No. _____

IN THE

Supreme Court of the United States

RUFINO VALDEZ-LOPEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID J. TEEL
Counsel of Record
The Law Office of David J. Teel, PLLC
2303 N. 44th Street, Ste. 14-1518
Phoenix, Arizona 85008
(602) 441-3434 voice
teel@arizonalegal.org
Counsel for Petitioner

QUESTION PRESENTED

This case turns on whether the *Pearce* presumption of judicial vindictiveness applies—for the Government to then rebut with new evidence—when a second (new) sentencer imposes a harsher sentence, representing an actual (true) increase, following a successful collateral attack on the original sentence.

The question presented is whether the 9th Circuit erred in failing to address whether the new judge's application of new controlling case law to a collateral attack on the original sentence is a "triggering event".

If not, the controlling question is whether the *Pearce* presumption applies to a second sentencer, absent a traditional reversal or order from a higher tribunal, which is also the subject of a long-standing and firmly entrenched circuit split. This Court should grant certiorari to resolve these issues.

When the Court (a new judge) granted Mr. Valdez-Lopez §2255 motion it was because the Court was ostensibly bound by *Johnson* and *Davis* (and the government also did not oppose the §2255 motion).[1] This is akin to an order of a higher tribunal and is therefore a "triggering event" requiring application of the *Pearce* presumption and rendering moot any potential second (new) sentencer issue. The 9th Circuits panel opinion, however, failed to consider Valdez-Lopez arguments and merely stated that the presumption does not apply because the Court itself granted the §2255 motion and was not the original judge. The Court's opinion can be found at 4 F.4th 886

[1] *Johnson v. United States*, 135 S. Ct. 2551 (2015); *United States v. Davis*, 139 S. Ct. 2319 (2019)

(9th Cir. 2021) and is reproduced at App. 1-16. The §2255 order is reproduced at App. 18.

When the new judge was ostensibly forced to grant the §2255 motion this directly and substantially reduced Valdez-Lopez exposure. The resentencing record reflects that there is a reasonable likelihood that the harsher sentence was the product of actual vindictiveness stemming from the successful collateral attack, various institutional interests and the fettering of the usually broad sentencing authority of the new judge. The Court could not and did not rely on information, conduct or events occurring after the original sentence. The Court's sentence was also contrary to the recommendations of probation (15 yrs) and the government (reimpose original sentence sentence of 20 yrs). (C.A. E.R. 20, 35).

The mere fact that the harsher sentence was imposed by a new judge does not insulate against a deprivation of Valdez-Lopez Due Process Rights guaranteed by the Fifth and Fourteenth Amendments or his Sixth Amendment right to not be punished for going to trial. This is not a retrial by a new judge and no new information upon which the court could rely was received. Accordingly, the actual increase of 60 months despite the vacated 924(c) count cannot stand and the *Pearce* presumption should apply in second (new) sentencer cases following a successful §2255 attack on a sentence that was, in part, unconstitutional.

Judge Fletcher, although concurring, wrote separately stating the sentencing law at issue here has gone awry. He notes that the law should not permit a judge, whether the original judge or a replacement judge, to impose a longer sentence when

the only change in the record is the fact that petitioner prevailed on collateral attack because part of the original sentence was unconstitutional. App. 16.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed on the cover of this petition.

DIRECTLY RELATED PROCEEDINGS

- *United States v. Rufino Valdez-Lopez*, No. 2:07-cr-00428-SPL-1 (D. Ariz.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

U.S. Constitution

Court Rules

PETITION FOR WRIT OF CERTIORARI

Petitioner Rufino Valdez-Lopez respectfully asks this Court to reverse a decision of court of appeals and to resolve the circuit split.

DECISIONS BELOW

The court of appeals' published opinion, which discusses the question presented here, is reported at 4 F.4th 886 (9th Cir. 2021). Its order denying petitions for rehearing and rehearing *en banc* was issued on September 29, 2021. The decisions are reproduced in the appendix.

STATEMENT OF JURISDICTION

The court of appeals issued its decisions in this case on July 16, 2021. It denied timely filed petitions for rehearing and rehearing en banc on September 29, 2021. This petition is timely filed pursuant to this Court's order of December 22, 2021, granting petitioner's application for extension of time. *See also* Sup. Ct. R. 13.1, 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

1. Mr. Valdez-Lopez was convicted at trial on Counts 1-5 and sentenced to 240 months

A. The original judgment of conviction was entered June 4, 2008.

B. Following a six-day jury trial, Mr. Valdez was convicted of conspiracy to harbor illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), (a)(1)(A)(v)(I), and (a)(1)(A)(v)(II); one count of harboring illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and (a)(1)(A)(v)(II); one count of conspiracy to commit hostage taking, in violation of 18 U.S.C. § 1203; one count of hostage taking, in violation of 18 U.S.C. § 1203; and one count of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii).

C. Mr. Valdez was sentenced to a total of 240 months in prison, consisting of concurrent sentences of 120 months on the Title 8 counts and 156 months on the hostage-taking counts, followed by an 84-month sentence on the § 924(c) count.

D. Mr. Valdez appealed his convictions and sentences. On March 8, 2011, the Ninth Circuit allowed appellate counsel to withdraw in accordance with *Anders v. California*, 386 U.S. 738 (1967).

2. **Following his direct appeal Mr. Valdez-Lopez filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. §2255 and the Magistrate Judge recommended the Court grant the Motion to which the parties did not object**

E. Mr. Valdez challenged his conviction for brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), obtained in No. 2:07-cr-428-EHC-1, in the United States District Court for the District of Arizona.

3. **The Court granted the Motion, vacated the Judgement as to Count V (18 U.S.C. § 924(c)) and ordered a resentencing hearing for Counts I-IV in the underlying criminal case (CR-07-00428-PHX-SPL) which is the subject of this appeal.**

F. On September 10, 2019, Magistrate Judge Eileen Willett issued a Report and Recommendation recommending that the Court grant the Section 2255 Motion for the reasons stated in the Government's Response. (DKT 20 CV16-02079-SPL/CR07-00428-PHX-SPL).

G. In its Response, the Government conceded that the Motion should be granted in light of *United States v. Davis*, 139 S.Ct 2319 (2019). (DKT 19 CV16-02079-SPL/CR07-00428-PHX-SPL).

H. On September 30, 2019, the Court accepted and adopted the Report and Recommendation. The Court granted the Section 2255 Motion. Count V of the superseding indictment was vacated. A resentencing

on Counts I-IV was scheduled as to the underlying criminal matter. (DKT 21 CV16-02079-SPL/CR07-00428-PHX-SPL DKT 278).

4. **The Court conducted a new sentencing hearing and sentenced Valdez-Lopez to 300 months for Counts I-IV an increase of 60 months over the prior Court's 240 month sentence for Counts I-V following the trial over which the Court presided**

I. On January 6, 2020, the Court conducting a resentencing hearing. (C.A. E.R. 8).

J. Mr. Valdez-Lopez required the assistance of the court interpreter. (C.A. E.R. 9).

Q. Counsel for Mr. Valdez-Lopez indicates he has reviewed the case facts and prior sentencing transcripts. The changes from the original sentencing before Judge Carroll to now are described as: (1) the convictions themselves, (2) his counsel and (3) the Defendant himself has changed. (C.A. E.R. 18)

R. Counsel notes that the Government's memorandum is very similar to the memorandum provided to Judge Carroll. He agrees that a lifetime sentence is not appropriate but that additional leniency is appropriate for the three reasons described previously. (C.A. E.R. 18)

S. The Court interrupts noting: "hopefully you know and understand that your client has agreed to set aside the sentencing in the case, so from the floor to the ceiling is now wide open. Hopefully you understand that the low end isn't what he's already been sentenced to in the past." (C.A. E.R. 18).

T. Counsel explains that a slightly lower sentence is appropriate because the Government charged him with Count five which created additional exposure and mandatory sentencing that was eventually set aside based on Supreme Court jurisprudence. (C.A. E.R. 19). The presentence report recommendation also reflects this fact. (C.A. E.R. 20).

U. Counsel believes the 15-year recommendation is appropriate because it is a compromise between his original sentence, which is now gone, and takes into account the fact that Count 5 was set aside. (C.A. E.R. 20).

V. Counsel also argues for a further downward variance. Counsel agrees with the prior legal rulings overruling the original defense objections; however, sentencing disparity was still a valid issue that was raised but could have been more thoroughly explored by prior counsel. (C.A. E.R. 20-21).

W. The Court interrupts Counsel stating, "let me stop you for a moment…I am not here to listen to you tear down what another lawyer did back in 2008…we have a brand-new presentence report…Count number 5 has gone away…you indicated that you didn't have any objections to the PSR, so just make your arguments in terms of what you believe the sentencing should be based on the victims in the case and the four counts that I am currently here to sentence on." (C.A. E.R. 21).

X. Counsel goes on to note that in comparison to the other defendants, and as mentioned in the presentence report, Mr. Valdez-Lopez was an average participant. The same was stated in the presentence report. (C.A. E.R. 21-22).

Y. The Court interrupts Counsel asking: "Which codefendants went to trial?" Counsel responds that none of them went to trial. The Court responds: "Okay. Go ahead." (C.A. E.R. 22).

Z. Counsel goes on to specifically compare outcomes for codefendants that plea and their corresponding level of participation with Valdez-Lopez. In particular, and mentioned in the PSR, codefendant Flores-Cristerna received 60 months for similar actions. The purported ring leader, also mentioned in the PSR, received 63 months. (C.A. E.R. 22-23).

AA. The differences are acknowledged by Counsel for Valdez-Lopez. The differences noted are that the codefendants took pleas and had no criminal history. Mr. Valdez-Lopez on the other hand had two misdemeanors and two illegal reentries giving him a criminal history category II. (C.A. E.R. 23-24).

BB. Counsel further points out that the plea agreement for the individual identified in the PSR contained a provision that if the Defendant turned out to not be a category I that his prison range would increase to between 63-96 months. (C.A. E.R. 24).

CC. Counsel agree that the it would be appropriate to increase Mr. Valdez-Lopez sentence slightly based on these differences but not a difference of 15 years. (C.A. E.R. 24).

DD. Counsel notes that the goal of general deterrence would not be undermined by a reduced term even if it was time-served which would be about 13 years at this point. He also argues that general deterrence is undermined when the leader, giving

commands to Mr. Valdez-Lopez, only received 63 months. (C.A. E.R. 26).

EE. The Court interrupts and asks the prosecutor whether Mr. Valdez-Lopez was offered a plea agreement. The Government confirmed that he was and that it was similar to what the other codefendants were offered. (C.A. E.R. 26).

FF. Counsel argues that the facts don't warrant a lifetime sentence. The Court states that it does not intend to impose a life sentence. (C.A. E.R. 27).

GG. Counsel argues that the specific facts also demonstrate that a sentence less than 240 months and more in line with the recommendation of probation or for time served is proper. That is because nobody was hurt. (C.A. E.R. 28).

HH. The Court interrupts Counsel asking:

"Are you familiar with what an AK-47 is?...Have you ever heard an AK-47 being fired….Have you ever been around an AK-47 when it has been discharged…Have you ever been in a room when that was discharged, a small room…But clearly you've never been in a position where you were in a room and you were told you could not leave and someone had an AK-47 or an AR-15." (C.A. E.R. 28). The Court goes on to clarify that they point these things out because there are different types of harm. (C.A. E.R. 29). Counsel clarifies that he was referring to physical harm not mental harm. (C.A. E.R. 30).

II. Counsel addresses his third point which is the changes that Mr. Valdez-Lopez personally has gone through over the last 13 years. (C.A. E.R. 31-32). He

is much older now and has missed his daughters growing up. Mr. Valdez-Lopez was, as noted in the PSR, involved in a couple of squabbles in prison. Counsel notes that these were situations where Mr. Valdez-Lopez was picked on and he had to stand up for himself. He had his food stolen and had to stand up for himself or face further bullying. As a result, he repeatedly requested transfers. He was eventually transferred and in 10 years he has had no problems in the facility. (C.A. E.R. 32-33).

JJ. Counsel points out that at this point Mr. Valdez-Lopez has doubled the sentences of this codefendants including the leader. (C.A. E.R. 33).

KK. The Government recommends 20 years based on the 70 vulnerable victims imprisoned in a small house. They were threatened, trapped in bedrooms and starved. At trial victims described being mentally confused and weak. (C.A. E.R. 35).

LL. In terms of disparity, the Government states there was no disparity. The Defendant rejected the plea, went to trial and was convicted of hostage-taking whereas the codefendants were not. His criminal history is also much different with seven police contacts, four criminal convictions, two involving assaults on federal peace officers. (C.A. E.R. 35).

MM. The Court reviewed the entire case file and is familiar with the victim issues that the Government just places on the record. (C.A. E.R. 36).

NN. The Court asks the Government to refresh its memory as to what Judge Carroll sentenced the Defendant to. (C.A. E.R. 36). The total was 20 years. (C.A. E.R. 36).

OO. The Courts concern is the "staggering amount of individuals that you harmed mentally and emotionally and basically scarred for life." They were held in a small location and "treated like an animal with the threat that you could be shot down by an AK-47." (C.A. E.R. 36).

PP. The Court States that Judge Carroll had access to the same information and that Judge Carroll sentenced the Defendant based on what he had saw and he had heard. "But I also think that I need to give some considerable…consideration to the all of the victims in this case…." (C.A. E.R. 37).

QQ. The Court finds that a variance under the guideline is warranted. (C.A. E.R. 37).

RR. The crime involved many victims, possession of firearms by the Defendant and codefendants, money was demanded, threats were made and insufficient nourishment was provided to the victims. (C.A. E.R. 38). One witness indicated that the Defendant beat him, stole his money and locked him in a closet. *Id*.

SS. The Court points out that: "You refused to accept responsibility for your criminal conduct, and you have distinguished yourself based on your criminal history…" (C.A. E.R. 38). The Defendant also has a violent history and was illegally in the United States. *Id*.

TT. At the Bureau of Prisons "you have been disciplined for violation for fighting…But as I indicated before, that's a long time ago…That's over a decade." (C.A. E.R. 38).

UU. The Court then sentences Mr. Valdez-Lopez to 120 months on Counts 1 and 2 concurrent to each other. 180 months on counts 3 and 4 concurrent with each other but consecutive to counts 1 and 2. That is a total of 300 months or 25 years. (C.A. E.R. 39).

VV. Following release from prison Mr. Valdez-Lopez is placed on supervised release for 60 months with 36 months on counts 1 and 2, and 60 months on counts 3 and 4 to run concurrently. (C.A. E.R. 40).

WW. The Court finds that this sentence is sufficient but not greater than necessary, promotes respect for the law, provides you with just punishment, will serve to protect the public because it reflects the seriousness of the offense and will deter the Defendant and others from committing similar crimes. (C.A. E.R. 41).

XX. The Court goes on to reiterate that when you are in the presence of other human beings and you have an AK47, there is only one reason and that is in the even that you need it to kill another human being. (C.A. E.R. 41).

REASONS FOR GRANTING THE WRIT

1. A presumption of vindictiveness applies to Mr. Valdez-Lopez re-sentencing by a new judge following a successful collateral attack decided by the new sentencing court. There was a triggering event and the court did not rely on new information or events after the original sentencing to justify the harsher sentence thereby preventing the government from rebutting the *Pearce* presumption. This is guaranteed by the Fifth Amendment.

The court of appeals fails to directly address whether the new Court's granting of the §2255 motion was a "triggering event", requiring application of the *Pearce* presumption regardless of whether the longer sentence was imposed by a new judge.

The court of appeals concludes that "no presumption of vindictiveness applies." App. 4. The Court acknowledged that *Pearce* does apply following a successful §2255 motion but the Court disagrees regarding what constitutes a "triggering event" and likewise will not apply *Pearce* in second (new) sentencer cases. App. 6.

In doing so, the Court relies on what they deem the relevant narrowing of *Pearce* which requires a "reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." *Id*. This, however, is far from a pronouncement that *Pearce* cannot be applied to second (new) sentencer cases. App. 6.

Nevertheless, the Court then states that the presumption cannot apply in this case because the "only reason a new sentencing occurred is that the

district court itself granted Valdez-Lopez's motion." App. 6-7.

The opinion cites to *McCullough* in support of this position noting that "the trial judge herself" granted the motion for a new trial. *Id*. "And unlike the judge who has been reversed, a judge who grants such a motion has no motivation to engage in self-vindication." 475 U.S. 134 (1986), *quoting, Chaffin v. Stynchcombe*, 412 U.S. 17, 27 (1973).

Ultimately, the panel concluded "[w]e see no reason to presume that a judge would act vindictively in resentencing a defendant after determining that the defendant's section 2255 motion was meritorious." App. 7-9. The Court does not address the difference between granting a motion for a new trial and conducting a resentencing where a 924(c) count that constituted a significant portion of the original sentence had been struck as unconstitutional.

The Court then reasons that the presumption cannot apply because the new sentence was imposed by a different judge. App. 7-9. In doing so, the Court relies on *McCullough*. 475 U.S. at 140 and *Chaffin*, 412 U.S. at 26-28 as well as *Colten v. Kentucky*, 407 U.S. 104, 116-18 (1972). *Id*. The panel cites to the lack of a "personal stake" as the rationale for this seemingly bright-line rule. *Id*. The panel notes that the Ninth Circuit has recognized the same. *Id*. at 7.

The opinion does not, however, address Valdez-Lopez's argument that the *Pearce* presumption applies here because the §2255 motion acted as a "triggering event" meaning the court did acquire a personal stake thereby rendering moot any potential second sentencer problem.

It has long been acknowledged, whether it is due to "institutional interests" or other motivations, that a court may look unkindly upon a successful collateral attack. This could especially be the case here when the collateral attack is waged nearly 15 years into a case and dramatically alters the sentencing calculus and ties the Courts hands in a manner contrary to the broad discretion they are normally entitled. Similarly, these considerations are magnified where the second (new) judge is ostensibly bound to grant a §2255 motion because a portion of the original sentence that was responsible for a significant portion of the term imposed was unconstitutional. Further, even if the original sentence was a "package", absent something like a new trial and the acquisition of new information after the original sentencing, an actual increase is unjustifiable. This remains the case regardless of whether it is the original judge or a new judge that hands down the new sentence. This is all amplified in cases like this involving challenges to 18 U.S.C. § 924(c) convictions. Accordingly, these issues are likely to recur and given the passage of time between the imposition of sentence and the likelihood that the new sentence will be imposed by a second (new) judge is also increased.

Mr. Valdez-Lopez specifically addressed these issues and the second (new) sentencer issue, in significant detail in his Opening Brief and Reply brief. (C.A. Op. Br. 24-28, C.A. Reply Br. 1, 4-5, 10-13). Mr. Valdez-Lopez argued that to recognize the limited applicability of the *Pearce* presumption, post-*Smith* (490 U.S. 794 (1989) and *Goodwin* (457 U.S. 368 (1982)), the Ninth Circuit requires a "triggering event" such as a set aside of a convicted count and a remand for resentencing. (C.A. Op. Br. at 24). *See Nulph v. Cook*, 333 F.3d 1052, 1057 (9th Cir. 2003)

(quoting *Bono v. Benov*, 197 F.3d 409, 417-418 (9th Cir. 1999)). The Court appears to conclude that this, in turn, precludes the application of *Pearce* to second (new) sentencer cases.

Interestingly, and as discussed by Petitioner in his Opening Brief, *Nulph* was a Ninth Circuit case that involved a second (new) sentencer (different parole board members). Nevertheless, the Ninth Circuit applied *Pearce*. The Court, however, in Valdez-Lopez noted that *Nulph* can be distinguished because the Court now views parole boards act as single entity with a single-mind even if the membership shifts over the course of many years to a defendant's detriment. App. 8. This is a distinction without a difference and cannot be reconciled with the Court's pronouncement that *Pearce* cannot be applied in second (new) sentencer cases. It further widens and complicates the long-standing and firmly entrenched circuit split also at issue in this case.

Here, relief should be granted because either because a "triggering event" took place requiring the application of *Pearce* or because this Court should resolve the circuit split and clarify that *Pearce* applies to second (new) sentencer cases.

Mr. Valdez-Lopez Opening brief and Reply brief outline a variety of examples as to why the §2255 motion was a "triggering event" and/or marked the acquisition of a "personal stake" despite the fact that it did not flow from a traditional reversal or order from a higher court. Among the factors described and discussed were: (1) the Court here was bound by

Johnson and *Davis*[1] rendering Valdez-Lopez sentence unconstitutional as constructed, (2) the Magistrate Judge recommended granting the §2255 motion based upon binding case law and (3) the government did not oppose. Similarly, the panel, here, did not address the potential for "institutional motivations" coupled with the citations to the record evidencing the same to further satisfy the reasonable likelihood analysis and apply the *Pearce* presumption.

Mr. Valdez-Lopez also asserted that this is similarly consistent with *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973) and *Bono v. Benov*, 197 F.3d 409, 418–19 (9th Cir. 1999), in that a sentencing court—despite not being directly reversed—can be shown to have a "personal stake" in the prior conviction, the associated initial sentence and other "institutional interests" that may yield a vindictive sentence. *See also Texas v. McCullough*, *supra*." (C.A. Reply Br. at 1).

Valdez-Lopez also maintains that the *Pearce* presumption can only be rebutted by new evidence not known to the original judge or conduct occurring after the time of the original sentencing. This is consistent with *Nulph v. Cook*, *333 F.3d 1052, 1057 (9th Cir. 2003*) relying on *Pearce*, 395 U.S. at 726, *Texas v. McCullough*, 475 U.S. at 146, *Bono*, 197 F.3d at 420, *United States v. Rapal*, 146 F.3d 661, 664 (9th Cir. 1998). It was noted by Valdez-Lopez in both the Opening brief and Reply brief, no such evidence or subsequent conduct exists here. Further, in addressing these claims in a different context, the opinion indirectly concedes no such evidence or conduct exists in this record. App. 5, 9-10.

---

[1] *Johnson v. United States*, 576 U.S. 591(2015); *United States v. Davis*, 139 S. Ct. 2319 (2019)

Accordingly, the *Pearce* presumption applies here and cannot be rebutted. The court of appeals erred in determining that a "triggering event" had not occurred and that the *Pearce* presumption did not apply. The court of appeals further erred in determining that the *Pearce* presumption could also not apply because the harsher sentence was imposed by a second (new) judge. Had the *Pearce* presumption been applied Valdez-Lopez would have prevailed.

2. This case further turns on the long-standing and firmly entrenched circuit split regarding whether the *Pearce* presumption applies when the new harsher sentence is imposed by a second (new) sentencer. In *Plumley v. Austin*, 135 S.Ct 828 (2015), Justice Thomas joined by Justice Scalia, writes in dissent from this Court's denial of certiorari arguing, in part, that a circuit split exists that must be resolved. If the *Pearce* presumption applies, in this second sentencer case, Valdez-Lopez prevails as the record is clear that the harsher sentence was not based on new information or events occurring after the original sentence. The Court should grant certiorari to resolve the long-standing circuit split.

The court of appeals here reasoned that the *Pearce* presumption cannot apply because the new sentence was imposed by a different judge. App. 7, 9. This is a misapplication and overreading of the United States Supreme Court precedent upon which they rely. Similarly, the Ninth Circuit's relevant opinions are inconsistent and incompatible on this second (new) sentencer issues. This only serves to widen and

complicate the firmly entrenched circuit split that exists.

In order to clarify the Ninth Circuit's bright-line stance the court of appeals relied on *McCullough*. 475 U.S. at 104 and *Chaffin*, 412 U.S. at 26-28 as well as *Colten v. Kentucky*, 407 U.S. 104, 116-18 (1972). This bright-line rule deepens the existing circuit split yet it is not consistent with this Court's precedent and indeed even a narrower version of *Pearce*.

Pearce itself was a second (new) sentencer case. This stands in contrast to *McCullough*, *supra.*, where the Court found that that in specific situation a second (different) sentencer may not be subject to the *Pearce* presumption but this was merely a factor not a bright-line rule. The Court in *McMcullough* at footnote 3 acknowledges that *Pearce* itself involved two different sentencing authorities; however, the Court did not specifically address the materiality of different sentencers, if any, in the opinion. Accordingly, the Court did not believe that *Pearce* governs in this regard, e.g., that different sentencers will automatically be entitled to the *Pearce* presumption. It also clearly did not establish a rule that different sentencers mean that the presumption automatically does not apply.

Although the Court in *Pearce* does not directly address the second sentencer issue in the formal opinion it was discussed extensively throughout the oral argument. The audio link to the oral argument in *Pearce* has been included at App. 20. The fact that a second (new) judge imposed the harsher sentence did not deter the Court in *Pearce*. In fact, the ability of Defendant to show—in order to ensure due process

isn't illusory—that the second judge was actually vindictive would be virtually impossible were concerns of the Court.

In addition, the oral argument reveals that the Petitioner appears to have framed the issue a second (new) sentencer issue where due to a constitutional defect the question becomes whether the second trial court impose a harsher punishment upon the defendant.[2]

In contrast to the Petitioner's claim that a Defendant could simply have a burden to demonstrate actual vindictiveness Justice Stewart Potter expressed concern. The Justice questioned whether it would ever be possible for this type of evidence to be produced by the Defendant. Accordingly, *Pearce* is instructive on this issue and the Court's subsequent minimization of *Pearce* in this regard is misplaced.[3]

Most recently, in *Plumley v. Austin*, 135 S.Ct 828 (2015), Justice Thomas joined by Justice Scalia, wrote in dissent from this Court's denial of certiorari arguing, in part, that a circuit split exists that must be resolved. Justice Thomas noted that "[t]he Fourth Circuit's decision merits review for an additional reason: It deepens existing disagreement between the Courts of Appeals over the scope of the presumption of vindictiveness." *Id*.

---

[2] *See* Oral Argument at https://www.oyez.org/cases/1968/413 (at :48 seconds).

[3] *See* Oral Argument at https://www.oyez.org/cases/1968/413 (at 24:42 seconds).

Specifically, the Fifth and Ninth Circuits will not apply the *Pearce* presumption "[a]bsent a triggering event" that
"prods the sentencing court into a posture of self-vindication." The Court cites to *Kindred v. Spears*, 894 F.2d 1477, 1480 (5th Cir. 1990); *accord, e.g., Fenner v. United States Parole Comm'n*, 251 F.3d 782, 788 (9th Cir. 2001). "For these courts, a reversal by a higher tribunal or order from a higher tribunal is such a triggering event, see *Bono v. Benov,* 197 F.3d 409, 417 (C.A.9 1999); *Kindred, supra,* at 1479–1480, *831." Justice Thomas notes that "the Eighth Circuit has also concluded that reversal by a higher tribunal is the only such triggering event. *Savina v. Getty,* 982 F.2d 526 (1992) (unpublished table decision)."

To the contrary, Justice Thomas notes that the Seventh Circuit, has stated that it would apply the presumption even if the trial court imposed a higher sentence after itself granting a defendant's motion for a corrected sentence. *United States v. Brick,* 905 F.2d 1092, 1096 (1990)(citing *United States v. Paul,* 783 F.2d 84, 88 (C.A.7 1986)).

Some, but not all of the circuits have addressed this issue in a variety of ways only adding to the confusion. *See United States v. Anderson*, 449 F.3d 1013 (8th Cir. 2006) (collecting cases). In particular, some of these circuits, hold the presumption is inapplicable in this second (new) sentencer situation only if the second sentencer states objective, non-vindictive reasons for imposing the greater sentence (added condition). *See Anderson*, 440 F.3d at 1016; *Macomber v. Hannigan*, 15 F.3d 155, 156-57 (10th Cir. 1994); *Rock v. Zimmerman*, 959 F.2d 1237, 1267 (3rd Cir. 1992), *overruled on other grounds by Brecht v.*

Abrahamson, 507 U.S. 619, 113 S.Ct. 1710 (1993); see *also United States v. Newman*, 6 F.3d 623, 630-31 (9th Cir. 1993) (seeming to impose the added condition). *But see Gonzales*, 290 Fed.Appx. at 813; *United States v. Cheek*, 3 F.3d 1057, 1064 (7th Cir. 1993); *United States v. Perez*, 904 F.2d 142, 146 (2d Cir. 1990). The Third and Tenth Circuits cite *McCullough* in support of imposing this added condition. *See Macomber*, 15 F.3d at 157; *Rock*, 959 F.2d at 1257-58.

McCullough stated, as quoted *supra*: "Here [in *McCullough*], the second sentencer provide[d] an on-the-record, wholly logical, non-vindictive reason for the sentence. We read *Pearce* to require no more[,] particularly since trial judges must be accorded broad discretion in sentencing". 475 U.S. at 140, 106 S.Ct. 976 (citing *Wasman*, 468 U.S. at 563-64, 104 S.Ct. 3217).

It may be that this added-condition difference of opinion incidentally and somewhat artificially arises from the repeated summarization and quotation from vindictiveness decisions. And, none of these circuits addresses this added-condition difference of opinion.

Arguably, the evolved reasonable-likelihood-of-vindictiveness standard negates this added condition. *See Alabama v. Smith*, 490 U.S. 794, 798-800, 109 S.Ct. 2201 (1989).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
/S/ DAVID J. TEEL
DAVID J. TEEL
Counsel of Record
The Law Office of David J. Teel, PLLC
2303 N. 44th Street, Ste. 14-1518
Phoenix, Arizona 85008
(602) 441-3434 voice
teel@arizonalegal.org