No. 23-7108

IN THE SUPREME COURT OF THE UNITED STATES

EFREN DERMA-DOMINGUEZ, 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 the district court reversibly erred in treating petitioner as having a leadership role in a criminal organization for purposes of the Sentencing Guidelines, based on petitioner's exercise of management responsibility over the organization's property, assets, or activities, where petitioner did not contemporaneously object to that interpretation of the Guidelines.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Derma-Dominguez, No. 22-cr-54 (Apr. 2, 2024) (judgment)

United States Court of Appeals (5th Cir.):

United States v. Derma-Dominguez, No. 22-50787 (Dec. 29, 2023)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is not published in the Federal Reporter but is reprinted at 2023 WL 9011961.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2023. The petition for a writ of certiorari was filed on March 27, 2024. 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 Western District of Texas, petitioner was convicted of possessing 100 kilograms or more of marijuana and 50 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). Judgment 1; Pet. App. A3. Petitioner was sentenced to 108 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3; Pet. App. A5. The court of appeals affirmed in part and vacated and remanded in part. Pet. App. A1-A13. The case was remanded, and while the petition for a writ of certiorari was pending, petitioner was re-sentenced to 87 months of imprisonment and five years of supervised release. D. Ct. Doc. 57, at 2-3 (Apr. 2, 2024). He has not appealed that sentence.

1. In January 2022, a U.S. Border Patrol agent stopped petitioner while he was driving in Redford, Texas. Pet. App. A2. Petitioner consented to a search of his vehicle, in which the agent found several wrapped bundles containing 450 pounds of marijuana. Ibid. The agent also found a bag containing 154 grams of methamphetamine and two loaded AR-15 magazines. Ibid.

Petitioner was arrested and then interviewed by Drug Enforcement Administration (DEA) agents. Pet. App. A2. Petitioner admitted to the DEA agents that he was not legally in the United States and that he had been living in Texas and working in human and drug trafficking. Ibid. Petitioner explained that the

operator of a human- and drug-smuggling organization had initially given petitioner work smuggling noncitizens. Ibid. After petitioner had successfully completed several such jobs, he was promoted to drug smuggling. Ibid. And after successfully completing several drug-smuggling jobs "he was again promoted," this time "to working directly with" the operator of the smuggling organization. Ibid.

Petitioner further admitted to the DEA agents "that his usual drug smuggling procedure involved transporting the drugs" from Lajitas, Texas, to a "stash trailer" in Odessa, Texas. Pet. App. A3. Petitioner also told the agents about two trailers in Odessa and Midland, Texas, that he was "'staying at'" and to which he had transported "illegal aliens" in the past. Ibid. Petitioner gave agents consent to search those trailers. Ibid.

2. A grand jury in the Western District of Texas returned an indictment charging petitioner with one count of possessing 100 kilograms or more of marijuana and 50 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B), and one count of unlawfully possessing ammunition, in violation of 18 U.S.C. 922(g). Indictment 1-2. Petitioner pleaded guilty to the drug charge, and the government agreed to dismiss the ammunition charge at sentencing. Plea Tr. 5-6; see Pet. App. A3.

a. The Probation Office calculated a Sentencing Guidelines range of 108 months to 135 months of imprisonment for the drug

offense. Presentence Investigation Report (PSR) ¶ 52. That calculation included a two-level enhancement under Sentencing Guidelines § 3B1.1(c). PSR ¶ 25. Sentencing Guidelines § 3B1.1 provides for increases in the offense level based on the defendant's aggravating role in the offense. Subsection (a) specifies a four-level increase if the defendant was an "organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." Sentencing Guidelines § 3B1.1(a). Subsection (b) specifies a three-level increase if the defendant was a "manager or supervisor (but not an organizer or leader)" and the activity was extensive. Id. § 3B1.1(b). And subsection (c) specifies a two-level increase if the defendant was an "organizer, leader, manager, or supervisor in any criminal activity other than that described in (a) or (b)." Id. § 3B1.1(c).

In the commentary to Section 3B1.1, Application Note 2 states that "[t]o qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization." Sentencing Guidelines § 3B1.1, comment n.2.

In his written objections to the presentence report, petitioner challenged the application of the Section 3B1.1

enhancement based solely on the assertion that "nothing in the facts suggest that [petitioner] was a leader/organizer or anything other than a person transporting the drugs." Third Addendum to PSR (PSR Addendum) 1. The Probation Office rejected that objection. Ibid. After quoting the text of Application Note 2, the Probation Office described the facts of the offense to which petitioner had "freely admitted." Id. at 1-2. The Probation Office then explained that it "believe[d] the defendant did maintain management responsibility in the instant offense," observing that he "agreed" to engage in human trafficking both "for financial gain" and to "gain the trust of the criminal organization's group members"; that he had "continuously maintained contact with the organization's members for drug and human smuggling"; and that he had "hous[ed] illegal aliens and firearms" at trailers in which he was residing. Id. at 2.

Petitioner also objected to the presentence report on the theory that the Probation Office should have applied a reduced offense level based on the so-called "safety valve" provision in Sentencing Guidelines § 2D1.1(b)(18). PSR Addendum 2. That provision provides for a two-level decrease "[i]f the defendant meets the criteria set forth in paragraphs (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases)." Sentencing Guidelines § 2D1.1(b)(18). The criteria in Sentencing Guidelines § 5C1.2, in turn, include that "the defendant was not an organizer, leader,

manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848." Id. § 5C1.2(a)(4). Petitioner asserted, inter alia, that he was "[n]ot a leader/organizer," cross-referencing his objection to the application of the two-level increase under Sentencing Guidelines § 3B1.1. PSR Addendum 2. The Probation Office, however, declined to amend the presentence report on that ground, explaining that "based on his overall involvement in the offense and admitted prior criminal activity, [petitioner] was in fact an organizer/leader in the instant offense." Ibid.

b. At the sentencing hearing, petitioner repeated his objection to the "leader/organizer enhancement" under Sentencing Guidelines § 3B1.1. Sent. Tr. 4. To support application of the enhancement, the government then presented testimony from one of the DEA agents who had worked on the case. Id. at 5. The government questioned the agent about how petitioner had gained "trust in the drug trafficking organization," whether and how he had "move[d] up," and whether "his contacts [had] change[d]". Id. at 8-9.

The government also asked about whether petitioner had "start[ed] off dealing with maybe somebody lower in the organization and he moved up as far as dealing with somebody higher." Sent. Tr. 9. The agent agreed that petitioner had moved up and had progressed to working for the "organizer of the actual

load on the river," who was "right below the owner of the drugs further in Mexico." Id. at 9-10. The government also asked the agent if petitioner "br[ought] along other people" to facilitate the drug transaction that led to the vehicle search and arrest. Id. at 10. The agent agreed that there had been "a second individual involved working as a scout vehicle to monitor for law enforcement activity," ibid., subsequently clarifying that petitioner had not "recruited" the other person but was working "with" him, id. at 15.

The district court ultimately overruled petitioner's objection to the leader/organizer enhancement "in reliance upon the [presentence report], the testimony, the Government's argument, and [the Probation Officer's] response." Sent. Tr. 25; see id. at 38. It then sentenced petitioner to 108 months of imprisonment, to be followed by five years of supervised release. Id. at 41; Judgment 2-3.

3. Petitioner appealed, arguing that the district court had "clearly erred" in making the factual finding that petitioner had "exercise[d] control or management responsibility in the instant offense." Pet. C.A. Br. 15-16. In a footnote, petitioner also asserted for the first time that he objected to circuit precedent under which the Section 3B1.1 enhancement may be "applie[d] to someone who exercises control over another participant or exercises management responsibility over the property, assets, or activities of a criminal organization." Id. at 14; see id. at 14

n.6. Petitioner asserted that Application Note 2 to Section 3B1.1 allows the enhancement to be applied only when a defendant supervises another participant. Ibid.

In an unpublished per curium decision, the court of appeals affirmed in part and vacated and remanded in part. Pet. App. A1-A13. Addressing petitioner's challenge to the application of the Section 3B1.1 enhancement, the court first found that the "clear error" standard applied because petitioner had "preserved" his challenge to the district court's "factual findings" regarding his role in the offense. Id. at A5. The court then viewed its en banc decision in United States v. Delgado, 672 F.3d 320 (5th Cir.), cert. denied, 568 U.S. 978 (2012), as providing that "a § 3B1.1 enhancement may be based on either the defendant's control over other people in the organization or his management of the organization's property, assets, or activities." Pet. App. A9; see id. at A6-A9.

"Given [that] controlling precedent," the court of appeals "conclude[d] that the district court did not clearly err in applying the enhancement on this record." Pet. App. A9. The court observed that petitioner "started off working less profitable jobs with lower-ranking members of the organization" and then "swiftly advanced to higher-level and more profitable drug smuggling jobs," followed by a "promot[ion] to working directly with the lead operator of the organization." Id. at A9-A10. The court also observed that petitioner was arrested with large quantities of

drugs "and two loaded AR-15 magazines" and that he "resided in[] the stash trailers." Ibid. The court found that petitioner "was more than a low-level drug courier," and that his "actions in this case squarely conformed to the enhancement's parameters as defined by the guidelines" and the court's prior decision in Delgado. Pet. App. A10. But because both parties agreed that the district court had erred in failing to reduce the drug weight to account for the packaging, the court of appeals vacated and remanded for correction of that error. Id. at A11-A12.

Judge Dennis concurred in part and dissented in part. Pet. App. A14-A18. He agreed with the limited remand but dissented from the majority's conclusion that petitioner's actions warranted application of the aggravating role enhancement under Section 3B1.1(c). Id. at A14. Judge Dennis agreed that the court was bound by Delgado's reading of Section 3B1.1, id. at A14 n.1, but he thought that in other cases affirming application of the enhancement, the defendants "went beyond mere physical control of contraband" and were "involved in some way in planning or decision-making regarding control of the contraband," id. at A15. He also took the view that the majority's finding that petitioner was residing in the stash trailers was not supported by the evidence. Id. at A17-A18.

4. Petitioner did not seek rehearing en banc. On remand, petitioner was re-sentenced to 87 months of imprisonment and five

years of supervised release. D. Ct. Doc. 57, at 2-3 (Apr. 2, 2024). Petitioner did not appeal the new judgment.

ARGUMENT

Petitioner contends (Pet. 13-16) that this Court should grant certiorari to consider whether the court of appeals erred in its unpublished decision affirming the district court's application of the enhancement in Sentencing Guidelines § 3B1.1. This Court ordinarily does not review Guidelines questions because Congress charged the Sentencing Commission with resolving such issues. See Braxton v. United States, 500 U.S. 344, 347-348 (1991). And intervention is particularly unwarranted here because the Commission has recently indicated that it is prioritizing the resolution of Guidelines-related disagreements and analyzing the appropriate treatment of Guidelines commentary. Furthermore, the court of appeals has shown a willingness to revisit its position, the interpretive question is unlikely to have significant practical consequences, and petitioner failed to raise his current legal claim in the district court in the first instance. Finally, the petition is interlocutory, and petitioner's failure to appeal the sentence that he received on remand should not allow him to circumvent the Court's usual rule against review of interlocutory petitions. The petition should be denied.

1. The text of Sentencing Guidelines § 3B1.1 does not expressly require that a defendant be the "organizer, leader, manager, or supervisor" of other participants in the criminal

activity. Sentencing Guidelines § 3B1.1(c). Rather, Sentencing Guidelines § 3B1.1 calls for a three- or four-level enhancement for a defendant who was a manager, supervisor, organizer, or leader "of a criminal activity that involved five or more participants or was otherwise extensive," id. § 3B1.1(a)-(b), and a two-level enhancement for a defendant who "was an organizer, leader, manager, or supervisor in any" other criminal activity, id. § 3B1.1(c).

By 1993, circuit disagreement had developed regarding whether the enhancement should nonetheless be limited to defendants who manage or supervise other people. Several courts of appeals had held that some degree of control over other participants is necessary. See, e.g., United States v. Carroll, 893 F.2d 1502, 1508 (6th Cir. 1990); United States v. Fuller, 897 F.2d 1217, 1220 (1st Cir. 1990); United States v. Mares-Molina, 913 F.2d 770, 773-774 (9th Cir. 1990); United States v. Fuentes, 954 F.2d 151, 153-155 (3d Cir.), cert. denied, 504 U.S. 977 (1992). At least one other circuit, however, had held that a defendant may be a "manager" even if he does not directly supervise others. United States v. Chambers, 985 F.2d 1263, 1266 (4th Cir.), cert. denied, 510 U.S. 834 (1993).

In light of that disagreement, the Sentencing Commission amended the commentary to Section 3B1.1. See Sentencing Guidelines App. Supp. C, Amend. 500 (Nov. 1, 1993). Application Note 2 now provides:

> To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

Since the adoption of Application Note 2, most courts of appeals have reasoned that a defendant qualifies for an enhancement only when he supervises or manages other participants, with those who manage property or activities instead potentially subject to an "upward departure." See United States v. Ochoa-Gomez, 777 F.3d 278, 285 n.6 (5th Cir. 2015) (Prado, J., concurring) (citation omitted) (collecting cases). The decision below, however, construes Fifth Circuit precedent as allowing courts to apply the Section 3B1.1 enhancement to defendants who supervise or manage either people or property and activities. Pet. App. A6-A9.

Concerns about circuit disagreement on that issue should be left to the Sentencing Commission. This Court typically does not intervene to resolve questions regarding the proper interpretation of the Sentencing Guidelines. Braxton, 500 U.S. at 347-349. Congress has charged the Commission with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Id. at 348; see also United States v. Booker, 543 U.S. 220, 263 (2005) (similar). By conferring that authority on the Sentencing Commission, Congress indicated that it expects the Commission, not

this Court, "to play [the] primary role in resolving conflicts" over the interpretation of the Guidelines. Buford v. United States, 532 U.S. 59, 66 (2001). And this Court's decision in United States v. Booker, which rendered the Guidelines advisory, see 543 U.S. at 245, provides further support for the practice of leaving questions regarding the interpretation of the Guidelines to the Sentencing Commission.

No sound reason exists to depart from that practice here. Indeed, the Commission may well turn to this question soon. The Commission has recently explained that it is prioritizing the "[r]esolution of circuit conflicts" and a "[m]ultiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary, and possible consideration of amendments that might be appropriate." U.S. Sentencing Comm'n, Final Priorities for Amendment Cycle, 88 Fed. Reg. 60,536, 60,536-60537 (Sept. 1, 2023) (emphasis omitted). And the Office of the General Counsel of the Commission has recently issued a report that notes the Fifth Circuit's approach to the commentary at issue here. See Office of the General Counsel, U.S. Sentencing Comm'n, Primer on Aggravating and Mitigating Role Adjustments (2023) at 1 n.3, available at https://www.ussc.gov/sites/default/files/pdf/training/primers/ 2023_Primer_Role.pdf.

2. Even setting aside the Sentencing Commission's role in resolving interpretive questions regarding the Sentencing Guidelines, certiorari is not warranted both because the Fifth

Circuit itself may resolve any disagreement, and because such disagreement is unlikely to have significant practical effects in the interim.

a. Multiple judges of the Fifth Circuit have expressed the view that the circuit's en banc decision in United States v. Delgado may have misinterpreted Application Note 2. In United States v. Ochoa-Gomez, supra, Judge Prado, joined by Judge Elrod, perceived an "apparent error" in the en banc decision. 777 F.3d at 284. Judge Prado stated that Delgado "appears to have conflated an 'adjustment' and an 'upward departure' for purposes of Application Note 2." Ibid. (Prado, J., concurring) (citation omitted). He observed that Application Note 2 provides for an enhancement for those who manage people and an "upward departure" for those who manage property and activities, and posited that Delgado mistakenly viewed the two terms as synonymous. Id. at 284-285 (emphasis omitted). And he expressed the view that "[g]iven that our precedent appears to conflict with the plain language of Application Note 2," and "places this circuit at odds with several other circuits, the issue merits en banc review." Id. at 285-286.

In United States v. Warren, 986 F.3d 557 (2021), a separate panel of the Fifth Circuit (which included one judge who is currently still active) likewise stated that the cases applying Delgado "incorrectly applied the Guidelines," and noted that Judge Prado has urged en banc review of the issue. Id. at 569 & n.45.

And panels issuing unpublished decisions have pointed to Judge Prado's statements as well as well. See United States v. Polty, 798 Fed. Appx. 824, 825 n.1 (5th Cir. 2020); United States v. Gama-Peralta, 798 Fed. Appx. 785, 786 n.8 (5th Cir. 2020) (per curiam); United States v. Alvarez, 761 Fed. Appx. 363, 364 n.1 (5th Cir. 2019) (per curiam).

None of the defendants in any of those cases have sought en banc review. Although Guidelines questions typically do not warrant en banc review for the same reasons that they do not warrant certiorari, the apparent genesis of the Fifth Circuit's approach in an en banc decision may justify a different result. And such review would provide another route, as an alternative to Commission action, to resolve any circuit disagreement.[1] Petitioner here, however -- like the defendants in the other cases just mentioned -- did not seek en banc review, and his request for this Court's intervention is accordingly premature at best.

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[1] Petitioner briefly suggests that the Tenth Circuit has adopted the same understanding of Application Note 2 as the Fifth Circuit. See Pet. 18 (citing United States v. Parker, 553 F.3d 1309, 1322 (10th Cir. 2009)). But it is not clear that the court in United States v. Parker relied exclusively on managing property and activities rather than people, because the court noted that the defendant "direct[ed]" certain "engine overhaul work,"553 F.3d at 1322, which would have involved supervising other participants in the criminal enterprise. Furthermore, petitioner recognizes that other panel decisions of the Tenth Circuit have required the defendant to organize people, see Pet. 18 (citing United States v. Valdez-Arieta, 127 F.3d 1267, 1271-1272 (10th Cir. 1997)), and petitioner identifies no cases relying on Parker to adopt a broader view.

b. The question presented also has little practical significance. A defendant with a management role in a criminal organization will often have some authority over other participants. And even when he does not, Application Note 2 recognizes that an "upward departure" may be warranted where the defendant exercises management responsibility only "over the property, assets, or activities of a criminal organization." Sentencing Guidelines § 3B1.1, comment n.2.

A sentencing enhancement and an upward departure differ in that the former affects a defendant's Guidelines level, while the latter permits a sentencing court to go above the recommended guidelines range. See Ochoa-Gomez, 777 F.3d at 285 (Prado, J., concurring). But as a practical matter, a court may order an upward departure that increases the defendant's sentence by the same amount as an enhancement if the court believes that the defendant's role in managing property and activities warrants it. And because the Guidelines are advisory, a sentencing court could rely on a defendant's role in the offense as a reason to increase the sentence irrespective of whether it would enhance the guidelines range or warrant an official departure.

Petitioner also offers no reason why personnel management is necessarily more deserving of a higher sentence than other forms of management in a criminal enterprise, such as petitioner's own attachment to the leader of the criminal enterprise. A defendant who occupies a high-ranking position, which may well involve

closely advising or working with leadership, may thereby be similarly culpable.

c. Petitioner claims (Pet. 19) that his own case shows how the question presented may be outcome determinative, asserting that the government has "conceded that he did not supervise a participant," and his sentence would have been lower without the enhancement. But no such concession appears in the record, and even if it had, petitioner disregards that he might well have been subject to an upward departure even without the enhancement.

While petitioner asserts (Pet. 11, 19) that the government conceded he did not supervise other people, petitioner does not offer any citation, and the government is unaware of any such concession. Indeed, the question of whether petitioner supervised other participants was not even presented in the district court. Instead, petitioner's written objection to the enhancement consisted of a single sentence stating that "nothing in the facts suggest that [petitioner] was a leader/organizer or anything other than a person transporting the drugs." PSR Addendum 1. And at the sentencing hearing, while petitioner cross-examined the DEA agent regarding petitioner's role in the criminal organization, petitioner did not assert that testimony about supervision of others was a necessary prerequisite for the enhancement. It was not until the court of appeals that petitioner raised his challenge to the Fifth Circuit's interpretation of Sentencing Guidelines

§ 3B1.1 in a footnote purporting to "preserve[]" the issue. Pet. C.A. Br. 14 n.6.[2]

By failing to raise his challenge to the Fifth Circuit's interpretation of Section 3B1.1 until his court of appeals briefing, petitioner deprived the government of the opportunity to respond by, for example, developing evidence that petitioner had managed other individuals -- a possibility given that petitioner was working "directly" for the "organizer of the actual" importation of drugs "on the river." Sent. Tr. 9-10. Alternatively, the government might have argued for an upward departure or variance rather than an enhancement -- another reasonable possibility given petitioner's role in the human and drug trafficking organization.

Petitioner briefly suggests (Pet. 20 n.3) that without the Section 3B1.1 enhancement, he might have been given an additional safety-valve reduction under Section 2D1.1(b)(18). But as the government explained before the court of appeals, See Gov't. C.A. Br. 19, the district court did not decide whether petitioner would

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[2] In responding to petitioner's arguments before the court of appeals, the government observed that binding circuit precedent permitted the application of the Section 3B1.1 enhancement where a person manages property, and then explained why there was ample evidence that petitioner supervised drugs and weapons in this case. See C.A. Br. 8-12; see also C.A. Br. 9 n.2 (taking no position on the "merit" of the argument that Delgado was wrongly decided). Particularly given that petitioner raised the supervision-of-individuals issue only in a preservation-focused footnote, Pet. C.A. Br. 14 n.6, the government's arguments do not constitute a concession that petitioner did not in fact supervise other individuals.

have been eligible for a safety-valve reduction absent the enhancement, and he might well have been disqualified from the safety-valve provision for other reasons. This case thus well-illustrates the inappropriateness of reviewing issues that were not properly preserved below.

3. Furthermore, the petition arises in an interlocutory posture, because the court of appeals vacated and remanded for resentencing based on an error in calculating the drug weight. Pet. App. A11-A12. The interlocutory posture of a case ordinarily "alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (explaining that a case remanded to the district court "is not yet ripe for review by this Court"); Abbott v. Veasey, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari).

Consistent with that general rule, this Court routinely denies interlocutory petitions in criminal cases. See Stephen M. Shapiro et al., Supreme Court Practice 4-55 n.72 (11th ed. 2019). That practice promotes judicial efficiency, because the proceedings on remand may affect the consideration of the issues presented in a petition. It also enables issues raised at different stages of lower-court proceedings to be consolidated into a single petition. See Major League Baseball Players Ass'n

v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals.").

Petitioner is not entitled to an exception from the general rule against review of interlocutory petitions. He has now been resentenced, and his failure to appeal that resentencing -- which he could easily have done -- provides no reason why he is entitled to interlocutory review of his now-superseded sentence. If anything, his failure to keep his criminal case alive may require the Court to address potential questions of mootness. Although the government can appeal to reinstate a criminal conviction even if further proceedings have occurred in the case, see, e.g., United States v. Villamonte-Marquez, 462 U.S. 579, 580 n.2 (1983), it is not clear whether a live controversy remains for a defendant in petitioner's position, cf. Mancusi v. Stubbs, 408 U.S. 204, 205-207 (1972) (live controversy remained following resentencing where, inter alia, state habeas petitioner had appealed that resentencing) -- another potential complicating factor for any further review here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2024