“Imposing” a Sentence Under Rule 35(c)

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INTRODUCTION

Federal Rule of Criminal Procedure 35(c) permits a sentencing court, “acting within 7 days after the imposition of sentence, [to] correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.”¹ The Rule provides a court the narrow authority to correct an obvious error in a sentence, such as a mistake in computing a sentence under the Federal Sentencing Guidelines, in order to avoid incurring the greater cost of an appeal that would lead to the same result.² If the court does not act within seven days, however, its jurisdiction to make the change expires.³

Circuit courts disagree on when a sentence is “imposed”—the triggering event of the seven day limit. The Second and Tenth Circuits maintain that a sentence is imposed when it is orally pronounced by the judge in court.⁴ The First and Seventh Circuits, on the other hand, hold that the date of “imposition of sentence” is when the clerk officially enters the sentence on the record.⁵

This distinction becomes critical when a judge wishes to change a sentence more than seven days after the oral pronouncement, but within seven days of the clerk’s entry of the sentence on the record. Resolution of the issue is not merely academic—sentencing courts frequently do not enter the judgment

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¹ FRCrP 35(c).

² Unlike older versions of the rule, Rule 35(c) does not permit a sentencing court to reconsider an exercise of its discretion under the Sentencing Guidelines, or simply to change its mind about the appropriate sentence.

³ See *United States v Townsend*, 33 F3d 1230, 1231 (10th Cir 1994) (“Because the district court attempted to alter Mr. Townsend’s sentence outside this seven day period, it acted outside its jurisdiction.”). See also *United States v Blackwell*, 81 F3d 945, 948 (10th Cir 1996) (“Subsection (c) does not apply . . . because the court did not correct defendant’s sentence within seven days after the original sentence was imposed . . .”).

⁴ *United States v Abreu-Cabrera*, 64 F3d 67, 74 (2d Cir 1995); *Townsend*, 33 F3d at 1231.

⁵ *United States v Clay*, 37 F3d 338, 340 (7th Cir 1994); *United States v Morillo*, 8 F3d 864, 869 n 8 (1st Cir 1993).

on the same day the judge pronounces the sentence.⁶ In fact, one court waited almost six months after pronouncing a sentence before entering it on the record.⁷

On the one hand, a broader time limit may give a sentencing judge greater opportunity to reconsider an act of discretion, which the Rule does not allow. On the other hand, a stricter time limit could waste judicial resources by requiring an expensive and time-consuming appellate process to fix an error that could have been corrected immediately. Furthermore, if no appeal is made, the stricter time limit could prevent a mistake from being corrected at all.

Courts holding that a sentence is "imposed" at oral pronouncement set forth two rationales for their interpretation. First, these courts construe "imposition of sentence" in light of the Sixth Amendment's requirement that a defendant be present during sentencing:⁸ because the defendant is present when the sentence is orally pronounced, but not when it is entered on the record, "imposition of sentence" must refer to oral pronouncement.⁹ The second, and stronger, rationale for this "Oral Pronouncement Rule" is to prevent judges from abusing their authority to change sentences.¹⁰ This logic assumes that the more time judges have to modify a sentence, the more likely they are to reconsider a correctly calculated sentence simply because of a change of heart.

Courts holding that a sentence is "imposed" on the date of its entry on the record base their position on the relationship between Rule 35(c) and the time limit for appealing a sentence.¹¹ The current version of Rule 35(c) was meant to codify case law holding that judges have the inherent power to correct errors in sentencing within the time in which either party can file an appeal.¹² Because the appellate rules specifically allow either party to appeal within ten days after "entry of judgment,"¹³ these courts

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⁶ See, for example, *United States v Skufca*, 1997 US App LEXIS 5829, *4-5 (10th Cir) (unpublished opinion); *Abreu-Cabrera*, 64 F3d at 73; *Clay*, 37 F3d at 340; *Townsend*, 33 F3d at 1231; *United States v Navarro-Espinosa*, 30 F3d 1169, 1170 (9th Cir 1994); *Morillo*, 8 F3d at 869.

⁷ See *Abreu-Cabrera*, 64 F3d at 73.

⁸ US Const, Amend VI.

⁹ See *Townsend*, 33 F3d at 1231.

¹⁰ See *Abreu-Cabrera*, 64 F3d at 74.

¹¹ See *Clay*, 37 F3d at 340; *Navarro-Espinosa*, 30 F3d at 1171; *Morillo*, 8 F3d at 869 n 8.

¹² See Advisory Committee Notes to FRCP 35, 1991 Amendment; *United States v Rico*, 902 F2d 1065, 1069 (2d Cir 1990); *United States v Cook*, 890 F2d 672, 675 (4th Cir 1989).

¹³ FRAP 4(b).

reason that "imposition of sentence" under Rule 35(c) must refer to entry of judgment as well.¹⁴

The term "imposition of sentence" is ambiguous on its face. Predictably, traditional tools of statutory construction are not dispositive and could support either interpretation. Furthermore, the Advisory Committee Notes to Rule 35(c) provide mixed signals of the drafters' intent. Finally, the reasoning of the circuit courts on both sides of the issue contains inherent weaknesses and overlooks critical issues.

This Comment contends that "imposition of sentence" should refer to the date of entry of judgment upon the record.¹⁵ Rule 35(c) gives district court judges extremely narrow powers: they may change a sentence already imposed only in the context of "clear error" in order to avoid an unnecessary appeal.¹⁶ Because the circuits have uniformly interpreted "clear error" quite narrowly, there is no justification for the Second Circuit's concern that extending the period in which judges can correct clearly erroneous sentences will allow judicial changes of heart. The narrow "clear error" standard weeds out sentence alterations that reflect mere changes of heart, so that a short time period for corrections of genuine errors is an unnecessary safeguard. Moreover, beginning the seven day clock at the entry of judgment better serves the Rule's remedial purposes of avoiding costly and unnecessary appeals and ensuring that mistakes are corrected in the event that no appeal is made.

Part I reviews the mechanics and history of Rule 35(c) and tracks, from the common law through the present, the dramatic changes in judges' authority to modify legally imposed sentences. Part II analyzes the reasoning of the circuit courts that have addressed the issue of when a sentence is "imposed." Part III examines how the circuits have narrowly circumscribed the meaning of "clear error" under the current rule. As the first systematic documentation of the narrow scope of "clear error," this Part demonstrates that judges may not use Rule 35(c) to implement mere changes of heart, regardless of the seven day time limit. This result undermines the strongest basis for the position that a sentence is "imposed" at oral pronouncement. Finally, Part IV argues that courts interpreting Rule 35(c) should hold that "imposi-

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¹⁴ See, for example, *Navarro-Espinosa*, 30 F3d at 1171.

¹⁵ This Comment does not address whether, as a policy matter, Rule 35(c) should be amended to give a judge the opportunity to change her mind about a sentence. Rather, the Comment attempts to resolve the question of when a sentence is "imposed" in a manner consistent with the narrow authority the Rule confers.

¹⁶ FRCrP 35(c).

tion of sentence" occurs on the date judgment is entered on the record.

I. MECHANICS AND HISTORY OF RULE 35(c)

Prior to the enactment of the Sentencing Reform Act of 1984,¹⁷ a district court had wide discretion to modify a sentence it had imposed on a defendant's "plea for leniency," the presentation of new evidence such as that relating to the defendant's family situation, or a simple change of heart.¹⁸ The Act, as part of a larger effort to make sentences more uniform and determinate, restricts the ability of a district court to modify a defendant's sentence unless Congress expressly grants the court jurisdiction to do so.¹⁹ The Act "virtually eliminates the sentencing court as a direct avenue for the review of sentences, requiring that all challenges to sentences be made on direct appeal."²⁰

However, 18 USC § 3582(c) provides three exceptions to the general rule that a district court may not change a term of imprisonment it has imposed: (1) in certain circumstances upon motion of the Director of the Bureau of Prisons;²¹ (2) to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure;²² or (3) in cases where the Sentencing Commission has subsequently lowered the applicable sentencing range.²³

In turn, Rule 35 empowers a court to correct or reduce a defendant's sentence in three specific circumstances. Rule 35(a) allows a court to correct a sentence on remand from the court of appeals; 35(b) grants the court authority to "reduce a sentence to reflect a defendant's subsequent, substantial assistance in the in-

¹⁷ Pub L No 98-473, 98 Stat 1987 (1984), codified at 18 USC §§ 3551 et seq (1994).

¹⁸ See FRCrP 35 (1946); *United States v Ellenbogen*, 390 F2d 537, 543 (2d Cir 1968); *District Attorney v Superior Court*, 342 Mass 119, 172 NE2d 245, 250-51 (1961).

¹⁹ 18 USC § 3582(c). See also *United States v Blackwell*, 81 F3d 945, 947 (10th Cir 1996), rev'd on other grounds, 127 F3d 947 (10th Cir 1997) ("A district court is authorized to modify a Defendant's sentence only in specified instances where Congress has expressly granted the court jurisdiction to do so.").

²⁰ *Twenty-Fifth Annual Review of Criminal Procedure*, 84 Georgetown L J 1389, 1389 (1996). See also 18 USC § 3742, which provides for appeals by the defendant and the government.

²¹ 18 USC § 3582(c)(1)(A).

²² 18 USC § 3582(c)(1)(B). "Otherwise expressly permitted by statute" has been held to include changes due to clerical errors under FRCrP 36. See *Blackwell*, 81 F3d at 947-48. In addition, 28 USC § 2255 gives the court jurisdiction to correct a plainly illegal sentence. See 28 USC § 2255 (West 1996); *United States v Lussier*, 104 F3d 32, 37 (2d Cir 1996) (noting that a defendant may seek relief under 28 USC § 2255 if the seven day period provided by Rule 35(c) elapses).

²³ 18 USC § 3582(c)(2). See also *Blackwell*, 81 F3d at 947-48, citing 18 USC § 3582(c)(1)-(2).

vestigation or prosecution of another person who has committed an offense" on motion of the government within one year after the imposition of sentence; and 35(c) permits a court, "acting within 7 days after the imposition of sentence, [to] correct a sentence that was imposed as a result of arithmetical, technical, or other clear error."²⁴ Although the Rule does not provide any formal method of bringing the error to the attention of the court, the Advisory Committee Notes indicate that the court may act under Rule 35(c) either *sua sponte* or upon motion of one of the parties.²⁵

It should be emphasized that the current Rule 35(c) confers limited jurisdiction; both the "clear error" standard and the seven day limit severely restrict a judge's ability to change the sentence.²⁶ This, however, was not always the case. The historical development of a court's authority to correct its own sentence demonstrates that prior to the enactment of the Sentencing Reform Act of 1984, the window for such correction was much wider.

A. Common Law Term of Court Rule

At common law, a court could revise a sentence during the term of court in which it was initially imposed.²⁷ This rule had both a "remedial" and a "jurisdictional" purpose.²⁸ Allowing the trial judge to reconsider a legally imposed sentence achieved a remedial objective;²⁹ the time limit served the jurisdictional purpose of preventing abuse by the sentencing court.³⁰

1. Remedial purpose.

The common law rule did not limit courts to fixing mistakes in sentencing, but actually allowed judges to reconsider the appropriateness of a sentence.³¹ In fact, sentencing courts had enormous discretion to change sentences. The Massachusetts Su-

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²⁴ FRCrP 35(c).

²⁵ See Advisory Committee Notes to FRCrP 35, 1991 Amendment ("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.").

²⁶ See *Blackwell*, 81 F3d at 948, citing *Townsend*, 33 F3d 1230, 1231 (10th Cir 1994).

²⁷ See Wayne R. LaFave and Jerold R. Israel, 3 *Criminal Procedure* § 25.2(e) at 936 (West 1994).

²⁸ B. Carole Hoffman, Note, *Rule 35(b) of the Federal Rules of Criminal Procedure: Balancing the Interests Underlying Sentence Reduction*, 52 *Fordham L Rev* 283, 283-84 (1983).

²⁹ See *id.* at 284.

³⁰ See *id.*

³¹ See *id.* at 289. This power was normally construed to allow a trial judge to reduce, but not to increase, a sentence previously imposed. However, the increase of a sentence previously imposed was not unheard of. See LaFave and Israel, 3 *Criminal Procedure* § 25.2(e) at 937 (cited in note 27); *United States v DiFrancesco*, 449 US 117, 139 (1980).

preme Judicial Court offered this explanation of the policies underlying the discretionary system:

Occasions inevitably will occur where a conscientious judge, *after reflection* or upon receipt of new probation reports or other information, will feel that he has been too harsh or has failed to give weight to mitigating factors which properly he should have taken into account. In such cases the interests of justice and sound judicial administration will be served by permitting the trial judge to reduce the sentence within a reasonable time.³²

Thus, unlike the current Rule 35(c), which restricts a court's ability to change sentences to instances involving clear mistakes, the common law rule afforded trial judges latitude to modify sentences because of new evidence or simply a change of heart.

2. Jurisdictional purpose.

The time limit of this "Term of Court Rule" served two jurisdictional functions. First, it prevented the trial judge from infringing on the executive authority of the Parole Commission, preserving separation of powers.³³ If there were no time limit on a judge's authority to change a sentence, the judge could usurp the role of the executive branch to grant parole.³⁴ Second, the time limit served to assure some finality in sentencing.³⁵

Predictably, the Term of Court Rule resulted in arbitrary and unfair consequences; a defendant sentenced at the beginning of a court's term had more time to prepare a motion to reduce sentence than did a defendant sentenced near the end of the term.³⁶ In order to mitigate such unfair consequences, the Supreme Court adopted a practice that allowed district courts up to ninety

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³² *District Attorney v Superior Court*, 342 Mass 119, 172 NE2d 245, 250-51 (1961) (emphasis added).

³³ See LaFave and Israel, 3 *Criminal Procedure* § 25.2(e) at 937 (cited in note 27).

³⁴ See *Wisconsin v Wuensch*, 69 Wis 2d 467, 480, 230 NW2d 665, 671-72 (1975) (A trial judge cannot reduce a sentence based upon offender's changed attitude and rehabilitative progress because that decision is within the exclusive province of the executive branch; the trial judge may resentence only on the ground that his original sentence was unduly harsh.).

³⁵ Compare *United States v Addonizio*, 442 US 178, 184-85 n 11 (1979) (stating that narrow limits on collateral attack of final judgments in criminal cases prevent inroads on the "concept of finality").

³⁶ See *United States v Mendoza*, 565 F2d 1285, 1290 (5th Cir 1978) (noting that Rule 35 was adopted to remedy the "arbitrary common law rule," under which "the time within which the motion had to be filed varied greatly . . ."), *aff'd*, 581 F2d 89 (5th Cir 1978) (en banc).

days beyond their court terms to change a valid sentence.³⁷ Nevertheless, district courts determined whether to use the ninety day extension on a case-by-case basis, leading to inconsistent results.³⁸

B. Precursors to the Current Federal Rule of Criminal Procedure 35(c)

In 1946, the Supreme Court, pursuant to congressional authorization, promulgated the Federal Rules of Criminal Procedure.³⁹ Rule 35(b) gave the sentencing court power to reduce a sentence within sixty days after it was imposed.⁴⁰ The time limit served the jurisdictional concerns of the Term of Court Rule, while eliminating its inconsistent and unfair results. Regardless of how long the sentencing court's term extended, a sentencing court lost control over a judgment once the sixty days expired, and each defendant had the same sixty days in which to seek a reduction of sentence.⁴¹

Rule 35 also fulfilled the remedial purpose of the common law approach to allow a sentencing judge to reconsider a legally imposed sentence.⁴² The Rule gave the sentencing judge "an opportunity to reconsider the sentence in light of any further information about the defendant or the case,"⁴³ and it gave the defendant a second chance to "plea[d] for leniency."⁴⁴

Disposition of a Rule 35 motion was entirely within the discretion of the sentencing court.⁴⁵ In fact, the 1966 revisions to

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³⁷ See Alexander Holtzoff, ed, 6 *Federal Rules of Criminal Procedure with Notes and Institute Proceedings* 211, 225 (NYU 1946) (remarks of Mr. Chapman and G. Dession, Advisory Committee Members); Hoffman, 52 Fordham L Rev at 290 (cited in note 28).

³⁸ See Hoffman, 52 Fordham L Rev at 290 (cited in note 28).

³⁹ See 18 USC App (1946); 327 US 856 (1946). The Federal Rules of Criminal Procedure are promulgated by the Supreme Court pursuant to its authority granted by the Act of June 29, 1940, Pub L No 76-675, 54 Stat 688 (1990), codified as amended at 18 USC § 3771 (1982). The Rules were then reported to Congress, which chose whether to adopt them.

⁴⁰ See FRCrP 35 (1946).

⁴¹ See Hoffman, 52 Fordham L Rev at 290-91 (cited in note 28).

⁴² See *United States v Maynard*, 485 F2d 247, 248 (9th Cir 1973) (stating that the function of Rule 35(b) is "simply to allow the district court to decide if, on further reflection, the original sentence now seems unduly harsh").

⁴³ *United States v Ellenbogen*, 390 F2d 537, 543 (2d Cir 1968) (explaining that the objective of Rule 35 was to "give every convicted defendant a second round before the sentencing judge, and [afford] the judge an opportunity to reconsider the sentence in light of any further information about the defendant or the case which may have been presented to him in the interim").

⁴⁴ *Poole v United States*, 250 F2d 396, 401 (DC Cir 1957).

⁴⁵ *United States v Kajevec*, 711 F2d 767, 771 (7th Cir 1983) ("Since the motion for reduction of sentence is a plea for leniency, decision on the motion is as close to being a matter of pure discretion as any other under the Rules . . ."), quoting 8A *Moore's Federal*

Rule 35 increased the time limit from 60 days to 120 days in order to give courts more time to consider motions filed under the Rule or to discover errors *sua sponte*.⁴⁶ The 1979 amendments to the Rule made clear that a judge could reduce a sentence from incarceration to probation.⁴⁷ This change ensured that Rule 35 gave district courts the power to "consider all alternatives that were available at the time of imposition of the original sentence."⁴⁸

The Sentencing Reform Act of 1984,⁴⁹ however, repealed the existing version of Rule 35, thereby eliminating any explicit statutory authority for a district court to modify a legally imposed sentence.⁵⁰ Only two narrow exceptions remained. First, the new Rule 35 left the district court with the authority to alter a sentence on remand after a successful appeal. Second, the new Rule allowed a court to alter a sentence on a motion of the government within one year after the imposition of a sentence in response to a defendant's substantial assistance in the investigation of others.⁵¹

Practice § 35.02[4] at 35-7 (1982). In fact, appellate courts rarely reduced a sentence after a district court denial of a Rule 35(b) motion. See *McGee v United States*, 462 F2d 243, 245 (2d Cir 1972) (Timbers dissenting) (noting the rarity of an appellate vacation, reversal, or modification of a trial judge's Rule 35 discretionary order).

⁴⁶ See FRCrP 35 (1966), codified at 18 USC App (Supp IV 1964); Advisory Committee Note to FRCrP 35, 1966 Amendment.

⁴⁷ See FRCrP 35 (1979), codified at 18 USC App (Supp V 1983); Advisory Committee Note to FRCrP 35, 1979 Amendment.

⁴⁸ Advisory Committee Note to FRCrP 35, 1979 Amendment, quoting *United States v Golphin*, 362 F Supp 698, 699 (W D Pa 1973).

⁴⁹ Pub L No 98-473, 98 Stat 1987 (1984), codified at 18 USC §§ 3551 et seq (1994).

⁵⁰ See FRCrP 35 (1984), codified at 18 USC App (1982) (Supp I 1984). The legislative history of the Sentencing Reform Act provides scant insight into the specific reasons for the repeal of the old Rule 35. See Comprehensive Crime Control Act of 1984, S Rep No 98-225, 98th Cong, 2d Sess 121-22, 158 (1984), reprinted at 1984 USCCAN 3304-05, 3341. Further, it is not self-evident that the repeal of the Rule served the overall goals of the Act. For example, one major concern of the legislation was to reduce sentencing disparities for similar crimes. See 1984 USCCAN at 3221. Preventing a judge from changing a sentence, however, does not necessarily reduce such disparities because the change was within the judge's original sentencing discretion. Another major goal of the Act was to make sentences more final and certain. See *id* at 3232. However, this concern stemmed from deficiencies in the parole system, rather than from the judge's ability to modify a sentence within a limited amount of time. See *id*. According to the Fourth Circuit, the underlying purpose of the change was to ensure that the sentence imposed in the public forum during the sentencing hearing would remain "constant, immune from later modification." *United States v Cook*, 890 F2d 672, 674-75 (4th Cir 1989). In other words, once the judge imposed the sentence in court, that sentence was final. However, as discussed above, it is not clear what goal was served by such finality.

⁵¹ FRCrP 35(b) (1984). See also *Review of Criminal Procedure*, 84 Georgetown L J at 1389-90 (cited in note 20); *United States v Lopez*, 26 F3d 512, 517 (5th Cir 1994) ("[U]nder the literal language of Rule 35 as adopted in 1984, district courts had no authority to modify a sentence either *sua sponte* or upon motion by the defendant."), quoting *United States v Fraley*, 988 F2d 4, 6 (4th Cir 1993). Note that the 1984 version of the Rule also used the term "imposition of sentence." However, neither the Rule itself nor relevant case law addressed whether the phrase referred to oral pronouncement or entry of judgment.

Concern about the restrictive nature of the new scheme prompted at least two circuits to hold that district courts retained the inherent power, notwithstanding Rule 35, to reconsider a sentence during the period in which any party could file a notice of appeal.⁵² These holdings first introduced the concept of "obvious" or clear error, which is codified in Rule 35(c) today. For example, in *United States v Cook*,⁵³ the Fourth Circuit emphasized:

[O]ur holding is a very narrow one. The power of a district court to amend a sentence does not extend to a situation where the district judge simply changes his mind about the sentence. Nor should this be interpreted as an attempt to reenact former Rule 35 by judicial edict. Our decision is limited to the case . . . of an *acknowledged misinterpretation* of the [Sentencing Guidelines].⁵⁴

Similarly, the Second Circuit noted in *United States v Rico*⁵⁵ that district courts retained the power to modify sentences to correct "obvious errors." The Second Circuit justified extending this limited authority to district courts because "it would have been a *waste of judicial resources* to require an appeal and remand in this case in order to impose the same sentence that should have been imposed in any event."⁵⁶

As a result of the narrow "obvious error" requirement, neither *Rico* nor *Cook* restored the broad remedial objectives of the former Rule 35(b)—for example, to give defendants a second chance before the sentencing judge and to afford the judge an opportunity to reconsider a sentence based on new information. The Sentencing Reform Act of 1984 eliminated those ambitious reme-

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⁵² *United States v Rico*, 902 F2d 1065, 1068 (2d Cir 1990) (holding that the district court has the "inherent power to correct the sentence within the time fixed for filing a notice of appeal"); *United States v Cook*, 890 F2d 672, 675 (4th Cir 1989) ("[T]he authority to modify a sentence to correct an acknowledged and obvious mistake exists only during that period of time in which either party may file a notice of appeal.").

⁵³ 890 F2d 672 (4th Cir 1989).

⁵⁴ *Id.* at 675 (emphasis added). See also *United States v Rico*, 902 F2d 1065, 1069 (2d Cir 1990) (holding that the district court has "inherent power to correct a mistaken sentence within the time fixed for filing an appeal, where the parties had agreed to a different sentence and the court otherwise intended to abide by the agreement").

⁵⁵ 902 F2d 1065, 1067 (2d Cir 1990). The Second Circuit reasoned that the legislative history of the Sentencing Reform Act did not indicate any congressional intent to eliminate the court's "inherent power" to change sentences. Nevertheless, the Second Circuit was careful to limit this judge-made power to fixing obvious errors, rather than reinstating the old judge-made Term of Court Rule. *Id.*

⁵⁶ *Id.* at 1068 (emphasis added). See also *United States v Himself*, 951 F2d 144, 146 (7th Cir 1991) ("Appeals are costly and if a clear error of law can be corrected beforehand, possibly sparing an appeal, then so much the better.").

dial goals, and they remain absent today.⁵⁷ The *Rico* and *Cook* courts merely focused on the absurdity of requiring an appellate process to correct an acknowledged and obvious mistake that the trial judge could fix immediately.

C. The Current Rule 35(c)

The Advisory Committee adopted Rule 35(c) in 1991 to recognize explicitly the ability of the sentencing judge to correct, within seven days after imposition, a flawed sentence based on an arithmetical, technical, or other clear error.⁵⁸ The Rule "in effect codifies" the result of *Rico* and *Cook* "but provides a more stringent time requirement."⁵⁹ The Advisory Committee Notes make clear that the district court's authority is "very narrow," and extends only "to those cases in which an obvious error or mistake has occurred in the sentence . . . which would almost certainly result in a remand of the case . . . ."⁶⁰

Furthermore, the Notes specifically reject the old remedial rationale: the Rule "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."⁶¹ In fact, the Committee considered, but rejected, a proposal to permit modification of a sentence within 120 days of sentencing based upon new factual information revealed since sentencing: "The Committee believed such a change would inject into Rule 35 a degree of post-sentencing discretion which would raise doubts about the finality of determinate sentencing that Congress attempted to resolve by eliminating former Rule 35(a)."⁶²

⁵⁷ See 18 USC § 3582(c) (1994).

⁵⁸ See Advisory Committee Notes to FRCrP 35, 1991 Amendment; FRCrP 35(c), codified at 18 USC App (1994).

⁵⁹ Advisory Committee Notes to FRCrP 35, 1991 Amendment. Courts have rejected the proposition that, even after the enactment of Rule 35(c), district courts retain the "inherent authority" to correct obvious mistakes beyond the seven day period. See *United States v Fahm*, 13 F3d 447, 453-54 (1st Cir 1994) ("The 1991 amendment to Rule 35(c) was intended to codify the result reached in *Rico* and *Cook* but requires as well that the sentencing court act within the time frame prescribed in the rule."). Furthermore, it is not enough for a defendant to make a request for a 35(c) correction within seven days; if the court does not take action within the seven days, the judge's "power to act under the rule subsides and the pending motion is deemed to be denied as of that date." *United States v Morillo*, 8 F3d 864, 869 (1st Cir 1993).

⁶⁰ Advisory Committee Notes to FRCrP 35, 1991 Amendment.

⁶¹ *Id.*

⁶² *Id.*

Finally, the Notes identify three reasons for limiting the time to correct errors to "within the time for appealing the sentence".⁶³

1. to reduce the likelihood of jurisdictional questions in the event of an appeal;
2. 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; and
3. to reduce the likelihood of abuse of the Rule by limiting its application to acknowledged and obvious errors in sentencing.⁶⁴

Unfortunately, neither the plain language of Rule 35(c) nor the Advisory Committee Notes directly address whether "imposition of sentence" refers to the date the court orally pronounces the sentence or the date it enters the judgment on the record. In the face of this silence, courts have disagreed on when a sentence is "imposed."

II. CURRENT LAW ON WHEN A SENTENCE IS "IMPOSED"

Rule 35(c) gives the court a mere seven days to modify a sentence.⁶⁵ According to the Advisory Committee Notes, the stringent time limit is intended to keep the period within the amount of time allowed for a party to file an appeal and to "reduce the likelihood of abuse of the Rule by limiting its application to acknowledged and obvious errors in sentencing."⁶⁶

Given the short time limit, it is important to know when the seven day clock begins to run. The Rule indicates that the court must act within seven days from the "imposition of sentence."⁶⁷ Circuit courts disagree, however, on whether "imposition of sentence" refers to the oral pronouncement of the sentence in court, or, alternatively, the formal entry of the sentence on the record.

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⁶³ Id.

⁶⁴ Id.

⁶⁵ FRCrP 35(c).

⁶⁶ Advisory Committee Notes to FRCrP 35, 1991 Amendment. Note that the "clear error" standard itself is the main means of restricting a judge's ability to modify a sentence. Regardless of when the change is made, a judge may only modify a sentence under Rule 35(c) when there was clear error in the original sentence. See Part III for an extended discussion of the clear error standard.

⁶⁷ FRCrP 35(c).

A. The Oral Pronouncement Rule

The Second and Tenth Circuits have held that "imposition of sentence" refers to the date of oral pronouncement of the sentence in court.⁶⁸ Each circuit offered a different rationale in support of this position. The Tenth Circuit understood "imposition of sentence" to refer to oral pronouncement, because the Sixth Amendment requires that the defendant be present during trial.⁶⁹ The Second Circuit, on the other hand, reasoned that the oral pronouncement interpretation better comports with the intent of Rule 35(c) to promote finality in sentencing and to reduce the likelihood of abuse.⁷⁰

1. Sixth Amendment argument.

In *United States v Townsend*,⁷¹ the Tenth Circuit used the Sixth Amendment to support this "Oral Pronouncement Rule." According to the court:

It is well established that a sentence orally imposed governs a conflicting, later-written sentence of the court. This rule is grounded in the Sixth Amendment which requires that a defendant be physically present at sentencing. When a judgment of conviction containing the sentence is officially entered of record, only members of the clerk's office are present. This cannot be what Congress meant in Rule 35(c) by "imposition of sentence" in light of the Sixth Amendment.⁷²

The Tenth Circuit correctly noted that an orally imposed sentence trumps a written sentence when they conflict. According to the Supreme Court, "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."⁷³ This principle has led courts to hold uniformly in cases where there is a "direct conflict between an unambiguous oral pronouncement of sentence

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⁶⁸ *United States v Abreu-Cabrera*, 64 F3d 67, 74 (2d Cir 1995); *United States v Townsend*, 33 F3d 1230, 1231 (10th Cir 1994).

⁶⁹ See *Townsend*, 33 F3d at 1231. Because of the Sixth Amendment, "imposition of sentence" is in fact a term of art that refers to oral pronouncement in certain contexts. *United States v Navarro-Espinosa*, 30 F3d 1169, 1170-71 (9th Cir 1994).

⁷⁰ See *Abreu-Cabrera*, 64 F3d at 74 (contending that timing the 35(c) seven day period from the date of 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").

⁷¹ 33 F3d 1230 (10th Cir 1994).

⁷² *Id* at 1231 (citations omitted).

⁷³ *Illinois v Allen*, 397 US 337, 338 (1970) (holding that a defendant can lose this right based on disorderly or disruptive behavior).

and the written judgment . . . that the oral pronouncement . . . must control."⁷⁴ Even where the judge misspeaks in pronouncing the oral sentence, the "only sentence that is legally cognizable is the actual oral pronouncement in the presence of the defendant."⁷⁵

The Tenth Circuit's approach to Rule 35(c), however, is misguided. The Tenth Circuit is applying the definition of "imposing a sentence" in the context of conflicting oral and written sentences to come up with a definition of "imposing a sentence" under Rule 35(c). However, the Sixth Amendment rationale, which governs in the context of conflicting oral and written sentences, has no relevance to Rule 35(c).

The Sixth Amendment guarantee gives the defendant an opportunity to confront witnesses at trial and to communicate with counsel during the proceedings.⁷⁶ Where the oral and written sentences conflict, choosing the latter would deprive the defendant of these rights because the defendant was not present when the written sentence was determined. To the contrary, holding that the seven day limit under Rule 35(c) begins at the entry of judgment would in no way violate a defendant's right to be present at sentencing. In fact, the defendant is present when the judge determines the sentence, regardless of which interpretation of "imposition of sentence" is used. Thus, the Sixth Amendment is irrelevant to the interpretation of "imposition of sentence" for Rule 35(c).⁷⁷

Reference to the Federal Rules of Appellate Procedure also demonstrates that using entry of judgment as the event to trigger

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⁷⁴ *United States v Munoz-Dela Rosa*, 495 F2d 253, 256 (9th Cir 1974). See also *United States v Daddino*, 5 F3d 262, 266 (7th Cir 1993) (holding that "if the oral and written sentences conflict, the oral language governs"), quoting *United States v Makros*, 851 F2d 1016, 1019 (7th Cir 1988). This rule is recognized in nearly every circuit. See *United States v Lewis*, 626 F2d 940, 953 (DC Cir 1980); *United States v Pugliese*, 860 F2d 25, 30 (2d Cir 1988); *United States v Chasmer*, 952 F2d 50, 52 (3d Cir 1991); *United States v Morse*, 344 F2d 27, 29 n 1 (4th Cir 1965); *United States v McAfee*, 832 F2d 944, 946 (5th Cir 1987); *United States v Glass*, 720 F2d 21, 22 n 2 (8th Cir 1983); *United States v Bergmann*, 836 F2d 1220, 1222 (9th Cir 1988); *United States v Blackner*, 901 F2d 853, 855 (10th Cir 1990); *United States v Khoury*, 901 F2d 975, 977 (11th Cir 1990).

⁷⁵ *Munoz-Dela Rosa*, 495 F2d at 256. But see *Daddino*, 5 F3d at 266 (noting that where the language of an orally-pronounced sentence is ambiguous, courts have allowed the written sentence to resolve the ambiguity).

⁷⁶ See *Allen*, 397 US at 344.

⁷⁷ The canon to construe statutes to avoid constitutional doubt dictates that a court should avoid interpretations that would create doubt about the constitutional validity of a statute. See *Public Citizen v United States Department of Justice*, 491 US 440, 466 (1989). This canon does not support the Tenth Circuit's interpretation, however, because, as shown in the text above, the interpretation of "imposition of sentence" under Rule 35(c) raises no constitutional uncertainty at all.

a time limit does not present any constitutional concerns. According to Appellate Rule 4(b), a defendant has ten days from the entry of judgment to appeal a sentence.⁷⁸ This context is much more similar to Rule 35(c) than the situation of an oral sentence conflicting with a written one; both the Appellate Rule and Rule 35(c) involve time limits for converting a sentence. Yet, there have been no constitutional challenges to Rule 4(b) on the ground that the defendant was not "present" at the entry of judgment, nor would such a challenge be successful.

The Seventh Circuit's decision in *United States v Evans*⁷⁹ illustrates another situation in which the meaning of "imposition of sentence" depends on the context. At issue in that case was a statute that required the judge to apply the Sentencing Guidelines in effect "on the date the defendant is sentenced."⁸⁰ The court held that the term "sentencing" refers "to the pronouncing of sentence by the judge in open court, rather than to the subsequent recording of the sentence on a docket sheet."⁸¹ In the context of *Evans*, it made sense for the date "defendant is sentenced" to refer to oral pronouncement. Otherwise, a judge pronouncing a sentence just before the effective date of a change in the Guidelines would not be certain which Guidelines to observe because "he would not know exactly when the clerk would enter the judgment on the docket sheet."⁸² The court was careful to distinguish this context, however, from the context of Rule 35(c), which does not have a similarly compelling reason for "imposition of sentence" to refer to oral pronouncement.⁸³ Thus, *Evans* gives credence to the conclusion that the meaning of "imposition of sentence" in other contexts is not controlling for purposes of Rule 35(c).

Concededly, "imposition of sentence" is "a term of art that generally refers to the time at which a sentence is orally pronounced."⁸⁴ As explained above, however, the source of this interpretation is the Sixth Amendment's requirement that a defendant be present during sentencing, which is inapplicable in the context of Rule 35(c). As explained by the Ninth Circuit, "in the

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⁷⁸ FRAP 4(b).

⁷⁹ 92 F3d 540 (7th Cir 1996).

⁸⁰ Id at 544, citing 18 USC § 3553(a)(4)(A).

⁸¹ 92 F3d at 544.

⁸² Id.

⁸³ See id at 544-45.

⁸⁴ *Navarro-Espinosa*, 30 F3d at 1170.

context of Rule 35(c), the phrase ["imposition of sentence"] does not have the same meaning that it has in other rules."⁸⁵

2. Finality and the desire to prevent abuse.

In *United States v Abreu-Cabrera*,⁸⁶ the Second Circuit presented a much more compelling case for the Oral Pronouncement Rule. According to *Abreu-Cabrera*, interpreting "imposition of sentence" to refer to oral pronouncement "best effectuates the intent of the rule's drafters—finality in sentencing."⁸⁷ The court explained:

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 . . . .⁸⁸

At first glance, such a scenario envisions some pretty devious thinking by district courts and could be dismissed as unrealistic. In fact, however, district courts may have used exactly such tactics. For example, in *Townsend*, the district court reduced the defendant's sentence three weeks after orally announcing it.⁸⁹ At the time of resentencing, the oral sentence apparently still had not been entered onto the record.⁹⁰ What could explain this delay? It is plausible that the judge was unfamiliar with Rule 35(c) and scheduled the resentencing hearing on his own motion without any thought of whether he had jurisdiction to do so. Thus, the fact that the sentence was never entered on the record may have been an oversight. However, it is equally plausible that the judge intended the delay to buy time under Rule 35(c).⁹¹

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⁸⁵ Id. The Ninth Circuit suggested that entry of judgment is the appropriate rule, although it noted that "while the intention of the drafters [that entry of judgment was intended] seems fairly clear, the language chosen does not further it." Id. at 1171.

⁸⁶ 64 F3d 67 (2d Cir 1995).

⁸⁷ Id. at 74.

⁸⁸ Id.

⁸⁹ 33 F3d at 1231.

⁹⁰ See id. But see *United States v Skufca*, 1997 US App LEXIS 5829, *6 (10th Cir) (holding that district court lacked jurisdiction to correct a sentence eight days after oral pronouncement).

⁹¹ Importantly, not only did the court in *Townsend* potentially abuse the seven day limit, it also impermissibly attempted to modify a sentence in the absence of "clear error." See 33 F3d at 1231-32 (McKay concurring) (noting that "even within the seven-day period provided by Rule 35(c)," the district court impermissibly changed the sentence because clear error did not exist). Thus, assuming the government appealed, the change would have been reversed even if it had been made within the seven day limit. See Part IV, which argues that the Oral Pronouncement Rule is unnecessary to prevent such abuse, because the district court would have been reversed for exceeding the scope of clear error regardless of the time limit.

Abreu-Cabrera itself provides an example of possible abuse by a district court. In that case, the district judge resentenced the defendant almost six months after the original oral sentence.⁹² As in *Townsend*, it is not clear whether the court ever entered the orally pronounced sentence onto the record. Interestingly, four days after the oral sentencing, the district court issued an order that purportedly "reserved the right to correct the sentence" beyond the seven day limit dictated by Rule 35(c).⁹³ This order, unauthorized by Rule 35(c), suggests that the failure to enter the sentence on the record may have been part of a deliberate attempt to flout the seven day limit.⁹⁴

The district courts' antics in *Townsend* and *Abreu-Cabrera* suggest that the Second Circuit may not have been far off base when it expressed concern that, under the Entry of Judgment Rule, district courts could intentionally delay the entry of judgment to buy more time to change a sentence.⁹⁵ The Advisory Committee Notes to Rule 35(c) provide further support to the reasoning of the Second Circuit. The Notes state that one purpose of the seven day limit is to "reduce the likelihood of abuse of the Rule by limiting its application to acknowledged and obvious errors in sentencing."⁹⁶ This logic assumes that the more time a judge has to change a sentence for "clear error," the more likely he will abuse the Rule and modify a sentence merely because of a change of heart. The Notes therefore provide some evidence that the drafters may have intended the Oral Pronouncement Rule; it results in a shorter period than the Entry of Judgment Rule when

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⁹² *Abreu-Cabrera*, 64 F3d at 70.

⁹³ *Id.*

⁹⁴ See FRCrP 35(c). As in *Townsend*, the sentence modification the judge eventually made was not permitted under the clear error standard. See *Abreu-Cabrera*, 64 F3d at 72 (noting that the trial judge's correction was "clearly outside the scope of the rule"). The district court changed the original sentence because "it may not have been apprised of and considered all relevant factors" in sentencing the defendant. *Id.* at 70. As established in Part III and emphasized by the Second Circuit in this case, such an "error" "could certainly not be categorized as . . . 'clear error'" under Rule 35(c). *Id.* at 72. Thus, as in *Townsend*, the district court would have been reversed even if it remained within the seven day limit. See also *United States v Fraley*, 988 F2d 4 (4th Cir 1993), revg an unpublished district court opinion. In *Fraley*, the district court resentenced the defendant pursuant to Rule 35 nearly four months after orally imposing the sentence. See *id.* at 5 (the case does not indicate when, if ever, the original sentence was entered on the record). In addition to ignoring the seven day rule, the change was "not the product of error." *Id.* at 7. Instead, the court changed the sentence because the defendant informed the court that his father was ill and unable to continue the family business without his assistance. See *id.* at 5. In response, the district court modified *Fraley's* sentence to allow him to serve less time in jail, and more time in community confinement. See *id.* The Fourth Circuit reversed, holding the district court had no authority to make the change. See *id.* at 7.

⁹⁵ See *Abreu-Cabrera*, 64 F3d at 74.

⁹⁶ Advisory Committee Notes to FRCrP 35, 1991 Amendment.

the two dates conflict and thus would be more likely to prevent the type of abuse seen in *Townsend* and *Abreu-Cabrera*.⁹⁷

B. The Entry of Judgment Rule

The First and Seventh Circuits have held that for purposes of Rule 35(c) "imposition of sentence" refers to the date of entry of judgment, rather than oral pronouncement.⁹⁸ The Ninth Circuit also strongly suggested that Congress intended the seven day period to commence upon the entry of judgment.⁹⁹

The Ninth Circuit presented its argument for the entry of judgment interpretation in *United States v Navarro-Espinosa*.¹⁰⁰ The court pointed to the Advisory Committee Notes stating that Rule 35(c) was intended to codify the decisions in *Cook* and *Rico*. Those cases held that sentencing courts have the inherent power to correct sentencing mistakes within the time period either party can file for appeal.¹⁰¹ In fact, the notes specifically state that the time for correcting errors under Rule 35(c) should be "within the time for appealing the sentence," but with a more stringent time requirement than that for filing an appeal.¹⁰² The time limit for filing appeals is ten days from "entry of judgment."¹⁰³ Thus, the Ninth Circuit in *Navarro-Espinosa* concluded that the "intention of the drafters seems fairly clear" that the seven days should run from the date of entry of judgment.¹⁰⁴

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⁹⁷ Note that this "evidence" from the Advisory Committee Notes does not dispositively show that the Oral Pronouncement Rule was intended. The Entry of Judgment Rule does not directly conflict with the goal expressed by the Notes to "reduce abuse of the rule." Advisory Committee Notes to FRCrP 35, 1991 Amendment. Furthermore, as discussed below, other evidence from the Notes suggests the Entry of Judgment approach.

⁹⁸ *United States v Clay*, 37 F3d 338, 340 (7th Cir 1994); *Morillo*, 8 F3d 864, 869 n 8 (1st Cir 1993).

⁹⁹ See *United States v Navarro-Espinosa*, 30 F3d 1169, 1170-71 (9th Cir 1994) (stating that the "Advisory Committee Notes accompanying Rule 35(c) . . . indicate that the drafters intended that sentencing courts be empowered to correct clearly erroneous sentences within 7 days of the formal entry of judgment"). The Ninth Circuit did not formally adopt the Entry of Judgment Rule, however, because the case was decided on other grounds.

¹⁰⁰ 30 F3d 1169 (9th Cir 1994).

¹⁰¹ *Navarro-Espinosa*, 30 F3d at 1171, citing Advisory Committee Notes to FRCrP 35. See also text accompanying notes 54-56.

¹⁰² Advisory Committee Notes to FRCrP 35, 1991 Amendment. The purpose of narrowing the time limit, according to the Advisory Committee Notes, was 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 sentence, or lack thereof, in any appeal. *Id.*

¹⁰³ FRAP 4(b).

¹⁰⁴ 30 F3d at 1171. The First and Seventh Circuits used a shortened version of this reasoning. In *Morillo*, 8 F3d at 869 n 8, the First Circuit simply concluded that because entry of judgment is used for the time limit for appeals, it is also the appropriate date for Rule 35(c). The court held that imposition of sentence "signifies the date judgment enters,

While there are two possible challenges to this analysis, neither is damning. First, a challenger could argue that Rule 4(b) of the Federal Rules of Appellate Procedure specifies "entry of judgment,"¹⁰⁵ while 35(c) states "imposition of sentence."¹⁰⁶ Thus, the language of Rule 4(b) indicates that the drafters knew how to denote "entry of judgment" if they so intended, implying that they meant something different by "imposition of sentence." Such an inference, however, assumes more care on the part of the drafters of the two rules than is reasonable.

Second, a challenger could argue that the goal that the time limit for Rule 35(c) be "within the time for appealing the sentence"¹⁰⁷ is satisfied under either the Oral Pronouncement Rule or the Entry of Judgment Rule. Because a notice of appeal in a criminal case must be filed within ten days of entry of judgment,¹⁰⁸ the seven day limit under Rule 35(c) is within that period whether or not the seven day clock runs from oral pronouncement or entry of judgment.¹⁰⁹ However, it would be a strained reading to conclude that "within the time limit for appealing the sentence" refers to something other than entry of judgment simply because another conceivable time limit also fits within the period for filing an appeal. It would be equivalent to someone who makes \$10,000 answering yes to the question, "Do you make \$1,000?"

Thus, the Ninth Circuit's position that Congress intended entry of judgment is the most likely explanation of congressional intent. Congress clearly adopted Rule 35(c) to be in harmony with the appellate rules,¹¹⁰ so it is probable that Congress envisioned

rather than the date sentence is orally pronounced," and cited cases that state the time limit for appeals. *Id.* The Seventh Circuit also did no more than cite the rule for appeals when it concluded that "the date of 'imposition of sentence' from which the seven days runs signifies the date judgment enters rather than the date sentence is orally pronounced." *Clay*, 37 F3d at 340.

¹⁰⁵ FRAP 4(b).

¹⁰⁶ FRCrP 35(c).

¹⁰⁷ Advisory Committee Notes to FRCrP 35, 1991 Amendment.

¹⁰⁸ See FRAP 4(b).

¹⁰⁹ See *Abreu-Cabrera*, 64 F3d at 73.

¹¹⁰ Rule 35(c) and FRAP 4(b) work together in a number of ways. One purpose of the seven day limit is to ensure that "the appellate process (if a timely appeal is taken) may proceed without delay and without jurisdictional confusion." Advisory Committee Notes to FRCrP 35, 1991 Amendment. Rule 4(b) itself was drafted with Rule 35(c) in mind: "The Committee believes . . . that a notice of appeal should not be affected by the filing of a Rule 35(c) motion or by correction of a sentence under Rule 35(c)." Advisory Committee Notes to FRAP 4(b), 1993 Amendment. In response to these directives, courts have been careful to ensure that the processes of correcting sentences and appealing sentences work together smoothly. For example, the filing of a Rule 35(c) motion suspends the time limit for filing an appeal. See *Morillo*, 8 F3d at 868, referring to *United States v Healy*, 376 US 75, 78-80

that the seven day period would commence at the same time as the ten day period for appeals. As the Seventh Circuit explained in *Evans*:

[T]he practice under Rule 35(c) should be conformed to the practice in taking an appeal because correcting a sentence serves a similar purpose, that of revising the judgment. . . . It would be pretty confusing if the time for making the correction ran from the time of the pronouncing of sentence even though the time for appealing did not start to run until the entry of the judgment.¹¹¹

Evans presents a compelling reason why, as a policy matter, "imposition of sentence" should refer to entry of judgment in the context of Rule 35(c). The potential challenges to the Ninth Circuit's reasoning discussed above, however, simply show that congressional intent on the issue is not a foregone conclusion.

In sum, "imposition of sentence" is ambiguous on its face as to whether it refers to oral pronouncement or entry of judgment. There is some indication Congress intended oral pronouncement to prevent abuse of authority conferred by the Rule. Somewhat stronger, but not dispositive, evidence suggests that Congress understood the seven days to run from entry of judgment, similar to the ten day time limit for filing an appeal.

III. DEFINITION OF CLEAR ERROR

The case for defining "imposition of sentence" as the entry of judgment becomes much stronger upon an investigation of the meaning of "clear error." A proper understanding of the "clear error" limitation on Rule 35(c) relief undermines the strongest rationale for the Oral Pronouncement Rule—the desire to prevent abuse by district court judges who undergo a "change of heart."¹¹²

(1964). This means the ten day time limit for appeals begins to "run afresh at the time of disposition of the motion . . ." *Morillo*, 8 F3d at 867 n 4. In effect, a timely Rule 35(c) motion renders the underlying judgment "non-final for purposes of appeal until the motion is disposed of either explicitly or by inaction." *Clay*, 37 F3d at 340 n *. Thus, if a district court fails to act within seven days of "imposition of sentence," it has the "same effect as denying the motion, making the judgment final [for purpose of appeal] on the date the district judge's power to alter the sentence expired." *United States v Turner*, 998 F2d 534, 536 (7th Cir 1993). To be sure, none of the directives on the relation between Rule 35(c) and Rule 4(b) requires that the seven days for correction of sentence begin at entry of judgment. In fact, the oral pronouncement trigger for the seven day period would not disrupt the appellate process. Nonetheless, given how closely the two provisions work together, it would be confusing for one time limit to begin at entry of judgment, and the other to begin when the sentence is pronounced.

¹¹¹ 92 F3d at 545.

¹¹² See Part II.A.2.

The "clear error" limitation on Rule 35(c) relief provides an effective constraint on such abuse. Thus, "imposition of sentence" (and the triggering event for the seven day window that it describes) need not be defined so restrictively, better allowing the Rule to serve the remedial and judicial efficiency goals discussed earlier.

Rule 35(c) restricts a trial court's power to correct a sentence to cases of "arithmetical, technical, or other clear error."¹¹³ As noted above, the Advisory Committee Notes explain that the sentencing court's authority is "very narrow," limited to fixing the kind of mistakes that "would almost certainly result in a remand of the case."¹¹⁴ Following this guidance, it is important to determine what exactly constitutes "clear error," and what types of mistakes (in addition to those specified in Rule 35(a)) "almost certainly" result in remand.

One inherent difficulty in this analysis is that it is impossible to know whether a circuit court that affirms a district court's sentence modification under Rule 35(c) also would have remanded the case had the same question been presented to it on appeal. It is possible that circuit courts give clear error an expansive definition. Thus, this Part considers whether the clear error standard is an amorphous determination that leaves district courts with significant discretion to alter their decisions, leading to arbitrary results. This Part demonstrates that the scope of "clear error" is actually quite narrow. The analysis provided is useful both in itself as an attempt to catalog district courts' authority under Rule 35(c) and because it suggests a solution to the interpretation of "imposition of sentence."

Appellate courts have been remarkably consistent in defining "clear error." There are no examples of disagreement among appellate courts. Occasionally, however, district courts have at-

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¹¹³ FRCrP 35(c).

¹¹⁴ Advisory Committee Notes to FRCrP 35, 1991 Amendment. According to the Advisory Committee Notes, Rule 35(c) encompasses the types of errors that would result in a remand under Rule 35(a). See also *United States v Waters*, 84 F3d 86, 89 (2d Cir 1996), cert denied, *Waters v United States*, 117 S Ct 262 (1996) (noting that a district court's narrow authority to correct a sentencing error is limited to "errors which would almost certainly result in a remand . . . under Rule 35(a)"), quoting *Abreu-Cabrera*, 64 F3d at 72, citing Advisory Committee Notes to FRCrP 35, 1991 Amendment. Rule 35(a) provides that the court shall correct a sentence that is determined on appeal to have been imposed in violation of the law, as a result of an incorrect application of the Sentencing Guidelines, or to have been unreasonable. See *Abreu-Cabrera*, 64 F3d at 72 ("Defendant's original sentence was not illegal, nor was it the result of an incorrect application of the Guidelines or unreasonable."). One might think the standard of "unreasonable" might be amorphous enough to give district courts a loophole to change sentences simply because of a change of heart. However, a search revealed no published example of a district court making a Rule 35(c) correction because the original sentence was "unreasonable."

tempted to modify a defendant's sentence where clear error does not exist.¹¹⁵ It is unclear whether these courts have misinterpreted, overlooked, or intentionally abused Rule 35(c). Regardless, there have been few instances of district courts acting beyond their authority, and they always have been reversed on appeal.

A. Examples of Clear Error

1. Incorrect application of the Sentencing Guidelines.

An incorrect application of the Sentencing Guidelines is the most common form of bona fide "clear error." A prime example occurred in *Cook*, one of the cases that Rule 35(c) was meant to codify. In *Cook*, the district judge stated at the sentencing hearing that he intended to sentence the defendant under a particular section of the Guidelines that requires a minimum three month prison sentence; he then, however, pronounced a sentence of three months community confinement.¹¹⁶ When the judge realized his mistake three weeks later (this case was prior to enactment of the seven day limit), he amended the sentence sua sponte to make it comply with the Guidelines.¹¹⁷ The Fourth Circuit affirmed the district court's ability to correct an "obvious mistake."¹¹⁸

a) *Mistake regarding minimum sentence.* Another example of an incorrect application of the Guidelines is a mistake as to the minimum sentence required by the Guidelines. In *United States v Goldman*,¹¹⁹ the court originally sentenced the defendant to 262 months in prison, thinking the applicable guideline range was 262 to 327 months. In fact, the minimum sentence in the appropriate range was 360 months.¹²⁰ The First Circuit held that the district court permissibly corrected the sentence to 360 months pursuant to Rule 35(c).¹²¹

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¹¹⁵ See, for example, *United States v Fraley*, 988 F2d 4 (4th Cir 1993), revg unpublished district court opinion modifying a defendant's sentence.

¹¹⁶ 890 F2d at 674.

¹¹⁷ Id.

¹¹⁸ Id at 675.

¹¹⁹ 41 F3d 785, 789 (1st Cir 1994), affg an unpublished district court opinion.

¹²⁰ See id.

¹²¹ Id. Yet another type of mistake in applying the Guidelines is where a court sentences a defendant to concurrent terms when the Guidelines mandate consecutive terms. See *United States v Uccio*, 917 F2d 80, 85 (2d Cir 1990) (noting that the Guidelines require imposition of consecutive sentences when the selected sentence exceeds a statutory maximum).

b) *Failure to consider a policy statement.* A district court's failure to consider a "policy statement," as opposed to an actual guideline, in imposing the original sentence also constitutes an incorrect application of the Guidelines. Thus, the district court may correct such an error under Rule 35(c). In *United States v Waters*,¹²² the district court judge imposed a sentence on the defendant because he had violated the terms of his supervised release. At the time of sentencing, however, the judge was unaware of a "policy statement" that would have allowed him to impose a longer sentence.¹²³ When the state brought this provision to the judge's attention, the judge increased the defendant's sentence pursuant to Rule 35(c).¹²⁴ The Second Circuit affirmed, explaining that the district court was required at least to consider the policy statement, and that its failure to do so was "in direct contravention" of the Guidelines.¹²⁵

c) *Failure to explain adequately a downward departure.* The failure of a district judge to provide an adequate explanation for departing from the Guidelines is also valid grounds for changing a sentence. In *United States v Himsel*,¹²⁶ the district court judge departed from the Guidelines by imposing a sentence without prison time. While the law permits departures from the Guidelines, 18 USC § 3553(c)(2) requires the judge to provide specific reasons for the departure.¹²⁷ In this case, the judge vacated the original sentence and imposed a term of imprisonment after he decided that he had not adequately explained his reasons for the departure.¹²⁸ The Seventh Circuit affirmed the new sentence, holding that failure to explain a departure from the Guidelines constitutes clear error.¹²⁹

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¹²² 84 F3d 86 (2d Cir), cert denied, 117 S Ct 262 (1996), affg an unpublished district court opinion.

¹²³ See id at 88-89.

¹²⁴ See id at 90.

¹²⁵ Id. By finding clear error here, the Second Circuit implied that it would have reversed the district court's original sentence had it been reviewed on appeal. It is not possible to know whether the circuit court really would have reversed, or whether there is a tendency for circuit courts to affirm district court determinations in such close cases.

¹²⁶ 951 F2d 144, 145 (7th Cir 1991), affg an unpublished district court opinion.

¹²⁷ See id at 147, discussing 18 USC § 3553(c)(2) (1994).

¹²⁸ See id at 146.

¹²⁹ See id at 148. In *Himsel*, the Seventh Circuit allowed a change of sentence for what could be characterized as a change of heart by the sentencing judge. It should be noted that the district judge's action, however, came before the passage of Rule 35(c). See id at 147. Furthermore, in fairness to the Seventh Circuit, failure to explain adequately a departure from the Guidelines is an "incorrect application of the sentencing guidelines." FRCP 35(a). As in *Waters*, it would be interesting to know if the Seventh Circuit would

2. Examples of clear error unrelated to the Sentencing Guidelines.

In addition to incorrect application of the Guidelines, other "errors" are subject to modification under Rule 35(c). In *United States v Morillo*,¹³⁰ the defendant filed a motion to correct a sentence because of an alleged miscalculation in the quantity of drugs involved. In *Rico*,¹³¹ the government and the defendant agreed to a sentence in a written plea agreement. However, in sentencing the defendant, the district court mistakenly failed to consider the agreement. In this pre-Rule 35(c) case, the Second Circuit held that the district court had the "inherent power to correct [the sentence]."¹³²

B. Examples of What Does Not Constitute Clear Error

In many of the cases described below, the district judge attempted to impose a new sentence that would have been within her discretion in the original sentencing, but was barred from subsequently modifying the sentence under Rule 35(c). A judge may not use Rule 35(c) to reconsider an application of her *discretion*.¹³³ There must have been an actual error in the original sentence for it to be modified.¹³⁴

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have reversed the original sentence had the issue been presented on appeal.

¹³⁰ 8 F3d 864, 866 (1st Cir 1993). Although the district court did not act on the motion, the First Circuit held that such a motion "is the very sort of situation that Rule 35(c) was designed to address." Id at 868.

¹³¹ 902 F2d at 1068.

¹³² Id. It is interesting to note that in almost every case above, the circuit court affirmed the *increase* of an original sentence by the district court. See *Cook*, 890 F2d at 676 (affirming trial judge's change of sentence from three months community confinement to three months imprisonment); *Goldman*, 41 F3d at 789 (affirming an increase of sentence from 260 to 360 months); *Waters*, 84 F3d at 88-89 (affirming an increase in a prison sentence from six to fourteen months); *Rico*, 902 F2d at 1066 (affirming an increase in sentence from ten to twenty-six months). The common practice under the common law and old Rule 35(b), however, was for the district court to use its authority to *decrease* a defendant's sentence. See, for example, *United States v Maynard*, 485 F2d 247, 248 (9th Cir 1973). Thus, use of 35(c) to increase sentences presents a stark contrast to the original purpose of the Rule as a "plea for leniency."

¹³³ *United States v Clay*, 1996 US App LEXIS 25990 (7th Cir) (unpublished decision), is a classic example. In *Clay*, the defendant filed a motion for the district court to eliminate her commitment to work release and to lengthen her period of home confinement instead. Id at *10. The Seventh Circuit held that the sentencing court "has no authority to [reconsider the exercise of its discretion] . . . once the judgment has been entered." Id. Under the old Rule 35(b), this type of motion was standard practice as a "plea for leniency." See, for example, *Poole v United States*, 250 F2d 396, 401 (DC Cir 1957). Note, however, that the distinction between an "incorrect application of the sentencing guidelines" and a judge's "discretion under the guidelines" is not always obvious. In *United States v Gallego*, 943 F Supp 343, 345 (S D NY 1996), the court imposed a higher sentence within the guideline range because the defendant refused to assist the government in the prosecution of others

1. New factual information not known at the time of sentencing.

For example, the presentation of new factual information not known at the time of sentencing is not a ground to change a sentence under Rule 35(c). In *United States v Fraley*,¹³⁵ the Fourth Circuit held that new evidence of a defendant's family business situation did not permit a district court judge to change a defendant's ten month prison sentence to a five month sentence with a five month in-home confinement.

2. Defendant's conduct after the original sentence is imposed.

A district court also is not permitted to reconsider a defendant's sentence because of the defendant's post-sentence conduct. In *United States v Lopez*,¹³⁶ the district court credited the defendant with a downward departure because the defendant agreed to cooperate and testify for the government. When the defendant failed to uphold his part of the bargain, the judge resentenced the defendant and eliminated the downward departure.¹³⁷ On appeal, the Fifth Circuit reversed, holding there was no "error" present in the first sentence, and thus the district court lacked jurisdiction to act pursuant to Rule 35(c).¹³⁸

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involved in the same crime. However, USSG § 5K1.2 provides that "a defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor." *Id.* The district court held that it did not increase the defendant's punishment for his lack of cooperation; rather, it simply refused to grant leniency that it otherwise might have granted if the defendant had cooperated. See *id.* at 345-46. As the court recognized, this distinction is illusory. See *id.* Thus, *Gallego* is one example of a case in which, even though the judge simply may have experienced a change of heart, the district court could have used Rule 35(c) to modify the sentence because of a technical mistake in applying the Guidelines.

¹³⁴ See *United States v Lopez*, 26 F3d 512, 520 (5th Cir 1994) (noting that Rule 35(c) applies in cases where a party commits "arithmetical, technical, or other clear error," but not where a court "simply changes its mind"). See also *United States v Springs*, 988 F2d 746, 747-48 (7th Cir 1993) (A sentencing judge's misunderstanding of her discretion under the Guidelines is not a ground to resentence: "Judges may correct technical errors within seven days.").

¹³⁵ 988 F2d 4, 7 (4th Cir 1993) (concluding that "the district court, once confronted with the new evidence . . . simply changed its mind about the continued appropriateness of *Fraley's* sentence").

¹³⁶ 26 F3d 512, 513 (5th Cir 1994), *rev'd* an unpublished district court opinion.

¹³⁷ See *id.* at 513-14.

¹³⁸ *Id.* at 520. This case exposes one situation in which Rule 35(c) may be underinclusive. It would be less costly to allow a judge to resentence here than the alternative of rescinding the entire plea agreement. The rescission would require either a new trial or a new plea agreement. Alternatively, the plea agreement itself could explicitly provide for the contingency that the defendant does not uphold his end of the bargain.

3. A sentencing judge's "change of heart."

Circuit courts routinely hold that Rule 35(c) does not give sentencing judges the authority to "change their minds" about sentences. In *Abreu-Cabrera*,¹³⁹ the trial court determined at a resentencing hearing that its original application of the Guidelines was correct. However, it reduced the sentence because of the defendant's conduct and small threat of recidivism. The Second Circuit reversed, holding that Rule 35(c) did not authorize the correction.¹⁴⁰ Similarly, in *United States v Arjoon*,¹⁴¹ the district court lowered the defendant's sentence because of a perceived unfair disparity between Arjoon's sentence and that of the defendant in an unrelated case who was convicted of a more serious crime than Arjoon. Again, the Second Circuit held that the district court lacked the authority to alter the initial sentence.¹⁴²

What is interesting about these cases is both that the district courts have been consistently reversed when they have exceeded the bounds of clear error, and that they have overstepped their authority in the first place. Rule 35(c) in no way implies that a judge may resentence a defendant because of a change of heart regarding the original sentence.¹⁴³ Yet, as shown above, district courts occasionally have attempted to do so. In *Fraleley*,¹⁴⁴ for example, the district court, given new information about the defendant's family situation, simply changed its mind about the continued appropriateness of a sentence. Yet even a casual reading of the Rule indicates that it does not permit such a change.

Why have judges tried to alter sentences to reflect "changes of heart"? Some of the instances occurred soon after the adoption of the Rule, and perhaps the judges had not yet adjusted to the change.¹⁴⁵ Another possibility is that judges may act without consulting the Rule, failing to recognize that they do not have juris-

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¹³⁹ 64 F3d at 70, revg an unpublished district court opinion.

¹⁴⁰ Id at 72 (finding that the resentencing of defendant "represented nothing more than a district court's change of heart as to the appropriateness of the sentence").

¹⁴¹ 964 F2d 167, 168 (2d Cir 1992), revg *United States v Arjoon*, 1991 WL 210943 (S D NY).

¹⁴² 964 F2d at 170 ("[T]he district judge did not resentence Arjoon to correct an obvious error made in calculating the original sentence, but he did so because he had simply changed his mind . . ."). The court went on to hold that even if the district court had such authority, the downward departure was not warranted under the Guidelines. See id at 170-72. By doing so, the court inherently determined that this was not the type of "error" that would have resulted in remand of the case.

¹⁴³ See FRCrP 35(c) (specifying that a court may only correct "arithmetical, technical, or other clear error").

¹⁴⁴ 988 F2d at 4, revg an unpublished district court opinion.

¹⁴⁵ See, for example, *Arjoon*, 964 F2d at 167 (decided six months after Rule 35(c) went into effect).

diction to change the sentence. Alternately, the judges knowingly may have attempted to skirt the restrictions of the Rule. Often, in addition to falling outside of the "clear error" standard, such unauthorized modifications have come beyond Rule 35(c)'s seven day window. Perhaps this demonstrates that district court judges are intentionally disregarding the Rule. Regardless, appellate tribunals have consistently reversed district courts that have overstepped their authority under Rule 35(c).

IV. "IMPOSITION OF SENTENCE" SHOULD REFER TO ENTRY OF JUDGMENT

Given the ambiguity of the current Rule 35(c), courts should adopt the interpretation that best serves the policies of the Rule. This Part demonstrates that there is, in the end, no compelling reason to support the Oral Pronouncement Rule. Thus, courts should hold that the "imposition of sentence" occurs on the date of entry of judgment.

Consider the two typical situations in which the choice of rule makes a difference: (1) where the judge intentionally delays entry of judgment for several weeks, giving her more time to change a sentence under Rule 35(c); and (2) where the judgment is entered a day or two after oral pronouncement, and the judge wishes to correct an error within seven days of entry, but outside the seven day window from oral pronouncement. In the former situation, the Oral Pronouncement Rule is unnecessary to prevent such abuse; in the latter, the Entry of Judgment Rule serves the purpose of Rule 35(c)—avoiding costly appeals—while presenting no serious jurisdictional concerns.

Part III demonstrated that district courts occasionally may attempt to delay the time limit in order to modify impermissibly a sentence. However, the Oral Pronouncement Rule is not necessary to prevent such behavior. Because the "clear error" standard is so narrow, a district court that intentionally delays the time limit still has no authority to reconsider a sentence in the absence of clear error. If it does so, it certainly will be reversed on appeal regardless of the time limit.¹⁴⁶

The Second Circuit reasoned that the Entry of Judgment Rule permits a district court to delay entry, "*have a change of*

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¹⁴⁶ If there is a clear error that is not corrected, the sentence also will be overturned on appeal. Thus, from an efficiency standpoint, the best result is a system that provides district court judges the widest power to correct clear errors, and no power to make other alterations. A combination of the Entry of Judgment Rule and the narrow "clear error" standard provide such a result.

heart," and change the sentence.¹⁴⁷ In the same opinion, however, the Second Circuit emphatically stated that the "clear error" language of Rule 35(c) does not permit a district judge to modify a sentence because of a change of heart.¹⁴⁸ As Part III demonstrated, any attempt to do so would be reversed on appeal, regardless of whether it occurred during the seven day limit. Thus, a stricter seven day limit is not necessary to prevent a judge from abusing the "clear error" standard.

Had Part III indicated that circuit courts were unclear on the meaning of "clear error," applied the standard inconsistently, or allowed district courts to circumvent the clear error limitation, then perhaps the Oral Pronouncement Rule would be necessary to enforce the jurisdictional dictates of the Rule. However, courts of appeal have consistently reversed district courts that modified a sentence because of a "change of heart." Therefore, the Oral Pronouncement Rule is a superfluous safeguard. *Abreu-Cabrera*, *Townsend*, and *Fraleley* illustrate the point: in each case, the district court's impermissible sentence modification would have been reversed regardless of the seven day limit.

Looked at another way, it is implausible that a district court would purposefully delay entry of judgment to give it more time to correct what truly qualifies as a clear error. Even if it did, there is less reason to be concerned about such an act; in the end, the same change would probably have been made on appeal, assuming a timely appeal is made. If a judge unintentionally acts beyond the seven day limit, there is likewise less reason to be concerned—as long as the judge observes the clear error limitation. In such a case, the appellate court would be in the awkward yet unproblematic position of reversing the district court's sentence modification under Rule 35(c), then imposing that exact modification on appeal.¹⁴⁹

Taken to its logical extreme, this argument supports eliminating the seven day limit entirely, as long as the strict clear error standard remains in place. If it saves judicial resources, why ever restrict a district court's ability to fix an obvious error prior to the actual appeal? However, such an extreme position is not required by support of the Entry of Judgment Rule. In fact, removing the time limit altogether could create jurisdictional con-

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¹⁴⁷ *Abreu-Cabrera*, 64 F3d at 74 (emphasis added).

¹⁴⁸ See *id.* at 72 ("Such correction is clearly outside the scope of the rule.").

¹⁴⁹ On the other hand, the appellate process is unlikely to reach the same result when a district court makes a change that does not qualify as clear error. For example, when a judge modifies a sentence because of a change of heart, the original sentence does not contain a reversible error.

flicts with the appellate process, which Rule 35(c) seeks to avoid. Furthermore, if the time limit were completely removed, district courts might take it as a sign that they had more latitude to make changes. Finally, seven days should be enough time to detect and fix truly clear errors. Thus, having some time limit is not inconsistent with favoring entry of judgment over oral pronouncement when the two dates differ by a few days; such an approach would not create any jurisdictional problems, nor would it send district courts the wrong message about the restrictive scope of the Rule.

One could argue that if the Rule clearly defined "imposition of sentence" as oral pronouncement, a district court would be less likely to abuse the clear error standard in the first place, simply because it would have less time to do so. However, this is an empirical claim that would be difficult to demonstrate. More importantly, the few judges who intentionally disregard the well settled "clear error" standard are just as likely to disregard a more clearly stated and strict time limit.

Thus, although the Oral Pronouncement Rule has some indirect support in the Advisory Committee Notes, it is not supported by any clear canon of construction, direct indication of intent, or compelling policy reason. On the other hand, the entry of judgment interpretation better serves the remedial purpose of Rule 35(c) without offending its jurisdictional constraints. Given the absurdity, inefficiency, and cost of requiring an appeal to correct an obvious mistake, it makes sense to adopt the more lenient standard, so long as doing so does not open the door to abuse. As discussed above, beginning the seven day limit at entry of judgment does not give sentencing judges latitude to abuse Rule 35(c).

For the most part, district courts have stuck to the seven day limit. In the few cases in which they may have intentionally ignored it, they have been reversed regardless of when the seven day limit was triggered.¹⁵⁰ Thus, the entry of judgment approach does not offend Rule 35's jurisdictional concerns. Furthermore, using the entry of judgment approach better serves the remedial purpose of Rule 35(c). Where the judgment is entered a few days after oral pronouncement, and the judge wishes to correct a mistake outside of the seven day window from oral pronouncement, but within seven days of entry, use of the Entry of Judgment Rule prevents a costly appeal that would almost certainly lead to the same result.

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¹⁵⁰ See, for example, *Abreu-Cabrera*, 64 F3d at 72-74; *Townsend*, 33 F3d at 1231.

CONCLUSION

Rule 35(c) allows a district court to fix an obvious mistake in a sentence, thereby avoiding a lengthy appellate process and ensuring that the mistake is corrected. The Rule only permits the court to correct clear errors; it does not embrace the old rule, which permitted the district court to reconsider a legally imposed sentence in response to a defendant's "plea for leniency."

The authority conferred by the Rule is especially strict because the judge may only make the correction within seven days of "imposition of sentence." This event could conceivably occur at the oral pronouncement of the sentence in court or at the official entry of the judgment on the record. While courts have disagreed on whether "imposition" refers to oral pronouncement or entry of judgment, an analysis of possible scenarios shows that the Entry of Judgment Rule is superior.

In the case where a judge intentionally delays entry of judgment to buy more time to reconsider a sentence, the judge will be reversed for failing to observe the clear error limitation. Thus, the Oral Pronouncement Rule is not necessary to prevent such abuse. The Entry of Judgment Rule clearly prevails in the case where the sentence is entered on the record a few days after oral pronouncement and where an obvious technical sentencing mistake comes to the attention of the district court judge. Here, use of the Entry of Judgment Rule will allow the court to make a timely correction under Rule 35(c), avoiding a costly appeal that would reach the same result.