No. 21-1185

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

REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

This is an ideal case for review that presents important issues for Mr. Valdez-Lopez and other similarly situated defendants. These issues continue to arise and are capable of repetition. These cases involve the constitutionally mandated protections afforded to Defendants that successfully challenge their convictions or sentences only to be subject to the random whims resulting from the mere passage of time and chance. *Pearce* protects these Defendants; however, the court of appeals panel decision and the arguments advanced by the

respondent render these protections hollow and illusory.

As noted by Judge Fletcher in his concurrence, the law has gone awry, and a Defendant should not be subjected to a harsher punishment where nothing has changed other than a portion of their original sentence was unconstitutional. Pet. App. 14-17.

This case is an appropriate vehicle. It involves multiple questions that are the subject of great variance, ambiguity, and inconsistency throughout the circuit courts. The Court is once again presented with a case that, like *Pearce*, involved a second (new) sentencer; yet the court of appeals and the respondent argue this is an absolute bar to the application of the *Pearce* presumption. This Court's precedent demands clarification on this issue.

This case, unlike the majority of cases presenting similar issues, does not flow from a retrial where new information and legal issues come to light. It also involves a substantive change to the sentencing calculus as opposed to violation of other rights or a procedural deficiency as was the case in *Mathurin* cited by the respondent. BIO 8. In addition, and unlike *McCullough*, where the judge independently and objectively made a ruling requiring a new trial the new judge here was not truly exercising independent discretion. The new judge here was ostensibly bound to follow new precedent and grant relief. This created a "triggering event". The record then reflects a reasonable likelihood of vindictiveness. The record shows an unwillingness to address how the dismissal of Count V was being accounted for and factored into the Court's sentencing calculus absent vindictiveness of any

kind. Instead, the record demonstrates directed focus on Mr. Valdez-Lopez decision to go to trial, failure to take a plea which was different from his codefendants, and the brandishing of a firearm which was part and parcel to the dismissed Count V. Pet. 2-10. There is also evidence of hostility toward Mr. Valdez-Lopez sentencing presentation despite, as the respondent points out, the district court's pronouncement that any sentence was possible from the floor to the ceiling. Pet. 4. This yields a reasonable likelihood of vindictiveness. *See Alabama v. Smith*, 490 U.S. 794, 798-800, 109 S.Ct. 2201 (1989). Both the court of appeals and the Respondent assert that an additional condition exists wherein the *Pearce* presumption can be overcome if the new sentencing judge provides "an on-the-record, wholly logical, nonvindictive reason" for the harsher sentence. (BIO 9). They appear to assert that even a partial application of the factors required by §3553(a) defeats the presumption in this case. This is at odds with the evolved reasonable likelihood of vindictiveness test announced in *Alabama v. Smith*, *supra*.

It does not follow that simply because a new sentencing decision, in a vacuum, may otherwise comply with §3553(a)—as must all sentencing decisions—that alone rebuts the *Pearce* presumption and renders moot other evidence of a reasonable likelihood of vindictiveness.

Here, following this Court's decisions in *Johnson* and *Davis*, on questions of constitutional interpretation, the newly assigned judge was ostensibly bound to apply this precedent to the §2255 motion thereby rendering a critical portion of Mr.

Valdez-Lopez original sentence unconstitutional.[1] The Government also did not oppose the motion and the Magistrate Judge recommended it be granted. Pet. 3. This was a "triggering event" and a reasonable-likelihood-of-vindictiveness is clearly demonstrable upon the resulting record. The *Pearce* presumption should be applied. Neither the court of appeals nor the respondent meaningfully address this important question.

At resentencing, before the new judge, the PSR recommendation was for 15 years which was 5 years less than the original sentence and accounted for the change in the sentencing calculus, the lack of new information and the lack of intervening events for the Court to consider. Similarly, the Government recommended 20 years which represented a reimposition of the original sentence again taking into account the gravity of the constitutionally mandated §2255 victory and material alteration of the sentencing calculus. (C.A. E.R. 20, 35).

Nevertheless, Mr. Valdez-Lopez was sentenced on Count I-IV to an additional 60 months above and beyond the original sentence imposed for Counts I-V and contrary to the recommendations of all other interested parties. Pet. 10.

Therefore, despite this constitutionally mandated §2255 "victory", Mr. Valdez-Lopez nevertheless remains incarcerated to this very day.

Judge Fletcher later wrote separately stating that the law should not permit a judge, whether the original judge or a replacement judge, to impose a

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

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. Pet. App. 16.

Nevertheless, the court of appeals as well as the respondent assert that the *Pearce* presumption cannot apply for two primary reasons: (1) the new judge granted the §2255 motion that resulted in the new sentencing and (2) a second (new) judge imposed the harsher sentence which acts as an absolute bar to the relief sought and a showing of actual prejudice was deficient.

Despite the court of appeals' opinion and respondent's contentions the record reflects a "triggering event". It also reflects a vindictive sentencing motivation and an unconstitutional fixation on Mr. Valdez-Lopez decision to go to trial, his failure to take a plea like the rest of the codefendants and the brandishing of a firearm. The brandishing of a firearm is necessarily and inextricably intertwined with the dismissed 18 U.S.C. § 924(c)(1)(A)(ii) count. This is also evidence of actual vindictiveness.

This Court should review whether the new judge's application of new binding case law to a collateral attack on the original sentence is a "triggering event". If so, and the *Pearce* presumption is applied, Mr. Valdez-Lopez invariably prevails because it cannot be rebutted.

If a "triggering event" did not take place, this Court should still address 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. Both the court of appeals and the respondent assert that a second (new) sentencer is an absolute bar to the application of the *Pearce* presumption. However, 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 case is a prime example of why there cannot be an absolute bar simply because a new judge imposed the harsher sentence. The record before this Court justifies review.

1. There was a "triggering event", the *Pearce* presumption applies, and no new information exists to justify the harsher sentence.

Review should be granted because: (1) the court of appeals erred when it tacitly determined that a "triggering event" did not occur, and (2) because it remains unclear whether a "triggering event" is even required especially where a reasonable likelihood of vindictiveness otherwise exists.

The court of appeals does not directly 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.

Mr. Valdez-Lopez specifically addressed these issues and the second (new) sentencer issue, in significant detail in his Opening Brief and Reply brief as well as the underlying Petition. Pet. 11-16. 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. Pet. 13.

The "triggering event" is evidenced here by, among other things, the fact that: (1) the Court here was bound by *Johnson* and *Davis*[2] rendering Valdez-Lopez sentence unconstitutional as constructed, (2) the Magistrate Judge recommended granting the §2255 motion based upon binding case law, (3) the government did not oppose and (4) the resulting sentence was contrary to the recommendations of all interested parties. These are indicia of a reasonable likelihood of vindictiveness.

Similarly, the panel, here, did not address the potential for "institutional motivations" coupled with the citations to the record both demonstrating and satisfying the reasonable likelihood analysis required by *Smith, supra.*

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 and seek to protect their normally broad sentencing discretion. *See Chaffin v. Stynchcombe*, 412 U.S. 17, 27 (1973); *Bono v. Benov*, 197 F.3d 409, 419 (9th Cir. 1999).

There is a reasonable likelihood, as reflected upon a plain reading of the record, that the harsher sentence is the product of: (1) institutional interests, (2) a reaction to the winnowing of normally broad

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

sentencing discretion and (3) a punishment for proceeding to trial, not taking a plea offer like the other codefendants and then successfully attacking the underlying sentence in a material fashion.

Here the collateral attack came nearly 15 years into the case and dramatically altered the sentencing calculus. It tied the Court's hands. These considerations are magnified where the second (new) judge is ostensibly bound to grant a §2255 motion and unable to truly make their own determination like the second judge was able to do in *McCullough, supra.*

Further, as can arguably be inferred from Judge Fletcher's concurrence, absent something like a new trial and the acquisition of new information after the original sentencing, an actual increase is unjustifiable. This cannot and should not be the law. If it is the law, then a "triggering event" cannot be so narrowly defined that it renders the constitutional protections guaranteed to defendants like Mr. Valdez-Lopez hollow and illusory.

Where, as is the case here, the record evidences a "triggering event" the *Pearce* presumption applies.

2. This Court should grant certiorari to resolve the circuit split regarding these recurring issues, to clarify the law regarding *Pearce*, in light of Judge Fletcher's concurring opinion and as urged in the 2015 dissent to this Court's denial of certiorari in *Plumley v. Austin*, 135 S.Ct 828 (2015)

The respondent joins the court of appeals here arguing that an absolute bar exists to the application of the *Pearce* presumption in cases involving a second

(new) sentencer. Respondent does so while, like the court of appeals, simultaneously arguing that second sentencer cases involving parole boards are different because they act with a single or unified mind. BIO 11. *See, e.g., Nulph v. Cook*, 333 F.3d 1052 (9th Cir. 2003). This argument turns a blind eye to the shifting membership of these boards. The Ninth Circuit's relevant opinions are inconsistent and incompatible on this second (new) sentencer issue and inconsistent with other circuits. This only serves to widen and complicate the firmly entrenched circuit split that exists.

As acknowledged by the respondent, *Pearce* itself was a second (new) sentencer case. BIO 10-11. The Court in *McCullough* at footnote 3 acknowledges that *Pearce* itself involved two different sentencing authorities; however, it did not believe that *Pearce* necessarily governs in this regard. Pet. 17.

Although not directly addressed in the opinion, the fact that a second (new) judge imposed the harsher sentence also did not deter the Court.

In addition, the *Pearce* court was concerned about whether demonstrating actual prejudice, especially in a second sentencer case, was even possible with the larger question being whether due process is therefore illusory. The question then necessarily evolves into whether the mere fact that a second sentencer handed down the harsher sentence or issued the order requiring the new sentencing should, standing alone, eviscerate a defendant's due process safeguards. Arguably, the Court in *Pearce* reasoned that the mere presence of a second

sentencer should not relegate every defendant to a showing of actual prejudice.

The oral argument demonstrates that the issue in *Pearce* was indeed framed as a second (new) sentencer issue. Pet. 17-18.

In *Pearce*, Justice Stewart Potter expressed concern about whether it would ever be possible for this type of evidence [actual prejudice] to be produced by the Defendant. *Id*. Accordingly, *Pearce* is instructive on this issue and the *McCullough* court's subsequent minimization of *Pearce* in this regard is misplaced.

The dissent in *Plumley v. Austin*, 135 S.Ct 828 (2015), documents the circuit split still at issue today and this Court should grant review on these recurrent and important issues. Pet. 18-20.

Similarly, the dissent points out that the Seventh Circuit 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)).

The confusion grows considering the various ways in which the various circuits address these and related issues. *See United States v. Anderson*, 449 F.3d 1013 (8th Cir. 2006) (collecting cases).

For example, some of these circuits, created an added condition that deprives a defendant of the *Pearce* protections. Pet. 19-20.

These circuits hold the presumption is inapplicable only if the second sentencer states objective, non-vindictive reasons for imposing the greater sentence. *Id*. However, it does not follow that simple because a new sentencing decision, in a vacuum, may otherwise comply with §3553(a)—as must all sentencing decisions—that alone rebuts the *Pearce* presumption and renders moot other evidence of a reasonable likelihood of vindictiveness. Likewise, Petitioner has argued this is also at odds with the reasonable likelihood of vindictiveness analysis noted in *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,
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