07-1903-cr

To Be Argued By:
FELICE M. DUFFY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-1903-cr

UNITED STATES OF AMERICA,
Appellant

-vs-

JOSE DIAZ,
Defendant-Appellee.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The Solicitor General of the United States has personally authorized this government sentencing appeal. *See* 18 U.S.C. § 3742(b).

The district court (Peter C. Dorsey, Senior United States District Judge) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231.

On April 3, 2007, the district court orally sentenced the defendant to 18 months in prison. Joint Appendix ("JA") 6, 116. On April 9, 2007, the government moved to correct the sentence pursuant to Fed. R. Crim. P. 35(a). JA 122-27. On April 10, 2007, the court vacated the sentence but declined to impose a corrected sentence. JA 6, 131-33, 138-39. On April 26, 2007, the government filed a notice of appeal and moved to stay further proceedings in the district court pending its appeal, on the ground that the district court lost jurisdiction over the case upon the lapse of seven days from the oral pronouncement of sentence, pursuant to Rule 35(a). JA 6, 190. On May 4, 2007, the district court granted the stay. JA 6. As argued more fully in Point II.A *infra*, the government contends that because the district court failed to impose a corrected sentence within the seven-day window provided by Rule 35(a), its vacatur order was unperfected and therefore became ineffective, and the 18-month sentence became final. Notwithstanding the district court's failure to enter a written judgment, the government contends that this Court has appellate jurisdiction to review the sentence pursuant to 18 U.S.C. § 3742(a). *See* Point II.B *infra*.

Statement of Issues Presented for Review

1. Whether the district court erred in imposing an 18-month sentence, when neither of the permissible bases for sentencing below the mandatory minimum of 60 months was present.

2. Whether the district court's failure to correct Diaz's sentence within the seven-day period established by Rule 35(a) rendered the original 18-month sentence final for purposes of appellate review, and deprived the district court of further jurisdiction to alter the sentence, despite the fact that the court purported to vacate the original sentence within the seven-day period.

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Docket No. 07-1903-cr

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JOSE DIAZ,

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Preliminary Statement

Jose Diaz pleaded guilty to possessing with intent to distribute 500 grams or more of cocaine. That violation carries a minimum penalty of 60 months in prison. 21 U.S.C. § 841(b)(1)(B)(ii). It was undisputed at sentencing that Diaz did not qualify for a sentence below the mandatory minimum: He had not provided substantial assistance to the government under 18 U.S.C. § 3553(e), and he was ineligible for the "safety-valve" provisions of 18 U.S.C. § 3553(f) because he had more than one criminal history point. Notwithstanding the mandatory

minimum set by statute, on April 3, 2007, the district court (Dorsey, J.) sentenced the defendant to 18 months in prison over the government's objection.

On April 9, 2007, the government moved to correct the sentence pursuant to Fed. R. Crim. P. 35(a) on the ground that it was "clear error" to sentence Diaz below the statutory minimum. The government pointed out that under Rule 35(a), the court would have to correct the sentence within seven business days of its oral pronouncement. At a hearing on the following day, the district court acknowledged its error and vacated the original 18-month sentence, but it did not impose a new sentence. On April 11, 2007, the court again failed to impose a new sentence, taking the view that its vacatur was sufficient to comply with Rule 35(a). It then invited the defense to submit supplemental briefing on any issues it wished to raise, including the potential for a motion for sentence reduction pursuant to U.S.S.G. § 5K1.1 based on substantial assistance to the government. The government filed a notice of appeal and later moved, successfully, to stay further proceedings pending this Court's resolution of the matter.

This appeal raises two issues. The first issue was undisputed below: The district court clearly violated 21 U.S.C. § 841(b)(1)(B)(ii) when it sentenced the defendant to 18 months in prison, below the statutory minimum penalty of 60 months. The second, procedural, issue is more complicated: what to do in light of the district court's vacatur of the original, orally pronounced sentence, but its failure to correct that sentence within the seven days

provided by Rule 35(a), and its failure to enter a written judgment on the docket. The government submits that to "correct" a sentence within the meaning of Rule 35(a), a district court is obligated to actually re-sentence the defendant within the seven-day window set forth in that rule. Upon the expiration of that period, the district court lacked further jurisdiction to act, and its vacatur should be deemed unperfected and hence ineffective. The 18-month sentence should therefore be deemed final and appealable, notwithstanding the absence of a final written judgment.

Regardless of how dissatisfied a district court may be with the mandatory minimum sentence that applies to a defendant after he has entered a valid guilty plea, Rule 35(a) does not authorize the wholesale reopening of a criminal case after sentence has been orally pronounced and seven days have passed. This Court should hold that the district court's failure to re-sentence within seven days means that there has been no "correct[ion]" of sentence under Rule 35; that the 18-month sentence therefore became final and appealable; and that the 18-month sentence was unlawful. Accordingly, this Court should vacate that sentence and remand for imposition of a sentence at or above the 60-month statutory minimum.

Statement of the Case

On May 4, 2006, a federal grand jury sitting in Bridgeport, Connecticut, returned a second superseding indictment charging Jose Diaz and four others with conspiring to possess with intent to distribute five

kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A)(ii)(II). JA 2-3, 8-9.

On November 15, 2006, Diaz pleaded guilty to a substitute information charging him with a single count of possessing with intent to distribute, and distributing, 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and 18 U.S.C. § 2. JA 4-5 (docket); JA 10 (information); JA 11-18 (plea agreement); JA 19-67 (plea hearing).

At a sentencing hearing on April 3, 2007, the district court orally sentenced the defendant to 18 months in prison, over the government's objection. JA 116.

On April 9, 2007, the government filed a written motion to correct the sentence pursuant to Fed. R. Crim. P. 35(a). JA 122-27.

At a hearing on April 10, 2007, at which the defendant was not present, the district court vacated the 18-month sentence, but did not impose a corrected sentence. JA 131, 138-39; *see also* JA 6 (electronic endorsement order).

At a hearing on April 11, 2007, at which the defendant was present, the district court declined to impose a corrected sentence, JA 167, and instead invited the defense to file supplemental briefing within two weeks, JA 187.

On April 26, 2007, the government filed a notice of appeal. JA 6, 190. On that same date, the government also moved to stay further proceedings pending appeal,

asserting that the district court had lost jurisdiction over the case upon the lapse of seven days. JA 6. On May 4, 2007, the district court entered an electronic endorsement order, granting the stay motion. JA 6.

Statement of Facts and Proceedings Relevant to this Appeal

A. The Offense Conduct[1]

This case involves a multi-jurisdictional cocaine conspiracy that occurred over a two-month period between December 2005 and February 2006. During the course of the conspiracy, Diaz allowed his friend and co-defendant Julio Reyes Salas to stay in his living room in Hackensack, New Jersey, after Reyes Salas had arrived from Puerto Rico and while he was looking for housing in New Jersey. PSR ¶¶ 20-21. As part of the conspiracy, Reyes Salas was supposed to transport eight kilograms of cocaine from New Jersey to Massachusetts. PSR ¶¶ 15-16. At one point, Diaz gave Mapquest directions to Reyes Salas to help him navigate to where certain cocaine was to be distributed. JA 61 (factual basis for plea, to which defense agrees), JA 70-71 (defendant's sentencing memo); *see also* JA 107 (government's comments at sentencing). Reyes Salas had told Diaz that he had cocaine with him and needed help. PSR ¶ 22. Diaz stored the drugs for Reyes Salas for a week in a storage locker. *Id.* About one week

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[1] These facts are drawn largely from the statement of offense conduct in the presentence report, which the defense acknowledged was "accurate." JA 104.

later, Diaz retrieved the drugs and gave them to Reyes Salas. *Id.* On February 15, 2006, Reyes Salas was arrested by police at a rest area in Darien, Connecticut, as he was driving north to Massachusetts with five of those kilograms. PSR ¶ 19. Agents then executed a search warrant at Diaz's home in Hackensack. Diaz cooperated and directed the agents to a gym bag in his bedroom that contained the remaining three kilograms of cocaine. PSR ¶ 22; JA 61; *see also* JA 107 (government representing that Diaz gave Reyes Salas the gym bag to store the cocaine).[2]

B. The Indictment

On May 4, 2006, a federal grand jury returned a two-count superseding indictment against Norberto Garcia Vallejo, Abimael Navedo, Hiram Rosario Diaz and Julio Reyes Salas, adding Jose Diaz as an additional defendant. JA 2-3, 8-9. All five defendants were charged in Count One with conspiring to possess with intent to distribute 5 or more kilograms of cocaine. *Id.*

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[2] As the government noted at sentencing, the defendant gave a proffer to the government regarding his involvement in this offense, even though he understood that he could not qualify for the safety-valve provisions of 18 U.S.C. § 3553(f). JA 110. The defendant never, however, entered into a cooperation agreement with the government. JA 110.

C. The Guilty Plea

At a hearing on November 15, 2006, Diaz pleaded guilty to a substitute information charging him with possession with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). JA 4-5, 10. Diaz signed a plea agreement that confirmed the penalties applicable to his drug offense. JA 11-18. It explained that the charge carried "a maximum penalty of 40 years' imprisonment, a $2,000,000 fine, and a mandatory minimum penalty of five years' imprisonment." JA 11-12. The agreement contained a guideline stipulation, in which the parties agreed that Diaz faced a sentencing range of 70-87 months of imprisonment. JA 13. That range was premised on a base offense level of 28, U.S.S.G. § 2D1.1(6), less three levels for acceptance of responsibility, U.S.S.G. § 3E1.1, and a criminal history category III. JA 13. The stipulation reiterated that "the defendant is facing a five-year mandatory minimum term of imprisonment pursuant to 21 U.S.C. § 841(b)(1)(B)." JA 13. The parties reserved their rights to argue for upward or downward departures from the guidelines range. *Id.* The plea agreement also contained a stipulation of offense conduct, in which the defendant agreed that on the date charged in the information, he had "knowingly and intentionally possessed with intent to distribute at least 2.0 kilograms but less than 3.5 kilograms of a mixture or substance containing a detectable amount of cocaine," and that he knew the substance was in fact cocaine, a controlled substance. JA 18.

During the plea allocution, the district court advised Diaz of the penalties he faced, including a "five-year mandatory minimum period of incarceration, with a maximum of 40 years imprisonment." JA 42. In discussing the sentencing guidelines, the court advised:

> Now I'm not obliged to impose a sentence within the guideline range. I do have a mandatory minimum provision that's involved that would be applicable in your case, but I need only consider the guideline range as part of the question of whether a particular sentence is reasonable.

JA 53. The government set forth a factual basis for the plea, which the defendant acknowledged and the court accepted. JA 61-62.

D. The Presentence Report

The PSR calculated Diaz's guideline range using a base offense level of 28 for 2.0 to 3.5 kilograms of cocaine in accordance with U.S.S.G. § 2D1.1(c)(6). PSR ¶ 25. It then subtracted three levels for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1. PSR ¶ 30. A total offense level of 25, coupled with a criminal history category II, PSR ¶ 41, yielded an advisory range of 63-78 months of imprisonment, PSR ¶ 76, with a statutory range of five to forty years of imprisonment, PSR ¶ 75. The probation officer stated that she was "not aware of any circumstances that would warrant a departure from the applicable guideline range." PSR ¶ 85.

E. Sentencing

In Diaz's sentencing memorandum filed on April 2, 2007, Diaz agreed that the applicable sentencing range was 63-78 months imprisonment and that he faced a mandatory minimum sentence of 60 months. JA 69. Diaz did not rely on any specific grounds for departures, but rather requested that the district court sentence him to "a period of confinement that is the absolute minimum in the court's sound discretion." JA 80.

At a sentencing hearing on April 3, 2007, the district court gave a number of reasons why it believed it appropriate to sentence Diaz below the advisory guideline range set forth in the plea agreement. First, the court opined that Diaz deserved a four-level downward adjustment for a minimal role in the offense, on the theory that his providing a stash house had only an "incidental" effect on the larger drug conspiracy. JA 101-02. Second, the court noted that there had been a twelve-year hiatus between Diaz's last criminal conviction and the instant offense, suggesting that his criminal history score overstated the risk of recidivism. JA 102-03. Third, the court explained that because Diaz had already been confined for eleven months and was probably entitled to another month's credit for good behavior, the court would sentence "on the basis of starting from that point." JA 103.

The government agreed with the PSR's calculation that Diaz fell within criminal history category II rather than III, as had been provided in the plea agreement. JA 105. The government also moved for the defendant to receive a

third point for accepting responsibility for the offense, U.S.S.G. § 3E1.1. JA 105. The government explained that Diaz had received a favorable disposition in this case. It had agreed to dismiss the count in the indictment that charged Diaz with the overall drug conspiracy, which would have involved all eight kilograms of cocaine stored at his apartment and carried a mandatory minimum of ten years. Instead, the government had agreed to pursue a lesser charge in the substitute information, with a threshold amount of 500 grams of cocaine, that carried only a five-year mandatory minimum. JA 111. Moreover, the government explained that it had agreed not to file a second-offender notice pursuant to 21 U.S.C. § 851, which would have exposed Diaz to a mandatory minimum ten years on the charge in the information, or a minimum of twenty years on the charge in the indictment. JA 111.

After hearing from the parties, the district court sentenced the defendant to 18 months in prison, with credit for the time already served, leaving approximately 6 months. JA 116. The court also ordered that the defendant be placed on supervised release for three years, and that he pay a $100 special assessment. *Id.* The government pointed out that Diaz had pled guilty to a violation of 21 U.S.C. § 841(b)(1)(B), which entailed a five-year mandatory minimum. JA 118. In response, the court stated:

> Well, I have determined to depart and, therefore, the sentence I've imposed, while it is – I have taken into consideration the guidelines, and also taken into consideration the statute, I'm going

to impose it as a non-guideline statute [*sic*] in order to avoid the problem with the mandatory minimum.

JA 118-19. The government stated that it objected to "a sentence below the five-year mandatory minimum, below the . . . sixty-three months," which was the low end of the stipulated guideline range. JA 119.

F. Rule 35(a) Motion

On April 9, 2007, the government filed a motion to correct the sentence pursuant to Federal Rule of Criminal Procedure 35(a), requesting that the district court correct the sentence and impose a sentence above the 60-month statutorily mandated minimum term of imprisonment. JA 122-27. The government observed that it was undisputed that Diaz had not entered into a cooperation agreement or provided substantial assistance to the government. JA 126. It was also undisputed that Diaz was ineligible for the safety-valve provisions of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2 because he had more than one criminal history point. JA 126. The government therefore requested that the court correct the sentence within seven days of the sentencing that had been held on April 3, 2007. JA 127.

On April 10, 2007, the district court held a hearing on the motion to correct the sentence. Given the short notice, the U.S. Marshal's office had not been able to produce the defendant for that day's hearing. JA 129. The court recognized that "by an oversight on the part of the Court, in trying to think the thing through and determine what

was appropriate, having in mind all of what was involved, I neglected and failed to accommodate the mandatory minimum involved in the statute to which Mr. Diaz had entered the plea, and that clearly []as the government's motion and memorandum flags, constitutes error." JA 129-30. The court acknowledged that it had "compounded the thing" by failing to "call[] a halt to the whole thing" after the government had "flagged the fact of the mandatory minimum." JA 130. The court recognized that "the court of appeals would, in all probability, and indeed probably absolutely, agree with the government's position and vacate the sentence and judgment, and send the case back here to do it over again, and this time, appropriately." JA 131.

The government pointed out that the court was obliged to act under Rule 35(a) within seven business days of sentencing, so that any correction of sentence would have to take place no later than the Thursday of that week (April 12, 2007). JA 135-36. The government also took the position that Diaz would have to be present if the court were to impose a new sentence, and that "[u]nder Rule 35(a), it would be correcting the sentence . . . to impose a new sentence." JA 135.

Although the court announced its intention to vacate the 18-month sentence immediately, within the seven-day window provided by Rule 35(a), it nevertheless declined to promptly impose a new sentence. JA 139. Instead, the court suggested that the parties should explore "alternative scenarios" that might permit it to avoid imposing the mandatory minimum sentence. *Id.* At the outset of the

hearing, the court had openly referred to the fact that after receiving the government's motion at 9:30 a.m. that morning, it had received "an indication that I was not going to be able to resolve the matter informally, as I discussed with you, and had previously discussed, through the probation office, with the government . . . ." JA 132. Later, the court explained that

> this was the subject that I thought would not be inappropriate to discuss informally, and that is to see whether the matter could be resolved in some fashion and we're of course, trapped by Congress' mandatory minimum, but it seems to me that for all of the reasons that I put on the record at the time of the original sentencing, plus a couple of additional factors that have occurred to me that could very well resolve the problem, that it's not inappropriate for particularly the government to review its position and decide what it wishes to do, basically on the premise that the sentence that was imposed, notwithstanding the noncompliance with the mandatory minimum, was nonetheless not an inappropriate, unreasonable, unfair, or unjust sentence.
>
> Now, that's a matter for the government to decide, and there are various alternative scenarios that might be pursued consistent with that approach to the case.
>
> I am not suggesting, and had no intention in the discussion that I intended to have, that the

> government took exception to, I'm not proposing; one, to tell the government what it should do, two, I am not prepared to negotiate with the government as to what should be done.
>
> Frankly, all I intended to do was point out the possible scenarios that might follow so that . . . all possible considerations were reviewed by the government and then a decision could and should be made.
>
> My contemplation would be that . . . if the government decided to take some particular position, that it would be communicated to [defense counsel] and eventually to Mr. Diaz, and whatever action was required by the Court would follow.

JA 139-40. Judge Dorsey recognized that his "informal approach was not acceptable to the government, [which] necessitated the formality of the proceedings here today . . . ." JA 141. Judge Dorsey further stated he had communicated "what alternatives might appropriately be considered" to the probation officer, and that the government and defense counsel were "perfectly at liberty to discuss the matter with her." *Id.* The court then discussed a new inquiry raised that morning, which had not been mentioned at the sentencing hearing, about whether the probation office could obtain copies of FBI interview reports dealing with Diaz. JA 142. Judge Dorsey said that he would not get involved in that matter "at the moment," but that it "may have some relevance to

the further proceedings that would be involved in the case." *Id.*

There ensued some debate about whether the district court would be obliged to impose a corrected sentence within the seven-day window provided by Rule 35(a). The government argued that re-sentencing must occur within that time frame, and that any failure to do so would leave open only an appeal. JA 146-47. The district court suggested that Rule 35(a) would be satisfied by a vacatur order, and that a failure to re-sentence within seven days would lead to a "reversion of the case back to the point at which the defendant has pled guilty, but has not been sentenced." JA 147. The district court nevertheless invited the parties to provide additional briefing regarding the seven-day jurisdictional window under Rule 35(a). JA 144-45.

The court reconvened the following day, on April 11, 2007, with the defendant present. JA 169. Judge Dorsey again declined to impose a new sentence, taking the view that Rule 35(a) would be satisfied by vacatur of the sentence alone. JA 166-67. The court also noted that "[t]he judgment that would normally enter, has not been entered and docketed." JA 168. The government reiterated its position that Rule 35(a) required that re-sentencing occur within seven days of sentencing. JA 169. The court then raised the question, "just talking hypothetically at the moment," of whether the government would be obliged to file a § 5K1.1 motion on Diaz's behalf if he had "fulfilled the requirements of § 5K1.1." JA 172. The government pointed out that no claim in that regard had ever been

raised, that nothing had arisen in the week after sentencing to suggest that such a claim had been overlooked, and that in any event the only time for such a claim to have been raised would have been at the original sentencing. JA 173-76. Judge Dorsey said that he was not "second guessing" defense counsel, but was "concerned about the end result," and that "the reason I raised the question I have about the 5K, is that in the first place, if a 5K motion was in order and filed, then the ultimate problem with which we are struggling, i.e., the application of the mandatory minimum of five years, would be vitiated. . . . . I am not convinced but that perhaps . . . there is a justification for a 5K motion." JA 178. The court gave defense counsel two weeks to file any papers regarding a basis for a motion for a downward departure pursuant to U.S.S.G. § 5K1.1 for substantial assistance by Diaz. JA 174-88.

On April 26, 2007, the government filed a motion to stay proceedings pending appeal, asserting that the district court no longer had jurisdiction because no new sentence had been imposed within seven days of the oral pronouncement of the defendant's sentence. JA 6. On that same day, the government also filed a notice of appeal. *Id.* On May 4, 2007, the district court granted the government's motion to stay the proceeding pending appeal. *Id.*

SUMMARY OF ARGUMENT

1. Judge Dorsey erred in imposing an 18-month sentence. It was undisputed that Diaz was subject to a statutory minimum sentence of 60 months because he

pleaded guilty to a violation of 21 U.S.C. § 841(b)(1)(B) for possessing with intent to distribute, and distributing, 500 grams or more of cocaine. It was also undisputed that Diaz did not satisfy the requirements for either of the two statutory exceptions for receiving a sentence below the mandatory minimum. He had more than one criminal history point, and therefore was ineligible for the safety-valve provisions of 18 U.S.C. § 3553(f). Nor had the government filed a motion under 18 U.S.C. § 3553(e), certifying that the defendant had provided substantial assistance in the investigation or prosecution of another person. Indeed, Diaz never claimed to have provided such assistance, much less had the government ever entered into a cooperation agreement with him. As Judge Dorsey subsequently recognized, the 18-month sentence was clearly unlawful.

2. In order to "correct" Diaz's sentence for purposes of Fed. R. Crim. P. 35(a), Judge Dorsey was required not only to vacate the unlawful 18-month sentence, but also to re-sentence the defendant within seven days. Every circuit to consider the question has agreed that Rule 35(a) requires the imposition of a corrected sentence within the seven days provided by that rule. That conclusion is consistent with this Court's closely related holding that it is insufficient for a district court to state within the seven days that it intends to correct a sentence; the correction itself must occur within the window set by the rule. Such a rule is also most consistent with Fed. R. App. P. 4(b)(5), which provides that the filing of a Rule 35 motion does not suspend the time for filing a notice of appeal, since that rule is designed to ensure that any re-sentencing occurs

before a defendant's ten-day period to file a notice of appeal has run.

The district court's failure to re-sentence the defendant within seven days deprives it of further jurisdiction to alter the sentence. The Supreme Court has recently distinguished between time limits that are "jurisdictional" and those that are waivable "claim-processing" rules. Time limits that Congress establishes by statute are deemed "jurisdictional" and hence unalterable by courts. Congress has expressly incorporated Rule 35 into the exclusive list of methods for modifying a sentence in 18 U.S.C. § 3582(c)(1)(B), and this incorporation into statute renders it jurisdictional.

The government submits that this Court has jurisdiction to consider this appeal notwithstanding the district court's failure to complete the ministerial task of entering a written judgment memorializing the 18-month sentence that it purported to vacate. This Court has repeatedly held that a sentence is final upon its oral pronouncement, and that a district court has no jurisdiction to alter it after the expiration of the seven-day period set forth in Rule 35(a). Now that the district court has lost jurisdiction over the sentence, prohibiting this appeal from proceeding would lead to the anomalous situation in which neither the district court nor the appellate court has jurisdiction over the case – a case in which the 18-month sentence imposed was clearly unlawful. Congress could not have intended such a jurisdictional impasse. The requirement of a written judgment that is found in Fed. R. App. P. 4(b) is not derived from or incorporated into

statute, and therefore it is a waivable claim-processing rule rather than a jurisdictional prerequisite. Where, as here, the party seeking appellate review waives the entry of a written judgment, the appeal should be permitted to proceed.

In the alternative, if the Court believes that it cannot proceed in the absence of a written judgment embodying the orally imposed 18-month sentence, it should exercise its mandamus authority to direct the district court to complete its purely ministerial duty of entering such a written judgment, thereby perfecting this Court's jurisdiction over the appeal of the 18-month sentence.

ARGUMENT

I. The district court erred in imposing an 18-month sentence, when neither of the permissible bases for sentencing below the mandatory minimum of 60 months was present.

The district court's imposition of an 18-month sentence clearly violated 21 U.S.C. § 841(b)(1)(B), which prescribes a minimum sentence of 60 months. Sentences are reviewed for reasonableness, *see generally United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), and it is plainly unreasonable for a judge to impose a sentence outside the range authorized by statute.

There was no dispute in the district court that Diaz pleaded guilty to a violation of § 841(b)(1)(B),[3] and that he specifically admitted that his offense involved a type and quantity of drugs that triggered the five-year mandatory minimum of that provision. Pursuant to a written plea agreement, Diaz admitted possessing with intent to distribute, and distributing, 500 grams or more of cocaine. JA 11, 15. In the written stipulation of offense conduct, Diaz admitted that his offense involved between 2.0 and 3.5 kilograms of cocaine. JA 18. This was sufficient to trigger the enhanced penalties of § 841(b)(1)(B). *See United States v. Gonzalez*, 420 F.3d 111 (2d Cir. 2005) (requiring defendant to admit, or jury to find, drug type and quantity to trigger enhanced penalties of § 841).

It was likewise undisputed that Diaz did not qualify for either of two exclusive avenues for receiving a sentence below the mandatory minimum. "[A] district court may impose a sentence of imprisonment below a statutory minimum for a drug crime if: (1) the government makes a motion pursuant to 18 U.S.C. § 3553(e) asserting the defendant's substantial assistance to the government; or (2) the defendant meets the 'safety valve' criteria set forth

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[3] Section 841(b)(1)(B) provides that "any person who violates subsection (a) of this section shall be sentenced as follows: (1) . . . (B) In the case of a violation of subsection (a) of this section involving . . . (ii) 500 grams or more of a mixture or substance containing a detectable amount of . . . (II) cocaine . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . ."

in 18 U.S.C. § 3553(f)." *United States v. Medley*, 313 F.3d 745, 749-50 (2d Cir. 2002); *see also United States v. Phillips*, 382 F.3d 489, 498-99 (5th Cir. 2004) (joining all other circuits that have addressed the issue and concluding that substantial assistance and safety-valve subsections of § 3553 "represent the exclusive routes to depart below the statutory minimum") (collecting cases). The first of these avenues was foreclosed to Diaz because the government had not filed a motion under § 3553(e) certifying that he had provided substantial assistance. JA 126. Indeed, Diaz had never even entered into a cooperation agreement with the government, much less claimed that he had given substantial assistance. *Id.* Likewise, Diaz did not qualify for the "safety-valve" provisions of 18 U.S.C. § 3553(f), because he had more than one criminal history point. JA 13 (stipulation in plea agreement to criminal history category III); JA 69 (defense sentencing memorandum, agreeing with PSR's calculation of criminal history category II); JA 105 (government agrees to PSR's recalculation of criminal history category).

It bears note that nothing in *United States v. Booker*, 543 U.S. 220 (2005), undermines the validity of statutory minimum sentences. *See United States v. Krumnow*, 476 F.3d 294, 297 (5th Cir. 2007). This Court has recognized the continuing vitality of *Harris v. United States*, 536 U.S. 545 (2002), which held that statutory minimum sentences triggered by judicial factfinding are consistent with the Sixth Amendment. *See United States v. Estrada*, 428 F.3d 387 (2d Cir. 2005) (upholding constitutionality of mandatory minimum sentence based on judicial factfinding about defendant's prior convictions, where

those findings did not also increase defendant's maximum potential sentence), *cert. denied,* 546 U.S. 1223 (2006). *A fortiori*, there can be no doubt that a statutory minimum sentence founded on a defendant's own admissions comport with the Sixth Amendment. *See also United States v. Sharpley*, 399 F.3d 123, 127 (2d Cir.) (holding that no post-*Booker* remand for re-sentencing was required where defendant received statutory minimum sentence; "any reduction in the calculated Guidelines range could not reduce Sharpley's actual sentence"), *cert. denied*, 546 U.S. 840 (2005). This Court has similarly confirmed that the rules limiting safety-valve eligibility do not conflict with the Sixth Amendment. *See United States v. Holguin*, 436 F.3d 111, 117-20 (2d Cir.) (per curiam) (upholding constitutionality of imposing burden on defendant of proving eligibility for safety valve, subject to judicial factfinding), *cert. denied*, 126 S.Ct. 2367 (2006); *United States v. Barrero*, 425 F.3d 154, 158 (2d Cir. 2005) (recognizing constitutionality of mandatory minimum where defendant is ineligible for safety valve).

At the hearing on April 10, 2007, when it partially granted the government's Rule 35(a) motion, the district court recognized that its 18-month sentence constituted clear error. JA 131. However, the court did not impose a new, corrected sentence within the seven days provided by Rule 35(a). For the reasons set forth in Point II.A below, the court's failure to do so within that period stripped it of jurisdiction to act further, and effectively leaves in place the 18-month sentence imposed at the original sentencing.

II. The district court's failure to correct Diaz's sentence within the seven-day period established by Rule 35(a) rendered the original 18-month sentence final for purposes of appellate review, and deprived the district court of further jurisdiction to alter the sentence, despite the fact that the court purported to vacate the original sentence within the seven-day period.

A. Rule 35(a) required the district court to re-sentence Diaz within seven days of the oral pronouncement of sentence.

Section 3582(c) of Title 18 limits a district court's authority to modify a sentence to a handful of circumstances. First, a sentence may be reduced upon motion of the Bureau of Prisons in certain situations. 18 U.S.C. § 3582(c)(1)(A). Second, a court may modify a sentence pursuant to authority granted by statute or Fed. R. Crim. P. 35. 18 U.S.C. § 3582(c)(1)(B). Under Rule 35(a), a court may correct a sentence within seven days based on a clear legal error. Under Rule 35(b), a court may reduce a defendant's sentence based on post-sentence substantial assistance on motion by the government. Third, a court may reduce a defendant's sentence if the applicable sentencing guidelines range "has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). *See generally McClure v. Ashcroft,* 335 F.3d 404, 413 (5th Cir. 2003). A court may also reconsider and change a sentence after an appellate court remands and directs the sentencing court to reconsider or recalculate the sentence pursuant to 18 U.S.C. § 3742. A district court is

also authorized by 28 U.S.C. § 2255 to amend a sentence to correct an error that is cognizable on collateral review. Because federal courts are courts of limited jurisdiction and may not act beyond the authority granted by Article III of the Constitution or statutes enacted by Congress, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986), a district court lacks the authority to alter a sentence outside those circumstances, which are delineated by § 3582. *See generally Moore's Federal Practice*, § 635.02 (2006).[4]

This case involves only a district court's authority under Rule 35(a), which provides:

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

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[4] Fed. R. Crim. P. 36 authorizes correction "at any time" of a "clerical error in a judgment, order, or other part of the record, or [to] correct an error in the record arising from oversight or omission." Rule 36 does not authorize a court to change a sentence itself; it only permits amendment of a written judgment to conform with an already-imposed sentence. *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); *id.* at 347 (further noting that "Rule 36 covers only minor, uncontroversial errors").

As this Court has explained, "[a] district court's concededly narrow authority to correct a sentence imposed as a result of 'clear error' is limited to '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'" if determined on appeal to have been imposed in violation of law. *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. 1996) (quoting, in turn, Fed. R. Crim. P. 35, 1991 advisory committee's note)); *see also United States v. Spallone*, 399 F.3d 415, 421 n.5 (2d Cir. 2005) ("Rule 35(a) permits courts to 'correct a sentence that resulted from arithmetical, technical, or other clear error,' but only '[w]ithin 7 days after sentencing.'"). Under Rule 35(a), a sentencing court must correct a sentence within seven days of its oral pronouncement. Fed. R. Crim. P. 35(c); *Abreu-Cabrera*, 64 F.3d at 73-74 (holding that seven-day period runs from oral imposition because "[a] contrary rule, interpreting the phrase to refer to the written judgment, would allow district courts to announce a sentence, delay the ministerial task of formal entry, have a change of heart, and alter the sentence – a sequence of events we believe to be beyond what the rule was meant to allow").

A district court's application of Rule 35 is reviewed *de novo*. *See, e.g., United States v. Lett*, 483 F.3d 782, 784 (11th Cir. 2007); *United States v. De la Torre*, 327 F.3d 605, 608 (7th Cir. 2003); *cf. Reiter v. MTA New York City Transit Auth.*, 457 F.3d 224, 229 (2d Cir. 2006) (holding that district court's interpretation of Federal Civil Rules is reviewed *de novo*), *cert. denied*, 127 S. Ct. 1331 (2007);

United States v. Camacho, 370 F.3d 303, 305 (2d Cir. 2004) (reviewing *de novo* district court's construction of what constitutes "final judgment" for purposes of Fed. R. Crim. P. 33).

Although Judge Dorsey vacated the original sentence within seven days of the initial imposition of sentence, his failure to impose a new sentence within that time constituted a violation of Rule 35(a).[5] His reasoning – that vacatur of the sentence was adequate to meet the requirements of Rule 35(a), and that re-sentencing need not occur within any particular time constraints – is inconsistent with Rule 35(a), and has been expressly rejected by every circuit that has considered the question.

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[5] Fed. R. Crim. P. 45(a)(2) provides that intervening weekends and legal holidays are not counted for periods of fewer than eleven days. Here, Judge Dorsey orally imposed sentence on Tuesday, April 3, 2007. The seven-day period prescribed by Rule 35(a) therefore expired on Friday, April 13, 2007, because the intervening weekend days of April 7-8 are not counted, nor was Friday, April 6 because it was Good Friday, which was declared a legal holiday in Connecticut in 2007. *See* Fed. R. Crim. P. 45(a)(2) (excluding "legal holidays"); Fed. R. Crim. P. 45(a)(4)(B) (defining "legal holiday" to include "any other day declared a holiday by . . . the state where the district court is held"); *State Holidays In Year 2007*, www.ct.gov/dob/cwp/view.asp?a=2226&q=320430 (last viewed Oct. 21, 2007). The parties and the court below had been operating under the erroneous assumption that April 12 was the last day of that period, having overlooked the exclusion applicable to state holidays. That one-day discrepancy is immaterial, because the district court never re-sentenced Diaz.

"Rule 35 requires a district court *to actually resentence* a defendant within the seven-day period therein prescribed." *United States v. Vicol*, 460 F.3d 693, 695 (6th Cir. 2006) (emphasis added). Several courts have specifically held that vacatur of the original sentence within the seven-day period does not extend the time within which a court may impose a new sentence. "Without imposition of a new and corrected sentence before the seven days were up, the court's order [within the 7-day period] vacating the initial sentence withered and is of no effect." *United States v. Morrison*, 204 F.3d 1091 (11th Cir. 2000); *see also United States v. Green*, 405 F.3d 1180, 1186 (10th Cir. 2005) (following *Morrison*; holding that district court's scheduling of hearing within seven days to act on defendant's motion did not satisfy Rule 35(a) when court did not impose new sentence until tenth day); *United States v. Penna*, 319 F.3d 509, 512 (9th Cir. 2003) (stating that "[t]he district court's jurisdiction to correct a sentence depends upon vacating the sentence *and resentencing within the seven days* following oral pronouncement of the sentence," and holding that vacatur within that period and re-sentencing outside it was error) (emphasis added); *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993) (if a timely Rule 35 motion "is not decided within the seven-day period, the judge's power to act under the rule subsides").

Although this Court has not yet had occasion to confront a case involving this precise issue – where the district court vacated a sentence within seven days, but failed to re-sentence within that period – it has reversed in a similar situation. In *Abreu-Cabrera,* a district court held

a sentencing hearing, and orally sentenced the defendant to 57 months in prison. 64 F.3d at 70. Four days later, before the entry of a written judgment, the court issued an order stating that it "may not have been apprised of and considered all relevant factors" in sentencing the defendant, "and therefore wishe[d] to consider correcting the sentencing" pursuant to Rule 35(c) (which has since been redesignated Rule 35(a)). *Id.* The court noted that the correction "could not be accomplished within the seven days after the imposition of sentence" provided by the rule, and so it "reserved the right to correct the sentence, if error was found." *Id.* The district court allowed the parties to file briefs on various sentencing issues, and held a new sentencing hearing nearly six months after the initial hearing, at which he sentenced the defendant to 24 months in prison. *Id.*

On appeal, this Court agreed with the government that, *inter alia*, the district court lacked authority after expiry of the 7-day period set forth in Rule 35, which begins running upon oral pronouncement, to correct the sentence. *Id.* at 74. The Court held that the district court's interim order, "announcing its wish to consider correcting defendant's sentence did not extend that seven-day jurisdictional window." *Id.* (The Court also held that the type of error which the district court had "recognized" was not of the type contemplated by Rule 35(a).)

The rule that a court must re-sentence within the seven-day period is supported by a 2002 amendment to Fed. R. App. P. 4(b)(5), which specifies that "[t]he filing of a motion under [Rule] 35(a) does not suspend the time for

filing a notice of appeal from a judgment of conviction," which for a defendant is ten days after entry of the judgment, *see* Fed. R. App. P. 4(b)(1), or thirty days for the government.[6] If a district court could delay final resolution of re-sentencing under Rule 35(a) beyond the periods carefully delimited by Rule 4(b), it would create problems regarding the filing of notices of appeal. Parties would, as a precautionary matter, have to file a notice of appeal from the original sentence (since their time to do so would not be suspended), and potentially to file a second notice following a re-sentencing that might occur days, weeks, or months later. Rule 4(b)(5) and Rule 35(a) together provide clarity by requiring that any correction be completed before the defendant's notice of appeal is due. *See Green*, 405 F.3d at 1187-88 (noting the change to Rule 4(b)(5) as supporting strict application of the seven-day period).

Indeed, this Court has described the seven-day period established by Rule 35 as "jurisdictional." *United States v. Werber*, 51 F.3d 342, 348 (2d Cir. 1995) ("Because the district court modified the defendants' original sentences more than seven days after they were imposed, the court had no jurisdiction to enter the corrected judgments under Rule 35(c)"). *Accord, e.g., Abreu-Cabrera*, 64 F.3d at 73; *Green*, 405 F.3d at 1184-85; *Penna*, 319 F.3d at 512. If a district court's jurisdiction extends no further than seven

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[6] If one party files a timely notice of appeal, the other party's time to file its notice runs from the filing of the first notice of appeal. *See* Fed. R. App. P. 4(b)(1)(A)(ii), 4B(1)(B)(ii).

days following oral imposition of sentence, then re-sentencing must occur within that time.

The conclusion that Rule 35(a) is jurisdictional is consistent with the Supreme Court's recent decisions distinguishing between time limits that are "jurisdictional" as opposed to "claim-processing rules." *See Bowles v. Russell*, 127 S. Ct. 2360 (2007); *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam); *Kontrick v. Ryan*, 540 U.S. 443 (2004). As most recently explained in *Bowles*, statutory time limits generally constitute jurisdictional limitations, whereas time limits derived from court rules do not. 127 S. Ct. at 2364. That is because Congress has authority to establish the jurisdiction of federal courts, and the courts are not free to expand their own jurisdiction. *See id.* at 2365. Thus, in *Bowles*, the Court held that the time limits set forth in Fed. R. App. P. 4(a) are jurisdictional because they are derived from 28 U.S.C. § 2107. By contrast, the deadline for filing a motion for new trial in a criminal case, established by Fed. R. Crim. P. 33, is a non-jurisdictional, albeit mandatory, claim-processing rule because it has no source of authority apart from court-promulgated rules. *Eberhart*, 546 U.S. at 16-19.

The two circuits to consider this issue have agreed that the time limits of Rule 35 are "jurisdictional" in light of the Supreme Court's latest analysis. *See United States v. Higgs*, ___ F.3d ___, 2007 WL 2874317, at *8 (3d Cir. Oct. 4, 2007); *United States v. Smith*, 438 F.3d 796, 799 (7th Cir. 2006). Congress has provided in 18 U.S.C. § 3582(c)(1)(B) that "[t]he court may not modify a term of imprisonment once it has been imposed except that . . . the court may modify an imposed term of imprisonment to the

extent otherwise expressly permitted by statute *or by Rule 35 of the Federal Rules of Criminal Procedure*." (Emphasis added) Thus, the limitations of Rule 35(a) are incorporated by reference into a statutory mandate. Moreover, Section 3582(c)(1)(B), which specifies that "the court may not modify" a sentence except as "expressly permitted" in Rule 35(a), which provides that "the court may correct" the sentence within seven days, speaks to the authority of the court to act, not the time within which a party must request action by the court, as was the case with Rule 33 ("Any motion for a new trial . . . must be filed within 7 days after the verdict or finding of guilty.") and Fed. R. Bkrtcy. P. § 4004(a), which the Supreme Court held to be a non-jurisdictional claim-processing rule in *Kontrick,* 540 U.S. at 458-60.

Even if Congress had not incorporated Rule 35(a) into statutory limitations on a district court's power to amend a sentence, it would still remain a mandatory rule that required Judge Dorsey to act within seven days upon the government's objection. The main functional difference between claim-processing and jurisdictional rules is that the former may be forfeited if not preserved in the district court, whereas the latter may not. *See Eberhart*, 546 U.S. at 18-19. In the present case, the government promptly and repeatedly argued before Judge Dorsey that he was obliged to re-sentence within seven days of the oral pronouncement of sentence. *See, e.g.,* JA 124, 135-38, 146-48. Because the government's objection to any action outside that seven-day window was preserved, that limitations period is mandatory and enforceable. *See In re Johns-Manville Corp.*, 476 F.3d 118, 123-24 (2d Cir. 2007) (holding that time limit for filing civil cross-appeal,

even if not jurisdictional, must be enforced "strictly, once it is properly invoked"); *United States v. Moreno-Rivera*, 472 F.3d 49, 50 n.2 (2d Cir. 2006) (holding that court need not decide whether time limits for filing criminal appeal are jurisdictional, because government properly objected to untimeliness); *Coco v. Incorporated Village of Belle Terre*, 448 F.3d 490, 492 (2d Cir. 2006) (per curiam) (avoiding question of whether time limit of Fed. R. Civ. P. 23(f) for appealing class certification order is jurisdictional, because party objected to untimely filing and time limit is "inflexible").

Accordingly, because Judge Dorsey did not enter a new sentence within the seven-day period mandated by Rule 35(a), he lacks authority to now re-sentence the defendant (absent a remand from this Court). Further, because the government did not file a motion for substantial assistance and the defendant was ineligible for safety-valve consideration, the district court committed reversible error by sentencing the defendant below the minimum 60-month sentence prescribed by statute.

B. This Court has jurisdiction over the appeal notwithstanding the district court's failure to enter a written judgment embodying the 18-month sentence that was orally imposed.

The government submits that this Court has jurisdiction over the appeal despite the district court's failure to enter a written judgment on the docket reflecting either the originally announced sentence or the corrected sentence that it would have entered if the seven-day window had not expired. Under Fed. R. App. P. 4(b)(1),

the time for filing a notice of appeal runs from "the entry of either the judgment or the order being appealed." The government has been unable to find any reported cases that address the rather unique situation presented in this case: Where the government seeks to appeal an orally imposed sentence that has been rendered final upon the expiration of the seven-day period of Rule 35(a); where the district court lacks jurisdiction to take any further action in the case by virtue of the lapse of that period; and where the district court has failed to enter a written judgment.

In circumstances like the present one, barring the government's appeal would create an anomalous situation in which both the district court and the appellate court lacked jurisdiction over the case. Congress could not have intended to create such a jurisdictional impasse. The statute that confers jurisdiction over government sentencing appeals turns entirely on the finality of a sentence, and does not require the entry of a written judgment. Section 3742(b) of Title 18 provides:

> **(a) Appeal by the Government.** The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence–
>
> (1) was imposed in violation of law . . . .

As this Court has repeatedly recognized, a sentence is imposed when the district court orally pronounces it. *See, e.g., Werber*, 51 F.3d at 347 (holding that oral sentence controls when in conflict with written judgment) (citing, *inter alia*, *United States v. Marquez*, 506 F.2d 620, 622

(2d Cir. 1974)). Although Rule 4(b) adds a timing requirement – that a notice of appeal be filed (or, if filed prematurely, take effect) after the entry of a written judgment, a district court's failure to enter a written judgment notwithstanding the existence of a final criminal sentence should not cause the appellate review process to grind to a halt. There is a civil rule that explicitly provides as much: "[a] failure to set forth a final judgment or order on a separate document when required by [Fed. R. Civ. P. 58(a)(I)] does not affect the validity of an appeal from that judgment or order." Fed. R. App. P. 4(a)(7)(B). *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (holding that separate judgment requirement of Rule 58 could be waived); Fed. R. App. P. 4, 2002 Advisory Notes (stating that Rule 4(a)(7)(B) was intended "to make clear that the decision whether to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone" because "[i]f the appellant chooses to bring an appeal without waiting for the judgment or order to be set forth on a separate document, then there is no reason why the appellee should be able to object"). Although Rule 4(b) contains no parallel provision for criminal appeals, a district court's failure to enter a judgment should not be permitted to defeat the jurisdiction over final sentences which is provided by § 3742(b).[7]

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[7] In *Joseph v. Leavitt*, 465 F.3d 87, 89-90 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1855 (2007), this Court upheld its appellate jurisdiction where the district court had failed to enter a separate document, as required by Rule 58, but the Court relied in part on the fact that the district court's order granting summary judgment became a final judgment by operation of (continued...)

Moreover, because the timing requirement of Rule 4(b) is not derived from, or incorporated into, a statute, it is merely a waivable claim-processing rule rather than a jurisdictional prerequisite as those terms were delineated in *Kontrick*, *Eberhart*, and *Bowles*. In circumstances like the present, where the party invoking a court's appellate authority waives the need for a written judgment, Rule 4(b)'s requirement of such a judgment should not be viewed as a bar to appellate jurisdiction.

Alternatively, if this Court believes that a written judgment is necessary for this case to proceed on appeal, it should exercise its mandamus authority to direct the district court to carry out its ministerial duty of entering a written judgment memorializing the 18-month sentence that was orally imposed on April 3, 2007. *See In re Charge of Judicial Misconduct*, 593 F.2d 879, 881 (9th Cir. 1979) ("If a judge fails or refuses to enter judgment in a particular case when the circumstances require that judgment be entered, a petition for mandamus under the All Writs Statute, 28 U.S.C. § 1651(a), provides an adequate remedy."); *cf. United States v. Spilitro*, 884 F.2d 1003, 1009 (7th Cir. 1989) (granting government's

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[7] (...continued)
law 150 days after it was entered on the docket, pursuant to Fed. R. Civ. P. 58(b)(2)(B). Although there is no criminal counterpart to Rule 58(b)(2)(B), finality is nevertheless provided by 18 U.S.C. § 3582(c), which provides that "[t]he court may not modify a term of imprisonment once it has been imposed except" in specified circumstances, including Rule 35(a), which did not apply here, because the district court did not act within its time parameters.

petition for mandamus, directing district court to vacate unlawful reduction of sentence beyond 120-day period then embodied in Fed. R. Crim. P. 35(b), in case where § 3742 did not grant appellate jurisdiction).

In other circumstances, this Court has recognized that it possesses some flexibility in correcting the absence of a timely judgment that would trigger appellate review. In *United States v. Fuller*, 332 F.3d 60 (2d Cir. 2003), the defendant asked his lawyer to file a notice of appeal, but counsel failed to do so in a timely fashion. *Id.* at 64. On appeal, the parties agreed that "appellate time limits [of Fed. R. App. P. 4(b) are jurisdictional." *Id.* (This came before the Supreme Court decided *Kontrick*, *Eberhart*, or *Bowles*, which cast considerably doubt on that mutual concession.) The Court recognized that even if it lacked jurisdiction over the untimely appeal, it was not limited to simply dismissing the appeal. *Id.* at 64. In light of various considerations – including "the waste of time and judicial resources" that would result from forcing the defendant to resort to a § 2255 motion – the Court found it most appropriate "to dismiss the appeal as untimely *and remand to the District Court with instructions* to vacate the judgment *and enter a new judgment from which a timely appeal may be taken.*" 332 F.3d at 65 (emphasis added). Such a remand did not "adjudicat[e] any aspect of the merits of the appeal" but was rather only a "preliminary step[] to enable [the defendant] to pursue that appeal in a manner that will provide a sound jurisdictional basis for whatever ruling is ultimately made on the merits of that appeal." *Id.* at 66.

As in *Fuller*, it would be a "waste of time and judicial resources," 332 F.3d at 65, to have the parties engage in further litigation before a district court that clearly lacks jurisdiction to take any further action in this case, and to wait for the district court to enter a written judgment – embodying either the 18-month sentence, or some other subsequently imposed sentence – which would then finally activate the government's earlier-filed notice of appeal pursuant to Fed. R. App. P. 4(b)(2). The government therefore submits that if the Court views the entry of a written judgment as a necessary condition for proceeding to the merits of this appeal, that it direct the district court to enter a written judgment memorializing the 18-month sentence imposed on April 3, 2007. Such an order could proceed in accordance with the limited remand procedure outlined by this Court in *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994), with jurisdiction being restored to this Court following compliance with that mandate so that the Court can proceed to consideration of the merits of the challenge to the 18-month sentence.

Conclusion

Accordingly, the government respectfully requests that this Court reverse the 18-month sentence orally imposed by the district court, and remand for imposition of a sentence at or above the 60-month minimum established by 21 U.S.C. § 841(b)(1)(B)(ii).

Dated: October 26, 2007

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,929 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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ADDENDUM

Fed. R. Crim. P. 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.

(b) Reducing a Sentence for Substantial Assistance.

(1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

(2) Later Motion. 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 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.

(3) Evaluating Substantial Assistance. In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) Below Statutory Minimum. When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

(c) "Sentencing" Defined. As used in this rule, "sentencing" means the oral announcement of the sentence.

Fed. R. App. P. 4(b) Appeal in a Criminal Case.

* * *

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing

of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order--but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)--becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective--without amendment--to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may--before or after the time has expired, with or without motion and notice--extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

18 U.S.C. § 3553. Imposition of a sentence

* * *

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.-- Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

* * *

18 U.S.C. § 3582. Imposition of a sentence of imprisonment

* * *

(c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--

(1) in any case--

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure.