NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MONTREZ DUNCAN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a court constitutionally vindictive in violation of due process when, after it vacates the conviction and mandatory-consecutive sentence on a count that was deemed unconstitutional, it resentences a defendant to an equally long total sentence by increasing the sentences on the counts that remain?

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PARTIES TO THE PROCEEDING

All parties are listed in the caption of the opinion of the United States Court of Appeals for the Sixth Circuit.

REFERENCE TO OPINIONS BELOW

The August 24, 2023 opinion of the Sixth Circuit Court of Appeals is unpublished but available as *United States v. Duncan*, No. 22-5370, 2023 WL 5447338 (6th Cir. 2023). The April 19, 2021 order of the Middle District of Tennessee vacating the 18 U.S.C. § 924(c) count is unpublished but available as *Duncan v. United States*, No. 3:20-cv-00207, 2021 WL 1530937 (M.D.T.N. Apr. 19, 2021). Both of these are reproduced in the appendix to this petition.

STATEMENT OF JURISDICTION

Petitioner Montrez Duncan seeks review of the August 26, 2023 judgment of the Sixth Circuit Court of Appeals. The decision is final and subject to review under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. V (Due Process Clause)

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This petition stems from a resentencing proceeding after a successful petition under 18 U.S.C. § 2255 in which the district court vacated an unconstitutional conviction and consecutive sentence on a § 924(c) count.

In 2014, Petitioner Montrez Duncan was charged with conspiracy to commit Hobbs Act robbery and Hobbs Act robbery under 18 U.S.C. § 1951(b), and with brandishing a firearm during the commission of a crime of violence under 18 U.S.C. § 924(c). All of the counts stemmed from a single robbery. App. 1. A jury found him guilty on the three counts. App. 2.

At Mr. Duncan's initial sentencing, the district court sentenced him to two concurrent 180-month sentences for the conspiracy and Hobbs Act robbery counts, and to a mandatory-consecutive 120-month sentence for the § 924(c) charge, totaling 300 months. App. 67.

In 2019, this Court issued its opinion in *United States v. Davis*, 139 S. Ct. 2319 (2019), holding that 18 U.S.C. § 924(c) was unconstitutionally vague. Mr. Duncan filed a petition to vacate his conviction on the § 924(c) count pursuant to 18 U.S.C. § 2255. App. 15. The district court vacated the conviction and sentence on that count, which entitled Mr. Duncan to a resentencing on the remaining Hobbs Act counts. App. 18.

At resentencing, Mr. Duncan argued that his new sentence should total 180 months, reflecting the initial two concurrent 180-month sentences for the Hobbs Act counts and the vacatur of the § 924(c) count. App. 30-34.

There, the court chose to apply a new "organizer" enhancement where there was no new evidence about leadership or organization. App. 24.
The organizer enhancement had no relation to the vacated § 924(c) count and was available as a factor at the original sentencing. The new Pre-Sentence Report also added seven levels to the offense level for the usage of a firearm in the commission of the offense. App. 23.

Because Mr. Duncan was deemed a career offender, the guidelines in both sentencing proceedings were 360 months to life. App. 25, 66. At resentencing, the court sentenced Mr. Duncan to 200 months for conspiracy to commit Hobbs Act robbery and 100 months for Hobbs Act robbery and changed the sentences from concurrent to consecutive. App. 43–44. The 300-month sentence on the remaining counts amounted to a 120-month increase for those counts and left Mr. Duncan's total time served *exactly* the same in spite of the vacatur of the mandatory-consecutive § 924(c) sentence.

Mr. Duncan objected to the longer consecutive sentences on the remaining counts. App. 33–34. The court's only rationale for the increased total sentence on the remaining counts was that it "[was] sentencing the same behavior" despite the vacatur. App. 50.

Mr. Duncan appealed to the United States Court of Appeals for the Sixth Circuit. He argued that the district court violated his due process rights by subjecting him to presumptive or actual vindictiveness during resentencing by imposing a harsher sentence on the remaining counts. App. 12. Relying on

North Carolina v. Pearce, 395 U.S. 711 (1969), Mr. Duncan argued that the harsher sentence on the remaining counts raised a presumption of vindictiveness. App. 12. He further argued that failure to explain the consecutive sentences was procedurally unreasonable because the court failed to state any adequate justification. App. 6.

The Sixth Circuit rejected Mr. Duncan's arguments and held that the court only applies a presumption of vindictiveness if the total new sentence is longer than the total old sentence, regardless of the vacated count. App. 12. This is known as the "packaging" or "aggregate packaging" method of assessing sentencing vindictiveness. App. 12. Consequently, the Sixth Circuit held that imposing an equally long sentence after the vacatur of the consecutive § 924(c) count did not create a presumption of vindictiveness. App. 12 (*citing United States v. Rogers*, 278 F.3d 599, 604 (6th Cir. 2002)).

REASONS FOR GRANTING THE WRIT

I. The lower courts are split on how to determine when a judge has created a presumptively vindictive sentence at resentencing.

The federal courts of appeals and state supreme courts are split on how to interpret and apply *North Carolina v. Pearce* and its prohibition against vindictiveness in the resentencing process. In *Pearce*, this Court held that due process prohibits both actual vindictiveness and presumptive vindictiveness which a court fails to rebut. 395 U.S. 711, 723–26 (1969), *overruled in part on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). While the Court has since clarified that this does not prevent the imposition of all "enlarged sentences" after vacatur, *Pearce* still stands for the proposition that vindictiveness that chills a defendant's right to challenge a sentence is constitutionally impermissible. *Texas v. McCullough*, 475 U.S. 134, 137–38 (1986).

This Court has not yet determined how to determine whether a new sentence is longer or harsher for the purposes of assessing sentencing vindictiveness. In *Pearce* itself, the new sentence added approximately three years to the total time served and was clearly longer. *Pearce*, 395 U.S. at 714 n.1. This meant that the Court did not have to rule on how new and old and new sentences should be compared to assess vindictiveness with respect to vacated counts. Lower courts have consequently crafted a threshold step to determine "whether the new sentence is actually harsher than that imposed prior to successful appeal" or other post-conviction petition. *United States v.*

Kincaid, 964 F.2d 325, 329 (4th Cir. 1992). A persistent and well-acknowledged split has developed in this step. *See, e.g.*, *United States v. Campbell*, 106 F.3d 64, 67-–68 (5th Cir. 1997) (noting that application of *Pearce* on when a sentence is longer "has been the subject of some confusion in this Circuit and among our sister circuits"); *United States v. Vontsteen*, 950 F.2d 1086, 1092–93 (5th Cir. 1992) (acknowledging "some controversy in this and the other circuit courts" on when a sentence is longer for the purpose of sentencing vindictiveness).

A majority of the circuits utilize the "aggregate packaging" method where they compare the total length of the initial sentence with the total length of the new sentence. *United States v. Pimienta-Redondo,* 874 F.2d 9, 14 (1st Cir. 1989*)*; *United States v. Ventura,* 864 F.3d 301, 309 (4th Cir. 2017); *United States v. Campbell,* 106 F.3d 64, 67–68 (5th Cir. 1997); *United States v. Murphy*, 591 F. App'x 377, 383–84 (6th Cir. 2014); *United States v. Mancari*, 914 F.2d 1014, 1021–22 (7th Cir. 1990); *Gardiner v. United States,* 114 F.3d 734, 736 (8th Cir. 1997); *United States v. Bay,* 820 F.2d 1511, 1514 (9th Cir. 1987)*; United States v. Easterling,* 157 F.3d 1220, 1223 (10th Cir. 1998)*; United States v. Townsend,* 178 F.3d 558, 567 (D.C. Cir. 1999). Under this view, a new sentence that has the same total length as the old sentence is not presumptively vindictive, even when a previously consecutive count was vacated. This approach was applied in the instant case to hold that the 300-month sentence was not constitutionally vindictive, even after a mandatory-

consecutive count that accounted for 120 months of the initial 300-month sentence was vacated. App. 12–13. Several state courts have also adopted the aggregate packaging method. *See State v. Febuary*, 96 P.3d 894, 906 (Or. 2017); *State v. Hudson*, 748 S.E.2d 910, 913 (Ga. 2013); *People v. Johnson*, 363 P.3d 169, 178–79 (Co. 2015).

The Second Circuit, and to a lesser extent the Eleventh Circuit, utilize the "remainder aggregate" method of analysis. *United States v. Markus*, 603 F.2d 409, 413 (2d Cir. 1979); *United States v. Monaco*, 702 F.2d 860, 885 (11th Cir. 1983). Under this method, a court is presumptively vindictive when it imposes a longer sentence overall on the remaining counts on remand. *United States v. Weingarten,* 713 F.3d 704, 711 (2d Cir. 2013). Therefore, when "the new sentence on the remaining counts exceeds the original sentence on those counts," vindictiveness is presumed. *Campbell*, 106 F.3d at 68 (describing the method adopted by sister circuits). Under this approach in the instant case, any sentence greater than 180 months on the remaining counts would be a presumptively vindictive increase after Mr. Duncan's consecutive § 924(c) count was vacated. At least one state court has endorsed a method that looks like the "remainder aggregate" as well. *See State v. Abram*, 941 A.2d 576 (N.H. 2007).

Finally, at least two states have created an even broader notion of presumptive vindictiveness through the "count-by-count" method, where courts compare the original and new sentence on the remaining counts and

protect against a vindictive increase on any individual count. This approach creates a presumption of judicial vindictiveness where the sentence increases on any individual remaining counts after vacatur. *See People v. Moore*, 686 N.E.2d 587, 594 (Ill. 1970); *Bowser v. State*, 441 P.3d 540, 543 (Nev. 2019) (holding that the "count-by-count" method is the only one that adheres to *Pearce*'s mandate to deter actual vindictiveness at resentencing and to "avoid a chilling effect on defendants exercising their right to appeal").

Therefore, the lower courts are split on how to decide if a new sentence is "harsher" and what types of sentences should give rise to a presumption of constitutional vindictiveness at resentencing. This justifies the exercise of this Court's jurisdiction.

II. The vindictiveness analysis in *North Carolina v. Pearce* requires the adoption of the "remainder aggregate" or "count-by-count" method.

The "remainder aggregate" or the "count-by-count" methods are necessary to vindicate the due process protection against presumptive vindictiveness. The prophylaxis against judicial vindictiveness is hindered if a defendant who engages with the judicial process to vacate an unconstitutional count of his sentence is penalized by an increased sentence on the remaining counts. As this Court said in *Pearce*, "[s]ince the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a

defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Pearce*, 395 U.S. at 725.

Judicial vindictiveness should not deter defendants from pursuing legal avenues to which they are entitled. The "aggregate packaging" method allows a judge to impose longer sentences on remaining counts up to the length of the total original sentence with no presumption of vindictiveness, effectively rendering the vacatur of a count meaningless. Therefore, the "aggregate packaging" method allows the risk of judicial vindictiveness to deter defendants from exercising their right to challenge a sentence on appeal or in a post-conviction petition. Guarding against this risk requires a prophylactic rule that creates a presumption of vindictiveness when a court creates a sentence that is longer on remaining counts after a count is vacated.

Pearce continues to stand for the presumption that a defendant cannot be penalized for, or dissuaded from, exercising his right to challenge his conviction. This presumption applies unless there is "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" that applies to the new sentence. *Pearce*, 395 U.S. at 726. A sentence after vacatur that is equal to or longer than the original length of imprisonment deters defendants from utilizing their constitutional entitlement to due process.

The "remainder aggregate" or "count-by-count" methods allow for an inquiry into judicial vindictiveness after a successful post-conviction challenge

when the total of the new sentence remains as long as the original sentence, or when the individual sentence increases on any remaining count. Without a minimum of the "remainder aggregate" rule, a judge can be vindictive in resentencing as long as the new total term does not exceed the total old term. With the "aggregate packaging" method, a hypothetical defendant who has a count that accounted for most of his sentence vacated would be unable to challenge the sentence for presumptive vindictiveness if the new total sentence is the same as the old one.

The adoption of either the "remainder aggregate" or the "count-by-count" method is therefore necessary to protect defendants against presumptive vindictiveness when they exercise their rights to challenge their sentence.

III. This case presents an effective vehicle to resolve the sentencing vindictiveness question.

Mr. Duncan's case provides an excellent vehicle to resolve whether judges are presumptively vindictive when they increase a sentence on remaining counts at a resentencing. After a vacatur of a count that constituted 120 months of Mr. Duncan's original sentence, the judge resentenced him to a longer term on one of the remaining counts, and ordered, for the first time, that they be served consecutively. App. 43. The court increased the total sentence on the remaining counts by 120 months and negated the effect of the successful vacatur of an unconstitutional count. App. 43–44. At Mr. Duncan's resentencing, the judge presented no justification for the increased sentence

except to say it was for "the same behavior." App. 50. There were no new facts that justified an increased sentence on the remaining counts. This presents a clear-cut case for whether a total sentence that remains unchanged after a successful appeal or post-conviction petition constitutes judicial vindictiveness.

Further, it is clear that if Mr. Duncan's case had been heard in another court of appeals, the court would have considered the increased sentence presumptively vindictive. A "count-by-count" court would have found that an increase in the sentence on any individual count, which occurred here, created a rebuttable presumption of vindictiveness. A "remainder aggregate" court would have found vindictiveness any time Mr. Duncan's sentence exceeded the 180-month total for his Hobbs Act counts. This divergence in outcomes shows the need for this Court to exercise its jurisdiction and unify the rule in light of its precedent in *Pearce*.

Mr. Duncan's case is therefore an excellent vehicle for this Court to decide whether it is vindictive for a court to assess an equally long sentence at resentencing when a conviction on a consecutive count is vacated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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