No. 02-1225

In the Supreme Court of the United States

JACK WILLIAM TOCCO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals may adopt a rule that resentencing on remand is de novo unless the remand order limits its scope.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-32a) is reported at 306 F.3d 279. The opinion of the district court (Pet. App. 33a-92a) is unreported. The earlier opinion of the court of appeals (Pet. App. 93a-156a) is reported at 200 F.3d 401.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2002. A petition for rehearing was denied on November 19, 2002. Pet. App. 1a. The petition for a writ of certiorari was filed on February 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of two counts of racketeering conspiracy, in violation of 18 U.S.C. 1962(d), and one count of Hobbs Act conspiracy, in violation of 18 U.S.C. 1951. He was sentenced to a prison term of a year and a day. The court of appeals affirmed the convictions but vacated the sentence and remanded for resentencing. On remand, the district court sentenced petitioner to a prison term of 34 months. The court of appeals again vacated the sentence and remanded for resentencing.

1. For 20 years, petitioner was the "Boss" of the Detroit family of the Mafia. He participated in illegal activities of various types, including extortion, illegal lotteries, bookmaking, loansharking, and acquiring undisclosed investments in gambling casinos. In 1996, petitioner and 16 others were charged in a 25-count indictment alleging crimes related to those activities. Petitioner was charged with 13 crimes: a Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy based on a pattern of racketeering activity (Count One); a RICO conspiracy based on collection of an unlawful debt (Count Two); a Hobbs Act conspiracy based on extortion (Count Six); and ten counts of extortion or attempted extortion. In 1998, after a three-month trial, petitioner was convicted of the two RICO conspiracies and the Hobbs Act conspiracy. He was acquitted on the other charges. Pet. App. 3a-4a, 94a-95a.

The district court sentenced petitioner to a prison term of a year and a day, to be followed by two years of supervised release, and a fine of $94,447.32. His sentence was based on an offense level of 12. The district

court found that petitioner's base offense level was 19 under the guideline for racketeering crimes and added three levels under the grouping rules. The court then departed downward by ten levels, based on petitioner's community service, his age and poor health, and his wife's poor health. Pet. App. 4a-5a, 135a-136a.

2. The court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing. Pet. App. 94a-156a. Under Sentencing Guidelines § 2E1.1(a), the base offense level for a RICO offense is the greater of 19 or the offense level applicable to the underlying racketeering activity. The court of appeals held that the district court had erred in using a base offense level of 19 without making any findings "as to what criminal activities were in furtherance of the [RICO] conspiracy and what activities were reasonably foreseeable [to petitioner]." Pet. App. 143a. The court accordingly instructed the district court to determine on remand "which underlying offenses may properly be attributable to [petitioner] for purposes of sentencing him under § 2E1.1" (*ibid.*), and, in the event that it finds the extortion guideline applicable, to "reconsider whether any enhancements under that guideline would apply" (*id.* at 145a). The court also held that the district court had clearly erred in not imposing a three-level supervisory-role enhancement, and directed the district court to apply the enhancement on remand. *Id.* at 145a-146a. As for the downward departure, the court held that the district court had not made sufficiently particularized findings to support the departure on any of the three grounds on which it relied, and it instructed the district court to reconsider each ground. *Id.* at 146a-155a.

3. On remand, the district court sentenced petitioner to 34 months' imprisonment, to be followed by two

years of supervised release, and reimposed a fine of $94,447.32. The new sentence was based on an offense level of 20. The district court used a base offense level of 18 for the Hobbs Act conspiracy, and added three levels for petitioner's supervisory role and three levels under the grouping rules. It then departed downward by four levels, based on petitioner's community service, but declined to depart on any other ground. As it had at petitioner's initial sentencing, the court found that the base offense level for the RICO conspiracy charged in Count One was 19, the guideline minimum, because the only underlying racketeering activity found by the court had lower offense levels. Pet. App. 6a, 84a-92a.

4. The court of appeals again vacated the sentence and remanded for resentencing. Pet. App. 2a-32a.

The court held that the district court had improperly calculated the offense level for the Count One RICO conspiracy offense. Pet. App. 8a-25a. In particular, the court held that the district court had clearly erred in not finding that petitioner had committed two underlying racketeering offenses; had clearly erred in failing to impose a four-level leadership-role enhancement in calculating the offense level for a racketeering offense that the district court found petitioner did commit; and had erred in failing to consider whether petitioner had committed other racketeering offenses. *Id.* at 10a, 11a-16a, 18a-23a. Relying on Sentencing Guidelines § 1B1.2(d), which provides that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit," the court of appeals also held that the district court had failed to consider petitioner's responsibility for the various acts of extortion listed in the Hobbs Act con-

spiracy count. Pet. App. 25a-28a. The court therefore remanded the case for the district court to "recalculate [petitioner's] Count 1 RICO conspiracy base offense level and his Count 6 Hobbs Act conspiracy offense level." *Id.* at 31a.

The court of appeals rejected petitioner's claim that the district court had exceeded the scope of the previous remand in resentencing him. Pet. App. 28a-29a. The court agreed with petitioner that the remand was "limited" (*id.* at 28a), but did not agree that the limitations it imposed prevented the district court from "assess[ing] * * * underlying racketeering activity for the purpose of calculating [petitioner's] Count 1 RICO conspiracy base offense level" or from "assess-[ing] * * * appropriate bases for downward departure" (*id.* at 29a). On the contrary, the court explained, the previous opinion directed the district court to determine which underlying racketeering offenses should be attributed to petitioner and to reconsider its decision to depart. *Id.* at 29a-30a. Quoting *United States* v. *Campbell*, 168 F.3d 263, 265 (6th Cir.), cert. denied, 528 U.S. 882 (1999), the court explained that "[g]eneral remands * * * give district courts authority to address all matters as long as remaining consistent with the remand," while "limited remands explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate." Pet. App. 29a. In *Campbell*, the Sixth Circuit applied its rule that "a district court can review sentencing matters de novo unless the remand specifically limits the lower court's inquiry." 168 F.3d at 265.

ARGUMENT

Petitioner points to a disagreement among the courts of appeals on whether resentencing after a remand is presumptively de novo or presumptively limited to correction of the errors found on appeal. Pet. 6-9. He asks the Court to grant certiorari and establish a presumption of limited resentencing. Pet. 11-14. For two independent reasons, this is not an appropriate case for the Court to adopt a rule concerning the scope of resentencing. First, in the decision of which petitioner seeks review, the court of appeals again remanded the case to the district court, and this Court ordinarily does not review interlocutory decisions. Second, because the court of appeals specified in its first opinion that resentencing was to be limited, the result would be the same no matter what default rule the Court established. This Court has repeatedly declined to grant review in cases presenting the question raised by petitioner, see *Hass* v. *United States*, 531 U.S. 812 (2000) (No. 99-1694); *Harris* v. *United States*, 525 U.S. 1148 (1999) (No. 98-6358); *Marmolejo* v. *United States*, 525 U.S. 1056 (1998) (No. 98-5372); *Whren* v. *United States*, 522 U.S. 1119 (1998) (No. 97-6220), and there is no reason for a different result here.[1]

1. In the decision petitioner asks this Court to review, the court of appeals again vacated petitioner's sentence and remanded the case to the district court for resentencing. The decision is therefore interlocutory, a posture that "of itself alone furnishe[s] sufficient ground" for the denial of certiorari. *Hamilton-Brown*

[1] The same issue is raised in two other cases now pending before this Court: *Donato* v. *United States*, No. 02-1191 (filed Feb. 6, 2003), and *Robison* v. *United States*, No. 02-9096 (filed Feb. 12, 2003).

Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Accord *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *American Constr. Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 384 (1893); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring). This Court ordinarily denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). The practice promotes judicial efficiency by ensuring that all of the defendant's claims can be consolidated and presented in a single petition to the Court. See *ibid.* While not an invariable rule, the practice makes particular sense in this case, where petitioner challenges the sentencing procedures administered by the court of appeals, and his sentence is not yet final.

2. a. Under 28 U.S.C. 2106, a court of appeals may "affirm, modify, vacate, set aside or reverse any judgment, decree, or order" of the court whose decision it is reviewing, and may "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." In addition, the statute governing sentencing appeals, 18 U.S.C. 3742, provides that, when a court of appeals finds a sentencing error, it must "remand the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. 3742(f)(1), (2)(A), and (2)(B). It is thus well settled that, after a court of appeals has reversed the judgment in a criminal case, it has authority to provide either for de novo resentencing or for a limited resentencing. See, *e.g.*, *United States* v. *Moore*, 131 F.3d 595, 597-598 (6th Cir. 1997); *United States* v.

Santonelli, 128 F.3d 1233, 1238 (8th Cir. 1997); *United States* v. *Webb*, 98 F.3d 585, 587 (10th Cir. 1996), cert. denied, 519 U.S. 1156 (1997); *United States* v. *Polland*, 56 F.3d 776, 777 (7th Cir. 1995); *United States* v. *Pimentel*, 34 F.3d 799, 800 (9th Cir. 1994), cert. denied, 513 U.S. 1102 (1995). It is also well settled that, except perhaps in extraordinary circumstances, a district court conducting a resentencing must act in conformity with the mandate of the court of appeals. See, *e.g.*, *Moore*, 131 F.3d at 598; *Webb*, 98 F.3d at 587; *United States* v. *Tamayo*, 80 F.3d 1514, 1519-1520 (11th Cir. 1996); *Polland*, 56 F.3d at 777-779; *Pimentel*, 34 F.3d at 800; *United States* v. *Bell*, 5 F.3d 64, 66 (4th Cir. 1993). The courts of appeals are thus in agreement that they have discretion to determine the scope of a resentencing, and that the district court is obligated to follow the directions of the court of appeals when conducting the resentencing.

There is a disagreement among the courts of appeals, however, on the narrow question of the proper scope of a resentencing when the court of appeals gives no indication as to the intended scope of proceedings on remand. Some courts of appeals have held that resentencing in such cases is limited to correction of the errors found on appeal. See *United States* v. *Ticchiarelli*, 171 F.3d 24, 32 (1st Cir.), cert. denied, 528 U.S. 850 (1999); *United States* v. *Marmolejo*, 139 F.3d 528, 530-531 (5th Cir.), cert. denied, 525 U.S. 1056 (1998); *United States* v. *Whren*, 111 F.3d 956, 958-960 (D.C. Cir. 1997), cert. denied, 522 U.S. 1119 (1998); *United States* v. *Parker*, 101 F.3d 527, 528 (7th Cir. 1996). Other courts of appeals, including the Sixth Circuit, have held that resentencing in such cases is de novo. See *United States* v. *Faulks*, 201 F.3d 208, 210 (3d Cir. 2000); *United States* v. *Keifer*, 198 F.3d 798, 801

(10th Cir. 1999); *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996), cert. denied, 519 U.S. 1137 (1997); *United States* v. *Jennings*, 83 F.3d 145, 151, amended, 96 F.3d 799 (6th Cir.), cert. denied, 519 U.S. 975 (1996); *United States* v. *Ponce*, 51 F.3d 820, 826 (9th Cir. 1995); *United States* v. *Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992). The rule in the Second Circuit is that resentencing is presumptively de novo when one or more counts of conviction have been overturned and presumptively limited when all convictions are affirmed but the court of appeals finds an error in sentencing. See *United States* v. *Quintieri*, 306 F.3d 1217, 1225-1228 (2002), petition for cert. pending, No. 02-1191 (filed Feb. 6, 2003).

b. It is not clear that there is any need for this Court to adopt a uniform rule for all the courts of appeals, because the rules concerning resentencing on remand might appropriately be viewed as local rules that can differ from circuit to circuit. So long as such local rules are reasonable, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Fed. R. App. P. 47(a), there is no requirement of "uniformity among the circuits in their approach to [these] rules." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993).[2] But even if there should be a uniform rule

[2] Two courts of appeals have suggested a connection between the court's rule concerning the scope of resentencing on remand and the provision of Federal Rule of Criminal Procedure 32 (currently Fed. R. Crim. P. 32(i)(1)(D)) that allows new claims to be raised at any time before the imposition of sentence "for good cause." See *United States* v. *McCoy*, 313 F.3d 561, 564-567 (D.C. Cir. 2002) (en banc); *United States* v. *Moore*, 83 F.3d 1231, 1235 (10th Cir. 1996). To the extent that a court of appeals considers its rule on the scope of resentencing to be compelled by the Federal

governing resentencing, this is not an appropriate case for the Court to establish one, because the Court's decision would have no effect on the outcome of the case.

Petitioner contends that the presumption in the Sixth Circuit is that resentencings are de novo (Pet. 8-9); that the presumption was applied in this case (Pet. 11); and that the result would have been different if he had been sentenced in a number of other circuits (Pet. 10-11). Petitioner is correct on the first point, but mistaken on the second and third. It is true that the rule in the Sixth Circuit is that resentencings are presumptively de novo. See, *e.g.*, *Campbell*, 168 F.3d at 265; *Jennings*, 83 F.3d at 151. As explained below, however, the presumption was not applied in this case. Instead, resentencing was specifically limited by the court of appeals. And since the remand was for a limited, not a de novo, resentencing, the result here would have been the same in a circuit where resentencings are presumptively limited.

After the first appeal, the court of appeals remanded for a determination of "which underlying offenses may properly be attributable to [petitioner] for purposes of sentencing him under [the racketeering guideline]" (Pet. App. 143a); for imposition of a supervisory-role enhancement (*id.* at 146a); and for reconsideration of the downward departure (*id.* at 149a-155a). The district court acknowledged that that was the scope of the remand (*id.* at 35a-36a), and resentenced petitioner accordingly (*id.* at 36a-92a). On appeal from the resentencing, the court of appeals explicitly held that its "previous remand was limited" (*id.* at 28a) and that the

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Rules of Criminal Procedure, the rule cannot properly be viewed as a local rule of practice.

district court had not exceeded the scope of the limited remand in resentencing petitioner (*id.* at 29a-30a).

Petitioner thus was given what he claims to be seeking: a limited resentencing. And since the court of appeals specified that resentencing was to be limited, the question that has divided the courts of appeals —what the default rule should be when the court does *not* specify whether resentencing should be de novo or limited—is not presented in this case. To the extent that petitioner is claiming that the court of appeals erred in characterizing the prior remand as limited, or that it erred in finding that the district court had not exceeded the scope of the remand, the claims are fact-bound and do not merit this Court's attention.[3]

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[3] There is another reason why the Court should not grant certiorari in this case to establish a uniform rule concerning the scope of resentencing. A new subsection (g), entitled "Sentencing Upon Remand," was recently inserted in 18 U.S.C. 3742, the statute that governs sentencing appeals. See PROTECT Act, Pub. L. No. 108-21, § 401(e), 117 Stat. 671. Among other things, the new subsection (g) provides that a district court must "resentence [the] defendant in accordance with section 3553," which sets forth the factors to be considered in imposing sentence and requires that the Sentencing Guidelines ordinarily be applied, and that the only grounds for a departure following a remand are those specifically relied upon at the original sentencing and approved by the court of appeals. In interpreting Section 3742(g), one or more of the courts of appeals may conclude that the provision supersedes the existing rule concerning resentencing, either in whole or in part. Over time, therefore, the disagreement among the courts of appeals may diminish or even disappear.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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