No.

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

PETITION FOR A WRIT OF CERTIORARI

ROBERT A. RATLIFF
RATLIFF LEGAL GROUP
713 Dauphin Street
Mobile, AL 36602
(251) 438-2250

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

[Additional Counsel Listed On Inside Cover]

MARK T. STANCIL
ROBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W.
Suite 411
Washington, DC 20006
(202) 775-4500

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

QUESTION PRESENTED

Whether, when considering how much to reduce a defendant's sentence for substantial assistance pursuant to Federal Rule of Criminal Procedure 35(b), a court (i) cannot consider the sentencing factors set forth in 18 U.S.C. § 3553(a), as held by the Sixth Circuit; (ii) may consider those factors only to the extent that they yield a smaller sentence reduction than the defendant's assistance alone would warrant, as held by the Seventh, Eighth, Tenth, and Eleventh Circuits; or (iii) may consider those factors to grant either a smaller or a larger sentence reduction, as held by the Fourth and Ninth Circuits.

TABLE OF CONTENTS

APPENDIX CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Statutes:

Rules:

Other Authorities: **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) is under seal and unreported.[1] The opinion and order of the district court (App. 12a-19a) also is under seal and unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE AND STATUTORY PROVISION INVOLVED

Rule 35(b)(1) of the Federal Rules of Criminal Procedure provides that, "[u]pon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person." Rule 35(b)(2) provides:

> Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:
>
> (A) information not known to the defendant until one year or more after sentencing;
>
> (B) information provided by the defendant to

[1] As discussed in petitioner's Motion to Seal, the Appendix has been filed with the Court under seal.

the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

Section 3553(a) of title 18 of the United States Code provides:

The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines[;] * * *

(5) any pertinent policy statement * * * issued by the Sentencing Commission[;] * * *

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT

In its decision below, the Sixth Circuit applied and extended its rule, announced by a sharply divided en banc court, that district judges are absolutely barred from considering the sentencing factors set forth in 18 U.S.C. § 3553(a) when determining the size of a defendant's substantial assistance sentence reduction under Federal Rule of Criminal Procedure 35(b). *United States* v. *Grant*, 636 F.3d 803, 811 (6th Cir. 2011). The Sixth Circuit's interpretation has no basis in the text of Rule 35(b), contradicts its history and purpose, and contravenes fundamental principles of individualized sentencing by forbidding judges from considering "highly relevant—if not essential * * * information * * * concerning the defendant's life and characteristics." *United States* v. *Pepper*, 131 S. Ct.

1229, 1240 (2011) (quoting *Williams* v. *New York*, 337 U.S. 241, 247 (1949)). As the dissenting judges in *Grant* aptly noted, the Sixth Circuit's approach creates "an unmanageable legal standard" that "will lead to unnecessary confusion." 636 F.3d at 822-823.

The Sixth Circuit's decisions in *Grant* and below also deepen an entrenched three-way "divi[sion] on the issue of whether a court adjudicating a Rule 35(b) motion may consider the § 3553(a) factors as grounds to further reduce a defendant's sentence." *United States* v. *Srivastav*, No. 10-4702, 2012 WL 2393089, at *1 n.2 (3d Cir. June 26, 2012). The issue is a recurring one—indeed, Rule 35(b) is the leading basis for sentence modifications nationwide. It is therefore no surprise that the government acknowledged, in successfully seeking rehearing en banc on this very issue, that the standard governing such proceedings is "an issue of exceptional importance." U.S. Pet. for Reh'g En Banc 1, *Grant*, 636 F.3d 803 (6th Cir. filed July 22, 2009) (No. 07-3831). This Court's review is necessary to bring uniformity to this critical area of sentencing and eliminate the "complexity and uncertainty of the existing state of the law." *United States* v. *Poland*, 562 F.3d 35, 42 (1st Cir. 2009) (Torruella, J., concurring).

1. In 1998, petitioner was convicted of conspiracy to distribute marijuana and cocaine. App. 12a. He was sentenced to 360 months' imprisonment and ten years' supervised release. *Ibid*. The court of appeals affirmed petitioner's conviction and sentence.

2. Petitioner has repeatedly assisted federal investigations. In 1999, for example, petitioner cooperated in the investigation of a contract killing. U.S.

Exh. 4. The following year, petitioner volunteered information to the United States Attorney's Office concerning the prosecution of a former deputy sheriff in North Carolina. U.S. Exh. 3. In 2003, petitioner began assisting prison officials investigating a drug smuggling operation inside a federal prison. U.S. Exh. 2. Recognizing the critical value of petitioner's information, prison officials set aside a dedicated phone line for him to provide updates. *Ibid.* Petitioner's information led to the successful investigation of a smuggling operation involving several inmates, people outside the prison, and a national street gang. *Ibid.* Finally, after participating in a controlled buy to gather information about a drug smuggling operation at a second prison facility, D. Ct. Tr. 31, petitioner testified as a government witness in a federal criminal prosecution. App. 2a. The government has credited petitioner for assistance in some of these matters, but in others, the government maintains that it was able to convict based on other evidence or that its investigations have not yet progressed to a point that would warrant a motion for a reduction in sentence under Federal Rule of Criminal Procedure Rule 35(b). *Id.* at 13a-14a.

Petitioner's assistance to the government has placed him and his family at risk. A prison safety consultant submitted an affidavit to the district court concluding that petitioner's history of cooperation would place him in "grave danger" if he were housed in the prison's general population. App. 17a. In recognition of the danger petitioner faces, the Bureau of Prisons has repeatedly placed him in protective custody, which requires him to live in solitary confinement for twenty-three hours per day. D. Ct. Tr.

40. Petitioner's sister, a tenured professor, testified that she fears for her safety because, at the government's request, she provided the funds for the controlled buy petitioner participated in, thereby exposing her name and address. Pet. C.A. Br. 18-19.

In addition to assisting in various investigations, petitioner has demonstrated model behavior while in prison, reflecting rehabilitation. For example, petitioner—at great risk to himself—warned a fellow prisoner of an imminent assault by a prison gang. U.S. Exh. 1. He also disclosed the plot to prison officials. *Ibid.* Prison officials acknowledged that petitioner "tried to do the right thing" by warning of the assault. *Ibid.*

3. Because of petitioner's substantial assistance in the trial involving the smuggling operation at the prison, the government filed a Rule 35(b) motion to reduce his sentence by twenty-four months. U.S. Mot. for Reduction of Sentence; App. 2a. Neither the government nor the court served petitioner or his counsel with a copy of the motion or notified them of the proceedings. Pet. Mot. to Reconsider ¶ 1. The district court granted the motion. App. 2a.

Once petitioner learned of those proceedings, he filed a motion to reconsider to allow him to submit evidence of his assistance in other matters. Pet. Mot. to Reconsider (98-cr-00048). The district court initially stayed its consideration of the motion pending the outcome of two cases: this Court's *United States* v. *Pepper*, 131 S. Ct. 1229 (2011), and the Sixth Circuit's en banc reconsideration of *Grant*. App. 3a. In *Pepper*, this Court held that a district court may consider evidence of a defendant's post-sentencing rehabilita-

tion when resentencing a defendant after the initial sentence has been set aside on appeal. 131 S. Ct. at 1236. In *Grant*, the en banc Sixth Circuit, reversing the panel's decision favoring the defendant, held that a district court is prohibited from considering the 18 U.S.C. § 3553(a) sentencing factors when acting under Rule 35(b) to reduce the sentence of a defendant who was originally sentenced to a statutory mandatory minimum. *Grant*, 636 F.3d at 816. The court concluded that "the reduction may not exceed the value of the assistance" given by the defendant. *Ibid.* Despite multiple dissents and the court's acknowledgement of ambiguity in the text of Rule 35(b), the court concluded that the text, history, and context of Rule 35(b) prohibit a district court from considering the Section 3553(a) factors in determining the extent of the reduction. *Id.* at 815. Following the release of opinions in those two cases, the district court granted petitioner's motion to reconsider and scheduled a hearing. App. 3a.

Before the hearing, the district court warned petitioner that "a review of the [18 U.S.C. §] 3553 factors, is not permitted" and that he was prohibited from presenting any evidence or making arguments related to those factors. App. 3a. After the hearing, the district court granted a continuance and ordered the government to investigate petitioners' claims of further assistance. *Id.* at 4a; D. Ct. Tr. 57. After conducting its investigation, the government conceded that petitioner had provided substantial assistance to the investigation of the drug smuggling matter and presented its results at a second hearing. App. 4a. The government recommended a sixty-month reduction in addition to the previously recommended twen-

ty-four month reduction, based solely on the assistance in the drug smuggling matter in the second prison. *Id.* at 4a-5a. The district court agreed and reduced petitioner's sentence by a total of eighty-four months. *Id.* at 5a.

4. The court of appeals affirmed. App. 1a-11a. The court rejected petitioner's argument that the district court improperly failed to consider the Section 3553(a) factors and mistakenly held *Pepper* to be inapplicable in the sentence-reduction context. *Id.* at 8a, 10a, 11a. Relying on *Grant*, the Sixth Circuit held that the district court was "limited to determining the value of the defendant's substantial assistance to law enforcement and [could] not reduce the defendant's sentence beyond the value of that assistance." *Id.* at 7a. Although *Grant* had addressed only the consideration of the Section 3553(a) factors in determining the extent of sentence reductions below a statutory mandatory minimum, the court extended the *Grant* rule to prisoners whose reductions did not implicate a mandatory minimum sentence. While the court held that district courts may weigh limited "contextual considerations" in order to "determin[e] the value of a defendant's cooperation," it made clear that those "contextual considerations" were distinct from the Section 3553(a) factors. *Id.* at 8a.

The court expressly recognized that its decision conflicted with the rule the Ninth Circuit adopted in *United States* v. *Tadio*, 663 F.3d 1042 (9th Cir. 2011), cert. denied, 132 S. Ct. 2703 (2012), that courts may consider the "non-assistance factors listed in § 3553(a)" either to increase or decrease the sentence reduction beyond the value of assistance rendered. *Tadio*, 663 F.3d at 1047. The court offered no reason-

ing to reject the *Tadio* rule or distinguish the two cases, but merely remarked, "the Ninth Circuit reached a different conclusion than we did." App. 11a.

Finally, the court rejected petitioner's argument that *Pepper* requires a district court to consider the Section 3553(a) factors in order to fully understand the value of the assistance rendered. *Pepper* was not applicable here, the court held, because it dealt with resentencing after a successful appeal, while petitioner's case involved a sentence reduction under Rule 35(b). App. 10a-11a.

REASONS FOR GRANTING THE WRIT

I. The Courts Of Appeals Are In Conflict About Whether Judges May Consider The Section 3553(a) Factors When Determining The Size Of A Rule 35(b) Sentence Reduction

"The courts of appeal are divided" about whether and how a district judge may consider the factors listed in 18 U.S.C. § 3553(a) when determining the size of a sentence reduction under Federal Rule of Criminal Procedure 35(b). *United States* v. *Srivastav*, No. 10-4702, 2012 WL 2393089, at *1 n.2 (3d Cir. June 26, 2012). Courts have repeatedly noted that "our sister circuits * * * differ on whether [the Section 3553(a)] factors may be considered." *United States* v. *Clawson*, 650 F.3d 530, 532 n.1 (4th Cir. 2011); see also *United States* v. *Tadio*, 663 F.3d 1042, 1047 (9th Cir. 2011) (noting that the circuits are divided on the circumstances in which non-assistance factors may be used). Judges have lamented the resulting "complexity and uncertainty" in this area of

the law. See, *e.g.*, *United States* v. *Poland*, 562 F.3d 35, 42 (1st Cir. 2009) (Torruella, J., concurring).

The circuits that have spoken on this issue have developed three conflicting approaches. The Sixth Circuit is the sole court of appeals to hold that district judges are absolutely barred from considering the Section 3553(a) factors when determining the size of a sentence reduction under Rule 35(b). By contrast, the Seventh, Eighth, Tenth, and Eleventh Circuits have used a "one-way ratchet" approach, under which a judge may consider the Section 3553(a) factors to *decrease* the size of a Rule 35(b) sentence reduction below that which would be warranted based on the assistance alone, but not to *increase* the reduction. Finally, the Ninth and Fourth Circuits have adopted a symmetrical "two-way ratchet" rule, under which judges may consider the Section 3553(a) factors regardless of whether they counsel a larger or smaller sentence reduction. The differences among these positions are stark and, as nearly all of the circuits have weighed in, the conflict is unlikely to be resolved without this Court's review.[2]

---

[2] It bears noting two issues that are distinct from the one presented here. First, this case does not concern the factors a court may consider when deciding *whether* to grant a Rule 35(b) reduction; there is no judicial disagreement that that threshold inquiry focuses narrowly on the fact of the defendant's substantial assistance and no other factors may trigger a Rule 35(b) reduction. *Clawson*, 650 F.3d at 532 n.1. Second, this case does not involve a reduction below a statutory mandatory minimum—a circumstance that courts have concluded, for policy reasons, warrants distinct treatment to align with the standard for departures at the original sentencing under 18 U.S.C. § 3553(e). See, *e.g.*, *Poland*, 562 F.3d at 40-41; see also *United States* v. *Winebarger*, 664 F.3d 388, 396 (3d Cir. 2011). Those

A. The Sixth Circuit Has Held That Judges May Never Consider The Section 3553(a) Factors When Determining The Size Of A Rule 35(b) Sentence Reduction

The Sixth Circuit is the only court of appeals to conclude that district judges are prohibited from considering the Section 3553(a) factors when determining the extent of any sentence reduction under Rule 35(b). The decision below reaffirmed that position, confirming that the court's holding in *United States* v. *Grant*, 636 F.3d 803 (6th Cir. 2011), applies to *all* sentence reductions under Rule 35(b), not just those seeking reductions below mandatory minimums. In *Grant*, over several forceful dissents, the en banc Sixth Circuit "resolve[d] the ambiguity" about whether the Rule authorized consideration of non-assistance factors by holding that "the § 3553(a) factors *have no role* in Rule 35(b) proceedings" and a district judge cannot consider them when determining the extent of the reduction. *Id.* at 815-816 (emphasis added). Although *Grant* was decided in the context of a reduction below a statutory minimum and explicitly relied on the "practice of interpreting [Rule 35(b)(4)] in lockstep with § 3553(e)" under those circumstances, *id.* at 815, see n.1, *supra,* the decision below extended *Grant* to *all* Rule 35(b) reductions, holding

---

cases do not bear on the factors a judge may consider in cases in which a Rule 35(b) motion has not reduced a sentence below a statutory minimum. See *United States* v. *Park*, 533 F. Supp. 2d 474, 478 n.2 (S.D.N.Y. 2008) (Chin, J.) (concluding that the "line of cases 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").

that judges are "limited to determining the value of the defendant's substantial assistance * * * and cannot reduce the defendant's sentence beyond the value of that assistance." App. 7a. Thus, the Sixth Circuit is the sole court of appeals to extend an "assistance-only" interpretation of Rule 35(b) beyond the narrow context of statutory minimum sentences.

Although *Grant* acknowledged that district judges retain narrow discretion to consider "contextual factors" in order to evaluate the defendant's assistance, see *Grant*, 636 F.3d at 817, the court distinguished those judicially created considerations from the statutory Section 3553(a) factors identified by Congress. The court emphasized that those contextual factors must be "tied to a defendant's substantial assistance" and may *only* be considered "in valuing the assistance." *Id.* at 816-817. Indeed, the court warned that "mingling the terminology of § 3553(a) with the concept of valuation of assistance * * * clouds the analytical exercise that the district court must undertake," *id.* at 818, unequivocally stating that, while judges may consider (or opt not to consider) "contextual factors" as they see fit, judges are simply "not * * * authorize[d]" to consider the Section 3553(a) factors. App. 7a (quoting *Grant*, 636 F.3d at 816).

B. Four Circuits Have Held That Judges May Consider The Section 3553(a) Factors Only If They Would Yield A Smaller Reduction Than Warranted By Assistance Alone

The Seventh, Eighth, Tenth, and Eleventh Circuits have held that a district court may consider the Section 3553(a) factors in *limiting* the extent of the

sentence reduction but not in order to *increase* the size of the reduction. *United States* v. *Rublee*, 655 F.3d 835, 839 (8th Cir. 2011); *United States* v. *Shelby*, 584 F.3d 743, 745-748 (7th Cir. 2009); *United States* v. *Neary*, 183 F.3d 1196, 1998 (10th Cir. 1999); *United States* v. *Manella*, 86 F.3d 201 (11th Cir. 1996) (per curiam). The Eleventh Circuit first adopted this view in *Manella,* reasoning from the absence of any restrictive language in the text of the provision that "[Rule 35(b)] does not limit the factors that may militate in favor of granting a *smaller* reduction." 86 F.3d at 204 (emphasis added); see also *Neary* 183 F.3d at 1198 (citing *Manella* with favor); *Rublee*, 655 F.3d at 839 (holding that the court's decision to "*limit* the * * * reduction, as opposed to extending it further downward, need not be based only on factors related to the assistance provided").

Although the *Manella* decision was the first to adopt the "one-way ratchet" position, the fullest statement of its rationale is found in Judge Posner's majority opinion in *Shelby*. The Seventh Circuit briefly considered the language of Rule 35(b), finding "no suggestion that the filing of the motion allows * * * resentencing on the basis of something other than the assistance [the defendant] gave the government." *Shelby*, 584 F.3d at 745. But the court then recognized that a judge "cannot impose a sentence that is inconsistent with the statutory sentencing factors" and as a result must "reserve the right to condition the grant of a Rule 35(b) motion * * * on its consistency with the statutory sentencing factors, in order to make sure that the reduced sentence is not unjust." *Id.* at 748. While thus recognizing that district courts should consider the Section 3553(a) fac-

tors to some extent, the *Shelby* majority concluded that they could be considered only when doing so would yield a *smaller* sentence reduction.

The opinion identified no basis in the text of the rule for limiting consideration of the Section 3553(a) factors, but based its asymmetrical rule on policy considerations. According to the *Shelby* majority, consideration of Section 3553(a) factors favoring a *greater* reduction (but not those favoring a lesser reduction) would "create arbitrary distinctions between similarly situated defendants" by allowing a "full *Booker* resentencing to only a subset of defendants," would create "the equivalent of a judge-administered parole system," and would "impair the objective of Rule 35(b) * * * to assist law enforcement." 584 F.3d at 745-746 (internal quotations omitted). The court speculated that a two-way ratchet would "almost certainly reduce the number of [Rule 35(b)] motions filed, to the detriment of the government—in whose interest * * * the rule was created." *Id.* at 746. Accordingly, it concluded that a sentencing judge may "consider the section 3553(a) factors * * * only in deciding whether to grant a sentencing reduction *less* than" that warranted by the defendant's assistance alone. *Id.* at 749.

C. Two Circuits Have Held That Judges May Consider The Section 3553(a) Factors Regardless Of Their Effect On The Size Of A Rule 35(b) Sentence Reduction

The Ninth and Fourth Circuits have held that a district court may properly rely on the Section 3553(a) factors "irrespective of the direction in which those factors cut"—that is, whether they support a

reduction that "is 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 (W. Fletcher, J.). As the Ninth Circuit recognized, nothing in the language of Rule 35(b) "even arguably requires a district court to determine the amount of sentence reduction based only on the amount of assistance provided." *Id.* at 1050. Nor does the text of the Rule suggest "that non-assistance factors should operate as a one-way ratchet." *Ibid.* Instead, as Judge Fletcher observed, "[t]he most natural reading of the current language is that non-assistance factors may be considered * * * and that non-assistance factors may be considered symmetrically." *Ibid.*

In so holding, the court expressly acknowledged that it was parting company not only with the Sixth Circuit, which categorically prohibits consideration of the Section 3553(a) factors, but also with courts holding that such factors may only be relied on when decreasing the size of the reduction. The Ninth Circuit specifically rejected the Sixth Circuit's decision to limit courts to considering "contextual" factors, recognizing that "once non-assistance factors are allowed to influence the district court's decision," "there is no reason * * * to restrict those non-assistance factors to a shorter list than Congress has indicated in § 3553(a) are relevant to sentencing decisions." *Tadio*, 663 F.3d at 1049. The court explained that there was "no basis" for interpreting the Rule to operate as a one-way ratchet, *id.* at 1047, and that doing so "results in an odd, asymmetrical application of Rule 35(b)." *Id.* at 1050; accord *Park*, 533 F. Supp. 2d at 478 ("The Government's suggestion that a district

court may consider § 3553(a) factors when they militate *against* a larger reduction but not when they *favor* a larger reduction is not logical.").

The Fourth Circuit reached the same conclusion in *United States* v. *Davis*, 679 F.3d 190 (4th Cir. 2012). After acknowledging that it is settled law that a district court may not consider any factor other than a defendant's substantial assistance "when deciding whether to *grant* a Rule 35(b) motion," *id.* at 195 (quoting *Clawson*, 650 F.3d at 537), the court noted that *Davis* presented the distinct issue of "whether the district court erred in considering other sentencing factors contained in 18 U.S.C. § 3553(a) in determining the *extent* of a sentence reduction." *Ibid.* Relying on the plain language of Rule 35(b) and the traditionally broad discretion of sentencing judges, *id.* at 196, the Fourth Circuit held that "the district court can consider other sentencing factors, besides the defendant's substantial assistance, when deciding the extent of a reduction to the defendant's sentence after granting a Rule 35(b) motion." *Id.* at 195-196. The court explained that adopting a rule prohibiting a district court from considering such factors "would void the court's ability to use its discretion in balancing the sentencing factors to determine an appropriate sentence." *Id.* at 196. Since "[n]othing in Rule 35 * * * requires that the district court adjudicate in such an abstract vacuum," *ibid.*, and because "[i]mposing appropriate sentences requires that courts be able to balance *all relevant sentencing factors* when determining a defendant's actual sentence reduction," *id.* at 197 (emphasis added), the Fourth

Circuit upheld the district court's consideration of the Section 3553(a) factors.[3]

* * *

There is an entrenched, widespread, and well-recognized three-way split among the courts of appeals regarding the authority of district courts to consider the Section 3553(a) factors when determining the extent of a Rule 35(b) sentence reduction. The pervasive disagreement about the meaning of such an important provision of federal law is reason enough to exercise this Court's jurisdiction. See Sup. Ct. R. 10(a). But that division is especially intolerable for a sentencing scheme whose central purpose is to eliminate sentencing disparities. This Court's intervention is therefore necessary, particularly because—as explained in detail below—the decision below is plainly contrary to law.

II. The Sixth Circuit's Decision Is Wrong

The text, history, and purpose of Rule 35(b) strongly support allowing a district court to consider the factors enumerated in 18 U.S.C. § 3553(a) when

[3] Because *Davis* involved a district court's decision to decrease the sentence reduction justified by assistance alone, the Fourth Circuit did not have occasion to address whether Rule 35(b) authorizes courts to rely on the Section 3553(a) factors to increase a sentence reduction. The Fourth Circuit's categorical language and broad reasoning indicates, however, that such factors may be considered to both increase and decrease the extent of such reductions. But even if the Fourth Circuit were to depart from the course *Davis* set, the three conflicting interpretations of Rule 35(b) would persist, and this Court's review would still be warranted.

reducing a sentence because of a defendant's substantial assistance.

Rule 35(b) states that "[u]pon the government's motion * * * the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person." Fed. R. Crim. P. 35(b)(1). While the language of the rule makes substantial assistance a necessary precondition for a Rule 35(b) sentence modification, see, *e.g.*, *Park*, 533 F. Supp. 2d at 476 ("[S]ubstantial assistance is the only event that can trigger the court's authority to reduce the sentence."), nothing in the text limits what information a court may then consider in determining how much to reduce a sentence. According to the Rule's plain terms, the court may "reduce the sentence" "if" the defendant has provided substantial assistance and the government has made a motion, but it places no restrictions on what information a court can consider in making the reduction. There is no basis for grafting an extratextual restriction onto the rule prohibiting considering the Section 3553(a) factors. Courts "must enforce plain and unambiguous * * * language according to its terms," *Hardt* v. *Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010); see also *United States* v. *John Doe, Inc. I*, 481 U.S. 102, 109-110 (1987) (stating that the plain meaning limits construction of the Federal Rules of Criminal Procedure), and are not at liberty to "read[] words or elements into" a provision "that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997).

In keeping with the most natural reading of the text, every court other than the Sixth Circuit to have considered the issue has recognized that some con-

sideration of non-assistance factors is appropriate. See *Davis*, 679 F.3d at 195 (holding that sentencing courts may consider non-assistance factors); *Tadio*, 663 F.3d at 1050-1051 (same); *Rublee* 655 F.3d at 839 (non-assistance factors may be considered as a one-way ratchet); *Shelby*, 584 F.3d at 748 (same); *Neary*, 183 F.3d at 1998 (same); *Manella*, 86 F.3d at 204 (same). Even the Sixth Circuit, the only court of appeals to categorically prohibit consideration of the Section 3553(a) factors, has held that *other* "contextual factors" may be considered in weighing the value of a defendant's substantial assistance. See *Grant*, 636 F.3d at 817. While some courts have held that Rule 35(b) limits judicial discretion to consider non-assistance factors when they benefit the defendant (but not when they disadvantage him), no court has identified any basis in the Rule's text for that restriction.[4] Thus, the "most natural reading" of the Rule's text permits sentencing courts to consider non-assistance factors in determining the extent of a reduction, regardless of whether they increase or decrease the reduction. *Tadio*, 663 F.3d at 1050-1051.

The Rule's amendment history confirms that interpretation. Although the Rule's original language required sentence reductions to "reflect" substantial assistance, as Judge William Fletcher noted, that

---

[4] Given that the text of Rule 35(b) contains no limitation on the consideration of non-assistance factors, it certainly does not demand that those factors be considered only in one direction. The text, therefore, provides no support for the "one-way ratchet" approach adopted by several circuits. See *Tadio*, 663 F.3d at 1050 ("[T]here is nothing in the current language suggesting that non-assistance factors should operate as a one-way ratchet.").

language did not prohibit consideration of non-assistance factors. See *Tadio*, 663 F.3d at 1049-1050. Subsequent changes to Rule 35(b) have made that meaning all the more clear. In 2002, its language was amended to permit sentence modification "if" there has been substantial assistance.[5] When in 2007 the Rule was further amended to eliminate the requirement that the reduced sentence "accord with the Sentencing Commission's guidelines and policy statements," the Committee expressly declined to add language, suggested by the U.S. Sentencing Commission, stating that the scope of the information courts could consider in reducing sentences would not be enlarged.[6] That pointed omission suggests that whatever limitations might have inhered in the Rule's original language did not survive amendment. See *Tadio*, 663 F.3d at 1051; *United States* v. *Poland*, 533 F. Supp. 2d 199, 211 (D. Me. 2008), aff'd on other grounds, 562 F.3d 35 (1st Cir. 2009).

Reading Rule 35(b) to permit consideration of the Section 3553(a) factors accords with background principles of sentencing law. As this Court has recognized, "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual."

---

[5] The fact that the Rules Committee considered this change to be "stylistic only," Fed. R. Crim. P. 35 advisory committee's note, simply confirms that the Rule always contemplated consideration of non-assistance factors in determining the extent of a sentencing reduction.

[6] See Letter from Judith W. Sheon, Staff Director, United States Sentencing Commission, to Committee on Rules of Practice and Procedure 3-4 (Feb. 15, 2006), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CR%20Comments%202005/05-CR-017.pdf.

Pepper v. *United States*, 131 S. Ct. 1229, 1239-1240 (2011) (quoting *Koon* v. *United States*, 518 U.S. 81, 113 (1996)). This goal of individualized consideration reflects the bedrock principle that in sentencing a defendant, courts must ensure that the "punishment * * * fit[s] the offender and not merely the crime." *Williams* v. *New York*, 337 U.S. 241, 247 (1949). "[H]ighly relevant—if not essential"—to the goal of individualized sentencing is "the possession of the fullest information possible concerning the defendant's life and characteristics." *Pepper*, 131 S. Ct. at 1240 (quoting *Williams*, 337 U.S. at 247).

"Post-arrest cooperation cannot be assessed in a vacuum." *United States* v. *Chapman*, 532 F.3d 625, 629 (7th Cir. 2008). Modifying a sentence by assessing the "value" of a defendant's assistance without considering "the character and propensities of the offender," *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U.S. 51, 55 (1937), does just that. It "undermine[s]" the "district court's 'original sentencing intent * * * by altering one portion of the calculus," *Pepper*, 131 S. Ct. at 1251 (quoting *United States* v. *White*, 406 F.3d 827, 832 (7th Cir. 2005)), and results in the modified sentence no longer "suit[ing] * * * the individual defendant," *Wasman* v. *United States*, 468 U.S. 559, 564 (1984). "Whether such cooperation represents an opportunistic attempt to obtain a sentence reduction or a genuine alteration in the defendant's life perspective can best be determined by assessing the cooperation in light of earlier criminal history and the nature of the crime for which the defendant is presently being sentenced." *Chapman*, 532 F.3d at 629.

The Sixth Circuit's arbitrary limitation of the factors that may be considered prevents judges from exercising their "institutional strength[]" in sentencing. *Kimbrough* v. *United States*, 552 U.S. 85, 109 (2007); see also *Koon*, 518 U.S. at 98 (describing the "refined assessment" made by the district court in sentencing based on its "vantage point and day-to-day experience"). Because the sentencing judge possesses a "greater familiarity with the individual case and the individual defendant before him than * * * the appeals court," *Kimbrough*, 552 U.S. at 109, the district court should be free to determine for itself whether any or all of the Section 3553(a) factors are relevant, just as it does when imposing an initial sentence.

Permitting courts to consider the Section 3553(a) factors also advances the recognized interest in avoiding the "institutionalized subterfuge" that occurs when judges "mask[]" their reliance on sentencing factors they are otherwise constrained from considering. *Spears* v. *United States*, 555 U.S. 261, 266 (2009). For example, "a district judge who believes that a defendant's sentence should be reduced by, say, 24 months based on his substantial assistance, and an additional 6 months based on § 3553(a) factors, might award a 30-month reduction and attribute the reduction entirely to a defendant's substantial assistance." *Tadio*, 663 F.3d at 1052-1053. Allowing judges to consider Section 3553(a) factors on the record "has the virtue of transparency," *id.* at 1052, and "discourag[es] fudging by judges," *Shelby*, 584 F.3d at 751 (Evans, J., dissenting). It promotes basic objectives of sentencing by facilitating effective appellate review, see *Gall* v. *United States*, 552 U.S. 38, 50 (2007), and increases the legitimacy of the sentence

modification, because a "public statement of [the] reasons [for imposing a particular sentence] helps provide the public with the assurance that creates * * * trust." *Rita* v. *United States*, 551 U.S. 338, 356 (2007).

The courts that prohibit (or limit) consideration of the Section 3553(a) factors in Rule 35(b) proceedings have not identified any textual basis for their conclusion, but rather have come to that view principally because of policy concerns. Those concerns are unfounded. Contrary to the suggestion of the Seventh Circuit, see *Shelby*, 584 F.3d at 747, allowing district courts to consider non-assistance factors is not likely to result in the government making fewer Rule 35(b) motions because of concerns that it "would lose control of the sentencing process." *Ibid.* But district courts "already have the authority to grant greater Rule 35(b) reductions than the government requests if they conclude that the defendant's assistance was worth more than the government has recommended," *Tadio*, 663 F.3d at 1055, and the resulting lack of control has not prevented the government from making heavy use of Rule 35(b) motions. As the *Tadio* court explained, in light of the only "slightly expanded authority of the district court to grant a greater sentence reduction than recommended by the government," there is no reason to believe that Rule 35(b) "will operate differently." *Ibid.*

Nor would considering the Section 3553(a) factors in the context of Rule 35(b) motions prove unworkable. District courts already apply the Section 3553(a) factors in a wide variety of contexts, and doing so for Rule 35(b) motions as well would be nothing but routine. If courts can effectively administer the Sec-

tion 3553(a) factors when their consideration is mandatory, see U.S.C. §§ 3582(C)(1)(A), (B), courts surely could do so when their consideration is merely permissible. Because courts would retain the discretion *not* to consider non-assistance factors, "many cases * * * will likely be uncomplicated[,] and the reduction awarded will only reflect the defendant's substantial assistance." *Tadio*, 663 F.3d at 1053.

Nor, contrary to the suggestion of the *Shelby* majority, would considering non-assistance factors in Rule 35(b) proceedings treat "similarly situated defendants" differently, or be unfair to prisoners who have no assistance to offer. See *Shelby*, 584 F.3d at 745-746. In *Pepper* v. *United States*, this Court rejected the notion that considering evidence of post-sentencing rehabilitation for defendants whose original sentences were vacated on appeal would be unfair to those whose original sentences were affirmed or unchallenged. As the Court explained, such "disparity arises not because of arbitrary or random sentencing practices but because of the ordinary operation of appellate review." 131 S. Ct. at 1248. Similarly, here, "any disparity arises * * * because of the ordinary operation of a rule that rewards a defendant's assistance to the government." *Tadio*, 663 F.3d at 1054. In other words, "[t]he defendant who has rendered substantial assistance is not similarly situated to a defendant who has not." *Id.* at 1054-1055. The difference in treatment, moreover, furthers the purpose of Rule 35(b) by encouraging prisoners to provide assistance in order to gain the opportunity to present to the court information relevant to the Section 3553(a) factors.

In short, the Sixth Circuit's restrictive holding is inconsistent with the text, history, and purpose of Rule 35(b), and conflicts with bedrock principles of criminal sentencing. It must be rejected in favor of allowing full consideration of the Section 3553(a) factors in determining the extent of a reduction under Rule 35(b).

III. The Broad Importance Of This Issue Is Undisputed

The government itself has recognized that the issue raised here is one of "exceptional importance" to the administration of the federal criminal justice system. U.S. Pet. for Reh'g En Banc 1, *Grant*, 636 F.3d 803 (6th Cir. filed July 22, 2009) (No. 07-3831). There is "near-universal agreement that sentence reductions for cooperation with authorities" are "a necessary tool of modern federal criminal investigation." Frank O. Bowman, III, *Adjustments for Guilty Pleas and Cooperation with the Government: Model Sentencing Guidelines §§ 3.7-3.8*, 18 Fed. Sent'g Rep. 370, 371 (2006). Prosecutors frequently rely on Rule 35(b) both to obtain information and to manage their caseload, and evidence obtained in connection with Rule 35(b) reductions is a critical factor in initiating new investigations and prosecutions. U.S. Sentencing Comm'n, *Federal Court Practices: Sentence Reductions Based on Defendant's Substantial Assistance to the Government* 53-54 (1997).

The criminal justice system's reliance on substantial assistance reductions has made Rule 35(b) motions commonplace and created significant litigation over the proper size of such reductions. In recent years, Rule 35(b) motions have become the leading

cause of sentence modifications. See U.S. Sentencing Comm'n, 2010 Annual Report 42 (2011); U.S. Sentencing Comm'n, 2011 Annual Report 44 (2012). Since the Commission began collecting data on this issue in 2008, no fewer than 1700 defendants, see U.S. Sentencing Comm'n, 2008 Sourcebook tbl.62 (2009), and as many as 2098, see U.S. Sentencing Comm'n, 2009 Sourcebook tbl.62 (2010), have received a Rule 35(b) reduction *each year*. This is in addition to the almost 10,000 defendants annually who received a reduction for substantial assistance at their original sentencing. *Id.* tbl.30 n.1.

The conflicting decisions of the courts of appeals create uncertainty and confusion for prosecutors, defendants, and courts about an issue that arises virtually every day. This lack of guidance and the resulting inconsistency in sentencing reductions is particularly intolerable in light of Congress's stated goal of making sentencing in federal courts more uniform. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, § 3553(a)(6), 98 Stat. 1987. This Court has previously recognized the need for sentencing uniformity for other, far less common issues, such as sentencing under the Armed Career Criminal Act ("ACCA"). See, *e.g.*, *Sykes* v. *United States*, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting) (noting that the Court had addressed ACCA's residual clause four times since 2007); see also U.S. Sentencing Comm'n, 2011 Sourcebook tbl.22 (2012) (571 criminal defendants sentenced under ACCA in 2011).

The majority of the courts of appeals have addressed this issue and it is ripe for review. This case has been fully litigated and squarely presents a recurring legal question, affording the Court an ideal

opportunity to bring needed clarity to an area of law that is of enormous practical importance to the federal criminal justice system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT A. RATLIFF
RATLIFF LEGAL GROUP
713 Dauphin Street
Mobile, AL 36602
(251) 438-2250

MARK T. STANCIL
ROBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W.
Suite 411
Washington, DC 20006
(202) 775-4500

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

NOVEMBER 2012