No. _____ 08-4444 OCT 2 - 2008

IN THE

Supreme Court of the United States

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

PETITION FOR A WRIT OF CERTIORARI

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October 2, 2008

QUESTION PRESENTED

When a court of appeals reverses a criminal sentence, it remands the case to the district court for further sentencing proceedings because the district court is best situated to hear and decide in the first instance issues that bear on the appropriate sentence. The court of appeals has the option of explicitly restricting the scope of the district court's inquiry on resentencing, but in this case it did not. The question presented is whether a district court on remand for resentencing retains the discretion to hear issues and take evidence beyond the scope of the error addressed by the appellate court, where the appellate court has not expressly limited the district court's authority on remand.

PARTIES

All parties to this case are listed in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit is published at 527 F.3d 231 and is reproduced in the appendix ("Pet. App.") at 1–17. This decision will be referred to as "*Cruzado III*." The United States Court of Appeals for the First Circuit has issued two previous published opinions in this case. The first, *United States v. Cruzado-Laureano*, 404 F.3d 470 (1st Cir. 2005) ("*Cruzado I*"), is reproduced at Pet. App. 18–62. The second, *United States v. Cruzado-Laureano*, 440 F.3d 44 (1st Cir. 2006) ("*Cruzado II*"), is reproduced at Pet. App. 63–76. The transcript of the district court's resentencing hearing, conducted on April 26, 2006, is reproduced at Pet. App. 77–117.

JURISDICTION

The United States Court of Appeals for the First Circuit filed its opinion on June 4, 2008. Mr. Cruzado sought and was granted an extension of time to file this petition until October 2, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The text of 28 U.S.C. § 2106 and 18 U.S.C. § 3553(a) are set out in the statutory appendix at Pet. App. 118–20.

STATEMENT OF THE CASE

The courts of appeals reverse sentences in hundreds of criminal cases every year. Just about every one of these cases presents the possibility on remand that either the defendant or the Government will ask the district court to consider facts, evidence, or argument relating to issues other than the ones that formed the basis of the appellate court's reversal. The circuits are hopelessly split over whether the district court has the power to consider such issues or evidence, where (as is almost invariably the case) the court of appeals does not expressly limit the district court's authority in the opinion reversing the sentence.

The issue has percolated for two decades. Every regional circuit has weighed in on the question, and staked out a position on one side or another, yielding a 7-5 split. The split is acknowledged, longstanding, and intractable. Only this Court can resolve it.

The Criminal Charges Against Mr. Cruzado

In 2001, Mr. Cruzado was elected mayor of Vega Alta, Puerto Rico. Pet. App. 19. While he was in office, the Government charged him with several crimes. *Id.* He was ultimately convicted of several counts of theft concerning programs receiving federal funds, witness tampering, extortion and attempted extortion, and money laundering. *See* 18 U.S.C. §§ 666, 1512, 1951, 1956; Pet. App. 19.

Many of the charges arose out of Mr. Cruzado's role as the chairman of a nonprofit organization in charge of preparations for a Puerto Rican Day Parade. Pet. App. 24–26. The Government alleged that he extorted or attempted to extort money from

several people, based on his request that the leftover funds be transferred to him so that he could return them to donors, as opposed to having the nonprofit return the funds directly to donors. Pet. App. 25–26. The Government alleged that instead of returning the funds, Mr. Cruzado deposited the money in bank accounts he controlled or cashed checks at a check-cashing business he previously owned. Pet. App. 26. The Government similarly alleged that he kept for himself funds that should have been returned to Vega Alta. Pet. App. 21. This conduct provided the basis for the Government's money laundering counts. *Id.* The Government also eventually charged Mr. Cruzado with witness tampering as a result of his contact with some of the witnesses who testified against him. Pet. App. 35.

The district court sentenced Mr. Cruzado to 63 months of imprisonment and 3 years of supervised release, at the top of the range permitted by the United States Sentencing Guidelines ("U.S.S.G."). Pet. App. 3. It also imposed a fine of $10,000, even though the Presentence Report ("PSR") reported that Mr. Cruzado did not have the resources with which to pay the fine. *See id.* Finally, the district court imposed restitution in the amount of $14,252, over Mr. Cruzado's objection and without conducting a hearing on restitution. *See id.*

The Three Appeals

This case bounced back and forth between the district court and the court of appeals for several years. This petition arises from the third appeal.

The First Appeal: Cruzado I. In the first appeal, Mr. Cruzado appealed both his conviction

and his sentence. *Id.* The First Circuit affirmed the conviction, but remanded the case for resentencing because the district court had used the incorrect version of the Guidelines. *Id.*

On remand, Mr. Cruzado objected to the PSR's calculation of the sentence range (63–78 months). Among other challenges, he claimed that the sentencing range should not be increased for "abuse of a position of trust" under U.S.S.G. § 2C1.1, because the range for the extortion charges already included this factor. Pet. App. 73–76. Thus, taking this factor into consideration again was impermissible double counting. Pet. App. 75–76. He contended that the appropriate sentencing range was 41 to 51 months. He likewise filed a motion detailing why restitution should not be imposed. Because the PSR itself had concluded that he did not have the ability to pay a fine, Mr. Cruzado presented no objections regarding a fine in advance of the sentencing.

Despite these objections and the recommendations of the PSR, the district court computed the sentencing range to be from 63 to 78 months, and sentenced Mr. Cruzado to 63 months. Pet. App. 3. The court once again imposed restitution in the same amount it had imposed earlier—$14,252. *Id.* The court also reimposed a fine of $10,000, even though the PSR documented that Mr. Cruzado could not pay the fine—and, indeed, he was proceeding in forma pauperis. *Id.*

The Second Appeal: Cruzado II. Mr. Cruzado again appealed his sentence, pressing the same points he had pressed before the district court. Pet.

App. 70–76. The First Circuit agreed with him and concluded that the increase in the sentencing range for abuse of a position of trust was erroneous because the factor was already included as part of the extortion offense. Pet. App. 73–76.

As to the fine, Mr. Cruzado argued that it was erroneously imposed because the PSR, the only document apparently considered by the sentencing court, had concluded that a fine was inappropriate. Further, Mr. Cruzado argued that the fine, as well as the term of supervised release, was an integral part of the punishment, and thus should be considered by the sentencing court again if the case was remanded. Mr. Cruzado also made a brief, but clear argument that restitution was improper. He specifically referenced the arguments presented to the district court in his briefing on this issue.

Instead of considering his arguments relating to the fine and restitution on the merits, the First Circuit concluded that these arguments were not sufficiently presented. Pet. App. 70 n.7. The First Circuit remanded again for resentencing, stating that "[t]he sentence imposed by the district court is ***vacated*** and the case is ***remanded*** for resentencing." Pet. App. 76. The language of the First Circuit's opinion did not suggest that the district court was simply to recalculate the sentence absent the abuse of a position of trust as a factor. Instead, it offered only the following direction: "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." *Id.*

On the second remand, Mr. Cruzado sought to present testimony from ten witnesses relating to various issues, ranging from restitution, to Mr. Cruzado's character, to whether Mr. Cruzado was a victim of malicious prosecution. All of these witnesses would have presented information Mr. Cruzado felt the district court "should take into consideration" when it determined how to sentence him.[1] Pet. App. 82–87.

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[1] Had the district court permitted, Mr. Cruzado would have presented testimony from: (1) the F.B.I. agent who handled the investigation to demonstrate a factual basis for malicious prosecution; (2) Dr. Gonzalez, to demonstrate the he was not the victim of extortion and never felt threatened by Mr. Cruzado, and to demonstrate Mr. Cruzado's character; (3) Mr. Angel Castillo, the head of the office of Municipal Affairs for Vega Alta, to demonstrate that no money was due to Vega Alta from Mr. Cruzado; (4) Mr. Orlando Ramirez, the former President of the Legislative Assembly of Vega Alta, also to demonstrate that no money was due to Vega Alta from Mr. Cruzado; (5) Mr. Jose Colon Garcia, former secretary and major of the City of Vega Alta; (6) Ms. Lillian Alonso to demonstrate that restitution was improper, that she did not feel extorted by Mr. Cruzado, and to testify regarding his character; (7) Mr. Benjamin Declet, the director of finance of Vega Alta, to demonstrate that Mr. Cruzado did not owe any money to Vega Alta; (8) Mrs. Marilyn Garcia, to testify as to Mr. Cruzado's character and the fact that he did not owe any money to Vega Alta; (9) Mr. Ernesto Ortega, to testify as to the fact that he asked Mr. Benjamin Declet to make a claim for restitution for Vega Alta; and (10) Mr. Manuel Saldaña, Comptroller of the Commonwealth of Puerto Rico, to testify regarding an audit of the finances of Vega Alta for the year 2001 that would show that Mr. Cruzado did not owe any money to Vega Alta.

The district court rejected virtually all the testimony proffered on the ground that the testimony related to issues that were "foreclosed." Pet. App. 88; *see also* Pet. App. 90 (stating that the court did not consider many of the issues that Mr. Cruzado wished to raise "open at this stage of the proceeding"). The court concluded that "[t]he only issue before the Court is where within the range of 51 to 63 I should proceed to sentence this defendant. Nothing else." Pet. App. 90. In sum, the district court felt constrained by First Circuit precedent that ordinarily prohibits a lower court from exercising its discretion to consider on remand an issue that was not the basis for the reversal. Pet. App. 6.

The court sentenced Mr. Cruzado to the top of the newly calculated sentencing range of 51 to 63 months. Pet. App. 4. The court likewise imposed the same fine and restitution, again without considering the fact that the PSR concluded that Mr. Cruzado lacked the ability to pay the fine and after refusing to hear the witnesses who would have testified that Mr. Cruzado did not owe money to Vega Alta in restitution. *Id.*

The Third Appeal: Cruzado III. Mr. Cruzado appealed to the First Circuit again. *Id.* Among other challenges to his sentence, Mr. Cruzado argued that the district court should have been permitted to hear issues unrelated to the recalculation of the sentencing range required by the last remand. Pet. App. 5–6. He acknowledged that First Circuit precedent authoritatively rejected this argument, but he was preserving the issue for this Court's review. Pet. App. 6. Mr. Cruzado discussed the

witnesses he had intended to call and the issues their testimony would have supported. Pet. App. 4.

The Court of Appeals adhered to its precedent that the district court lacked the authority to consider any issues not specifically addressed by the appellate decision remanding for resentencing. Pet. App. 6. Applying the precedent, the court concluded that it would have been improper for the district court to consider Mr. Cruzado's evidence regarding the various sentencing issues he sought to raise—including the propriety of the restitution and the fine, whether Mr. Cruzado had been subjected to malicious prosecution, and the impact of the crime on its victims. Pet. App. 6–8. The sole reason the Court of Appeals gave for putting those issues off limits was that the issues were "unrelated to the abuse-of-trust issue and had no relationship to the issue before the court on remand—the appropriate length of the sentence under the Guidelines." Pet. App. 7.

In so ruling the Court of Appeals acknowledged that its rule conflicts with decisions of other circuits. Pet. App. 6 ("Although some circuits do generally allow de novo resentencing on remand, . . . the First Circuit does not." (citing, as contrary authority, *United States v. Duso*, 42 F.3d 365, 368 (6th Cir. 1994); *United States v. Smith*, 930 F.2d 1450, 1456 (10th Cir. 1991))).

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for three reasons. First, the question presented—regarding the default rule about the district court's power to

consider issues it determines to be relevant to resentencing—has left the circuits hopelessly split for two decades. *See infra* Point I. Second, this is an issue of national importance. It affects hundreds of cases each year, and the differential treatment of similarly situated criminal defendants violates the imperative to treat like defendants the same. *See infra* Point II. Third, the minority rule adopted by the First Circuit is wrong: It undermines the discretion due to the district court in sentencing decisions, which this Court has recognized is an area of institutional strength of the district court; it is inconsistent with statutory rules guiding that discretion; and it promotes ancillary litigation over what issues are sufficiently related to the error identified by the remanding court. *See infra* Point III.

I. THE COURTS OF APPEALS HAVE LONG BEEN HOPELESSLY SPLIT ON THE DEFAULT RULE ABOUT THE EXTENT OF A DISTRICT COURT'S DISCRETION IN RESENTENCING TO CONSIDER ISSUES OUTSIDE THE SCOPE OF THE REMANDING COURT'S OPINION.

Splits do not get any more intractable or mature than this one. Every regional circuit has addressed the question, and they have split 7-5. The majority rule is that a district court has authority to consider any issues not specifically foreclosed by the court of appeals' opinion when a case is remanded for resentencing. The minority rule is the one the First Circuit applied in this case, that a district court ordinarily lacks authority to consider any issues

other than those specifically made relevant by the court of appeals' decision even when the remanding court's opinion does not expressly restrict the lower court's authority. Courts have acknowledged the split, and have only become further entrenched over the course of two decades. Only this Court can resolve the dispute.

A. Seven Circuits Have Held That District Courts Have Authority to Consider Any Issue Not Specifically Foreclosed by the Remanding Court's Decision.

The majority of the courts of appeals have concluded that the district court may consider any issue not expressly foreclosed by the remanding court's opinion. That is the rule in seven circuits: the Second, Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits.[2]

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[2] ***Second Circuit:*** *United States v. Atehortva*, 69 F.3d 679, 685 (2d Cir. 1995) (holding that, on resentencing, "the court was free to consider grounds for departure it had not contemplated in the first sentencing proceeding" because "the resentencing proceeding was appropriately treated as a de novo sentencing, for the remand did not specifically limit the scope of resentencing"); *United States v. Sanchez Solis*, 882 F.2d 693, 699 (2d Cir. 1989). ***Fourth Circuit:*** *United States v. Broughton-Jones*, 71 F.3d 1143, 1149 n.4 (4th Cir. 1995) (holding that unless specifically limited by the remanding court's mandate, resentencing may proceed *de novo*, "constrained only by the constitutional bar against vindictiveness" (citing *United States v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993)). ***Sixth Circuit:*** *United States v. Jennings*, 83 F.3d 145, 151 (6th Cir. 1996) (holding that "[o]n remand, the only constraint under which the District Court must operate, for the purposes of resentencing, is the remand order itself. Where the

The rule dates back nearly two decades, when the Second Circuit confronted the issue in *Sanchez Solis*.

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remand does not limit the District Court's review, sentencing is to be *de novo*[, and a district court] err[s]" in refusing to consider issues raised by the defendant on resentencing); *United States v. Crouse*, 78 F.3d 1097, 1100 (6th Cir. 1996); *Duso*, 42 F.3d at 368 (resentencing is not limited unless "the remand [is] a limited one"); *United States v. Moored*, 38 F.3d 1419, 1422 (6th Cir. 1994) (stating that the district courts have "broad discretion . . . to reconsider sentencing factors on a sentencing remand"). ***Eighth Circuit:*** *United States v. Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992) ("Once a sentence has been vacated or a finding related to sentencing has been reversed and the case has been remanded for resentencing, the district court can hear any relevant evidence on that issue that it could have heard at the first hearing." (citing *Smith* and *Sanchez Solis*)). ***Ninth Circuit:*** *United States v. Klump*, 57 F.3d 801, 803 (9th Cir. 1995) (holding that "[g]enerally, a court may take into account at resentencing 'any evidence relevant to sentencing'" and the "general rule" is "that resentencing is de novo" (quoting *United States v. Caterino*, 29 F.3d 1390, 1394 (9th Cir. 1994); other internal citation omitted); *United States v. Ponce*, 51 F.3d 820, 826 (9th Cir. 1995) ("On remand, the district court may consider any matter relevant to the sentencing. A district court may not, however, begin anew following a limited remand." (internal citations omitted)). ***Tenth Circuit:*** *United States v. Ortiz*, 25 F.3d 934, 935 (10th Cir. 1994) (absent a remand that is "narrowly confined" to specific issues, the district court has authority to hear "any relevant evidence the court could have heard at the first sentencing hearing"); *Smith*, 930 F.2d at 1456 (holding that when a sentence is vacated and remanded, "[s]uch an order directs the sentencing court to begin anew, so that 'fully *de novo* resentencing' is entirely appropriate"). ***Eleventh Circuit:*** *United States v. Cochran*, 883 F.2d 1012, 1017 (11th Cir. 1989) ("Once the court nullified the thirty year sentences, they were void in their entirety. . . . The district judge was free to reconstruct Cochran's punishment . . . .").

There, the rule redounded to the benefit of the *Government*, and not the defendant, for it was the *prosecution* that was seeking to introduce new information on remand. In remanding for resentencing, the Second Circuit anticipated and rejected the argument that the Government should be precluded from requesting that the district court consider new sentencing enhancements. The Second Circuit concluded that "in the interests of truth and fair sentencing a court should be able on a sentence remand to take new matter into account on behalf of either the Government or the defendant." 882 F.2d at 699.

Other courts have embellished on this logic in the intervening decades. The majority rule, courts have held, respects the "holistic nature of the trial judge's sentencing decision" and allows the district court to craft a "sentencing scheme which takes into consideration the total offense characteristics of a defendant's behavior." *United States v. Rosen*, 764 F.2d 763, 767 (11th Cir. 1985). The majority rule is a natural extension of the notion that post-sentencing conduct may be considered at resentencing because "the sentencing court [is] required to assess the defendant as he stood before the court at that time." *United States v. Green*, 152 F.3d 1202, 1207 (9th Cir. 1998) (internal quotation marks omitted).

In keeping with this philosophy, the courts that follow the majority rule presume that an appellate court's "practice is to vacate the entire sentence and remand for resentencing." *Ponce*, 51 F.3d at 826. Thus, "[s]ubsequent appellate panels presume that this general practice was followed unless there is

clear evidence to the contrary." *Id.* at 826 (internal quotation marks omitted).

In adopting the majority rule, the courts in the majority camp have rejected various arguments that recur when parties seek to limit the scope of the district court's authority on remand. First, they reject arguments grounded in prejudice: "The defendant is accorded the same procedural rights on resentencing as on the initial sentencing. Therefore, no prejudice results from the reconsideration of the sentencing factors under the guidelines." *Smith*, 930 F.2d at 1456 (internal citations omitted).

Second, they reject the argument that the law of the case doctrine limits the district court's authority on remand. This doctrine only "precludes revisitation of an issue where: (a) the issue was expressly or impliedly decided on appeal, or (b) the appellate court's mandate to the lower court is so narrow in scope as to preclude the district court from considering the issue." *Crouse*, 78 F.3d at 1100. Thus, as the Tenth Circuit has held, the doctrine is "inapposite, given this court's vacation of [the] initial sentence." *Smith*, 930 F.2d at 1456; *see also Crouse*, 78 F.3d at 1100 (holding that "the law of the case doctrine does not directly apply to resentencing").

Finally, courts have rejected the notion that the majority rule is overly favorable to defendants. It is just not fair to assert "that defendants who are granted departures based on post-sentencing behavior receive unfair treatment because they are 'lucky enough' to be resentenced. . . . [D]efendants who are resentenced are resentenced because they received illegal sentences, not because of some

random or fortuitous event." *Green*, 152 F.3d at 1207 (internal quotation marks omitted). Moreover, as the Sixth Circuit has explained, the defendant must take a "calculated risk" when deciding whether to appeal a sentence. Nothing prevents "a district judge from revisiting the entire sentencing procedure unless restricted by the remand order," thus an appeal may result in a "Pyrrhic victory" because a higher sentence could result. *Duso*, 42 F.3d at 368; *see also Atehortva*, 69 F.3d at 685–86 (noting that, when a defendant appeals his sentence, "the defendant assumes the risk of undoing the intricate knot of calculations should he succeed" and "[o]nce this knot is undone, the district court must sentence the defendant de novo and, if a more severe sentence results, vindictiveness will not be presumed"). And besides, as *Sanchez Solis* and other cases illustrate, the rule applies with equal force to the Government and the defendant alike.

B. Five Other Circuits Have Concluded That District Courts Lack the Discretion to Consider Any Issues Not Expressly Authorized by the Remanding Court's Opinion, Even Absent Specific Instructions From the Remanding Court Limiting the District Court's Authority.

Five other circuits have explicitly rejected the majority view, and held that a district court lacks discretion to address any issues not specifically authorized by the remanding court's opinion, even when the remanding court's mandate contains no

explicit limitation. This rule is applied in the First, Third, Fifth, Seventh, and D.C. Circuits.[3]

The Seventh Circuit was among the first to break with the majority rule. *See United States v. Polland*, 56 F.3d 776 (7th Cir. 1995). Previous Seventh Circuit precedent had "indicated that the vacation of a sentence results in a 'clean slate' and allows the district court to start from scratch." *Id.* at 777 (citing *United States v. Atkinson*, 979 F.2d 1219,

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[3] ***First Circuit:*** *United States v. Ticchiarelli*, 171 F.3d 24, 32 (1st Cir. 1999) (holding "that 'upon a resentencing occasioned by a remand, unless the court of appeals [has expressly directed otherwise], the district court may consider only such new arguments or new facts as are made newly relevant by the court of appeals' decision—whether by the reasoning or by the result'" (quoting *United States v. Whren*, 111 F.3d 956, 960 (D.C. Cir. 1997))). ***Third Circuit:*** *United States v. Giraldo*, 52 Fed. Appx. 584, 587–88 (3d Cir. 2002) ("Our decision, vacating the original sentence, pertained to the quantities of drugs attributable to Giraldo and did not breathe life into [issues not relating to drug quantity]. We agree with the District Court that, under the circumstances presented, Giraldo's [attempt to introduce new issues] came too late and, as a result, he waived his ability to [raise those issues]."). ***Fifth Circuit:*** *United States v. Marmolejo*, 139 F.3d 528, 531 (5th Cir. 1998) (holding that "[t]he only issues on remand properly before the district court are those issues arising out of the correction of the sentence ordered by this court. In short, the resentencing court can consider whatever this court directs—no more, no less"). ***Seventh Circuit:*** *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996) (Posner, J.). ***D.C. Circuit:*** *Whren*, 111 F.3d at 960 (holding "that upon a resentencing occasioned by a remand, . . . the district court may consider only such new arguments or new facts as are made newly relevant by the court of appeals' decision—whether by the reasoning or by the result").

1223 (7th Cir. 1992); *United States v. Barnes*, 948 F.2d 325, 330 (7th Cir. 1991)). But the court, in a seeming reversal of position, has since held that this would not be the norm in the Seventh Circuit. "[T]here may be occasions when justice requires, once we have found error, the district court to revisit *de novo* the entire sentencing calculus," the court opined. *Id.* at 778–79. But in most circumstances the district court's authority is limited. *Id.* Thus, in the Seventh Circuit, the rule is that "[i]f the [remanding court's] opinion identifies a discrete, particular error that can be corrected on remand without the need for a redetermination of other issues, the district court is limited to correcting that error," and all other issues should be considered waived. *Parker*, 101 F.3d at 528.

The Fifth Circuit, too, changed positions from the majority view to the minority. In an early case, the court criticized a district court that, upon resentencing, had limited the Government to information already in the record. The court opined, "We seek justice and truth and therefore do not preclude the introduction of information that is helpful in determining a proper sentence." *United States v. Kinder*, 980 F.2d 961, 963 (5th Cir. 1992). In keeping with this principle, the court held that "a district court may conduct an inquiry broad in scope, largely unlimited . . . as to the kind of information it may consider," and "should be able on a sentence remand to take new matter into account on behalf of either the government or the defendant" "[i]n the interest of truth and fair sentencing." *Id.* (internal quotation marks and citations omitted)

But just a few short years later, the Fifth Circuit reversed course: "This court specifically rejects the proposition that all resentencing hearings following a remand are to be conducted *de novo* unless expressly limited by the court in its order of remand." *Marmolejo*, 139 F.3d at 531. To the contrary, "[t]he only issues on remand properly before the district court are those issues arising out of the correction of the sentence ordered by this court. In short, the resentencing court can consider whatever this court directs—no more, no less." *Id.*

As a general matter, this minority position recognizes only two exceptions to this rule: (1) if "the court of appeals expressly directs otherwise," or (2) if the defendant raises a new "objection to the sentence [that] is based upon an error so plain that the district court or the court of appeals should have raised it for him." *Whren*, 111 F.3d at 960, 957; *see also Ticchiarelli*, 171 F.3d at 29 (exceptions for situations of "a blatant error that causes serious injustice" (internal quotation marks omitted)); *United States v. Stern*, 13 F.3d 489, 498 (1st Cir. 1994) (exception where a party has not had the opportunity to introduce evidence relevant to a "newly announced rule").

The circuits adopting the minority view have grappled with, and expressly rejected, the arguments in favor of the majority view. First, whereas the courts that subscribe to the majority view reject any notion that defendants who are resentenced should consider themselves "lucky," *Green*, 152 F.3d at 1207, the courts in the minority camp conclude that "[a] party cannot use the accident of a remand to raise in a second appeal an

issue that he could just as well have raised in the first appeal because the remand did not affect it," *Parker*, 101 F.3d at 528.

Second, the minority view is based on the concern that an alternative rule will encourage defendants to game the system: "*De novo* resentencing is in essence a license for the parties to introduce issues, arguments, and evidence that they should have introduced at the original sentencing hearing." *Whren*, 111 F.3d at 959–60. The minority, therefore, subscribes to a rule "requiring the parties to raise all relevant issues at the original sentencing hearing" on the basis of "equity and efficiency." *Id.* This position is in stark contrast to the majority view that "'front-loading'" of issues "would unnecessarily increase the burden on district courts and" the courts of appeals. *Jennings*, 83 F.3d at 151.

Third, in contrast to the majority view, some courts have supported the minority rule by invoking the law of the case doctrine, *see Ticchiarelli*, 171 F.3d at 28, or notions of waiver, *see Giraldo*, 52 Fed. Appx. at 587–88 ("under the circumstances presented," the defendant's attempt to introduce new issues "came too late and, as a result, he waived his ability to" raise those issues).

* * *

As is evident from the foregoing discussion, the courts of appeals are not only split, but they explicitly acknowledge the split, as the First Circuit did in this very case. Pet. App. 6 ("Although some circuits do generally allow de novo resentencing on remand, the First Circuit does not." (citing *Duso*, 42 F.3d at 368 and *Smith*, 930 F.2d at 1456)). As much

as a decade ago, the Fifth Circuit observed that "[t]he issue involving the scope of a remand for resentencing has caused a *significant split in the circuits*." *Marmolejo*, 139 F.3d at 530 (emphasis added). Courts have identified (as this petition does) a "majority view among the circuits" and a "minority view." *Id.*; *see also Whren*, 111 F.3d at 959 (tallying up cases on either side of the split, before siding with the minority view). The Government, for its part, has "correctly assert[ed] that the *federal courts of appeals are divided* on the question of whether, following a remand after appeal, a defendant waives issues he could have but did not raise in a prior proceeding." *Giraldo*, 52 Fed. Appx. at 587 (emphasis added).

The split is longstanding, and it is intractable. The circuits are not going to realign and reach a unanimous view. Only this Court can bring uniformity.

II. THE ISSUE PRESENTED IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT IMPLICATES HUNDREDS OF CASES EACH YEAR.

Consistent treatment of similarly situated criminal defendants is one of the basic aspirations of this country's criminal justice system. *See* 18 U.S.C. § 3553(a)(6) (noting "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" as one of seven factors to be considered by a district court in imposing a sentence). Yet the split in the circuits on the issue of the scope of remand for resentencing undermines that aspiration by

subjecting similarly situated criminal defendants to different rules depending upon the circuit in which their case arises.

The courts of appeals hear thousands of criminal appeals each year. *See* Administrative Office of the United States Courts, *2007 Annual Report of the Director: Judicial Business of the United States Courts* at Table S-6 (2008) (reporting that the number of criminal appeals filed in the courts of appeals during the period of 2003 to 2007 ranged from 11,968 to 16,060). Virtually every criminal appeal involves a challenge to the sentence. *Id.* (reporting that the number of cases during the same period that challenged just the conviction ranged from 710 to 1,104). Both before and after *United States v. Booker*, 543 U.S. 220 (2005), the courts of appeals continue to hear thousands of appeals of sentences involving the U.S.S.G. each year. *2007 Annual Report of the Director* at Table S-6. And, although courts of appeals often affirm criminal appeals, last year alone the courts of appeals reversed or remanded over 850 criminal cases. *Id.* at Table B-5 (reporting that the courts of appeals collectively reversed or remanded 856 criminal cases during the 12-month period from September 2006 to September 2007).[4]

Every time a court of appeals remands a case for resentencing, the district court must assess the

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[4] A search of court of appeals opinions on Westlaw that include the terms "reverse" or "remand" and "resentence" in the digest, holding, or synopsis fields generated 858 results for the time period between January 2007 and September 2008.

extent of its power to conduct that resentencing. Thus, resolving the split among the circuits as to the scope of a district court's power on remand for resentencing would clarify the issue for district courts in hundreds of cases each year. The Court should grant this petition to provide adequate guidance on this novel and important question of federal law.

III. THE MINORITY RULE APPLIED BY THE FIRST CIRCUIT HERE NEEDLESSLY UNDERMINES THE DISCRETION THAT IS APPROPRIATELY EXERCISED BY THE DISTRICT COURTS IN CONDUCTING SENTENCING HEARINGS AND PROMOTES ANCILLARY LITIGATION REGARDING WHAT THE DISTRICT COURT MAY CONSIDER.

This Court should also grant review because the minority rule that the First Circuit followed in this case is fundamentally flawed.

First, the minority rule needlessly restricts the discretion of the district court on resentencing. This Court has increasingly recognized that the district court is in the best position to make determinations regarding appropriate sentencing. In *Booker*, this Court held that district courts may not be bound to follow the U.S.S.G. Instead, as an acknowledgement of the discretion that district courts exercise in fashioning an appropriate sentence, this Court concluded that the U.S.S.G. must be treated as "effectively advisory." 543 U.S. at 245. Courts of appeals, post-*Booker*, have the power to review the

decisions of district courts in this regard only for "reasonableness." *Id.*

Both *Booker* itself and the Court's subsequent opinion in *Kimbrough v. United States*, 128 S. Ct. 558 (2007), rested in part on an assessment of the institutional strengths of the district courts.

> The sentencing judge . . . has "greater familiarity with . . . the individual case and the individual defendant before him than the [United States Sentencing] Commission or the appeals court." He is therefore "in a superior position to find facts and judge their import under § 3553(a)" in each particular case.

Id. at 574–75 (internal citations omitted); *see also Koon v. United States*, 518 U.S. 81, 98 (1996) (noting that "[d]istrict courts have an institutional advantage over appellate courts" in sentencing).

The minority rule that automatically restricts a district court's discretion in resentencing, even without any explicit limitation by the remanding court, intrudes on an area of the district court's special expertise. The rule serves no useful purpose because, if the court of appeals concluded in any particular case that it was important for some reason to restrict the discretion of the district court, it could include specific instructions in its opinion. But the minority rule, by providing a default rule even absent specific instructions, restricts the district court's discretion in all cases automatically, whether or not that is appropriate. Thus, the courts of appeals that follow the minority rule, by expanding their own authority at the expense of the

district courts in an area in which the district courts are uniquely positioned to make superior decisions, have adopted a rule that is both in tension with the principles recognized in *Booker*, *Kimbrough*, and like cases and serves no useful purpose.

Second, the minority rule is also inconsistent with the text and policy of 18 U.S.C. § 3553(a). This section guides the discretion of the district court in fashioning an appropriate sentence designed to "reflect the seriousness of the offense, . . . promote respect for the law, . . . provide just punishment, . . . afford adequate deterrence, . . . protect the public . . . and . . . provide the defendant with needed" educational, vocational, or medical services. *Id.* § 3553(a)(2). Section 3553(a) requires a district court to consider several factors when sentencing, including "the nature and circumstances of the offense," "the history and characteristics of the defendant," and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(1), (6).

By automatically cabining the district court's discretion on resentencing to only those issues made relevant by the remanding court's opinion, the minority rule is inconsistent with both the text and the purpose of § 3553(a). Section 3553(a) *requires* the district court to consider the enumerated factors in order to fashion an appropriate sentence. *Id.* § 3553(a) (stating that the district court "shall consider" the enumerated factors). As courts have recognized, some of these factors are not static. Factors like "the history and characteristics of the defendant" and "the need to avoid unwarranted

sentence disparities among defendants with similar records who have been found guilty of similar conduct" may change over time. *Id.* § 3553(a)(1), (6). The majority rule, in contrast, consistent with the statute, permits the district court to assess the factors in § 3553(a) at the time of the resentencing. Indeed, courts adopting the majority rule have specifically noted that it allows the district court to consider post-sentencing conduct. *Green*, 152 F.3d at 1207 (noting that post-sentencing conduct should be considered because "the sentencing court was required to assess the defendant as he stood before the court at that time" (internal quotation marks omitted)).

Third, the minority rule is likewise flawed because it promotes ancillary litigation regarding whether an issue is sufficiently related to the remanding court's decision to be addressed on resentencing. As this case and the others discussed above demonstrate, the minority rule promotes additional litigation regarding the scope of the district court's authority on remand as the parties and the courts struggle to determine what issues have been "made relevant" by the remanding court's opinion.

CONCLUSION

For each of these reasons, this Court should grant a writ of certiorari to review the Court of Appeals' judgment.

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