No. 99-1694

In the Supreme Court of the United States

TOMMIE HASS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred at resentencing by declining to reconsider the drug quantity finding it had made at petitioner's first sentencing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 199 F.3d 749. An earlier opinion of the court of appeals is reported at 150 F.3d 443.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1999. A petition for rehearing was denied on January 24, 2000 (Pet. App. 20a). The petition for a writ of certiorari was filed on April 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioner was convicted of conspiring to manufacture and distribute methamphetamine, in violation of 21 U.S.C. 846. He was sentenced to life imprisonment under the "three strikes" provision of 21 U.S.C. 841(b)(1)(A). The court of appeals affirmed petitioner's conviction, but remanded for resentencing because the government had failed to prove that petitioner had two final felony drug convictions at the time of the commission of the instant methamphetamine conspiracy offense. 150 F.3d 450-451. On remand, petitioner was sentenced to 240 months' imprisonment, to be followed by a five-year period of supervised release. The court of appeals affirmed. Pet. App. 1a-9a.

1. From 1993 to 1996, petitioner was involved in a large-scale methamphetamine manufacturing and distribution ring known as the Anderson Organization. The organization purchased and manufactured methamphetamine in various locations in the Dallas, Texas, area, and distributed it throughout the United States. Petitioner and his brother Richard were one of the organization's major sources of methamphetamine. 150 F.3d at 445-446.

2. Petitioner was tried and found guilty of conspiring to manufacture and distribute methamphetamine. In the Presentence Investigation Report (PSR) prepared for petitioner's sentencing, the probation officer concluded that petitioner and his co-conspirators possessed at least 26.8 kilograms of methamphetamine during the course of the conspiracy, and that this amount was a "very conservative estimate" of the total amount that petitioner distributed. Pet. App. 2a; PSR ¶ 38.

The PSR recited that the base offense level was 36 for that amount of methamphetamine, which, combined with petitioner's criminal history category of VI, produced a sentencing range of 324-405 months' imprisonment. PSR ¶¶ 39, 95. The PSR noted, however, that petitioner had three prior felony drug convictions (PSR ¶¶ 57, 59-60), and recited that petitioner was thus subject to a mandatory term of life imprisonment pursuant to 21 U.S.C. 841(b)(1)(A) and Sentencing Guidelines § 5G1.1(b). PSR ¶¶ 94-95.

Petitioner filed an extensive memorandum detailing his objections to the PSR, which included a challenge to the possible imposition of a life sentence; the calculation of drug quantities attributed to him; and the assessment of his criminal history. The government filed a response to petitioner's objections, including a response to petitioner's claim that the drug quantity attributed to petitioner had been wrongly calculated. Pet. App. 2a.

At sentencing, the district court determined that petitioner's objections to the calculation of drug quantities attributable to him and to the computation of his criminal history were without merit. The court thus refused to reduce petitioner's base offense level. The court also heard argument from the government and petitioner regarding the PSR's recommendation that petitioner be sentenced to life imprisonment under 21 U.S.C. 841(b)(1)(A), because he had committed two prior felonies. The court adopted the PSR's findings and sentenced petitioner to life imprisonment. Pet. App. 2a.

3. In petitioner's original appeal, he raised several challenges to his conviction and also argued that his life sentence based on the three strikes provision was based on an erroneous finding that he had two felony con-

victions that had become final before he committed the instant offense. Petitioner did not challenge the district court's drug quantity findings. The court upheld petitioner's conviction, but vacated the life sentence. The court found that petitioner was not eligible for a life sentence under the three strikes provision of 21 U.S.C. 841(b)(1)(A), because his two prior convictions were not final at the time the present conspiracy violation was committed. 150 F.3d at 449-450. The court remanded for resentencing, stating: "[B]ecause the Government failed to establish that [petitioner] had two final felony drug convictions at the time of the commission of the instant offense, we VACATE the district court's imposition of a life sentence for [petitioner], and REMAND for his resentencing." 150 F.3d at 451.

On remand, petitioner argued that the quantity of drugs attributed to him in the PSR was too high. The district court declined to address the drug quantity argument, concluding that the only course open to the court on remand from the court of appeals was to reimpose sentence without application of the three strikes provision. The district court adopted the findings on drug quantity from the original PSR and enhanced petitioner's sentence based on those findings. The court sentenced petitioner to 240 months' imprisonment, to be followed by a five-year period of supervised release. Pet. App. 3a.

4. Petitioner appealed his sentence, arguing that the district court erred on remand in precluding him from raising the issue of drug quantity. The court of appeals affirmed petitioner's sentence. Relying on *United States* v. *Marmolejo*, 139 F.3d 528 (5th Cir.), cert. denied, 525 U.S. 1056 (1998), the court held that petitioner was foreclosed from challenging drug quantity at resentencing because he failed to raise the issue during

his initial appeal. Pet. App. 7a-9a. The court noted that petitioner had obviously been aware of the district court's adverse ruling rejecting his objections to the PSR's drug quantity findings, yet had failed to challenge those findings during his initial appeal. "As a result, although the drug quantity issue was fully presented and reviewed by the district court this court's decision only considered [petitioner's] arguments on the three strikes provision." Pet. App. 7a. The court found that its remand order "only directed the district court to resentence [petitioner] without applying the three strikes provision," and that the district court on remand had properly followed the court's instructions "to only address 'issues arising out of the correction of the sentence ordered by [the appellate] court.'" *Ibid.* (quoting *United States* v. *Marmolejo*, 139 F.3d at 531).

The court rejected petitioner's contention that he had no incentive to raise the drug quantity issue in his initial appeal because the district court's application of the three strikes provision made drug quantity irrelevant. The court found that petitioner could not claim that he believed that the drug quantity issue was irrelevant, because he had objected to the drug quantity findings at the district court level. The court explained:

> A defendant cannot know which appellate argument might be successful, therefore each contested issue must be appealed. Countless criminal appeals are determined by our court which encompass multiple bases of relief claimed by appellants. [Petitioner's] circumstance is no different. Because [petitioner] had another appealable issue which turned out to be successful, does not mean that the issue of drug quantity was not germane and appealable. There-

> fore, we reiterate our conclusion from [*United States* v. *Marmolejo*] that all issues not arising out of the remand order which could have been brought in the original appeal are not proper for reconsideration by the district court below at resentencing.

Pet. App. 8a-9a.

ARGUMENT

Petitioner contends (Pet. 5-11) that the district court should have conducted a *de novo* sentencing hearing on remand from the court of appeals' first decision, at which he should have been allowed to raise the issue of drug quantity. Petitioner further contends that the decision of the court of appeals conflicts with decisions from other courts of appeals. The decision of the court of appeals is correct and does not present a conflict meriting this Court's attention. This Court recently denied review in the case on which the court below relied in rejecting petitioner's claim, see *Marmolejo* v. *United States*, 525 U.S. 1056 (1998) (No. 98-5372), and there is no reason for a different result here.

1. It is 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 more limited resentencing. See, *e.g.*, *United States* v. *Moore*, 131 F.3d 595, 598 (6th Cir. 1997); *United States* v. *Santonelli*, 128 F.3d 1233, 1238-1239 (8th Cir. 1997) ("Ordinarily, an appeals court can avoid the problem of multiple appeals by specifically issuing limited remands [in] sentencing cases, leaving open for resolution only the issue found to be in error on the initial sentencing. Of course in an appropriate case it may remand for a complete redetermination of the sentence."); *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, 777-778 (7th Cir. 1995) ("[W]e have the power to limit a remand to specific issues or to order complete resentencing."); *United States* v. *Pimentel*, 34 F.3d 799, 800 (9th Cir. 1994), cert. denied, 513 U.S. 1102 (1995); *United States* v. *Bell*, 5 F.3d 64, 66-67 (4th Cir. 1993).

It is also 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.*, *United States* v. *Campbell*, 168 F.3d 263, 265 (6th Cir.), cert. denied, 120 S. Ct. 195 (1999); *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 777-778 (citing cases); *Pimentel*, 34 F.3d at 800; *Bell*, 5 F.3d at 66. Thus, the courts of appeals agree that they have discretion to determine the scope of a resentencing, and that the district court is obliged to follow the directions of the court of appeals when conducting the resentencing.

In remanding for resentencing in this case, the court of appeals stated: "[B]ecause the Government failed to establish that [petitioner] had two final felony drug convictions at the time of the commission of the instant offense, we VACATE the district court's imposition of a life sentence for [petitioner], and REMAND for his resentencing." 150 F.3d at 451. The district court interpreted that mandate as limiting the scope of remand, Pet. App. 3a, and the Fifth Circuit confirmed that interpretation by holding that "[o]ur remand order only directed the district court to resentence [petitioner] without applying the three strikes provision," *id.* at 7a. Given that limited remand order, the district court properly concluded that it lacked authority to

reconsider sentencing claims unrelated to those enhancements.

The courts of appeals have consistently held that *de novo* resentencing is inappropriate after limited remand orders. See, *e.g.*, *Santonelli*, 128 F.3d at 1237 (resentencing was properly limited to correction of a single error where, although court of appeals stated generally that case was remanded for resentencing, "that statement must be read with the analysis offered in the opinion," which gave one specific reason for resentencing); *United States* v. *Whren*, 111 F.3d 956, 958-960 (D.C. Cir. 1997), cert. denied, 522 U.S. 1119 (1998); *Tamayo*, 80 F.3d at 1519-1520; *Polland*, 56 F.3d at 777-778 (resentencing was properly limited where case had been remanded "for resentencing on the issue of obstruction of justice"); *United States* v. *Stanley*, 54 F.3d 103, 107-108 (2d Cir.), cert. denied, 516 U.S. 891 (1995); *Pimentel*, 34 F.3d at 800 (resentencing was properly limited where court of appeals had "expressly limited the scope of [the] remand to consideration of a single sentencing issue").

2. Petitioner contends that there is a disagreement among the courts of appeals on the 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. A number of courts of appeals have held that resentencing in such circumstances is presumptively limited in nature. See, *e.g.*, Pet. App. 6a n.2; *Santonelli*, 128 F.3d at 1237-1239; *Whren*, 111 F.3d at 958- 960; *United States* v. *Parker*, 101 F.3d 527, 528 (7th Cir. 1996); *Tamayo*, 80 F.3d at 1519-1520; *Stanley*, 54 F.3d at 107-108; *United States* v. *Bell*, 988 F.2d 247, 250 (1st Cir. 1993). Several other courts of appeals, however, have suggested that resentencing after remand is presumptively *de novo*. See, *e.g.*, *United States* v.

Smith, 116 F.3d 857, 859 (10th Cir.), cert. denied, 522 U.S. 903 (1997); *United States* v. *Jennings*, 83 F.3d 145, 151 (6th Cir.), cert. denied, 519 U.S. 975 (1996); *United States* v. *Ponce*, 51 F.3d 820, 826 (9th Cir. 1995).

The disagreement among the courts of appeals on that narrow procedural issue does not merit plenary review by this Court. Compare *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993) (noting that courts of appeals have supervisory authority to structure discretionary principles of appellate practice). A particular court of appeals may clarify its intent by adopting a rule that remand orders that give no specific indication of their intended scope should be generally construed to permit (or not to permit) *de novo* resentencing. But the fact that different circuits have different rules concerning the scope of remand in such cases poses no problem, since attorneys and district courts within each circuit can easily become familiar with local practice.

In any event, review is not warranted here for an additional reason. The district court ruled at the original sentencing that petitioner was responsible for the amount of drugs as recited in the Presentence Investigation Report, and petitioner did not contest that ruling in the first appeal. That issue was therefore abandoned. Petitioner argues (Pet. 6-8), however, that it was only after he was resentenced that he had reason and incentive to appeal the drug quantity calculations. The court of appeals correctly rejected that claim. As the court observed (Pet. App. 8a-9a), petitioner cannot claim that he believed that the issue was irrelevant at the time of his first sentencing, because he objected to the drug quantity findings at the district court level. And, because petitioner could not know which appellate argument he advanced would be successful, he was

obligated to appeal each contested issue that he wished to preserve. As the court below explained, the fact that "[petitioner] had another appealable issue which turned out to be successful * * * does not mean that the issue of drug quantity was not germane and appealable." Pet. App. 8a. Thus, at the time of petitioner's original appeal, it was plain to petitioner that if he was successful in his challenge to his life sentence under the three strikes provision, the drug quantity amount—which was decided adversely to him at the district court level—would be highly relevant. In those circumstances, the court of appeals properly concluded that because the drug quantity issue could have been raised in the original appeal, it was not proper for reconsideration by the district court at resentencing. See *United States* v. *Ticchiarelli*, 171 F.3d 24, 28 (1st Cir.) (suggesting negative answer to "the question whether a party, not having appealed from an aspect of explicit findings and conclusions at sentencing, is free on remand as to a different unrelated issue to require the court to hear that aspect again"), cert. denied, 120 S. Ct. 129 (1999); *Parker*, 101 F.3d at 528 ("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.").

The cases relied on by petitioner (Pet. 6-8) do not stand for the proposition that a district court must consider anew on remand an issue that was abandoned in a previous appeal. In *United States* v. *Ticchiarelli*, 171 F.3d at 30, *United States* v. *Jennings*, 83 F.3d at 151, and *United States* v. *Atehortva*, 69 F.3d 679, 684-685 (2d Cir. 1995), cert. denied, 517 U.S. 1249 (1996), a party was permitted to raise a new sentencing argument for the first time after remand, but the argument was irrelevant—and thus had not been raised—at the

time of the original sentencing. Here, by contrast, petitioner at the original sentencing actively contested the Presentence Investigation Report's computation of the quantity of drugs for which he was responsible, and the district court decided that issue adversely to him. Accordingly, in order to preserve the issue of drug quantity, petitioner was obligated to raise the issue on appeal. See *Whren*, 111 F.3d at 960 ("A defendant should not be held to have waived an issue if he did not have a reason to raise it at his original sentencing," but a defendant "may not revive in the second round an issue he allowed to die in the first.").

Indeed, it would seriously undermine the orderly and efficient operation of the appellate process if district courts were routinely required to reconsider issues that should have been challenged on appeal. See, *e.g.*, *Santonelli*, 128 F.3d at 1238 ("Repetitive hearings, followed by additional appeals, waste judicial resources and place additional burdens on parole officers and personnel and on hardworking district and appellate judges."); *Whren*, 111 F.3d at 960 (permitting parties to raise previously abandoned sentencing claims on remand would be "anomalous and inefficient"); *United States* v. *Connell*, 6 F.3d 27, 30 (1st Cir. 1993) (noting "wastefulness, delay, and overall wheel-spinning that attend piecemeal consideration of matters which might have been previously adjudicated" and stating that "litigants should not ordinarily be allowed to take serial bites at the appellate apple").*

* Petitioner argues (Pet. 9-10) that a remand for resentencing under the Sentencing Guidelines necessitates a *de novo* hearing because the district court's factual findings under the Guidelines are frequently interdependent. Thus, he argues, quoting *United States* v. *Atehortva*, 69 F.3d at 685, "[w]hen a defendant challenges convictions on particular counts that are inextricably tied to other

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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counts in determining the sentencing range under the guidelines, the defendant assumes the risk of undoing the intricate knot of calculations should he succeed." We agree that when a defendant is found guilty on a multi-count indictment, the sentence imposed typically constitutes a package that takes into account "a breadth of information" to ensure that "the punishment will suit not merely the offense but the individual defendant." *United States* v. *Pimienta-Redondo*, 874 F.2d 9, 14 (1st Cir.) (en banc), cert. denied, 493 U.S. 890 (1989) (internal quotation marks omitted). Accordingly, "[w]hen the conviction on one or more of the component counts is vacated, common sense dictates that the judge should be free to review the efficacy of what remains in light of the original plan, and to reconstruct the sentencing architecture upon remand, within applicable constitutional and statutory limits, if that appears necessary to ensure that the punishment still fits both crime and criminal." *Ibid.* Those concerns, however, have no bearing on the instant case. The court of appeals did not reverse one count of a multi-count indictment. Rather, the court affirmed petitioner's conviction on the lone drug count with which petitioner was charged and vacated his life sentence because he was not eligible for a life sentence under the three strikes provision of 21 U.S.C. 841(b)(1)(A). That action by the court of appeals did not undo any intricate knot of district court sentencing calculations that would justify (let alone require) *de novo* sentencing on remand.