No. 19-

IN THE

Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a district court deny a government's Federal Rule of Criminal Procedure 35(b) motion for reduction of sentence based on substantial assistance without first deciding whether the defendant provided substantial assistance?

2. After a district court has already *imposed* a criminal defendant's original sentence, may it later deny a government's Federal Rule of Criminal Procedure 35(b) motion for *reduction* of sentence, in whole or in part, based on the same 18 U.S.C. § 3553(a) sentencing factors that it used to determine the defendant's original sentence?

PARTIES TO THE PROCEEDING AND RELATED CASES

Petitioner, who was the defendant and appellant in the prior court proceedings, is John Doe.[1] Respondent is the United States of America. Neither party has any parent companies or subsidiaries.

The cases related to the case in this Court within the meaning of Supreme Court Rule 14.1(b)(iii) are identified in Petitioner's Supplemental Appendix at SA 31, which is incorporated by reference herein. Disclosure of the related cases may expose Petitioner's true name, so Petitioner has requested they be filed under seal.

[1] The proceedings in the district court and court of appeals were under seal due to the substantial assistance Petitioner provided in the investigation and prosecution of several serious crimes, placing Petitioner and his family in grave risk of retaliation. The Fifth Circuit unsealed its opinion, except that Petitioner's true name was redacted and replaced with "John Doe."

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OPINIONS AND ORDERS BELOW

The opinion of the Fifth Circuit Court of Appeals in this case is reported at 932 F.3d 279 and reproduced at App. 1a-13a. The order of the District Court for the Northern District of Texas reviewed by the Fifth Circuit is unreported and reproduced at Supp. App. SA1.[2]

JURISDICTION

This Court has jurisdiction to review the judgment of the Fifth Circuit Court of Appeals under 28 U.S.C. § 1254(1). The Fifth Circuit's judgment was entered on June 27, 2019. On September 12, 2019, the Honorable Justice Samuel Alito extended the time to file this petition to and including October 25, 2019.

RULES AND STATUTORY PROVISIONS

Rule 35(b) of the Federal Rules of Criminal Procedure provides:

> (b) Reducing a Sentence for Substantial Assistance.
>
> (1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided

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[2] The district court's order was filed under seal in the proceedings below. Concurrently, with this petition, Petitioner has filed a motion to file the district court's order and other sealed district court documents under seal in this Court.

substantial assistance in investigating or prosecuting another person.

(2) Later Motion. Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) Evaluating Substantial Assistance. In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) Below Statutory Minimum. When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

Section 3553(a) of title 18 of the United States Code provides:

> (a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any

amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

This case presents the Court with an opportunity to resolve two related issues that have divided the courts of appeals and to clarify the standards and procedures a district court must apply when evaluating a motion for a reduced sentence under Federal Rule of Criminal Procedure 35(b).

In this case, the district court denied two Rule 35(b) motions filed by the Government in terse, unreasoned orders that made no findings as to whether Petitioner provided substantial assistance within the meaning of the Rule. The district court's order denying the Government's second motion was based on "the facts and circumstances of Defendant's offense conduct, along with the other factors found in

18 U.S.C. § 3553(a)" rather than on Petitioner's assistance to the Government. Supp. App. SA1. In effect, the district court sentenced Petitioner again based on the same factors it used to imposed the original sentence, without crediting Petitioner for his assistance.

The Fifth Circuit affirmed the district court's second order, which places it in conflict with other courts of appeals on two issues: 1) whether a district court can deny a Rule 35(b) motion without making a finding of whether the defendant provided substantial assistance; and 2) whether a district court can rely on the 18 U.S.C. § 3553(a) sentencing factors in denying a Rule 35(b) motion, or in awarding the defendant less of a sentence reduction than that which would be appropriate based on the defendant's assistance alone. The rule adopted by the Fifth Circuit effectively allows Rule 35(b) motions to be evaluated no differently than the original sentencing decision, even if the defendant provided substantial assistance.

I. Petitioner's Sentencing and Transformation

On April 27, 2006, Petitioner pleaded guilty to violating 18 U.S.C. §§ 1343 (wire fraud) and 18 U.S.C. § 1957(a) (monetary transactions in property derived from certain unlawful activity). Dist. Ct. Dkt. 39. The district court sentenced Petitioner to a prison term of 300 months (25 years), which exceeded the top of the Sentencing Commission Guidelines range by 65 months (5.4 years) and the minimum of the Guidelines range by 112 months (9.3 years). *Id.*, Dkt. 75. Petitioner is expected to be released from prison and begin a 36 month term of supervised release on May 9, 2028. Supp. App. SA5.

During his lengthy incarceration, Petitioner's perspective and character underwent a dramatic transformation. *Id.*, SA16-28. Petitioner converted to Christianity and committed himself to serving and improving the lives of others. *Id.*, SA18-22. Inspired by his new faith, Petitioner spent four years as a GED tutor assisting inmates in obtaining their high school diplomas, led inmate Bible study groups in the recreation yard, and co-authored a children's book that received positive reviews. *Id.*, SA18-20. More recently, Petitioner launched a Christian-inspired advertising and online retail sales company and related charitable organization that uses revenues to provide food, clothing, and shelter to persons struggling in the local community. *Id.*, SA21-22.

II. Petitioner's Substantial Assistance

In 2011, Petitioner helped solve a 1990 double homicide case that had gone cold. Supp. App. SA23-28. A fellow inmate confessed to Petitioner that he and an accomplice had murdered two victims. *Id.*, SA24-25. After eliciting specific details regarding the murders and memorializing them in comprehensive notes, Petitioner took the information to the authorities and agreed to testify against the inmate who had confessed. *Id.*, SA25-26. Faced with Petitioner's testimony, the suspect pleaded guilty to the murders and was sentenced to 40 years in prison. *Id.*, SA26.

Petitioner also provided critical information concerning a different homicide. *Id.*, SA6-9. Petitioner overheard a fellow inmate brag about committing the murder, providing details that only the killer would know. *Id.*, SA6-7. Petitioner shared

what he had learned with an investigator and signed a document indicating that he would be willing to testify. *Id.* The assistance Petitioner provided resulted in two suspects pleading no contest to second-degree murder. *Id.*, SA8-9.

Petitioner further assisted in investigating a corrupt correctional officer who was smuggling contraband into prison and delivering it to inmates in exchange for bribes. *Id.*, SA9-10. Although the officer was not criminally charged, Petitioner's substantial assistance led the officer to resign under threat of termination by the Bureau of Prisons. *Id.* In addition, Petitioner helped the Bureau of Prisons root out two contraband smuggling schemes operated by inmates, including a dangerous prison gang. *Id.*, SA10-12.

Petitioner's assistance to the government placed him and his family at great risk, leading to death threats and an extended 80-day period of solitary confinement for his protection. *Id.*, SA13, SA26-28.

III. The Government's Rule 35(b) Motions and Petitioner's Appeal

On October 4, 2013, the Government filed a sealed motion to reduce Petitioner's sentence on the basis of the assistance he provided in solving the 1990 double murder case. Dist. Ct. Dkt. 112. Five days later, the district court denied the Government's motion in the following two-sentence order:

> "On this day came on to be considered the Government's Sealed Motion for Reduction in

> Sentence for Substantial Assistance. The Court finds that said motion should be DENIED." *Id.*, Dkt. 114.

The district court offered no rationale for its decision.

On December 5, 2017, the Government filed a second sealed motion under Rule 35(b), requesting that the district court reduce Petitioner's sentence to the Guidelines range based on the other substantial assistance Petitioner provided.[3] Supp. App. SA2-15. Three days later, the District Court summarily denied the Government's second Rule 35(b) motion in the following two-paragraph order:

> "On this day came on to be considered the Government's Sealed Motion for Reduction in Sentence for Substantial Assistance Under Federal Rule of Criminal Procedure 35(b)(2), filed December 5, 2017. The Court also considered the Sealed Statement in Support, filed by Defendant's counsel on December 5, 2017. After careful consideration of the arguments, *the facts and circumstances of Defendant's offense conduct, along with the other factors found in 18 U.S.C. § 3553(a),* the Court finds that said Motion should be **DENIED.**" *Id.*, SA1 (italics added).

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[3] Petitioner's attorney filed a sealed statement in support of the Governments section Rule 35(b) motion that detailed Petitioner's substantial assistance in the 1990 double murder case and Petitioner's transformed identity. Supp. App. SA16-30.

The district court failed to make any finding as to whether Petitioner provided substantial assistance in the investigation or prosecution of another person. Instead, the district court denied the Government's motion based on the 18 U.S.C. § 3553(a) sentencing factors; the same factors the court used to sentence Petitioner to an above-Guidelines sentence prior to Petitioner's substantial assistance. *Id.*

Petitioner filed a timely notice of appeal of the district court's denial of the Government's December 5, 2017 Rule 35(b) motion. The Fifth Circuit Court of Appeals affirmed. App. 1a-13a; 932 F.3d 279. The Fifth Circuit held, contrary to the law of several other circuits, that the district court need not make a threshold finding of whether a defendant provided substantial assistance in ruling on a Rule 35(b) motion. 932 F.3d at 283-84. The Fifth Circuit further held that the district court was within its rights to rely on the sentencing factors set forth in 18 U.S.C. § 3553 in denying the Government's motion. *Id.* at 284. On this point, the Fifth Circuit's holding is in conflict with *U.S. v. Grant*, 636 F.3d 803 (6th Cir. 2011) (en banc) which held "that Rule 35(b) does not require *or authorize* consideration of § 3553(a) factors" and "the § 3553(a) factors have no role in Rule 35(b) proceedings." *Grant,* 636 F.3d at 816 (emphasis added).

REASONS FOR GRANTING THE PETITION

Rule 35(b) is an important prosecutorial tool, whose purpose is "to facilitate law enforcement by enabling the government to elicit valuable assistance from a criminal defendant...after he was sentenced by asking the sentencing judge to reduce the

defendant's sentence as compensation for the assistance that he provided." *United States v. Shelby*, 584 F.3d 743, 745 (7th Cir. 2009). The importance of Rule 35(b) to the federal criminal justice system is reflected in the fact that there were 1,095 Rule 35(b) sentence modifications in the 2018 fiscal year, which represented 33.8% of all resentencing or other sentence modifications and more than any other form of sentence modification. U.S. Sentencing Comm'n, Fiscal Year 2018 Overview of Federal Criminal Cases Report (June 25, 2019). This is in addition to all pre-sentencing sentence reductions for substantial assistance awarded under 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1. There is "near-universal agreement that sentence reductions for cooperation with authorities" are "a necessary tool of modern federal criminal investigation." Frank O. Bowman, III, Adjustments for Guilty Pleas and Cooperation with the Government: Model Sentencing Guidelines §§ 3.7-3.8, 18 Fed. Sent'g Rep. 370, 371 (2006).

Despite its importance and over 30 years of existence, this Court has not had the opportunity to clarify the procedure and standards by which Rule 35(b) reductions are to be evaluated. The lack of guidance from this Court has resulted in divergent interpretations from the courts of appeals.

The Fifth Circuit's decision in this case deepens an appellate divide over the role the initial sentence factors under 18 U.S.C. § 3553(a) can play in a Rule 35(b) proceeding, and creates a new divide on whether a district court can decide a Rule 35(b) motion without determining whether the defendant

provided substantial assistance. In addition, the Fifth Circuit's holding that a district court can deny a Rule 35(b) motion based on the same exact factors it used to impose a sentence in the first place, and without deciding whether substantial assistance exists, saps the rule of its usefulness as an incentive. Far fewer convicted persons serving their sentence will be willing to assist federal law enforcement if the court can effectively affirm the original sentence in response to a Rule 35(b) motion without considering the assistance provided and how much of a reduction in sentence the assistance independently warrants.

The Court should grant certiorari to resolve the multiple splits in authority that have emerged and to provide some much needed clarification on the procedures that govern Rule 35(b) motions. *See* Sup. Ct. R. 10 (certiorari is appropriate when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court...").

I. The Fifth Circuit's Decision Conflicts with the Procedure Adopted by Other Courts of Appeals Requiring Courts to Determine Whether Substantial Assistance Exists Before Deciding the Appropriate Extent of a Sentence Reduction under Rule 35(b)

Most courts of appeals have decided either explicitly or implicitly that a district court ruling on a Rule 35(b) motion must employ a two-step process: first the court must determine whether substantial

assistance has been provided, and then the court must decide how much of a reduction in sentence is appropriate. *See, e.g.*, *United States v. Katsman*, 905 F.3d 672, 674-75 (2d Cir. 2018) (per curium); *U.S. v. Grant*, 636 F.3d 803, 816 (6th Cir. 2011) (en banc) ("When faced with a Rule 35(b) motion, the district court must initially decide whether the defendant did in fact render substantial assistance."); *United States v. Clawson*, 650 F.3d 530, 535-37 (4th Cir. 2011) ("[W]hen deciding whether to grant a Rule 35(b)motion, a district court may not consider any factor other than the defendant's substantial assistance to the government"); *United States v. Tadio*, 663 F.3d 1042, 1046-47 (9th Cir. 2011).

The Fifth Circuit in this case, however, rejected the two-step approach. 932 F.3d at 283-84. The Fifth Circuit's position is highly problematic, because it allows a district court to deny a Rule 35(b) motion without ever considering the value of the defendant's assistance. The problem is particularly acute in this case where Petitioner provided a herculean level of assistance only to have the district court summarily deny the Government's Rule 35(b) motion based on the same criteria it used to originally sentence Petitioner.

The Fifth Circuit sought to explain away the circuit split it created by noting that *Tadio* (9th Cir.), *Clawson* (4th Cir.), and *Grant* (6th Cir.) all arose on appeal of orders granting a Rule 35(b) sentence reduction, rather than denying one. But this is a distinction without a difference. Whether the district court grants or denies a Rule 35(b) motion, the court cannot evaluate whether and by how much a

reduction in sentence for substantial assistance is appropriate without making a threshold finding of whether substantial assistance exists. *Cf. Arizona v. Washington*, 434 U.S. 497, 510 n. 28 (1978) (court abuses discretion "[i]f the record reveals that the trial judge has failed to exercise the 'sound discretion' entrusted to him"); *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 103 (1993) (Scalia, J., concurring) ("[I]t was an abuse of discretion to decline to reach [an issue]—constituting, in effect, a failure to exercise *any discretion at all.*") (original emphasis).

Furthermore, in *Tadio* and *Grant*, the appellant was the defendant arguing that the district court should have reduced a sentence by more than it did. Thus, the posture of *Tadio* and *Grant* is not substantially different from that where a defendant appeals an outright denial of a Rule 35(b) motion, yet the court in both cases affirmed that the two-step process should be used.

In *United States v. Davis*, 679 F.3d 190, 195 (4th Cir. 2012) the Fourth Circuit affirmed that *Clawson* stands for the proposition that the district court may not consider any factors other the defendant's assistance in deciding whether to grant a Rule 35(b) motion, but held that the district court may consider the 18 U.S.C. § 3553(a) factors "in determining the *extent* of a sentence reduction." (original emphasis). *Davis* therefore confirms that the Fourth Circuit distinguishes between the decision to grant a Rule 35(b) motion, where only the defendant's assistance

may be considered, and the proper extent of a sentence reduction.[4]

The Fifth Circuit's attempt to distinguish *Katsman*, 905 F.3d 672 (2nd Cir.) is also unpersuasive. The defendant in *Katsman* argued that the district court should have followed the two-step procedure and improperly "conflated these discrete steps into one." 905 F.3d at 674. The Second Circuit held that the district court had not improperly conflated the two steps, but agreed with the defendant "that, in deciding a Rule 35(b) motion, a district court makes two inquiries. First, it must determine whether the defendant in fact provided substantial assistance. Second, if so, it must then determine what, if any, reduction in sentence is warranted." *Id.* The Fifth Circuit's holding that district courts are not required to engage in the two-step analysis thus directly conflicts with the rule in the Second Circuit.

The Court should grant certiorari in this case to resolve the conflict in the circuit courts of appeals

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[4] The Fourth Circuit was directly faced with the issue of whether *Clawson* prohibits a denial of a Rule 35(b) motion based on factors other than the defendant's assistance in *United States v. Thornsbury*, 670 F.3d 532, 535-40 (4th Cir. 2012), but concluded that the defendant had waived the contention. However, the government did not dispute that *Clawson* required consideration of the defendant's assistance alone in the decision to grant or deny its Rule 35(b) motion. *Id.* at 535. The government argued that the district court did not in fact rely on non-assistance factors, that the Fourth Circuit lacked jurisdiction to hear the appeal, and that the defendant had waived his arguments. *Id.*

and clarify the procedure that district courts are to use in deciding Rule 35(b) motions.

II. The Fifth Circuit's Decision Adds to a Conflict Among the Courts of Appeals on Whether and to What Extent the 18 U.S.C. § 3553(a) Sentencing Factors Can Be Considered in Connection with a Rule 35(b) Motion

The courts of appeals are also deeply conflicted as to what role the 18 U.S.C. § 3553(a) sentencing factors play in Rule 35(b) proceedings. The Seventh, Eighth, and Eleventh Circuits have all held a district court may consider the § 3553(a) factors, but only to reduce a sentence by less than that to which a defendant would be entitled based on the defendant's assistance alone. *United States v. Shelby*, 584 F.3d 743, 748-49 (7th Cir. 2009); *United States v. Chapman*, 532 F.3d 625, 629-31 (7th Cir. 2008); *United States v. Rublee*, 655 F.3d 835, 839 (8th Cir. 2011) ("If the court decides to grant the Rule 35(b) motion, its decision to *limit* the § 3553(e) reduction, as opposed to extending it further downward, need not be based only on factors related to the assistance provided.") (original emphasis); *United States v. Manella*, 86 F.3d 201, 203-05 (11th Cir. 1996); *United States v. Mora*, 703 F. App'x 836, 843 (11th Cir. 2017) ("While a court may deny or limit the size of a sentence reduction based on its consideration of factors other than the defendant's substantial assistance, it may only award a reduction on the

basis of the defendant's substantial assistance.") (original emphasis).[5]

In contrast, the Second, Fourth and Ninth Circuits have held that the district court may rely on the § 3553(a) factors to adjust a Rule 35(b) sentence reduction either upwards or downwards from that which would be proper considering only the defendant's assistance. *Katsman*, 905 F.3d at 675 (2nd Cir.) ("Section 3553(a) does not limit the consideration of those factors to the original sentencing decision, nor does it prohibit courts from considering them during a resentencing proceeding."); *United States v. Park*, 533 F. Supp. 2d 474, 479 (S.D.N.Y. 2008) ("[O]nce the court determines that the defendant has provided substantial assistance, the court may consider other factors as well—including all the 3553(a) factors—in deciding the extent to which the defendant's sentence will be reduced."); *Davis*, 679 F.3d at 195-96 (4th Cir.) ("[W]e hold that the district court can consider other sentencing factors, besides the defendant's substantial assistance, when deciding the extent of a reduction to the defendant's sentence after granting a Rule 35(b) motion."); *Tadio*, 663 F.3d at 1055 (9th Cir.) ("[T]he court may consider the § 3553(a) factors to award a sentence reduction that is greater than, less than, or equal to the reduction that the

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[5] A dissenting judge in *Shelby* from the Seventh Circuit would have permitted consideration of the 18 U.S.C. § 3553(a) sentencing factors to either increase or decrease a Rule 35(b) sentence reduction. 584 F.3d at 750-51 (Evans, J., dissenting).

defendant's assistance, considered alone, would warrant.").[6]

The First Circuit held that the § 3553(a) factors cannot be used to award a greater reduction in sentence on a Rule 35(b) motion than the defendant's assistance would warrant, although its holding is limited to a sentence reduction below a statutory minimum. *United States v. Poland*, 562 F.3d 35, 41 (1st Cir. 2009). The First Circuit has not considered whether the § 3553(a) factors can justify a lesser reduction in sentence, or a greater reduction in sentence when a mandatory minimum is not implicated.

In yet another variation, the Sixth Circuit held en banc, over a dissent, that district courts may not consider the § 3553(a) factors *at all* in ruling on a Rule 35(b) motion. *United States v. Grant*, 636 F.3d 803, 810-17 (6th Cir. 2011) (en banc) ("the § 3553(a) factors have no role in Rule 35(b) proceedings"). *Grant* held that a variety of factors can be considered to the extent they inform the value of the defendant's

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[6] Although *Davis* arose on appeal of an order that considered the 18 U.S.C. § 3553(a) sentencing factors to award a smaller reduction in sentence, the broad language of the decision is not limited to this context. The Fourth Circuit distinguished *Davis* in *United States v. Spinks*, 770 F.3d 285, 288-89 (4th Cir. 2014) as applying only to post-sentencing motions brought under Rule 35(b), as opposed to pre-sentencing motions under 18 U.S.C. § 3553(e). *Spinks* involved a defendant who argued that the district court should have considered the 18 U.S.C. § 3553(a) sentencing factors to award a greater reduction on a 18 U.S.C. § 3553(e) motion. Were *Davis* limited to consideration of the § 3553(a) factors to award a smaller reduction, then *Spinks* would have said so rather than limiting the *Davis* holding to Rule 35(b) post-sentencing motions.

assistance, but "mingling the terminology of § 3553(a) with the concept of valuation of assistance...does not reflect the purpose of Rule 35(b)." *Id.* at 816-18.

In this case, the Fifth Circuit held that the district court was within its rights to deny the Government's motion based on consideration of 18 U.S.C. § 3553(a). 932 F.3d at 284. The Fifth Circuit's opinion directly conflicts with the Sixth Circuit's en banc opinion in *Grant*. The Fifth Circuit acknowledged that *Grant* is Petitioner's "best case" and that *Grant* "limits some of the factors the district court can consider in imposing its new sentence after it *grants* a Rule 35(b) motion," but purported to distinguish *Grant* on the ground that "*Grant* obviously did not decide what factors the district court can consider in exercising its discretion to *deny* a Rule 35(b) motion." *Id.* (emphasis omitted).

The Fifth Circuit's effort to distinguish *Grant* cannot be squared with the plain language of the opinion or with common sense. *Grant* was clear "that Rule 35(b) does not require *or authorize* consideration of § 3553(a) factors" and that "the § 3553(a) factors have no role in Rule 35(b) proceedings." *Grant*, 636 F.3d at 816 (emphasis added). Nothing in *Grant* can be read to limit consideration of the § 3553(a) factors only when the district court grants and awards some form of reduction. The Fifth Circuit's interpretation of *Grant* creates an irrational "cliff" whereby the § 3553(a) factors can be used to decide whether to grant or deny a Rule 35(b) reduction in sentence, but if the district court grants any reduction at all it must

award the precise amount of reduction warranted by the value of the assistance without considering § 3553(a). This understanding of *Grant* has no basis in Rule 35(b), § 3553(a), or the opinion itself. *See id.* at 820 ("I concur with the majority's conclusion that in resentencing under Rule 35(b), the court's task is simply to grant a reduction to reflect the defendant's substantial assistance.") (White, J., concurring in part and dissenting in part). Furthermore, if the Fifth Circuit's implausible reading of *Grant* were correct, it would conflict with the law of the Fourth Circuit, where the § 3553(a) factors cannot be used in the decision to grant a Rule 35(b) reduction but may be used to determine the appropriate extent of a reduction. *Davis*, 679 F.3d at 195; *Clawson*, 650 F.3d at 535-37.

The Fifth Circuit's opinion further conflicts with its own precedent. The Fifth Circuit held in *United States v. Malone*, 828 F.3d 331, 340-41 (5th Cir. 2016) that in evaluating a presentencing reduction in sentence for substantial assistance under 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, the district court is precluded from considering the 18 U.S.C. § 3553(a) sentencing factors. *Malone* was explicit that the bar on consideration of the § 3553(a) factors applies to both "increasing the extent of a defendant's § 5K1.1 departure" and "limiting the extent of a defendant's § 5K1.1 departure."[7] *Id.* at 340-41 (emphasis omitted);

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[7] The Fifth Circuit noted that the position that the 18 U.S.C. § 3553(a) can be used as a "one-way ratchet" to decrease, but not increase, the amount of a sentence reduction for substantial assistance "may find support in case law from other circuits," but held "it finds none in this Court's case law." *Malone*, 828 F.3d at 340.

see also United States v. Desselle, 450 F.3d 179, 182 (5th Cir. 2006) ("[T]he extent of a § 5K1.1 or § 3553(e) departure must be based solely on assistance-related concerns."). Most courts, including the 5th Circuit, have held that 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 must be read in pari materia with Rule 35(b). *See, e.g., United States v. Lopez*, 26 F.3d 512, 523 (5th Cir. 1994) ("[T]he district court can account for post-sentencing substantial assistance pursuant to Rule 35(b), which is § 5K1.1's post-sentencing analog."); *United States v. Stewart*, 595 F.3d 197, 203 (4th Cir. 2010) ("Circuit courts have consistently treated motions for reductions in sentence under section 5K1.1 and Rule 35 as bound by the same rules and standards."); *United States v. Mulero-Algarin*, 535 F.3d 34, 38 (1st Cir. 2008); *In re Sealed Case No. 97-3112*, 181 F.3d 128, 136 (D.C. Cir. 1999); *but see United States v. Spinks*, 770 F.3d 285, 288-89 (4th Cir. 2014) (holding non-assistance factors can be considered on a Rule 35(b) motion, but not a § 3553(e) motion). However, the Fifth Circuit provided no explanation how its holding in this case that the § 3553(a) factors may be considered in ruling on a post-sentencing Rule 35(b) motion can be squared with its holding in *Malone* that the § 3553(a) factors are verboten in § 3553(e) and U.S.S.G. § 5K1.1 proceedings.

As is evident from the foregoing, the interaction between Rule 35(b) and 18 U.S.C. § 3553(a) "has proved surprisingly difficult" and divided the courts of appeals. *Tadio*, 663 F.3d at 1046. The Court should take this opportunity to provide much needed clarity and uniformity in this important, yet uncertain, area of law.

III. The Fifth Circuit's Decision Is Incorrect, Undermines the Purpose of Rule 35(b), and Results in Substantial Injustice to Defendants Providing Assistance

If the Fifth Circuit's decision is allowed to stand, Rule 35(b) will lose much of usefulness as a law enforcement tool to obtain cooperation and assistance from criminal defendants serving their sentences. Rule 35(b) works as an incentive; criminal defendants cooperate and provide assistance, and in return their sentences are reduced. If district courts can reject substantial assistance motions out of hand, as the district court did here, without making any findings as to whether substantial assistance was provided and based instead on the same factors used to sentence defendants in the first place, then defendants will have no reason to cooperate with the government, and offers of a sentence reduction in exchange for assistance will not be taken seriously.

The Fifth Circuit's opinion is also deeply unfair to defendants, like Petitioner, who provide substantial assistance—often at great risk to themselves and their families—in reliance on the prospect of a sentence reduction. Having provided assistance, defendants should at least be entitled to consideration of that assistance and not a summary resentencing based on the same factors used to impose the original sentence.

The Fifth Circuit's opinion further creates an unfair and irrational incongruity between defendants who provide substantial assistance before sentencing and those who provide it after sentencing, at least where a mandatory minimum sentence is not

implicated. When the government requests a pre-sentencing reduction in sentence for substantial assistance under U.S.S.G. § 5K1.1 or 18 U.S.C. § 3553(e), the sentencing court will have already considered the § 3553(a) factors (which includes the advisory guidelines and policy statements of the Sentencing Commission) in arriving at a sentence independent of the defendant's assistance.[8] The district court will then reduce the sentence based solely on the value of the defendant's assistance. *See United States v. Coyle*, 506 F.3d 680, 683 (8th Cir. 2007) ("We see nothing...that prevents a district court in this situation from relying to some degree on both § 3553(a) and § 3553(e) to fashion an appropriate sentence.") But, if the district court can consider the § 3553(a) factors again in ruling on a Rule 35(b) motion after having already used the factors to impose a sentence, then the defendant is doubly punished (or doubly benefited) by those factors in a way that a defendant who received a presentencing reduction would not be. *See Grant*, 636 F.3d at 817 ("One unfortunate consequence of accepting [applicability of § 3553(a) factors in a Rule 35(b) proceeding] would have been creating unwarranted sentencing disparities between defendants" who assisted before sentencing and those who assisted after sentencing).

Furthermore, prior to 2002, Rule 35(b) contained express language that a reduction in sentence must

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[8] In *United States v. Booker*, 543 U.S. 220 (2005) the Court held that the Sentencing Commission Guidelines are advisory and severed the provision of 18 U.S.C. § 3553(b)(1) making the Guidelines binding in order to save them from violating the Sixth Amendment right to a jury trial.

"reflect a defendant's subsequent, substantial assistance." Sentencing Reform Act of 1984, Pub. Law No. 98-473, § 215(b), 98 Stat. 1837, 2015-16 (1984). This was, at the time, parallel to the still current language in 18 U.S.C. § 3553(e) authorizing presentence reductions "as to reflect a defendant's substantial assistance." The courts of appeals are unanimous that § 3553(e) does not permit consideration of any factors other than those related to the value of the defendant's assistance. *See, e.g.*, *United States v. Ahlers*, 305 F.3d 54, 62 (1st Cir. 2002); *United States v. Williams*, 551 F.3d 182, 186-87 (2d Cir. 2009); *United States v. Hood*, 556 F.3d 226, 234 n.2 (4th Cir. 2009); *Desselle*, 450 F.3d at 182-83; *United States v. Thomas (Thomas II)*, 11 F.3d 732, 737 (7th Cir. 1993); *United States v. Jackson*, 577 F.3d 1032, 1036 (9th Cir. 2009); *United States v. A.B.*, 529 F.3d 1275, 1280-85 (10th Cir. 2008); *United States v. Mangaroo*, 504 F.3d 1350, 1356 (11th Cir. 2007); *In re Sealed Case*, 449 F.3d 118, 125 (D.C. Cir. 2006). Although the "reflect" language has been removed from Rule 35(b), the advisory committee notes to the amendment indicate that the change was "stylistic" only. Fed. R. Crim. P. 35(b) Advisory Committee on Criminal Rules' notes 2002 amendments. Thus, Rule 35(b) should still be read in conjunction with § 3553(e) to require reductions in sentence for substantial assistance to "reflect" the assistance provided. *See Grant*, 636 F.3d at 815 ("The [2002] amendment does not change the purpose of Rule 35(b) or require a departure from the longstanding practice of interpreting the rule in lockstep with § 3553(e) and § 5K1.1."); *Shelby*, 584 F.3d at 748 (holding that 2002 amendment did not substantively change Rule 35(b)); *Mora*, 703 Fed.

Appx. at 843 ("We also reject Mora's argument that the 2002 amendments to Rule 35 abrogated this Court's holdings" regarding consideration of § 3553(a) factors in Rule 35(b) proceedings).

The Court should therefore accept certiorari because the Fifth Circuit's decision is erroneous, conflicts with the decisions of other circuit courts, undermines the purpose of Rule 35(b), and unfairly prejudices defendants who provide substantial assistance to the government post-sentencing.[9]

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Court grant his petition for certiorari and reverse the Fifth Circuit decision.

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[9] Other courts of appeals and dissenting judges have held that the 2002 amendments to Rule 35(b) expand the scope of permissible factors that the district court may consider. *See Tadio*, 663 F.3d at 1054 (permitting consideration of § 3553(a) factors because "[t]he requirements that a Rule 35(b) reduction 'reflect' substantial assistance and 'accord' with the Sentencing Commission's Guidelines and policy statements have now been deleted from Rule 35(b)"); *Spinks*, 770 F.3d at 289 n.3; *Shelby*, 583 F.3d. at 750-51 (Evans, J., dissenting); *Grant*, 636 F.3d at 824 ("This change in the plain language of the Rule is significant.") (Clay, Keith, More and Cole, J.J., dissenting). This creates further conflict that the Court should resolve by accepting certiorari.

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