No. 07-1042

In the Supreme Court of the United States

PATRICK LETT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
J. CAM BARKER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that any error in the district court's initial conclusion about its sentencing discretion was not "clear error" subject to correction under Federal Rule of Criminal Procedure 35(a) because, as the district court acknowledged, the issue was a novel one as to which the proper answer was not clear.

2. Whether, after the court of appeals determined that the district court was without authority to amend its initial sentence under Rule 35(a), the court of appeals correctly remanded the case for reinstatement of the initial sentence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-22a) is reported at 483 F.3d 782. The order of the district court amending its previously imposed sentence (Pet. App. 23a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2007. A petition for rehearing was denied on November 30, 2007 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on February 12, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Alabama, petitioner

was convicted of possessing with intent to distribute powder cocaine and crack cocaine, in violation of 21 U.S.C. 841 (2000 & Supp. V 2005). Pet. App. 2a, 31a-32a, 43a-44a. The district court sentenced him to 60 months of imprisonment. *Id.* at 59a. Shortly thereafter, the district court modified the sentence to time served, which was 11 days. *Id.* at 29a, 33a. The court of appeals vacated that modified sentence and remanded for reinstatement of the original sentence. *Id.* at 22a.

1. In 2004, following his discharge from the Army, petitioner joined a cocaine distribution conspiracy involving at least 14 other individuals and led by his cousin Michael. Pet. App. 4a-6a. On seven separate occasions during a five-week period in the Spring of 2004, petitioner sold crack or powder cocaine to or in the presence of an undercover agent. *Id.* at 4a-5a, 56a. The quantities involved in the sales ranged from one gram to approximately 14.5 grams, totaling 60.42 grams of crack cocaine and 7.89 grams of powder cocaine. *Id.* at 5a-6a. Petitioner left the conspiracy and reenlisted in the Army. *Id.* at 5a.

In 2005, petitioner was charged with seven counts of possessing with intent to distribute powder cocaine and crack cocaine, in violation of 21 U.S.C. 841(a)(1), and one count of conspiring to possess with intent to distribute powder cocaine and crack cocaine, in violation of 21 U.S.C. 846. Indictment 1-7. Petitioner reached a plea agreement with the government. He agreed to plead guilty to the possession counts and to waive his right to appeal or collaterally attack his sentence, with exceptions for a sentence above the statutory maximum or guideline range, a claim of ineffective assistance of counsel, or in the event of a future retroactive amendment to the Sentencing Guidelines. Plea Agmt. ¶¶ 2, 19-22. In

exchange, the government agreed to drop the conspiracy count and recommend a sentence at the low end of the applicable advisory Sentencing Guidelines range, as determined by the court. *Id.* at ¶¶ 16-17. The district court accepted petitioner's guilty plea. 12/30/2005 Order on Guilty Plea.

The Presentence Report calculated petitioner's base offense level as 32, which the PSR reduced to 27 as a result of a three-level adjustment for acceptance of responsibility and a two-level reduction through application of the safety valve under Sentencing Guidelines § 2D1.1(b)(7) (2005). See Pet. App. 44a.[1] Petitioner had a criminal history category of I, which combined with his offense level generated a Guidelines range of 70 to 87 months of imprisonment. *Ibid.* The PSR further stated that "[a]lthough it appears that the defendant is eligible for consideration under U.S.S.G. § 5C1.2, [which mandates that in certain circumstances the defendant be sentenced "in accordance with the applicable guidelines without regard to any statutory minimum sentence"] because the minimum of the guideline range is 70 months, which is greater than the statutory mandatory minimum 60 months, 5C1.2 consideration is a moot issue." *Id.* at 25a. Petitioner did not object to the PSR, either in writing or at the sentencing hearing. *Id.* at 25a, 44a.

At sentencing, the court determined that petitioner's advisory Guidelines range was 70 to 87 months of imprisonment. Pet. App. 44a. The court determined that the statutory minimum sentence for petitioner's offenses was 60 months of imprisonment. *Id.* at 57a; see 21

[1] In its order of April 24, 2006, the district court misidentified the relevant Guidelines provision as Section 2D1.1(b)(1). Pet. App. 24a. That subsection provides for an *increase* of two levels for use of a firearm.

U.S.C. 841(b)(1)(B). After considering the pertinent sentencing factors, the district court concluded that a sentence below the Guidelines range was appropriate, but determined that it could not impose a sentence below the statutory minimum. Pet. App. 59a. The court sentenced petitioner to concurrent sentences of 60 months of imprisonment on each count of conviction. *Ibid*. Although the court did not expressly rule on petitioner's motion for a sentence below the statutory mandatory minimum on the ground that a sentence at that level would be unconstitutionally excessive, *id.* at 56a, it stated that it had considered the sentencing factors set forth in 18 U.S.C. 3553(a) (2000 & Supp. V 2005) and determined that a 60-month sentence of imprisonment was "a reasonable sentence," *id.* at 60a, thus implicitly rejecting petitioner's constitutional argument.

Eleven days later, the district court filed an order in which it "*sua sponte* reconsider[ed] the sentence imposed" on petitioner and imposed a new sentence of time served. Pet. App. 23a, 29a.[2] In its order, the court stated that, upon further reflection, it believed petitioner to be eligible for a sentence below the statutory minimum pursuant to the "safety valve" provision of Sentencing Guidelines § 5C1.2(a). Pet. App. 23a. That provision, quoted above, reiterates the substance of 18 U.S.C. 3553(f), under which, if a defendant meets certain criteria, "the court shall impose a sentence pursuant to [the] guidelines * * * without regard to any statutory minimum sentence." It is undisputed that petitioner meets the statutorily prescribed criteria.

[2] The court apparently acted in response to a letter sent to it by a friend of petitioner's who was a law student. Pet. App. 9a-10a. The record does not reflect any response to that letter by petitioner or the government. *Id.* at 10a.

In its order, the district court stated that it had originally sentenced petitioner according to the court's "consistent[]" application of Section 5C1.2 before this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005). Pet. App. 25a. The district court explained that it had previously construed the Guidelines to preclude application of the safety valve "if the applicable guidelines range is above the mandatory minimum." *Id*. at 26a. That interpretation was compelled, the court had believed, by the text of Section 5C1.2, which requires that a below-statutory-minimum sentence be imposed "in accordance with the applicable guidelines." *Ibid.* Although petitioner had not objected to the PSR, which was premised on the same understanding, or otherwise objected to the court's determination that petitioner was not eligible for a sentence below the statutory minimum, the court invoked Federal Rule of Criminal Procedure 35(a) to consider *sua sponte* whether this Court's decision in *Booker* changed the proper analysis of Section 5C1.2. Pet. App. 24a, 26a.[3]

The district court started its discussion by acknowledging that the effect of *Booker* "certainly is not clear" and that "there is little or no guidance from the courts of appeal or even from sister courts throughout the country," none of which had addressed the issue in factually similar circumstances. Pet. App. 26a-27a. Although the court recognized that it was "clear" that petitioner would not have been eligible for a sentence below the statutory mandatory minimum "[i]n the pre-*Booker* mandatory guidelines world," the court concluded, without further explanation, that, after *Booker*, the safety

[3] Rule 35(a) provides that "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a).

valve provision allows a sentencing court to impose a sentence below the statutory minimum when the defined criteria are met even when the otherwise applicable Guidelines range, before any variance or departure, is above the statutory minimum. *Id.* at 27a. Finding that its initial views to the contrary "were error," *id.* at 28a, the court imposed a modified sentence of imprisonment for time served, which was 11 days. *Id.* at 29a. The court entered judgment in accordance with that sentence. *Id.* at 31a-40a.

2. The government appealed the sentence on the basis that the district court lacked the authority under Rule 35(a) to modify the originally imposed sentence on the basis of an "error" that the court admitted was "certainly * * * not clear," Pet. App. 26a, 28a, as well as on the ground that an 11-day term of imprisonment was unreasonable for the crimes of which petitioner was convicted. The government contended that the initial sentence did not result from an "arithmetical" or "technical" error and that any error in the district court's initial assessment of its sentencing discretion was not "clear." Gov't C.A. Br. 17; Gov't C.A. Reply Br. 3-4.

The court of appeals agreed and vacated the sentence. Pet. App. 3a-22a. Citing the advisory committee's notes to Rule 35 and decisions of several courts of appeals, the court stated that the district court's corrective power under Rule 35(a) is "limited in scope to those obvious errors that result in an illegal sentence or that are sufficiently clear that they would, as the committee notes specify, 'almost certainly result in a remand of the case.'" Pet. App. 16a (quoting Fed. R. Crim. P. 35 advisory committee's note (1991)). That standard was not satisfied here, the court held, because it was not clear that the district court's initial assessment of its sentenc-

ing discretion was wrong. *Id.* at 17a. The court explained that *Booker* did not address Section 3553(f) and that "[r]easonable arguments can be made on both sides" of the question whether, after *Booker*, Section 3553(f) allows a district court to sentence below a statutory minimum when the advisory Guidelines range is above that minimum. *Id.* at 17a-18a. The court of appeals did not decide that question, holding only that its proper resolution was not clear. *Id.* at 18a.

Because there was no "arithmetical, technical, or other clear error" underlying the district court's initial sentence, the court of appeals held that Rule 35(a) did not provide authority for the district court to change it. Pet. App. 21a. The court of appeals therefore vacated the district court's modification order and remanded for the district court to reinstate its original sentence of 60 months of imprisonment. *Id.* at 22a.

ARGUMENT

Petitioner seeks review of the court of appeals' holding that Federal Rule of Criminal Procedure 35(a), which permits a district court to correct a "clear error" in sentencing, provides authority for the district court to revise its sentence only on the basis of errors that are "obvious," Pet. App. 21a (quoting Fed. R. Civ. P. 35 advisory committee's note (1991)). That holding is correct, and it does not conflict with any decision of this Court or another court of appeals. Further review of petitioner's claim is therefore unwarranted.

1. Petitioner argues (Pet. 24) that any "legal error that has a consequential impact on the sentence imposed" necessarily constitutes "clear error" within the meaning of Rule 35(a) and that a district court therefore has authority under that Rule to reconsider its sentence

on the basis of any claim of legal error, no matter how *un*clear the proper resolution of the legal question may be. That contention is contrary to the position advanced by petitioner in the court of appeals and to the plain text of Rule 35(a). The court of appeals correctly held that Rule 35(a) authorizes a district court to resentence a defendant only if the court's original sentence was based on an error that was "clear" in the sense of being "an obvious error or mistake * * * which would almost certainly result in a remand" from the court of appeals if the sentence were appealed. Pet. App. 21a (quoting Fed. R. Civ. P. 35 advisory committee's note (1991)).

a. In this Court, petitioner argues (Pet. 24-25) that the court of appeals erred by "interpret[ing] Rule 35 to create a class of sentencing errors that can only be corrected by a circuit court." In petitioner's view (Pet. 24), the "clear error" standard of Rule 35(a) is satisfied whenever the district court believes it committed "a legal error that has a consequential impact on the sentence imposed." That argument is contrary to the position advanced by petitioner before the court of appeals, and petitioner should be deemed to have waived it.

At oral argument before the court of appeals, petitioner invited the court to construe the "clear error" standard in Rule 35(a) consistently with the "plain error" standard of Federal Rule of Criminal Procedure 52(b). See Pet. App. 20a. As this Court has held, in order for an unpreserved claim of error to be corrected under Rule 52(b), the error must as a threshold matter be "plain," which the Court has equated with "obvious." *United States* v. *Olano*, 507 U.S. 725, 732-737 (1993). Petitioner likewise recognized below that the "clear error" standard of Rule 35(a) similarly requires that an error be "obvious," in addition to being reversible. Pet.

C.A. Br. 16 (construing "clear error" to be "an 'obvious error or mistake' which, if appealed, 'would almost certainly result in a remand'") (quoting Fed. R. Crim. P. 35 advisory committee's note (1991)). Necessarily, any rule that permits correction only of "obvious" errors "create[s] a class of sentencing errors" that are outside the rule's scope, Pet. 24, *i.e.*, those determinations that, albeit erroneous, were not obviously so. Petitioner should not now be heard to complain that the court of appeals adopted the standard he advocated.

b. In any event, petitioner's claim lacks merit. The plain text of Rule 35(a) creates the distinction of which petitioner complains: "[c]lear error," as well as arithmetical and technical error, is subject to correction under the Rule; any other perceived error is not. Fed. R. Crim. P. 35(a). The notes of the Advisory Committee on Criminal Rules confirm that the power to correct a sentence under Rule 35(a) applies only to "acknowledged and obvious errors in sentencing":

> 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.

Fed. R. Crim. P. 35 advisory committee's note (1991). Petitioner does not cite any decision of any court of appeals that equates the term "clear error" in Rule 35(a) with any "legal error that has a consequential impact on the sentence imposed," as petitioner urges, Pet. 24.

Petitioner contends (Pet. 13-15) that the court of appeals' decision conflicts with decisions from the First and Second Circuits, but that is not the case. In *United States* v. *Goldman*, 41 F.3d 785 (1994), cert. denied, 514

U.S. 1007 (1995), the First Circuit upheld the district court's authority to correct an error in sentencing based upon the court's mistaken impression that the defendant had no prior drug conviction, when, "[i]n fact," the defendant "had a prior drug conviction," which made the applicable maximum sentence life imprisonment. *Id.* at 789. Unlike the present case, the district court found that its error was "clear," *ibid.* and the defendant did not contest the obviousness of the error, but instead argued that it was "fundamentally unfair" to correct the error by imposing a higher sentence. *Ibid.* In *United States* v. *Waters*, 84 F.3d 86 (2d Cir.), cert. denied, 519 U.S. 905 (1996), the district court stated that it "clearly did not take * * * into account" the policy statement in Sentencing Guidelines § 7B1.3(e) on the calculation of sentences when time served would be credited by the Bureau of Prisons, although that Section did "clearly apply." *Id.* at 89 (quoting district court). The court of appeals adopted the advisory committee's note, which limits Rule 35(a) to correction of "an obvious error or mistake," *ibid.* (quoting *United States* v. *Abreu-Cabrera*, 64 F.3d 67, 72 (2d Cir. 1995)), and upheld the district court's determination that it "clear[ly]" did not consider a policy statement that "courts are *required* to consider" in sentencing, *id.* at 90; see *id.* at 91 ("we find that the district court neglected to *even consider* U.S.S.G. § 7B1.3(e)"). Thus, there is no conflict between the decision below and the other decisions construing Rule 35(a) upon which petitioner relies.[4]

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[4] Before 2002, the substance of Rule 35(a) was located in Rule 35(c). In 2002, the text of Rule 35(c) was moved to subsection (a), and nonsubstantive changes were made in the wording of that provision. See Fed. R. Crim. P. 35 advisory committee's note (2002). The provision is cited as Rule 35(a) throughout this brief.

A more recent decision of the Second Circuit confirms that it construes Rule 35(a) consistently with the court of appeals in this case. In *United States* v. *Donoso*, 521 F.3d 144 (2008), the Second Circuit reaffirmed its adoption of the advisory committee's interpretation that Rule 35(a) permits post-sentencing correction by the district court only in instances of "obvious error or mistake" that "would almost certainly result in a remand of the case to the trial court for further action." *Id.* at 146 (quoting *Abreu-Cabrera*, 64 F.3d at 72). Although the court of appeals recognized that the precise question of law that was the basis of the revised sentence in that case—whether "a district court may direct that a defendant's federal sentence run consecutively to a state sentence that has not yet been imposed by the state court"—had not previously been determined by the court of appeals, *id.* at 147, the court proceeded to hold that the reasoning of one of its precedents "in a slightly different context" "compel[led] the conclusion" that the district court lacked the authority to impose such a sentence, *id.* at 148, 149. Because the district court not only "erred" in its initial sentence, but "[f]urther, because, on appeal from that sentence, [the court of appeals] would 'almost certainly' have remanded" in light of circuit precedent, the initial sentence constituted "clear error" subject to correction under Rule 35(a). *Id.* at 149. The *Donoso* decision is thus entirely consistent with the court of appeals' insistence in this case that the district court's initial sentence be not merely erroneous, but "clearly" so before it can be corrected pursuant to Rule 35(a). Pet. App. 21a (noting that, on the underlying substantive question presented in this case "[t]here is no decision on point from any

court, and reasonable people could differ about the matter").[5]

Finally, petitioner argues (Pet. 23-24) that there is no "legal or practical value" in keeping district courts from issuing a revised sentence under Rule 35(a) any time they believe that the initial sentence rested on an error of law, even a debatable one. He argues that the purpose of the Rule is to avoid appeals and that allowing the correction of any perceived harmful error would further that goal. Yet there is little efficiency to be gained by expanding the scope of Rule 35(a) to encompass reconsideration by the district court of debatable points of law: If reasonable arguments exist on both sides of an issue, an appeal will often follow regardless of which way the district court resolves the question, and the withdrawal of the initial judgment and issuance of an amended judgment will only delay matters by starting a new clock for filing a notice of appeal by the party adversely affected by the modification. See Fed. R. App. P. 4(b)(1)(A)(i) and (B)(i) (time for appeal runs from "entry of either the judgment or the order being appealed").

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[5] The decisions cited in the court of appeals' opinion (Pet. App. 15a-16a) likewise uniformly recognize that an error must be obvious to be corrected under Rule 35(a). See *United States* v. *Yost*, 185 F.3d 1178, 1181 (11th Cir. 1999) ("[A]ny error to be corrected under that subsection must be obvious."), cert. denied, 529 U.S. 1108 (2000); *United States* v. *Cook*, 890 F.2d 672, 675 (4th Cir. 1989) (stating that any error to be corrected under predecessor to Rule 35(a) must be "an acknowledged and obvious mistake"); accord *United States* v. *Higgs*, 504 F.3d 456, 461 (3d Cir. 2007); *United States* v. *Galvan-Perez*, 291 F.3d 401, 407 (6th Cir. 2002); *United States* v. *Sadler*, 234 F.3d 368, 373 (8th Cir. 2000); *United States* v. *Barragan-Mendoza*, 174 F.3d 1024, 1029 (9th Cir. 1999); *United States* v. *Porretta*, 116 F.3d 296, 300 (7th Cir. 1997); *Abreu-Cabrera*, 64 F.3d at 72.

Further, petitioner ignores that Rule 35(a) was not intended to serve the interest of efficiency exclusively, but was also designed to further the public's interest in the finality of sentences, *i.e.*, it was "not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines." Fed. R. Crim. P. 35 advisory committee's note (1991). Petitioner's construction of Rule 35(a) would subordinate the Rule's interest in finality to a district court's second thoughts about the legality of the sentence. And, in any event, his policy arguments in favor of a broader authority in the district court cannot change the Rule's plain text by eliminating the express limitation that only "clear" errors are subject to correction by the district court.

c. Petitioner is also mistaken in his assertion (Pet. 16-20) that the court of appeals' decision conflicts with those of other circuits that hold that a district court's erroneous understanding of the extent of its sentencing discretion constitutes reversible error. None of those cases, however, involved the extent of a district court's power under Rule 35 to correct its own sentence. The cited cases stand for the proposition that when the court of appeals determines, applying the appropriate standard of review, that the district court misconstrued the scope of its sentencing discretion, such an error requires a remand, so that the district court may sentence the defendant in light of a correct understanding of its discretion.[6] In other words, those cases hold that such an

[6] *United States* v. *Mejia-Pimental*, 477 F.3d 1100, 1109 (9th Cir. 2007) (holding that the district court's erroneous belief that it lacked sentencing discretion required a remand for resentencing); *United States* v. *Mancari*, 463 F.3d 590, 598 (7th Cir. 2006) (same); *United States* v. *Gardiner*, 463 F.3d 445, 461-462 (6th Cir. 2006) (same); *United*

error is not harmless and is an appropriate basis for remand. Those cases do not, however, hold that such "error" always and necessarily constitutes "clear error" in the sense, required by Rule 35(a), that the error be an "obvious" one. In all but one of the cases cited by petitioner, the defendant had preserved the objection and the court of appeals' review was *de novo*, such that any finding of non-harmless "error" was sufficient for a remand.[7] In *United States* v. *Gardiner*, 463 F.3d 445 (6th Cir. 2006), the one case cited by petitioner in which the defendant failed to preserve a claim that the district court erroneously lacked awareness of the extent of its sentencing discretion, the court of appeals noted that it could remand only if the district court's misapprehension of its discretion constituted "plain error." *Id.* at 460, 461. The court remanded based on the district court's "misapprehension" that it could not enhance the defendant's sentence on the basis of judicial fact-finding because the court's error was "clear under the law of

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States v. *Dominguez*, 296 F.3d 192, 194, 200 (3d Cir. 2002) (same); *United States* v. *Delgado-Reyes*, 245 F.3d 20, 22-23 (1st Cir. 2001) (same); *United States* v. *Pierce*, 132 F.3d 1207, 1208-1209 (8th Cir. 1998) (same); see also *United States* v. *Thorpe*, 191 F.3d 339, 344 (2d Cir. 1999) (holding that a district court's possible mistake as to its sentencing discretion requires remand for clarification of the district court's beliefs).

[7] See *Mejia-Pimental*, 477 F.3d at 1103 (defendant claimed entitlement to the safety-valve); *Mancari*, 463 F.3d at 596 (defendant sought below-guidelines sentence based on overrepresentation of his criminal history); *Dominguez*, 296 F.3d at 194-195 (reviewing de novo court's "refusal" to downward depart based on family circumstances); *Delgado-Reyes*, 245 F.3d at 22 (defendant and government had urged that court had discretion to depart); *Thorpe*, 191 F.3d at 342 (defendant had sought sentence of probation); *Pierce*, 132 F.3d at 1207-1208 (defendant urged that court could decline to impose prison sentence).

this Circuit." *Id.* at 461. Thus, *Gardiner* confirms that where the applicable standard for correcting an error with respect to the district court's sentencing discretion is "plain error" (or, as here, "clear error") some errors will not be subject to correction because they are not sufficiently obvious.

d. Although petitioner asserts (Pet. 22) that the district court's "discretion clearly was not limited in the manner he thought," petitioner does not seriously contend that the district court's mistake rose to the level of an "obvious" error. As the district court observed, before this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), the district court had "consistently" construed the Guidelines to preclude application of the safety valve "if the applicable guidelines range is above the mandatory minimum," Pet. App. 25a, 26a, based on the court's understanding that the text of Section 5C1.2 permitted a below-statutory-minimum sentence only if "the applicable guidelines" range placed the defendant below the statutory minimum. *Ibid.* The novel question that the district court faced was whether *Booker*, which rendered the Sentencing Guidelines advisory, 543 U.S. at 245, required a change to the court's "consistent[]" practice, a question as to which the court acknowledged the answer was "certainly is not clear." Pet. App. 25a-26a. Yet, while petitioner asserts that the district court "clearly" had discretion to apply Section 5C1.2 even when the defendant's advisory guidelines range was above the statutory minimum, Pet. 22, he does not even cite *Booker*, much less explain why, contrary to the district court's view, *Booker* renders the district court's consistent pre-*Booker* practice "clearly" erroneous.

Significantly, in order to rule in petitioner's favor, this Court would first have to resolve the question

whether the district court's initial view of its discretion was erroneous, a question of law on which no court of appeals has yet spoken. The court of appeals did not resolve the merits of the question in this case, Pet. App. 18a, relying instead on its determination that, in light of the absence of any precedent on point, the district court's error, if it was error, was not sufficiently "obvious" to come within Rule 35(a), *id.* at 21a. And the court of appeals has subsequently reiterated that the question remains an open one in that court. See *United States* v. *Quirante*, 486 F.3d 1273, 1276 (11th Cir. 2007).

2. Petitioner claims (Pet. 25-30) that, even if the district court lacked authority to impose its revised sentence, the court of appeals erred in remanding the case to the district court with directions to reinstate the original sentence, without first considering whether the originally imposed sentence was infected with legal error. Petitioner's claim lacks merit, and it does not warrant this Court's review.

The only appeal in this case was the government's appeal from the 11-day sentence imposed by the district court in its revised judgment. The only questions raised by the government in its appeal were (a) whether the district court had authority under Rule 35(a) to correct its purported error and (b) whether, if it did have such authority, the court's sentence of 11 days (time served) was unreasonable in this case. Pet. App. 13a. Petitioner did not challenge his initial sentence in the court of appeals, and the court had no occasion to pass on it. See Pet. C.A. Br. 15-36. Upon vacating the modification order, the court properly remanded the case for reinstatement of the initial sentence and entry of judgment accordingly. Pet. App. 22a. That is the routine practice of

courts of appeals when a district court modifies a sentence without authority.[8]

Petitioner may present the constitutional and other challenges to his original sentence to which he alludes (Pet. 26-30) in an appeal from the final judgment on remand reimposing that sentence or in a motion for collateral relief under 28 U.S.C. 2255, to the extent those arguments are allowed by his plea agreement. See Plea Agmt. ¶¶ 19-21 (allowing limited appeal and collateral review of the sentence). For instance, to the extent petitioner suggests that "the deficient performance of [his] initial trial counsel" deprived him of his constitutional right to the effective assistance of counsel, Pet. 29, or he believes that he would be entitled to a reduced sentence based on the retroactive amendments to the crack cocaine guidelines, Pet. 26-27, those claims are expressly preserved for appeal or collateral attack, Plea Agmt. ¶¶ 21(c), 22 (allowing such claims). Those claims are irrelevant, however, to the court's narrow decision in this appeal.

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[8] See *United States* v. *Griffin*, 524 F.3d 71, 82, 84-85 & n.15 (1st Cir. 2008) (after concluding that district court acted outside the time allowed by Rule 35(a), directing reinstatement of original sentence without reaching question whether district court correctly concluded that it had been error, in light of this Court's decision in *Cunningham* v. *California*, 127 S. Ct. 856 (2007), to enhance defendant's sentence based on judicially-found facts). See also *United States* v. *Robinson*, 368 F.3d 653, 657 (6th Cir. 2004); *United States* v. *Penna*, 319 F.3d 509, 513 (9th Cir. 2003); *United States* v. *Jones*, 238 F.3d 271, 273 (4th Cir. 2001) (per curiam); *United States* v. *Austin*, 217 F.3d 595, 598 (8th Cir. 2000); *United States* v. *Blackwell*, 81 F.3d 945, 947-949 (10th Cir. 1996); *United States* v. *Werber*, 51 F.3d 342, 347-349 (2d Cir. 1995); *United States* v. *Lopez*, 26 F.3d 512, 523 (5th Cir. 1994) (per curiam); *United States* v. *Daddino*, 5 F.3d 262, 265 (7th Cir. 1993) (per curiam); *United States* v. *Whittington*, 918 F.2d 149, 152 (11th Cir. 1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

J. CAM BARKER
Attorney

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