No. 18-5168

IN THE SUPREME COURT OF THE UNITED STATES

JOSE PALACIOS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals may adopt a rule that resentencing on remand is presumptively limited, not presumptively de novo, when the court of appeals remands for correction of a discrete, specific error but does not otherwise specify whether the remand is limited.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-22) is not published in the Federal Reporter but is reprinted at 721 Fed. Appx. 405.[1] A prior opinion of the court of appeals (Pet. App. 3-13) is reported at 844 F.3d 527.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2018. The petition for a writ of certiorari was filed on July 3,

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[1] The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the pages in the appendix as if they were consecutively paginated.

2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of possession with intent to distribute 100 kilograms or more of marijuana, in violation of 21 U.S.C. 841(a)(1). Judgment 1. He was sentenced to 144 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals vacated the sentence and remanded for resentencing. Pet. App. 3. On remand, the district court sentenced petitioner to 108 months of imprisonment, to be followed by four years of supervised release. Id. at 16-17. The court of appeals affirmed. Id. at 21-22.

1. Petitioner, an attorney licensed in the State of Texas, participated in the activities of a drug-trafficking organization by overseeing the organization's drug-transportation activities, helping to collect narcotics proceeds, and representing members of the organization in state legal proceedings in order to gain access to privileged information regarding law-enforcement activity. Pet. App. 3-4. A federal grand jury returned a 21-count indictment charging petitioner and co-conspirators with multiple drug-trafficking offenses. Id. at 4. Petitioner pleaded guilty to one count of possession with intent to distribute 100 kilograms or

more of marijuana, in violation of 21 U.S.C. 841(a)(1). Pet. App. 4.

At sentencing, petitioner requested additional time to meet with the government in order to satisfy the requirements of the Sentencing Guidelines' "safety valve" provision. See 3/6/2014 Sent. Tr. (2014 Sent. Tr.) 9-12. Promulgated pursuant to 18 U.S.C. 3553(f), the safety valve provides that, if a defendant convicted of specific drug-trafficking offenses meets certain requirements, the defendant's offense level is reduced by two, Sentencing Guidelines § 2D1.1(b)(16) (2014), and the district court is authorized to impose a sentence below the otherwise-applicable mandatory minimum sentence, id. § 5C1.2. Among other requirements, a defendant qualifies for safety-valve relief only if, "not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." Id. § 5C1.2(a)(5).

The district court denied petitioner's request for additional time, finding that petitioner "had plenty of opportunity" to meet with the government to satisfy the safety-valve eligibility requirements. 2014 Sent. Tr. 10. The court observed that it was the government's position that petitioner "continued to minimize his involvement and didn't really want to implicate or talk about

his father and his father's role in this and hasn't been completely truthful in his debriefings thus far." Ibid. The court also stated that, if petitioner subsequently provided substantial assistance to the government, he could avail himself then of Federal Rule of Criminal Procedure 35, which allows a court, upon motion by the government, to "reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person," Fed. R. Crim. P. 35(b)(1). See 2014 Sent. Tr. 10.

At sentencing, the district court determined that petitioner's base offense level under the Sentencing Guidelines was 34 because his offense involved 6400 kilograms of marijuana. 2014 Sent Tr. 20; see Sentencing Guidelines § 2D1.1(c)(3) (2014). The court applied a three-level reduction for acceptance of responsibility. 2014 Sent. Tr. 18, 20; see Sentencing Guidelines § 3E1.1 (2014). The court also applied a two-level increase because a dangerous weapon was possessed during the offense by petitioner's co-conspirators. 2014 Sent. Tr. 5, 8-9, 20; see Sentencing Guidelines § 2D1.1(b)(1) (2014). The resulting offense level of 33, together with a criminal history category of I, produced an advisory Guidelines range of 135 to 168 months of imprisonment. 2014 Sent. Tr. 20; see Pet. App. 5. The court sentenced petitioner to 144 months of imprisonment. Pet. App. 5.

2. Petitioner appealed, raising one claim. Pet. App. 3. He argued that the district court had denied him the right to allocute at sentencing. Ibid.; see Fed. R. Crim. P. 32(i)(4)(A)(ii) ("Before imposing sentence, the court must * * * address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence."). The court of appeals concluded that the district court had in fact denied petitioner his right to allocute, and it vacated petitioner's sentence and remanded for resentencing. Pet. App. 13.

On remand, the district court determined that petitioner's base offense level was now 32 because the Sentencing Commission had since amended the offense levels for drug-trafficking offenses based on drug quantity and made those amendments retroactive. 5/11/2017 Sent. Tr. (2017 Sent. Tr.) 20-21, 32-33, 53, 56; see Sentencing Guidelines App. C, Amend. 782 (Nov. 21, 2016) (offense level 32 for drug offenses involving between 3000 and 10,000 kilograms of marijuana). As at the first sentencing, the court applied a three-level reduction for acceptance of responsibility. 2017 Sent. Tr. 53-54.

Petitioner argued that the district court should apply a two-level reduction under the Guidelines' safety valve, and should undo its determination at the original sentencing to apply a two-level enhancement for possession of a weapon. 2017 Sent. Tr.

33-36. The district court denied those requests. The court determined that petitioner had previously been given an opportunity to seek a two-level reduction under the safety valve at his initial sentencing and could "not get an additional opportunity" now because the court of appeals had remanded only to provide petitioner the "opportunity to allocute." Id. at 3-4. For the same reason, the district court concluded that petitioner was not entitled to object on resentencing to the two-level enhancement for possession of a weapon. Id. at 36-37. The court therefore determined that petitioner's advisory Guidelines range was 108 to 135 months of imprisonment, based on an offense level of 31 and a criminal history category of I. Id. at 53-54. The court sentenced petitioner to 108 months of imprisonment. Id. at 54-55.

3. Petitioner appealed again. He acknowledged that, under circuit precedent, the only aspect of sentencing that had been properly before the district court by virtue of the court of appeals' remand order concerned the issue that he had raised in the appeal that resulted in the remand, i.e., the right to allocute. 1/22/2018 Def. C.A. Letter Br. 1-2 (citing, inter alia, United States v. Marmolejo, 139 F.3d 528, 531 (5th Cir.), cert. denied, 525 U.S. 1056 (1998)). Petitioner stated, however, that other courts of appeals had concluded that "a de novo approach should be used for resentencing on remand, meaning that any issue

could be raised on resentencing, not just the issues raised in the prior appeal which resulted in the remand for resentening." Id. at 1-2. Petitioner requested that the en banc court of appeals reconsider its precedent, but he acknowledged that, absent rehearing en banc, the court was bound by prior precedent and therefore should summarily affirm the district court's judgment. Id. at 2-3.

The court of appeals affirmed in an unpublished, per curiam opinion, observing that petitioner "conced[ed] that his arguments challenging his sentence on remand were foreclosed by the mandate rule." Pet. App. 21-22.

ARGUMENT

Petitioner contends (Pet. 10-13) that, when his case was remanded for resentencing so that he could allocute, the district court improperly declined to reconsider his other objections to his recommended sentence under the Sentencing Guidelines. Petitioner points to a disagreement among the courts of appeals on whether resentencing after a remand is presumptively de novo or presumptively limited to correcting the errors found on appeal. He urges the Court to grant certiorari and adopt the former rule.

This Court has repeatedly denied review in cases presenting the question raised by petitioner.[2] It should follow the same

[2] See, e.g., Alvarez v. United States, 135 S. Ct. 1399 (2015) (No. 14-456); Vidal v. United States, 135 S. Ct. 56 (2014) (No. 13-9752); Blackson v. United States, 571 U.S. 992 (2013)

course here. Because Congress has authorized the courts of appeals to limit a remand in a criminal case as the courts deem appropriate, and has authorized each court of appeals to adopt local rules of practice, it is unnecessary for this Court to adopt a uniform default rule to govern the scope of resentencing in cases where the court of appeals does not expressly address that issue.

1. Under 28 U.S.C. 2106, a court of appeals may "affirm, modify, vacate, set aside or reverse any judgment, decree, or order" of the court whose decision it is reviewing, and it may "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." In addition, the statute governing sentencing appeals provides that, when a court of appeals finds a sentencing error, it must "remand the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. 3742(f)(1), (2)(A) and (B) (emphasis added). The sentencing-appeal statute also provides that, on remand, a district court shall resentence a defendant in

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(No. 13-5483); Cruzado-Laureano v. United States, 555 U.S. 1099 (2009) (No. 08-444); Tocco v. United States, 539 U.S. 926 (2003) (No. 02-1225); Donato v. United States, 539 U.S. 902 (2003) (No. 02-1191); Hass v. United States, 531 U.S. 812 (2000) (No. 99-1694); Harris v. United States, 525 U.S. 1148 (1999) (No. 98-6358); Marmolejo v. United States, 525 U.S. 1056 (1998) (No. 98-5372); Whren v. United States, 522 U.S. 1119 (1998) (No. 97-6220).

accordance with 18 U.S.C. 3553 and with "such instructions as may have been given by the court of appeals." 18 U.S.C. 3742(g).

It is thus well settled that, after a court of appeals has reversed the judgment in a criminal case, it has authority to provide either for de novo resentencing or for a limited resentencing. See Pepper v. United States, 562 U.S. 476, 505 n.17 (2011) (recognizing that courts of appeals may issue "limited remand orders" in "appropriate cases"); United States v. Alston, 722 F.3d 603, 607 (4th Cir.), cert. denied, 571 U.S. 1104 (2013); United States v. Diaz, 639 F.3d 616, 623 n.3 (3d Cir. 2011); United States v. Moore, 131 F.3d 595, 597-598 (6th Cir. 1997); United States v. Santonelli, 128 F.3d 1233, 1238 (8th Cir. 1997); United States v. Webb, 98 F.3d 585, 587 (10th Cir. 1996), cert. denied, 519 U.S. 1156 (1997); United States v. Polland, 56 F.3d 776, 777-779 (7th Cir. 1995); United States v. Pimentel, 34 F.3d 799, 800 (9th Cir. 1994) (per curiam), cert. denied, 513 U.S. 1102 (1995). It is also well settled that, except perhaps in extraordinary circumstances, a district court conducting a resentencing must act in conformity with the mandate of the court of appeals. See, e.g., Alston, 722 F.3d at 607; Moore, 131 F.3d at 598; Webb, 98 F.3d at 587; United States v. Tamayo, 80 F.3d 1514, 1519-1520 (11th Cir. 1996); Polland, 56 F.3d at 777-779; Pimentel, 34 F.3d at 800; United States v. Bell, 5 F.3d 64, 66-67 (4th Cir. 1993). The courts of appeals are accordingly in

agreement that they have discretion to determine the scope of a resentencing and that a district court is obligated to follow the directions of the court of appeals when conducting the resentencing.

2. As the decisions cited by petitioner (Pet. 10-11) reflect, the practice in the courts of appeals is not uniform on the proper scope of a resentencing when the court of appeals does not directly speak to the intended scope of proceedings on remand. Some courts of appeals, like the court below, have adopted a default rule that resentencing in such cases is limited to correction of the errors identified on appeal. See United States v. Blackson, 709 F.3d 36, 40-42 (D.C. Cir.), cert. denied, 571 U.S. 992 (2013); United States v. Pileggi, 703 F.3d 675, 679-681 & n.7 (4th Cir. 2013); United States v. Pineiro, 470 F.3d 200, 205-207 (5th Cir. 2006) (per curiam); United States v. Ticchiarelli, 171 F.3d 24, 31-32 (1st Cir.), cert. denied, 528 U.S. 850 (1999); United States v. Marmolejo, 139 F.3d 528, 530-531 (5th Cir.), cert. denied, 525 U.S. 1056 (1998); United States v. Parker, 101 F.3d 527, 528 (7th Cir. 1996).

Other courts of appeals have adopted a default rule that resentencing in such cases is de novo. See United States v. Keifer, 198 F.3d 798, 801 (10th Cir. 1999); United States v. Stinson, 97 F.3d 466, 469 (11th Cir. 1996) (per curiam), cert. denied, 519 U.S. 1137 (1997); United States v. Jennings, 83 F.3d

145, 151, amended by 96 F.3d 799 (6th Cir.), cert. denied, 519 U.S. 975 (1996); United States v. Ponce, 51 F.3d 820, 826 (9th Cir. 1995) (per curiam); United States v. Cornelius, 968 F.2d 703, 705 (8th Cir. 1992). The Second Circuit has held that de novo resentencing is required when one or more counts of conviction have been overturned on appeal, unless the defendant has received and is still subject to a mandatory minimum sentence, United States v. Powers, 842 F.3d 177, 180 (2016) (per curiam), but that explicit authorization for de novo resentencing is required when all convictions are affirmed but the court finds a "specific sentencing error," United States v. Quintieri, 306 F.3d 1217, 1227 (2d Cir. 2002), cert. denied, 539 U.S. 902 (2003).

Petitioner contends (Pet. 13) that this Court should grant review to establish "a uniform rule * * * that is applicable to all federal criminal defendants in the United States." This Court, however, need not adopt a uniform default rule for all courts of appeals, because the rules concerning resentencing on remand can appropriately be viewed as local rules -- which simply establish default presumptions about how circuit opinions should be interpreted -- that may differ from circuit to circuit. So long as local rules are reasonable, see Thomas v. Arn, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Fed. R. App. P. 47(a), no requirement exists for "uniformity among the circuits in their

approach to [these] rules." Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993); see Joseph v. United States, 135 S. Ct. 705, 705 (2014) (Kagan, J., respecting denial of certiorari).[3] The absence of any need for uniformity is particularly apparent where, as here, the circuit's choice of rule does not in any way constrain the circuit's authority to give individualized consideration to each case. Regardless which default rule a circuit adopts about the scope of resentencing, every panel in every circuit remains free to override the default rule in any given case by specifying the scope of resentencing it considers appropriate under the circumstances.

3. In any event, this case would not be a suitable vehicle for considering whether a resentencing remand is presumptively limited or presumptively de novo. Even if petitioner were entitled to a de novo resentencing under the rule that he advocates, a de novo sentencing would not likely have changed the result in his case.

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[3] Two courts of appeals have suggested a connection between their rules concerning the scope of resentencing on remand and the provision of Fed. R. Crim. P. 32(i)(1)(D) that allows new claims to be raised at any time before the imposition of sentence "for good cause." See United States v. McCoy, 313 F.3d 561, 564-567 (D.C. Cir. 2002) (en banc); United States v. Moore, 83 F.3d 1231, 1235 (10th Cir. 1996). To the extent that a court of appeals considers its rule on the scope of resentencing to be compelled by the Federal Rules of Criminal Procedure, that rule could not properly be viewed as a local rule of practice.

First, the district court properly applied a two-level enhancement based on possession of a weapon by petitioner's co-conspirators. The two-level enhancement for a firearm under Guidelines Section 2D1.1 applies to "a defendant who did not personally possess a gun (or have actual knowledge of a coconspirator's gun possession)" if the sentencing court finds "by a preponderance of the evidence: (1) that someone in the conspiracy actually possessed a firearm in furtherance of the conspiracy, and (2) that the firearm possession was reasonably foreseeable to the defendant." United States v. Ramirez, 783 F.3d 687, 690 (7th Cir. 2015). Here the district court found "many weapons throughout this conspiracy" that were "foreseeable to people involved in this conspiracy." 2014 Sent. Tr. 5; see id. at 9 ("And so whether [petitioner] possessed them directly himself or not doesn't really matter. They were foreseeable that others would possess them."). Petitioner provides no basis for concluding that the district court would or should reconsider its factual findings if it were free to do so on remand.

Petitioner similarly provides no basis to conclude that the district court would make a different determination regarding his eligibility for safety-valve relief. At sentencing, petitioner acknowledged that he did not provide "information about his father," who was one of the co-conspirators charged and convicted in the case. 2014 Sent. Tr. 11. Thus, by petitioner's own

admission, he did not "truthfully provide[ ] to the Government all information and evidence [he] ha[d] concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." Sentencing Guidelines § 5C1.2(a)(5) (2014).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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