

No. 25-905

IN THE
Supreme Court of the United States

ANDREW J. JOHNSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The Government concedes the circuits are split on both questions presented. It does not dispute that these questions are important. And it does not even defend the Seventh Circuit’s decision on the merits. Instead, the Government relies exclusively on procedural objections and attempts to minimize the undisputed splits or how much the underlying issues would matter to resolution of this case. But nothing it says provides any good reason to deny review.

Contrary to the Government’s arguments, both splits are squarely implicated in this case. On the first question, the Seventh Circuit explicitly held that § 3742(a) barred it from considering Johnston’s challenges to the district court’s “discretionary judgments,” which it deemed “unreviewable.” Pet. App. 15a. Had § 1291 governed, those discretionary judgments would have been reviewable. On the second, the District Court premised its partial denial on § 3553(a) factors unrelated to the value of Johnston’s assistance—factors that in another circuit would have “no role in Rule 35(b) proceedings.” *United States v. Grant*, 636 F.3d 803, 816 (6th Cir. 2011) (en banc).

The Government’s preservation objection to the second question does not hold up either. Johnston explicitly preserved his § 3553(a) argument in the court of appeals and was not required to press it any further because it was foreclosed by circuit precedent. *See* CA7 Pet. Br. 49 n.7. The Government cites no authority for its suggestion that he was also required to seek to overturn circuit precedent before petitioning this Court.

Nor does the Government's lone vehicle objection have merit. The "threshold jurisdictional question" it invokes, BIO 13, was correctly resolved below under *Hamer v. Neighborhood Housing Services of Chicago*, 583 U.S. 17 (2017). The Government agreed in the court below that there was no jurisdictional problem, and it does not actually contest jurisdiction now. This is just a smokescreen.

In sum: The circuits are divided, the decision below is wrong, the questions presented are important, and this is a clean vehicle. This Court should grant review on both questions presented.

ARGUMENT

I. THE GOVERNMENT'S ATTEMPTS TO MINIMIZE THE § 3742(A) SPLIT FALL SHORT.

As explained in the petition, the circuits are split on whether § 3742(a) or § 1291 governs appellate review of Rule 35(b) orders. The First Circuit holds that § 1291 controls: "the appealability of an order resolving a Rule 35(b) motion is not controlled by 18 U.S.C. § 3742 because such an order is not, properly speaking, a sentence." *United States v. McAndrews*, 12 F.3d 273, 277 (1st Cir. 1993). The D.C. Circuit has followed suit in analogous contexts involving other sentence-modification procedures. *United States v. Jones*, 846 F.3d 366 (D.C. Cir. 2017) (appeals from sentence-reduction motions under 18 U.S.C. § 3582(c)(2)); *United States v. Long*, 997 F.3d 342, 351–52 (D.C. Cir. 2021) (appeals from denials of compassionate-release motions); Pet. 11–12. Ten circuits have held that § 3742(a) applies instead. Pet. 12–13.

The Government concedes the split, BIO 6, does not dispute that the questions presented are important, and does not defend the merits of the majority position. Its only move is to downplay the split. That effort fails.

1. The Government concedes a square split with the First Circuit, which it acknowledges “would apply Section 1291 to an appeal like [Johnston]’s,” but it dismisses the split as “shallow.” BIO 6–7. Specifically, the Government claims that the D.C. Circuit has not followed the First Circuit on the short side of the split because it has “only applied Section 1291 to appeals from the *denial* of a sentence-reduction motion.” BIO 7 (emphasis added). Here, by contrast, Mr. Johnston’s sentence reduction was partially granted. But that distinction is irrelevant because the order here still *is* a denial—albeit a partial one. The Government requested a 25% reduction, and the District Court denied that request, granting only 10%. Pet. App. 23a–24a. The D.C. Circuit’s logic in applying § 1291 therefore applies with full force here. *See Jones*, 846 F.3d 369–70; *Long*, 997 F.3d at 351–52. By the time a district court rules on a Rule 35(b) motion, a sentence has necessarily “already ... been imposed,” *McAndrews*, 12 F.3d at 277, and a partial denial does not itself impose a final sentence but rather “operate[s] upon and modif[ies] ... an already-existing and already-imposed sentence.” *Long*, 997 F.3d at 352. Accordingly, D.C. Circuit precedent undoubtedly would require application of § 1291 here because the ruling below did not involve “the *imposition* of a sentence under Section 3742,” but rather “sentence-*modification* proceedings” subject to § 1291. *Id.* at 351 (emphasis added).

Nor is the split stale. The Government dismisses the First Circuit’s key precedent as “33 years old,” BIO 7, but ignores that the split it created continues to “confound[]” the lower courts, *United States v. Doe*, 932 F.3d 279, 282 n.2 (5th Cir. 2019) (Oldham, J.), *cert denied on other grounds*, 589 U.S. 1139 (2020), with commentators noting the split’s persistence as recently as last year. Pet. 14–15. And *McAndrews* is no relic. The First Circuit has invoked *McAndrews* twice in just the past three years, extending its rationale by holding that § 1291 applies to appeals from compassionate-release motions. *United States v. Rivera-Rodríguez*, 75 F.4th 1, 16 (1st Cir. 2023); *United States v. Burgos-Montes*, 142 F.4th 48, 56 (1st Cir. 2025). The split shows no signs of abating. If anything, it is expanding. Pet. 25.

2. The Government next claims the split has no significance here because Johnston’s argument for a discretionary sentence reduction “*was* reviewed and rejected” by the Seventh Circuit. BIO 9. That is incorrect. The Seventh Circuit held that § 3742(a) “narrowly circumscribes” its review and that Johnston’s challenges to the District Court’s “discretionary judgments” were “unreviewable.” Pet. App. 15a. It even acknowledged that “[p]erhaps” Johnston’s “postconviction litigation ... didn’t deserve the weight [the District Court] gave it,” but held that it could not consider that question. Pet. App. 17a. Under § 1291, it could have. The Seventh Circuit’s position in the split was thus outcome-determinative in Johnston’s appeal.

II. THE GOVERNMENT'S RESPONSES TO THE § 3553(A) SPLIT LIKEWISE FAIL.

The Government does not deny the split on the second question presented—whether a court ruling on a Rule 35(b) sentence reduction motion can consider sentencing factors under § 3553(a) that are unrelated to the defendant's assistance. As courts and commentators alike have recognized, the circuits have adopted at least three irreconcilable positions. The en banc Sixth Circuit holds that § 3553(a) factors have “no role in Rule 35(b) proceedings,” *Grant*, 636 F.3d at 816–17; the First Circuit holds they may not be used to award a *greater* sentence reduction than a defendant's assistance alone warrants, *United States v. Poland*, 562 F.3d 35, 41 (1st Cir. 2009); and other circuits freely permit their consideration or allow them only to limit a reduction. Pet. 16–18. The Government likewise does not dispute that this question is important, nor does it engage with the serious textual and structural arguments that the Seventh Circuit's decision is wrong. Pet. 21–23, 26–29.

Instead, the Government makes three arguments in opposing certiorari. None has merit.

1. The Government first claims that Johnston “did not raise” his § 3553(a) argument in the court of appeals. BIO 10–11. But that is incorrect. To be sure, Johnston worked within binding circuit precedent to argue below that the District Court erred by considering “some, but not all” of the § 3553(a) factors. CA7 Pet. Br. 48–51. But he also explicitly “preserve[d] for further review the argument that a district court may not apply non-assistance factors in this way.” *Id.* at 49 n.7. In context, “in this way” plainly referred to

using non-assistance § 3553(a) factors to deny a reduction. *Id.* That reading is confirmed by Johnston’s accompanying citation of *United States v. Tadio*, 663 F.3d 1042 (9th Cir. 2011), which he described as identifying a “circuit split on the factors that may be considered in deciding a Rule 35(b) motion”—the same split he presses in this petition. CA7 Pet. Br. 49 n.7. Moreover, both the District Court and the Seventh Circuit squarely endorsed the rule underlying the split. Pet. App. 16a (“[A] judge may consider the § 3553(a) sentencing factors when presented with a Rule 35(b) motion.”); Pet. App. 24a (“The court has discretion in deciding whether a Rule 35(b) reduction is appropriate, and is free to consider § 3553 factors in doing so.”). The issue was thus fully preserved and passed upon below.

The Government faults Johnston for declining to try to overturn binding circuit precedent by seeking rehearing en banc or invoking Seventh Circuit Rule 40(e). BIO 11 n.2. But it cites no authority for any such requirement—and for good reason. This Court’s review does not depend on attempts to reverse prior circuit precedent below. In any event, the Seventh Circuit’s position is well-entrenched and has been repeatedly reaffirmed. *See, e.g., United States v. Chapman*, 532 F.3d 625, 629 (7th Cir. 2008); *United States v. Shelby*, 584 F.3d 743, 748–49 (7th Cir. 2009); *United States v. Webster*, 666 F.3d 1023, 1024 (7th Cir. 2012); *United States v. Harrington*, 834 F.3d 733, 737 (7th Cir. 2016). Seeking to overturn that entrenched precedent would have been futile, and by causing further delay would

have threatened Johnston’s ability to obtain meaningful appellate relief.¹

2. The Government next contends the District Court “looked only to its *past* consideration” of the § 3553(a) factors and therefore the second question presented is not “meaningfully implicated.” BIO 11. But that is a distinction without a difference. The District Court *did* consider § 3553(a) factors unrelated to the value of Johnston’s assistance. Pet. App. 24a. If, as the Sixth Circuit holds, such factors have “no role in Rule 35(b) proceedings,” then remand is warranted. *Grant*, 636 F.3d at 816–17. The second question presented is squarely implicated.

3. The Government is wrong that “[no] circuit” would find the District Court’s approach “impermissible.” BIO 12. In fact, the Sixth Circuit has made clear that “[t]he value of the substantial assistance is the governing principle” in weighing a Rule 35(b) motion and § 3553(a) factors have “no role” to play. *Grant*, 636 F.3d at 816. By contrast, the District Court found Johnston’s assistance “unquestionably useful” but denied full reduction based on non-assistance-related § 3553(a) factors—

¹ The Seventh Circuit panel issued its decision nearly two years after oral argument. Pet. App. 1a. As Johnston explained in his March 9, 2026 letter filed on this Court’s docket, “[i]f the Court were to grant certiorari and reverse, and Mr. Johnston were ultimately to receive the full 25% sentence reduction, his projected release date would move to April 2026.” While further delay “diminishes the practical value of a favorable ruling,” “a decision by the end of the Court’s October 2026 Term would still afford him meaningful relief.”

namely, that Johnston's post-conviction litigation conduct purportedly evinced a "continue[d] lack of remorse." Pet. App. 23a–24a. At a minimum, the value of Johnston's assistance was not the "governing principle" driving that analysis, as it must be under the Sixth Circuit's approach. *Grant*, 636 F.3d at 816.

The Government suggests the District Court's order could survive even under *Grant*, which recognizes that reductions can be "tempered by other factors affecting the valuation" such as "context surrounding the original sentence." BIO 12; *Grant*, 636 F.3d at 817. But that does not help the Government here. The Sixth Circuit's context-based inquiry—encompassing potential sentencing disparities, the cooperator's "capacity for abiding by the law," and the heinousness of the underlying offense—is tied to context "surrounding *the initial sentence*." 636 F.3d at 817 (emphasis added). It does not extend to a defendant's supposed "motives" for providing assistance, let alone motives gleaned from *post-conviction* litigation conduct. BIO 12.

In any event, considering the § 3553(a) factors on a Rule 35(b) motion "clouds the analytical exercise that the district court must undertake, which is to determine whether the defendant is entitled to a reduction for substantial assistance and, if he is, the extent of the reduction." *Grant*, 636 F.3d at 818. Here, the District Court led with a consideration of the § 3553(a) factors and used them to discount the value of Johnston's assistance. Pet. App. 24a. At a minimum, the analysis would have been different under an approach that keeps the value of assistance front and center. *Grant*, 636 F.3d at 817.

III. THE GOVERNMENT’S VEHICLE OBJECTION IS MERITLESS.

Finally, the Government contends this case “would be a poor vehicle” because the Court would have to confront a “threshold jurisdictional question” before reaching the merits. BIO 13. But the Government itself has already agreed that there is no actual jurisdictional problem here. BIO 13; Pet. App. 8a–9a. And the Seventh Circuit also agreed below. Pet. App. 14a–15a.

Nor is the question a difficult one. The conclusion that Rule 35(b)(1)’s one-year time prescription is not jurisdictional is compelled by *Hamer v. Neighborhood Housing Services of Chicago*, 583 U.S. 17 (2017), which held “in unequivocal terms that time limits in court-made rules are not jurisdictional.” Pet. App. 13a. Rule 35(b) is court-made, and the Seventh Circuit correctly held that *Hamer* controls here. Pet. App. 12a.

The Government does not even defend the contrary position on the merits. It simply suggests the Court would have to address it. But a jurisdictional question that is both undisputed and “unequivocal[ly]” resolved by Supreme Court precedent is no obstacle to this Court’s review. Pet. App. 13a. There is no real “threshold complication” here. BIO 14.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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