No. 12-705

In the Supreme Court of the United States

JOHN DOE, PETITIONER

v.

UNITED STATES

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government concedes (Opp. 5) that "conflict exists between the Ninth Circuit and the other circuits" about the extent to which courts may consider the non-assistance factors of 18 U.S.C. § 3553(a) in determining the size of a sentence reduction under Federal Rule of Criminal Procedure 35(b). And it does not contest the tremendous frequency with which the issue arises. See Pet. 25-26. It hardly could, since the government itself noted the frequency of Rule 35(b) motions among several "reasons * * * [that] rehearing en banc [wa]s warranted" for this "issue of exceptional importance" in *United States* v. *Grant*.[1] U.S. Pet. for Reh'g En Banc 1-2, *United States* v. *Grant*, 636 F.3d 803 (6th Cir. 2009) (No. 07-3831) ("Gov't Reh'g Pet"). The government nonetheless asserts the split is narrower than we described, "is unlikely to have much practical significance," Opp. 5, and this case is a poor vehicle because petitioner purportedly "has not explained * * * how the Section 3553(a) factors would justify a sentence reduction greater than the 84 months that he received." *Id.* at 17.

[1] Although the government maintains it considered the issue important only because the *Grant* panel opinion would have permitted "wide-ranging resentencing," Opp. 11 n.3, its petition also explicitly identified the frequency with which the issue arose and the purported "disparity" it would create "between defendants whose cooperation is complete before sentencing and those whose cooperation does not bear fruit until later." Gov't Reh'g Pet. 1-2; *id.* at 14 (citing "fairness" implications of panel rule).

The government's argument depends entirely on (i) reading the Sixth Circuit's *Grant* opinion to permit wholesale consideration of Section 3553(a) factors, though both the en banc Sixth Circuit and other courts of appeals have *explicitly* rejected that interpretation; (ii) asserting that petitioner seeks "plenary resentencing" though he advocates consideration of the *very same* factors most courts already review, which the government concedes "does not equate to a full, de novo resentencing," Opp. 6; and (iii) disregarding petitioner's pleadings detailing Section 3553(a) factors supporting further sentence reductions. Far from demonstrating that Rule 35(b) has a definite meaning, the brief in opposition reflects the conflicting positions the government *itself* has taken on the extent to which the Rule permits consideration of Section 3553(a) factors, contributing to the current "complexity and uncertainty," *United States* v. *Poland*, 562 F.3d 35, 42 (1st Cir. 2009) (Torruella, J., concurring), and yielding widely disparate reductions. Review is urgently needed.

A. The Three-Way Circuit Split Will Persist Absent Review

1. In an effort to minimize the three-way circuit split, Pet. 9-17, the government struggles to portray the Sixth Circuit's *Grant* rule that "§ 3553(a) factors have no role in Rule 35(b) proceedings," 636 F.3d at 816, as differing only in "terminology" (Opp. 8) from the "one-way ratchet" approach taken by the Seventh, Eighth, Tenth, and Eleventh Circuits, which permits a judge to consider Section 3553(a) factors to decrease a Rule 35(b) sentence reduction below that which would be warranted based on assistance alone. But the courts of appeals recognize the conflict, explicitly

citing *Grant* to illustrate that the "circuits * * * differ on whether [Section 3553(a)] factors may be considered" in determining the extent of a reduction. *United States* v. *Clawson*, 650 F.3d 530, 532 n.1 (4th Cir. 2011) (contrasting *Grant*, 636 F.3d at 814, with *United States* v. *Shelby*, 584 F.3d 743, 749 (7th Cir. 2009)).

That is unsurprising; after all, the *Grant* factors and Section 3553(a) serve fundamentally different purposes. As the decision below explained, the *Grant* factors are strictly "limited to determining the value of the defendant's substantial assistance," Pet. App. 7a, rather than independently evaluating "the nature and circumstances of the offense and the history and characteristics of the defendant," "the need for the sentence imposed to reflect the seriousness of the offense," provide "adequate deterrence," and "protect the public, and "the need to avoid unwarranted sentence disparities," and "to provide restitution to any victims." 18 U.S.C. § 3553(a). While the government asserts that the *Grant* factors "mirror" and "essentially restate the Section 3553(a) factors," Opp. 9-10, there is no serious question that they are far narrower. The Ninth Circuit recognizes that *Grant* permits "only a few non-assistance factors [to] be considered," 663 F.3d at 1048, and *Grant* itself recognized that *at most* "*some* of the factors we view as appropriate aspects of valuing the assistance" have *some* "overlap" with Section 3553(a). 636 F.3d at 818. *Grant* could not have been more explicit: "Rule 35(b) does not * * * authorize consideration of § 3553(a) factors." *Id.* at 816.

2. The government errs in contending that the Fourth Circuit permits consideration of Section

3553(a) factors only "to limit, but not to increase, the reduction warranted by the defendant's assistance." Opp. 9-10 n.2. The Fourth Circuit has categorically held that it "allow[s] the district court to consider *all relevant sentencing factors*." *United States* v. *Davis*, 679 F.3d 190, 196 (4th Cir. 2012) (emphasis added). Moreover, *each* of the considerations the Fourth Circuit found persuasive—"[n]othing in the plain language of Rule 35(b) restricts the district court from considering other factors when determining the extent of the sentence reduction"; district courts are afforded "broad discretion * * * during sentencing"; Section 3553(a) requires that "the sentencing court 'shall consider' [its] litany of sentencing factors"; and district courts must use their discretion "to determine an appropriate sentence," *ibid.*—equally support longer sentence reductions.[2]

B. The Issue Is Important

1. The government does not deny that Rule 35(b) reductions are extraordinarily common, that between 1700 and nearly 2098 defendants receive them every year, see Pet. 25-26, and that they are overwhelmingly the most common basis for sentence modifications nationwide. See U.S. Sentencing Comm'n, 2011

[2] While the government states that *Davis* emphasized that it was "'consistent' with those courts of appeals that have held that the Section 3553(a) factors may be used to limit, but not to increase, the reduction," Opp. 10 n.2, the court merely sought to distinguish its conclusion from the defendant's position that non-assistance factors could not be considered; the government neglects to mention that the court *also* said its decision was "consistent with the decision[] of" the Ninth Circuit, 679 F.3d at 196, which permits consideration of Section 3553(a) factors to *increase* a sentence reduction.

Sourcebook of Federal Sentencing Statistics 153 (2012) (49% of all sentence modifications made pursuant to Rule 35(b)). "It is a rare federal criminal trial that does not require the use of criminal witnesses," Ann C. Rowland, *Effective Use of Informants and Accomplice Witnesses*, 50 S.C. L. Rev. 679, 697 (1999), who testify seeking a sentence reduction.

The government nonetheless asserts that whether non-assistance factors can be considered in reducing a sentence below the level warranted by assistance alone "may not have significant practical import" (Opp. 10) because the one circuit the government acknowledges has adopted such a rule has stated that "a resentencing under Rule 35(b) is not the equivalent of a de novo sentencing." *Id.* at 10-11 (quoting *United States* v. *Tadio*, 663 F.3d 1042, 1055 (9th Cir. 2011), cert. denied, 132 S. Ct. 2703 (2012)). That is a red herring; "de novo resentencing" is not necessary for defendants to obtain a significant benefit.

The rule petitioner advocates only requires consideration of the *very same* factors courts already consider under the "one-way ratchet" approach currently used by the Seventh, Eighth, Tenth, and Eleventh Circuits; the sole difference is that under the symmetrical "two-way ratchet" rule employed by the Fourth and Ninth Circuits, the court can consider those factors "irrespective of the direction in which those factors cut"—whether they support a reduction "greater than, less than, or equal to the reduction that the defendant's assistance, considered alone, would warrant." *Tadio*, 663 F.3d at 1047, 1055. And as the government acknowledges, "every court of appeals has held that consideration of non-assistance factors in determining the amount of the [Rule 35(b)]

reduction does not equate to a full, de novo resentencing." Opp. 6. So long as "the starting point is the original sentence" and the "triggering factor for any reduction" is assistance, the proceeding is not a "de novo sentencing." *Tadio*, 663 F.3d at 1055.

2. This case starkly illustrates that the different rules have great "practical significance." Opp. 5.

Petitioner asked that the district court further "reduce [petitioner's] sentence" under Rule 35(b) based on "post-conviction rehabilitation" evidenced by "his exceptional personal development * * * while incarcerated," Def't's Sent. Mem. In Support of Reconsideration 11, 14, Doc. No. 399 (Dec. 7, 2010), and because the "standard margin of departure in similar Rule 35 cases * * * begins at 50%." *Id.* at 10. Those considerations plainly are cognizable under Section 3553(a). As this Court has recognized, "evidence of postsentencing rehabilitation may be highly relevant to several of the § 3553(a) factors," particularly the defendant's "history and characteristics." *Pepper* v. *United States*, 131 S. Ct. 1229, 1242 (2011) (citing § 3553(a)(1)). Indeed, the Court emphasized that the very factors petitioner demonstrated here, see Def't's Sent. Mem. 11—sobriety, attending classes, supporting his family, and re-establishing familial relationships—were "clearly relevant to the selection of an appropriate sentence." *Ibid.* Similarly, a district court may consider "the need to avoid unwarranted sentence disparities," § 3553(a)(6), in imposing a shorter sentence. *Gall* v. *United States*, 552 U.S. 38, 54 (2007). Thus, a showing that others received greater sentence reductions is relevant under Section 3553(a). See *ibid.* Courts have considered such factors in awarding substantial sentence reductions.

E.g., *United States* v. *Bond*, No. 01-CR-1140(LBS), 2005 WL 2347843, at *2 (S.D.N.Y. Sept. 23, 2005) (granting 40% sentence reduction based in part on rehabilitation). But implementing *Grant*, the district court "caution[ed]" petitioner not to raise Section 3553(a) factors, stating that "a review of the [Section] 3553 factors[] is not permitted," and permitting the parties to "submit memoranda in advance of th[e] hearing—relating only to the value of [petitioner's] assistance." D. Ct. Op. & Order 3, Doc. No. 402 (Mar. 16, 2011).

Had this case been prosecuted within the Fourth or Ninth Circuits, the district judge would have been free to consider that information in determining petitioner's sentence reduction. The circuits' inconsistent application of Rule 35(b) promotes sentencing disparities that undermine important federal interests in sentencing uniformity, see generally Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, § 212(a)(2), 98 Stat. 1987, 1990. It is particularly intolerable given Section 3553's stated purpose of "avoid[ing] unwarranted sentencing disparities." 18 U.S.C. § 3553(a)(6).

C. The Sixth Circuit's Decision Is Wrong

The government's principal contention is that the decision below was correct because "[a] district court must determine the extent of any sentence reduction under Rule 35(b) based *exclusively* on the defendant's assistance." Opp. 12 (emphasis added). But to preserve the one-way ratchet approach, the government hedges, adding that a district court "may not *reduce* the sentence below the level warranted by that assistance based on other factors." *Ibid.* (emphasis add-

ed). The government's shifting position underscores the confusion surrounding this recurring issue and the need for review.

1. The government defends the judgment below by saying that "[n]othing in Rule 35(b) suggests that a court may look beyond the nature and extent of a defendant's assistance." Opp. 16. But that argument conflicts with its position just pages earlier that the Sixth Circuit "permits consideration of non-assistance factors in the Rule 35(b) analysis." *Id.* at 7. It also flatly contradicts the position the government has advanced before many courts of appeals, where "[t]he Government [has] note[d] that the text of Rule 35(b) does not explicitly limit the district court's consideration of other sentencing factors, and argue[d] that consideration of such other factors may be warranted to ensure the ultimate sentence imposed is neither unreasonable nor unjust."[3] *Davis*, 679 F.3d at 195. And it conflicts with the views of "[e]very court [of appeals] that has addressed the question," which "has concluded that a court may consider at least some non-assistance factors" in determining the extent of a

[3] See, *e.g.*, U.S. Br. 10, *United States* v. *Davis*, 679 F.3d 190 (4th Cir. 2012) (No. 10-5234) ("A district court * * * should be allowed to consider the § 3553(a) factors underlying a defendant's original sentence, not only because Rule 35(b) permits it to do so, but also because a judge's failure to consider the statutory sentencing factors could result in an unjust sentence."); U.S. Br. 6, *United States* v. *Rublee*, 655 F.3d 835 (8th Cir. 2011) (No. 11-1065) ("the [District] Court was entitled to consider [non-assistance] factors" in determining extent of Rule 35(b) reduction); U.S. Br. 12-13, *United States* v. *Tadio*, 663 F.3d 1042 (9th Cir. 2010) (No. 10-10144) ("prohibit[ing] the consideration of § 3553(a) factors * * * would require the district court to rule in a vacuum").

sentence reduction. Opp. 6 (quoting *Tadio*, 663 F.3d at 1048) (second alteration in original).

The government does not mention, much less refute, our analysis (Pet. 19-20) demonstrating that Rule 35(b)'s language ("if the defendant * * * provided substantial assistance") merely establishes a precondition on a sentence reduction and does not limit the factors the court can consider; as the government previously explained, "Rule 35(b) does not prohibit the consideration of § 3553(a) factors in deciding to what extent a defendant's sentence should be reduced." U.S. Br. 13, *Tadio*. Nor does the government mention, much less refute, our observation (Pet. 20-21) that this interpretation is consistent with the bedrock principle that courts have "broad discretion * * * during sentencing." *Davis*, 679 F.3d at 196; accord U.S. Br. 15, *Davis* ("Interpreting Rule 35(b) to require a district court to consider substantial assistance in isolation leaves too little discretion with the sentencing court."). This will not result in the "plenary resentencing proceeding[]," Opp. 12 (quoting *Dillon* v. *United States*, 130 S. Ct. 2683, 2692 (2010)), the government says Rule 35(b) forbids, see pp. 5-6, *supra*; in light of the only "slightly expanded authority of the district court to grant a greater sentence reduction," there is no reason to believe that Rule 35(b) "will operate differently." *Tadio*, 633 F.3d at 1055.

The government argues that the original language of Rule 35(b) paralleled that of 18 U.S.C. § 3553(e), which has been construed to allow consideration only of assistance for reductions below a mandatory minimum sentence, and that "neither of the amendments to Rule 35(b)" supports a different interpretation. Opp. 14, 16. But courts have recognized more discre-

tion to consider non-assistance factors under Rule 35(b) than in the context of Section 3553(e)'s statutory mandatory minimums, *e.g.*, *United States* v. *Park*, 533 F. Supp. 2d 474, 478 n.2 (S.D.N.Y. 2008) (Chin, J.) ("[C]ases addressing whether a court may consider factors other than substantial assistance when deciding whether to reduce a sentence below a statutory mandatory minimum * * * are inapplicable [where] no mandatory minimum is implicated."), and "[e]very court [of appeals] that has addressed the question has concluded that a court may consider at least some non-assistance factors" in determining the extent of a Rule 35(b) reduction. Opp. 6 (quoting *Tadio*, 663 F.3d at 1048) (second alteration in original).

The government does not mention, much less refute, the fact that Rule 35(b)'s original language (which provided that a revised sentence should "reflect" a defendant's assistance) permitted consideration of non-assistance factors. See Pet. 19 (citing *Tadio*, 663 F.3d at 1049-1050). And nothing in the current language of Rule 35(b) prohibits consideration of Section 3553(a) factors in determining the extent of a sentence reduction. E.g., U.S. Br. 10-11, *Tadio*. While the government argues that the two amendments to Rule 35(b) did not change its meaning, that simply confirms that the Rule's original language permitted consideration of those factors. *Tadio*, 663 F.3d at 1050.

2. While the government halfheartedly defends the one-way ratchet approach, it identifies no textual basis in Rule 35(b) for considering non-assistance factors only so long as they disadvantage the defendant. See Pet. 23; cf. *United States* v. *Booker*, 543 U.S. 220, 223 (2005) ("Congress would not have enacted sen-

tencing statutes that make it more difficult to adjust sentences *upward* than to adjust them *downward*."). Nor does it defend the policy considerations that some courts of appeals have relied upon.

D. No Vehicle Problem Would Prevent Resolution Of This Issue

The government does not dispute that this case squarely presents an issue that has been appropriately preserved and thoroughly litigated. The sole "vehicle problem" the government can contrive is that "petitioner has not explained at any stage how the Section 3553(a) factors would justify a sentence reduction greater than" he received, and thus "he has not demonstrated that he would benefit from" a ruling in his favor. Opp. 17.

That is demonstrably false. See p. 6, *supra*. As the district court acknowledged, petitioner argued that "a greater reduction in sentence is warranted" because the "reduction was less than the reduction recommended in similar cases; and * * * the Court should consider the scope of [petitioner's] rehabilitation." D. Ct. Op. & Order 1, Doc. No. 402 (Mar. 16, 2011). Before the district court forbade him, petitioner submitted detailed argumentation on rehabilitation and sentencing disparity supported by approximately *200 pages* of evidence. See D. Ct. Doc. No. 399. There is every reason to believe petitioner would have received an additional sentence reduction has this case been prosecuted in the Fourth or Ninth Circuits.

* * * * *

The acknowledged circuit conflict over whether Section 3553(a) non-assistance factors can be considered in determining sentence reductions has resulted in "complexity and uncertainty" in the application of Rule 35(b), *Poland*, 562 F.3d at 42 (Torruella, J., concurring), which implicates the sentences of around 2,000 defendants *each year*. This issue has been thoroughly considered by seven of the courts of appeals. The costs of letting the decision stand are substantial—in terms of persistent uncertainty, months or years of unwarranted imprisonment, and sentence disparities based solely on the happenstance of where the government chose to prosecute a defendant. This Court's review is urgently needed.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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