No. 08-444

IN THE

United States Supreme Court

JUAN M. CRUZADO-LAUREANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF

E. Joshua Rosenkranz
Sarah C. Marriott
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, New York 10103
212-506-5000

Malaika M. Eaton
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101
206-467-1816

Alexander Zeno
Counsel of Record
P.O. Box 92551
Washington, D.C. 20090
202-441-2851

Counsel for Petitioner

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The Government concedes that the courts of appeals are split on the question presented by this petition, and does not dispute that the split is mature, intractable, and longstanding. The Government nevertheless advances two circular arguments that ignore the basis for Mr. Cruzado's challenge. Neither of these arguments is a basis for denying Mr. Cruzado's petition.

First, the Government argues that this Court should ignore a longstanding circuit split on a fundamental and pervasive question about the power of district courts on sentencing because the applicable laws "might appropriately be viewed as local rules" of practice in each circuit. Opp. 13. Far from it. The question presented addresses the appropriate interpretation of the federal sentencing statutes, including 18 U.S.C. §§ 3553(a) and 3742(g). That is why the courts themselves do not treat this as local rule.

Second, the Government argues that Mr. Cruzado's case is not an appropriate vehicle for this Court to resolve the question presented because the result would be the same under either rule. Opp. 14. According to the Government, the court of appeals expressly limited its mandate in *Cruzado II*. To the contrary, the court of appeals in *Cruzado II* did not limit the mandate in any way, and neither the district court, on remand, nor the Court of Appeals in *Cruzado III*, suggested that they thought the mandate had been expressly

limited. They purported only to apply the First Circuit's blanket rule that remands are necessarily limited by default. Thus, this case presents an appropriate vehicle for this Court to resolve the circuit split.

I. THE SCOPE OF RESENTENCING ON REMAND IS AN ISSUE OF SUBSTANTIVE FEDERAL LAW, NOT A "LOCAL RULE."

The Government begins its opposition with the suggestion—presented ever so tentatively—that the minority approach "might appropriately be viewed as local rules." Opp. 13. In hedging in this manner, it is not clear whether the Government is saying (A) that this might not be an appropriate matter for a local rule or (B) that the courts of appeals might not, in fact, be treating this as a local rule. The truth is the Government's hypothesis must be rejected on both grounds.

A. The Scope of Resentencing on Remand Is Governed by Federal Law.

This case is not about local practice. It is about the interpretation of two federal statutes and a federal rule, the inherent power of district courts on sentencing, and the substantive rights of thousands of criminal defendants.

The federal statute governing resentencing on remand requires district courts to "resentence a defendant in accordance with Section 3553 and with such instructions as may have been given by the court of appeals." 18 U.S.C. § 3742(g). In turn, 18 U.S.C. § 3553, which governs the discretion of

sentencing courts, *requires* those courts to consider seven enumerated factors before determining a defendant's sentence. *Id.* § 3553(a)(1)–(7). And Federal Rule of Criminal Procedure 32 directs that a district court "may, for good cause, allow a party to make a new objection at any time before sentence is imposed"—without regard to whether the court of appeals expressly authorized it.

Thus, the issue presented for review is not which approach to resentencing is superior as a matter of docket management or efficient administration of justice. *Cf. Ortega-Rodriguez v. United States*, 507 U.S. 234, 257 (1993) (Rehnquist, C.J., dissenting) (stating that "courts of appeals have supervisory authority, both inherent and under Rule 47, to create and enforce procedural rules designed to promote the *management of their docket*" (emphasis added)). Rather, it is about how to interpret federal law. Petitioner's argument is that when the First Circuit—and other courts adopting the minority view—hold that district courts at resentencing lack discretion to address any issues not specifically authorized by the remanding court's opinion, including issues bearing upon the § 3553(a) factors, these courts misread the sentencing statutes. Simply put, the argument is that the default rule in the minority circuits contravenes §§ 3742(g) and 3553(a) by preventing district courts from following the dictates of § 3553, *even in the absence of express instructions* from the courts of appeals.

The question presented also implicates the appropriate role of sentencing courts, *see Kimbrough v. United States*, 128 S. Ct. 558, 574 (2007) (stating that the sentencing judge is "in a superior position to find facts and judge their import under § 3553(a)"), and the substantive rights of criminal defendants.

Thus, even if the courts of appeals treated this issue as a matter of local rule, the conflict between the rule applied by the minority circuits and federal law should not be overlooked on the grounds of judicial rulemaking authority. After all, the rule authorizing local rules itself directs that "[a] local rule must be consistent with . . . Acts of Congress and rules adopted under 28 U.S.C. § 2072." Fed. R. App. Proc. 47. Thus, "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." *Thomas v. Arn*, 474 U.S. 140, 148 (1985).

B. The Courts of Appeals Do Not Treat this Issue as a "Local Rule."

The truth is that the courts of appeals do not treat this issue as a matter of local rule. To begin with, not a single one of the circuit courts—on either side of the split—has promulgated its approach through the formal rulemaking process outlined in Federal Rule of Appellate Procedure 47. None of the courts "act[ed] by a majority of its judges in regular active service," and none of them gave "appropriate public notice and opportunity for

comment," before adopting their position. Fed. R. App. P. 47(a)(1).

It is possible, of course, for a circuit to adopt a rule of practice through adjudication rather than the formal rulemaking process, but only under the limited circumstances where (1) "[t]he nature of the rule and its prospective application demonstrates that the court intended to adopt a rule of procedure" in the exercise of the court's supervisory powers; and (2) "[l]ater opinions of the . . . Circuit make it clear that the court views [its precedent] in this way." *Thomas*, 474 U.S. at 145 (internal brackets and citations omitted). Neither condition is satisfied here.

None of the courts of appeals to have weighed in on either side of the split has treated this as a local procedural rule. The First Circuit, for example, views its rule regarding sentencing upon remand as an application of the law of the case doctrine. *See United States v. Ticchiarelli*, 171 F.3d 24, 28–29 (1st Cir. 1999). On the other hand, the Eleventh Circuit concludes that *de novo* resentencing on remand of all aspects of a defendant's sentence, "both proper and improper," is appropriate because of "the need for a sentencing scheme which takes into consideration the total offense characteristics of a defendant's behavior," a concern that reflects the requirements imposed by 18 U.S.C. § 3553(a). *United States v. Rosen*, 764 F.2d 763, 767 (11th Cir. 1985). Similarly, the Tenth Circuit has reasoned that, in light of the requirements of § 3553(a), "the purposes of the federal sentencing scheme would be

frustrated" if the district court were not able to conduct a *de novo* resentencing. *United States v. Hicks*, 146 F.3d 1198, 1203 (10th Cir. 1998). The Tenth and D.C. Circuits have reasoned that the proper scope of resentencing upon remand is dependent in part on the provision of Federal Rule of Criminal Procedure 32. *See United States v. McCoy*, 313 F.3d 561, 564, 565 (D.C. Cir. 2002) (holding that the rules about the scope of sentencing on remand "must be understood in light of [Rule 32]" and that "a proper application of Rule 32 required the district court in resentencing to decide whether [defendant's] failure to raise her [new] argument was 'for good cause shown'"); *United States v. Moore*, 83 F.3d 1231, 1235 (10th Cir. 1996) (stating that after vacation of a sentence, Rule 32 "allows the parties to raise new objections to the presentence report for good cause shown"). None of the decisions on this subject indicates an intention to adopt a local rule of practice pursuant to Federal Rule of Appellate Procedure 47.

* * *

In sum, the question presented is a matter of federal importance, not just a matter of local practice. The Government does not dispute that the correct application of the federal statutory scheme could affect thousands of criminal appeals every year that involve a challenge to the sentence. The issue becomes critical especially as the volume of sentencing appeals has prompted circuit courts to resolve many of these cases in hastily issued memorandum dispositions that may not reflect any

consideration at all of the scope of the district court's authority on resentencing.

Despite the Government's characterization of the question presented as involving a mere local procedural rule, it is as important as the many other federal procedural questions that this Court has resolved. Even where, as here, a lack of uniformity may not lead to forum shopping or other sorts of gamesmanship, it remains important for this Court to resolve disputed questions of federal procedure. *See, e.g., Bowles v. Russell*, 127 S. Ct. 2360 (2007).[1]

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[1] The Government notes that this Court has previously declined to review other cases presenting this question. Opp. 10 n.5. Several of these petitions were decided a decade ago, before all the circuits had weighed in on this issue, and before they had time to reconsider their positions in light of conflicting authority from other circuits. Furthermore, in each of these cases there was a basis for denying certiorari on the ground that the case was not an appropriate vehicle for resolution of the issue. For example, one case was an interlocutory appeal. *See* Brief for United States in Opposition at 6, *Tocco v. United States*, 539 U.S. 926 (2003) (No. 02-1225). In another case, the resentencing court had actually considered and ruled upon several of the new issues raised by the petitioner. *See* Brief for the United States in Opposition at 10, *Donato v. United States*, 539 U.S. 902 (2003) (No. 02-1191). In yet another, the resentencing court ruled that the defendant was not permitted to raise new issues on remand, but nevertheless heard the proffer of new evidence and ruled in the alternative that the new evidence would not have affected the sentence. *See* Brief for the United States in Opposition at 10, *Marmolejo v. United States*, 525 U.S. 1056 (1998) (No. 98-5372). And in three of

II. THE APPROPRIATE DEFAULT RULE AS TO THE SCOPE OF SENTENCING ON REMAND IS SQUARELY PRESENTED IN THIS CASE.

The Government argues that this case is not an appropriate vehicle for resolution of the question presented because the result would have been the same under either rule. Opp. 14–15. According to the Government, that is because "the remand [in *Cruzado II*] was for a limited, rather than *de novo,* resentencing," so even courts in the majority camp would have limited the scope of the district court's discretion on resentencing. *Id.* The Government is mistaken.

As an initial matter, both the district court on remand and the *Cruzado III* panel rejected Mr. Cruzado's argument on the basis of the default rule that is challenged in this petition—the rule the First Circuit articulated in *Ticchiarelli*, 171 F.3d at 32. *See* Pet. App. 7, 90. Neither disposed of the argument on the ground that the remand mandate included limiting language, or in any way suggested that they believed it was limited. That

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the cases, the appellate court had held, or at least the Government had argued, that the issue was not presented, because the remanding court had explicitly and unequivocally limited the remand. *See* Brief for the United States in Opposition at 7, *Hass v. United States*, 531 U.S. 812 (2000) (No. 99-1694); Brief for the United States in Opposition at 6, *Harris v. United States*, 525 U.S. 812 (1999) (No. 98-6358); Brief for the United States in Opposition at 8, *Whren v. United States*, 522 U.S. 1119 (1998) (No. 97-6220).

choice is especially significant, because the court of appeals explicitly noted that Mr. Cruzado was preserving for this Court's review the question whether the First Circuit's default rule was correct. *See* Pet. App. 6–7. If the court of appeals had believed that it had, indeed, explicitly limited the mandate in its earlier ruling, it would undoubtedly have said so and pointed out that the larger issue was not presented.

In any event, the First Circuit's remand order in *Cruzado II* was not expressly limited. The remand stated:

> Having determined that the [district] court's interpretation of the Guidelines was legally erroneous . . . we must again send the case back to the district court. . . . In remanding the case, we do not intend to intimate that the length of the sentence should necessarily be changed; what matters is that the premise as to the Guideline range must be correct.
>
> The sentence imposed by the district court is **vacated** and the case is **remanded** for resentencing.

Pet. App. 76.

Far from limiting the mandate, this language is quite general. In arguing otherwise, the Government focuses exclusively on the language, "we do not intend to intimate that the length of the

sentence should necessarily be changed; what matters is that the premise as to the Guideline range must be correct." Opp. 14 (quoting Pet. App. 76). But that language is more naturally read as an acknowledgment of the district court's discretion to determine the length of Mr. Cruzado's sentence than as a limitation of any sort.

Courts in circuits following the majority approach would never treat this language as limiting. To overcome the presumption that a remand order is general, these courts would require that that the appellate panel express any limitation "specifically," *Hicks*, 146 F.3d at 1201, and "clearly," *United States v. Campbell*, 168 F.3d 263, 267 (6th Cir. 1999), in language that is "*unmistakable*," and that "leave[s] no doubt in the district judge's or parties' minds as to the scope of the remand," *id.* at 268 (emphasis added); *see also United States v. Washington*, 172 F.3d 1116, 1118 (9th Cir. 1999) ("[T]he general practice in a remand for resentencing was to vacate the entire sentence. We will presume that this general practice was followed unless there is 'clear evidence to the contrary.'" (citation omitted)). That means that a remanding court under the majority rule does not overcome the presumption unless it "sufficiently outline[s] the procedure the district court is to follow," articulates "[t]he chain of intended events . . . with *particularity*," *Campbell*, 168 F.3d at 268 (emphasis added), and "create[s] a narrow framework within which the district court must operate," *id.* at 265.

Thus, for example, the Sixth Circuit, which subscribes to the majority view, did not consider a mandate to be limited when the mandate directed that "the defendant's sentence is VACATED and the case REMANDED to the district court for resentencing, consistent with this opinion." *United States v. Obi*, 542 F.3d 148, 154 (6th Cir. 2008). The Ninth Circuit reached the same result when a panel's remand read: "the district court erred in departing from the guidelines based on the quantity of drugs involved. Defendants' sentences should be recalculated accordingly . . . . VACATED and REMANDED." *United States v. Ponce*, 51 F.3d 820, 826 (9th Cir. 1995). Only where the remanding court specifies the precise issue to be resolved do the courts in the majority camp consider the remand limited—where, for example, the appellate court directs that "the case is remanded for resentencing *on the issue of obstruction of justice*." *United States v. Polland*, 56 F.3d 776, 777–78 (7th Cir. 1995) (emphasis added).

The language of the *Cruzado II* remand plainly would not satisfy this stringent standard. There is nothing in the opinion that specifies what limited issue the district court must address, much less that does so clearly and unmistakably.

The Government only proves the point when it concedes that the remand language in *Cruzado II* could have been "more explicit," but nevertheless argues that the language is limiting if read with an eye toward implementing "the letter and the spirit" of the appellate court's mandate. Opp. 14. The

majority rule, with its emphasis on "unmistakable language," *Campbell*, 168 F.3d at 268, would not limit a defendant's resentencing rights based upon the invocation of a "spirit."

Moreover, the Government curiously cites cases only from the *minority* circuits—where remand rights are limited by default—in support of its argument that Mr. Cruzado's remand rights would be limited in *majority* circuits. *See* Opp. 14–15 (citing cases from the First, Second, and Fifth Circuits, all of which apply the minority rule limiting mandates by default). To take one example, the Government quotes the following language from the Second Circuit: "to determine whether a remand is *de novo*, we must look to both the specific dictates of the remand order as well as the broader spirit of the mandate." *United States v. Quintieri*, 306 F.3d 1217, 1227 (2d Cir. 2002). But that was not a basis for finding that the mandate in that case was limited; it was the Second Circuit's argument in support of the *minority* rule that "[t]o allow for *de novo* resentencing in cases [identifying a particular *sentencing* error] would contradict the spirit of the mandate—directing the district court to correct an error or possible error that we had identified in the sentencing—even if the mandate does not expressly state that the resentencing will be limited." *Id.*

The Government's struggle to construe the *Cruzado II* language as limiting further highlights another flaw in its argument, while emphasizing the burden on district courts in minority rule

jurisdictions. The Government suggests that the issue here does not matter because courts must scrutinize the entire appellate court decision in order to make a judgment call about what issues come within the "letter and spirit" of the mandate in any case. Opp. 15 n.8. However, in minority circuits, not only must the district court look for limiting language, even if it finds none, it also must constantly question whether issues that the parties wish to raise are sufficiently related to issues addressed by the appellate court. If the court gets this judgment call wrong, it faces the prospect of reversal on appeal and yet more sentencing proceedings.

In contrast, district courts in majority circuits face a much simpler task. They must read the language of the remanding court's opinion for limiting instructions. But if no limiting language is used, the district court need not struggle to determine what issues are sufficiently related to the issues addressed by the appellate court. Instead, it is left to the district court's discretion to determine what issues to address on resentencing, even if the issues are unrelated to those addressed on appeal.

Either way, uniform application of the majority rule is critical—not only as a matter of interpretation of federal sentencing and criminal procedure laws—but also as a matter of process for hundreds of district court cases each year. In the wake of this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which greatly

increased the impact of the district court's discretion in sentencing, clarity on this issue is more important than it has ever been in the long history of this circuit split.

CONCLUSION

For the reasons set forth above, this Court should grant a writ of certiorari to review the Court of Appeals' judgment.

Respectfully submitted,

E. Joshua Rosenkranz
Sarah C. Marriott
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
(212) 506-5000

Alexander Zeno
Counsel of Record
P.O. Box 92551
Washington, D.C. 20090
(202) 441-2851

Malaika M. Eaton
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101

Counsel for Petitioner

December 15, 2008

CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2960 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 15, 2008.