

No. 24-_____

IN THE
Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA

Respondent,

V.

KEITH ANTHONY ROSARIO

Petitioner.

On Petition for Writ of Certiorari
to the Superior Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

John E. Egers, Jr.
Counsel of Record
PEACOCK KELLER, LLP
95 West Beau Street, Suite 600
Washington, PA 15301
(724) 222-4520
john.egers@peacockkeller.com

QUESTION PRESENTED

Whether increases in minimum sentences upon re-sentencing, when no new objective information since the previous sentencing exists to justify the increases, violates the presumption of vindictiveness of North Carolina v. Pearce and the right to due process under the United States Constitution Amendment XIV?

RELATED PROCEEDINGS

- *Commonwealth of Pennsylvania v. Keith Anthony Rosario*, No. 241 WAL 2023, Supreme Court of Pennsylvania. Order denying Petition for Allowance of Appeal entered February 21, 2024.
- *Commonwealth of Pennsylvania v. Keith Anthony Rosario*, No. 931 WDA 2022, Superior Court of Pennsylvania. Memorandum Opinion entered June 21, 2023 and Application for Reargument by Commonwealth of Pennsylvania denied August 30, 2023.
- *Commonwealth of Pennsylvania v. Keith Anthony Rosario*, No. CP- 63-CR-2611-2017, Court of Common Pleas of Washington County, Pennsylvania. Judgment of Sentence entered March 25, 2022 and a Post-Sentence Motion to Modify Sentences at Counts 3 and 4 was denied July 18, 2022.
- *Commonwealth of Pennsylvania v. Keith Anthony Rosario*, No. 1700 WDA 2019, Superior Court of Pennsylvania, reported at 248 A.3d 599 (Pa. Super. 2021)(ordering vacation of sentence and remand for resentencing).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Keith Anthony Rosario (Rosario) respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania in Commonwealth of Pennsylvania v. Keith Anthony Rosario, No. 931 WDA 2022.

OPINIONS BELOW

The Superior Court of Pennsylvania's opinion is unpublished. Pet. App. 2a-31a. After the Superior Court denied the Commonwealth's application for reargument by order dated August 30, 2023, Rosario sought review by the Pennsylvania Supreme Court. The February 21, 2024 order of the Supreme Court of Pennsylvania denying the petition for allowance of appeal is also unpublished. Pet. App. 1a. The orders and opinion of the Court of Common Pleas of Washington County, Pennsylvania issued on March 25, 2022 (Pet. App. 51a-55a), July 18, 2022 (Pet. App. 49a-50a) and September 30, 2022 (Pet. App. 32a-48a) are unpublished.

JURISDICTION

The Superior Court of Pennsylvania entered a memorandum order affirming in part and reversing and remanding in part Rosario's appeal June 21, 2023. Pet. App. 29a. The Commonwealth's timely application for reargument before the Superior Court of Pennsylvania was denied on August 30, 2023. Rosario timely filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania that was denied pursuant to an order dated February 21, 2024. Pet. App. 1a. This Court has jurisdiction to review the judgment of the Superior Court of Pennsylvania pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment states in pertinent part that "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case presents an important Fourteenth Amendment due process issue affecting the courts of our nation: whether the presumption of vindictiveness in North Carolina v. Pearce, 395 U.S. 711, 725 (1969) exists in an indeterminate sentencing scheme, when a criminal defendant is resentenced by the same judge to higher minimum sentences without no new objective information since his previous sentencing to justify the increased minimum sentences.

1. Rosario was charged under the Pennsylvania Crimes Code by an information dated November 9, 2017 with the crimes of Criminal Attempt-Homicide in violation of 18 Pa.C.S. §§ 901(a), 2501(a), Aggravated Assault in violation of 18 Pa.C.S. §2702(a)(1), Aggravated Assault in violation of 18 Pa.C.S. § 2702(a)(4), Kidnapping in violation of 18 Pa.C.S. § 2901(a)(2)and (a)(3), Criminal Conspiracy to Commit Criminal Homicide, Aggravated Assault and/or Kidnapping in violation of 18 Pa.C.S. § 903(a)(1) and Possession of Firearm Prohibited, 18 Pa.C.S. § 6105(a)(1). The charges originated from the allegation that Rosario kidnapped and took Marcus Stancik to another location and shot Stancik in the back of the head with a .22 caliber pistol. The jury

trial of Rosario began on February 5, 2019 and continued until February 7, 2019 when the jury returned a verdict of guilty on Counts One through Six in the information. On Count Six, criminal conspiracy, the jury concluded that the objects of the criminal conspiracy were criminal homicide, aggravated assault and kidnapping. A presentence report and addendum were prepared and a sentencing hearing held on June 3, 2019. The defendant along with his mother and older sister addressed the court. Written statements in favor of Rosario were also submitted to the court. Stancik was not present for sentencing, but the court accepted a statement from him, included with the presentence report and a handwritten victim impact statement that was read by a victim advocate from the witness stand. The court then imposed the following sentence: Count 1, Criminal Attempt, Homicide Felony 1, 120-240 months; Count 2, Aggravated Assault, Felony 1 no sentence as it merged with the sentence at Count 1; Count 3, Aggravated Assault, Felony 2, 36-120 months; Count 4, Kidnapping, Felony 1, 90-240 months; Count 5, Kidnapping, Felony 1, 90-240 months; and Count 6, Criminal Conspiracy, Felony 1, 90-240 months with all counts running consecutively. Count 7, possession of firearm prohibited, that was

severed from the other charges, was nolle prossed. Post-sentence motions were filed but denied by operation of law under Pa.R.Crim.P. 720(B)(3). On October 24, 2019, undersigned counsel was appointed to represent Rosario. Rosario was granted in forma pauperis status by Order dated November 12, 2015 and filed a notice of appeal on November 15, 2019 to the Pennsylvania Superior Court. The Superior Court reversed and remanded in part the original sentencing order finding as a matter of law that the trial court could not sentence Rosario for both the charges of criminal attempt at Count 1 and criminal conspiracy at Count 6 and could not sentence Rosario for both of his kidnapping charges at Counts 4 and 5. Commonwealth v. Rosario, 248 A.3d 599, 616-621 (Pa. Super. 2021). Pet. App. 78a – 90a. After being denied review by the Supreme Court of Pennsylvania and the Supreme Court of the United States, this matter came before the Court of Common Pleas of Washington County on remand for re-sentencing.

2. On March 25, 2022, Judge Valarie Costanzo resentenced Rosario to the following sentence: Count 1, Criminal Attempt-Homicide Felony 1, 120-240 months; Count 2, Aggravated Assault, Felony 1 no sentence

as it merged with the sentence at Count 1; Count 3, Aggravated Assault, Felony 2, 60-120 months; Count 4, Kidnapping, Felony 1, 120-240 months; Count 5, Kidnapping, Felony 1, no further penalty as it merged with Count 4; and Count 6, Criminal Conspiracy, Felony 1, no further penalty as it merged with Count 1; all counts of incarceration were imposed consecutively to each other and consecutively to any other sentences he was serving. Pet. App. 51a-54a. A post-sentence motion challenging discretionary aspects of the sentence was denied on July 18, 2022. Pet. App. 49a.

3. Rosario appealed the sentence imposed upon resentencing. In an unpublished memorandum filed June 21, 2023, two members of a Superior Court panel concluded that the trial court abused its discretion. Specifically, it found that Rosario's sentences at Count 3 for aggravated assault with a deadly weapon and at Count 4, Kidnapping were in excess of the aggravated guidelines range for both counts and unreasonable as the only new information received at resentencing was Rosario's allocution, which provided no support for the increased sentence. Pet. App. 15a-21a.

The Superior Court denied relief on Rosario's argument that his sentences at Counts 3 and 4 were vindictive in violation of due process. Pet. App. 22a-26a. Rosario argued that the increase in the minimum sentences from 36 to 60 months and 90 to 120 months respectively violated North Carolina v. Pearce because the increase in individual minimum sentences without new evidence that post-dated the original sentence that could justify this increase of the minimum sentence. The Superior Court disagreed concluding that a comparison between an original sentence and a sentence imposed upon remand must be judged by looking at the difference between the aggregate sentences, not differences between the individual sentences. Pet App. 25a-26a.

Rosario sought discretionary review in the Supreme Court of Pennsylvania, but was denied by order dated February 21, 2024. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

How a court is to judge a violation of Pearce's presumption of vindictiveness remains a subject of difference among the state and lower federal courts and it is an issue not yet determined by this Court. See Plumley v. Austin, 574 U.S. 1127 (2015)(Thomas, J., dissenting from

denial of certiorari)(noting the confusion among courts on their views of Pearce).

The resentencing of a criminal defendant after vacating the prior sentence calls for the sentencing court to start anew. See United States v. Norwood, 49 F.4th 189, 204 (3d Cir. 2022); United States v. Garcia-Robles, 640 F.3d 159, 166 (6th Cir. 2011); United States v. Moore, 83 F.3d 1231 (10th Cir. 1996). Upon resentencing, this Court has held that the successfulness of the criminal defendant cannot be met with a vindictive sentencing court upon remand. North Carolina v. Pearce, 395 U.S. 711 (1969). The calculus of a more severe sentence is more complicated when the original sentence consisted of multiple individual counts of conviction some of which were found to be illegal after appeal. This is what occurred in Rosario's case.

Applying Pearce, the severity of a sentence imposed on resentencing is judged by the Pennsylvania Superior Court by comparing the new aggregate sentence (also known as sentencing package) on remand and prior the vacated illegal aggregate sentence. Commonwealth v. Barnes, 167 A.3d 110, 124-125 (Pa. Super. 2017). This approach is illogical and violative of due process as it evaluates

vindictiveness *using as a measuring stick the prior aggregate sentence that is no longer valid and in most cases would be higher than an aggregate sentence on remand.* Further, it ignores the distinct characteristics of each count of conviction in favor of a simplistic comparison of aggregate sentences. It must be noted that the Pennsylvania Supreme Court has not adopted the aggregate package approach that was employed by the Pennsylvania Superior Court below in the present appeal. See Commonwealth v. Prinkey, 277 A.3d 554, 568 n.24, 573-575 (Pa. 2022).

The majority of states employ indeterminate sentencing. *Parole Boards Within Indeterminate and Determinate Sentencing Structures.* <https://robinainstitute.umn.edu/articles/parole-boards-within-indeterminate-and-determinate-sentencing-structures> (last visited May 20, 2024). This includes Pennsylvania. See 42 Pa.C.S. § 9756. The employment of an aggregate package approach for resentencing under Pennsylvania's indeterminate sentencing scheme permits a trial court upon resentencing to focus any vindictiveness upon increases in the minimum sentences imposed as compared to prior minimum sentences. As minimum sentences are not considered in the aggregate package

approach, the Pearce presumption of vindictiveness is essentially removed from cases like Rosario's by most jurisdictions. As a result, Rosario suffered increases in two of his minimum sentences when there was no new evidence to justify increasing the sentences for these counts upon remand.

The aggregate package approach when applied to the presumption recognized by this Court in Pearce does not serve to protect due process.

For the reasons below, the time has come for this Court to disapprove of the aggregate package approach also known as the sentence package doctrine.

I. Application of the Pearce presumption is not uniform throughout the nation.

A. A majority of federal and state courts assess vindictiveness upon resentencing using the aggregate package approach.

The First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits apply an aggregate package approach. United States v. Pimienta-Redondo, 874 F.2d 9 (1st Cir 1989); Kelly v. Neubert, 898 F.2d 15, 16 (3d Cir. 1990); United States v. Ventura, 864 F.3d 301 (4th Cir. 2017), United States v. Campbell, 106 F.3d 64, 68 (5th Cir. 1997); United States v. Rivera, 327 F.3d 612, 615 (7th Cir. 2003);

Sexton v. McKenna, 278 F.3d 808, 816-817 (8th Cir. 2002); United States v. Horob, 735 F.3d 866, 870 (9th Cir. 2013); United States v. Sullivan, 967 F.2d 370, 374 (10th Cir. 1992); United States v. Fowler, 749 F.3d 1010 (11th Cir. 2014). This approach is followed by many states as well. See State v. February, 396 P.3d 894 (Or. 2017); People v. Johnson, 363 P.3d 169 (Colo. 2015); State v. Hudson, 748 S.E.2d 910 (Ga. 2013)(switching its approach from count by count to aggregate); State v. Wade, 998 A.2d 1114 (Conn. 2010); and State v. Bolsinger, 738 N.W.2d 643, 646 (Iowa Ct. App. 2007).

The application of this approach is simple: upon resentencing, the restructuring of a sentence does not violate the Pearce presumption of vindictiveness if the aggregate sentence is less than the aggregate sentence originally imposed. The consideration of how the individual counts of sentence are modified upon resentencing is of no concern in this analysis.

This approach is supported in the federal courts as it is consistent with the Federal Sentencing Guidelines that allow for grouping of closely related counts. U.S.S.G. §§ 3D1.1-3D1-3. See Wilson v. State, 170 P.3d 975, 978-979 (Nev. 2007)(recognizing the uniqueness of the

sentencing package to federal sentencing). However, it should be noted that even the Federal Sentencing Guidelines have instances where not all offenses are grouped but require a specific term of imprisonment to be imposed or sentences to run consecutively. U.S.S.G. § 3D1.2 Application Note 1.

B. The majority approach violates due process.

In multi-count cases, the application of the aggregate package approach will almost certainly result in no presumption of vindictiveness. This is because if the test for application of the presumption begins with identifying the original maximum aggregate sentence and comparing it to the sentence imposed upon remand after sentences on some counts are likely found to be illegal or not proven beyond a reasonable doubt. On resentencing, the court will have no ability to include the terms of incarceration previously used on the dismissed counts or illegal sentences in computing the new aggregate sentencing on remand. Additionally in Pennsylvania, courts are permitted to restructure the sentence in an attempt to reconstitute the original sentence. See Commonwealth v. Bartrug, 732 A.2d 1287 (Pa. Super. 1999). This further limits the Pearce presumption. In this

scenario where one count or more are not subject to resentencing, a court at resentencing can make a futile attempt to go as close as it can to the maximum term of imprisonment imposed originally based upon the remaining charges without new information justifying increases in individual counts. This flies in the face of viewing individual charges independently with their individual terms of imprisonment.

Further, even in those instances where the sentencing calculation on remand would permit the judge to arrive at the same aggregate sentence, a resentencing to the same aggregate sentence communicates a message to the criminal defendant that it is useless to appeal because the court will still imprison you for the same amount of time despite the inability to sentence you on certain counts.

A final sentencing package arrived at by a sentencing judge can only be judged by the sum of its parts. Each crime included in a multi-count sentence is defined differently by a legislature to protect society's interest in punishing a particular action. When certain parts of that sum are removed after a successful appeal, then a different calculus must be used to judge the existence of vindictiveness in that new sentence. Using the maximum of a prior sentencing package as the

measuring stick for resentencing will always make the new sentence appear non-vindictive when the new sentence is less than or equal to the maximum sentence of the original sentencing package. See Sexton at 816-817 (Arnold, J. in dissent)(concluding that arriving at the same sentence based upon one less count of conviction without later conduct as a justification is a more severe sentence prohibited by Pearce.)

The various local, state and federal criminal justice systems in our country are based upon code defined crimes. Each crime has its own elements, its own statutes of limitations and its own classification or grading for purposes of severity and punishment. When an aggregate punishment is arrived at sentencing, it derives from individual crimes. Likewise, courts can impose consecutive sentences on multi-count cases. Consecutive sentencing supports the individual nature of the sentence imposed at each count of conviction because if punishment at each count must be served one by one before the next punishment is served, the punishment imposed is specific to each count and removal of one conviction or sentence will not impact the need to serve the sentence(s) that remain intact after appeal. Rosario's sentence is one such

aggregate sentence where all of the individual sentences are running consecutively.

The resentencing of a defendant must start anew. Imposing punishment upon resentencing and permitting it to be judged by the failed aggregate sentencing that was the original sentencing ignores vindictiveness that can be imposed on each count upon resentencing. Sentencing courts should not be allowed to justify their resentencing as an exercise of attempting to restructure and reach for the unattainable in the prior aggregate sentence that required the remand of the matter. Permitting courts to proceed with these exercises violates due process by judging and encouraging the recreation of results that have already been vacated by prior appeals.

C. A minority of courts apply differing approaches to determine the application of Pearce's presumption.

1. The Second Circuit applies a remainder aggregate approach.

In United States v. Markus, 603 F.2d 409 (2d Cir. 1979), the Second Circuit rejected a pure count-by-count approach for a remainder aggregate approach. This approach compares the aggregate sentence of those counts that were not reversed on appeal with the aggregate

sentences for the same counts upon resentencing. Id. at 413. Should the aggregate sentences of these particular counts exceed the aggregate sentences on the same counts in the original sentence, the Pearce presumption of vindictiveness is violated. Id.

2. A minority of states have rejected the aggregate approach.

Ohio has rejected the “sentencing package doctrine” used in the federal courts because its sentencing law look to each individual offense. Ohio v. Paige, 103 N.E.3d 800, 802-803 (Ohio 2018)(citing Ohio v. Saxon, 846 N.E.2d 824 (Ohio 2006)).

Illinois considers an increase to individual sentences as an increase prohibited by Pearce as well as their statutory sentencing laws. People v. Moore, 686 N.E.2d 587, 595 (Ill. 1997). See also State v. Keefe, 573 A.2d 20, 22 (Me. 1990)(Glassman, J. dissenting)(advocating for a similar count-by-count approach).

New York has taken a different approach under Pearce that does not adopt the aggregate package or count-by-count approach. People v. Young, 723 N.E.2d 58 (N.Y. 1999). Instead, when one count upon resentencing receives a greater sentence, despite there being an equal or lesser aggregate sentence, a court must review the record for “a

reasonable likelihood that the enhanced sentence on the individual count was the result of vindictiveness.” Young at 63. This approach, as noted in Young, does not prohibit an increased individual sentence upon resentencing from being found vindictive despite receipt of a lesser aggregate sentence. Id. at 64. However, the Young court recognized that with multiple count convictions, sentencing courts balance interests other than the individual counts of conviction such as a defendant’s history and ability to rehabilitate himself. Id. at 65.

D. This Court has not settled how the presumption of vindictiveness is to be evaluated by lower courts.

As noted by Justice Thomas, there is confusion among courts as to how the Pearce presumption should be judged. Plumley v. Austin, 574 U.S. 1127 (2015)(Thomas, J., dissenting). Further, the majority approach presents a mechanical approach that does not protect due process as analyzed above.

II. The question presented is extremely important as a presumption of vindictiveness is being judged solely by a maximum term of imprisonment in most jurisdictions.

In the absence of guidance from this Court, the jurisdictions above have come to differing conclusions on how to determine if the presumption of vindictiveness used to protect their due process right

upon resentence is violated. Pearce was decided in 1969. The development of the vindictiveness presumption has had 55 years to evolve. This conflict has percolated long enough and while a majority position has emerged from the federal and state courts, this Court must evaluate whether that position comports with due process.

Sentencing is based upon individual criminal acts and punishment imposed upon each count. In a multi-count information or indictment, a defendant must be tried on each count, jury instruction delivered on each count and punishment imposed as to each count. Aggregate sentences are built upon the punishment imposed at these individual counts. In Pennsylvania, total confinement as a punishment is imposed based upon the individual crime receiving the sentence. 42 Pa.C.S. § 9725.

The minimum sentence is just as important in terms of due process as the maximum sentence. To not look at the individual sentences is to ignore possible due process violations on each sentence. A final term of imprisonment is built upon punishment derived from each individual sentence imposed on each count of conviction. Pearce set no standards by which punishment must always be judged by a

maximum sentence.

In Pennsylvania, a minimum sentence is required to be imposed and cannot exceed half of the maximum sentence imposed. 42 Pa.C.S. § 9756. It is at a judge's discretion to impose sentences at each count to be served concurrently or consecutively. In Rosario's case, the imposition of multiple consecutive sentences resulted in an aggregate sentence of 25 to 50 years that is currently under review. The minimum sentences for Counts 3 and 4 were increased by the same sentencing judge when compared to the original sentence despite no additional evidence or information that suggested punishment should be increased. This violated the clear language of Pearce: "whenever a judge imposes a more severe sentence...the reasons for doing so must affirmatively appear." Pearce at 726.

In Pennsylvania's indeterminate sentencing scheme, the minimum sentence sets the period by which parole eligibility is determined. Hudson v. Pennsylvania Bd. of Prob. & Parole, 204 A.3d 392, 396 (Pa. 2019). Thus, an increase to the limit of a minimum sentence is a key part of the sentencing system and provides a mark by which a prisoner can begin to seek parole and the parole board in

Pennsylvania has the power to grant parole. Therefore, ignoring any increase in minimum sentence terms results in ignoring a prisoner's right to seek release under Pennsylvania's parole.

An aggregate sentence like Rosario's is made up of integral parts. And in Pennsylvania's indeterminate sentencing scheme, the calculation of the minimum term is just as important and required as the maximum term is. To ignore the calculation of the minimum sentence under Pennsylvania's scheme would ignore the prisoner's right to a minimum sentence that should be imposed upon the facts supporting the conviction and analysis of the prisoner's needs just like the maximum sentence does.

III. This case is the ideal vehicle to resolve the question presented.

This case is the ideal vehicle to address the application of Pearce's presumption of vindictiveness as vindictiveness cannot be said to exist solely in the maximum aggregate term of imprisonment. Vindictiveness upon resentencing could take any form. Pearce's holding did not confine itself to increases in maximum prison sentences. In Rosario's case, the minimum sentences imposed at Counts 3 and 4 were increased even though these counts were not overturned on appeal. The sentencing

court justified this action by noting Pennsylvania courts recognize the ability of the sentencing court to “attempt to achieve as much as possible the purpose and effect of its original sentencing scheme.” Pet. App. 45a citing Commonwealth v. Conklin, 275 A.3d 1087, 1096 (Pa. Super. 2022).

As required by the Pearce standard, Rosario’s case presents an example of where an increase in punishment by the same judge occurred without justification or explanation by the court. The Pennsylvania Superior Court recognized that the reasons for the imposition of sentence upon Rosario at resentencing was almost verbatim from the reasoning provided in the original sentencing. Pet. App. 20a-21a. So the increase in the minimum sentencing at Counts 3 and 4 when compared to the original sentence was without the required explanation under Pearce. Additionally, the same judge sentenced Rosario under both sentences and no intervening guilty plea or trial preceded the resentencing as his conviction by jury trial prior to the first sentencing was not overturned on his initial appeal. Therefore, the changes in the minimum sentences on Counts 3 and 4 have no basis in new fact and were imposed by the same judge who initial sentence was

overturned on appeal.

The question presented is also outcome determinative. If the Pennsylvania Superior Court concluded that the increase in the minimum sentencing on Counts 3 and 4 violated the Pearce presumption, this result would be resentencing of Rosario on these counts.

IV. This matter is ripe for resolution.

It has been fifty-five years since this Court issued its decision in Pearce. And through that time, the analysis of when the presumption of vindictiveness has had sufficient time to percolate and develop. Yet this Court has not considered the validity of the approaches taken by the federal and state courts. Resentencing is a procedure that is key to due process, particularly after a defendant has been successful on direct appeal. Resentencings occur regularly in our criminal justice system. Pearce's presumption was created to protect from vindictiveness in response to a direct appeal. However, Pearce has never defined what increased punishment was in terms of imprisonment. As the 50 states and the federal system all employ differing structures and approaches to sentencing, the presumption against vindictiveness must be applied

across all sentencing approaches controlled by the protections of due process. Whether a maximum aggregate sentence was exceeded on resentencing is but one way a defendant's due process rights could suffer vindictiveness. This one size fits all approach used by the majority of courts ignores the due process rights granted by the various sentencing schemes in our republic's various jurisdictions.

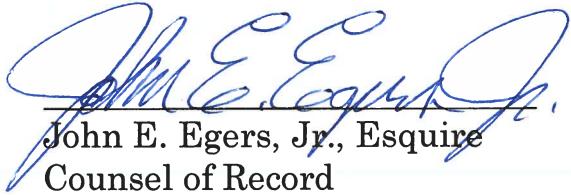
Thus, Rosario respectfully asks this Honorable Court to clarify the standard by which the Pearce presumption of vindictiveness upon resentencing should be judged as vindictiveness cannot be judged by a prior illegal sentence nor only one aspect of that sentence.

CONCLUSION

For the foregoing reasons, Mr. Rosario respectfully submits that the Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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John E. Egers, Jr., Esquire
Counsel of Record

PA. ID No. 89172

Peacock Keller, LLP
95 West Beau Street, Suite 600
Washington, PA 15301
(724) 222-4520
John.Egers@peacockkeller.com