No. 14-456

In the Supreme Court of the United States

LUIS EDUARDO ALVAREZ, 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

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
STEPHAN E. OESTREICHER, JR.
Attorney

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

QUESTION PRESENTED

Whether the court of appeals permissibly determined that certain objections to the presentence investigation report and advisory Guidelines calculation, which "could have been made at the time of [petitioner's] original sentencing but were not," were outside the scope of resentencing following a remand "for correction of a specific and defined sentencing error."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is not published in the *Federal Reporter* but is reprinted in 575 Fed. Appx. 522. An earlier opinion of the court of appeals (Pet. App. 14a-41a) is reported at 706 F.3d 603.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2014. The petition for a writ of certiorari was filed on October 20, 2014. 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 Southern District of Texas, petitioner was convicted on one count of conspiring to possess with intent to distribute more than five kilograms of

cocaine, in violation of 21 U.S.C. 846, 841(a)(1) and (b)(1)(A); and one count of using and carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(1) and 2. Pet. App. 44a, 46a. He was sentenced to a total of 352 months of imprisonment, to be followed by five years of supervised release. 11-41385 Gov't C.A. Br. 4. The court of appeals vacated the sentence based on the erroneous application of a two-level Guidelines enhancement; affirmed the convictions and sentence "on all other grounds"; and remanded for resentencing. Pet. App. 37a-38a, 41a. On remand, the district court corrected the two-level enhancement error identified by the court of appeals and sentenced petitioner to a total of 295 months of imprisonment, to be followed by five years of supervised release. *Id.* at 47a, 49a. The court of appeals affirmed. *Id.* at 1a-13a.

1. In early 2011, an undercover federal agent met several times with Mark Anthony Milan—an illegal weapons dealer operating in Laredo, Texas—to propose that Milan select a crew and rob a house. Pet. App. 2a-3a. The agent claimed (fictitiously) that a drug cartel was storing at least 25 kilograms of cocaine in the house and that Milan could keep most of it. *Id.* at 3a. The agent told Milan that the house would be guarded by two men, at least one of whom would be armed. *Ibid.*

On the day of the planned robbery, Milan brought a crew of three other men, including petitioner, to a final meeting with the agent. Pet. App. 3a-4a. The would-be robbers, including petitioner, were members of a military-style street gang involved in transporting drugs from Mexico into Texas. 11-41385 Gov't C.A. Br. 9. They were all dressed in black, and petitioner

was wearing a bulletproof vest. *Id.* at 8. The robbers told the agent they were "ready"; one of them put a Glock pistol in his waistband; a second showed the agent a bag containing two rifles; and petitioner assured the agent that "we're not rookies" and informed the agent that he was "gonna go in first." Pet. App. 4a. Moments later, other federal agents and local law-enforcement officers arrested Milan and his crew, including petitioner. *Ibid.*

2. A jury ultimately found petitioner guilty of one count of conspiring to possess with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 846, 841(a)(1) and (b)(1)(A); and one count of using and carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(1) and 2. Pet. App. 4a, 44a, 46a. For petitioner's conviction on the conspiracy count, the original presentence investigation report (PSR) calculated an advisory Guidelines range. *Id.* at 4a. That calculation reflected, in part, a two-level enhancement under Sentencing Guidelines § 2D1.1(b)(1) (2010) for possessing a firearm during the offense. 10/3/11 PSR ¶ 52. The district court sentenced petitioner to 292 months of imprisonment on the conspiracy count and to a mandatory consecutive 60-month term of imprisonment on the Section 924(c) count, for a total of 352 months of imprisonment. Pet. App. 4a-5a.

Petitioner (along with his co-defendants) appealed, challenging both his convictions and sentence. Pet. App. 14a-41a. The court of appeals rejected all of petitioner's arguments except for one of his two challenges to the calculation of his advisory Guidelines range. See *id.* at 19a-41a. The court agreed with petitioner that his two-level enhancement under Sentenc-

ing Guidelines § 2D1.1(b)(1) (2010) for firearm possession "impermissibly punishe[d] [petitioner] twice for the same conduct" because it was "levied in conjunction with [his] sentence for violating 18 U.S.C. § 924(c)," which prohibits possession of a firearm in furtherance of a drug-trafficking offense. Pet. App. 38a. The court stated in the concluding portion of its decision that "[t]he sentences of [petitioner and a co-defendant] are VACATED and REMANDED for resentencing. We AFFIRM Appellants' convictions and sentences on all other grounds." *Id.* at 41a.

3. The revised PSR removed the erroneous two-level firearm enhancement and calculated a new advisory Guidelines range of 235 to 293 months. 7/12/13 Sent. Tr. (Tr.) 4. Represented by a new attorney at resentencing, petitioner raised numerous new objections that he had not raised during his initial sentencing or in his first appeal: (1) that he did not make the statements attributed to him by the undercover agent; (2) that a four-level enhancement under Sentencing Guidelines § 3B1.5(2)(B) (2010) for wearing body armor was unwarranted because the undercover agent "induced" petitioner to do so by saying there was an armed guard at the stash house; (3) that petitioner was entitled to an offense-level reduction because he was a "minor participant" in the crime; (4) that petitioner was entitled to a downward departure or variance from the advisory Guidelines range because the government "fabricated" the amount of drugs that would be involved in the robbery; and (5) that a downward departure or variance would be appropriate because of petitioner's family responsibilities. Pet. App. 5a; see 7/9/13 Objections to the PSR 2-19; see also Pet. 6-7.

At the outset of the resentencing hearing, the district court stated that any "specific objections * * * either to factual * * * issues in the PSR or to the scoring of the guidelines in the PSR, other than the gun enhancement" were "foreclosed" by the court of appeals' earlier decision, which had vacated and remanded "only" because of "the gun enhancement." Tr. 5-6. The court recognized, however, that it "obviously can consider in the sentence that it imposes whatever [petitioner] may wish to present by way of mitigation and in that respect [he] may be arguing some of the points that [he] made in [his] response, but that would go to the overall sentence that the Court imposes rather [than] as to a specific objection to the PSR." Tr. 5. Defense counsel then reiterated petitioner's objections at length, on the understanding that the court had "power to deviate under" 18 U.S.C. 3553(a). Tr. 6; see Tr. 6-11. The government subsequently presented argument on the same subjects defense counsel had raised. Tr. 15-17.

In imposing sentence, the district court noted that it was "taking into account all the * * * arguments made here and considering the * * * factors" that Section 3553(a) required it to consider in imposing sentence. Tr. 22. The court emphasized that "I'm not disregarding the arguments that [petitioner's counsel] ha[s] made," finding them to be "proper arguments to make in considering whether a variance should be made or even a departure should be made." *Ibid.* After giving the arguments "due weight" for those purposes, the court concluded that a Guidelines-range sentence was necessary. *Ibid.* The court imposed a 235-month term of imprisonment, a sentence at the bottom of the advisory range, on the conspiracy count.

Ibid. Including the 60-month consecutive sentence on the firearm count (which the district court viewed as having been left undisturbed by the court of appeals), petitioner's total combined sentence was 295 months of imprisonment. Tr. 23.

4. The court of appeals affirmed the revised sentence in an unpublished per curiam opinion. Pet. App. 1a-13a. The court rejected petitioner's contention "that the district court should have conducted a full, *de novo* sentencing and considered all of the new objections his new counsel raised." *Id.* at 7a-9a. The court of appeals observed that under circuit precedent, "[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." *Id.* at 8a (quoting *United States* v. *Marmolejo*, 139 F.3d 528, 531 (5th Cir.), cert. denied, 525 U.S. 1056 (1998)). "All other issues not arising out of this court's ruling and not raised before the appeals court, *which could have been brought in the original appeal*, are not proper for reconsideration by the district court below." *Ibid.* (quoting *Marmolejo*, 139 F.3d at 531). The court explained that this "general rule" foreclosed most of petitioner's new sentencing claims because, in petitioner's first appeal, the court had "remand[ed] for correction of a specific and defined sentencing error." *Ibid.*

The court of appeals made clear, however, that its precedents "d[id] not preclude the district court from considering [petitioner's] new and renewed arguments as a part of its Section 3553 analysis." Pet. App. 12a. It also recognized that the district court could consider any new facts that had arisen since the previous sentencing, and it considered whether one of petition-

er's arguments (about his family circumstances) was based on such facts. *Id.* at 9a-11a. In reviewing petitioner's sentence, the court of appeals emphasized the district court's statements that "it would consider all of [petitioner's] arguments in order to analyze mitigation." *Id.* at 11a. The court of appeals also noted that petitioner had "not argued that the district court ignored a relevant factor" in determining the appropriate sentence under Section 3553(a). *Id.* at 12a. Finding no abuse of discretion in the district court's consideration of the relevant factors, the court of appeals affirmed. *Id.* at 13a.

ARGUMENT

Petitioner asks this Court to grant certiorari to determine whether a district court may "conduct resentencing *de novo*" following "a general remand for resentencing." Pet. i. This case does not implicate that question. The court of appeals did not consider its initial remand here to be a "general remand," but instead to be "a remand for correction of a specific and defined sentencing error." Pet. App. 8a.

To the extent petitioner argues that courts of appeals may not establish a "default rule" (Pet. 26) that resentencing following a remand is presumptively limited to correcting the errors found on appeal, rather than presumptively de novo, this Court's review would be unwarranted, even assuming the issue were fairly encompassed within the question presented. This Court has repeatedly and recently declined to review differences in circuit practices on that issue,[1]

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[1] See, *e.g.*, *Vidal* v. *United States*, cert. denied, No. 13-9752 (Oct. 6, 2014); *Blackson* v. *United States*, 134 S. Ct. 514 (2013) (No. 13-5483); *Cruzado-Laureano* v. *United States*, 555 U.S. 1099 (2009)

and it should follow the same course here. Congress authorized the courts of appeals to limit a remand in a criminal case as the courts deem appropriate, and it has further authorized each court of appeals to adopt local rules of practice. Accordingly, it is unnecessary for this Court to adopt a uniform default rule to govern the scope of resentencing in cases where a particular panel does not expressly address that issue. This case would, in any event, be an unsuitable vehicle for considering the appropriateness of such a uniform rule.

1. 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 it 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 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) (emphasis added). The sentencing-appeal statute also provides that, on remand, a district court shall resentence a defendant in accordance with 18 U.S.C. 3553 and with "such instructions as may

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(No. 08-444); *Tocco* v. *United States*, 539 U.S. 926 (2003) (No. 02-1225); *Donato* v. *United States*, 539 U.S. 902 (2003) (No. 02-1191); *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).

have been given by the court of appeals." 18 U.S.C. 3742(g).

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 *Pepper* v. *United States*, 131 S. Ct. 1229, 1249 n.17 (2011) (recognizing that courts of appeals may issue "limited remand orders" in "appropriate cases"); *United States* v. *Alston*, 722 F.3d 603, 607 (4th Cir.), cert. denied, 134 S. Ct. 808 (2013); *United States* v. *Diaz*, 639 F.3d 616, 623 n.3 (3d Cir. 2011); *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, 777-779 (7th Cir. 1995); *United States* v. *Pimentel*, 34 F.3d 799, 800 (9th Cir. 1994) (per curiam), 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.*, *Alston*, 722 F.3d at 607; *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, 66-67 (4th Cir. 1993). The courts of appeals are accordingly in agreement that they have discretion to determine the scope of a resentencing and that a district court is obligated to follow the directions of the court of appeals when conducting the resentencing.

2. As decisions cited by petitioner (Pet. 12-17) reflect, practice in the courts of appeals is not uniform

on the proper scope of a resentencing when the court of appeals does not directly speak to the intended scope of proceedings on remand. Some courts of appeals, like the court below, have adopted a default rule that resentencing in such cases is limited to correction of the errors identified on appeal. *United States* v. *Blackson*, 709 F.3d 36, 40-42 (D.C. Cir.), cert. denied, 134 S. Ct. 514 (2013); *United States* v. *Pileggi*, 703 F.3d 675, 679-681 & n.7 (4th Cir. 2013); *United States* v. *Pineiro*, 470 F.3d 200, 205-207 (5th Cir. 2006) (per curiam); *United States* v. *Ticchiarelli*, 171 F.3d 24, 31-32 (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. *Parker*, 101 F.3d 527, 528 (7th Cir. 1996).

Other courts of appeals have adopted a default rule that resentencing in such cases is de novo. See *United States* v. *Keifer*, 198 F.3d 798, 801 (10th Cir. 1999); *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. l996) (per curiam), cert. denied, 519 U.S. 1137 (1997); *United States* v. *Jennings*, 83 F.3d 145, 151, amended by 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) (per curiam); *United States* v. *Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992). The Second Circuit has held that no explicit authorization for de novo resentencing is required when one or more counts of conviction have been overturned on appeal, but that explicit authorization for de novo resentencing is required when all convictions are affirmed but the court finds a "specific sentencing error." *United States* v. *Quintieri*, 306 F.3d 1217, 1227-1228 (2002), cert. denied, 539 U.S. 902 (2003).

This Court, however, need not adopt a uniform default rule for all courts of appeals, because the rules concerning resentencing on remand can appropriately be viewed as local rules—which simply establish default presumptions about how circuit opinions should be interpreted—that may 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), no requirement exists for "uniformity among the circuits in their approach to [these] rules." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993); see *Joseph* v. *United States*, No. 13-10639 (Dec. 1, 2014), slip op. 1 (Kagan, J., respecting the denial of certiorari).[2] The absence of any need for uniformity is particularly apparent where, as here, the circuit's choice of rule does not in any way constrain the circuit's authority to give individualized consideration to each case. Regardless which default rule a circuit adopts about the scope of resentencing, every panel in every circuit remains free to override the default rule in any given case by specifying the scope of resentencing it considers appropriate under the circumstances.

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[2] Two courts of appeals have suggested a connection between their rules concerning the scope of resentencing on remand and the provision of 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 Rules of Criminal Procedure, that rule could not properly be viewed as a local rule of practice.

Petitioner argues that "the default rule in the courts of appeals controls the scope of resentencing for most defendants," especially "in jurisdictions that allow for *de novo* resentencing." Pet. 28; see Pet. 28-29, 34-45. Even assuming that is true, it does not follow that the rules "result in significant sentencing disparity across circuits." Pet. 27. Petitioner does not present any reason or evidence to believe that default rules governing the scope of remand produce *substantively* different sentences in cases that should be treated similarly. Regardless of the scope of the remand, a district court at resentencing must comply with 18 U.S.C. 3553(a), which requires the court to impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing set forth in 18 U.S.C. 3553(a)(2) and to take account of "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. 3553(a)(6). For example, notwithstanding the limited scope of the original remand in this case, both courts below emphasized the district court's substantial authority to consider all arguments, whether or not raised in the initial sentencing or appeal, as grounds for a variance from the advisory Guidelines range. Pet. App. 11a-13a; see Tr. 5-6, 22.

3. Petitioner's reliance (Pet. 12, 18-20) on *Pepper* v. *United States*, *supra*, is misplaced. The Court in *Pepper* held that a district court could consider evidence of a defendant's post-sentencing rehabilitation, and could vary from the advisory Sentencing Guidelines range based on that evidence, when resentencing a defendant whose sentence had been set aside on appeal. 131 S. Ct. at 1236. The decision below is con-

sistent with that principle. Far from foreclosing consideration of post-sentencing rehabilitation, it indicated that a district court at resentencing may even consider post-sentencing factual developments such as changes in a defendant's family circumstances. Pet. App. 11a.

Pepper's holding on the rehabilitation issue does not prevent a court of appeals from adopting a default rule that resentencings are limited, rather than fully de novo. The Court in *Pepper* made clear that its holding was not intended to restrict appellate courts' authority to limit the scope of a resentencing on remand, explaining that it did not "mean to preclude courts of appeals from issuing limited remand orders, in appropriate cases, that may render evidence of postsentencing rehabilitation irrelevant in light of the narrow purposes of the remand proceeding." 131 S. Ct. at 1249 n.17.

The Court in *Pepper* also held that "because the Court of Appeals" in that case had "remanded for *de novo* resentencing," the district court "was not bound by the law of the case doctrine to apply the same 40 percent departure [from the advisory Guidelines range] that had been applied at [the defendant's] prior sentencing." 131 S. Ct. at 1251. That holding has no application to a case, like this one, in which the appellate court did not order a de novo resentencing. Nothing in *Pepper* requires that courts of appeals order de novo resentencings in every case, or that they have a default rule that resentencings should presumptively be de novo.

4. In any event, this case would not be a suitable vehicle for considering whether a resentencing re-

mand is presumptively limited or presumptively de novo.

First, even in the absence of a presumption that sentencing remands are limited, the court of appeals' original decision is best interpreted as specifically contemplating a limited resentencing. In that decision, the court concluded that "the district court's only error occurred when it applied a sentencing enhancement" (a two-level enhancement for firearm possession) "that should not have been applied." Pet. App. 16a. Even after explaining that a remand would be necessary because of that error (*id.* at 38a), the original decision went on to consider and reject petitioner's objection to a different Guidelines enhancement (a four-level body-armor enhancement under Sentencing Guidelines § 3B1.5(2)(B) (2010). Pet. App. 38a-40a. The court of appeals did not suggest that this additional discussion was purely advisory, or that the district court would be free to revisit on remand the conclusion that the court of appeals was affirming.

To the contrary, in the concluding portion of its initial decision, the court of appeals stated that "[t]he sentences of [petitioner and a co-defendant] are VACATED and REMANDED for resentencing. We AFFIRM Appellants' convictions *and sentences* on all other grounds." Pet. App. 41a (emphasis added). Affirming petitioner's "sentences on all other grounds," after expressly endorsing one of petitioner's sentencing claims and expressly rejecting another, should not be read as authorizing a de novo resentencing. The court of appeals recognized as much in petitioner's second appeal, characterizing its initial decision as "a remand for correction of a specific and defined sentencing error." *Id.* at 8a. Under those cir-

cumstances, petitioner would not be entitled to relief even under a default rule that presumed de novo resentencing subject to any contrary directions the appellate court decided to give.

Second, even assuming petitioner would be entitled to a de novo resentencing under the rule that he advocates, he is mistaken in suggesting (Pet. 30-32) that a de novo sentencing would likely have changed the result. Although the district court at resentencing stated that "specific objections * * * either to factual * * * issues in the PSR or to the scoring of the guidelines in the PSR, other than the gun enhancement" were "foreclosed," it recognized that it "obviously can consider in the sentence that it imposes whatever [petitioner] may wish to present by way of mitigation," which "would go to the overall sentence that the Court imposes rather [than] as to a specific objection to the PSR." Tr. 5-6. The court then "t[ook] into account all the * * * arguments made" at the resentencing hearing when "considering the 3553(a) factors," giving those arguments "due weight." Tr. 22.

The district court's consideration of petitioner's arguments as reasons for varying from the advisory Guidelines range, as opposed to reasons for applying a different Guidelines range, is unlikely to have changed the ultimate sentence that the court found "sufficient, but not greater than necessary" to achieve the purposes of sentencing. 18 U.S.C. 3553(a). Indeed, as the government explained in the court of appeals, had petitioner's arguments been presented as objections to the calculation of his advisory Guidelines range, they would have been meritless. See 11-41385 Gov't C.A. Br. 13-18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
STEPHAN E. OESTREICHER, JR.
Attorney

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