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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff - Appellee*, v. DAVID WAYNE DEPAPE, *Defendant - Appellant*.	No. 24-3458 D.C. No. 3:22-cr-00426-JSC-1 OPINION

Appeal from the United States District Court
for the Northern District of California
Jacqueline Scott Corley, District Judge, Presiding

Argued and Submitted December 10, 2025
San Francisco, California

Filed March 25, 2026

Before: Patrick J. Bumatay, Anthony D. Johnstone, and Ana de Alba, Circuit Judges.

Opinion by Judge Bumatay

SUMMARY*

Criminal Law

Affirming David Wayne DePape's sentence, the panel held that, where the sentencing court violates Fed. R. Crim. P. 32 by not affording a defendant the right to allocute, the sentencing court can correct the error as an "arithmetical, technical, or other clear error" under Fed. R. Crim. P. 35(a).

Failing to afford a defendant his Rule 32 allocution right is unquestionably erroneous and is thus correctable as "other clear error" under Rule 35(a). The district court therefore properly re-sentenced DePape under Rule 35(a) after giving him a chance to personally address the court.

The panel affirmed DePape's convictions in a concurrently filed memorandum disposition.

COUNSEL

Ross D. Mazer (argued), Helen L. Gilbert, and Kyle F. Waldinger, Assistant United States Attorneys; Merry J. Chan, Chief, Appellate Section, Criminal Division; Craig H. Missakian, United States Attorney; Office of the United States Attorney, United States Department of Justice, San Francisco, California; for Plaintiff-Appellee.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Todd M. Borden (argued) and Angela Chuang, Assistant Federal Public Defenders; Jodi Linker, Federal Public Defender; Office of the Federal Public Defender, San Francisco, California; for Defendant-Appellant.

OPINION

BUMATAY, Circuit Judge:

A criminal defendant has a right to personally address the sentencing court before any sentence is imposed. Fed. R. Crim. P. 32(i)(4)(A)(ii). But what happens when a sentencing court violates Rule 32 by not affording a defendant the right to allocute? Can the sentencing court correct the error as an "arithmetical, technical, or other clear error" under Federal Rule of Criminal Procedure 35(a)? Under the plain text of Rule 35(a), the answer is yes.

We thus affirm David Wayne DePape's sentence.[1]

I.

After a jury trial, David Wayne DePape was convicted of attempting to kidnap a federal officer under 18 U.S.C. § 1201(d) and assaulting a family member of a federal official under 18 U.S.C. § 115(a)(1)(A). At DePape's sentencing hearing, the district court heard from counsel for both DePape and the government. But the district court did not ask DePape if he wanted to address the court personally, as Rule 32 requires. The district court then sentenced

[1] In a concurrently filed memorandum disposition, we also affirm DePape's convictions.

DePape to the statutory maximum—concurrent sentences of 240 months on the first count and 360 months on the second. Later that afternoon, the government realized the mistake. It moved to reopen sentencing under Rule 35(a), noting the failure to allow DePape the opportunity to allocute. DePape opposed the motion.

The next day, the district court granted the government's motion, vacated its prior sentence, and scheduled a new sentencing hearing. DePape opposed reopening the hearing, arguing that doing so would exceed Rule 35(a)'s narrow scope. Eleven days after the initial sentencing hearing, after receiving briefing on the issue from DePape and the government, the district court reopened sentencing. This time, DePape allocuted and apologized for his actions. The district court reimposed a sentence identical to the one from the initial hearing.

DePape appeals his sentence, arguing that the district court improperly resentenced him under Rule 35(a). We review de novo whether the district court had authority to modify its judgment under Rule 35(a). *United States v. JDT*, 762 F.3d 984, 1005 (9th Cir. 2014).

II.

A.

Rule 35(a) provides that "[w]ithin 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a). We have not yet addressed whether a violation of Rule 32's right to allocute constitutes an "arithmetical, technical, or other clear error" that may be corrected under Rule 35(a). The government argues that the

Rule 32 error falls within the category of "other clear error." We agree.

As always, we start with the text. *United States v. Myers*, 136 F.4th 917, 921 (9th Cir. 2025). First, let's define "arithmetical" and "technical" error. While neither party contends that the Rule 32 error is an "arithmetical" or "technical" error, their definitions help us understand the meaning of "other clear error." Any grade schooler can tell us what an "arithmetical" error is. It involves a numerical error of "addition, subtraction, multiplication, [or] division." American Heritage Dictionary (3d ed. 1996). And a "technical" error is one involving "strict legal interpretation." *United States v. Engstrom*, 166 F.4th 835, 843 (9th Cir. 2026) (quoting *Technical*, Oxford English Dictionary (online ed. 2009)).

Second, "clear error" is a "legal term of art," *Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for So. Cal.*, 508 U.S. 602, 652 (1993) (Thomas, J., concurring in part), and refers to "[a] trial judge's decision or action that appears to a reviewing court to have been unquestionably erroneous," Black's Law Dictionary (7th ed. 1999). And "other," in this context, denotes a thing that is "[s]eparate or distinct from that or those already specified or implied." *Other*, Oxford English Dictionary (online ed. 2004). So "other clear error" here means an "unquestionably erroneous" decision that's different from a "technical" or "arithmetical" error.

With that context in mind, the failure to afford a defendant his allocution right under Rule 32(i)(4)(A)(ii) is "other clear error" that may be corrected under Rule 35(a). Generally, "the failure of the district court to follow the procedures of Rule 32 constitutes clear error." *United States*

v. Bigman, 906 F.2d 392, 395 (9th Cir. 1990) (simplified). Rule 32 unambiguously requires 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). We've recognized that allocution is a "vital part of the sentencing process." *Boardman v. Estelle*, 957 F.2d 1523, 1526 (9th Cir. 1992). Indeed, "[a]s 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) (simplified); *see also United States v. Behrens*, 375 U.S. 162, 167 (1963) (Harlan, J., concurring) (describing Rule 32 as "embod[ying]" an "elementary right").

A Rule 32(i)(4)(A)(ii) error is so clear that, "when a district court *could have* lowered a defendant's sentence, we . . . presume[] prejudice and remand[.]" *United States v. Gunning*, 401 F.3d 1145, 1149 (9th Cir. 2005). Multiple sister circuits likewise describe a Rule 32(i)(4)(A)(ii) violation as "clear." *See, e.g.*, *United States v. Adams*, 252 F.3d 276, 286 (3d Cir. 2001) (a district court's error in failing to personally address a defendant before sentencing was "plain, because it was clear or obvious" (simplified)); *United States v. Reyna*, 358 F.3d 344, 350 (5th Cir. 2004) (calling failure to follow Rule 32's "clear language" an "obvious or plain" error); *United States v. Hernandez-Espinoza*, 890 F.3d 743, 747 (8th Cir. 2018) ("[T]he failure to give the defendant the right of allocution is clear error that requires a reversal."); *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1133 (10th Cir. 2017) (explaining that "failure to personally address the defendant and offer an opportunity to allocute" is "a clear failure of the trial court"). And we've

agreed that the violation of the analogous Rule 32.1 allocation right, which "is clearly not substantively different from the right to allocute under Rule 32," is a "clear or obvious" error. *United States v. Daniels*, 760 F.3d 920, 924–25 (9th Cir. 2014) (simplified).

Given this precedent, failing to afford a defendant his Rule 32 allocution right is unquestionably erroneous and falls within Rule 35(a)'s "other clear error." *See United States v. Delgado*, 256 F.3d 264, 279 (5th Cir. 2001) (calling Rule 35(a)'s predecessor provision "the most appropriate authority under which the district [court] could resentence [the defendant] and correct the clear error of failing to afford him his right to allocute"). Thus, the district court properly re-sentenced DePape under Rule 35(a) after giving him a chance to personally address the court. *See* 18 U.S.C. § 3582(c)(1)(B) (permitting courts to modify a prison sentence if "expressly" permitted by Rule 35).

B.

DePape makes several arguments that his sentencing was invalid under Rule 35(a). None are persuasive.

Following the Third Circuit, DePape argues that Rule 35(a)'s "other clear error" should be limited to errors "akin to arithmetical or a technical error," such as "the failure to impose a mandatory term of imprisonment, a mandatory fine, or a mandatory order of restitution," which "produce illegal sentences outside of a court's discretion." *See United States v. M. M.*, 23 F.4th 216, 220–21 (3d Cir. 2021) (simplified). It is true that, under the canon of *ejusdem generis*, "a general phrase can be given a more focused meaning by the terms linked to it." *Fischer v. United States*, 603 U.S. 480, 488 (2024). But this does not help DePape. Even if we were to give "clear error" a narrower reading, a

Rule 32(i)(4)(A)(ii) violation would still fit. Like an arithmetical error, such as miscalculating the sentencing guidelines, or a technical error, such as failing to impose a mandatory sentence, denying a defendant the right to allocute is a procedural error that is readily discernible from the sentencing record and requires correction whenever a lower sentence is possible. *See Engstrom*, 166 F.4th at 843 (suggesting that "arithmetical and technical errors" are "easily identifiable and readily ascertained from the sentencing proceeding and judgment" (simplified)).

DePape next argues that Rule 35(a) is inappropriate here because resentencing after a belated allocution requires the reexercise of the sentencing court's discretion. According to DePape, any error requiring the use of sentencing discretion falls out of Rule 35(a)'s scope. But that's wrong. While it's true that correcting a Rule 32(i)(4)(A)(ii) violation may result in reconsideration of the sentencing factors, *see Gunning*, 401 F.3d at 1147 (the sentencing court must "listen and give careful and serious consideration" to the defendant's allocution) (simplified), nothing in Rule 35(a)'s text limits its scope in this way. Indeed, an "arithmetical error" involving the Guidelines calculations—which unquestionably falls within Rule 35(a)'s purview—often requires reapplication of the discretionary 18 U.S.C. § 3553(a) factors. *See United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) ("Guidelines are the starting point and the initial benchmark" and must "be kept in mind" during "consider[ation] [of] the § 3553(a) factors[.]" (simplified)). And we've already held that a district court commits a "clear error of a technical kind" when it sentences a defendant based on a mandatory-minimum sentence when it thought safety-valve relief applied, and that the district court would have "had the latitude under Rule 35 to correct its perceived

technical error" by re-sentencing under the discretionary § 3553 factors afresh. *Engstrom*, 166 F.4th at 843. So we see 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." *See* Fed. R. Crim. P. 35(a). After all, correcting the allocution error doesn't require the district court to revisit its prior factual findings, its resolution of any disputed Guidelines issues, or any other previously resolved issues.

Finally, DePape contends that the district court violated his right to due process because it granted the government's Rule 35(a) motion less than 24 hours after the government filed it, without adversarial briefing, and despite DePape's opposition to the motion. We see no due process violation. The district court gave DePape four days to respond to the government's motion to reopen sentencing, did not reopen sentencing until it received his opposition briefing, and addressed his arguments against the applicability of Rule 35(a) in a well-reasoned order. *See United States v. Montoya*, 82 F.4th 640, 650 n.13 (9th Cir. 2023) (explaining that due process in criminal proceedings is generally satisfied with notice and an adequate opportunity to be heard).

III.

A district court's failure to afford a defendant the allocution right is unquestionably erroneous and is thus correctable as "other clear error" under Rule 35(a).

AFFIRMED.

NOT FOR PUBLICATION

FILED

MAR 25 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DAVID WAYNE DEPAPE, Defendant - Appellant.	No. 24-3191 D.C. No. 3:22-cr-00426-JSC-1 MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jacqueline Scott Corley, District Judge, Presiding

Argued and Submitted December 10, 2025
San Francisco, California

Before: BUMATAY, JOHNSTONE, and DE ALBA, Circuit Judges.

David Wayne DePape appeals his convictions for attempting to kidnap a federal officer under 18 U.S.C. § 1201(d) and assaulting a family member of a federal official under 18 U.S.C. § 115(a)(1)(A). We have jurisdiction under 28 U.S.C. § 1291. We affirm.[1]

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[1] In a concurrently filed opinion, we also affirm DePape's sentence.

1. DePape first challenges the sufficiency of the evidence against him. We review this claim in the light most favorable to the prosecution and consider whether "any rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *United States v. McCarron*, 30 F.4th 1157, 1162 (9th Cir. 2022) (quoting *United States v. Nevils*, 598 F.3d 1158, 1161 (9th Cir. 2010) (en banc)).

Sufficient evidence supports that DePape attempted to kidnap a federal officer "on account of[] the performance of official duties." 18 U.S.C. § 1201(a)(5). "[W]hether an officer is engaged in the performance of official duties" is determined by "whether the officer's actions fall within [her] agency's overall mission, in contrast to engaging in a personal frolic of [her] own." *United States v. Ornelas*, 906 F.3d 1138, 1149 (9th Cir. 2018) (internal quotation marks omitted). The government offered evidence that DePape targeted the then-Speaker of the House because he saw her as a leader of the Democratic Party and responsible for congressional policy he disliked. Other evidence showed that DePape planned the attack on the former Speaker to "teach [other Members of Congress] a lesson" that there are consequences for their actions. A rational trier of fact could have concluded that DePape attempted to kidnap the former Speaker "on account of[] the performance of [her] official duties." 18 U.S.C. § 1201(a)(5).

Sufficient evidence also supports that DePape assaulted an immediate family member of the former Speaker with intent to impede her while engaged in the performance of her official duties or to retaliate against her on account of her official duties. *Id.* § 115(a)(1)(A). DePape stated he assaulted the then-Speaker's husband because "something needed to be done" about the Speaker's alleged corruption. This shows that the assault was intended to cause interference, to retaliate, or both.

2. DePape next asserts that the jury instructions inadequately presented his defense theory. We review the "formulation of jury instructions for abuse of discretion," but review "de novo whether those instructions correctly state the elements of the offense and adequately cover the defendant's theory of the case." *United States v. Liew*, 856 F.3d 585, 595–96 (9th Cir. 2017).

DePape requested that the district court define "on account of" as "because of" and specify that the former Speaker's performance of her official duties had to be "as a member of Congress." It was not an abuse of discretion to deny this instruction. The terms "on account of" and "because of" are synonymous. *See O'Gilvie v. United States*, 519 U.S. 79, 83 (1996). And the provided jury instructions explained that "official duties" specifically pertained to "United States official[s]" like "Member of Congress." The instruction conveyed that the former Speaker's performance of her official duties needed to be performed in her capacity as a

member of Congress and thus "adequately encompass[ed DePape's] theory." *Liew*, 856 F.3d at 598.

3. Finally, DePape claims that the district court violated Federal Rule of Evidence 403 by admitting graphic footage of the assault's aftermath. We review the admission of evidence under Rule 403 for abuse of discretion. *United States v. Jimenez-Chaidez*, 96 F.4th 1257, 1264 (9th Cir. 2024). The district court's decision to admit the evidence was not "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc).

The district court properly ruled that the video footage and photographs of the injuries to the then-Speaker's husband were relevant to DePape's intent to retaliate against Speaker Pelosi "on account of the performance of official duties," tended to show that DePape took a "substantial step" towards the attempted kidnapping charge, and was probative of whether he used a "dangerous weapon" to inflict serious bodily injury under the interference charge. Moreover, the evidence was not unduly prejudicial. Undue prejudice applies only to a narrow class of materials of "scant or cumulative probative force, dragged in by the heels for the sake of [their] prejudicial effect." *United States v. Plascencia-Orozco*, 852 F.3d 910, 926 (9th Cir. 2017) (internal quotation marks omitted). Avoiding "unfair prejudice" does not require "scrub[bing] the trial clean of all evidence that may have an emotional

impact." *United States v. Ganoe*, 538 F.3d 1117, 1124 (9th Cir. 2008) (internal quotation marks omitted). While the video footage and photographs are graphic, they "go to an element of [each] charge," proving intent, substantial step, dangerous weapon, and serious bodily injury. *Cf. United States v. Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005). They thus present no "undue tendency to suggest decision on an improper basis." *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (quoting Fed. R. Evid. 403 advisory committee's note). Because the materials were relevant to proving DePape had the requisite intent and took the requisite steps for each of his charges, the district court did not abuse its discretion in admitting them.

Because we find no error, we do not consider whether any error was harmless.

AFFIRMED.

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DAVID WAYNE DEPAPE, Defendant - Appellant.	No. 24-3191 D.C. No. 3:22-cr-00426-JSC-1 Northern District of California, San Francisco ORDER
UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DAVID WAYNE DEPAPE, Defendant - Appellant.	No. 24-3458 D.C. No. 3:22-cr-00426-JSC-1 Northern District of California, San Francisco

Before: BUMATAY, JOHNSTONE, and DE ALBA, Circuit Judges.

The panel unanimously votes to deny the petitions for panel rehearing and rehearing en banc. Fed. R. App. P. 40. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on it. *Id.* The petitions for panel rehearing and rehearing en banc (Dkt. 63) are therefore **DENIED**.

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DAVID WAYNE DEPAPE, Defendant.	Case No. 22-cr-00426-JSC-1 **ORDER RE: DEFENDANT'S MOTION IN OPPOSITION TO REOPENING SENTENCING UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 35** Re: Dkt. Nos. 243, 250

On May 18, 2024, the Court granted the government's motion to reopen the sentencing hearing pursuant to Federal Rule of Criminal Procedure 35(a), scheduled the reopened sentencing hearing for Tuesday, May 28, 2024 at 9:30 a.m., and directed any response from Mr. Depape be filed by noon on Wednesday, May 22, 2024. (Dkt. No. 244.)[1] Mr. Depape filed a timely response opposing the Court's reopening of his sentencing. (Dkt. No. 250.) Among other things, Mr. Depape argued Rule 35(a) does not apply to the clear allocution error underlying the reopening of the sentencing procedure. At the May 28, 2024 hearing, the Court gave Mr. Depape the opportunity to orally address his Rule 35(a) argument. After hearing argument, the Court concluded Rule 35(a) applies to the clear sentencing error at issue, set aside its previous sentence, and proceeded to resentence Mr. Depape. This Order reflects the Court's analysis as to the applicability of Rule 35(a).

DISCUSSION

Federal Rule of Criminal Procedure 32(i)(4)(A)(ii) provides "[b]efore imposing a sentence, the court must: . . . address the defendant personally in order to permit the defendant to speak or

[1] Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

present any information to mitigate the sentence." *See Green v. United States*, 365 U.S. 301, 304 (1961) ("Taken in the context of its history, there can be little doubt that the drafters of Rule 32(a) intended that the defendant be personally afforded the opportunity to speak before imposition of sentence. . . . The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."). "In exercising the right to allocution, a defendant has the right to fully present all available accurate information bearing on mitigation of punishment, and the district court has a duty to listen and give careful and serious consideration to such information." *United States v. Mack*, 200 F.3d 653, 658 (9th Cir. 2000). The Ninth Circuit presumes prejudice when a district court fails to accord a defendant his allocution right before imposing a sentence. *United States v. Gunning*, 401 F.3d 1145, 1149 (9th Cir. 2005) ("[W]hen a district court *could have* lowered a defendant's sentence, we have presumed prejudice and remanded, even if we doubted that the district court *would have* done so.").

Under Rule 35(a), the Court "may correct a sentence that resulted from" clear error, which includes "errors which would almost certainly result in a remand of the case to the trial court for further action." Fed. R. Crim. P. 35, advisory committee notes to 1991 amendments. Failing to provide a defendant his Rule 32 allocution right is clear error "which would almost certainly result in a remand of the case." *Id.*; *see, e.g.*, *Gunning*, 401 F.3d at 1149-50 (9th Cir. 2005) (finding district court's failure to provide the defendant his right of allocution at resentencing hearing required remand, saying "we are forced to hold that the district court's **major error was recrudescent**." (emphasis added)); *United States v. Daniels*, 760 F.3d 920, 926 (9th Cir. 2014) (vacating sentence and remanding because "[a] district court that does not offer a supervised releasee the chance to exercise [the right to allocute] **commits plain error**." (emphasis added)); *United States v. Mendez*, 501 F. App'x 619, 620 (9th Cir. 2012) (remanding for resentencing based on district court's denial of allocution right because "**the error is not harmless**, because the district court could have lowered [the defendant's] sentence and we cannot say that a personal statement from [the defendant] would not have made a difference." (emphasis added)); *United States v. Guntipally*, 735 F. App'x 432, 433 (9th Cir. 2018) (vacating sentence and remanding because the defendant "was not personally invited to allocute and, because she "could have

received a shorter sentence, **the denial of the right of allocution is not harmless**." (emphasis added)). So, Rule 35(a) permits the Court to correct Mr. Depape's sentence for failure to provide the opportunity to allocute.

Mr. Depape argued an allocution error "falls outside Rule 35(a)'s ambit" because (1) "an allocution error is not akin to an arithmetical or a technical error," (2) a resentencing hearing is unavailable under Rule 35, and (3) Rule 35 can no longer be used "to seek correction of a sentence on the ground that it was imposed *in an illegal manner*." (Dkt. No. 250 at 11-13.)

A. Denial of Rule 32 Allocution Right Is Readily Ascertainable

Mr. Depape relies on *United States v. M. M.* to insist Rule 35(a) is inapplicable to allocution error. 23 F.4th 216 (3d Cir. 2021). In *M. M.*, the Third Circuit overturned the district court's Rule 35(a) correction of a defendant's sentence for lack of clear error and stated, "clear error must be akin to an arithmetical or a technical error." *Id.* at 221. The Third Circuit reasoned "clear errors subject to correction under Rule 35(a) . . . . are easily identifiable and readily ascertained from the sentencing proceeding and judgment." *Id.* at 221. Because the Third Circuit did "not perceive error from the record at sentencing," the "type of error that occurred [in *M. M.*] simply d[id] not fit the parameters of Rule 35(a)." *Id.* at 223-24. Here, by contrast, the sentencing transcript clearly evidences the denial of Mr. Depape's allocution right. (Dkt. No. 247.) The allocution error is both "easily identified [and] readily ascertainable from the sentencing record." *M. M.*, 23 F.4th at 221. So, allocution error fits within the parameters of Rule 35(a), including the Third Circuit's description of those parameters.

Moreover, *M. M.* acknowledged "clear error would 'extend only to those cases in which an obvious error or mistake has occurred in the sentence' that 'would almost certainly result in a remand of the case to the trial court.'" *Id.* at 220; *see also United States v. Fields*, 552 F.3d 401, 404 (4th Cir. 2009) ("Although courts take different approaches to Rule 35(a), all essentially agree that 'clear error' under the Rule requires some reversible error at the initial sentencing (or here, the initial resentencing) hearing."). As explained above, the Ninth Circuit has repeatedly held the failure to provide a defendant an allocution opportunity is clear error requiring remand. *See, e.g.*, *Gunning*, 401 F.3d at 1149. So, allocution error falls within the scope of the plain language of

Rule 35(a).

B. A Resentencing Hearing Is Available

Mr. Depape contends a resentencing proceeding is unavailable under Rule 35 because Rule 35(a) is "limited only to 'correcting' clear error," and does not encompass plenary resentencing proceedings. Federal Rule of Criminal Procedure 43 "sets the proceedings authorized by § 3582(c)(2) and Rule 35 apart from other sentencing proceedings" as it acknowledges those proceedings can sometimes occur in the defendant's absence. *Dillon v. United States*, 560 U.S. 817, 828 (2010). But *Dillon* concerned whether 18 U.S.C. § 3582(c)(2) "authorize[d] a sentencing or resentencing proceeding" and does not hold resentencing to correct a clear error is unavailable under Rule 35(a). *Id*. at 825. And Rule 43's provision "a defendant need not be present" if a "proceeding involves the correction or reduction of a sentence under Rule 35" does not mandate a defendant's absence. Rule 43 is thus inapplicable when the relevant allocution correction requires the defendant's presence. Indeed, the 1991 advisory committee notes to Rule 35 explain "the Committee contemplates that the court will act in accordance with Rules 32 and 43 with regard to any corrections in the sentence." So, sometimes the defendant needs to be present.

Both the Seventh Circuit and the Fifth Circuit have held a district court can rectify an allocation error by setting aside the sentence, reopening the proceeding, and providing the defendant the opportunity to speak. *United States v. Luepke*, 495 F.3d 443, 448 (7th Cir. 2007) (explaining a "denial of the right to allocation" can "be cured by the district court" if the "trial judge, realizing after sentencing that the right of allocution has been neglected, may rectify the situation by, in effect, setting aside the sentence, reopening the proceeding, and inviting the defendant to speak." (cleaned up)); *United States v. Conour*, 716 F. App'x 538, 542-43 (7th Cir. 2017) ("[a] belated allocution is error unless the district court puts aside its original determination and takes steps to *communicate* effectively to the defendant that, through his statement, he has a meaningful opportunity to influence the sentence.") (quoting *Luepke*, 495 F.3d at 450 (emphasis in original)); *United States v. Delgado*, 256 F.3d 264, 279 (5th Cir. 2001) (holding Rule 35 "was the most appropriate authority under which the district could resentence [a defendant] and correct the clear error of failing to afford him his right to allocute."); *see also United States v. Bustamante-*

Conchas, 850 F.3d 1130, 1150 (10th Cir. 2017) ("For 14 days after the sentencing hearing, the district court could set aside the sentence for the clear error of violating the defendant's right of allocution. *See* Fed. R. Crim. P. 35(a) (correcting clear error in sentence).") (Hartz, J., dissenting).

C. Rule 35(a) Still Covers Clear Error

Finally, Mr. Depape argues the post-1987 version of Rule 35 does not authorize correction of allocution errors.

Prior to 1966, Rule 35 provided "the court may correct an illegal sentence at any time." In *Hill v. United States*, the Supreme Court held this language did not permit the correction of a sentence imposed in an illegal *manner*, and, specifically, a sentence imposed without providing the defendant an opportunity to allocute. 368 U.S. 424, 430 (1962). In 1966, in response to *Hill*, Rule 35 was amended to give courts "power to correct a sentence imposed in an illegal manner." Fed. R. Crim. P. 35, advisory committee notes to 1966 amendments ("The amendment to the first sentence gives the court power to correct a sentence imposed in an illegal manner within the same time limits as those provided for reducing a sentence."); Fed. R. Crim. P. 35(a) (1966) ("The 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."); *see also United States v. Stevens*, 548 F.2d 1360, 1363 n.8 (9th Cir. 1977) ("[The category of sentences imposed in an illegal manner] was created in amendments to Rule 35 intended to change the result in *Hill v. United States*, in which the then Rule 35 was held to be inapplicable to correct a sentence imposed without granting the defendant the right of allocution." (cleaned up)).

In 1984, Rule 35 was rewritten to "eliminate much of [the] overlap [between Rule 35 and the statutory motion to vacate or correct a sentence under 28 U.S.C. § 2255] and to accommodate the Sentencing Reform Act." 3 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 612 (5th ed.). The 1984 amendments went into effect in 1987:

> Rule 35. Correction of Sentence
> (a) CORRECTION OF A SENTENCE ON REMAND. — The court shall correct a sentence that is 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, upon remand of the case to the court —
> (1) for imposition of a sentence in accord with the findings of the court

> of appeals; or
> (2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.
> (b) CORRECTION OF SENTENCE FOR CHANGED CIRCUMSTANCES. — The court, on motion of the Government, may within one year after the imposition of a sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, to the extent that such assistance is a factor in applicable guidelines or policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).

Pub. L. 98-473, Title II, § 215(b).[2]

In 1991, Rule 35 was again amended to add then subdivision (c) (the provision that became today's subdivision (a)), which stated: "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 inclusion of the new subdivision was

> intended to adopt, in part, a suggestion from the Federal Courts Study Committee 1990 that Rule 35 be amended **to recognize explicitly the ability of the sentencing court to correct a sentence imposed as a result of an obvious arithmetical, technical or other clear error, if the error is discovered shortly after the sentence is imposed**.

Fed. R. Crim. P. 35, advisory committee notes to 1991 amendments (emphasis added). The advisory committee notes explain a "shorter period of time would also reduce the likelihood of abuse of the rule by limiting its application to acknowledged and obvious errors in sentencing." *Id.*

> 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

[2] While the 1987 version of Rule 35 did not explicitly afford district courts the authority to reopen sentencing proceedings to correct clear error, some courts continued to hold Rule 35 permitted them such authority. *See, e.g., United States v. Cook*, 890 F.2d 672, 674-75 (4th Cir. 1989) (holding while Congress had amended Rule 35 in 1984 with the purpose "to impose on the new sentencing system a requirement that the sentence imposed in the public forum during the sentencing hearing would remain constant, immune from later modification," that did not alter "the inherent power in a court to correct an acknowledged and obvious mistake," so long as its correction occurred within the "period of time in which either party may file a notice of appeal.").

> 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.

The 2002 amendments relocated "[f]ormer Rule 35(c), which addressed the authority of the court to correct certain errors in the sentence," to Rule 35(a). Fed. R. Crim. P. 35, advisory committee notes to 2002 amendments. The 2009 amendments extended the period for the trial court to correct sentencing errors from 7 days to 14 days, and noted "[e]xtension of the period in this fashion will cause no jurisdictional problems if an appeal has been filed, because Federal Rule of Appellate Procedure 4(b)(5) expressly provides that the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a)." Rule 35 has not been amended since.

Nothing in any of these amendments suggest an intent to revert to the *Hill v. United States* regime in which "clear" sentencing errors could not be corrected under Rule 35 unless they resulted in an illegal sentence. To the contrary, as discussed above, after Rule 35 was amended in response to *Hill*, Rule 35 permitted courts to "correct an illegal sentence at any time and" to "correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence" (120 days). So, at the time, "Rule 35 distinguishe[d] among motions to reduce or correct an 'illegal' sentence, a lawful sentence, and a 'sentence imposed in an illegal manner.'" *United States v. Fowler*, 794 F.2d 1446, 1448 (9th Cir. 1986) (quoting 3 C. Wright, *Federal Practice and Procedure* §§ 582-86 at 380-407 (2d ed. 1982 & Supp. 1986)). However, with the 1991 amendments, the text of rule collapsed this distinction: rather than referring to an "illegal sentence" and a "sentence imposed in an illegal manner," the rule now only refers to "a sentence that resulted from . . . other clear error." Accordingly, the rule encompasses sentences that *result* from clear error—such as the failure to afford Mr. Depape an opportunity to allocute during the sentencing proceeding. That failure was a "clear error," and the ensuing sentence "resulted from" that error.

Defendant's arguments to the contrary are unpersuasive. Defendant cites to *Sevilla-Oyola*, arguing "illegal sentences" for the purposes of Rule 35(a) concern *only* the terms of punishment

itself rather than errors that occurred during the sentencing proceeding. (Dkt. No. 250 at 13 (quoting *United States v. Sevilla-Oyola*, 770 F.3d 1, 10 (1st Cir. 2014)). But the "illegal sentence[s]" phrase in *Sevilla-Oyola* quotes from *Hill v. United States*—which, as discussed above, was a 1962 Supreme Court decision applying the pre-1966 version of Rule 35 (the version that explicitly applied only to "illegal sentences" rather than "a sentence that resulted from . . . other clear error"). *Sevilla-Oyola*, 770 F.3d at 10 ("The function of Rule 35(a) is narrowly circumscribed: It 'permit[s] correction . . . of an illegal sentence.'" (quoting *Hill*, 368 U.S. at 430)). Moreover, the *Sevilla-Oyola* court explained "Rule 35(a) does not . . . enable a judge to fix errors committed at trial or during proceedings prior to the imposition of sentence." *Id.* at 11. Indeed, the holding in *Sevilla-Oyola* was "Rule 35(a) does not provide a means to revisit possible errors in the plea colloquy," as the plea colloquy is a separate proceeding from the sentencing. However, in this case, the Court rectified a clear error that occurred at the sentencing *itself*.

CONCLUSION

For the reasons stated above, Rule 35(a) permitted the Court to reopen sentencing to correct Mr. Depape's sentence for failure to provide him with the opportunity to allocute, because that clear error, if left undisturbed, would require remand. *See, e.g.*, *Gunning*, 401 F.3d at 1149 (9th Cir. 2005). The Court was not persuaded by Mr. Depape's other arguments against the Court resentencing Mr. Depape.

IT IS SO ORDERED.

Dated: May 28, 2024

Jacqueline Scott Corley

JACQUELINE SCOTT CORLEY
United States District Judge

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID WAYNE DEPAPE,

Defendant.

Case No. 22-cr-00426-JSC-1

ORDER RE: FEDERAL RULES OF CRIMINAL PROCEDURE 35 MOTION

Pending before the Court is the government's motion to reopen the sentencing hearing pursuant to Federal Rules of Criminal Procedure 35(a). Federal Rules of Criminal Procedure 32(i)(4)(A)(ii) requires the Court, prior to imposing a sentence, to "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." At the May 17, 2024 sentencing proceeding, no party brought to the Court's attention that it had not done so. Nonetheless, it was the Court's responsibility to personally ask Mr. Depape if he wanted to speak. As the Court did not do so, it committed clear error.

"Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a). Clear error means "errors which would almost certainly result in a remand of the case to the trial court for further action." Fed. R. Crim. P. 35(a) advisory committee's note to 1991 amendment. Assuming the defendant represents on appeal he would have spoken if personally asked, this error will almost certainly result in remand for resentencing. So, rather than wait for that remand, the Court will reopen the sentencing to permit Mr. Depape to speak should he wish. The Court will withhold entry of the Judgment and Commitment in the interim.

The defendant's Notice of Appeal, filed within moments of the government raising the

issue with the defense, does not divest the Court of jurisdiction to reopen the proceedings pursuant to Rule 35(a). While "the filing of a notice of appeal generally divests the trial court of jurisdiction. . . . [t]he purpose of this judicially-created doctrine is to avoid the potential confusion and waste of resources from having the same issue before two separate courts at the same time." *In re Silberkraus*, 336 F.3d 864, 869 (9th Cir. 2003). As a result, the Ninth Circuit has "been careful to note that the rule 'should not be employed to defeat its purposes nor to induce needless paper shuffling.'" *Id.* (citation omitted); *see also United States v. Seugasala*, 670 F. App'x 641 (9th Cir. 2016) (stating that the judge-made rule does not actually "strip[ ] the district court of [its] subject matter jurisdiction" and the district court may still take action that aids the appellate court in its review) (cleaned up). Holding the defendant's hasty notice of appeal divests the Court of jurisdiction to correct its clear error would defeat the purpose of the judicially-created doctrine, as well as the explicit purpose of Federal Rules of Criminal Procedure 35(a).

So, the Court GRANTS the government's motion to reopen the sentencing hearing and schedules the reopened sentencing hearing for Tuesday, May 28, 2024 at 9:30 a.m. Any response from the defendant shall be filed by noon on Wednesday, May 22, 2024.

IT IS SO ORDERED.

Dated: May 18, 2024

JACQUELINE SCOTT CORLEY
United States District Judge

United States District Court
Northern District of California