

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CARLTON BUTLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED

Whether Federal Rule of Criminal Procedure 35(a) grants a district court authority to reallocate the illegal portion of a term of imprisonment levied on one count to other legal sentences for separate counts of conviction.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Carlton Butler respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case in relation to Federal Rule of Criminal Procedure 35(a).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, *United States v. Carlton Butler*, No. 17-11436, 2018 U.S. App. LEXIS 8585 (11th Cir. Apr. 2, 2018), appears at Appendix A to the petition and is unpublished. The order of the United States District Court for the Middle District of Georgia, *United States v. Carlton Butler*, No. 5:16-CR-16-1(MTT), Document 66 (M.D. Ga. Mar. 30, 2017), and the amended judgment, *United States v. Carlton Butler*, No. 5:16-CR-16-1(MTT),

Document 66 (M.D. Ga. Mar. 30, 2017), appear in Appendix B to the petition and are also unpublished.

JURISDICTION

The Eleventh Circuit entered judgment in this case affirming the district court's order and amended judgment on April 2, 2018. No petition for rehearing was filed. This petition is being filed within 90 days of entry of judgment by the Eleventh Circuit thereby making it timely under Rule 13.1 of the Rules of the Supreme Court of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Mr. Butler, Petitioner herein, remains in custody.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATUTORY PROVISIONS INVOLVED

Section 3582 of Title 18 states in pertinent part:

§3582(c)(1). Imposition of a sentence of imprisonment

The court may not modify a term of imprisonment once it has been imposed except that—in any case—

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure.

Federal Rule of Criminal Procedure 35(a) provides:

Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

Federal Rule of Criminal Procedure 43(a) provides that: "Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at..."

(3) Sentencing."

Federal Rule of Criminal Procedure 43(b) provides that: "A defendant need not be present under any of the following circumstances..."

(4) *Sentence Correction.* The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. §3582(c)."

STATEMENT OF THE CASE

Petitioner Carlton Butler was named as the sole defendant on a seventeen-count indictment on March 10, 2016, alleging four counts of distribution of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), four counts of using or carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A), eight counts of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2), and one count of possession of a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k) and 18 U.S.C. § 924(a)(1)(B).

On September 8, 2016, Petitioner pled guilty pursuant to a written plea agreement to Count One, distribution of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), and Count Two, using or carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A).

The district court held a sentencing hearing on March 17, 2017. The Court orally pronounced a sentence of 300 months on Count One, and a sentence of 60 months on Count Two. Judgment was entered the same day by the Court. Shortly following the sentencing hearing, the parties noticed the illegal sentence imposed by the district court as to Count One.

In reference to Count One, the statutory maximum sentence is 240 months, which is 60 months less than the illegal sentence of 300 months imposed by the district court. The district court then entered a *sua sponte* order vacating the judgment, scheduling resentencing for March 27, 2017. At the resentencing hearing,

defense counsel objected to proceeding outside of Federal Rule of Criminal Procedure 35(a). Petitioner filed a Motion for Relief under Rule 35(a), to which the government quickly responded.

On March 30, 2017, the district court held a phone conference, where it heard argument and determined that a corrected judgment under Rule 35(a) was the best way to proceed on the matter. Over Petitioner's objection, the district court resentenced Petitioner as to both counts. Petitioner was not present during this phone conference. While overruling Petitioner's objection to amending the term of imprisonment as to Count Two, the district court orally granted Petitioner's Rule 35(a) Motion as to Count One. The district court declined defense counsel's request to reconvene a hearing with Petitioner for resentencing on Count Two.

Without the Petitioner present, the district court, on March 31, 2017, entered an amended judgment and ordered an amended sentence of 240 months on Count One and 120 months on Count Two, running consecutively. This issue was presented to the Eleventh Circuit Court of Appeals, which relied on Eleventh Circuit precedent and denied Petitioner any remedy or relief. This Petition follows.

REASONS FOR GRANTING

This Court should grant Mr. Butler's petition in light of the impact on defendants across federal circuits, which are split as to the scope of power granted to a sentencing court under Rule 35(a).

I. THE CIRCUITS ARE SPLIT, AND THIS COURT SHOULD DEFINE THE SCOPE OF THE POWER GRANTED TO A SENTENCING COURT UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 35(A).

The restrictions on a sentencing court's power to modify a term of imprisonment are set forth in the plain language of 18 U.S.C. §3582, which reads that a Court may not modify a term of imprisonment once it has been imposed, except under three limited circumstances. Of the three exceptions allowed, only one provision is applicable to the case at hand. Section 3582(c)(1)(B) allows a court to "modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure."

Justice Stewart's delivery of the majority opinion in *Hill v. United States*, 368 U.S. 424, 430 (1962), clearly states that the Rule's "language and history make clear, the narrow function of Rule 35 is to permit correction at any time of an illegal *sentence*, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence." The majority opinion goes on to describe what this Court considered an illegal sentence, when reasoning that: "[t]he punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect." *Id.* at 430. Since then some Circuits have expanded that rubric to authorize the reallocation or even resentencing of terms of imprisonment between multiple counts of conviction.

Rule 35(a) states that “... within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.” In 1991, the Advisory Committee noted that when correcting a sentence under Rule 35(a), the scope of authority is “intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case”. Fed. R. Crim. P. 35(a) advisory committee’s note to 1991 amendment. Recent appellant decisions evidence a circuit split on whether Rule 35(a) allows resentencing on all counts or reallocating terms of imprisonment in a multi-count sentence when not all of the counts were illegally imposed.

While some Circuits apply the rule according to its unambiguous language and in accordance with the concerns as stated by the Advisory Committee, other Circuits choose to apply a more “holistic” or “sentencing package” approach. Unfortunately for Petitioner, the Eleventh Circuit embraces this holistic approach and analysis that unlawfully expands the power of the sentencing court under Rule 35(a).

The Ninth Circuit properly recognizes that “the oral pronouncement of a sentence, ‘even if contrary to the district judge’s intent,’ must control,” and Rule 35(a) is not to be expanded outside the narrow language of the Rule. *United States v. Reth*, 364 Fed. Appx. 323, 326 (9th Cir. 2010) (citing *United States v. Garcia*, 37 F.3d 1359, 1369 (9th Cir. 1994)) (holding that the sentencing court could not reallocate terms of imprisonment on multiple counts under Rule 35(a) where the oral sentence was clear in terms of confinement and whether those terms ran consecutively or concurrently).

Rule 35(a) cannot be utilized to “reflect an allocation between the counts.” *See United States v. Seavey*, 445 F. Supp. 2d 80, 82 (D. Me. 2006) (denying the Government’s motion attempting to use Rule 35(a) to provide a missing allocation of a term of imprisonment to the individual counts of conviction).

In *Kennedy v. United States*, 330 F.2d 26, 27 (9th Cir.1964), the defendant pled guilty to multiple counts of various and sundry crimes and was initially sentenced with all terms of imprisonment running concurrently for a total term of ten years. The terms of imprisonment on some counts exceeded the statutory maximum. *Id.* at 27. Under Rule 35(a), the sentencing court vacated the illegal portions of the sentence, but also amended the sentence so that some terms of imprisonment then ran consecutively to preserve a total term of imprisonment of ten years. *Id.* The sentencing court made clear its intent to have a total term of ten years, regardless of how it got there on a per count sentence basis. *Id.*

In *Kennedy*, the Ninth Circuit found that the initial sentences were void only regarding the terms of imprisonment exceeding the statutory maximum. *Id.* Of particular import to the present case, the *Kennedy* court focused on the fact that the matter was not returned with instructions on remand but handled via Rule 35(a) by the sentencing court. *Id.* at 29. The Ninth Circuit properly concluded in *Kennedy* that “the court may not increase or make more severe the valid portions of the sentences originally imposed”. *Id.* at 27. In similar holdings, the Ninth Circuit has held that the “authority to correct sentencing errors extend(s) only to the illegal portion of the sentence”. *U.S. v. Portin*, 20. F.3d 1028, 1030 (9th Cir. 1994); see also *United States*

v. Lewis, 862 F.2d 748, 750 (9th Cir. 1988); *United States v. Minor*, 846 F.2d 1184, 1188 (9th Cir. 1988).

Both the Second and Tenth Circuits have also chosen to narrowly apply the language of Rule 35(a). Relying upon the Second Circuit's analysis of the limits of Rule 35(a) and the history thereof, the Tenth Circuit has held that the Rule is intended only to extend to:

... errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a) [requiring remand when the sentence is imposed in violation of law, as a result of an incorrect application of the sentencing guidelines, or is unreasonable]. The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines.

United States v. Quijada, 146 Fed. Appx. 958, 971 (10th Cir. 2005) (citing *United States v. Abreu-Cabrera*, 64 F.3d 67, 72 (2d Cir. 1995)).

The Third Circuit likewise found that adjusting the severity of an otherwise legal sentence was not authorized under the Rule, holding that: "[a]s a result of Congress' desire to provide a finality to sentencing, such second thoughts, no matter how well intentioned are not the sort of error that [Rule 35(a)] was designed to remedy." *United States v. Johns*, 332 Fed. Appx. 737, 739 (3rd Cir. 2009). Following suit, the Sixth Circuit emphasized that the proper function of Rule 35(a) is to "eliminate illegal excess beyond statutory maximum". *United States v. Gray*, 521 F.3d

514, 544 (6th Cir. 2008) (quoting *United States v. Jordan*, 895 F.2d 512, 514-16 (9th Cir. 1990)).

Recently the First Circuit also found that “[f]or Rule 35(a) purposes, a sentence is illegal if ‘[t]he punishment meted out was . . . in excess of that prescribed by relevant statutes, multiple terms were . . . [or] the terms of the sentence itself [were] legally or constitutionally invalid in any respect.’” *United States v. Sevilla-Oyola*, 770 F.3d 1 (1st Cir. 2014) (citing *Hill v. United States*, 368 U.S. 424, 430 (1962)). The Eighth Circuit likewise emphasizes that Rule 35(a) cannot be used to correct a valid and legal sentence. *United States v. Sadler*, 234 F.3d 368, 374 (8th Cir. 2000) (citing *United States v. Abreu-Cabrera*, 64 F.3d 67, 72 (2d Cir. 1995)).

With Petitioner’s case having arisen from the Eleventh Circuit, it is no surprise that the Eleventh Circuit does not follow the First, Second, Third, Sixth, Eighth, Ninth or Tenth Circuits’ analysis of the limits of Rule 35(a). The Eleventh Circuit’s approach improperly expands the authority granted under Rule 35(a). The Eleventh Circuit has held that the district court may, but is not required to, “resentence” a defendant on all counts of conviction under Rule 35(a) (then Rule 35(c)) under the holistic theory that the sentence is a package deal. See *United States v. Yost*, 185 F.3d 1178 (11th Cir. 1999); see also *United States v. Pineda*, 988 F.2d 22, 23 (5th Cir. 1993).

In *Yost*, the defendant pled guilty on multiple counts, but the sentencing court applied the wrong sentencing guideline, even considering a count to which the defendant had not pled. *Id.* at 1180. Unlike *Kennedy*, 330 F.2d at 29, which intentionally raised an important distinction, *Yost* conflates cases on remand with

those handled under Rule 35(a) as granting sentencing courts the same procedural posture and power for correcting errors. *Id.* at 1181. This fundamental flaw undoes the logic of *Yost*'s holding.

Further and in the justification for its expansion of Rule 35(a), *Yost* relied upon *United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996), which held that a “criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent consistent with the Sentencing Guidelines.” *Id.* at 1181. *Yost* held that “it takes only one clear error to give the district court authority under Rule 35(c) to conduct an entire resentencing at which the court may correct any other errors, clear or not.” *Id.*

The Eleventh Circuit approach further causes friction with Federal Rule of Criminal Procedure 43 and the defendant’s right to be present under the Sixth Amendment to the United States Constitution. The Eleventh Circuit’s resentencing approach blurs the line between the Sixth Amendment and Rule 43(a)(3), requiring a defendant’s presence at sentencing, and Rule 43(b)(4), which allows a defendant’s absence for a correction of an illegal sentence under Rule 35(a). Following a resentencing approach to Rule 35(a) improperly allows a sentencing court to increase, adjust, and reallocate terms of imprisonment without a defendant being present.

The Eleventh Circuit approach improperly conflates resentencing under an appellate court’s mandate with the limited language of Rule 35(a). In *Kennedy*, the Court properly distinguished cases concerning the district court’s authority under Rule 35(a) from those remanded via an appellate court’s mandate. *Kennedy v. United*

States, at 29. It follows logic that a district court must follow the scope and spirit of instructions under an appellate mandate. However, comparing the authority of an appellate mandate to that under Rule 35(a) is illogical. A narrow interpretation of the language of Rule 35(a), as adopted by the First, Second, Third, Sixth, Eighth, Ninth, and Tenth Circuits, is preferable to the holistic approach by the Eleventh Circuit and appropriate with respect to the intent and clear language of the Rule.

The contention that Rule 35(a) should be read narrowly and extend only to the illegal portions of a sentence encourages sentencing courts to ensure that the correct sentence is imposed. If a defendant can be resentenced completely on the basis that one count in a multicount conviction is illegal, then that error will further suspend a defendant's ability to appeal and place an untenable burden on a defendant to distinguish between a court's intent versus its final, orally-pronounced judgment. This further erodes the sentencing finality sought by Congress and parties alike. By encouraging a procedure which allows for resentencing on all counts, both legal and illegal, the Eleventh Circuit encourages costly and unnecessary litigation, which often begins from re-opening issues already legally concluded and not subject to remand.

The application of the narrow reading of Rule 35(a) gives all parties a bright line rule that allows for focused preparation regarding the correction of illegal sentences on specific counts without disturbing the sentence as a whole. It is also a solution to limiting the guesswork for a defendant as to what a corrected sentence may hold, since resentencing can be unpredictable and damaging.

Petitioner's otherwise lawful sentence on Count Two should not have been disturbed. The Eleventh Circuit's holistic approach to the sentencing package entirely ignores the fact that the sentence is delineated per Count One and Two, which the law clearly requires. The fact that the sentences on separate counts of conviction, in Petitioner's case Counts One and Two, have a conglomerate sum total as to the term of imprisonment does nothing to justify the Eleventh Circuit's reliance on the sentencing package theory. It simply means that there is a total number of years (or months) of imprisonment.

In Petitioner's case, the only motion before the district court to consider was Petitioner's request for relief on Count One. Petitioner specifically objected to resentencing on Count Two. Oddly in *McNeese*, the Eleventh Circuit endorsed the Government's restriction of the scope of addressing a single count on a multi-count conviction. *United States v. McNeese*, 547 F. 3d 1307 (11th Cir. 2008). It would certainly be unjust to allow the government such a luxury while denying the Petitioner the same.

The resolution of split in circuits as Petitioner requests does nothing to erode the court's ability to effectively and efficiently sentence defendants; rather, by having a cohesive approach followed by all circuits, defendants are given the fairest and most just sentences. By adopting the approach taken by the First, Second, Third, Sixth, Eighth, Ninth, and Tenth Circuits, courts are held to the lawful portions of the judgment entered and uncertainty of corrections under Rule 35(a) is minimized. For these reasons and those below, Petition seeks review and relief.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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