149 Id at 858.

150 See *Williams v United States*, 503 US 193, 203 (1992) ("If the party defending the sentence persuades the court of appeals that the district court would have imposed the same sentence absent the erroneous factor . . . the court of appeals may affirm the sentence.").

151 *Rushton*, 738 F3d at 860.

152 Id.

153 Id. The rule against vindictiveness is derived from *Pearce*, in which the Court noted that "the fear of [ ] vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction." *Pearce*, 395 US at 725. See also Part II.A.2.

might even argue that the court's actions in *Rushton* are more acceptable than those in *Anderson*, because in *Rushton* the appellate court found merit in at least one of the defendant's arguments: the argument that the district court inappropriately double counted. But the tenor of the *Rushton* opinion indicates that whether the district court ignores or corrects the offsetting errors, it will also have to consider the unaddressed vulnerable-victim enhancement—an error that can only work to the defendant's detriment.[154] The most likely result on remand is therefore an increase in sentence based on an error not raised by the Government, a result that the Seventh Circuit explicitly acknowledged:

> [A] defendant who appeals from a sentence takes a risk that if the case is remanded for resentencing, as the defendant in this case urges be done, he will receive a longer sentence should the court of appeals notice an error in his favor committed in the sentencing proceeding that he has appealed.[155]

The Seventh Circuit effectively paved the way for an increase by indicating that nonvindictive impositions of higher sentences are not per se unreasonable.[156] The appellate court's recognition of an error makes it unlikely that the district court will ignore this error when given the opportunity to correct itself. Thus, the defendant will suffer the same adverse consequences he might have suffered if the appellate court itself had engaged in sua sponte adjustment of his sentence.

Rushton and the cases preceding it demonstrate that an explicit order is not the only appellate response that can lead to a potential sentence increase when the government has not appealed. The fact that these cases hardly mention *Greenlaw* emphasizes courts' failure to understand the breadth of *Greenlaw*'s restrictions. As described below, this misinterpretation leads to problematic conflicts with the spirit of *Greenlaw* and other precedents.

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[154] See *Rushton*, 738 F3d at 861 ("We cannot predict what sentence the district judge will impose on remand; it is unlikely to be shorter but uncertain whether it will be longer.").

[155] Id at 860–61.

[156] Id.

C. Potential Implications of the Cases following *Greenlaw*

The cases discussed in the previous Section demonstrate the need for a functionalist interpretation of *Greenlaw*. This Section argues that *Greenlaw* must be understood as prohibiting not only explicit increases by the appellate court but also other actions that achieve the same result. This Section then briefly discusses how this functionalist interpretation of *Greenlaw* bears on district courts' authority at resentencing.

1. Circumstances warranting appellate action.

Greenlaw explicitly prohibits increases imposed by appellate courts but also creates confusion about limitations on other appellate court actions. This Section focuses on three possible appellate court actions: (1) remand when there is only the likelihood, and not the certainty, of a sentence increase; (2) remand when the defendant is the only party requesting it and the court has rejected all of the defendant's arguments; and (3) remand when the court accepts some of the defendant's arguments but has discovered greater errors whose correction would disadvantage the defendant. A formalist interpretation of *Greenlaw* indicates that all of these actions are permissible but also introduces inconsistencies into sentencing review. A functionalist interpretation resolves these inconsistencies by broadening the restrictions on appellate courts and denying their ability to remand under any of these circumstances.

The first question arising out of the *Greenlaw* decision is whether appellate courts act within their authority when they remand a case following a defendant's appeal when it is likely that the remand will only hurt the defendant. For example, *Anderson* was remanded despite the fact that only the defendant appealed and despite the court's determination that the district court made no error detrimental to the defendant.[157] The entire basis for remand was to require additional justification of a sentence that was arguably too low.[158] If *Greenlaw* is read formally (that is, as forbidding only the direct imposition of an increased sentence by an appellate court), then *Anderson* does not violate this precedent.

However, the dicta in *Greenlaw* suggest that it should be read otherwise. By pointing out that the decision did not affect

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[157] *Anderson*, 526 F3d at 321.

[158] See id at 330–31 & n 7.

sentencing-package cases, *Greenlaw* emphasized that sentence increases following a defendant's successful appeal are acceptable only if the defendant ultimately loses nothing.[159] The dicta thus support a more functionalist interpretation: if the government has not appealed, an appellate court cannot take *any* action that results in a loss to the defendant.[160] If a case is remanded following the defendant's appeal and the only possible basis for action is the correction of an error made in the defendant's favor, it is highly unlikely that the remand will result in anything other than the defendant's loss. This result should make the very action of remanding invalid under *Greenlaw*—despite the fact that it is often done at the defendant's request—because the district court's interpretation of the mandate created by the remand will likely favor the government. Similarly, district courts cannot adjust a sentence following a defendant's appeal if the result would make the defendant worse off.

Sevilla-Oyola and *Rushton* present similar situations. While the appellate courts did not impose increased sentences themselves, remanding without finding any of the defendants' arguments valid constitutes an appellate action that advantages the nonappealing party. Under these circumstances, the most likely outcome is an increased sentence. In such a case, the appellate court should dismiss the appeal, as the appealing party has not justified its requested relief and the Government has not requested anything.

Under a formalist reading of *Greenlaw*, appellate courts can remand for resentencing as long as they themselves do not impose a higher sentence, even when a sentence increase is one possible result. The majority's holding—which only explicitly bars direct sentence increases by appellate courts—suggests that a remand for resentencing could be appropriate, especially if remand is what the defendant himself requested. However, this is the same action taken by the appellate court in *Greenlaw*—an action that the Supreme Court ultimately found objectionable. The appellate court remanded with instructions that the district court impose the correct (higher) statutory minimum.[161] The Court implied that this order was akin to the appellate court itself imposing a higher sentence.[162]

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159 See text accompanying notes 91–93.

160 See Part II.A.1.

161 *Greenlaw*, 554 US at 243.

162 Id at 240.

The next question is whether the appellate court in *Greenlaw* could have, after reviewing all of Greenlaw's arguments and finding them meritless, remanded the case for resentencing without explicit instructions. This approach appears slightly less objectionable because the appellate court would not have gone out of its way to point out an error made in the defendant's favor and therefore would not have explicitly encouraged the district court to revisit any particular issue at resentencing. Again, a formalist interpretation might allow this approach, but a functionalist interpretation should prohibit it. In such a case, the appellate court should have to acknowledge that it is not remanding based on the defendant's arguments and that it is instead doing so based solely on a self-discovered error that was made in the defendant's favor and can be corrected only to his detriment.

A final scenario is that an appellate court might remand after finding a legitimate error made to the defendant's detriment, despite also finding that other errors in the defendant's favor would cancel out or even override any advantage the defendant could possibly receive on remand. This scenario is precisely what occurred in *Rushton*, and there is an argument that this action is permissible because the appellate court was merely granting the defendant's request for remand after concluding that he made a valid argument. However, as explained in more detail below, the mandate rule makes it highly unlikely that a district court would be empowered to resentence with only the defendant's advantages in mind after the appellate court acknowledged the necessity of considering all of these errors. Thus, the result will likely be the same: a sentence increase that no one has requested. Regardless of whether an increase on remand is guaranteed or likely, or whether the appellate court has explicitly identified an error that would benefit the defendant, *Greenlaw* requires that appellate courts refrain from remanding cases when evaluation of the errors in sentencing suggests that remand would result in a sentence increase.

2. Implications for district courts.

This Comment's interpretation of *Greenlaw* as a functional restriction coalesces around a singular focus: the likely outcome at resentencing. As discussed above, appellate courts should limit their responses when the government has not appealed, based on the likely result at resentencing. In *Greenlaw*, the Court

appeared to rely on the appellate court's ability to self-restrict and did not explicitly prohibit the district court from increasing the defendant's sentence in response to the defendant's successful appeal. Yet a functionalist interpretation of *Greenlaw* raises questions as to whether district courts should be similarly restricted.

The Ninth Circuit comprehensively discussed this concern in *United States v Beltran-Moreno*.[163] The defendants each pleaded guilty to two charges of firearm possession in violation of § 924(c) (the same statute under which Greenlaw was convicted), which imposes an increased mandatory minimum for multiple convictions.[164] By statute, their sentences should have been at least forty years but the district court imposed only thirty-five years based on improper calculations.[165] On appeal, the defendants argued that their sentences should have been fifteen years; the Government did not appeal or cross-appeal.[166] The Ninth Circuit indicated that if it were to alter the defendants' sentences, the only possible result would be an increase of at least five years. Because the Government had not appealed, however, *Greenlaw* foreclosed this action.[167] The court went on to say that even if it were to remand the case, "the district court would not be permitted to raise [the defendants'] mandatory minimum sentence[s] *sua sponte* following the government's failure to appeal," citing the *Greenlaw* majority opinion.[168] But the court also acknowledged that it is hard to imagine that the lower court, in response to vacatur and remand, would ignore the fact that its original sentence was statutorily inadequate.[169] The Ninth Circuit also did not plainly state that the Government would be barred from requesting that the district court increase the sentence. If the sentence had been vacated in its entirety, the district court could likely have considered an argument by the Government for an increase based on a more accurate calculation of the mandatory minimum. Precedent discussed in the next Section provides good reason to think that district courts are typically less restricted than appellate courts at resentencing. But a functionalist understanding of *Greenlaw* inherently requires

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163 556 F3d 913 (9th Cir 2009).

164 Id at 915.

165 Id at 915–16.

166 Id at 916–17.

167 *Beltran-Moreno*, 556 F3d at 917.

168 Id, citing *Greenlaw*, 554 US at 254 n 8.

169 *Beltran-Moreno*, 556 F3d at 917.

limitations on district court authority, and therefore an appellate court should not remand without confining the scope of the district court's authority in some way.

D. District Court Authority at Resentencing

There is substantial precedent that currently frames district court authority at resentencing. Generally, district courts enjoy wide latitude when an appellate court has vacated a sentence and remanded a case. However, *Greenlaw* fails to effectively address how this power interacts with the prohibition on sua sponte appellate error correction. A functionalist interpretation demonstrates that district courts must also be more limited in their ability to correct errors at resentencing.

1. Existing restrictions on resentencing.

Alito's dissent in *Greenlaw* expresses concern over the disparity that the decision created regarding district courts' authority to increase sentences after a remand granted on the basis of a defendant's appeal.[170] In *Pearce*, the Court held that when "a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear."[171] In a subsequent case, the Court indicated that this standard creates a "presumption of vindictiveness" to be applied whenever a defendant's appeal results in an increased sentence.[172] This limitation on sentence increases has since been narrowed.[173] The Court has recognized that the limitation applies not in every case of an increased sentence but only when there is a reasonable likelihood "that the increase in sentence is the product of actual vindictiveness."[174] The result is an affirmative burden on defendants to demonstrate either a reasonable likelihood or the actual presence of vindictiveness. While *Pearce* applied specifically to retrials, it has subsequently been interpreted as imposing the same standard on increases at resentencing.[175]

In *Greenlaw*, Alito pointed out that *Greenlaw* and *Pearce* interact to create an apparent absurdity in which district courts

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170 *Greenlaw*, 554 US at 264–66 (Alito dissenting), citing *Pearce*, 395 US at 719–20.

171 *Pearce*, 395 US at 726.

172 *United States v Goodwin*, 457 US 368, 374 (1982).

173 See *Smith*, 490 US at 799–800.

174 Id at 799.

175 See *United States v Singletary*, 458 F3d 72, 75–77 (2d Cir 2006).

are permitted to correct an error that appellate courts must leave untouched, as uncorrected errors are likely to constitute affirmative reasons to modify sentences.[176] The majority responded by indicating that district courts would be confined by the doctrines of default and forfeiture, and that therefore this troublesome result would be unlikely to occur.[177] However, subsequent Supreme Court precedent suggests that the dissent's concern is well founded. Most importantly, the Court has indicated that district courts are not bound at resentencing by the same determinations used at the original sentencing.[178] In *Pepper v United States*,[179] the defendant was sentenced to twenty-four months in prison partially based on a 40 percent downward departure for substantial assistance.[180] The case was then appealed twice by the Government, after which the sentence was vacated and the case was remanded.[181] At resentencing, a new judge employed a departure of only 20 percent.[182]

Pepper argued that because the sentence was vacated on grounds unrelated to the substantial-assistance departure, the resentencing court should have been precluded from using a different departure percentage.[183] The Court rejected this argument, indicating that a general remand does not place any limits on the discretion of the judge at resentencing.[184] Rather, de novo resentencing "effectively wipe[s] the slate clean."[185] The Court then cited *Greenlaw* for the proposition that in reversing one aspect of a defendant's sentence, "an appellate court . . . 'may vacate the entire sentence . . . so that, on remand, the trial court

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176 *Greenlaw*, 554 US at 265 n 2 (Alito dissenting) ("If the Court permits sentencing courts to correct unappealed errors on remand, why does it not permit the courts of appeals to do the same on appeal?").

177 Id at 254 n 8 (noting that default and forfeiture doctrines "confine the trial court" and that it "would therefore be hard to imagine a case in which a district court . . . could properly increase the sentence based on an error the appeals court left uncorrected because of the cross-appeal rule").

178 See *Pepper v United States*, 562 US 476, 480–81, 505 (2011).

179 562 US 476 (2011).

180 Id at 483.

181 Id at 482–84.

182 Id at 485. Following resentencing, Pepper was sentenced to sixty-five months of imprisonment. Id at 486. Although Pepper ultimately lost on resentencing, this case does not implicate the same concerns as *Greenlaw*, because the Government was the appealing party. However, the Court's analysis of what binds a resentencing court is relevant to the additional concerns raised in *Greenlaw*.

183 *Pepper*, 562 US at 505–06.

184 Id at 506.

185 Id at 507.

can reconfigure the sentencing plan . . . to satisfy the sentencing factors in 18 U.S.C. § 3553(a).'"[186] This authority is similar to what *Greenlaw* indicated about sentencing-package cases—that reversal of some elements inherently demands that the district court be permitted to reconsider all elements.[187] The net result is that, at least following general remands, a district court may revisit issues that the appellate court did not address. *Pepper* definitively demonstrates that this authority exists when the resentencing court acts to benefit the appealing party. But a question still remains as to whether the same is true when the district court acts to benefit the nonappealing party. Without a functionalist reading of *Greenlaw*, it appears that district courts are not restricted from making changes to a defendant's detriment, despite the Court's indication in *Greenlaw* that a defendant should not lose following a successful appeal.

2. Considering the restrictions as applied to the nonappealing party.

Other cases also contradict the *Greenlaw* majority's assertion that a district court will not correct an error to the defendant's detriment when the appellate court has left it unresolved. In *United States v Ward*,[188] the defendant pleaded guilty to multiple charges related to child pornography.[189] Ward's sentence included a three-hundred-month prison term, a $100,000 fine, and a $500 special assessment.[190] On his first appeal, Ward argued that the district court had given insufficient reasons for imposing the fine and that his sentence was "an impermissible general sentence."[191] The Third Circuit first found that, while the district court erred in failing to provide a justification for the fine, this failure was not plain error and was therefore not grounds for remand.[192] But the court agreed with Ward's second argument—that his sentence was impermissibly general—and remanded the case for resentencing to convert the general sentence into

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186 Id, quoting *Greenlaw*, 554 US at 253.

187 *Greenlaw*, 554 US at 253.

188 732 F3d 175 (3d Cir 2013).

189 Id at 179.

190 Id.

191 Id. A general sentence is "an undivided sentence for more than one count that does not exceed the maximum possible aggregate sentence for all the counts but does exceed the maximum allowable sentence on one of the counts." *United States v Woodard*, 938 F2d 1255, 1256 (11th Cir 1991).

192 *Ward*, 732 F3d at 179.

separate sentences for each count of the indictment.[193] The district court responded by imposing the same prison sentence but increasing the fine to $250,000.[194] In doing so, it explicitly acknowledged that this correction was based on the Third Circuit's identification of its error in failing to provide justification for the fine.[195] Ward appealed this increase on the grounds that it was vindictive, but the Third Circuit rejected this argument and concluded that the alteration was properly based on the district court's recognition of its original failure to provide justification for the fine.[196]

Ward demonstrates the precise set of contradictions that the *Greenlaw* dissent was concerned about. The failure to provide a justification for the fine was an error that the appellate court identified but left uncorrected by remanding on a different basis. Yet the district court used this same error to justify a subsequent increase at resentencing, despite the fact that remand had been ordered at the defendant's request and for his benefit. As established in *Pepper*, the resentencing court in *Ward* was not bound by any of the determinations of the original sentencing court—even those left untouched by the appellate court—and therefore was able to increase the sentence based on this error.[197] Either the *Greenlaw* majority was mistaken in disregarding the anomaly between this district court power and the lack of appellate court authority, or else the district court's action contravened the *Greenlaw* Court's true intention to create a functional ban on sentence increases in response to the defendant's appeal.

3. Considering waiver and forfeiture.

The *Greenlaw* majority attempted to cast aside this concern based on the fact that, although district courts are not confined by the cross-appeal rule, they are confined by the rules of default and forfeiture.[198] The Court made this point briefly and did not elaborate. While *Greenlaw* did not address the issue of waiver, it

193 Id.
194 Id at 180.
195 Id at 184.
196 *Ward*, 732 F3d at 184.
197 See *Pepper*, 562 US at 505–06.
198 *Greenlaw*, 554 US at 254 n 8.

is strongly implicated by other precedent and presents an important limitation on parties facing appeal.[199]

However, when defining the district court's ability to resentence following a general remand, the *Pepper* Court did not indicate that this ability was in any way restricted by those principles.[200] It is possible that these doctrines may *permit* a resentencing court to ignore new arguments presented by a nonappealing party, but it does not seem as though they would *require* the court to pass over any consideration of error. *Pepper* is not an ideal example of the concerns raised by *Greenlaw*, because *Pepper* was remanded on the basis of the Government's appeal and the sua sponte reduction of the downward departure was made to the benefit of the Government (that is, the appealing party).[201] But nothing in the language of the *Pepper* opinion suggests that this broad power to revisit sentences under the guise of a general remand is in any sense limited by the perceived beneficiary of the remand. Yet the *Greenlaw* majority seemed to reject this very possibility and also suggested in dicta that resentencing on the basis of a defendant's appeal should never result in an aggregate increase in the sentence.[202]

The mandate rule *can* prevent lower courts from revisiting particular issues on remand. In *United States v Pileggi*,[203] the defendant was both sentenced to imprisonment and ordered to pay restitution.[204] He appealed, and the appellate court vacated and remanded for resentencing after concluding that the prison term was based on the district court's reliance on an erroneous view of the facts.[205] Significantly, the amount of restitution was completely unaddressed during the Fourth Circuit's initial review of the sentence—its only mention was in a brief footnote describing the components of the original sentence that was the basis for the appeal.[206] The resentencing court ultimately

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199 See, for example, *United States v Arroyo-Gonzales*, 316 Fed Appx 761, 763 (10th Cir 2009) ("[A] party who fails to make a timely objection to the magistrate judge's findings and recommendations waives appellate review of both the factual and legal questions.") (quotation marks omitted); *United States v Vieke*, 348 F3d 811, 813 (9th Cir 2003) ("Objections to a sentence not presented to the district court generally cannot be raised for the first time on appeal.").

200 *Pepper*, 562 US at 505–06.

201 Id at 483–85.

202 *Greenlaw*, 554 US at 254 & n 8.

203 703 F3d 675 (4th Cir 2013).

204 Id at 678.

205 Id.

206 *United States v Pileggi*, 361 Fed Appx 475, 477 n 5 (4th Cir 2010).

imposed a shorter prison term but also increased the restitution amount from $4 million to over $20 million, after which Pileggi again appealed.[207]

On his second appeal, Pileggi argued that the mandate rule prevented the district court from revisiting the amount of restitution.[208] The Fourth Circuit agreed, indicating that "[n]either party had raised the issue before [the] Court, and the government [was] not permitted to use the accident of a remand to raise . . . an issue that [it] could just as well have raised in the first appeal."[209] This statement contradicts the Supreme Court's conclusion in *Pepper* that a general remand wipes the slate clean. However, the Fourth Circuit concluded, for two reasons, that these authorities do not conflict. First, the remand in *Pepper* was general, whereas in *Pileggi* the court vacated only the prison term.[210] Second, the court indicated that *Pepper* still operates within the context of waiver and that the Government waived this argument by not raising it during the first appeal.[211] That is, if the Government makes an appeal for a higher sentence only on grounds A and B, it cannot on remand request a higher sentence based on C when it did not raise C on appeal. However, if the Government does not appeal and the remand is granted solely based on the defendant's request, the Government does not waive any arguments. Therefore, these cases suggest that the government can sometimes make an argument on remand on the basis of some error acknowledged but uncorrected by the appellate court. Further, *Pepper* seemed to give broad authority to the resentencing court to revisit the error on its own. Even absent the government's ability to argue for the correction of an error pointed out by the appellate court, there is still a concern that district courts could correct it sua sponte and ultimately hurt the appealing party.[212]

The Seventh Circuit has also noted that *Pepper* explicitly permitted only the introduction of postsentencing rehabilitation

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207 *Pileggi*, 703 F3d at 678–79.

208 Id at 679.

209 Id at 680 (quotation marks omitted).

210 Id.

211 *Pileggi*, 703 F3d at 680 ("*Pepper* does not abolish waiver in the context of resentencing.") (quotation marks omitted).

212 There is a potential argument that monetary fines should be approached differently than terms of imprisonment for the purposes of appellate review of criminal sentencing. Monetary fines are typically seen as less of a threat to individual liberties than incarceration. However, nothing in the language of *Greenlaw* suggests that its holding is limited to prison terms.

evidence at resentencing and that this permission did not "equate to carte blanche for defendants to raise new arguments unrelated to the issues raised on appeal."[213] The court made this assertion in response to defendants who successfully appealed and then attempted to make new arguments for decreased sentences on remand. But it is unclear how this decision might apply to the nonappealing party. If the defendant is not given broad ability to raise new arguments at resentencing, a nonappealing party should be even further restricted on remand due to the fact that it raised no arguments on appeal. A functionalist interpretation of *Greenlaw* would restrict district court action in this way.

III. RESOLVING THE DISCREPANCIES

The appellate court cases discussed above create unnecessary confusion in appellate sentencing authority and can disincentivize defendants from exercising their right to appeal. More importantly, the cases violate a functionalist interpretation of *Greenlaw*, which should be read to restrict both appellate and district courts. These negative effects can be avoided by more effective employment of the mandate rule combined with a broader interpretation of *Greenlaw*.

A. Why Sua Sponte Increases Should Be Avoided

A functionalist understanding of *Greenlaw* would admittedly restrict the power of both appellate and district courts to address mistakes during review and remand. This understanding appears to run counter to the ideal function of appellate courts: ensuring accurate application of the law.[214] While there are arguments in favor of fewer restrictions at the review stage, none is sufficient to override the problems that permitting sua sponte increases would create for defendants. This Section offers several possible justifications for the formalist understanding of *Greenlaw* and rejects each as insufficient to advance the protections intended by the *Greenlaw* majority.

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[213] *United States v Barnes*, 660 F3d 1000, 1007 (7th Cir 2011).

[214] See Hessick and Hessick, 60 Ala L Rev at 3 (cited in note 14) ("This conflict between the need for district court discretion and the Court's decision to retain appellate review has led the Court to abandon the core functions of appellate review—error correction and lawmaking."); Chad M. Oldfather, *Error Correction*, 85 Ind L J 49, 49 (2010) ("Most depictions of appellate courts suggest that they serve two core functions: the creation and refinement of law and the correction of error.").

1. Expected function of appellate courts.

One argument in favor of fewer restrictions on appellate courts is that comprehensive review better aligns with the expected function of the appellate review process. Courts that engage in broader review are presumably discovering and correcting errors, and therefore delivering decisions that more accurately adhere to the law. In the context of criminal appeals, this would theoretically lead to a more just result.[215] If the criminal-justice system is to function properly, it may be in society's best interest to ensure that defendants receive a precisely appropriate punishment, no more and (just as importantly) no less.[216] Otherwise, the system may not obtain the desired degree of deterrence or incapacitation of those who have already been found guilty. If appellate courts were permitted to engage in sua sponte error correction, sentences would be more accurate than if courts were prevented from addressing them. A functionalist interpretation of *Greenlaw* seemingly magnifies the problem by preventing both appellate and district courts from making adjustments that would otherwise promote sentencing accuracy.

Accuracy is also a justification for sua sponte correction in a broader sense. This justification seems to require sua sponte correction not only in the context of criminal sentencing but in other areas of law as well. Yet the Supreme Court has not shown any desire to abandon the concept of party presentation altogether. The adversarial ideal has proven paramount over absolute accuracy.[217] Further, absolute accuracy in sentencing is not the entire measure of a successful criminal-justice system.[218]

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[215] See Frost, 59 Duke L J at 509 (cited in note 44) ("[C]ourts must on occasion eschew the party presentation rule to avoid issuing decisions containing erroneous statements of law.").

[216] See *Chapman v United States*, 500 US 453, 473 n 10 (1991) ("[A] sentence that is unjustifiably low is . . . plainly unfair to the public.") (quotation marks omitted). See also Nancy J. King and Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L J 209, 214 (2005) (noting that sentencing reformers were concerned with "both unwarranted leniency and arbitrary punishment").

[217] See Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 Ind L J 301, 317 (1989) (noting that because "the principal criticism of the adversary system is that it masks the 'truth,'" defenders of the system instead focus on "the preservation of individual dignity" as a justification for the adversarial system).

[218] See Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S Cal L Rev 621, 624 (1992) (noting that "disparity reduction," "departure control," "fine-tuning," and "common law development" are also goals of appellate review of the criminal-justice system).

There is equal interest in the protections provided by procedural justice, such as the government meeting its burden of proof, which requires occasionally forsaking the upper limits of punishment in the interest of guaranteeing the constitutional protections of due process. This process relies on requiring parties to raise issues for review and request relief. Permitting sua sponte error correction would often require the consideration of issues not raised and the granting of relief not requested. Further, the Court in *Greenlaw* repeatedly emphasized that the statutory provisions governing appellate review of sentences are intended to "entrust[ ] to certain Government officials the decision whether to appeal an illegally low sentence."[219] The Court explicitly indicated that an interpretation of the statute permitting appellate courts to act sua sponte would enable appellate courts to trump the officials' decisions, a result the Court found inconsistent with the intent underlying the statute.[220] Permitting sua sponte appellate error correction—or even district court correction—would violate the emphasis that the Court has placed on party autonomy and the ability to guide one's own appeal.

2. Principle of notice.

Another argument in favor of a formalist reading is based on the principle of notice. The Supreme Court in *Greenlaw* was concerned that sua sponte sentence increases by appellate courts result in unfair surprise to defendants who have no reason to anticipate an increase. One might argue that this notice concern is sufficiently mitigated under a formalist understanding of *Greenlaw*. Defendants who receive an increased sentence from the district court on remand may not be presented with the same surprise, given that they had the opportunity to make additional arguments at resentencing. The Seventh Circuit in *Rushton* said as much when it indicated that appealing defendants take the risk that remand will result in a longer sentence.[221] If defendants are not so limited at resentencing, the *Greenlaw* Court's concern about notice does not justify a functionalist interpretation of the case that similarly restricts district courts.

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[219] See, for example, *Greenlaw*, 554 US at 251.

[220] See id.

[221] *Rushton*, 738 F3d at 860.

But sentence increases by the district court also raise notice concerns. The waiver and forfeiture doctrines likely limit the arguments that can be made on remand.[222] A defendant who successfully brings an appeal may be unable to raise arguments that are not made on appeal, and a narrow reading of *Greenlaw* does not solve the similar notice concerns that arise in this situation. Appellate courts imposing sua sponte increases often rely on errors not raised by the parties; defendants are therefore denied notice that these errors may be relevant and, more importantly, denied the opportunity to effectively argue against increases. While defendants facing the possibility of an increase on remand have the ability, in theory, to present arguments before resentencing, in practice they will be prevented from raising many arguments if they could have raised those issues on appeal and failed to do so. The Seventh Circuit has indicated that "any issue that could have been raised on appeal but was not is waived and, therefore, not remanded."[223] In these circumstances, the government has not requested an increase or presented any arguments in support of this result on appeal. Defendants therefore will not have advanced any arguments to oppose this possibility. At resentencing, the confines of waiver and forfeiture will likely prevent defendants from making arguments they otherwise would have used to oppose an increase, on the grounds that they did not raise those arguments on appeal. Under a narrow reading of *Greenlaw*, defendants would be just as limited in their ability to respond to unanticipated arguments on remand as they would be in a world in which sua sponte correction were permitted. A broad reading of *Greenlaw* is the only way to prevent defendants from being blindsided with arguments to which they have lost the ability to respond.

Further, relying on the problem of notice as the sole basis for the formalist interpretation of *Greenlaw* suggests that warning defendants of the possibility of an increase would cure the problem. The First Circuit clearly endorsed this view in *Sevilla-Oyola*, as it would have reinstated the increased sentence had the defendant received proper warning of this possibility.[224] But this view does not entirely resolve the notice issues acknowledged in *Greenlaw*. There, the Court specified that this notice interest importantly permits the defendant to "tailor

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[222] See Part II.D.3.

[223] *United States v Barnes*, 660 F3d 1000, 1006 (7th Cir 2011).

[224] *Sevilla-Oyola*, 770 F3d at 15. See also text accompanying notes 113–15.

his arguments to take account of" the fact that "pursuit of his appeal exposes him to the risk of a higher sentence."[225] Giving the defendant general notice that his appeal might result in an increased sentence does not aid his ability to tailor his arguments to respond to the possible justifications for an increase. Otherwise, an appellate court could presumably give a general warning, hear the defendant's appeal, and then use an error that had not been raised by either party to justify an increase without enabling the defendant to respond to the basis for the increase. The notice interest that *Greenlaw* so heavily relied on requires that a defendant facing the possibility of an increased sentence be aware of both the general possibility of and the potential basis for an increase so that he may respond effectively. A formalist interpretation of *Greenlaw* would not provide full protection of the notice interest that the majority claimed to advance.

3. Accuracy in criminal sentencing.

The particular context of criminal sentencing might provide justification for sua sponte error correction. Accurate decisionmaking is particularly important when the risk of error includes a potential increase in prison time. Prior to the creation of the Guidelines, similarly situated defendants sentenced by different judges were often subject to disparate sentences.[226] Congress explicitly cited the reduction of these sentencing disparities as a goal of the Guidelines.[227] This concern suggests that sentencing errors should be corrected regardless of whether they are raised by the parties. Allowing errors in the application of the Guidelines to go uncorrected is likely to increase, not decrease, disparities among defendants. For example, if in *Anderson* the defendant's sentence had been based on an incorrect calculation of the Guidelines range, as indicated by the Sixth Circuit, he would inherently have been treated more favorably than other defendants who had committed similar offenses.[228] Permitting sua sponte correction would help ensure that these types of disparities do not occur.

But the shift in *Booker* from mandatory to advisory application of the Guidelines suggests that individual considerations in

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[225] *Greenlaw*, 554 US at 253.

[226] See Rust, Comment, 26 Touro L Rev at 78 (cited in note 34).

[227] See *Booker*, 543 US at 253.

[228] See text accompanying notes 125–36.

sentencing are at least as significant as uniformity in sentencing. The Court indicated that the sentencing system remaining after *Booker* would "help[ ] to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences."[229] The Court appeared to reject the robotic application of predetermined sentences without any room for the variables inherent in an adjudicative system, which inevitably include the possibility that the government will choose not to seek the highest possible sentence by correcting an error.

4. Efficiency.

Another argument for sua sponte review is that permitting such appellate error correction promotes efficiency. Defendants would be encouraged to thoroughly review potential arguments for appeal and presumably would not proceed if they did not perceive a strong possibility of improving the outcomes they received at the district court level. Defendants would have to evaluate any unappealed errors made to their benefit and thus might be encouraged to make a more considered use of the review process. Practically speaking, allowing sua sponte correction might even eliminate some nonmeritorious appeals by discouraging defendants from risking long-shot arguments in light of the risk of exposing errors that actually worked in their favor.

Yet there seem to be equally compelling efficiency interests advanced by prohibiting sua sponte error correction, some of which were highlighted by the majority in *Greenlaw*.[230] A defendant who does not face a cross-appeal would be provided some closure in "anticipating that the appellate court will not enlarge his sentence."[231] The review process would be narrowly circumscribed to cover only those arguments that might lead to a sentence decrease, and judicial resources would not be consumed on issues not briefed by the parties. Finally, the efficiency arguments in favor of sua sponte correction may be better relegated to the context of private claims, in which parties can turn from appellate review to private settlement to achieve a more equitable solution while still taking advantage of errors made to their detriment. In the criminal context, defendants would be faced with an all-or-nothing option of either pursuing their

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[229] *Booker*, 543 US at 264–65.

[230] *Greenlaw*, 554 US at 252.

[231] Id.

appeals with the risk of a net increase or forgoing the possibility of a decrease altogether.

5. Prosecutorial caseloads.

A final argument for sua sponte review is that prosecutors' heavy caseloads inherently prevent them from appealing every improper sentencing decision. Appellate courts therefore should respond to errors as they arise because they would otherwise face them infrequently. However, this reasoning situates the court not as a neutral arbiter but rather as an aid to the prosecution, because, while it is possible for sua sponte review to benefit the defendant,[232] it is more likely to benefit the prosecution.[233] This argument should therefore be viewed with skepticism because courts should be particularly reluctant to relinquish neutrality at the expense of criminal defendants.

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Despite these perceived justifications, an appellate court's ability to effectuate a sentence increase in response to a defendant's appeal, even without imposing the increase itself, is likely to disincentivize defendants who have discovered valid errors to their detriment from pursuing these issues on appeal if they believe there is any chance that the court will find errors in their favor.[234] This result would produce an inefficient number of appeals, whereby egregious errors committed to defendants' detriment would go unaddressed. Defendants confronting sua sponte review would face the possibility of a longer sentence and therefore a greater risk in exercising their right to appeal than the government would face in choosing to appeal. This might cause defendants to appeal with less frequency overall, meaning that errors made to their detriment would presumably be addressed and corrected less often.

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[232] See Part III.D.

[233] This is due to what many consider a bias in favor of the prosecution in criminal cases. See, for example, Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 Wash U L Rev 1133, 1171 (2013) ("Ample evidence [ ] suggests that judges often are biased toward the prosecution.").

[234] See Gregory M. Dyer and Brendan Judge, Note, *Criminal Defendants' Waiver of the Right to Appeal—an Unacceptable Condition of a Negotiated Sentence or Plea Bargain*, 65 Notre Dame L Rev 649, 657 (1990) ("[T]he practice of imposing greater sentences . . . following a successful appeal [might have] a deterrent effect . . . on defendants contemplating an appeal.").

This result also runs counter to basic ideals of the criminal justice system. Primarily, defendants are not supposed to be punished for their success on appeal,[235] but granting sentence increases when the defendant is the only party who has requested relief would do just that. Further, although it is true that defendants always face this risk to some degree (when filing an appeal there is always the possibility that the government will simultaneously file its own appeal or cross-appeal), the fact that a defendant not confronted with a cross-appeal could face increased punishment also violates the ideal of the adversarial system.[236] *Greenlaw* itself encourages this view, as the Court suggested that defendants should not lose at resentencing following a successful appeal and found it "hard to imagine" that resentencing courts would correct errors to benefit a nonappealing party.[237] Any appellate court efforts that subvert these principles are in violation of the protections that the *Greenlaw* Court created.

B. The Mandate Rule

Appellate courts can avoid this possible *Greenlaw* violation by narrowly confining their remands to reach only those issues raised by the appealing party and by policing the lower courts' adherence to these mandates. Section 2106 permits appellate courts to issue either general or limited remands, and courts should use this ability to define the scope of resentencing to avoid violating the spirit of *Greenlaw*.

Limited remands would effectively prevent the district court from making any upward adjustments in circumstances when only the defendant has appealed. Remands should be limited to permit the district court to revisit only those arguments specifically advanced by the appealing party. This policy could be applied in situations similar to *Anderson*, in which the appellate court evaluated various departures that possibly offset each other. For example, assume that a defendant argues on appeal that he improperly received a two-level enhancement at

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[235] See *Bordenkircher v Hayes*, 434 US 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."); *Pearce*, 395 US at 724 ("A defendant's exercise of a right of appeal must be free and unfettered.").

[236] See Frost, 59 Duke L J at 457–58 (cited in note 44) (describing party control over case presentation as an essential aspect of the adversarial system).

[237] *Greenlaw*, 554 US at 254 n 8.

sentencing and requests remand. The Government does not appeal or cross-appeal. Instead, it merely argues that the sentence should be affirmed, because the defendant also received an improper three-level reduction and therefore his current sentence was lower than it otherwise should have been. If the appellate court concludes that the defendant did in fact receive an improper increase, the court should remand the case with instructions to resentence accordingly. Even if the appellate court decides that the defendant also received an improper decrease, the remand should not permit the resentencing court to revisit this error, because the Government did not appeal.

This is not to say that appellate courts cannot address arguments presented by the government in opposition to remand. In *Rushton*, the Seventh Circuit concluded that the error identified by the defendant was offset by an additional error identified by the Government.[238] The court would have been well within the confines of *Greenlaw* to deny the appeal on the grounds that the error presented by Rushton was therefore harmless. Rushton's appeal still would have cost him nothing. It is only when the appellate court determines that an error to the defendant's detriment was not harmless and actually requires remand that the court must use the mandate rule to ensure that the sentence is not increased.

If appellate courts must employ a limited remand when the likely outcome is a sentence increase, the next question is how likely an increase must be for this requirement to apply. In the example above, permitting reconsideration of the improper reduction could lead only to an increase in sentence. The reduction issue should therefore be excluded from the scope of the remand. However, there may be circumstances in which the basis for remand could cut in either direction, such as when the appellate court requests greater explanation of the defendant's sentence (as the court did in *Anderson*). Requiring additional explanation may be equally likely to lead to an increase, a decrease, or no change in sentence. But the important issue in *Anderson* was not the remand itself but the appellate court's basis for finding the error.[239] Appellate courts typically do not remand for general reconsiderations. In *Anderson*, the only error the court identified as the basis for requiring additional explanation was that the

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[238] *Rushton*, 738 F3d at 860 ("The alternative to ordering resentencing would be to pronounce the errors not plain because they were offsetting.").

[239] *Anderson*, 526 F3d at 329–30.

calculated Guidelines range was *too low*, an error clearly to the defendant's advantage.[240] When the only basis for the remand is an error in the defendant's favor, remand should not be awarded at all if the government did not appeal or cross-appeal.

A similar issue might arise if an appellate court instead finds two errors justifying the requirement of additional explanation. Suppose that the court finds—on its own—that the originally calculated Guidelines range was too low, and that the defendant successfully argues that the sentencing court failed to address the risk of unwarranted disparity among various defendants. In such a case, the appellate court should limit the remand to permit the resentencing court to consider only the error made to the defendant's detriment. Because the Government has not cross-appealed, it should not get the benefit of reconsideration.

The use of limited remands in the criminal-sentencing context is not unheard of. Appellate courts have interpreted the power to remand in the sentencing context as including the power to order limited remands.[241] Following the Court's decision in *Booker*, the Ninth Circuit adopted a limited-remand approach for reviewing sentences imposed under the previously mandatory Guidelines when the defendant has not appealed his sentence.[242] Under this approach, the Ninth Circuit remands to a district court "for the sole purpose" of determining whether the lower court would have imposed a different sentence under the now-advisory Guidelines.[243] This example demonstrates how appellate courts can use limited remands to effectively narrow the issues addressed by district courts. Further, it demonstrates that appellate courts have found criminal sentencing an appropriate area in which to employ limited remands. Indeed, the Ninth Circuit has specifically emphasized that "providing direction to the district court on how to cure [legal error] is a quintessentially appellate function."[244] The use of limited remands also

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[240] Id at 331 n 7.

[241] See, for example, *United States v Ameline*, 409 F3d 1073, 1079 (9th Cir 2005).

[242] See id at 1084. See also Michael Guasco, Note, *Defining "Ordinary Prudential Doctrines" after* Booker*: Why the Limited Remand Is the Least of Many Evils*, 37 Golden Gate U L Rev 609, 625 (2007) (discussing the Ninth Circuit's new "limited-remand procedure"). The Seventh Circuit and the DC Circuit have also both adopted a limited-remand approach to these types of cases, with slight procedural differences. See *United States v Paladino*, 401 F3d 471, 484 (7th Cir 2005); *United States v Coles*, 403 F3d 764, 770 (DC Cir 2005).

[243] Guasco, Note, 37 Golden Gate U L Rev at 625 (cited in note 242).

[244] *Ameline*, 409 F3d at 1082.

encourages procedural efficiency. An appellate court can more easily review a district court's resentencing to determine whether it adhered to the remand when the appellate court has narrowly cabined the scope of reviewable issues.

C. Reinterpreting *Greenlaw* and *Pepper* to a Broader Limitation

Limited remands would confine the behavior of district courts, but this solution relies heavily on the assumption that appellate courts will choose to use limited rather than general remands. Further, expanded use of limited remands leaves unresolved the question of what courts should do when the basis for remand is effectively neutral in that it is equally likely to lead to a decrease or an increase. One example of a possibly neutral basis for remand is demonstrated by an argument advanced in *Rushton*: that a particular sentence is impermissibly general. A defendant might request that the appellate court remand the case so that the district court can apportion the sentence to each charge. This remand would be neutral in that it would not in itself suggest that the sentence should have been either higher or lower. If the appellate court remands the case and directs the district court to separate the sentence by charge, the district court might then resentence the defendant in a way that increases the aggregate punishment. A limited remand would be of no help to the defendant in this case, as the court would have done what the defendant had asked.

Greenlaw must be read functionally not only to bar appellate courts from remanding when the only basis for doing so is an error clearly in the defendant's favor but also to bar district courts from increasing a sentence whenever remand follows a defendant's appeal. *Greenlaw* clearly encourages this pro-appellant perspective by suggesting that defendants should lose nothing on remand following a successful appeal.[245] Further, *Pepper* must be limited to permit de novo consideration of sentencing errors only when the reevaluation would benefit the appealing party. If an appellate court has vacated a defendant's sentence following his successful appeal, the district court charged with imposing a new sentence can consider only those errors that would have made the sentence too high. Any

[245] *Greenlaw*, 554 US at 252 ("Thus a defendant who appeals but faces no cross-appeal can proceed anticipating that the appellate court will not enlarge his sentence.").

deviation from the vacated sentence must be to the defendant's advantage.

This reinterpretation of precedent is not beyond the typical practices of courts. For example, when the Court interprets its own ambiguous precedent—such as *Greenlaw*, which can be described as ambiguous since the decision fails to fully explain how it interacts with precedent—the Court can "bend[ ] its interpretations toward first principles" in a way similar to its practice of constitutional avoidance.[246] Courts have done just that in declining to interpret cases in ways that would conflict with prior precedent.[247] To do otherwise under these circumstances would effect precisely what courts strive to prevent: punishment of defendants for their success.

D. Considering Role Reversal

The cases addressed in this Comment all present instances of appellate courts attempting to correct errors that originally benefitted the defendant. This Comment establishes that defendants should not be subjected to punishment exceeding that which the government requests. But it may be that the prohibition against correcting unappealed sentencing errors would prevent appellate courts from aiding a defendant as often as it would prevent the courts from punishing him further. Consider a situation in which a defendant is sentenced and only the Government appeals; the court rejects the Government's argument and finds that an error improperly increased the defendant's sentence. Should the appellate court be similarly prevented from remanding for correction of this error—a correction that would likely *reduce* the defendant's sentence? Such a result would be troublesome, and a more expansive reading of *Greenlaw* suggests that appellate courts should not be so limited.

The *Greenlaw* Court relied on the cross-appeal rule, which is a broad doctrine that theoretically provides no greater protection for defendants than it does for the government in achieving accurate sentencing. However, the Court's ultimate holding specifically states that sentences cannot be *increased* absent an

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[246] Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 Colum L Rev 1861, 1865 (2014) (discussing this means of interpretation in the context of narrowing previous precedent).

[247] See, for example, *United States v Goldberg*, 295 F3d 1133, 1140 (10th Cir 2002) ("To avoid conflict with precedent predating *Jones*, we choose not to read that case in this manner.").

appeal or cross-appeal by the *government*.[248] The Court explained that "[e]ven if there might be circumstances in which it would be proper for an appellate court to initiate plain-error review, sentencing errors that the Government refrained from pursuing would not fit the bill."[249] The logic may be that imposing too high a prison term in the face of any error—whether appealed by the defendant or not—is a violation of an individual right, whereas the government has no corresponding "right" to accurate sentencing. A plain error to the defendant's detriment, otherwise forfeited, is therefore likely to affect substantial rights in a way that a plain error to the government's detriment will not. This conclusion does not counsel in favor of disparate applications of the waiver and forfeiture doctrines for defendants versus the government at resentencing. Rather, it indicates that there may be reasons to permit sua sponte appellate review in order to prevent the threat to substantial rights that is created by excessive imprisonment.

CONCLUSION

Ever since the Supreme Court decided *Greenlaw*, appellate courts have refrained from expressly imposing higher sentences absent government appeals. However, appellate courts have used other means to create the same result, going against the spirit of the Court's assertion that a successful appellant should not receive a harsher punishment as a result of his own appeal. The Court has provided little guidance as to how this general maxim interacts with district courts' authority to increase sentences at resentencing, leaving courts conflicted as to whether the scope of resentencing is limited to the issues presented on appeal.

Appellate courts can remedy this confusion by issuing strict remand orders that clearly confine the scope of review and prevent district courts from revisiting errors that were not raised on appeal. Using limited remands will ensure that defendants have adequate notice of both the possible outcomes on appeal and the possible issues at resentencing. It will enable defendants to make informed decisions about whether moving forward with an appeal is worth the risk that the government will file its own cross-appeal, without having to predict what the appellate

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[248] *Greenlaw*, 554 US at 240.

[249] Id at 248.

or district court might choose to consider sua sponte. By issuing limited remands, appellate courts will also ensure that resentencing decisions can be more easily reviewed to determine whether district courts exceeded the authority granted on remand. This appellate response properly adheres to the functional ban established in *Greenlaw* without creating unnecessary conflict with the Court's prior precedent. Most importantly, it protects unsuspecting defendants from the infliction of harsher punishments that no one asks for.