

04-4198-cr

To be Argued By:
CHRISTOPHER W. SCHMEISSER

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 04-4198-cr

UNITED STATES OF AMERICA,
Appellant,

-v-

FRANK TORO, JR.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

This is an appeal from a resentencing by the district court (Dorsey, J.), on remand from this Court. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The United States filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(b).

STATEMENT OF ISSUES PRESENTED

- I. Did the district court, which had been reversed for acting without jurisdiction in reducing a defendant's original sentence, err in not following this Court's express instructions to reimpose the original sentence on remand, thereby violating the mandate rule and circumventing limitations on collateral attacks of a sentence?

- II. Did the district court, after first reimposing the defendant's original sentence on remand, err by reconsidering the reimposed sentence under Fed. R. Crim. P. 35(a) in light of the reasoning of *Blakely v. Washington*, 124 S. Ct. 2531 (2004), when there was no "clear error" in the reimposed sentence warranting such reconsideration?

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-vs-

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Both the restrictions of Fed. R. Crim. P. 35 and a mandate limiting the scope of a remand advance the same important systemic interests of finality in sentencing and the discouraging of wasteful and duplicative litigation. This case illustrates the importance of such restrictions on resentencing. Here, the defendant, unhappy with the extent of a *downward* departure he received at his original

sentencing, retained new counsel who sought and obtained reconsideration of the original sentence through a misuse of Rule 35. This Court promptly reversed the district court (Dorsey, J.) and remanded with express instructions to impose the original sentence, which the district court initially followed. The defendant, undaunted, again misused Rule 35 to ask the district court to reconsider its reimposed sentence and ignore the limited scope of the remand, even though the court had not committed error, much less “clear error,” in following the mandate. By again reducing the defendant’s sentence, the district court erred and, in doing so, provided a roadmap for future defendants seeking to avoid the standards of review and other procedural requirements necessary for appeal and collateral attack.

For the reasons discussed below, the government respectfully requests that this Court reverse the district court’s July 6, 2004, order granting the defendant’s Rule 35 motion and again instruct the district court to reimpose the sentence of 24 months of incarceration, three years of supervised release, a special assessment of \$100, and the amended restitution figure of \$726,988.

Statement of the Case

The defendant pled guilty on December 18, 2002, to a one-count information alleging that he made false statements in violation of 18 U.S.C. § 1001(a)(2). Government's Appendix ("GA") 006.

On June 5, 2003, the district court (Dorsey, J.) sentenced the defendant.¹ The court downwardly departed from a sentencing range of 27-33 months and imposed a sentence of 24 months of incarceration, three years of supervised release, and restitution in the amount of \$1,046,000. GA 100-101.²

On June 12, 2003, the defendant, through newly retained counsel, filed a motion under Rule 35 to correct or reduce his sentence. GA 119, 124. On June 18, 2003, the government filed its opposition to the defendant's motion, arguing among other things that the district court lacked jurisdiction to reduce the previously imposed sentence. GA 131. Nonetheless, on June 30 and

¹ The court applied the U.S. Sentencing Commission Guidelines Manual in effect on November 1, 1998. All Guidelines provisions cited herein are from that 1998 manual.

² The J&C misstated the restitution amount as \$1,360,000. The court *sua sponte* issued an amendment to the judgment on June 11, 2003, reducing the restitution amount to \$1,046,729, with a \$10,000 lump sum and a \$500 per month payment rate. In light of recoveries made by recent sales of properties, the district court subsequently granted the government's motion to reduce the defendant's restitution obligation to \$726,988. GA 014.

September 9, 2003, the district court conducted a series of evidentiary hearings on the defendant's motion. GA 009-010.

On September 11, 2003, the court issued a ruling on the defendant's motion to correct his sentence, concluding that it would reduce the defendant's sentence to 15 months of imprisonment. GA 165, 175.

On October 10, 2003, the government filed a notice of appeal. GA 179. On January 28, 2004, after discussions with defendant's counsel, the government filed an unopposed motion for summary remand to reimpose the original sentence.

On March 11, 2004, this Court reversed and remanded for further proceedings consistent with its order, including that on remand the district court vacate the defendant's amended sentence and reimpose the original sentence of 24 months of imprisonment, three years of supervised release, restitution in the amount of \$1,046,729, and a \$100 special assessment. GA 191. The mandate issued on April 1, 2004. GA 011.

Shortly thereafter, the defendant sought to vacate the yet-to-be-reimposed sentence under 28 U.S.C. § 2255, alleging among other grounds ineffective assistance of counsel. On May 13, 2004, the district court ordered the Government to show cause why the yet-to-be-reimposed sentence should not be vacated, and, on June 10, 2004, the government filed its response, explaining how, among other things, defense counsel had not been constitutionally ineffective. GA 197.

On June 29, 2004, the district court resentenced the defendant. GA 294, 271. On that day, the defendant argued that he was entitled to a reduced sentence under *Blakely v. Washington*, 124 S. Ct. 2531 (2004), which had been decided only five days earlier. The district court rejected the argument, finding that the reasoning of *Blakely* did not apply to the federal Sentencing Guidelines on the facts before it. The court then resentenced the defendant pursuant to this Court's mandate to 24 months of incarceration. The court also heard evidence and then denied the defendant's motion under 28 U.S.C. § 2255. GA 273.

On July 2, 2004, the defendant filed a Rule 35 motion for reconsideration of the 24-month sentence in light of *Blakely*, claiming that the district court had clearly erred in the reimposition of the original sentence. GA 473.

On July 6, 2004, the district court entered an order, reducing the defendant's sentence to six months of incarceration, with all other terms of the June 29, 2004, sentence to stand. GA 461. The next day, on July 7, 2004, the court issued a memorandum opinion, outlining its reasoning. GA 473.

Because the defendant had already served ten months of his sentence, the defendant was released from incarceration. On July 28, 2004, the government filed a timely notice of appeal. GA 493.

Statement of Facts

A. Background and Initial Sentencing

This is a mortgage fraud case involving the use of fraudulent appraisals, loan applications and closing documents to induce a mortgage lender, Equicredit Corporation of America, to extend a number of real estate loans to undeserving borrowers. The defendant, 63 years old, is an attorney who closed a number of the fraudulent loan transactions.

On December 18, 2002, the defendant pleaded guilty to a one-count information alleging that he made a false statement, in violation of 18 U.S.C. § 1001(a)(2), relating to misrepresentations he made on a HUD statement used in one of the loan transactions. GA 006. Based on relevant conduct, the government contended that the defendant was responsible for a loss exceeding \$1 million.

The presentence report (“PSR”) calculated an offense level of 18: a base offense level of 6, plus 11 levels for loss, plus 2 levels for more-than-minimal planning, plus 2 levels for use of a special skill, minus 3 levels for acceptance of responsibility. The Criminal History Category was I. The PSR noted possible departure grounds involving the defendant’s depression, family ties and responsibilities, and community service activities. Based on the intersection of offense level 18 and Criminal History Category I, the defendant was subject to a Sentencing Guidelines range of 27-33 months of

imprisonment and a fine between \$6,000 and \$60,000. PSR ¶¶ 23-32, 51-54.³

The defendant challenged the loss calculation prior to the sentencing date, and, in addition, in his sentencing memorandum, asked the court to consider the defendant's medical history, military service, and family and community ties as a basis for a downward departure. GA 007.

On June 5, 2003, at the initial sentencing, the defendant withdrew his objections to the guidelines calculations. GA 33-36. The government, however, maintained that the defendant still had not accepted responsibility for his conduct. GA 36-37.

After comments by his wife and son, the defendant addressed the court. GA 72-87. The defendant tried to minimize his conduct, calling the misrepresentations he made "much less offensive" than ones he could have made. *Id.* at 74. When the court (Dorsey, J.) noted that they were still false, the defendant agreed, but then again tried to minimize his conduct, claiming that the misrepresentations were simply innocent mistakes. *Id.* at 75-87.

The court found that the defendant's acceptance was "perhaps best described as begrudging," but nonetheless gave him credit for acceptance of responsibility. *Id.* at 99. The court also granted a one-level downward departure

³ The government has submitted the PSR in a separate sealed appendix.

based in part on the defendant's medical condition, diabetes. The court noted that the defendant's statements "clearly raise a doubt as to whether he really understands the impropriety of what he's done." *Id.* at 100. The court explained that it was "only going to depart downward very nominally." *Id.* The court imposed a sentence of 24 months of incarceration, three years of supervised release, and restitution in the amount of \$1,046,000. GA 100-101.⁴

B. The Initial Rule 35 Motion and Subsequent Amended Sentence

The defendant retained new counsel, who, on June 12, 2003 -- the seventh day after sentencing -- filed a motion under Rule 35 to "correct or reduce his sentence on the ground of clear error" because the defendant "was probably suffering from hypoglycemia" at the time of the initial sentencing and thus was not mentally competent at the time of his allocution. GA 119, 124. The defendant further contended that the court, misunderstanding the defendant's mental condition, misconstrued the defendant's remarks and failed to give the defendant sufficient credit in downwardly departing. GA 126.

On June 16, the defendant moved the court to extend the time for filing any appeal until 10 days after the motion to correct the sentence was ruled upon. GA 008. This motion was subsequently denied by the court, on

⁴ *See supra* n.2 (noting subsequent amendment of restitution figure in light of recovered assets).

October 9, 2003, and the defendant never took a direct appeal of his sentence. GA 010.⁵

On June 18, the government filed its opposition to the defendant's motion, arguing that the court lacked jurisdiction to consider and rule on the motion because the seven-day period under Fed. R. Crim. P. 35 for the court to correct the sentence had passed. In the alternative, the government contended that the defendant was not confused at his sentencing and that the alleged level of confusion did not create an issue of "clear error" under Rule 35 that would warrant relief. GA 131

⁵ The Rule 35 motion amounted to a calculated gamble by the defendant that, even if the district court ultimately acted without jurisdiction to reduce the sentence, the defendant might have better luck convincing the government not to appeal than to himself preserve and pursue a direct appeal. The defendant's chances for success on direct appeal were virtually nonexistent: the defendant had not objected to the guidelines calculation at his original sentencing, and the court had *downwardly departed* to reach the sentence imposed. *See, e.g., United States v. Hargrett*, 156 F.3d 447, 450 (2d Cir. 1998) (appeals court lacks jurisdiction to consider whether extent of downward departure was appropriate). In fact, reflecting his strategic choice, the defendant chose not to take any appeal before the statutory deadline despite the fact that, long before such deadline, he had received the government's brief plainly establishing that he lacked jurisdiction to press for Rule 35 relief. GA 129 (government's brief opposing defendant's Rule 35 motion); Fed. R. App. P. 4(b)(1) & (4) (permitting district court, upon motion of the defendant, to extend the filing of defendant's notice of appeal for a period no more than forty days after entry of judgment).

On June 30, the defendant responded, arguing, among other things, that the seven-day limitation of Rule 35 did not apply because the defendant had filed his motion within the seven-day period and before the time to appeal had passed. The defendant also argued that he was not seeking under Rule 35 to raise additional grounds for departure, but was merely seeking to correct the judge's misunderstanding because his alleged medical condition impaired his ability to allocute to the Court.

On June 30, the court held a hearing on the defendant's motion. Defense counsel sought to expand the record regarding the defendant's medical condition, asking the court to consider a more extensive departure in light of the to-be-proffered information. The court gave the defendant an opportunity to supplement the record with testimony of the defendant's treating physicians. GA 009, 143.

On July 18, the defendant filed a supplemental brief regarding his motion to correct sentence, arguing, among other things, that the court should consider a downward departure based on his medical condition under U.S.S.G. § 5H1.4. GA 141-150.

On July 29, the government filed a supplemental brief, noting that the court still lacked jurisdiction, that Rule 35 was not a vehicle to reopen and relitigate previously considered departure issues, and that the Bureau of Prisons ("BOP") was fully capable of addressing the defendant's medical concerns. GA 151-163.

On September 9, the court held a supplemental hearing on the defendant's medical condition. The court heard testimony from the defendant's treating physician, who questioned the ability of the BOP to address the defendant's diabetes. The government introduced evidence from the BOP that it could address the defendant's medical needs and had treated thousands of diabetics. The court reserved decision on the defendant's motion. GA 010, 170-171.

On September 11, 2003, the court reduced the defendant's sentence to 15 months of imprisonment. The court sidestepped the jurisdictional issue and declined to credit the defendant's claim that he was suffering from "aberrational thinking" at the sentencing. GA 167. However, the court downwardly departed in light of the supplemented medical record. *Id.* at 172-173.

C. Proceedings on the First Appeal

On October 10, 2003, the government filed a notice of appeal, GA 179, and shortly thereafter was able to convince defense counsel that this Court would reverse the belated reduction of sentence as beyond the scope of the district court's jurisdiction. As a result, on January 28, 2004, the government filed its unopposed motion for summary remand to reimpose the original sentence.

On March 11, 2004, this Court reversed and remanded for further proceedings consistent with its order. The *per curiam* opinion held:

Appellant moves to vacate Defendant-Appellee's amended sentence and remand to the district court to reimpose the original sentence or, alternatively, for a continuance of the briefing schedule. Upon due consideration, it is ORDERED that the motion is granted to this extent: *the case is remanded to the district court for further proceedings consistent with this order.* The district court lacked jurisdiction to grant a post-sentencing downward departure after the expiration of the seven-day time period within which a district court may correct or reduce a sentence under Fed. R. Crim. P. 35(a). *See United States v. Abreu-Cabrera*, 64 F.3d 67, 73 (2d Cir. 1995). *On remand, the court is instructed to vacate Appellee's amended sentence and reimpose the original sentence of 24 months imprisonment, three years supervised release, restitution in the amount of \$1,046,729, and a \$100 special assessment.* This order is entered without prejudice to Defendant-Appellee's right to seek relief under 28 U.S.C. § 2255.

GA 191 (emphasis added).

**D. Resentencing, § 2255 Hearing, Rule 35
Motion and Reconsideration of
Resentencing**

Shortly after the mandate issued, the defendant moved under 28 U.S.C. § 2255 to vacate the yet-to-be-reimposed sentence on three grounds: (1) ineffective assistance of counsel; (2) his present incarceration was cruel and unusual in violation of the Eighth Amendment; and (3)

the BOP should have already released him to a halfway house in light of pre-existing -- but not currently followed -- BOP policy. The defendant ultimately chose not to proceed with grounds (2) and (3) before the district court *in Connecticut*, realizing that the Connecticut court lacked jurisdiction to consider claims regarding his conditions of confinement in New York. GA 197-208, 422-424.

On May 23, 2004, the district court ordered the government to show cause why the yet-to-be-reimposed sentence should not be vacated. GA 193. The government responded that defense counsel had not been constitutionally ineffective and that the defendant lacked jurisdiction to raise the additional claims before the district court in Connecticut. GA 229.

On June 29, 2004, the district court reimposed the original sentence, orally rejecting defense counsel's argument that *Blakely v. Washington*, 124 S. Ct. 2531 (2004) -- decided five days earlier -- required a different result and holding that *Blakely* did not apply to the facts of this case:

I don't think *Blakely* is applicable, and on that basis, I am not going to eliminate the sentencing guideline calculation that is set forth in the presentence report and was adopted without objection, if I recall correctly, by defendant in the original sentence that was imposed.

GA 294 (Tr. at 20). The district court continued:

Now, that being the case, I further will find that there is no basis for otherwise imposing sentence, other than, in effect, as per the mandate of the Second Circuit, to reinstate the original sentence of 24 months, along with the period of supervised release that was not the subject of any challenge, and in other -- in all other respects the original sentence will be reinstated per the mandate.

Id.; *see also* GA 271 (Fourth Amended Judgment).

On the same day, the district court heard evidence on the defendant's motion to vacate the sentence pursuant to 28 U.S.C. § 2255. The defendant's new counsel cross-examined defendant's prior counsel and introduced additional evidence from the defendant's personal physician regarding alleged treatment difficulties encountered by the defendant in prison. At the end of the hearing, the court denied the defendant's claim of ineffective assistance of counsel. The court also found that the defendant was not so physically impaired or infirm as to "warrant a downward departure beyond what has been done already" GA 421. The court permitted defense counsel to withdraw the remaining claims he had filed under 28 U.S.C. § 2255 for refiling in the district in which the defendant was incarcerated. GA 423-424.

On July 2, 2004, the defendant filed a Rule 35 motion for reconsideration of the 24-month sentence in light of *Blakely*, arguing that the court was precluded at the June 29 hearing from imposing a sentence based on guidelines calculations not proven to a jury. GA 473. In opposition, the government argued that the defendant had not objected

to the guidelines calculations at the original sentencing in June 2003, the court had addressed the guidelines calculations at that sentencing, and the defendant had not appealed those calculations. The government further argued that to use Rule 35 and *Blakely* to recalculate the guidelines would be outside the mandate. Instead, the government argued, the defendant must raise any *Blakely* challenge in a collateral proceeding pursuant to 28 U.S.C. § 2255, and face any defenses to such a claim there. The government further contended that Rule 35's requirement that there must be "clear error" to warrant altering the sentence did not permit the reconsideration of unsettled law. The government also argued that the defendant's decision not to object at sentencing to any guidelines calculations constituted a *Blakely* waiver. Finally, the government argued that, if *Blakely* precluded the imposition of sentencing enhancements in this case, the court should revert to discretionary sentencing, treating the Sentencing Guidelines as advisory. GA 465.

On July 6, 2004, the district court held that, in light of *Blakely*, it would reduce the sentence to a term of six months of incarceration. GA 461. The next day, the court issued a memorandum opinion, which outlined its reasoning for the July 6 order, holding that *Blakely* applied to the federal guidelines and precluded imposition of any enhancements not admitted by the defendant or found by a jury beyond a reasonable doubt. The court rejected the government's mandate argument, stating that it "has an obligation to consider the law as it stands at the time of the sentencing." GA 484. The court also held that in light of *Blakely* its imposition of the 24-month sentence was "clear error." GA 485. The court concluded it could not make

findings that increased the guidelines calculation above that corresponding to the base-offense level and imposed a six-month sentence within the corresponding guidelines range of 0-6 months. The court alternatively held that, if a completely discretionary sentencing regime governed, it would impose the same six-month sentence. *Id.* at 475-487.

SUMMARY OF ARGUMENT

This case raises questions about whether a defendant may raise a *Blakely* challenge in a Rule 35 motion to reconsider a sentence reimposed pursuant to a limited remand, when consideration of *Blakely* under such circumstances would plainly circumvent the mandate, sidestep the restrictions on collateral attack, and ignore the narrow scope of Rule 35 itself.

Here the defendant replaced his first attorney just after his original sentencing, and retained new counsel. New counsel used Rule 35 as a means to reconsider the original sentencing, even though the district court plainly lacked jurisdiction to do so. When the district court nonetheless took additional evidence and then reduced the defendant's sentence, the government appealed. This Court summarily reversed, holding that the district court had acted without jurisdiction and instructing the district court to reimpose the original sentence.

Just prior to the date of the reimposition of the original sentence, the U.S. Supreme Court decided *Blakely v. Washington*, 124 S. Ct. 2531 (2004). After the district court initially reimposed the original sentence, rejecting

the defendant's arguments under *Blakely*, as well as the defendant's claim for relief under 28 U.S.C. § 2255, the defendant *again* used Rule 35 to seek a reconsideration of the reimposed sentence, although any sentence reduction would have been plainly outside of the limited remand and would have required the district court to reconsider guidelines calculations and findings which were undisputed at the original sentencing and had never been appealed.

By reconsidering the reimposition of the original sentence and reducing the sentence in light of *Blakely*, the district court erred in several key ways. *First*, the court failed to adhere to the mandate rule, which limits the scope of proceedings on remand. While there are certain exceptions to the mandate rule, including changes in the law, this case did not raise such issues because the *Apprendi/Blakely* arguments could have been raised in the initial sentencing over a year before. In this case, where this Court's order specifically directed the district court to reimpose the original sentence that the court had previously reduced in the absence of jurisdiction to do so, any *Blakely* challenge should have been by collateral attack under 28 U.S.C. § 2255.

Second, because the reasoning in *Blakely* has been held by this Circuit *not* to alter the federal Sentencing Guidelines, *see United States v. Mincey*, 380 F.3d 102, 105-06 (2d Cir. 2004) (per curiam), the district court erred by relying on *Blakely* to reduce the defendant's sentence. In fact, regardless of how *Blakely* is restricted, extended or otherwise applied in cases yet to be decided, the district court erred in its use of Rule 35 to alter the reimposed

sentence *in this case*, because a Rule 35 motion only permits reconsideration of a sentence when the sentence initially imposed was “*clear error*” at the time of the motion, a standard plainly not met given this Court’s decision in *Mincey*.

ARGUMENT

I. THE DISTRICT COURT EXCEEDED THE SCOPE OF THIS COURT’S MANDATE BY FAILING TO FOLLOW INSTRUCTIONS TO REIMPOSE THE ORIGINAL SENTENCE.

A. GOVERNING LAW AND STANDARD OF REVIEW

The “mandate rule” is an aspect of the law-of-the-case doctrine that “requires a trial court to follow an appellate court’s previous ruling on an issue in the same case.” *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002), *cert. denied*, 539 U.S. 902 (2003). The mandate rule “compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or *impliedly* decided by the appellate court.” *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (quoting *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993)). Likewise, where an issue “was ripe for review at the time of an initial appeal but was nonetheless foregone, the mandate rule generally prohibits the district court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so.” *Id.*

A corollary to the mandate rule is the this Court’s statement of principles governing whether a resentencing

after appellate remand should be “*de novo*” or “limited” in nature. “[A]bsent explicit language in the mandate to the contrary, *resentencing should be limited* . . . when the Court of Appeals upholds the underlying convictions but determines that a *sentence* has been erroneously imposed and remands to correct that error.” *United States v. Carpenter*, 320 F.3d 334, 340-41 (2d Cir. 2003) (quoting *Quintieri*, 306 F.3d at 1228) (first emphasis added). For example, where the mandate is narrowly drawn and identifies a specific offense level, the district court at resentencing may not depart downward on additional, previously available grounds that were not raised by the defendant at the first sentencing. *Carpenter*, 320 F.3d at 339, 341.

Whether a district court has exceeded the scope of this Court’s mandate is an issue of law that is subject to *de novo* review. See *United States v. Bryce*, 287 F.3d 249, 253 (2d Cir. 2002); *Carroll v. Blinken*, 42 F.3d 122, 126 (2d Cir. 1994). To determine whether a remand is limited or general, the court considers the “purpose of the rule -- encouraging finality and discouraging wasteful litigation -- and ‘the spirit of the mandate, taking into account the appellate court’s opinion and the circumstances it embraces.’” *United States v. O’Dell*, 320 F.3d 674, 680 (6th Cir. 2003).

The infrequent circumstances that might permit a court to ignore a limited remand under the mandate rule are “an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *United States v. Tenzer*, 213 F.3d 34, 39 (2d. Cir. 2000) (internal quotation marks

omitted) (quoting *Doe v. New York City Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983)); accord *Quintieri*, 306 F.3d at 1230 (“[E]ven when a remand is limited, an issue may be raised if it arises as a result of events that occur after the original sentence.”).

Although certain circumstances may permit a district court to consider issues beyond a limited remand, see *O'Dell*, 320 F.3d at 681, courts have held that failure to raise arguments under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in a direct appeal waives the opportunity to raise the issue in a resentencing guided by a limited remand. See *United States v. Banks*, 333 F.3d 884, 886 (8th Cir. 2003) (per curiam); *O'Dell*, 320 F.3d at 681.⁶ In *Banks*, the Eighth Circuit rejected the defendant’s argument that the district court should have considered the impact of *Apprendi* on drug quantity at his resentencing as “outside the limited scope of the mandate.” 333 F.3d at 886.

B. DISCUSSION

Here the remand was plainly limited. Aware that the district court had acted without jurisdiction to reduce the original sentence, this Court directed the district court as follows:

⁶ In *Quintieri*, this Court declined to decide whether the Supreme Court’s decision in *Apprendi*, issued after a remand from this Court but before resentencing in the district court, constituted a sufficient change in the law to warrant an exception to the mandate rule. 306 F.3d at 1231.

On remand, the court *is instructed* to vacate Appellee's amended sentence *and reimpose the original sentence* of 24 months imprisonment, three years supervised release, restitution in the amount of \$1,046,729, and a \$100 special assessment.

G.A. 191 (emphasis added).

The order gives no latitude for the district court to consider other issues in reimposing the original sentence, and with good reason: This Court was simply trying to turn back the clock and reimpose the sentence that had been in place before the district court acted without jurisdiction to change it.

Nor does this case raise a basis for imposing one of the few exceptions to the mandate rule. Although there are narrow exceptions, such as a change in the law, that sometimes permit a court to go beyond a limited remand, this case does not present such an exception.

First, because the *Apprendi* argument advanced in *Blakely* could have been made by the defendant at the June 2003 sentencing,⁷ when the defendant neither objected to

⁷ Despite this Court's holdings to the contrary, defendants have continually pressed *Apprendi*-based claims that factual findings under the U.S. Sentencing Guidelines must be made by a jury beyond a reasonable doubt, either in an effort to persuade this Court to alter its precedents or to preserve the question for review by the Supreme Court. *See, e.g., United States v. Thorn*, 317 F.3d 107, 124 (2d Cir. 2003),
(continued...)

the guidelines calculation nor appealed the decision, *Blakely* should not be deemed “an intervening change in controlling law” that would or should vitiate strong policy reasons to enforce the mandate in this case. See *Carpenter*, 320 F.3d at 339, 341 (where decretal paragraph of mandate “was narrow” and identified specific sentencing offense level and guidelines range for resentencing, district court at resentencing could not depart downward on additional previously available grounds that were not raised by defendant at first sentencing); see *O’Dell*, 320 F.3d at 681; *Banks*, 333 F.3d at 886 (precluding *Apprendi* arguments at resentencing). Indeed, this Court (like some other circuits) has held that *Blakely* did not change the law applicable to the federal Sentencing Guidelines, and that only a decision of the United States Supreme Court could do so. See *United States v. Mincey*, 380 F.3d 102, 105-06 (2d Cir. 2004) (per curiam). Given that the *Blakely* opinion itself claimed not to address the federal Sentencing Guidelines, 124 S. Ct. at 2538 n.9, it cannot be seen as an intervening change in the controlling law.

Second, where the limited remand arises out of circumstances where the district court previously acted without jurisdiction in altering a properly imposed sentence, there is a strong policy reason to further restrict when a district court may ignore a limited remand, including an alleged change in the law. Otherwise, district courts would have free license to reopen sentencings long ago decided and circumvent the strict restrictions when a

⁷ (...continued)
cert. denied, 538 U.S. 1064 (2003).

defendant may collaterally attack a sentence under 28 U.S.C. § 2255.

More pointedly, if the district court acted appropriately here, any district court in the future could circumvent limitations imposed by § 2255 by simply acting without jurisdiction to alter a previously imposed sentence, waiting for summary reversal by this Court and then reconsidering the entire sentence on remand in light of any newly developed interpretation of the law. By proceeding this way, the defendant sidesteps restrictions on collateral attack such as whether the new interpretation of the law should be given retroactive application.⁸ It is not

⁸ *Apprendi* and *Ring v. Arizona*, 536 U.S. 584 (2002), are not retroactive under the criteria laid out in *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, a new procedural rule is retroactive if it “places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,’” 489 U.S. at 290 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971)), or if it is a watershed rule of criminal procedure, one that will “properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction,” 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 693-94 (Harlan, J.)). The Supreme Court has found that “*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review,” *Schriro v. Summerlin*, 124 S. Ct. 2519, 2526 (2004), because the shift in decision making authority from judge to jury is not a watershed rule. In *Coleman v. United States*, 329 F.3d 77, 82 (2d Cir. 2003), *cert. denied*, 124 S. Ct. 840 (2003), this Court (like every other circuit) held that *Apprendi* does not apply retroactively to
(continued...)

hyperbole to imagine creative defense counsel filing thousands of “Rule 35 motions” on behalf of defendants who like their chances by this procedure more than by motion under 28 U.S.C. § 2255.

In short, the district court’s consideration of *Blakely* exceeded the permissible scope of this Court’s limited remand to reimpose the original sentence. The government respectfully requests that this Court reverse the district court’s order, dated July 6, 2004, and direct reimposition of the original sentence of 24 months of imprisonment, three years of supervised release, a \$100 special assessment, and a properly amended restitution amount of \$726,988.

II. THE DISTRICT COURT ERRED IN REDUCING THE DEFENDANT’S SENTENCE UNDER RULE 35(A).

A. GOVERNING LAW AND STANDARD OF REVIEW

Rule 35 of the Federal Rules of Criminal Procedure provides that a district court may correct a sentence within seven days of imposing sentence if it “resulted from

⁸ (...continued)
initial § 2255 motions for habeas relief, despite the increased burden of proof from preponderance to beyond-a-reasonable-doubt. *Blakely* is an extension of the *Apprendi-Ring* rule that elements contributing to a sentence must be found by a jury rather than a judge, and thus is unlikely to meet the *Teague* test for retroactivity. As a result, *Blakely* should not apply to a sentence subject to collateral review.

arithmetical, technical, or other clear error.” Fed. R. Crim. P. 35(a) (formerly codified as Fed. R. Crim. P. 35(c)). Prior to 1991, Rule 35 gave fairly broad license to a district court to correct “at any time” an “illegal” sentence or one “imposed in an illegal manner.” In 1991, however, the rule was changed to substantially its present form.

With respect to the types of errors that are amenable to correction under Rule 35, the 1991 Advisory Committee Notes explain that “[t]he authority to correct a sentence under this subdivision is intended to be *very narrow* and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action.” Fed. R. Crim. P. 35 (Advisory Committee Notes, 1991 Amendments) (emphasis added). *See also United States v. Waters*, 84 F.3d 86, 89 (2d Cir.1996) (per curiam) (quoting *United States v. Abreu-Cabrera*, 64 F.3d 67, 72 (2d Cir. 1995)); *United States v. Arjoon*, 964 F.2d 167, 170 (2d Cir. 1992) (limiting post-sentencing changes to judgments even prior to 1991 Amendments to Rule 35). The Advisory Committee Notes further explain that the rule is not a general vehicle for a court to reconsider its sentence or the manner in which the court exercised its discretion under the Sentencing Guidelines:

The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at the

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

Fed. R. Crim. P. 35 (Advisory Committee Notes, 1991 Amendments).

While the Rule requires the district court to act to correct the sentence within seven days, the advisory notes state that the Rule does not preclude a defendant from seeking post-conviction relief from an otherwise illegal sentence under 28 U.S.C. § 2255. Fed. R. Crim. P. 35 (Advisory Committee Notes, 1991 Amendments).

The cases reflect the limited circumstances allowing sentence correction under Rule 35. In *United States v. Arjoon*, 964 F.2d at 170, the district court had reduced Arjoon's original sentence for embezzlement because on the same day the court had imposed a milder guidelines-mandated sentence on an unrelated defendant for a gun-trafficking violation, which the court viewed as a far more serious offense. This Court reversed, stating "[t]his plainly does not constitute the kind of 'obvious error' which the district court has power to remedy, but instead constitutes a change of heart." *Id.* In *Abreu-Cabrera*, a district court elected to use Rule 35 as a vehicle to grant a post-sentencing downward departure from the severe consequences of an "aggravated felony" enhancement under the immigration sentencing guideline. *Id.* at 70, 72. The district court engaged in a "review [of] the underlying facts of the aggravated felony and defendant's other circumstances" in order to grant the downward departure. *Id.* at 72. This Court concluded that "[s]uch correction is

clearly outside the scope of the rule.” *Id.* Noting the limitation of the rule to obvious errors that would justify reversal on appeal, the Court observed that “[t]he failure to make a downward departure at Abreu-Cabrera’s initial sentencing did not constitute an obvious error or mistake that would have resulted in a remand by this Court.” *Id.* The Court concluded that “[s]ince Abreu-Cabrera’s resentencing represented nothing more than a district court’s change of heart as to the appropriateness of the sentence, it was accordingly not a correction authorized by Rule 35(c) [now Rule 35(a)].” *Id.* “[S]uch second thoughts, no matter how well intentioned, are not the sort of error that Rule 35(c) [now Rule 35(a)] was designed to remedy.” *Id.* at 73.

A district court’s jurisdiction to grant a Rule 35(a) motion is reviewed *de novo*. See *United States v. Sadler*, 234 F.3d 368, 373 (8th Cir. 2000) (collecting cases, and citing *Abreu-Cabrera*, 64 F.3d at 71-73, as having applied “*de novo* standard of review without explicitly declaring it”).

B. DISCUSSION

Here the district court held that it had committed “clear error” by reimposing the defendant’s original sentence on remand, rather than reducing the sentence in light of its re-reading of *Blakely*.⁹ The court, relying on Rule 35,

⁹ Rule 36 of the Federal Rules of Criminal Procedure authorizes correction “at any time” of a “clerical error in a judgment, order, or other part of the record, or . . . an error in
(continued...)

reconsidered the sentence and reduced it. In so doing, the court erred.

First, the holding in *Blakely* does not apply to the application of the federal Sentencing Guidelines. See *United States v. Mincey*, 380 F.3d 102, 105-06 (2d Cir. 2004) (per curiam). The district court thus did not commit error, much less “clear error,” in failing to apply the holding of *Blakely* to this case and should not have used Rule 35 to alter or amend the defendant’s reimposed sentence.

Second, even if the reasoning of *Blakely* is ultimately extended to the federal Sentencing Guidelines in later cases,¹⁰ it was simply not “clear error” for the district court to conclude, as it initially did, that *Blakely* did not apply to

⁹ (...continued)

the record arising from oversight or omission.” The defendant in this case sought relief under Rule 35, not Rule 36, and Rule 36 does not possibly justify the district court’s decision in this case. See *United States v. Werber*, 51 F.3d 342, 343 (2d Cir. 1995) (“We hold that Rule 36 authorizes a court to correct only clerical errors in the transcription of judgments, not to effectuate its unexpressed intentions at the time of sentencing.”) (internal footnote omitted); see also *id.* at 347 (further noting that “Rule 36 covers only minor, uncontroversial errors”).

¹⁰ On October 4, 2004, the Supreme Court heard oral argument in two cases involving the applicability of *Blakely* to the U.S. Sentencing Guidelines. *United States v. Booker*, No. 04-104, *cert. granted*, 2004 WL 1713654 (U.S. Aug. 2, 2004), and *United States v. Fanfan*, No. 04-105, *cert. granted*, 2004 WL 1713655 (U.S. Aug. 2, 2004).

the Guidelines. In fact, shortly after the date of the resentencing by the district court, this Court in *Mincey*, 380 F.3d at 105-06, reached the same conclusion. Because the initial resentencing involved no “clear error” at the time the district court was called on to decide the Rule 35 motion, the district court simply had no basis to reduce the sentence under Rule 35. Put another way, the district court had not committed an error that “almost certain[ly] [would have] result[ed] in a remand” Fed. R. Crim. P. 35 (Advisory Committee Notes, 1991 Amendments). Again, to the extent this defendant wanted to raise a *Blakely* challenge, the appropriate vehicle would be pursuant to a 28 U.S.C. § 2255 motion.¹¹

CONCLUSION

For the foregoing reasons, the order of the district court, dated July 6, 2004, reducing the defendant’s sentence should be reversed and the district court instructed to reimpose the sentence of 24 months of incarceration, three years of supervised release, a \$100

¹¹ The defendant may argue that the district court did not act under Rule 35 but acted pursuant to some kind of “inherent authority” to modify its own sentence. This argument, however, would render meaningless the limitations of Rule 35, and it has been rejected by the courts to consider it. *See United States v. Diaz-Clark*, 292 F.3d 1310, 1317-18 (11th Cir. 2002) *on subsequent appeal*, 2003 WL 678010 (11th Cir. 2003), *and cert. denied*, 539 U.S. 951 (2003) (no “inherent authority” outside limits of Rule 35; citing cases); *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1028-29 (9th Cir. 1999) (same).

special assessment, and the amended restitution figure of \$726,988.

Dated: November 1, 2004

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "C. W. Schmeisser". The signature is fluid and cursive, with a long horizontal stroke at the end.

CHRISTOPHER W. SCHMEISSER
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

ADDENDUM

ADDENDUM OF FEDERAL RULES

Rules of Criminal Procedure

Rule 35. Correcting or Reducing a Sentence

(a) **Correcting Clear Error.** Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.