No. 18-6377

IN THE SUPREME COURT OF THE UNITED STATES

RASHAD WOODSIDE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court was required to hold a hearing in open court, with petitioner present, to further explain its reasoning in calculating petitioner's drug quantity following a limited remand from the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 29-41)[1] is reported at 895 F.3d 894. A prior opinion of the court of appeals (Pet. App. 9-22) is not published in the Federal Reporter but is reprinted at 642 Fed. Appx. 490.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42) was entered on July 18, 2018. The petition for a writ of certiorari

[1] The appendix to the petition for a writ of certiorari is not paginated. This brief refers to the pages in the appendix in consecutive order.

was filed on October 16, 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 Middle District of Tennessee, petitioner was convicted of conspiracy to distribute oxycodone, in violation of 21 U.S.C. 841(b)(1)(C) and 846. Judgment 1. The district court sentenced petitioner to 170 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed his conviction but vacated his sentence and remanded for the district court to explain its drug-quantity calculation. Pet. App. 9-22. The court issued a written order detailing its calculation and reinstating the sentence. Id. at 24-27. The court of appeals affirmed. Id. at 29-41.

1. From 2009 to 2013, petitioner, a Florida resident, obtained prescription pain medication containing oxycodone and sold it to others for resale. Pet. App. 9, 24-26. Initially, petitioner sold his medication to Fredrick McGregor in Florida, who then sold it to Kenneth Stafford and Kacee Breeden in Tennessee. Id. at 24. But, after about six months of selling to McGregor, petitioner also began selling directly to Stafford and Breeden. Ibid. For approximately 18 months, petitioner sold pills both through McGregor and directly to Stafford and Breeden. Id. at 25. In mid-2011, McGregor stopped selling, but petitioner, who

had since recruited other people to sell their prescriptions to him, continued to sell to Stafford and Breeden until his arrest in June 2013. Id. at 25-26, 30.

A grand jury in the Middle District of Tennessee indicted petitioner on one count of conspiracy to distribute oxycodone, in violation of 21 U.S.C. 841(a)(1)) and 846. Indictment 2-3. Petitioner pleaded guilty without a plea agreement. Pet. App. 9-10. The Probation Office recommended holding him accountable, for purposes of calculating his advisory range under the Sentencing Guidelines, for 343,000 Roxicodone tablets, each containing 27 milligrams of oxycodone. Id. at 10-11. Based on the drug equivalency table, Sentencing Guidelines § 2D1.1, comment. (n.8(D)) (2014), which equates one gram of oxycodone to 6700 grams of marijuana, the Probation Office recommended holding petitioner accountable for the equivalent of 62,048.7 kilograms of marijuana. Pet. App. 11. That figure, which corresponded to a base offense level of 36 (30,000 to 90,000 kilograms of marijuana), included all the pills sold by McGregor. Ibid.; Presentence Investigation Report (PSR) ¶ 26.

The district court held a sentencing hearing at which Stafford, Breeden, and the case agent testified. Pet. App. at 11-14. Each provided an estimate of the quantity of pills petitioner and McGregor sold. Ibid. The government advocated for a base offense level of 36, arguing that the quantities testified to by

Stafford amounted to 31,727 kilograms of marijuana equivalent. Id. at 14-15. The court, acknowledging that the "numbers do jump around," decided to "give [petitioner] the benefit of the doubt" and "go with Ms. Breeden," whose testimony yielded a marijuana equivalence of around 28,000 kilograms. Id. at 15-16. That total yielded a base offense level of 34, which corresponds to a range of 10,000 to 30,000 kilograms of marijuana. Sentencing Guidelines § 2D1.1(c)(3) (2014). The district court added four levels for petitioner's conduct as a leader of the conspiracy, subtracted three levels for acceptance of responsibility, and arrived at a total offense level of 35. Pet. App. 15-16. The resulting Guidelines range was 168 to 210 months, and the court imposed a sentence of 170 months of imprisonment. Id. at 16.

2. Petitioner appealed, arguing, as relevant here, that the district court's drug-quantity findings were insufficiently particular. Pet. App. 17-18. The court of appeals agreed that the district court's methodology was "opaque" because it did not identify when the conspiracy started (and shifted) and the number of pills provided by petitioner and McGregor at various times. Id. at 19. Concluding that the court should "make these findings in the first instance," the court of appeals "VACATE[D] [petitioner]'s sentence, and REMAND[ED] to the district court for a recalculation of the drug quantity." Id. at 21-22.

3. On remand, petitioner filed a motion requesting a resentencing hearing at which the parties could present additional evidence regarding drug quantity and the scope of the conspiracy, D. Ct. Doc. 1265, at 9-10 (Jan. 13, 2017), which the district court denied, D. Ct. Doc. 1266 (Jan. 18, 2017). The court explained that the court of appeals had remanded "for a recalculation of the drug quantity" and "did not order or suggest that the Court hold a hearing for the presentation of additional evidence." D. Ct. Doc. 1266 (Jan. 18, 2017).

The district court subsequently issued an amended judgment describing its findings. Pet. App. 24-27. The court recounted the relevant facts: Stafford and Breeden began buying from McGregor in late 2008 or early 2009; approximately six months later, petitioner offered to supply them directly at a lower price; for the next 18 months, Stafford and Breeden received approximately 2000 pills per week from McGregor and petitioner combined; approximately 70% of those pills contained oxycodone. Id. at 24-25. The court found that McGregor's conduct was part of the same overall conspiracy and foreseeable to petitioner because petitioner was selling his own pills to McGregor during that time. Id. at 25. But, "to err on the side of caution, the [c]ourt [did] not attribute to the [petitioner] any pills sold by either Mr. McGregor or himself" before January 2010. Ibid.

The district court then detailed the drugs attributable to petitioner in three time periods. First, the court attributed 109,200 pills from January 2010 to June 2011, when petitioner was selling pills to Stafford and Breeden as well as McGregor (70% of 2000 for 78 weeks). Pet. App. 25. Second, for the next 14 months, after McGregor stopped supplying Stafford and Breeden, the court attributed 42,000 pills (70% of 1000 for 60 weeks). Id. at 26. Finally, for the last eight months of the conspiracy, the court attributed 6720 pills (70% of 300 pills for 32 weeks). Ibid. The court emphasized that those numbers included "conservative" estimates at multiple points. Ibid. (citation omitted). In total, the court attributed 157,920 Roxicodone pills to petitioner for a marijuana equivalence of 28,568 kilograms and an offense level of 34. Id. at 27. "[I]n all other respects, the prior Judgment remain[ed] unchanged." Ibid. (internal citation omitted).

4. The court of appeals affirmed. Pet. App. 29-39.

As relevant here, the court of appeals rejected petitioner's contentions that the district court was required to hold a new sentencing hearing and orally announce the reasons for its sentence. Id. at 33. The court found that the prior opinion's mandate "unmistakably limited the scope of the remand to the issue of drug quantity." Id. at 34. And it found "[n]othing" in the prior opinion's reasoning that "contemplate[d] the necessity or even advisability of taking any further evidence, or even holding

a nonevidentiary hearing"; rather, the district court merely needed to "show its work." Id. at 34-35. The court further explained that because the remand was limited to an explanation of the drug quantity calculation and there was no "sentencing," 18 U.S.C. 3553(c) -- which generally requires the district court "at the time of sentencing" to "to state in open court the reasons for its imposition of a particular sentence" -- did not apply. See Pet. App. 35. In light of its determination that no new evidence or argument was necessary, the court determined that a new hearing would be mere "pageantry" and was not required. Id. at 35a.

Turning to petitioner's argument that the district court erred in attributing to him the drugs sold by McGregor, the court of appeals found any error harmless because the base offense level would have been the same "under any conceivable estimate of the drugs that [petitioner] himself sold." Pet. App. 37. First, the court observed that the same offense level applies to quantities between 10,000 and 30,000 kilograms of marijuana equivalence, Sentencing Guidelines § 2D1.1(c) (2014), so even a much lower total quantity of drugs would yield the same offense level. Pet. App. at 37. Second, the court observed that because roughly a third of the total drug quantity came from the latter two time periods in the district court's calculation, when McGregor was not involved, petitioner crossed the 10,000-kilogram threshold if just seven

percent of the pills distributed during the first time period -- "a mere 98 pills per week" -- were attributed to him. Id. at 37-38. The court noted that petitioner's own admissions to the case agent put him over that threshold. Ibid. For similar reasons, the court rejected petitioner's argument that the district court erred in crediting Stafford's testimony instead of Breeden's in its calculations, observing that the difference between the district court's estimates at the sentencing hearing (relying on Breeden) and in its written order (relying on Stafford) -- 28,000 versus 28,568 kilograms -- had no effect on petitioner's sentence. Id. at 38-39.

Judge Stranch concurred. Pet. App. 40-41. She wrote separately to explain that whether to hold a new sentencing hearing on a limited remand is a matter of judicial discretion. Id. at 40. "As cases move across [the] continuum from de novo sentencing under a general remand to technical sentence revision," she observed, "there may be circumstances that require the presence of the defendant, mandate a sentencing hearing, or call for the pronouncement of [a] sentence in open court, even on a limited remand." Ibid. She stated that "[i]t is incumbent upon the appellate court" to outline instructions for remand; that "an appellate court has the discretion to mandate that a district court hold a hearing in the defendant's presence on a limited remand;" and that a district court also has discretion to add "procedural

protections not mandated by the appellate court but within the scope of its remand." Id. at 40-41.

ARGUMENT

Petitioner renews his claim (Pet. 8-14) that the district court was required to hold an open-court hearing, at which petitioner would physically appear and the court would orally pronounce the reasons for the sentence, on remand. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. It is well settled that, after reviewing a sentence, courts of appeals have authority to either provide for de novo resentencing or issue a limited remand. See Molina-Martinez v. United States, 136 S. Ct. 1338, 1348 (2016) (recognizing that "appellate courts retain broad discretion in determining whether a remand for resentencing is necessary" and endorsing the use of "mechanisms short of a full remand" following identification of sentencing errors); Pepper v. United States, 562 U.S. 476, 504-505 & n.17, 507 (2011) (recognizing that courts of appeals may issue "limited remand orders" in "appropriate cases" or "set aside [an] entire sentence and remand[] for a de novo resentencing"); 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); see also Hon. Jon O. Newman, Decretal Language: Last Words of an Appellate Opinion, 70 Brook. L. Rev. 727, 732 (2005) ("In altering a sentence, an appellate court should consider whether it wants to alter one part of the sentence and leave the remainder in place, or alter one part and grant the district judge discretion to reshape the entire sentence de novo."). 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 remand and that a district court is obligated to follow the directions of the court of appeals.

Courts of appeals are also in agreement about the process due to a defendant following a general remand. Every circuit court to

address the issue has held that the procedural requirements of an initial sentencing, including both Federal Rule of Criminal Procedure 43(a)(3), which entitles a defendant to be present during sentencing on a felony offense (subject to certain exceptions), and 18 U.S.C. 3553(c), which requires the court to state its "reasons for its imposition of the particular sentence" in "open court," apply at a de novo resentencing. See United States v. Bryant, 643 F.3d 28, 32 (1st Cir. 2011); United States v. Arrous, 320 F.3d 355 (2d Cir. 2003); United States v. Faulks, 201 F.3d 208, 210-211 (3d Cir. 2000); United States v. Graham, 944 F.2d 902, 1991 WL 182573, at *3 (4th Cir. 1991) (Tbl.) (per curiam); United States v. Moree, 928 F.2d 654, 656 (5th Cir. 1991); United States v. Garcia-Robles, 640 F.3d 159, 161 (6th Cir. 2011); United States v. Bonner, 440 F.3d 414, 417 (7th Cir. 2006); United States v. McClintic, 606 F.2d 827, 828 (8th Cir. 1979) (per curiam); United States v. Sanders, 421 F.3d 1044, 1052 (9th Cir. 2005); United States v. Smith, 930 F.2d 1450, 1456 (10th Cir.), cert. denied, 502 U.S. 879 (1991); United States v. Harrison, 362 Fed. Appx. 958, 965 (11th Cir. 2010) (per curiam).[2]

[2] Petitioner errs in contending that some courts apply Rule 43 on remand only "where the sentence is made more onerous." Pet. 10 (citing Mayfield v. United States, 504 F.2d 888 (10th Cir. 1974) (per curiam); Caille v. United States, 487 F.2d 614 (5th Cir. 1973) (per curiam)). As discussed above, all courts of appeals agree that Rule 43 applies when full resentencing is required on remand. The decisions cited by petitioner are not to the contrary; both merely explain that the newly imposed sentences

Limited remands are more varied, and the scope of a particular mandate determines the procedural rights applicable on remand. For example, formal resentencing hearings are generally unnecessary where the district court complies with instructions to make substantive modifications to its sentence but does not use its discretion to reshape the sentence further. See, e.g., Rust v. United States, 725 F.2d 1153, 1154 (8th Cir. 1984) (per curiam) (vacating one of two sentences illegally imposed for same offense does not constitute resentencing requiring the presence of the defendant); United States v. Barnes, 244 F.3d 172, 178 (1st Cir. 2001) (instructing the district court to reduce the term of supervised release to conform to the statutory maximum while noting that the reduction could "be accomplished without either disturbing the remainder of the sentence or reconvening the disposition hearing"). The same is true when the terms of the sentence modification are dictated by the court of appeals. See, e.g., United States v. Sabatino, 963 F.2d 366, 1992 WL 122285, at

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did not fit within Rule 43's exemption for reductions of sentences under Rule 35 because they were more onerous. See Mayfield, 504 F.2d at 889 ("We recognize that an exception to [Rule 43] applies to reductions of sentences under Rule 35. However, this is not such a case. Here, the severity of the original sentence was increased."); Caille, 487 at 617 (similar). Various courts have also stated that the right to be present during sentencing is rooted in the Constitution. See, e.g., United States v. Salim, 690 F.3d 115, 122 (2d Cir. 2012), cert. denied, 568 U.S. 1115 (2013); Bryant, 643 F.3d at 32; Faulks, 201 F.3d at 213; Graham, 944 F.2d at 902; Moree, 928 F.2d at 656; United States v. Jackson, 923 F.2d 1494, 1496 (11th Cir. 1991).

*1 (1st Cir. 1992) (Tbl.) (per curiam) ("Because the terms of our mandate directed a specific sentence, no purpose would have been served by the defendant's presence at correction of sentence.").

Courts of appeals have consistently rejected the argument that, following a limited remand, defendants always have a right to a resentencing hearing at which they are present and where the reasons for the sentence are stated in open court. See, e.g., United States v. Jackson, 923 F.2d 1494, 1497 (11th Cir. 1991) ("[W]here the entire sentencing package has not been set aside, a correction of an illegal sentence does not constitute a resentencing requiring the presence of the defendant, so long as the modification does not make the sentence more onerous."); Rust, 725 F.2d at 1154 ("Under Fed.R.Crim.P. 43, a defendant must be present only where the sentence is made more onerous, or the entire sentence is set aside and the cause remanded for resentencing."). To the government's knowledge, no court has interpreted Rule 43 or Section 3553(c) as requiring a full sentencing hearing on a limited remand, the sole purpose of which is for the district court to elaborate on a factual finding. To the contrary, courts of appeals regularly remand cases to obtain clarification or supplementation of the record from the district court without requiring resentencing. See, e.g., United States v. Lucena-Rivera, 750 F.3d 43, 53, 56 (1st Cir. 2014) (remanding to district court to either reaffirm previously imposed sentence and

file "additional written findings," or vacate the sentence and conduct resentencing proceeding); United States v. Redmond, 667 F.3d 863, 876 (7th Cir. 2012) (remanding to allow district court to clarify whether it "might be inclined to impose a different sentence if it knew the full extent of its discretion"); United States v. Levy, 870 F.2d 37, 39 (1st Cir. 1989) ("[W]e must remand the case for the court either to explain that it did not rely on the disputed facts or to resentence [defendant].").

The practices of the courts of appeals in this context reflect sound principles of judicial administration. A defendant who had the opportunity to present evidence and raise all relevant issues at the original sentencing hearing is not automatically entitled to present new evidence or arguments based on the fortuity of a limited remand that concerns only matters within the scope of the preexisting proceedings. See United States v. Bernardo Sanchez, 569 F.3d 995, 1000 (9th Cir.), cert. denied, 558 U.S. 1057 (2009); United States v. Morris, 259 F.3d 894, 898 (7th Cir. 2001); United States v. Whren, 111 F.3d 956, 960 (D.C. Cir. 1997), cert. denied, 522 U.S. 1119 (1998). And, at least where the remand permitted the district court to reimpose the same sentence, with no substantive changes to its legal or factual premises, and the district court does so, convening a new hearing so that the parties can receive the district court's expanded explanation of the basis for its unchanged Guidelines calculations orally, rather than in

writing, would serve little purpose. Moreover, as courts have recognized, invariably requiring a sentencing hearing at which a defendant may present new arguments would undermine the orderly and efficient operation of the appellate process. See, e.g., Santonelli, 128 F.3d at 1238 ("Repetitive hearings, followed by additional appeals, waste judicial resources and place additional burdens on parole officers and personnel and on hardworking district and appellate judges."); Whren, 111 F.3d at 960 (permitting parties to raise previously abandoned sentencing claims on remand would be "anomalous and inefficient").

2. The proceedings below are consistent with the courts of appeals' sensible and consistent approach and do not warrant further review. The district court and the court of appeals correctly determined that the initial panel decision was best interpreted as contemplating a limited remand for supplementation of the record rather than a resentencing hearing at which petitioner's presence would be required. The operative language in the court of appeals' opinion remanded the case to the district court for "a recalculation of the drug quantity attributable to [petitioner]," consistent with the opinion's requirement that the district court provide "a better explanation of the district court's calculations" or "recalculat[e] * * * the quantity of the drugs for which [petitioner] is to be held accountable" and its directive that the district court make "findings of fact" about

the scope of the conspiracy "in the first instance." Pet. App. 19, 21-22. The fact that the court of appeals vacated the sentence rather than retaining jurisdiction did not require the lower court to construe the remand more expansively, such that a full resentencing hearing was required, where the district court, in accordance with the remand order, did not reconsider or change its original sentence determination. See, e.g., Bryant, 643 F.3d at 33 ("[M]ost remands of a sentence vacate the existing sentence regardless of the further proceedings required."); see also United States v. Parker, 101 F.3d 527, 528 (7th Cir. 1996) (trial court properly construed mandate for resentencing as limited despite appellate court's vacatur of sentence); United States v. Graham, 989 F.2d 496, 1993 WL 88090, at *1-*2 (4th Cir. 1993) (Tbl.) (per curiam) (same); United States v. Kikumura, 947 F.2d 72, 76 (3d Cir. 1991) (same). To the extent that petitioner would construe the prior remand order in this case more expansively than the decisions below, that factbound contention does not provide a basis for certiorari. See Sup. Ct. R. 10.

Petitioner errs in contending (Pet. 10) that the court of appeals' decision in this case is incompatible with the practice of the Second Circuit. The Second Circuit routinely remands "to the district court to supplement the record on a discrete factual or legal issue" and does so "while retaining jurisdiction over the original appeal." Corporación Mexicana de Mantenimiento Integral,

S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92, 115 (2016) (Winter, J., concurring), cert. dismissed, 137 S. Ct. 1622 (2017); see also United States v. Jacobson, 15 F.3d 19, 22 (2d Cir. 1994) (recognizing the authority of federal appellate courts to seek "supplementation of a record without a formal remand or the need for a new notice of appeal before the appellate panel acts on the supplemental record").[3] In such instances, the Second Circuit has repeatedly affirmed on the basis of supplemental findings regarding the sentence notwithstanding that no new hearing was held. See, e.g., United States v. Zukerman, 897 F.3d 423, 426 (2d Cir. 2018) (per curiam) (affirming judgment following a remand for the district court to elaborate on the basis for the $10 million fine imposed as part of sentence), petition for cert. pending, No. 18-642 (filed Oct. 25, 2018); United States v. Dean, 591 Fed. Appx. 11 (2d Cir. 2014) (affirming judgment following a remand for the district court to clarify statements made at sentencing).

[3] Similar practices have been employed by other circuits. See United States v. Coles, 403 F.3d 764, 770 (D.C. Cir. 2005) (per curiam) (retaining jurisdiction over appeal and "remand[ing] the record to the District Court so that it may determine whether it would have imposed a different sentence materially more favorable to the defendant had it been fully aware of the post-Booker sentencing regime"); United States v. Paladino, 401 F.3d 471, 483-484 (7th Cir. 2005) (describing post-Booker remand procedure whereby the court of appeals "retain[ed] jurisdiction of the appeal" while allowing district court to indicate whether it would have imposed a different sentence if it had known the Guidelines were advisory).

The one Second Circuit case relied on by petitioner, United States v. DeMott, 513 F.3d 55 (2008) (per curiam), is not inconsistent with the decision below. In DeMott the district court misinterpreted the scope of its legal authority at the initial sentencing by taking the view that the defendant's two statutory-minimum drug sentences had to run consecutively. Id. at 57. Because it was "impossible to determine from the record whether the district judge would have imposed the same sentence if he had not misapprehended the law," the Second Circuit "VACATE[D] the sentence and REMAND[ED] for resentencing." United States v. Day, 201 Fed. Appx. 27, 29-30 (2006). But on remand the district court simply issued a written opinion explaining that even with the discretion to impose the sentences concurrently, it would not do so. DeMott, 513 F.3d at 58. On the second appeal, the parties agreed that because the district court was imposing a new sentence, it had violated defendant's right to be present at resentencing and Section 3553(c)'s requirement that it state in "open court" its reason for the sentence, particularly why it was imposing consecutive prison terms. Ibid. In contrast to DeMott, which involved a remand for full resentencing based on "misapprehen[sion] [of] the law," Day, 201 Fed. Appx. at 29, here the court of appeals simply issued a limited remand with instructions to the district court to supplement the record by showing its math.

3. In any event, this case would be an unsuitable vehicle for addressing the question presented. Even assuming that the mandate did entitle petitioner to de novo resentencing, he is mistaken in suggesting that the arguments he intended to raise would have affected the outcome. Indeed, the issues petitioner wants to press -- the drug quantity and the scope of the conspiracy -- were before the parties and the district court at the original sentencing hearing.

The Probation Office made an initial calculation as to drug quantity, and petitioner both raised objections to that calculation in his sentencing papers and was able to cross-examine the witnesses and present arguments on drug quantity at the initial sentencing hearing. Sent. Tr. 127-132. McGregor's pill quantities were also included in the Probation Office's calculation, PSR ¶ 21, and both Breeden and Stafford testified about McGregor's conduct, including on cross-examination. Sent. Tr. at 47-55, 72-76, 92-100, 118-119. Petitioner did not make any objections to the Probation Office's determination about the scope of the conspiracy or urge the district court to disregard the testimony on that topic, see Pet. App. 19 ("Defendant did not make this argument at sentencing."), and it is unclear that he would have any right to raise that forfeited argument in a second sentencing hearing.

Furthermore, as the court of appeals explained, even if the district court had not attributed McGregor's pills to petitioner,

the base offense level would not change because petitioner admitted that he was independently sending hundreds of pills a week during that phase of the conspiracy, which, in conjunction with the periods when he was Stafford and Breeden's sole supplier, was enough to support a base offense level of 34. Pet. App. 36-38. Thus, petitioner has provided no sound reason to conclude that, had a full rehearing occurred, the district court would have found less than 10,000 kilograms of marijuana equivalent -- as opposed to the more than 28,000 kilograms it found -- as would be required for his Guidelines range to change. Any error was accordingly harmless and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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