amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion to arrest judgment under Rule 34 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Changes Made After Publication and Comment. The Committee made no substantive changes to Rule 34 following publication.

COMMITTEE NOTES ON RULES—2009 AMENDMENT

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period—including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a)—sets a more realistic time for the filing of these motions.

Rule 35. Correcting or Reducing a Sentence

(a) CORRECTING CLEAR ERROR. Within 14 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 the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.

(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.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 28, 1983, eff. Aug. 1, 1983; Pub. L. 98–473, title II, §215(b), Oct. 12, 1984, 98 Stat. 2015; Apr. 29, 1985, eff. Aug. 1, 1985; Pub. L. 99–570, title I, §1009(a), Oct. 27, 1986, 100 Stat. 3207–8; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 26, 2004, eff. Dec. 1, 2004; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

The first sentence of the rule continues existing law. The second sentence introduces a flexible time limitation on the power of the court to reduce a sentence, in lieu of the present limitation of the term of court. Rule 45(c) abolishes the expiration of a term of court as a time limitation, thereby necessitating the introduction of a specific time limitation as to all proceedings now governed by the term of court as a limitation. The Federal Rules of Civil Procedure (Rule 6(c)) [28 U.S.C., Appendix], abolishes the term of court as a time limitation in respect to civil actions. The two rules together thus do away with the significance of the expiration of a term of court which has largely become an anachronism.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

The amendment to the first sentence gives the court power to correct a sentence imposed in an illegal manner within the same time limits as those provided for reducing a sentence. In *Hill v. United States*, 368 U.S. 424 (1962) the court held that a motion to correct an illegal sentence was not an appropriate way for a defendant to raise the question whether when he appeared for sentencing the court had afforded him an opportunity to make a statement in his own behalf as required by Rule 32(a). The amendment recognizes the distinction between an illegal sentence, which may be corrected at any time, and a sentence imposed in an illegal manner, and provides a limited time for correcting the latter.

The second sentence has been amended to increase the time within which the court may act from 60 days to 120 days. The 60-day period is frequently too short to enable the defendant to obtain and file the evidence, information and argument to support a reduction in sentence. Especially where a defendant has been committed to an institution at a distance from the sentencing court, the delays involved in institutional mail inspection procedures and the time required to contact relatives, friends and counsel may result in the 60-day period passing before the court is able to consider the case.

The other amendments to the second sentence clarify ambiguities in the timing provisions. In those cases in which the mandate of the court of appeals is issued prior to action by the Supreme Court on the defendant's petition for certiorari, the rule created problems in three situations: (1) If the writ were denied, the last phrase of the rule left obscure the point at which the period began to run because orders of the Supreme Court denying applications for writs are not sent to the district courts. See *Johnson v. United States*, 235 F.2d 459 (5th Cir. 1956). (2) If the writ were granted but later dismissed as improvidently granted, the rule did not provide any time period for reduction of sentence. (3) If the writ were granted and later the Court affirmed a judgment of the court of appeals which had affirmed the conviction, the rule did not provide any time period for reduction of sentence. The amendment makes it clear that in each of these three situations the 120-period commences to run with the entry of the order or judgment of the Supreme Court.

The third sentence has been added to make it clear that the time limitation imposed by Rule 35 upon the reduction of a sentence does not apply to such reduction upon the revocation of probation as authorized by 18 U.S.C. §3653.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

Rule 35 is amended in order to make it clear that a judge may, in his discretion, reduce a sentence of incarceration to probation. To the extent that this permits the judge to grant probation to a defendant who has already commenced service of a term of imprisonment, it represents a change in the law. See *United States v. Murray*, 275 U.S. 347 (1928) (Probation Act construed not to give power to district court to grant probation to convict after beginning of service of sentence, even in the same term of court); *Affronti v. United States*, 350 U.S. 79 (1955) (Probation Act construed to mean that after a sentence of consecutive terms on multiple counts of an indictment has been imposed and service of sentence for the first such term has commenced, the district court may not suspend sentence and grant probation as to the remaining term or terms). In construing the statute in *Murray* and *Affronti*, the Court concluded Congress could not have intended to make the probation provisions applicable during the entire period of incarceration (the only other conceivable interpretation of the statute), for this would result in undue duplication of the three methods of mitigating a sentence—probation, pardon and parole—and would impose upon district judges the added burden of responding to probation applications from prisoners throughout the service of their terms of imprisonment. Those concerns do not apply to the instant provisions, for the reduction may occur only within the time specified in subdivision (b). This change gives ''meaningful effect'' to the motion-to-reduce remedy by allowing the court ''to consider all alternatives that were available at the time of imposition of the original sentence.'' *United States v. Golphin*, 362 F.Supp. 698 (W.D.Pa. 1973).

Should the reduction to a sentence of probation occur after the defendant has been incarcerated more than six months, this would put into issue the applicability of 18 U.S.C. §3651, which provides that initially the court ''may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.''

NOTES OF ADVISORY COMMITTEE ON RULES—1983 AMENDMENT

Note to Subdivision (b). There is currently a split of authority on the question of whether a court may reduce a sentence within 120 days after revocation of probation when the sentence was imposed earlier but execution of the sentence had in the interim been suspended in part or in its entirety. Compare *United States v. Colvin*, 644 F.2d 703 (8th Cir. 1981) (yes); *United States v. Johnson*, 634 F.2d 94 (3d Cir. 1980) (yes); with *United States v. Rice*, 671 F.2d 455 (11th Cir. 1982) (no); *United States v. Kahane*, 527 F.2d 491 (2d Cir. 1975) (no). The Advisory Committee believes that the rule should be clarified in light of this split, and has concluded that as a policy matter the result reached in *Johnson* is preferable.

The Supreme Court declared in *Korematsu v. United States*, 319 U.S. 432, 435 (1943), that ''the difference to the probationer between imposition of sentence followed by probation . . . and suspension of the imposition of sentence [followed by probation]'' is not a meaningful one. When imposition of sentence is suspended entirely at the time a defendant is placed on probation, that defendant has 120 days after revocation of probation and imposition of sentence to petition for leniency. The amendment to subdivision (b) makes it clear that similar treatment is to be afforded probationers for whom execution, rather than imposition, of sentence was originally suspended.

The change facilitates the underlying objective of rule 35, which is to ''give every convicted defendant a second round before the sentencing judge, and [afford] the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim.'' *United States v. Ellenbogan*, 390 F.2d 537, 543 (2d Cir. 1968). It is only technically correct that a reduction may be sought when a suspended sentence is imposed. As noted in *Johnson*, supra, at 96:

> It frequently will be unrealistic for a defendant whose sentence has just been suspended to petition the court for the further relief of a reduction of that suspended sentence.
>
> Just as significant, we doubt that sentencing judges would be very receptive to Rule 35 motions proffered at the time the execution of a term of imprisonment is suspended in whole or in part and the defendant given a term of probation. Moreover, the sentencing judge cannot know of events that might occur later and that might bear on what would constitute an appropriate term of imprisonment should the defendant violate his probation. . . . In particular, it is only with the revocation hearing that the judge is in a position to consider whether a sentence originally suspended pending probation should be reduced. The revocation hearing is thus the first point at which an offender can be afforded a realistic opportunity to plead for a light sentence. If the offender is to be provided two chances with the sentencing judge, to be meaningful this second sentence must occur subsequent to the revocation hearing.

NOTES OF ADVISORY COMMITTEE ON RULES—1985 AMENDMENT

Note to Subdivision (b). This amendment to Rule 35(b) conforms its language to the nonliteral interpretation which most courts have already placed upon the rule, namely, that it suffices that the defendant's motion was made within the 120 days and that the court determines the motion within a reasonable time thereafter. *United States v. DeMier*, 671 F.2d 1200 (8th Cir. 1982); *United States v. Smith*, 650 F.2d 206 (9th Cir. 1981); *United States v. Johnson*, 634 F.2d 94 (3d Cir. 1980); *United States v. Mendoza*, 581 F.2d 89 (5th Cir. 1978); *United States V. Stollings*, 516 F.2d 1287 (4th Cir. 1975). Despite these decisions, a change in the language is deemed desirable to remove any doubt which might arise from dictum in some cases, e.g., *United States v. Addonizio*, 442 U.S. 178, 189 (1979), that Rule 35 only ''authorizes District Courts to reduce a sentence within 120 days'' and that this time period ''is jurisdictional, and may not be extended.'' See *United States v. Kajevic*, 711 F.2d 767 (7th Cir. 1983), following the *Addonizio* dictum.

As for the ''reasonable time'' limitation, reasonableness in this context ''must be evaluated in light of the policies supporting the time limitations and the reasons for the delay in each case.'' *United States v. Smith*, *supra*, at 209. The time runs ''at least for so long as the judge reasonably needs time to consider and act upon the motion.'' *United States v. Stollings*, *supra*, at 1288.

In some instances the court may decide to reduce a sentence even though no motion seeking such action is before the court. When that is the case, the amendment makes clear, the reduction must actually occur within the time specified.

This amendment does not preclude the filing of a motion by a defendant for further reduction of sentence after the court has reduced a sentence on its own motion, if filed within the 120 days specified in this rule.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Rule 35(b), as amended in 1987 as part of the Sentencing Reform Act of 1984, reflects a method by which the

government may obtain valuable assistance from defendants in return for an agreement to file a motion to reduce the sentence, even if the reduction would reduce the sentence below the mandatory minimum sentence.

The title of subsection (b) has been amended to reflect that there is a difference between correcting an illegal or improper sentence, as in subsection (a), and reducing an otherwise legal sentence for special reasons under subsection (b).

Under the 1987 amendment, the trial court was required to rule on the government's motion to reduce a defendant's sentence within one year after imposition of the sentence. This caused problems, however, in situations where the defendant's assistance could not be fully assessed in time to make a timely motion which could be ruled upon before one year had elapsed. The amendment requires the government to make its motion to reduce the sentence before one year has elapsed but does not require the court to rule on the motion within the one year limit. This change should benefit both the government and the defendant and will permit completion of the defendant's anticipated cooperation with the government. Although no specific time limit is set on the court's ruling on the motion to reduce the sentence, the burden nonetheless rests on the government to request and justify a delay in the court's ruling.

The amendment also recognizes that there may be those cases where the defendant's assistance or cooperation may not occur until after one year has elapsed. For example, the defendant may not have obtained information useful to the government until after the time limit had passed. In those instances the trial court in its discretion may consider what would otherwise be an untimely motion if the government establishes that the cooperation could not have been furnished within the one-year time limit. In deciding whether to consider an untimely motion, the court may, for example, consider whether the assistance was provided as early as possible.

Subdivision (c) is intended to adopt, in part, a suggestion from the Federal Courts Study Committee 1990 that Rule 35 be amended to recognize explicitly the ability of the sentencing court to correct a sentence imposed as a result of an obvious arithmetical, technical or other clear error, if the error is discovered shortly after the sentence is imposed. At least two courts of appeals have held that the trial court has the inherent authority, notwithstanding the repeal of former Rule 35(a) by the Sentencing Reform Act of 1984, to correct a sentence within the time allowed for sentence appeal by any party under 18 U.S.C. 3742. *See United States v. Cook*, 890 F.2d 672 (4th Cir. 1989) (error in applying sentencing guidelines); *United States v. Rico*, 902 F.2d 1065 (2nd Cir. 1990) (failure to impose prison sentence required by terms of plea agreement). The amendment in effect codifies the result in those two cases but provides a more stringent time requirement. The Committee believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions in the event of an appeal and to provide the parties with an opportunity to address the court's correction of the sentence, or lack thereof, in any appeal of the sentence. A shorter period of time would also reduce the likelihood of abuse of the rule by limiting its application to acknowledged and obvious errors in sentencing.

The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a). 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. Furthermore, the Committee did not intend that the rule relax any requirement that the parties state all objections to a sentence at or before the sentencing hearing. *See, e.g., United States v. Jones*, 899 F.2d 1097 (11th Cir. 1990).

The subdivision does not provide for any formalized method of bringing the error to the attention of the court and recognizes that the court could *sua sponte* make the correction. Although the amendment does not expressly address the issue of advance notice to the parties or whether the defendant should be present in court for resentencing, the Committee contemplates that the court will act in accordance with Rules 32 and 43 with regard to any corrections in the sentence. *Compare United States v. Cook, supra* (court erred in correcting sentence *sua sponte* in absence of defendant) with *United States v. Rico, supra* (court heard arguments on request by government to correct sentence). The Committee contemplates that the court would enter an order correcting the sentence and that such order must be entered within the seven (7) day period so that the appellate process (if a timely appeal is taken) may proceed without delay and without jurisdictional confusion.

Rule 35(c) provides an efficient and prompt method for correcting obvious technical errors that are called to the court's attention immediately after sentencing. But the addition of this subdivision is not intended to preclude a defendant from obtaining statutory relief from a plainly illegal sentence. The Committee's assumption is that a defendant detained pursuant to such a sentence could seek relief under 28 U.S.C. §2255 if the seven day period provided in Rule 35(c) has elapsed. Rule 35(c) and §2255 should thus provide sufficient authority for a district court to correct obvious sentencing errors.

The Committee considered, but rejected, a proposal from the Federal Courts Study Committee to permit modification of a sentence, within 120 days of sentencing, based upon new factual information not known to the defendant at the time of sentencing. Unlike the proposed subdivision (c) which addresses obvious technical mistakes, the ability of the defendant (and perhaps the government) to come forward with new evidence would be a significant step toward returning Rule 35 to its former state. The Committee believed that such a change would inject into Rule 35 a degree of postsentencing discretion which would raise doubts about the finality of determinate sentencing that Congress attempted to resolve by eliminating former Rule 35(a). It would also tend to confuse the jurisdiction of the courts of appeals in those cases in which a timely appeal is taken with respect to the sentence. Finally, the Committee was not persuaded by the available evidence that a problem of sufficient magnitude existed at this time which would warrant such an amendment.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The amendment to Rule 35(b) is intended to fill a gap in current practice. Under the Sentencing Reform Act and the applicable guidelines, a defendant who has provided ''substantial'' assistance to the Government before sentencing may receive a reduced sentence under United States Sentencing Guideline §5K1.1. In addition, a defendant who provides substantial assistance after the sentence has been imposed may receive a reduction of the sentence if the Government files a motion under Rule 35(b). In theory, a defendant who has provided substantial assistance both before and after sentencing could benefit from both §5K1.1 and Rule 35(b). But a defendant who has provided, on the whole, substantial assistance may not be able to benefit from either provision because each provision requires ''substantial assistance.'' As one court has noted, those two provisions contain distinct ''temporal boundaries.'' *United States v. Drown*, 942 F.2d 55, 59 (1st Cir. 1991).

Although several decisions suggest that a court may aggregate the defendant's pre-sentencing and post-sentencing assistance in determining whether the ''sub-

stantial assistance'' requirement of Rule 35(b) has been met, *United States v. Speed*, 53 F.3d 643, 647–649 (4th Cir. 1995) (Ellis, J. concurring), there is no formal mechanism for doing so. The amendment to Rule 35(b) is designed to fill that need. Thus, the amendment permits the court to consider, in determining the substantiality of post-sentencing assistance, the defendant's pre-sentencing assistance, irrespective of whether that assistance, standing alone, was substantial.

The amendment, however, is not intended to provide a double benefit to the defendant. Thus, if the defendant has already received a reduction of sentence under U.S.S.G. §5K1.1 for substantial pre-sentencing assistance, he or she may not have that assistance counted again in a post-sentence Rule 35(b) motion.

Changes Made After Publication (''GAP Report''). The Committee incorporated the Style Subcommittee's suggested changes.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 35 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The Committee deleted current Rule 35(a) (Correction on Remand). Congress added that rule, which currently addresses the issue of the district court's actions following a remand on the issue of sentencing, in the Sentencing Reform Act of 1984. Pub. L. No. 98–473. The rule cross-references 18 U.S.C. §3742, also enacted in 1984, which provides detailed guidance on the various options available to the appellate courts in addressing sentencing errors. In reviewing both provisions, the Committee concluded that Rule 35(a) was no longer needed. First, the statute clearly covers the subject matter and second, it is not necessary to address an issue that would be very clear to a district court following a decision by a court of appeals.

Former Rule 35(c), which addressed the authority of the court to correct certain errors in the sentence, is now located in Rule 35(a). In the current version of Rule 35(c), the sentencing court is authorized to correct errors in the sentence if the correction is made within seven days of the imposition of the sentence. The revised rule uses the term ''sentencing.'' No change in practice is intended by using that term.

A substantive change has been made in revised Rule 35(b). Under current Rule 35(b), if the government believes that a sentenced defendant has provided substantial assistance in investigating or prosecuting another person, it may move the court to reduce the original sentence; ordinarily, the motion must be filed within one year of sentencing. In 1991, the rule was amended to permit the government to file such motions after more than one year had elapsed if the government could show that the defendant's substantial assistance involved ''information or evidence not known by the defendant'' until more than one year had elapsed. The current rule, however, did not address the question whether a motion to reduce a sentence could be filed and granted in those instances when the defendant's substantial assistance involved information provided by the defendant within one year of sentence but that did not become useful to the government until more than one year after sentencing (e.g., when the government starts an investigation to which the information is pertinent). The courts were split on the issue. *Compare United States v. Morales*, 52 F.3d 7 (1st Cir. 1995) (permitting filing and granting of motion) *with United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998) (denying relief and citing cases). Although the court in *Orozco* felt constrained to deny relief under Rule 35(b), the court urged an amendment of the rule to:

> address the apparent unforeseen situation presented in this case where a convicted defendant provides information to the government prior to the expiration of the jurisdictional, one-year period from sentence imposition, but that information does not become useful to the government until more than one year after sentence imposition. *Id*. at 1316, n. 13.

Nor does the existing rule appear to allow a substantial assistance motion under equally deserving circumstances where a defendant, who fails to provide information within one year of sentencing because its usefulness could not reasonably have been anticipated, later provides the information to the government promptly upon its usefulness becoming apparent.

Revised Rule 35(b) is intended to address both of those situations. First, Rule 35(b)(2)(B) makes clear that a sentence reduction motion is permitted in those instances identified by the court in *Orozco*. Second, Rule 35(b)(2)(C) recognizes that a post-sentence motion is also appropriate in those instances where the defendant did not provide any information within one year of sentencing, because its usefulness was not reasonably apparent to the defendant during that period. But the rule requires that once the defendant realizes the importance of the information the defendant promptly provide the information to the government. What constitutes ''prompt'' notification will depend on the circumstances of the case.

The rule's one-year restriction generally serves the important interests of finality and of creating an incentive for defendants to provide promptly what useful information they might have. Thus, the proposed amendment would not eliminate the one-year requirement as a generally operative element. But where the usefulness of the information is not reasonably apparent until a year or more after sentencing, no sound purpose is served by the current rule's removal of any incentive to provide that information to the government one year or more after the sentence (or if previously provided, for the government to seek to reward the defendant) when its relevance and substantiality become evident.

By using the term ''involves'' in Rule 35(b)(2) in describing the sort of information that may result in substantial assistance, the Committee recognizes that a court does not lose jurisdiction to consider a Rule 35(b)(2) motion simply because other information, not covered by any of the three provisions in Rule 35(b)(2), is presented in the motion.

COMMITTEE NOTES ON RULES—2004 AMENDMENT

Rule 35(c) is a new provision, which defines sentencing for purposes of Rule 35 as the oral announcement of the sentence.

Originally, the language in Rule 35 had used the term ''imposition of sentence.'' The term ''imposition of sentence'' was not defined in the rule and the courts addressing the meaning of the term were split. The majority view was that the term meant the oral announcement of the sentence and the minority view was that it meant the entry of the judgment. *See United States v. Aguirre*, 214 F.3d 1122, 1124–25 (9th Cir. 2000) (discussion of original Rule 35(c) and citing cases). During the restyling of all of the Criminal Rules in 2000 and 2001, the Committee determined that the uniform term ''sentencing'' throughout the entire rule was the more appropriate term. After further reflection, and with the recognition that some ambiguity may still be present in using the term ''sentencing,'' the Committee believes that the better approach is to make clear in the rule itself that the term ''sentencing'' in Rule 35 means the oral announcement of the sentence. That is the meaning recognized in the majority of the cases addressing the issue.

Changes Made to Rule 35 After Publication and Comment. The Committee changed the definition of the triggering event for the timing requirements in Rule 35 to conform to the majority view in the circuit courts and adopted a special definitional section, Rule 35(c), to define sentencing as the ''oral announcement of the sentence.''

COMMITTEE NOTES ON RULES—2007 AMENDMENT

Subdivision (b)(1). The amendment conforms Rule 35(b)(1) to the Supreme Court's decision in *United States*

v. Booker, 543 U.S. 220 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. §3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act ''makes the Guidelines effectively advisory,'' and ''requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. §3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see §3553(a) (Supp. 2004).'' *Id.* at 245–46. Subdivision (b)(1)(B) has been deleted because it treats the guidelines as mandatory.

Changes Made to Proposed Amendment Released for Public Comment. No changes were made to the text of the proposed amendment as released for public comment, but one change was made in the Committee Note. Here—as in the other *Booker* rules—the Committee deleted the reference to the Fifth Amendment from the description of the Supreme Court's decision in *Booker*.

COMMITTEE NOTES ON RULES—2009 AMENDMENT

Former Rule 35 permitted the correction of arithmetic, technical, or clear errors within 7 days of sentencing. In light of the increased complexity of the sentencing process, the Committee concluded it would be beneficial to expand this period to 14 days, including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a). Extension of the period in this fashion will cause no jurisdictional problems if an appeal has been filed, because Federal Rule of Appellate Procedure 4(b)(5) expressly provides that the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a).

AMENDMENT BY PUBLIC LAW

1986—Subd. (b). Pub. L. 99–570 substituted ''in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court's authority to lower a sentence under this subdivision includes the authority to lower such sentence to a level below that established by statute as a minimum sentence'' for ''to the extent that such assistance is a factor in applicable guidelines or policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)''.

1984—Pub. L. 98–473 amended Rule 35 generally. Prior to amendment, rule read as follows:

''Rule 35. Correction or Reduction of Sentence

''(a) CORRECTION OF SENTENCE. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

''(b) REDUCTION OF SENTENCE. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.''

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99–570, title I, §1009(b), Oct. 27, 1986, 100 Stat. 3207–8, provided that: ''The amendment made by this section [amending this rule] shall take effect on the date of the taking effect of rule 35(b) of the Federal Rules of Criminal Procedure, as amended by section 215(b) of the Comprehensive Crime Control Act of 1984 [section 215(b) of Pub. L. 98–473, effective Nov. 1, 1987].''

EFFECTIVE AND TERMINATION DATES OF 1985 AMENDMENTS

Section 2 of the Order of the Supreme Court dated Apr. 29, 1985, provided: ''That the foregoing amendments to the Federal Rules of Criminal Procedure [amending Rules 6, 11, 12.1, 12.2, 35, 45, 49, and 57] shall take effect on August 1, 1985 and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending. The amendment to Rule 35(b) shall be effective until November 1, 1986, when Section 215(b) of the Comprehensive Crime Control Act of 1984, Pub. L. 98–473, approved October 12, 1984, 98 Stat. 2015, goes into effect.'' See section 22 of Pub. L. 100–182, set out below, for application of Rule 35(b) to conduct occurring before effective date of sentencing guidelines.

Pub. L. 98–473, title II, §235(a)(1), Oct. 12, 1984, 98 Stat. 2031, which originally provided for an effective date of Nov. 1, 1986 for the amendment to Rule 35 by section 215(b) of Pub. L. 98–473, was later amended to provide for an effective date of Nov. 1, 1987, with applicability only to offenses committed after the taking effect of such amendment. See Effective Date note set out under section 3551 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–473 effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of such amendment, see section 235(a)(1) of Pub. L. 98–473, set out as an Effective Date note under section 3551 of this title.

APPLICATION OF RULE 35(b) TO CONDUCT OCCURRING BEFORE EFFECTIVE DATE OF SENTENCING GUIDELINES

Pub. L. 100–182, §22, Dec. 7, 1987, 101 Stat. 1271, provided that: ''The amendment to rule 35(b) of the Federal Rules of Criminal Procedure made by the order of the Supreme Court on April 29, 1985, shall apply with respect to all offenses committed before the taking effect of section 215(b) of the Comprehensive Crime Control Act of 1984 [section 215(b) of Pub. L. 98–473, effective Nov. 1, 1987].''

AUTHORITY TO LOWER A SENTENCE BELOW STATUTORY MINIMUM FOR OLD OFFENSES

Subd. (b) of this rule as amended by section 215(b) of Pub. L. 98–473 and subd. (b) of this rule as in effect before the taking effect of the initial set of guidelines promulgated by the United States Sentencing Commission pursuant to chapter 58 (§991 et seq.) of Title 28, Judiciary and Judicial Procedure, applicable in the case of an offense committed before the taking effect of such guidelines notwithstanding section 235 of Pub. L. 98–473, see section 24 of Pub. L. 100–182, set out as a note under section 3553 of this title.

Rule 36. Clerical Error

After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

This rule continues existing law. *Rupinski v. United States*, 4 F.2d 17 (C.C.A. 6th). The rule is similar to Rule 60(a) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix].

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 36 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 37. Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal

(a) RELIEF PENDING APPEAL. If a timely motion is made for relief that the court lacks au-