

No. 25-905

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**In the Supreme Court of the United States**

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ANDREW J. JOHNSTON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether petitioner was entitled to appellate review of his claim that the particular factual circumstances of his case required the district court to grant a larger reduction of his sentence than the court granted following the government's motion under Federal Rule of Criminal Procedure 35(b).

2. Whether the district court's decision not to grant a larger reduction relied on legally impermissible considerations.

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 158 F.4th 870. The order of the district court (Pet. App. 21a-24a) is unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on October 29, 2025. The petition for a writ of certiorari was filed on January 23, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of attempted bank robbery, in violation of 18 U.S.C. 2113(a). Judgment 1; Pet. App. 4a. He was sentenced to 168 months of imprisonment, to be followed by three years of supervised release. Judgment

(1)

2-3. The court of appeals affirmed, 814 Fed. Appx. 142, and this Court denied certiorari, 141 S. Ct. 1257. The government later filed a motion under Federal Rule of Criminal Procedure 35(b) for a reduced term of imprisonment, and the district court reduced petitioner's term of imprisonment to 151 months. Pet. App. 21a-24a. The court of appeals affirmed. *Id.* at 1a-18a.

1. Petitioner is a serial bank robber who previously served two separate terms in federal prison for robberies committed in 2008 and 2013. Pet. App. 4a. In July 2017, shortly after his latest release from prison, petitioner attempted to rob a bank in suburban Chicago by threatening a teller. *Ibid.* He was unsuccessful and quickly apprehended. *Ibid.*

A grand jury in the Northern District of Illinois charged petitioner with attempted robbery, in violation of 18 U.S.C. 2113(a). Judgment 1. Petitioner elected to represent himself, and a jury found him guilty after a two-day trial. Pet. App. 4a. The district court sentenced him to 168 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

The court of appeals affirmed petitioner's conviction and sentence. 814 Fed. Appx. 142. This Court denied certiorari. 141 S. Ct. 1257.

2. While awaiting transfer to his designated prison, petitioner was detained at Chicago's Metropolitan Correctional Center. Pet. App. 4a. During his time there, petitioner learned that a fellow detainee—Jesus Raul Beltran Leon, a high-ranking member of the Sinaloa Cartel—had placed a bounty on another Sinaloa Cartel member detained at the facility, whom Beltran Leon believed to be cooperating with law enforcement. *Id.* at 4a-5a. Petitioner alerted authorities and agreed to wear a wire to record a conversation with Beltran Leon. *Id.*

at 5a. Although the recording was cut short, it captured Beltran Leon “seemingly acknowledging that he had offered to pay \$25,000 to anyone who would assault” the cooperating detainee. *Ibid.*

The government later called petitioner as a witness at Beltran Leon’s sentencing hearing to support its request for an obstruction-of-justice enhancement. Pet. App. 5a. The sentencing judge in Beltran Leon’s case “declined to credit [petitioner’s] testimony” and denied the obstruction-of-justice enhancement, but it relied on the audio recording obtained by petitioner when evaluating Beltran Leon’s sentence under the factors in 18 U.S.C. 3553(a). *Ibid.*

3. Petitioner thereafter asked the government to seek a 66% reduction in his term of imprisonment based on his assistance in prosecuting Beltran Leon. Pet. App. 6a. “Meanwhile, [petitioner] continued to file numerous frivolous motions, lawsuits, and appeals challenging his conviction and sentence in various respects.” *Ibid.* And when the government informed petitioner that it would seek a 25% reduction rather than the 66% reduction he had requested, petitioner sued the U.S. Attorney’s Office under the Administrative Procedure Act (a suit that “was soon dismissed”), filed a motion in his criminal case to compel the government to move for at least a 50% reduction, and sought reassignment to a new judge because he had separately sued the district judge and her court reporter. *Ibid.*

In April 2021, the government filed a motion under Federal Rule of Criminal Procedure 35(b)(1) seeking a 25% reduction in petitioner’s sentence based on his assistance in the Beltran Leon case. Pet. App. 6a. Although the motion was not filed within one year of petitioner’s sentencing, cf. Fed. R. Crim. P. 35(b)(1), (2), the

government affirmatively waived Rule 35's time limit, Pet. App. 6a-7a. The district court—after rejecting petitioner's effort to “use a lawsuit against a judge as a basis for disqualification” and finding petitioner's motion to compel a Rule 35(b) motion to be moot, *id.* at 22a-23a—granted the government's motion in part and denied it in part, reducing petitioner's term of imprisonment by 10% rather than 25%, *id.* at 23a-24a.

The district court acknowledged that petitioner's cooperation was “unquestionably useful to the government” in the Beltran Leon case and that “such cooperation is to be encouraged.” Pet. App. 23a. And the court noted that “[c]ooperation with authorities in a prosecution is often a sign of acceptance of one's own responsibility for wrongdoing.” *Ibid.* But the court was “unable to draw such a conclusion in this case,” because petitioner “has yet to acknowledge any wrongdoing of his own” and had instead “filed multiple appeals and some five civil actions that challenge his conviction in one form or another, naming as defendants the judge, the court reporter, prosecutors, a telephone service provider, and law enforcement officials.” *Ibid.*; see *id.* at 7a n.1 (cataloguing petitioner's civil suits and “multiple frivolous appeals”).

Emphasizing its “discretion in deciding whether a Rule 35(b) reduction is appropriate,” the district court assessed that the government's requested sentence reduction would be excessive in light of petitioner's “continue[d] lack of remorse” and the factors under 18 U.S.C. 3553(a) that originally resulted in petitioner's “substantial sentence.” Pet. App. 24a. The court therefore determined that “a 25% reduction \* \* \* is a greater reduction than appropriate,” and granted a 10% reduction instead. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-18a. The court agreed with the parties that Rule 35(b)'s one-year time limit is a waivable claims-processing rule, rather than a jurisdictional limit, and that the government had waived that limit. *Id.* at 9a-15a. But it found petitioner's argument that the district judge "wrongly concluded that a 25% sentence reduction was unwarranted based on [petitioner's] frivolous, repetitive, and vexatious postconviction litigation" to be a challenge to "the judge's discretionary judgments, which are unreviewable under [18 U.S.C.] 3742(a)." *Id.* at 15a. And it rejected on the merits petitioner's argument that "it was unlawful for the judge to consider his litigation conduct *at all* in ruling on the government's Rule 35(b) motion." *Ibid.*; see *id.* at 15a-18a.

Observing that it had "distinguished between cooperation that 'represents an opportunistic attempt to obtain a sentence reduction' and cooperation that represents a 'genuine alteration in the defendant's life perspective,'" the court of appeals explained that "[p]ost-arrest cooperation cannot be assessed in a vacuum." Pet. App. 16a (citation omitted). "Moreover," the court stated, "a judge may [also] consider the [Section] 3553(a) sentencing factors when presented with a Rule 35(b) motion," and "a defendant's lack of remorse can bear on that analysis." *Ibid.* The court of appeals found that "[n]othing here suggests" that the district court "punished [petitioner] for his vexatious litigation conduct." *Id.* at 16a-17a. Instead, the district court "concluded that [petitioner's] assistance to the government, though certainly helpful, was largely (though not wholly) outweighed by his failure to accept responsibility, as reflected in his repetitive frivolous postconviction litigation." *Id.* at 17a.

Finally, the court of appeals rejected petitioner’s claims that the district court “failed to consider some of the [Section] 3553(a) factors” and “did not adequately explain [its] decision.” Pet. App. 17a.

#### ARGUMENT

Petitioner contends (Pet. 18-21) that the court of appeals incorrectly treated the district court’s partial denial of the sentence-reduction motion under Federal Rule of Criminal Procedure 35(b) as “an otherwise final sentence” subject to the limited scope of appellate review under 18 U.S.C. 3742. He also contends (Pet. 21-23)—for the first time in his petition for a writ of certiorari—that district courts may not deny a Rule 35(b) motion, in whole or in part, based on any sentencing factors set forth in 18 U.S.C. 3553(a) unrelated to the defendant’s assistance to authorities. Those contentions do not warrant further review, as any shallow disagreement among the circuits on these issues is unlikely to have practical significance in this case or any other.

1. Like 11 other circuits, the court of appeals here reviews a defendant’s appeal of a Rule 35(b) sentence reduction under 18 U.S.C. 3742(a)’s specific provisions for appeals from “otherwise final sentence[s],” 18 U.S.C. 3742(a), rather than 28 U.S.C. 1291’s more general grant of appellate jurisdiction to review “final decisions” of district courts, 28 U.S.C. 1291. *United States v. Chapman*, 532 F.3d 625, 628 (7th Cir. 2008).<sup>1</sup> And in

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<sup>1</sup> Accord *United States v. Doe*, 93 F.3d 67, 67-68 (2d Cir. 1996) (per curiam), cert. denied, 519 U.S. 1109 (1997); *United States v. McKnight*, 448 F.3d 237 (3d Cir.), cert. denied, 549 U.S. 851 (2006); *United States v. Pridgen*, 64 F.3d 147, 148-150 (4th Cir. 1995), cert. denied, 535 U.S. 933 (2002); *United States v. Doe*, 932 F.3d 279, 281-282 (5th Cir. 2019), cert. denied, 589 U.S. 1139 (2020); *United States v. Moran*, 325 F.3d 790, 792-794 (6th Cir. 2003); *United States v.*

light of the limits of review under Section 3742(a), the court of appeals “ask[s] only whether the reduction was imposed in violation of the law, not whether the new sentence imposed was reasonable.” *Ibid.*

Petitioner does not dispute that if his appeal of the district court’s order reducing his term of imprisonment under Rule 35(b) qualifies as an appeal from an “otherwise final sentence” under Section 3742(a), then the court of appeals correctly limited the scope of its review. See Pet. 18-21; see also *United States v. Jones*, 846 F.3d 366, 369 (D.C. Cir. 2017) (“[A] would-be appellant cannot use [Section 1291’s] broad grand of jurisdiction to circumvent statutory restrictions on sentencing appeals in [Section] 3742.”). He contends (Pet. 19), however, that “an order granting or denying a Rule 35(b) motion” to reduce a sentence is not “a sentence” and “thus falls outside [Section] 3742(a)’s purview.” But he fails to identify any sound basis for the Court to grant certiorari to address that issue in this case.

As a threshold matter, only the First Circuit has precedent—its 33-year-old decision in *United States v. McAndrews*, 12 F.3d 273 (1993)—suggesting that it would apply Section 1291 to an appeal like petitioner’s, see *id.* at 276-279. Contrary to petitioner’s assertion (Pet. 10-11), the D.C. Circuit has not “followed” the First Circuit in that regard, but instead has only applied Section 1291 to appeals from the *denial* of a sentence-reduction motion under 18 U.S.C. 3582(c)(2), *Jones*, 846 F.3d at 369-370, and the *denial* of a compassionate-

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*Haskins*, 479 F.3d 955, 957 (8th Cir. 2007) (per curiam); *United States v. Tadio*, 663 F.3d 1042, 1045 (9th Cir. 2011), cert. denied, 566 U.S. 1029 (2012); *United States v. McMillan*, 106 F.3d 322, 324 n.4 (10th Cir. 1997); *United States v. Chavarria-Herrera*, 15 F.3d 1033, 1034-1036 (11th Cir. 1994).

release motion under 18 U.S.C. 3582(c)(1)(A), *United States v. Long*, 997 F.3d 342, 351-352 (D.C. Cir. 2021). This case, in contrast, involves a request for review of the *extent* of a *grant* of a sentence-reduction motion under Rule 35(b). And both D.C. Circuit decisions recognize a difference between the two scenarios.

Although the D.C. Circuit decisions include “Cf.” citations to *McAndrews*, they explicitly recognize that a district court’s denial of a sentence-reduction motion (at issue in those cases) can be differentiated from the grant of a sentence-reduction motion (at issue here), in that the former challenges only the district court’s yes-or-no decision to “leave[] the preexisting sentence untouched,” rather than a just-modified sentence. *Long*, 997 F.3d at 352; see *id.* at 351-352; *Jones*, 846 F.3d at 369. The same distinction is present in two other opinions (one of them a concurring opinion) cited by petitioner. See Pet. 19. Although those opinions question whether Section 3742 applies to the outright “denial of [a] motion to reduce [a] sentence” under Rule 35, neither disputes that that “Section 3742 \* \* \* applies” where, as here, “a party seeks review of [a] district court’s decision to *grant* a defendant’s motion to reduce his sentence.” *United States v. Richardson*, 960 F.3d 761, 766 (6th Cir. 2020) (Kethledge, J., concurring); see *United States v. Doe*, 932 F.3d 279, 281-282 (5th Cir. 2019), cert. denied, 589 U.S. 1139 (2020) (similar).

Even as to the First Circuit itself, petitioner fails to identify any materially different result in any case under its approach. In the 30-plus years since that decision issued, the First Circuit has cited it for the application of Section 1291 only twice, and in neither instance did the court have occasion to reapply it to a discretionary aspect of a Rule 35(b) sentence reduction. In *United*

*States v. Poland*, 562 F.3d 35 (2009), the First Circuit noted that other circuits applied Section 3742 to appeals of sentence-reduction grants under Rule 35(b), but then observed that the “purely legal” claim in *Poland* itself would be equally reviewable in those other circuits as an asserted “violation of law” under Section 3742(a). *Id.* at 37 & n.1. In *United States v. Angiulo*, 57 F.3d 38, 40-41 (1995), the First Circuit cited *McAndrews*, but did not apply it because it found the appeal untimely. And even in *McAndrews* itself, the court denied relief. See 12 F.3d at 279-280 (finding no abuse of discretion).

The practical importance of the First Circuit’s theoretical outlier is thus minimal, as it does not appear that *any* court has ever granted relief on a claim challenging the discretionary aspects of a Rule 35(b) sentence reduction. And even assuming that further review might be warranted in some case, it would not be this one. Petitioner’s legal claim—that the district court relied on improper factors—*was* reviewed and rejected by the court of appeals. See Pet. App. 15a-18a. And his claim that the district court abused its discretion in its application of the factors that it considered to grant a 10% rather than 25% reduction—the only challenge implicated by his first question presented—lacks merit.

As the court of appeals noted, petitioner’s cooperation in Beltran Leon’s case was helpful, but not extraordinary. Pet. App. 5a. The sentencing judge in Beltran Leon’s case considered the recording that petitioner obtained when evaluating Beltran Leon’s mitigating arguments and the Section 3553(a) factors. *Ibid.* But the judge was unable to credit petitioner’s testimony and thus declined to impose the requested obstruction-of-justice enhancement. *Ibid.* In addition, petitioner’s

conduct in the underlying crime was serious—and his overall criminal history extraordinary.

In 2009, petitioner was sentenced to 63 months of imprisonment after pleading guilty to three bank robberies and admitting to seven additional bank robberies. Presentence Investigation Report (PSR) ¶ 43. Less than three months after his release, petitioner committed another bank robbery and was sentenced in 2014 to 48 months of imprisonment. PSR ¶¶ 43-44. And in this case, again within a few months of his release from custody, petitioner attempted yet another bank robbery by threatening violence against a teller. Pet. App. 4a.

Although the district court varied downward from the Sentencing Guidelines range of 210-240 months and imposed 168 months of imprisonment, D. Ct. Doc. 374, at 9, 41-42, the court noted at sentencing that petitioner still “adamantly denie[d] having done what the evidence shows he did,” *id.* at 40. And, as that court observed when partially granting the government’s Rule 35(b) motion, petitioner’s continued attempts to challenge his conviction through frivolous lawsuits were inconsistent with acceptance of responsibility. Pet. App. 23a.

2. Petitioner next contends (Pet. 21-23) that the district court improperly considered the Section 3553(a) factors in resolving the government’s Rule 35(b) motion. That contention likewise does not warrant this Court’s review.

a. As a threshold matter, this Court should not consider petitioner’s claim because he did not raise it in the court of appeals, which accordingly did not address it. Petitioner argued below that the district court wrongly treated his postconviction litigiousness as demonstrating a lack of remorse. Pet. C.A. Br. 42-48. But he did

not argue, as he does now, that the Section 3553(a) factors “have ‘no role’ to play in Rule 35(b) proceedings.” Pet. 21 (citation omitted). To the contrary, petitioner faulted the court for “considering some, but not all, of the [Section] 3553(a) factors in denying the requested reduction.” Pet. C.A. Br. 48.<sup>2</sup>

As this Court has repeatedly emphasized, it is “a court of review, not of first view,” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), whose “traditional rule \* \* \* precludes a grant of certiorari” on a question that “was not pressed or passed upon below,” *United States v. Williams*, 504 U.S. 36, 41 (1992) (citation omitted); see *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (declining to review claim “without the benefit of thorough lower court opinions to guide our analysis of the merits”). Petitioner identifies no reason for this Court to depart from that practice and address this argument in the first instance.

b. In any event, the second question presented is not meaningfully implicated on the facts of this case. Although both the district court and the court of appeals stated that consideration of the Section 3553(a) factors was permissible, see Pet. App. 16a, 24a, the district court did not newly analyze any or all of them. Instead, it looked only to its *past* consideration of the Section

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<sup>2</sup> Petitioner asserts (Pet. 9-10 n.3) that he “preserved [t]his contention” below, pointing to a footnote in his appellate opening brief. The referenced footnote seeks to preserve an “argument that a district court may not apply non-assistance factors in this way” without specifying the “way” about which he was complaining. Pet. C.A. Br. 49 n.7. And while petitioner now attempts to excuse this lack of development by claiming (Pet. 9 n.3) that “he was bound by circuit precedent,” he does not explain why he did not ask the court to reconsider its prior precedent, either through a petition for rehearing en banc or by the panel pursuant to Seventh Circuit Rule 40(e).

3553(a) “factors that resulted in a substantial sentence just two years ago” to determine whether petitioner’s “cooperation represent[ed] an opportunistic attempt to obtain a sentence reduction or a genuine alteration in [his] life perspective.” *Id.* at 24a; see *ibid.* (stating that the nature of the cooperation “can best be determined by assessing that cooperation in light of earlier criminal history and the nature of the crime for which the defendant is presently being sentenced”).

An assessment of the motives for assistance is an assistance-related consideration that would be permissible even on petitioner’s view. See Pet. App. 16a. As the court of appeals explained, it is important to “distinguish[] between cooperation that represents an opportunistic attempt to obtain a sentence reduction and cooperation that represents a genuine alteration in the defendant’s life perspective.” *Ibid.* (citation and internal quotation marks omitted). As such, “[p]ost-arrest cooperation cannot be assessed in a vacuum.” *Ibid.* (citation and internal quotation marks omitted). The fact that lack of remorse is “[m]oreover” a relevant criterion under Section 3553(a), *id.* at 16a (emphasis added), is accordingly not dispositive here.

c. Nor can petitioner demonstrate that any circuit would find such a consideration impermissible. While the Sixth Circuit has declined to “mingl[e] the terminology of [Section] 3553(a) with the concept of valuation of assistance,” it has recognized the “obvious overlap” between “the [Section] 3553(a) factors” and the manner in which “the extent of the reduction might be tempered by other factors affecting the valuation” of the assistance—such as “the context surrounding the original sentence,” including the defendant’s culpability compared to his co-defendants, whether he presents “a

threat to society,” and whether he was “convicted of a heinous crime.” *United States v. Grant*, 636 F.3d 803, 817-818 (6th Cir. 2011).

Accordingly, the district court here, in considering whether petitioner’s assistance reflected actual remorse and the factors underlying the sentence that it had imposed, did no more than the Sixth Circuit would have permitted. And petitioner’s assertion (Pet. 16-17) of intercircuit disagreement with respect to whether the Section 3553(a) factors may be relied upon to increase a substantial-assistance reduction, or instead only to limit it, is likewise not implicated here. Petitioner’s contention in this Court is that the Section 3553(a) factors may not be considered *at all* in assessing the extent of a sentence reduction—not that some non-assistance-related factor warranted a larger reduction.

3. Finally, this case would be a poor vehicle for further review because of the threshold jurisdictional question that the Court would need to confront. Under 18 U.S.C. 3582(c), a court “may not modify a term of imprisonment once it has been imposed” outside of particular listed circumstances, one of which is “to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure.” 18 U.S.C. 3582(c)(1)(B). And Rule 35(b), in turn, allows for a reduction in a defendant’s sentence for substantial post-sentencing assistance only “[u]pon the government’s motion made within one year of sentencing.” Fed. R. Crim. P. 35(b)(1). Here, however, “the government missed the deadline by more than a year, and no exception applies.” Pet. App. 10a.

Although the court of appeals agreed with petitioner and the government that the one-year deadline is non-jurisdictional and waivable, it did so only after eliciting

argument from a court-appointed amicus curiae. Pet. App. 9a-15a & n.3. This Court, however, would have an “independent obligation” to examine any jurisdictional or other threshold bar to relief. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). If either of the questions presented were in fact to warrant further review in some case, this Court should await a case that lacks such a threshold complication.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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