No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID WAYNE DEPAPE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JODI LINKER
Federal Public Defender
Northern District of California
TODD M. BORDEN *
ANGELA CHUANG
Assistant Federal Public Defenders
450 Golden Gate Avenue, 19th Floor
San Francisco, California 94102
(415) 436-7700
todd_borden@fd.org

* *Counsel of Record for Petitioner*

QUESTION PRESENTED

Federal Rule of Criminal Procedure 35(a) permits a district court, within 14 days after sentencing, to "correct a sentence that resulted from arithmetical, technical, or other clear error." Federal Rule of Criminal Procedure 32(i)(4)(A)(ii), in turn, requires the court to address the defendant personally and permit him to speak before imposing the sentence.

The question presented is:

Whether Rule 35(a) authorizes a district court to vacate an otherwise lawful sentence it has announced and to conduct a new discretionary sentencing proceeding, over the defendant's objection, to cure its failure to afford the defendant an opportunity to allocute under Rule 32(i)(4)(A)(ii).

PARTIES TO THE PROCEEDING

Petitioner David Wayne DePape was the defendant-appellant below.

Respondent United States of America was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David DePape respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1a–9a) is reported at 170 F.4th 1239. The court of appeals' memorandum disposition affirming DePape's conviction (App. 10a–14a) is not published in the Federal Reporter but is available at 2026 WL 821891. The order denying rehearing and rehearing en banc (App. 15a) is unpublished. The district court's order granting the government's Rule 35(a) motion (App. 24a–25a) is unreported, and its subsequent order explaining its decision to reopen sentencing (App. 16a–23a) is unreported but is available at 2024 WL 2749426.

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment on March 25, 2026, and denied a timely petition for rehearing on July 1, 2026. App. 1a, 15a. On September 22, 2026, Justice Kagan extended the time to file this petition to October 29, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 35 provides, in relevant part:

> (a) **Correcting Clear Error**. Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

* * *

(c) **"Sentencing" Defined**. As used in this rule, "sentencing" means the oral announcement of the sentence.

Federal Rule of Criminal Procedure 32(i)(4)(A) provides:

(A) **By a Party**. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

Title 18 U.S.C. § 3582(c) provides in relevant part:

(c) **Modification of an Imposed Term of Imprisonment**.—The court may not modify a term of imprisonment once it has been imposed except that—

* * *

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

INTRODUCTION

Rule 35(a) is a narrow safety valve. It lets a district court, within 14 days of pronouncing sentence, correct a sentence that is the product of an arithmetical slip, a technical mistake, or some other clear error of the same kind. It does not authorize a do-over of a sentencing hearing. The drafters of the Rule said exactly this: the authority "is intended to be very narrow," it addresses "obvious technical

mistakes," and it does not permit "the court simply to change its mind about the appropriateness of the sentence." Fed. R. Crim. P. 35 advisory committee's note to 1991 amendment.

The Ninth Circuit read the Rule differently. At DePape's sentencing, the district court heard from both lawyers but neglected to invite DePape to speak, and then imposed concurrent statutory-maximum sentences on the two counts. Later that day, the government moved under Rule 35(a) to undo the sentence. Over DePape's objection, the court vacated the sentence, reconvened 11 days later, heard DePape's allocution, and reimposed the identical sentences during an 18-minute do-over. The Ninth Circuit affirmed. It held that "other clear error" under Rule 35(a) includes *any* "unquestionably erroneous" decision, and that a district court may therefore set aside a sentence it has already pronounced and resentence the defendant whenever it has failed to afford him the right of allocution, even though, as the court acknowledged, curing that error "may result in reconsideration of the sentencing factors." App. 7a–8a.

The courts of appeals disagree about the meaning of "other clear error" in Rule 35(a), and the decision below gets it wrong. The Third Circuit looks to the sentence itself, holding that Rule 35(a) reaches only errors that make a sentence illegal or otherwise outside the court's discretion; if it is not, Rule 35(a) does not apply. *United States v. M.M.*, 23 F.4th 216, 221, 224 (3d Cir. 2021). The Ninth Circuit held instead that Rule 35(a) also reaches errors in the manner in which a lawful sentence was imposed. It concluded that the failure to afford allocution, "a procedural error," is "other clear error" because it is "unquestionably erroneous,"

and that "nothing in Rule 35(a)'s text" bars a correction that requires the court to exercise its discretion anew. App. 8a. Under the Ninth Circuit's reading, the words "arithmetical" and "technical" do no work, and any obvious violation of Rule 32's procedural commands becomes a license to vacate and redo a sentence. That reading conflicts with the Rule's text; with the Rule's history, in which Congress repealed the authority to correct a sentence "imposed in an illegal manner" that the Ninth Circuit has now revived; and with Congress's command that a sentence of imprisonment, once imposed, may be modified only in narrowly defined circumstances. *See* 18 U.S.C. § 3582(c).

The question is important. The Ninth Circuit's rationale—that a violation of Rule 32 is "clear error" because it would be reversed on appeal—is not limited to allocution; it reaches any obvious procedural mistake at sentencing. It converts a narrow error-correcting provision into a general mechanism for procedural do-overs. And it lets the district court replace the plenary resentencing the defendant would otherwise receive on remand with a hurried proceeding that must be finished within 14 days. It also denies the defendant a critical remedy that would be available after such a fundamental violation through the normal appeal process: resentencing by a different judge. This case presents the question cleanly: the facts are undisputed, the issue was preserved at every stage, and the court of appeals decided it de novo in a published opinion. The petition should be granted.

STATEMENT OF THE CASE

A. Legal background

1. Rule 32 provides that, "[b]efore imposing sentence, the court must . . . address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." Fed. R. Crim. P. 32(i)(4)(A)(ii). This right of allocution has deep common-law roots: "As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal." *Green v. United States*, 365 U.S. 301, 304 (1961) (plurality opinion). Thus, the sentencing court must "listen and give careful and serious consideration" to what the defendant says before imposing sentence. *United States v. Gunning*, 401 F.3d 1145, 1147 (9th Cir. 2005) (quoting *United States v. Mack*, 200 F.3d 653, 658 (9th Cir. 2000)).

Courts of appeals ordinarily vacate a sentence imposed without affording the defendant an opportunity to allocute and remand for resentencing. In the Ninth Circuit, when the district court could have imposed a lower sentence, the court of appeals presumes prejudice and remands, and the other courts of appeals generally find denial-of-allocution error to be reversible plain error. *See Gunning*, 401 F.3d at 1149; *see, e.g.*, *United States v. Adams*, 252 F.3d 276, 286–89 (3d Cir. 2001) (holding that allocution error was "plain" and remanding for resentencing); *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1133, 1137–44 (10th Cir. 2017) (en banc) (holding that allocution error was "a clear failure of the trial court" and remanding for resentencing); *see also United States v. Reyna*, 358 F.3d 344, 350, 353 (5th Cir.

2004) (en banc) (error "obvious or plain," but relief denied at the fourth step of plain-error review).

2. Once a district court sentences a defendant, the court may not modify its sentence except under narrow circumstances. Specifically, a district court "may not modify a term of imprisonment once it has been imposed" except as specified by statute, including "to the extent otherwise expressly permitted . . . by Rule 35." 18 U.S.C. § 3582(c); *see Dillon v. United States*, 560 U.S. 817, 819, 828 (2010).

As originally promulgated, Rule 35 provided that "[t]he court may correct an illegal sentence at any time." *Hill v. United States*, 368 U.S. 424, 430 n.7 (1962). In *Hill*, this Court held that a district court's failure to ask a defendant whether he wished to speak before sentencing, i.e., an allocution error, could not be corrected under that provision, explaining that "the narrow function of Rule 35 is to permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence." *Id.* at 430.

In 1966, the Rule was amended to provide that "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence," which was 120 days. Fed. R. Crim. P. 35 (1966). The Advisory Committee's note discussed *Hill* and stated that the amendment "recognizes the distinction between an illegal sentence, which may be corrected at any time, and a sentence imposed in an illegal manner, and provides a limited time for correcting the latter." Fed. R. Crim. P. 35 advisory committee's note to 1966 amendment.

The Sentencing Reform Act of 1984 rewrote Rule 35, effective November 1, 1987. Pub. L. No. 98-473, tit. II, § 215(b), 98 Stat. 1837, 2015 (1984). As rewritten, the Rule did not retain the "illegal manner" clause. It provided for correction of a sentence on remand, where the sentence was "determined on appeal under 18 U.S.C. [§] 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable"; it also included a separate provision to reduce the sentences of defendants who provided substantial assistance to the government. *Id.*

In 1991, Rule 35 was amended to add a new subdivision (c): "The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(c) (1991). The Advisory Committee's note cited *United States v. Cook*, 890 F.2d 672 (4th Cir. 1989), which involved an "error in applying sentencing guidelines," and *United States v. Rico*, 902 F.2d 1065 (2d Cir. 1990), which involved a "failure to impose prison sentence required by terms of plea agreement," and stated that "[t]he amendment in effect codifies the result in those two cases but provides a more stringent time requirement." Fed. R. Crim. P. 35 advisory committee's note to 1991 amendment. The note further states:

> The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a). The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at

> the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines.

Id.

In 2002, the Rule was restyled and the provision was moved from Rule 35(c) to Rule 35(a) and changed "imposed as a result of" to "resulted from." These changes were "intended to be stylistic only." Fed. R. Crim. P. 35 advisory committee's note to 2002 amendment. The 2004 amendments added Rule 35(c), which defines "sentencing" as "the oral announcement of the sentence," and the 2009 amendments extended the correction period from 7 to 14 days. Fed. R. Crim. P. 35 advisory committee's notes to 2004 and 2009 amendments.

B. Proceedings below

DePape was charged with attempting to kidnap a federal officer, in violation of 18 U.S.C. § 1201(d), and assaulting an immediate family member of a federal official, in violation of 18 U.S.C. § 115(a)(1)(A), based on his attempted kidnapping of then-Speaker of the House Nancy Pelosi and his assault of her husband, Paul Pelosi. A jury convicted him on both counts. App. 10a–14a. The State of California separately prosecuted him for the same conduct. *See People v. DePape*, 345 Cal. Rptr. 3d 760 (Ct. App. 2026).

At the sentencing hearing on May 17, 2024, the district court heard from counsel for both parties but did not address DePape personally or ask whether he wished to speak. App. 3a. The district court held the sentencing hearing, over DePape's objection, while his state trial for the same conduct was under way, on a

day when the state court was not in session. 2-ER-249–257.[1] The probation officer had recommended a sentence of 300 months (25 years), DePape sought 14 years, and the government sought 40 years. Presentence Report (PSR) ¶ 87; 7-ER-1383–1409; 2-ER-229–248. The court imposed concurrent statutory-maximum sentences of 240 and 360 months, i.e., 30 years, which it ordered to run concurrently with any state sentence. App. 3a–4a; 1-ER-62–63. In doing so, it described DePape's conduct as "unprecedented" and compared him to the assassins of Presidents Lincoln and Kennedy. 1-ER-57–62.

Later the same day, the government moved to "reopen" sentencing under Rule 35(a) so that DePape could allocute, after which the court would again "pronounce" sentence. 2-ER-224–228. Relying on *Hill* and the 1966 amendment, the government argued that Rule 35(a) reaches errors in the manner in which a sentence is imposed, not only errors in the terms of the sentence itself. *Id.*

The next day, a Saturday, the district court granted the motion before DePape had responded to it. App. 24a–25a. Characterizing the allocution omission as an error that "would almost certainly result in a remand," the court vacated the sentence, withheld entry of judgment, set a new sentencing hearing for a date during DePape's ongoing state trial, and directed him to file any response by noon on May 22. *Id.* DePape filed a written opposition, arguing that Rule 35(a) does not reach an allocution error, that the proper remedy was appellate review, and that any resentencing should take place before a different judge who had not already announced a sentence without hearing from him. 2-ER-205–223.

[1] "ER" refers to the excerpts of record filed in the court of appeals.

On May 28, 2024—11 days after the original sentencing, and while the state trial was proceeding—the district court held an 18-minute hearing. 1-ER-17–31. It heard argument, concluded that Rule 35(a) applied, "set aside its previous sentence, and proceeded to resentence" DePape. App. 16a. DePape allocuted, apologizing for his conduct and for the harm he had caused, and describing his renewed connection with his family. App. 4a; 1-ER-23–24. The court then reimposed the identical sentence it had imposed 11 days earlier: concurrent statutory-maximum sentences. App. 4a. In a subsequent written order, the district court reasoned that an allocution error is clear error "which would almost certainly result in a remand of the case," and that Rule 35(a) therefore permitted it to "correct" the sentence. App. 17a (quoting Fed. R. Crim. P. 35 advisory committee's note to 1991 amendment).

The state jury convicted DePape, and the state court sentenced him to life imprisonment without the possibility of parole.

The Ninth Circuit affirmed the district court's Rule 35 ruling in a published opinion. Reviewing de novo, the court described the question as one it had "not yet addressed." App. 4a. Relying on dictionary definitions, the court defined "other clear error" as "an 'unquestionably erroneous' decision that's different from a 'technical' or 'arithmetical' error." App. 5a. Because "the failure of the district court to follow the procedures of Rule 32 constitutes clear error," *id.* (quoting *United States v. Bigman*, 906 F.2d 392, 395 (9th Cir. 1990)), and because several courts of appeals had described allocution errors as "plain," "obvious," or "clear" in applying plain-error review, the court held that a failure to afford allocution "is unquestionably erroneous and falls within Rule 35(a)'s 'other clear error'" definition.

App. 5a–7a. The court did not discuss *Hill*, the history of Rule 35, or the Advisory Committee's notes.

The Ninth Circuit rejected DePape's argument, grounded in the Third Circuit's decision in *M.M.*, that "other clear error" must be read in light of its neighbors to reach only errors akin to arithmetical or technical errors that produce illegal sentences outside the court's discretion. App. 7a–8a. "Even if we were to give 'clear error' a narrower reading," the court reasoned, an allocution error "is a procedural error that is readily discernible from the sentencing record and requires correction whenever a lower sentence is possible." *Id.* For that formulation, the court cited its own recent description of arithmetical and technical errors as "easily identifiable and readily ascertained from the sentencing proceeding and judgment"—language drawn from *M.M.* App. 8a (citing *United States v. Engstrom*, 166 F.4th 835, 843 (9th Cir. 2026)). The court also rejected DePape's argument that Rule 35(a) cannot be used to re-exercise sentencing discretion. It acknowledged that "correcting a Rule 32(i)(4)(A)(ii) violation may result in reconsideration of the sentencing factors," but concluded that "nothing in Rule 35(a)'s text limits its scope in this way." App. 8a. It saw "no reason to exclude a Rule 32(i)(4)(A)(ii) violation from the definition of Rule 35(a)'s 'other clear error' just because the district court might exercise some discretion in 'correct[ing] a sentence.'" App. 9a.

In a concurrently filed memorandum disposition, the court affirmed DePape's convictions. App. 10a–14a. The court denied rehearing and rehearing en banc on July 1, 2026. App. 15a.

REASONS FOR GRANTING THE WRIT

I. The courts of appeals disagree over the meaning of "other clear error" under Rule 35(a).

The courts of appeals agree that Rule 35(a) is narrow, but they do not agree on what makes an error "clear" under the Rule. As the Fifth Circuit has acknowledged, "the boundaries of Rule 35(a), including whether 'legal errors' even fall within its reach, are less clear" than the general principle that the Rule is narrow. *United States v. Hankton*, 875 F.3d 786, 791 (5th Cir. 2017). In particular, "[i]t is not entirely clear whether a district court [is] authorized to withdraw *any* sentence that would have been vacated and remanded on appeal or only a narrower subset of such sentences." *United States v. Ross*, 557 F.3d 237, 241 (5th Cir. 2009). The courts of appeals have answered that question differently. The Ninth Circuit below treats any obvious error, procedural or substantive, that would be reversed on appeal as correctable for that reason alone. By contrast, the Third Circuit limits the Rule to mistakes akin to arithmetical and technical errors, i.e., errors evident from the record that produced a sentence the district court had no authority to impose. Under that view, a sentence within the court's lawful discretion cannot be reopened under Rule 35(a), even if it was the product of a procedural error; such errors may be corrected only on direct appeal.

A. The Third Circuit limits "other clear error" to errors that produce a sentence outside the court's discretion.

In *M.M.*, the defendant faced a 240-month mandatory-minimum sentence, and the government moved for a departure based on his cooperation. 23 F.4th at 218. The district court granted the government's motion for a departure and, citing the

18 U.S.C. § 3553(a) factors, imposed a 120-month sentence. *Id.* at 218–19. Eleven days later, on the government's Rule 35(a) motion, the court concluded that it had erred by relying on factors unrelated to the defendant's cooperation to reduce the sentence below the statutory minimum, and it increased the sentence to 180 months. *Id.* at 219. The Third Circuit vacated the amended sentence and directed reinstatement of the original 120-month sentence. *Id.* at 224.

The court held that "Rule 35(a) offers an exceedingly narrow basis to correct a sentence." *Id.* at 219. Relying on the Advisory Committee's note, it emphasized that the Rule "'was not intended to be used as a method for reopening issues already decided, or to address questions related to the district court's discretion' during sentencing." *Id.* at 220 (quoting *United States v. Higgs*, 504 F.3d 456, 462 (3d Cir. 2007)). It observed that the two decisions the 1991 amendment codified each involved an illegal sentence: *Cook*, "a patently illegal sentence" not authorized by the then-mandatory Guidelines, and *Rico*, a sentence that "mistakenly deviated from the court-accepted plea agreement." *Id.*

Applying *ejusdem generis*, the court then held that "clear error must be akin to an arithmetical or a technical error." *Id.* at 221. Drawing on the Chief Justice's statement that a sentence, once imposed, "is final, and the trial judge's authority to modify it is narrowly circumscribed," *Dolan v. United States*, 560 U.S. 605, 622–23 (2010) (Roberts, C.J., dissenting), the Third Circuit identified the failure to impose a mandatory term of imprisonment, a mandatory fine, or a mandatory order of restitution as examples of "other clear error" under Rule 35(a). 23 F.4th at 221. "Such errors—like arithmetical and technical errors—are easily identifiable and

readily ascertained from the sentencing proceeding and judgment. These errors also produce illegal sentences outside of a court's discretion." *Id.*

The Third Circuit gave two independent reasons why the government's Rule 35(a) motion failed. First, the asserted error—considering an improper sentencing factor—was not "clear," because it could be detected only through the district court's "*post hoc* clarification" of its own sentence. *Id.* at 223–24. Second, "[i]n any event," the error "simply does not fit the parameters of Rule 35(a)": it was "not a technical, arithmetical, or even clerical mistake." *Id.* at 224. Instead, it was "the sort of issue best addressed on direct appeal, not in a motion with a fourteen-day window," and the court was "not confronted with an illegal sentence as the original 120-month term still fell within the District Court's discretion." *Id.* Thus, under this holding, an error that is properly the subject of direct appeal is not, for that reason alone, correctable under Rule 35(a), and a lawful sentence within the court's discretion is not a sentence that "resulted from" a clear error.

Other courts of appeals, without adopting the Third Circuit's precise formulation, have likewise refused to allow Rule 35(a) to be used to revisit sentences that were within the district court's discretion. *See United States v. Abreu-Cabrera*, 64 F.3d 67, 69, 72 (2d Cir. 1995) (holding that Rule 35 does not authorize a court "to change its mind as the winds change"; refusing to apply Rule 35 when the original sentence "was not illegal, nor was it the result of an incorrect application of the [then-mandatory] guidelines or unreasonable"); *United States v. Arroyo*, 434 F.3d 835, 838–39 (6th Cir. 2006) (holding that the authority under Rule 35(a) "is extremely limited"; vacating resentencing under Rule 35(a) on the

government's motion because the original sentence "was within the court's discretion"); *Ross*, 557 F.3d at 242–43 (expressing skepticism that Rule 35(a) permits a court to revisit a sentence's reasonableness, and holding that "a district court is not permitted to withdraw a reasonable sentence and impose what is, in its view, a more reasonable one"); *Hankton*, 875 F.3d at 790–91 (noting that the Fifth Circuit has affirmed Rule 35(a) corrections "for only the most uncontroversial errors," such as where the court "misspoke" in pronouncing the term of imprisonment or "mistakenly used the wrong number in a Guidelines provision"); *United States v. Wisch*, 275 F.3d 620, 625 (7th Cir. 2001) (holding that Rule 35 relief "must be limited to a claim of 'arithmetical, technical, or other clear error,' rather than a quarrel with the court's discretionary application of the guidelines to the facts of the offense") (citation omitted).

B. The Ninth Circuit treats any obvious error that would be reversed on appeal as correctable for that reason alone.

The Ninth Circuit below took a much more expansive approach to Rule 35(a). It defined "other clear error" to include any "unquestionably erroneous" decision and drew the content of that standard from decisions applying the plain-error standard to denial of allocution. *See* App. 6a–7a (citing *United States v. Daniels*, 760 F.3d 920, 924–25 (9th Cir. 2014); *Reyna*, 358 F.3d at 350; *Adams*, 252 F.3d at 286). The Ninth Circuit thus equated "clear error" under Rule 35(a) with the second prong of plain-error review, which the Fifth Circuit had observed no court of appeals had yet explicitly embraced. *See Hankton*, 875 F.3d at 791 ("Various courts have suggested

that the 'clear error' standard should mirror the 'plain error' standard, although no court of appeals has explicitly adopted that standard.").

The Ninth Circuit stated that an allocution error would qualify even under *M.M.*'s narrower reading because the error is "readily discernible from the sentencing record and requires correction whenever a lower sentence is possible." App. 8a. But that reasoning drew on only part of the Third Circuit's test. Specifically, *M.M.* also described other clear errors under Rule 35(a) as those that "produce illegal sentences outside of a court's discretion," 23 F.4th at 221, and it rejected the government's motion there in part because the original sentence "still fell within the District Court's discretion." *Id.* at 224. The ultimate sentence imposed without the benefit of a defendant's allocution, though procedurally flawed, is not unlawful or outside the district court's discretion. By asking only whether the district court committed an obvious sentencing error that would likely lead to reversal on appeal, the Ninth Circuit applied a test far broader than the Third Circuit's—one that reaches lawful sentences within the court's discretion, which *M.M.* places outside the ambit of Rule 35(a).

In the specific context of using Rule 35 to correct the denial of allocution, the Ninth Circuit is not alone in its result, but the only other appellate decision to approve the use of Rule 35 to cure an allocution error reached that conclusion without analysis. In *United States v. Delgado*, 256 F.3d 264 (5th Cir. 2001), the Fifth Circuit addressed the Rule 35 question in a single paragraph. The district court had pronounced sentence one morning without addressing the defendant and, after "the parties realized their mistake," it brought him back that afternoon and

reimposed the same sentence. *Id.* at 279. The defendant did not argue that the district court lacked authority to do so; his claim on appeal was that he had been denied an opportunity to allocute. *Id.* The court of appeals rejected that claim because the afternoon proceeding had supplied the allocution. *Id.* It acknowledged that "[t]he record is not clear as to whether the district court resentenced sua sponte or if it even relied on Rule 35," but stated that former Rule 35(c) "was the most appropriate authority" for what the court had done. *Id.* The court recited the Rule's text, cited the Advisory Committee's note only for the proposition that a correction may be made sua sponte, and did not consider what kinds of error the Rule reaches or whether it permits a court to set aside a lawful sentence in order to exercise its discretion anew. *Id.* The Fifth Circuit's later decisions addressing the scope of Rule 35(a) do not cite *Delgado*, and they treat the question of Rule 35(a)'s precise scope as unresolved. *See Hankton*, 875 F.3d at 791; *Ross*, 557 F.3d at 241.

The Fourth Circuit, for its part, reasoned in a footnote addressing whether a defendant had preserved an objection that because a district court's failure to hear from counsel before departing upward "amounted to plain error," "[i]t follows that the decision was also 'clear error' under Rule 35(c)." *United States v. Spring*, 305 F.3d 276, 281 n.2 (4th Cir. 2002) (citing *United States v. Ward*, 171 F.3d 188, 191 (4th Cir. 1999), as "holding that clear errors under Rule 35(c) are errors that would almost certainly result in reversal on appeal"). That footnote likewise did not engage the Rule's text or structure, or ask whether Rule 35(a) permits a court to re-exercise its sentencing discretion.

II. The decision below is wrong.

A. Rule 35(a)'s text reaches only a sentence that "resulted from" a clear error of the same kind as an arithmetical or technical error.

1. Rule 35(a) is directed at errors in the sentence itself, not errors in the manner in which it was imposed. It permits a court to "correct a sentence that resulted from" error. The errors it names—arithmetical and technical mistakes—make the sentence itself wrong: the omission of a mandatory term of imprisonment, a mandatory fine, or a mandatory order of restitution; a prison term that departs from what the plea agreement required the court to impose; or imposing a sentence significantly below the Guidelines range when the court's pronouncement as a whole showed that it intended a sentence at the top of the Guidelines range. *See M.M.*, 23 F.4th at 220–21; *Hankton*, 875 F.3d at 790–91.

An allocution error is altogether different. The terms of a sentence imposed without affording the defendant an opportunity to allocute may be entirely lawful and within the court's discretion; the error lies in the manner of its imposition, i.e., that the court decided its sentence before hearing from the defendant. Whether hearing from the defendant would have made a difference is unknowable, which is why appellate courts generally presume prejudice. *See, e.g., Gunning*, 401 F.3d at 1149. And here, after hearing from DePape, the district court imposed exactly the same sentence.

This distinction is the one Rule 35 has long drawn. *Hill* separated an illegal sentence from "errors occurring at the trial or other proceedings prior to the imposition of sentence," 368 U.S. at 430, and the 1966 amendment separately

authorized correction of "a sentence imposed in an illegal manner," a category Congress later eliminated. *See* Part II.B, *infra*.

2. Rule 35(a) authorizes the court only to "correct" the sentence. Correcting a sentence means fixing the defect that produced it, i.e., recalculating the arithmetic, imposing the mandatory prison term that was omitted, or conforming the sentence to the binding plea agreement. It does not mean vacating a facially lawful sentence and conducting a new hearing at which the court may impose any sentence within the statutory range. The district court here thus did not "correct" anything in DePape's actual sentence; it "set aside its previous sentence, and proceeded to resentence" him. App. 16a. And it then reimposed the identical sentence. That outcome is telling. The errors Rule 35(a) reaches are errors in the sentence itself, and correcting them changes the sentence: the arithmetic is redone, the omitted mandatory term is added, the sentence is conformed to the plea agreement. An error that can be "corrected" by reimposing exactly the same sentence was never an error in the "sentence" at all. When the Rules and the governing statutes contemplate further sentencing proceedings, they say so. *See* 18 U.S.C. § 3742(f)–(g) (remand "for further sentencing proceedings"); Fed. R. Crim. P. 35(b) ("reducing a sentence for substantial assistance").

3. "Other clear error" must also be read in light of the words that precede it. Under the canon of *ejusdem generis*, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (citation omitted);

see Fischer v. United States, 603 U.S. 480, 488 (2024) ("a general phrase can be given a more focused meaning by the terms linked to it"). The canon applies with full force to a residual phrase introduced by "other," which signals that the general term shares the character of the specific ones, and the Third Circuit applied it to Rule 35(a)'s "other clear error" category. *M.M.*, 23 F.4th at 220–21. Under a related interpretive principle, courts should "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

The Ninth Circuit acknowledged the *ejusdem generis* canon, App. 7a (quoting *Fischer*, 170 F.4th at 1243), but its construction of Rule 35(a) gives the canon no effect. The court defined "other clear error" to include any "unquestionably erroneous" decision that is not arithmetical or technical. App. 5a. On that reading, the words "arithmetical" and "technical" do nothing: every arithmetical or technical error that Rule 35(a) reaches is also "unquestionably erroneous," so the Rule would mean exactly the same thing if it said "clear error" alone. Under the Ninth Circuit's reading, no category of obvious sentencing error, be it legal, procedural, or factual, lies outside of the Rule.

What unites arithmetical and technical errors is not that they are obvious—many errors are obvious—but that they are mechanical. They can be identified from the record and judgment and corrected without any new exercise of discretionary sentencing judgment, such as when a court simply redoes the arithmetic, adds the omitted mandatory term of imprisonment, or imposes the prison sentence required by a binding plea agreement. *See M.M.*, 23 F.4th at 221.

The paradigmatic cases the Advisory Committee identified share that feature. *Cook* corrected "a patently illegal sentence": because the Guidelines were then mandatory, a sentence they did not authorize was unlawful. *Id.* at 220; *see Ross*, 557 F.3d at 240 (noting that the sentence in *Cook* "was not a lawful one"). *Rico* corrected a sentence that "mistakenly deviated from the court-accepted plea agreement." *M.M.*, 23 F.4th at 220. In each case, the district court had announced the sentence it meant to impose under the governing law and then, through a mistake, imposed a different one. *See Abreu-Cabrera*, 64 F.3d at 71. The correction in each case simply imposed the sentence the court had already decided on; it did not require the court to decide anew what sentence was appropriate. An allocution error has none of those characteristics.

The Ninth Circuit's test—that the error is "readily discernible from the sentencing record and requires correction whenever a lower sentence is possible," App. 8a—does not narrow the phrase "other clear error" at all. Nearly every procedural error at sentencing is readily discernible from the record. And the second half of that formulation simply restates the prejudice inquiry of appellate review. Under that test, any sentence an appellate court would vacate becomes correctable under Rule 35(a), and the words "arithmetical" and "technical" do no work.

B. <u>This Court's precedent and Rule 35's history confirm that allocution errors fall outside the Rule.</u>

1. This Court's decision in *Hill* construed a different version of Rule 35, and DePape does not contend that it controls the meaning of the current Rule. It

remains significant, however, because of what rulemakers and Congress did in response to the distinctions it drew. In *Hill*, this Court held that an allocution error does not render a sentence "illegal" and that Rule 35's "narrow function" was "to permit correction at any time of an illegal sentence, not to reexamine errors occurring at the trial or other proceedings prior to the imposition of sentence." 368 U.S. at 430.[2] In response, the Rules Committee created a separate, time-limited category—"a sentence imposed in an illegal manner"—to reach the kind of procedural defect at issue in *Hill*. Fed. R. Crim. P. 35 advisory committee's note to 1966 amendment; *see* 3 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 618 (5th ed. 2026) (noting that the 1966 amendment "was specifically intended to overrule the holding in" *Hill*). Nearly two decades later, Congress eliminated Rule 35's provision to correct sentences "imposed in an illegal manner" as part of the Sentencing Reform Act, in an effort to ensure that "the sentence imposed in the public forum during the sentencing hearing would remain constant, immune from later modification." *Abreu-Cabrera*, 64 F.3d at 71 (quoting *Cook*, 890 F.2d at 674–75); *see* Fed. R. Crim. P. 35 advisory committee's note to 1991 amendment (referring to "the finality of determinate sentencing that Congress attempted to resolve by eliminating former Rule 35(a)"). And when the Committee

[2] *Hill*'s description of the error as, at most, "a failure to comply with the formal requirements of the Rule," 368 U.S. at 429, does not make an allocution error "technical" within the meaning of Rule 35(a). *Hill* used that phrase to distinguish a violation that is "neither jurisdictional nor constitutional" from "a fundamental defect which inherently results in a complete miscarriage of justice," i.e., the kind of error cognizable on collateral review. *Id.* at 428. That distinction concerns the gravity of the error, not whether it is the kind of mechanical mistake that can be corrected without a new exercise of sentencing discretion. And *Hill* itself held that the violation fell outside Rule 35 as then written. *Id.* at 430.

restored a limited correction authority in 1991, it did not revive the "illegal manner" clause. Instead, it chose different, narrower words—"arithmetical, technical, or other clear error"—producing what the leading treatise calls "a very narrow provision" for correcting "obvious technical errors in the sentence." Wright & Miller, *supra*, § 612. The Committee explained that it meant to reach "obvious technical mistakes," not to take "a significant step toward returning Rule 35 to its former state" by "inject[ing] into Rule 35 a degree of post-sentencing discretion" of the kind Congress had eliminated. Fed. R. Crim. P. 35 advisory committee's note to 1991 amendment.

Thus, the drafters knew how to authorize correction of a sentence imposed through a procedurally defective hearing. They had done so once, in response to an allocution case, and Congress had repealed that authority. The government's motion below made the connection explicit: it invoked *Hill* and the 1966 amendment to argue that Rule 35(a) reaches errors in the "manner" of sentencing. 2-ER-226–227. But the provision that once reached such errors is gone. After 1987, "the district court no longer had authority to correct a sentence because it was illegal or was illegally imposed"; such challenges "now must be made on direct appeal or by motion under § 2255." Wright & Miller, *supra*, § 618. The Ninth Circuit's opinion restores through a strained judicial gloss on the phrase "other clear error" the very authority Congress expressly took away. The court below did not acknowledge any of this history; its opinion does not cite *Hill*, the 1966 amendment, or the Advisory Committee's notes.

2. The Advisory Committee's note also confirms DePape's interpretation of Rule 35(a). The Committee said the authority "is intended to be very narrow"; that it is limited to "acknowledged and obvious errors in sentencing"; and that it is "not intended to afford the court the opportunity . . . simply to change its mind about the appropriateness of the sentence." Fed. R. Crim. P. 35 advisory committee's note to 1991 amendment. A resentencing to cure an allocution error does exactly what the Committee disclaimed: it reopens the court's discretionary judgment about the appropriate sentence so that the court may decide, again, what sentence to impose.

The district court relied instead on a different phrase in the note: that the provision extends to "errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a)." App. 17a, 24a. Because a preserved allocution error ordinarily results in a remand, the district court reasoned, it qualifies. The Ninth Circuit did not cite the note, but its reasoning rests on the same premise: an allocution error falls within Rule 35(a) because it "requires correction whenever a lower sentence is possible." App. 8a. That premise takes the note's language out of context, for two reasons.

First, the note says the authority extends "only to those cases in which an obvious error or mistake has occurred *in the sentence*, that is, errors which would almost certainly result in a remand of the case to the trial court." Fed. R. Crim. P. 35 advisory committee's note to 1991 amendment (emphasis added). Whatever the remand clause adds, it describes errors "in the sentence" itself, not errors in the proceeding that produced it or in the manner of its imposition. An allocution error is not an error "in the sentence." The sentence DePape received was within the

statutory range and the court's discretion; the defect lay in how it was imposed. Such a procedural error may well lead to a remand, but it is not the kind of error the note describes.

Second, reading the remand language as the district court did—and as the Ninth Circuit's reasoning assumes—would contradict the sentence that immediately follows in the same note, which states that the Rule 35 is not intended to afford the court the opportunity "simply to change its mind about the appropriateness of the sentence." Fed. R. Crim. P. 35 advisory committee's note to 1991 amendment. An allocution error results in a remand precisely because the district court must exercise its discretion again. The Third Circuit read the note the same way: it quoted the remand language but held that an error "best addressed on direct appeal" falls outside the scope of Rule 35(a). *M.M.*, 23 F.4th at 220, 224.

C. The Ninth Circuit's reading conflicts with the structure of federal sentencing law.

1. Rule 35(a) is a narrow exception to the finality of a criminal sentence, 18 U.S.C. § 3582(b)–(c), and the Rules themselves show that it does not authorize a plenary resentencing. Specifically, the Rules confirm that a Rule 35(a) proceeding to "correct" a sentence is distinct from a plenary resentencing hearing. Rule 43 requires the defendant's presence at "sentencing," but excludes proceedings that "involv[e] the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c)." *Dillon*, 560 U.S. at 828 (quoting Fed. R. Crim. P. 43(a)(3), (b)(4)). As this Court explained in *Dillon*, Rule 43 thereby "sets the proceedings authorized by § 3582(c)(2) and Rule 35 apart from other sentencing proceedings." *Id*. The Court

relied on that feature of Rule 43 to confirm that § 3582(c)(2) is a "narrow exception to the rule of finality" rather than a "plenary resentencing proceeding[]," just like a proceeding to "correct" a sentence under Rule 35. *Id.* at 827–28. A proceeding at which the defendant's presence is not even required can hardly be the proper remedy to cure the denial of the right of allocution. *See* Fed. R. Crim. P. 32(i)(4)(A)(ii). That the district court here chose to bring DePape back does not change the nature of the authority it invoked.

2. The Ninth Circuit's construction is also in tension with Rule 32. Rule 32 requires an opportunity for allocution "[b]efore imposing sentence." Fed. R. Crim. P. 32(i)(4)(A). And Rule 35 defines "sentencing" as "the oral announcement of the sentence." Fed. R. Crim. P. 35(c). The allocution right exists because "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green*, 365 U.S. at 304 (plurality opinion). And the point of Rule 32's guarantee is that the defendant speaks while the court's decision is still open, so that he may actually influence it. *See Gunning*, 401 F.3d at 1147; *see also United States v. Landeros-Lopez*, 615 F.3d 1260, 1268 (10th Cir. 2010) (holding that a court violates the right of allocution by definitively announcing the sentence before the defendant speaks). A post-announcement allocution before the same judge, days after the court has pronounced and explained the sentence, is a different thing.

The Fourth Circuit has recognized as much in a closely related context. In *Spring*, the district court departed upward without first telling the parties it was considering a departure, depriving them of the opportunity Rule 32 then

guaranteed "to comment on . . . matters relating to the appropriate sentence." 305 F.3d at 282 (quoting Fed. R. Crim. P. 32(c)(1) (2001)). Because the parties learned of the departure only when the court announced it, "the sole option left to [the defendant] was to request reconsideration of a decision that had already been announced," and "[t]his is not equivalent to proper adversarial process before a decision is reached." *Spring*, 305 F.3d at 282. The remedy was vacatur and remand. *Id.* at 283. The Ninth Circuit's rule converts Rule 32's guarantee into an after-the-fact opportunity to ask the court to reconsider a decision it had very recently made. And because Rule 35(a)'s 14-day deadline compels a hurried proceeding, the rule allows a district court to cure the denial of allocution by checking a box, preserving the form of the right while discarding its substance.

Thus, where Rule 32 has been violated, the established remedy is vacatur and remand for resentencing. *See Gunning*, 401 F.3d at 1149. That remedy differs from what DePape received in ways that matter. On remand, the defendant would receive a plenary resentencing, and the court of appeals may, in an appropriate case, direct that it proceed before a different judge. *See, e.g.*, *United States v. Slinkard*, 61 F.4th 1290, 1297 (10th Cir. 2023) ("Reassignment will help preserve the appearance of justice, which is an essential purpose of the right of allocution."); *United States v. Avery*, 807 F. App'x 74, 76–77 (2d Cir. 2020) (vacating for denial of meaningful allocution and reassigning on remand because the judge's "repeated and unwavering statements" about the sentence meant she would "have substantial difficulty" setting that view aside). As the Second Circuit has put it, "there is a difference between speaking to a judge when the slate is clean and speaking after

sentencing in an effort to have the judge change his mind." *Avery*, 807 F. App'x at 76 (quoting *United States v. Gonzalez*, 529 F.3d 94, 98 (2d Cir. 2008)). That courts of appeals often reassign such cases shows that they do not regard a later allocution before the same judge as a cure. The decision below treats it as one, and in doing so forecloses any consideration of reassignment, because the Rule 35(a) hearing necessarily occurs before the judge who committed the error.

3. Nor is the Ninth Circuit's analogy to Guidelines errors persuasive. The court reasoned that correcting a Guidelines arithmetic error "often requires reapplication of the discretionary 18 U.S.C. § 3553(a) factors." App. 8a. But an arithmetic error is correctable because the sentence resulted from a mechanical mistake that can be fixed mechanically; any renewed exercise of sentencing discretion is merely a consequence of the mechanical correction, not the very purpose of the proceeding itself. *Cf. United States v. Yost*, 185 F.3d 1178, 1181 (11th Cir. 1999) (holding that after discovering that it had sentenced the defendant under the guideline for an offense to which he had not pleaded guilty, the district court could revisit other rulings at resentencing). An allocution error is wholly different: the renewed exercise of discretion is the entire purpose of the sentence "correction" proceeding.

III. The question is important and recurring.

Rule 35(a) applies at every federal sentencing, and the question of its scope arises regularly. Allocution errors recur with surprising frequency, as reflected by the many appellate decisions addressing them. *See, e.g.*, *Adams*, 252 F.3d at 286; *Reyna*, 358 F.3d at 350; *Gunning*, 401 F.3d at 1149; *Bustamante-Conchas*, 850 F.3d at 1133. Each such error now presents the question whether the district court may,

within 14 days, route the case into a Rule 35(a) proceeding rather than leave it to appellate review.

But the Ninth Circuit's reasoning is not limited to allocution errors. Its reasoning is much broader and rests on the premise that "the failure of the district court to follow the procedures of Rule 32 constitutes clear error." App. 5a–6a (quoting *Bigman*, 906 F.2d at 395). On that premise, any obvious Rule 32 violation—such as failure to confirm whether the defendant had discussed the PSR with counsel, failure to rule on a disputed portion of the PSR, or failure to give notice of a contemplated departure—becomes a basis for vacating and redoing a sentence within 14 days. *Cf. Spring*, 305 F.3d at 281 n.2. The decision thus transforms a narrow error-correction rule into a general mechanism for procedural do-overs.

The question is also one that only this Court can resolve. The Advisory Committee addressed the scope of the provision in 1991 in terms the courts of appeals now read in different ways, and courts on both sides invoke the same note. The source of the uncertainty is thus the drafting history itself, not any subsequent change in the Rule's text, and only an authoritative construction of that text can resolve it. The courts of appeals have had more than three decades to settle the meaning of the 1991 language and have not done so.

IV. This case is an excellent vehicle.

This case presents the question cleanly. The facts are not in dispute: the district court did not afford DePape an opportunity to allocute, the government moved under Rule 35(a) to "reopen" the sentencing proceedings, DePape objected,

and the district court vacated its original sentence and reimposed the (same) sentence under Rule 35(a). *See* App. 3a–4a. The question is purely legal, and it was preserved at every stage, both in the district court and on direct appeal. *Id.* And the court of appeals resolved the question in a published opinion as the sole basis for its judgment affirming the sentence.

The question is also outcome-determinative. If the Rule 35(a) procedure adopted by the district court was unlawful, then DePape is entitled to have the unremedied Rule 32 violation in the original sentencing addressed on appeal, which, under settled circuit law, means vacatur and a plenary resentencing, and an opportunity to request a new sentencing judge on remand. *See Gunning*, 401 F.3d at 1149.

Further, that the district court reimposed the same sentence after the Rule 35(a) hearing does not render the question academic, and a resentencing on remand would not be an empty exercise. The question is whether the Rule 35(a) hearing was authorized at all, and the rushed proceeding under Rule 35(a) "to correct" DePape's sentence bears little resemblance to the one he would receive on remand. The original sentencing had been scheduled, over DePape's objection, in the middle of his state criminal trial. 2-ER-249–257. The district court imposed concurrent statutory-maximum sentences—five years above the probation officer's recommendation—while describing DePape's conduct as "unprecedented." 1-ER-57–63. It granted the government's Rule 35(a) motion the next day, before DePape had responded, and set the reopened hearing for a date during the ongoing state trial. 1-ER-32–33. That hearing lasted a mere 18 minutes, and it proceeded on the

premise that, as the Ninth Circuit emphasized, all "previously resolved issues" remained fixed. 1-ER-17–31; App. 9a. Rule 35(a)'s 14-day deadline drove that rushed pace. Nothing would drive it on remand, where DePape would receive a plenary resentencing, with full adversarial presentation, and possibly before a different judge.

A resentencing on remand would also take place on a different record. After the federal sentence was imposed, a California court sentenced DePape to life imprisonment without the possibility of parole for the same conduct. The district court ordered its sentence to run concurrently with any state sentence, 1-ER-62–63, but it had no occasion to consider what the § 3553(a) factors—including the need for the sentence "to protect the public from further crimes of the defendant," 18 U.S.C. § 3553(a)(2)(C)—require of a federal sentence imposed alongside a state sentence of life without parole. And a court resentencing DePape on remand would consider any changed circumstances. *See Pepper v. United States*, 562 U.S. 476, 490–93 (2011). With time for reflection, a full adversarial presentation, and the changed circumstances before it, that court could reach a different conclusion. Whether it would is not the point. DePape was entitled to that proceeding; instead, he received an abbreviated one that Rule 35(a) does not authorize.

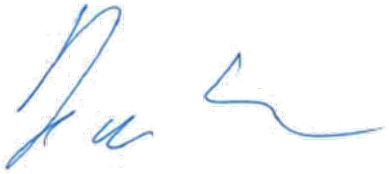
CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

JODI LINKER
Federal Public Defender
Northern District of California

October 29, 2026



TODD M. BORDEN*
ANGELA CHUANG
Assistant Federal Public Defenders

** Counsel of Record for Petitioner*