No. 03-16

In the Supreme Court of the United States

ROBERT R. KRILICH, SR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Acting Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1014—which prohibits, among other things, any false statement "for the purpose of influencing in any way" the action of a federally insured bank on "any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan"—prohibits a false statement in an application for the disbursement of funds held in trust by a covered bank that could be liable for disbursing the funds in violation of the trust agreement.

2. Whether, after the court of appeals remanded for resentencing under a mandate directing that petitioner be sentenced within a specific Sentencing Guidelines range, the district court properly declined to impose a sentence outside that range based on asserted changed circumstances.

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OPINIONS BELOW

The order of the court of appeals affirming petitioner's sentence (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted in 53 Fed. Appx. 788. The opinion of the court of appeals vacating petitioner's sentence and remanding for resentencing (App., *infra*, 1a-8a) is reported at 257 F.3d 689. The opinion of the court of appeals affirming petitioner's convictions, vacating the judgment, and remanding for resentencing (Pet. App. 11a-30a) is reported at 159 F.3d 1020. The order and opinion of the district court imposing sentence after the second remand (Pet. App. 3a, 4a-10a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 2002. A petition for rehearing was

denied on January 27, 2003 (Pet. App. 31a-32a). On April 18, 2003, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including June 26, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Northern District of Illinois on 14 counts of making false statements to a federally insured bank, in violation of 18 U.S.C. 1014, and on one count of conspiring to violate the Racketeer Influenced and Corrupt Organizations (RICO) Act, in violation of 18 U.S.C. 1962(d). The jury also returned a forfeiture verdict. Petitioner was sentenced to 64 months of imprisonment and ordered to pay a $1 million fine. He forfeited assets totaling $8,670,097.62. The court of appeals affirmed the convictions, vacated the judgment, and remanded for resentencing. This Court denied certiorari.

On remand, the district court sentenced petitioner to 87 months of imprisonment. The court of appeals again vacated the sentence, with instructions to the district court to impose a sentence in the range of 135 to 168 months. This Court again denied certiorari.

On remand, the district court sentenced petitioner to 135 months of imprisonment. The court of appeals affirmed.

1. a. In 1985, petitioner, a real estate developer, financed several construction projects with funds derived from municipally sponsored debt instruments known as Industrial Revenue Bonds (IRBs). The interest on IRBs was exempt from federal taxation. For that reason, investors accepted a lower return than on

taxable investments, and the developer was able to borrow funds at a below-market rate. Once a local unit of government approved the issuance of IRBs, they were sold to investors and the proceeds were placed with a trustee, who held the money and invested it in an interest-bearing account until the developer needed it to build the project for which the bonds were issued. From the interest earned on the proceeds, the investors were paid a set rate of return, and any excess amounts, referred to as "arbitrage," could be used by the developer for costs directly related to the project. In this case, the trustee banks for the bond proceeds and arbitrage funds were the First Tennessee Bank National Association and the LaSalle National Bank, which are both federally insured financial institutions. 97-2721 Gov't C.A. Br. 1-2, 9-10.

Tax and legal requirements, as well as the bond agreements, specifically limited the uses to which the bond proceeds and the arbitrage funds could be put. The restrictions served to protect the investors and to ensure the bonds' tax-free status. To obtain disbursements of arbitrage funds, petitioner had to submit written requisitions to the trustee banks identifying who and how much was to be paid. Petitioner also had to certify to the trustee and bond counsel that the costs were properly incurred for the project for which the bonds were issued, that the costs had not been the subject of a prior disbursement, and that 90% of the funds used thus far had been used for "good costs," as defined in the bond indenture. Based on the statements in the requisitions and certifications, the bank would disburse the funds either to petitioner or to the listed vendor. The banks relied on the statements made in the requisitions and certifications in disbursing the arbitrage funds. The banks could be liable if money

were paid for costs not covered under the bond indenture or if funds were expended in excess of the tax code's limits. 97-2721 Gov't C.A. Br. 10-11.

Petitioner caused false invoices and certifications to be submitted to the trustee banks to obtain arbitrage funds for impermissible purposes, such as a payment on his yacht, the purchase of a Corvette, and the payment of other expenses unrelated to the development projects for which the bonds were issued. Petitioner's role in the falsification of those invoices and certifications formed the basis of his convictions under 18 U.S.C. 1014. 97-2721 Gov't C.A. Br. 3, 9-12.

b. Petitioner's conviction for RICO conspiracy was based on several acts of bribery and mail fraud. In 1983, petitioner paid the mayor of Oakbrook Terrace, Illinois, $5000 to obtain a zoning change for petitioner's land without the involvement of the zoning board of appeals or the city council. The zoning change, which was made by substituting a new plat for petitioner's original plat, required the signatures of the mayor and the city clerk. Although the city clerk repeatedly refused to sign the papers legitimizing the new plat because the required procedures had not been followed, the mayor completed the deal by obtaining the signature of the deputy city clerk while the city clerk was on vacation. 97-2721 Gov't C.A. Br. 3-9.

In 1984, petitioner agreed to pay the same mayor $40,000 to arrange for his municipality to sponsor the issuance of IRBs to finance one of petitioner's development projects. Petitioner concealed the bribe by arranging for the mayor's son, Andy Sarallo, to win a $40,000 prize in a staged (and insured) hole-in-one golf contest. Petitioner met with the mayor and his sons before the contest and assured them that Sarallo would win the prize on the ninth hole. In keeping with

applicable insurance requirements, there were two spotters at that hole: John Hilgenberg, an employee of the golf course, who was at the tee; and Kim Plencner, one of petitioner's employees, who was on the green. Before Sarallo's foursome reached the ninth hole, petitioner instructed Hilgenberg to leave for lunch. As the foursome approached the hole, petitioner obtained one of Sarallo's golf balls and instructed him and his companions to start screaming after Sarallo teed off, as if he had made a hole-in-one. Petitioner then went to the ninth green and dropped the ball in the hole. The members of Sarallo's foursome and the "spotters" (Plencner and petitioner) falsely acted as if a hole-in-one had been made, even though Sarallo's ball had never reached the green. Sarallo was then awarded the $40,000 prize, an amount that petitioner fraudulently recovered under a special contest-related insurance policy. 97-2721 Gov't C.A. Br. 4-7.

2. a. A jury found petitioner guilty of making false statements to a federally insured bank, in violation of 18 U.S.C. 1014, and RICO conspiracy, in violation of 18 U.S.C. 1962(d). In imposing sentence, the district court applied the Guideline for bribery. A provision of that Guideline, Sentencing Guidelines § 2C1.1(b)(2)(A), required an increase in the offense level under the then-applicable Guideline for fraud and deceit, Sentencing Guidelines § 2F1.1(b)(1), based on the value of the bribes, the benefit received in return for the bribes, or the loss to the victim from the bribes, whichever was greatest. The court found that the benefit to petitioner was between $5 million and $10 million, that this amount was greater than the value of the bribes or the loss to the victim, and that his offense level should therefore be increased by 14 levels. The court then departed downward by seven levels, based on its con-

clusion that the bribes had caused no one a loss and its belief that imposing sentence within the Guidelines range would create a disparity between petitioner's sentence and the sentences of other public-corruption defendants, including the mayor bribed by petitioner. The court sentenced petitioner to 64 months of imprisonment. Pet. App. 12-13a, 24a- 29a.

b. Petitioner and the government both appealed. The court of appeals affirmed petitioner's convictions, but vacated his sentence and remanded for resentencing. Pet. App. 11a-30a.

In his appeal, petitioner claimed that the convictions under Section 1014 were invalid, because the withdrawals of the trust funds were not lending transactions and Section 1014 applies only to false statements made to obtain loans or other extensions of credit. The court of appeals disagreed. Pet. App. 19a-24a. "The text of the statute," the court explained, "is straightforward and broad: it applies to 'any' statement made for the purpose of influencing in 'any' way the action of 'any' of the covered institutions in 'any' application." *Id.* at 21a. The court also observed that Section 1014 specifically covers misstatements to a variety of institutions that do not make loans, and concluded that, "[i]f their inclusion in the statute is to have meaning, then § 1014 *must* cover statements that are not designed to influence an extension of credit." *Id.* at 22a. In an opinion concurring in part and dissenting in part (*id.* at 29a-30a), Judge Ripple agreed with petitioner's view that Section 1014 "applies only to lending activities by the financial institutions protected by the statute" (*id.* at 29a).*

* In addition to rejecting petitioner's interpretation of Section 1014, the court of appeals held that statements made by petitioner

In its cross-appeal, the government claimed that the district court had misapplied the Sentencing Guidelines. The court of appeals agreed. It held that the district court had relied on impermissible grounds in departing downward and directed the court to recalculate the benefit to petitioner from his bribes and then decide whether a departure was warranted on the ground that the resulting offense level overstated the seriousness of petitioner's conduct. Pet. App. 24a-29a.

c. Petitioner filed a petition for a writ of certiorari, raising two questions: whether the court of appeals had correctly interpreted Section 1014, and whether the district court had permissibly admitted petitioner's proffer statements at trial. See 98-1715 Pet. i, 9-20. This Court denied review. *Krilich* v. *United States*, 528 U.S. 810 (1999).

3. a. On remand, the district court found that the gain from petitioner's offenses was approximately $14 million, which added 15 levels to his offense level and yielded a Guidelines range of 135 to 168 months' imprisonment. The court concluded that the offense level did not significantly overstate the seriousness of petitioner's crimes and declined to depart on that ground. The court did grant a five-level downward departure, however, based on petitioner's age-related medical problems. As a result of the departure, petitioner's Guidelines range was 78 to 97 months' imprisonment. The court sentenced petitioner to a prison term of 87 months. App., *infra*, 2a-5a.

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as part of a proffer during plea negotiations had been properly admitted at trial (Pet. App. 13a-17a); rejected petitioner's contention that the evidence of one of his bribes was insufficient as a matter of law (*id.* at 17a-18a); and held that a variance between a date charged in the indictment and the date proved at trial was harmless error (*id.* at 18a-19a).

b. Both petitioner and the government appealed again. The court of appeals rejected petitioner's challenges to the district court's calculation of his gain and the court's conclusion that it did not significantly overstate the seriousness of his crimes. App., *infra*, 3a-4a. The court of appeals also rejected the government's argument that a downward departure based on petitioner's medical condition was barred by the terms of its remand, observing that "changed circumstances are a standard reason for consideration of additional issues on a remand." *Id.* at 5a. The court agreed with the government, however, that the district court had abused its discretion in departing downward, because Sections 5H1.1 and 5H1.4 of the Guidelines permit a departure based on a defendant's medical condition only if it is "debilitating" or "extraordinary," and petitioner's condition was neither. *Id.* at 5a-8a. The court of appeals thus vacated petitioner's sentence again, and remanded the case "with instructions to impose a sentence in the range of 135 to 168 months." *Id.* at 8a.

c. Petitioner again filed a petition for a writ of certiorari, this time raising two different questions: whether the district court had erred in calculating the benefits to petitioner from his bribes, and whether the court of appeals had erred in reversing the district court's downward departure. See 01-1108 Pet. i, 9-26. This Court again denied review. *Krilich* v. *United States*, 534 U.S. 1163 (2002).

4. a. On remand, petitioner filed a new motion for a downward departure, arguing that his medical condition had deteriorated since the previous resentencing. The district court found that petitioner did not satisfy the requirements for a departure on this ground, because he was not bedridden, he did not need constant care, the care he did need was available in prison, and

he could not establish that imprisonment would shorten his life. The court therefore denied the motion and sentenced petitioner to 135 months' imprisonment. Pet. App. 4a-10a.

b. Petitioner appealed again. In an unpublished two-paragraph order, the court of appeals affirmed. Pet. App. 1a-2a. Noting that it had remanded the case after petitioner's most recent appeal with instructions to impose a sentence between 135 and 168 months, the court held that its remand "did not permit the presentation of evidence or legal theories supporting a different [Guidelines] range," and that the district court therefore had no authority to "impose a sentence lower than the one [petitioner] received." *Id.* at 2a.

ARGUMENT

1. Petitioner renews a claim (Pet. 16-21) he raised in his first certiorari petition (98-1715 Pet. 9-15): that 18 U.S.C. 1014 applies only to false statements made to influence lending or other credit transactions, and that the court of appeals' contrary conclusion on petitioner's first appeal was erroneous. This Court determined that this issue did not warrant further review when it denied petitioner's first petition, and there is no reason for a different result now.

a. Section 1014 prohibits, among other things, the making of "any false statement" for the purpose of "influencing in any way" the action of "any institution the accounts of which are insured by the Federal Deposit Insurance Corporation" on "any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan." 18 U.S.C. 1014. Petitioner's conduct falls squarely within that prohibition. He caused false statements to be made for the purpose of influencing the banks' actions on

applications and commitments relating to the disbursement of IRB funds. As a result of those misrepresentations, funds were disbursed for purposes inconsistent with the tax-exempt status of the IRBs. Had petitioner told the banks the truth about the uses to which those funds would be put, the banks would have been obligated to deny the disbursements. As a bank officer testified at trial, the banks "would certainly be open to liability if [they] paid out money for costs that weren't qualified under the indenture," because the tax-exempt status of the bonds would have been subject to termination. Tr. 570.

Petitioner would limit the unqualified language of Section 1014 to false statements made in an application for a loan or credit. There is no merit to that position. The statute enumerates a long list of the types of transactions covered, and a loan is only one item on that list. Adopting petitioner's reading would render the other enumerated terms superfluous. See *United States* v. *Pinto*, 646 F.2d 833, 838 (3d Cir.) ("If 'advance' was only to refer to a loan, the term 'advance' would be rendered meaningless."), cert. denied, 454 U.S. 816 (1981); see also *United States* v. *Erskine*, 588 F.2d 721, 722 (9th Cir. 1978) (Kennedy, J.) (Section 1014 applies to "a loan or one of the other transactions listed in the statute"). If petitioner's construction were correct, there would also be no rational explanation for Congress's decision to include within Section 1014's scope false statements made to institutions such as the Federal Reserve banks, the Office of Thrift Supervision, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, and the National Credit Union Administration Board. As the court of appeals observed, "[n]one of

these institutions makes loans," and "[i]f their inclusion in the statute is to have meaning, then § 1014 *must* cover statements that are not designed to influence an extension of credit—indeed, must cover statements that have nothing to do with the payment of money." Pet. App. 22a. This Court has rejected efforts to limit the scope of Section 1014 with qualifications that do not appear in the text of the statute. See *United States* v. *Wells*, 519 U.S. 482, 490 (1997) (false statement need not be material, since text does not contain materiality requirement).

b. Petitioner contends (Pet. 16-19) that this Court should grant certiorari to resolve what he characterizes as a "square conflict" (Pet. 16) between the court of appeals' decision and the Fifth Circuit's decision in *United States* v. *Devoll*, 39 F.3d 575, 578 (1994), cert. denied, 514 U.S. 1067 (1995). Petitioner is mistaken. Although some of the language in *Devoll* is inconsistent with the court of appeals' reasoning in this case, no true conflict has yet developed. And even if there were a conflict, the unusual factual setting would make this case a poor vehicle for attempting to resolve it.

The defendant in *Devoll* appears to have argued, not that his misrepresentations lacked a connection to a lending transaction, but that the district court committed plain error in failing to instruct the jury that such a connection was an element of the offense. With little analysis, the court of appeals held that the district court had committed error, because "section 1014 applies only to actions involving lending transactions." 39 F.3d at 580. The court nonetheless affirmed the defendant's conviction, finding that the error was not "plain" and that, in any event, it did not affect his substantial rights, because there was "ample evidence" that his false statements did in fact arise in the context

of lending activities. *Id.* at 581. Petitioner cites no case, and the government is aware of none, in which a court of appeals has reversed a conviction or affirmed the dismissal of an indictment on the ground that Section 1014 is limited to lending activities.

Nor is it clear that the Fifth Circuit would find Section 1014 inapplicable on the peculiar facts of this case. The opinion in *Devoll* suggests that the court was principally concerned with avoiding Section 1014's application to "fraud or false representations having nothing to do with financial transactions, such as fraud in an employment contract or, for example, in a contract to provide goods or services for custodial care, premises repair, or renovation." 39 F.3d at 580. This is not such a case. Petitioner made false statements in applications for the disbursement of trust funds administered by banks, which could be held liable if they disbursed the funds in violation of the terms of the trust. Petitioner's conduct thus directly involved "financial transactions" (*ibid.*), and allowing the government to prosecute him for that conduct serves Section 1014's purpose of insulating such transactions from false statements intended to influence the institution's conduct. Even if the statute were construed (as petitioner proposes) to exclude false statements "unrelated to lending transactions" (Pet. i), this case would still fall within the statute, because it does involve borrowed funds (*i.e.*, funds that were borrowed from the issuers of the IRBs). Although the bank was not itself the lender, it played a central role in implementing the lending arrangement and took on financial exposure for improper release of the funds.

c. There is no merit to petitioner's contention (Pet. 19-21) that the court of appeals' decision is inconsistent with this Court's decision in *Williams* v. *United States*,

458 U.S. 279 (1982). In *Williams*, the Court held that depositing bad checks does not involve the making of a "false statement" under Section 1014, because "a check is not a factual assertion," and therefore "cannot be characterized as 'true' or 'false.'" *Id.* at 284. Examining the legislative history to determine whether it would permit a broader reading of Section 1014 than the statute's text, the Court found that it would not, because the only applicable legislative history focused on "representations made in connection with conventional loan or related transactions." *Id.* at 288-289. Despite petitioner's suggestion to the contrary (Pet. 20-21), that observation does not support a deviation from the unambiguous statutory language addressing the very different issue presented here. See *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100 (1991) (ambiguity of one aspect of statute does not render rest of statute ambiguous). Although the legislative history did focus on "conventional loan or related transactions" (458 U.S. at 289), this Court has made clear that "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute." *Brogan* v. *United States*, 522 U.S. 398, 403 (1998).

d. Petitioner contends that, while there may have been reason to deny review when he filed his first certiorari petition, review is warranted now, because, he says, the circuit conflict has "grown more substantial" in "the intervening four years," as "other circuits have embraced the Seventh Circuit's reading of Section 1014." Pet. 19. While two other courts of appeals have followed the Seventh Circuit's decision in this case, see *United States* v. *Boren*, 278 F.3d 911, 914-916 (9th Cir.

2002); *United States* v. *Wade*, 266 F.3d 574, 579-581 (6th Cir. 2001), cert. denied, 535 U.S. 964 (2002), no court of appeals has ever followed the Fifth Circuit's decision in *Devoll*, either before or after petitioner's first certiorari petition was denied. Thus, just as there was no true circuit conflict concerning the meaning of Section 1014 at the time of petitioner's first petition, there is no such conflict today.

2. Petitioner also contends (Pet. 9-16) that the court of appeals erred in holding, in his most recent appeal, that the district court was not permitted to impose a sentence outside the Sentencing Guidelines range specified in the mandate from the previous appeal. He asks this Court to resolve an asserted circuit conflict on whether, in resentencing a defendant after a remand, a district court may consider circumstances that have changed since the time of the initial sentencing. As explained below, this is not an appropriate case to address that question. Review by this Court is therefore unwarranted.

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 (B). It is thus well settled that, when a court of appeals reverses the judgment in a criminal case, it may limit the scope of the proceedings on remand. 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 court of appeals applied that "mandate rule," finding that its narrow remand to the district court "with instructions to impose a sentence in the range of 135 to 168 months" did not permit "the presentation of evidence or legal theories supporting a different range." Pet. App. 2a.

The vast majority of the court of appeals decisions on which petitioner relies (see Pet. 11-14) are not inconsistent with that ruling. Many did not even involve a resentencing after a remand. See *United States* v. *Rudolph*, 190 F.3d 720 (6th Cir. 1999); *Werber* v. *United States*, 149 F.3d 172 (2d Cir. 1998); *United States* v. *Core*, 125 F.3d 74 (2d Cir. 1997), cert. denied, 522 U.S. 1067 (1998); *United States* v. *Sally*, 116 F.3d 76 (3d Cir. 1997); *Puente* v. *United States*, 676 F.2d 141 (5th Cir. 1982). One did involve such a resentencing but did not address the question whether the district court was permitted to consider changed circumstances. See *United States* v. *Akrawi*, 982 F.2d 970 (6th Cir. 1993). Still others did address that question but were cases where the defendant was resentenced after a remand

that either was not limited or was not as limited as the one here, which required the imposition of a sentence within a particular Guidelines range. See *United States* v. *Quintieri*, 306 F.3d 1217, 1226 (2d Cir. 2002) (because there "may have been improper double counting," court "*remand[ed] to the district court for resentencing in light of this order*, without prejudice to the government submitting an argument to the district court explaining why th[ere] was not double-counting"), cert. denied, 123 S. Ct. 2246 (2003); *United States* v. *Bryce*, 287 F.3d 249, 252 (2d Cir.) ("the case was remanded for 'resentencing'"), cert. denied, 537 U.S. 884 (2002); *United States* v. *Bradstreet*, 207 F.3d 76, 78 (1st Cir. 2000) (court "ruled that the district court had erred in granting the departure, vacated the sentence, and remanded for resentencing"); *United States* v. *Rhodes*, 145 F.3d 1375, 1377 (D.C. Cir. 1998) (court "remanded * * * to the district court 'for possible resentencing taking into account the provisions of [Sentencing Guidelines] § 2D1.1(b)(1)'").

Petitioner cites only two decisions, both from the Second Circuit, that are arguably inconsistent with the court of appeals' decision. In one, *United States* v. *Bryson*, 229 F.3d 425 (2000), the Second Circuit held that a "remand [directing] that [the defendant] be resentenced 'according to his original offense level of 31' * * * did not preclude a departure based on intervening circumstances." *Id.* at 426. In the other, *United States* v. *Carpenter*, 320 F.3d 334 (2d Cir. 2003), the court permitted a departure based on changed circumstances despite a mandate directing the district court to resentence the defendant "at a base offense level of 15 and a criminal history category of I, which carries a sentencing range of 18-24 months," or, if the defendant was granted an additional one-level reduction for acceptance of responsibility, "at a base offense

level of 14 and a criminal history category of I, which carries a sentencing range of 15-21 months." *Id.* at 337. Even if the court of appeals' decision can be said to be inconsistent with these two decisions, however, there are at least four independent reasons why further review is not warranted.

First, the question on which the Seventh Circuit and the Second Circuit arguably disagree is whether, when a court of appeals remands for imposition of a sentence within a particular Guidelines range, a district court may depart from that range on the basis of circumstances that have changed since the time of the previous sentencing. That question is quite narrow and is unlikely to arise with much frequency.

Second, any conflict created by the court of appeals' decision is insufficiently developed to justify this Court's intervention. Only one circuit has issued decisions with which the court of appeals' decision arguably conflicts; both of those decisions are less than three years old; the court of appeals' decision was issued by unpublished order, and thus does not bind future panels of the Seventh Circuit, see 7th Cir. R. 53; and the published decision on which the court of appeals relied (see Pet. App. 2a) was a civil case, *Barrow* v. *Falck*, 11 F.3d 729 (7th Cir. 1993), which held that a remand with instructions to award attorneys' fees within a certain range did not permit an award outside that range. Indeed, in an earlier appeal in this very case, the Seventh Circuit permitted petitioner to rely on the asserted deterioration in his medical condition as a basis for urging a downward departure, notwithstanding a remand for resentencing that made no mention of that factor. See App., *infra*, 5a ("changed circumstances are a standard reason for consideration of additional issues on a remand") (citing *United States* v.

Buckley, 251 F.3d 668 (7th Cir. 2001)). The result in this case may therefore reflect only the court's reaction to petitioner's continued effort to relitigate a medical-departure ground that had already been rejected on appeal.

Third, in the context of downward departures, the "changed circumstances" rule that petitioner espouses must now be considered in light of the language of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650. As petitioner notes (Pet. 14 n.7), that Act (§ 401(e), 117 Stat. 671) amends 18 U.S.C. 3742 to forbid departure on a remand for resentencing except on a ground that was both "specifically and affirmatively included in the written statement of reasons * * * in connection with the previous sentencing" and "held by the court of appeals, in remanding the case, to be a permissible ground of departure." 18 U.S.C. 3742(g)(2). The courts of appeals have not yet had the opportunity to consider whether this language supersedes any "changed circumstances" rule with respect to new departure grounds.

Fourth, petitioner would not be entitled to relief even under the rule he asks this Court to adopt. The district court denied petitioner's motion for a downward departure, not on procedural grounds (*i.e.*, because it believed it was not permitted to impose a sentence outside the Guidelines range identified in the mandate), but on the merits (*i.e.*, because it found that petitioner's evidence did not satisfy the legal requirements for the departure he sought). Pet. App. 4a-10a. That decision would likely have been upheld on appeal even if the court had not applied the rule to which petitioner objects, because "discretionary decisions not to depart are not reviewable." *United States* v. *Egwaoje*, 335

F.3d 579, 588 (7th Cir. 2003) (quoting *United States* v. *Chavez-Chavez*, 213 F.3d 420, 421 (7th Cir. 1993)). (Contrary to petitioner's assertion (Pet. 6-7, 16), the district court did not apply an incorrect legal standard in denying his departure motion; it applied the standard set forth by the Seventh Circuit on the previous appeal, compare Pet. App. 7a with App., *infra*, 6a-8a.) Thus, even if a defendant is entitled to consideration of changed circumstances at his resentencing, that is precisely what petitioner received.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
CHRISTOPHER A. WRAY
Acting Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

SEPTEMBER 2003

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 00-3971, 00-4066, 00-4221

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE, CROSS-APPELLANT

v.

ROBERT R. KRILICH, SR.
DEFENDANT-APPELLANT, CROSS-APPELLEE

Submitted: Mar. 10, 2001*
Decided: July 16, 2001
Rehearing and Rehearing En Banc
Denied: Aug. 13, 2001**

Before EASTERBROOK, RIPPLE, and EVANS, Circuit Judges.

EASTERBROOK, Circuit Judge.

Robert Krilich's criminal case is on appeal for a third time. He has been convicted of racketeering and other offenses related to a scheme that included bribery of public officials in order to obtain assistance in the approval and financing of construction projects. In 1998

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* These cross-appeals have been submitted under Operating Procedure 6(b) to the panel that decided prior appeals in the case. The panel has concluded that additional oral argument is unnecessary.

** Judge WILLIAMS did not take part in the consideration of the petition for rehearing en banc.

we affirmed Krilich's convictions but on the United States' cross-appeal remanded for resentencing. See *United States v. Krilich*, 159 F.3d 1020 (7th Cir. 1998). See also *United States v. Krilich*, 178 F.3d 859 (7th Cir. 1999) (reversing an order releasing Krilich on bail). Krilich's original sentence was 64 months' imprisonment. On remand the district court imposed a sentence of 87 months. Once again, both sides complain.

What occasioned the remand is a dispute about the application of the table in U.S.S.G. § 2F1.1(b)(1) to add levels to the calculation of Krilich's offense severity. One aspect of Krilich's offense was co-opting a local government to sponsor tax-free industrial revenue bonds, some proceeds of which were used to finance a project (and other proceeds of which were diverted to Krilich's personal benefit). The prosecutor argued that the gain to Krilich from this offense should be measured by the difference between what he paid in interest on the bonds, and the higher payments that would have been necessary had the interest been taxable to the investors (as it should have been). The district judge did not resolve the parties' dispute about valuation, ruling instead that no matter how the matter came out he would allow only seven levels from this table, departing on the authority of Application Note 7(b) to § 2F1.1. (This has become Note 8(b) in the latest version of the Guidelines, but we use the former numbering for consistency with our prior opinions.) We held that this procedure was unauthorized and remanded for the imposition of a sentence based on the table in § 2F1.1(b)(1). 159 F.3d at 1029-31. Although downward departure could not be excluded as a possibility, we held, the procedure must start with an accurate calculation.

A different district judge imposed sentence on remand. After a hearing that lasted almost three weeks, the court concluded that the gain Krilich had reaped by offering tax-free bonds (and correspondingly the loss to the Treasury) was approximately $14 million, which added 15 offense levels under the table in § 2F1.1. This produced a total offense level of 32 and a presumptive sentencing range of 135 to 168 months' imprisonment. The judge concluded that the offense level of 32 did not "significantly overstate" the seriousness of Krilich's crime, and the court therefore held that departure under Application Note 7(b) is unwarranted. Nonetheless, the court granted Krilich a significant downward departure of five offense levels for health reasons. The level 27 sentencing range is 78-97 months, and the district judge chose a sentence in the middle of that range. Krilich contends that his sentence is too high, the United States that it is too low.

Krilich contests every aspect of the district court's findings. His principal contention is that the $14 million figure for his gain (and the Treasury's loss) is flawed because it supposes that he would have raised the same amount of money with taxable bonds had he lacked access to tax-free instruments. Higher interest rates could have led to a change of plans, for demand curves slope downward and an increase in the price of one project leads an entrepreneur like Krilich to shift to another. That much cannot be denied, but the Guidelines do not determine a wrongdoer's gain based on what-if scenarios. Imagine a bank robber who argues that, had he known about the presence of a guard, he would have robbed a grocery store instead and thus caused a lower loss. It is hard enough to tote up the gains and losses from crimes actually committed

without pursuing second-best solutions, which are usually indeterminate. The gain and loss rules in the Guidelines call for approximations, not exact figures. See § 2F1.1 Application Note 8 (now Note 9). Krilich did get access to tax-free bonds, raising $135 million that he held for 12 years. Some of this money he used for construction or consumption, and the rest he reinvested at higher interest. A similar kitty lent by investors who had to pay taxes on interest would have cost Krilich much more than what he actually paid in interest. Under the Guidelines the buck stops there. The district court's finding that the gain was $14 million is supported by the record (which includes the calculations of an expert in finance) and cannot be called a clear error. None of Krilich's other objections to the conclusion that his gain exceeds $10 million is persuasive; we see no need to add to the district court's analysis. And Krilich's contention that the district court should have departed under Application Note 7(b) goes nowhere; the judge understood the existence of (and limits on) that authority, and the decision that this is not an appropriate occasion for departure cannot be reviewed by this court. *United States v. Franz*, 886 F.2d 973 (7th Cir. 1989).

At the time of the resentencing hearing early in 2000, Krilich was 69 years old and had age-related medical problems. The district court concluded, on the basis of a psychiatrist's testimony (yes, a psychiatrist; no cardiologist testified), that Krilich has four physical infirmities: chronic cardiovascular disease, chronic peripheral vascular disease with hypertension, obstructive pulmonary disease, and lower back pain of lumbar and lumbosacral origin. The court gave Krilich a one-level

departure for each of these four, and a fifth level for the four in combination.

The United States' argument that consideration of this subject was barred by the terms of our remand is not correct. The district court found that Krilich's medical condition had deteriorated since his original sentencing, and changed circumstances are a standard reason for consideration of additional issues on a remand. See *United States v. Buckley*, 251 F.3d 668 (7th Cir. 2001). It remains necessary, however, to determine whether the district judge abused his discretion.

The judge acknowledged that none of the four physical problems would justify a departure standing alone but believed that the combination does so:

> I specifically do not find that . . . the Bureau of Prisons is unable to adequately treat the defendant's ailments. Nevertheless, contrary to the government's position, the defendant presented a medical profile outside the heartland of people remanded to the custody of the Bureau of Prisons. . . . Krilich's health issues present an unusual profile. The conditions of confinement will undoubtedly aggravate his conditions and make treatment more difficult. Therefore, a departure is warranted. . . . [These conditions create] treatment and quality of life difficulties that fall outside the heartland.

The judge reached this conclusion despite finding that "there is no structural reason why Krilich cannot receive adequate care within the [Bureau of Prisons]". Ten months after announcing the 87-month sentence, the district court held another hearing at which Krilich

argued, with the support of two cardiologists (neither of whom had examined him or was familiar with the medical care available in federal prisons), that an even greater departure was warranted. This hearing was unauthorized, because the district judge no longer had the authority to alter Krilich's sentence, see 18 U.S.C. § 3582(c) and Fed. R. Crim. P. 35, but was harmless, for the judge ultimately concluded that the cardiologists had added nothing to what was already in the record.

Relying on U.S.S.G. § 5H1.4, the United States contends that an "unusual [medical] profile" is not a valid ground for departure. Section 5H1.1 says that age may not be the basis of departure unless the defendant is "elderly and infirm", referring for further guidance to § 5H1.4, which provides:

> Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Does Krilich have an "extraordinary physical impairment"? Is he "elderly and infirm" or "seriously infirm"? The district court did not find so; instead the judge apparently believed that any "unusual" medical condition or combination of conditions justifies a departure. That can't be reconciled with the first sentence of § 5H1.4. "Extraordinary" is a subset of "unusual." We have held that the limit to "extraordinary" conditions

must be taken seriously. See *United States v. Woody*, 55 F.3d 1257, 1275-76 & n.15 (7th Cir. 1995).

Almost everyone is "unusual" in some respect, and many septuagenarians have conditions similar to Krilich's. Yet § 5H1.1 and § 5H1.4 put normal age-related features off limits as grounds for reduced sentences. Older criminals do not receive sentencing discounts. Many persons in poor health are confined in federal prisons. If the medical problem is extraordinary in the sense that prison medical facilities cannot cope with it, then a departure may be appropriate. See *United States v. Sherman*, 53 F.3d 782, 787 (7th Cir. 1995). To justify such a conclusion, however, the court "must ascertain, through competent medical testimony, that the defendant needs constant medical care, or that the care he does need will not be available to him should he be incarcerated." *United States v. Albarron*, 233 F.3d 972, 978 (7th Cir. 2000). Or a bedridden person would be as effectively imprisoned at home as in a jail; the physical condition itself does the imprisoning. But the district court found that the Bureau of Prisons could treat Krilich's conditions, and he is not bedridden, so these rationales for departure are missing.

An ailment also might usefully be called "extraordinary" if it is substantially more dangerous for prisoners than nonprisoners. Then imprisonment would shorten the defendant's life span, making a given term a more harsh punishment than the same term for a healthy person. A district court properly may reduce the sentence's *length* when necessary to equalize *severity*. See *United States v. Gee*, 226 F.3d 885, 902 (7th Cir. 2000). Cf. *United States v. Guzman*, 236 F.3d 830 (7th Cir. 2001). The district judge not only did not make such a finding for Krilich but also believed that this

finding could not be sustained. Approximately 4,000 persons in federal custody receive care for cardiovascular conditions, and no evidence of record demonstrates that they exhibit greater mortality than free persons with these conditions.

The Bureau of Prisons can provide Krilich with the medical regimen (which is to say, the drugs and diet) that his physicians believe to be appropriate. That the Bureau has not provided (and does not propose to provide) the quality of care that top private specialists provide is neither here nor there; wealthy defendants can afford exceptional care, but this does not curtail the punishment for their crimes. Krilich did not establish that his condition is either "debilitating" or "extraordinary," and a departure therefore conflicts with norms established by § 5H1.1 and § 5H1.4. A generic statement that a defendant's circumstances are out of the "heartland" may not be used to override limitations written into the Guidelines. See *Koon v. United States*, 518 U.S. 81, 92-96, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996); *Krilich*, 159 F.3d at 1030. Krilich's sentence therefore is again vacated, and the case is remanded with instructions to impose a sentence in the range of 135 to 168 months.