No. 18-5182

IN THE SUPREME COURT OF THE UNITED STATES

CARLTON BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court acted within its authority under Federal Rule of Criminal Procedure 35(a) to "correct a sentence that resulted from arithmetical, technical, or other clear error" when, upon recognizing that it had exceeded the statutory maximum penalty on one of two counts, it resentenced petitioner on both counts to the same total term of imprisonment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is not published in the Federal Reporter but is reprinted at 729 Fed. Appx. 732. The order of the district court (Pet. App. B1-B3) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2018. The petition for a writ of certiorari was filed on June 30, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Georgia, petitioner was convicted of distributing cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and carrying a firearm during a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Am. Judgment 1. The district court initially sentenced petitioner to 300 months of imprisonment on the drug count and 60 months of imprisonment on the firearm count, to run consecutively and to be followed by three years of supervised release. Judgment 2. The court subsequently relied on Federal Rule of Criminal Procedure 35(a) to resentence petitioner to 240 months of imprisonment on the drug count and a consecutive 120 months on the firearm count for the same total term of 360 months of imprisonment, again to be followed by three years of supervised release. Am. Judgment 2. The court of appeals affirmed. Pet. App. A1-A12.

1. On May 28, 2014, a confidential informant arranged to purchase a gun and cocaine base from petitioner in Montezuma, Georgia. Presentence Investigation Report (PSR) ¶ 10. The informant went to petitioner's home, gave him $700, and received approximately ten grams of cocaine base and a semiautomatic pistol. Ibid. Over the next eight months, petitioner sold the informant 11 more guns and approximately ten more grams of cocaine base. PSR ¶¶ 10-17.

A grand jury indicted petitioner on four counts of distributing cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); four counts of possessing a firearm during a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); eight counts of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); and one count of possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k) and 924(a)(1)(B). Indictment 1-10.

Petitioner pleaded guilty to one count of distributing cocaine base and one count of possessing a firearm during a drug trafficking crime. PSR ¶ 1. The Probation Office determined that petitioner was a career offender under Sentencing Guidelines § 4B1.1, which resulted in an offense level of 32 and a criminal history category of VI. PSR ¶¶ 29, 60. Using the tables in Section 4B1.1(c)(3), the Probation Office calculated that petitioner's advisory Guidelines range was 360 months to life imprisonment. PSR ¶¶ 33-34. The Probation Office noted that 240 months of imprisonment was the statutory maximum penalty for the drug offense and life imprisonment was the statutory maximum penalty for the firearm offense. PSR ¶ 83.

At sentencing, the district court adopted the Probation Office's calculations of petitioner's advisory Guidelines range, and did not find "grounds for a downward variance." 3/17/17 Tr. 22. "[A]fter considering the advisory sentencing range and the sentencing factors found at 18 U.S.C. Section 3553(a) and after

making an individualized assessment of the totality of the circumstances," the court sentenced petitioner to 300 months on the cocaine count and 60 months of on the firearm count, to run consecutively. Ibid.; see Judgment 2.

2. After the parties informed it that the 300-month sentence on the cocaine count exceeded the statutory maximum penalty, the district court vacated its sentencing order and held a new hearing. D. Ct. Doc. 61 (Mar. 21, 2017). The court acknowledged that it had "mistakenly said or sentenced [petitioner] to a period of 300 months on Count One when, in fact, the statutory maximum was 240 months." 3/27/17 Tr. 2. It then explained that "[w]hat [the court] should have done is sentenced [petitioner] to 240 months under Count One and 120 months under Count Two to run consecutively" and that the mistake "could be corrected by an amended judgment." Ibid.

Petitioner objected, asserting that modifying the sentences imposed on both counts exceeded the district court's authority under Federal Rule of Criminal Procedure 35(a), which permits a court to "correct a sentence that resulted from arithmetical, technical, or other clear error" within 14 days. See 3/27/17 Tr. 5-6. In petitioner's view, the court was constrained only to lower his sentence on the cocaine count in light of the statutory maximum, while remaining "bound by the 60 months" sentence on the firearm count. 3/27/17 Tr. 6.

The district court entered an order "reinstat[ing]" the original judgment, but modifying it to "correctly apportion[]" the total 360-month sentence between the two counts: 240 months of imprisonment for the cocaine count and 120 months of imprisonment for the firearm count. Pet. App. B3, B5 (emphasis omitted). It observed that "[t]he parties agree[d] that the Court's intention was to impose a minimum guideline sentence and to correctly apportion the sentence between the counts of conviction." Id. at B1. The court rejected petitioner's argument that Rule 35(a) precluded it from reallocating the total term of imprisonment between the two counts, explaining that petitioner's "sentence was 'holistic,'" especially because "[t]he sentence for Count 2 is necessarily dependent on Count 1." Id. at B2 (citing United States v. Yost, 185 F.3d 1178, 1181 (11th Cir. 1999), cert. denied, 529 U.S. 1108 (2000)).

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A12. The court observed that petitioner's argument that the district court had exceeded its authority under Rule 35(a) was foreclosed by its prior decision in Yost, supra, which had determined "that when a district court resentences a defendant under [what was then] Rule 35(c) in order to correct a clear error, the district court may conduct an entire resentencing as to each of the counts of conviction."[1] Pet. App.

[1] The relevant language was moved from Subsection (c) to Subsection (a) in 2002. The amendment did not change the substance

A2-A5 (footnote omitted). The court explained that such a "holistic approach" is necessary because "a criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent consistent with the Sentencing Guidelines." Ibid. (quoting Yost, 185 F.3d at 1181) (brackets omitted). The court of appeals also noted that its interpretation of Rule 35(a) was consistent with Sentencing Guidelines § 5G1.2(e), which provides that when a defendant is a career offender "the total punishment is to be apportioned among the counts of conviction."

ARGUMENT

Petitioner contends (Pet. 5-13) that the district court lacked authority under Federal Rule of Criminal Procedure 35(a) to reallocate his 360-month sentence between two counts of conviction to comply with one count's statutory maximum penalty, and was instead bound to impose a lower total sentence than the one it had determined to be appropriate. The court of appeals correctly rejected that contention. Although a limited circuit conflict exists on the issue, the conflict is shallow and does not warrant this Court's intervention. Review is especially unwarranted because the Advisory Committee on Rules of Criminal Procedure is well positioned to resolve any disagreement over the meaning of Rule 35. This court denied a petition for a writ of certiorari on

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of the Rule. See Fed. R. Crim. P. 35 advisory committee's note (2002).

a similar issue in Yost v. United States, 529 U.S. 1108 (2000) (No. 99-1170), and the same result is warranted here.

1. Rule 35(a) provides that a district court "may correct a sentence that resulted from arithmetical, technical, or other clear error" within 14 days. Fed. R. Crim. P. 35(a). By its plain terms, Rule 35(a) governs the circumstances in which a court may correct a sentence. But Rule 35(a) does not limit the scope of the court's authority in correcting a sentence in such circumstances. So while a district court may not correct a sentence in the absence of "arithmetical, technical, or other clear error," once it discovers such an error, it is free to correct any other mistake in the sentence, even those that would not have warranted reopening the sentence in the first place. As the Seventh Circuit has explained, "whenever the district court must revise one aspect of the sentencing scheme, it is permitted by Rule 35 to revise the rest." United States v. Bentley, 850 F.2d 327, 329 (7th Cir. 1988), cert. denied, 488 U.S. 970 (1989).

That interpretation is consistent with this Court's precedents. "Sentencing courts have long enjoyed discretion in the sort of information they may consider when setting an appropriate sentence." Dean v. United States, 137 S. Ct. 1170, 1175 (2017). Because a criminal sentence is "a package of sanctions that the district court utilizes to effectuate its sentencing intent," a court's "original sentencing intent may be undermined by altering one portion of the calculus." Pepper v.

United States, 562 U.S. 476, 507 (2011) (quoting United States v. Stinson, 97 F.3d 466, 469 (11th Cir. 1996) (per curiam), cert. denied, 519 U.S. 1137 (1997), and United States v. White, 406 F.3d 827, 832 (7th Cir. 2005), cert. denied, 549 U.S. 1018 (2006)). Accordingly, this Court has held that a sentencing court may "consider[] a mandatory minimum under [one offense] when calculating an appropriate sentence for [another] offense," Dean, 137 S. Ct. at 1178, and that "an appellate court when reversing one part of a defendant's sentence 'may vacate the entire sentence . . . so that, on remand, the trial court can reconfigure the sentencing plan'" in its entirety, Pepper, 562 U.S. at 507 (citation omitted).

Sentencing courts have similar discretion when correcting "arithmetical, technical, or other clear error[s]" under Rule 35(a). Fed. R. Crim. P. 35(a). A regime in which a sentencing court could not adjust the whole "package of sanctions" to effectuate its "original sentencing intent," Pepper, 562 U.S. at 507 (citations omitted), is neither required by Rule 35(a) nor sensible in practice. Under such an approach, a court that inadvertently overlooks a statutory limit on the sentence range for a particular count in apportioning a sentence that it determines to be appropriate overall across consecutive terms would then be forced to reimpose an overall sentence that deviates from that determination. An error as to a statutory maximum would require that the overall sentence be shortened; an error as to a

statutory minimum would require that the overall sentence be lengthened. Rule 35(a) allows courts to correct manifest errors. It does not mandate that the consequence of such errors be a sentence that the court considers to be shorter or longer than a particular defendant deserves.[2]

A holistic approach to correcting sentences under Rule 35(a) is also consistent with the Sentencing Guidelines. As the court of appeals observed, Guidelines Section 5G1.2(e) provides that, for career offenders convicted on multiple counts under Sections 924(c) or 929(a), "to the extent possible, the total punishment is to be apportioned among the counts of conviction" so long as the sentence for each count adheres to statutory minimum penalties and the sentence imposed under Sections 924(c) or 929(a) runs consecutively to other counts. Sentencing Guidelines § 5G1.2(e). The district court's adjustment of the total sentencing package in light of its undisputed clear error here thus aligned with the

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[2] Petitioner argues (Pet. 13) that it is "unjust" for the government to interpret Rule 35(a) to allow for a holistic approach when it has taken the position that the government should be able to specify a particular portion of a sentence for reduction under Rule 35(b). See United States v. McNeese, 547 F. 3d 1307 (11th Cir. 2008) (per curiam), cert. denied, 556 U.S. 1200 (2009). But Rule 35(b) differs markedly from Rule 35(a). It allows the government to reward a defendant's post-sentencing cooperation with law enforcement by enabling his sentence to be reduced in light of that substantial assistance. Consistent with that design, a court's authority is contingent "[u]pon the government's motion," Fed. R. Crim. P. 35(b), as to which the government has "vast discretion," McNeese, 547 F.3d at 1308-1309 (citing Wade v. United States, 504 U.S. 181, 185 (1992)).

Sentencing Guidelines because it enabled the court to correct a clear error while preserving its original sentencing intent by apportioning the appropriate "total punishment" between petitioner's counts of conviction. Nothing in Rule 35(a) prohibited it from doing so.

2. Although a limited circuit conflict exists on the question presented, petitioner overstates its scope. The Seventh Circuit, like the Eleventh, has recognized that Rule 35(a) does not constrain a district court to impose a different sentence than it determined to be appropriate when it identifies a clear error that affects only one of multiple consecutive terms imposed as an overall sentencing package. See Bentley, 850 F.2d at 328. Only the Ninth Circuit has held that Rule 35(a) permits a sentencing court to correct only the "illegal or excessive portion[]" of a sentence, and does not permit reapportionment among multiple counts to correct clear error. Kennedy v. United States, 330 F.2d 26, 27 (9th Cir. 1964); see also United States v. Jordan, 895 F.2d 512, 514 (9th Cir. 1989). That shallow conflict, which favors the approach taken in this case, does not warrant this court's review.

Petitioner suggests (Pet. 9-10) that the First, Second, Third, Sixth, Eighth, and Tenth circuits have followed the Ninth. That is incorrect. None of the cases on which petitioner relies addressed the issue presented here. Instead, they all addressed the circumstances in which a court may correct a sentence under

Rule 35 in the first place, not the scope of a correction in the face of uncontested clear error.

The decisions in United States v. Abreu-Cabrera, 64 F.3d 67, 72 (2d Cir. 1995), United States v. Johns, 332 Fed. Appx. 737, 739 (3d Cir.), cert. denied, 558 U.S. 963 (2009), and United States v. Sadler, 234 F.3d 368, 373-374 (8th Cir. 2000) (per curiam), stand only for the proposition that Rule 35's limitation to "arithmetical, technical, or other clear error" does not authorize a district court to revisit a defendant's sentence based on its "change of heart as to the appropriateness of the sentence." Because a "change of heart" is not "arithmetical, technical, or other clear error," the Second, Third, and Eighth circuits concluded that Rule 35 did not apply. Similarly, in United States v. Sevilla-Oyola, 770 F.3d 1 (2014), the First Circuit held that "Rule 35(a) does not provide a means to revisit possible errors in the plea colloquy," because those errors did not "result[] in an illegal sentence." Id. at 11.

The Sixth and Tenth Circuit decisions cited by petitioner (Pet. 9-10) affirmed a district court's Rule 35 resentencing and do not suggest that those courts would have disagreed with the court of appeals' affirmance here. See United States v. Gray, 521 F.3d 514, 544 (6th Cir. 2008) (concluding that the "district court acted within the scope of Rule 35(a) when it amended Gray's sentences * * * to correct its error in imposing a sentence greater than the allowable statutory maximum"), cert. denied, 557

U.S. 919 (2009); United States v. Quijada, 146 Fed. Appx. 958, 971 (10th Cir. 2005) (concluding that resentencing was proper where "the district court initially did not apply the § 2L1.2(b)(1)(A) enhancement, based on its mistaken belief the rule in Blakely [v. Washington, 542 U.S. 296 (2004)] allowed only a jury to determine the characterization of Mr. Quijada's prior convictions as 'crimes of violence'"), cert. denied, 546 U.S. 1203 (2006).

3. Certiorari is particularly unwarranted because the Advisory Committee on Rules of Criminal Procedure is the appropriate entity to address any disagreement on this issue. This Court has observed that it "may and should leave" interpretive conflicts over the Federal Rules of Criminal Procedure "for resolution by the rule-making process." Lott v. United States, 367 U.S. 421, 425 (1961); cf. Buford v. United States, 532 U.S. 59, 66 (2001) ("Insofar as greater [sentencing] uniformity is necessary, the [Sentencing] Commission can provide it."). That observation applies with full force here. The Advisory Committee is well situated to amend Rule 35 to resolve any conflict, as it has done before. See Fed. R. Crim. P. 35 advisory committee notes to 2004 Amend. (adding Rule 35(c) to resolve a circuit conflict over the meaning of the term "sentencing"); id., 2002 Amend. (revising Rule 35(b) to address a circuit conflict as to whether a motion to reduce a sentence could be granted when the defendant's substantial assistance was not helpful to the government until

after the one-year tolling period). This Court's intervention is therefore unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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