No. 21-1185

In the Supreme Court of the United States

RUFINO VALDEZ-LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
KEVIN J. BARBER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner is entitled to a presumption of judicial vindictiveness when the district court judge, who did not originally sentence him, granted his motion for postconviction relief and then imposed a higher sentence than the original one, after applying the factors in 18 U.S.C. 3553(a) and considering the "incredibly outrageous" nature of petitioner's offense.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Ariz.):

United States v. *Valdez-Lopez*, No. 07-cr-428 (Jan. 9, 2020)

United States Court of Appeals (9th Cir.):

United States v. *Valdez-Lopez*, No. 20-10004 (July 16, 2021)

United States v. *Valdez-Lopez*, No. 08-10263 (Mar. 8, 2011)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 4 F.4th 886. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 419 Fed. Appx. 712.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2021. A petition for rehearing was denied on September 29, 2021 (Pet. App. 18). On December 22, 2021, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 25, 2022. The petition for a writ of certiorari was filed on February 24, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on one count of conspiring to harbor noncitizens,[1] in violation of 8 U.S.C. 1324(a)(1)(A)(iii), (v)(I), and (II); one count of harboring noncitizens, in violation of 8 U.S.C. 1324(a)(1)(A)(iii) and (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 2; and one count of possessing or using a firearm during and in relation to a crime of violence (hostage taking), in violation of 18 U.S.C. 924(c) (2006) and 18 U.S.C. 2. Judgment 1. The court sentenced petitioner to 240 months of imprisonment, to be followed by five years of supervised release. Judgment 1. The court of appeals affirmed. 419 Fed. Appx. 712. Following the original district judge's retirement, another district judge granted petitioner's motion under 28 U.S.C. 2255 to vacate his Section 924(c) conviction and resentenced him on the remaining counts to 300 months of imprisonment, to be followed by five years of supervised release. C.A. E.R. 4, 58-59. The court of appeals affirmed. Pet. App. 1-17.

1. In April 2007, a woman contacted federal agents in Michigan to report that her ex-boyfriend's nephew was being held hostage at gunpoint in Arizona by human smugglers. Presentence Investigation Report (PSR) ¶ 9. The smugglers had told the woman that the hostage would not be released unless they received $3000 wired to a bank account in Mexico. *Ibid.* By the next day, federal agents had identified the residence

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[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

where the hostage and other noncitizens were being held. PSR ¶ 12. Local police entered the residence and found 81 noncitizens, including 75 hostages and six smugglers, as well as an AK-47 rifle. PSR ¶ 14; Pet. App. 4. Witnesses identified petitioner as one of the smugglers. PSR ¶ 16.

In May 2007, a federal grand jury returned a superseding indictment charging petitioner with five counts: two related to harboring noncitizens; two related to hostage taking; and one for possession or use of a firearm during and in relation to a "crime of violence" (hostage taking), in violation of 18 U.S.C. 924(c) (2006). PSR ¶ 3. A jury found petitioner guilty on all counts. The district court sentenced petitioner to a total of 240 months of imprisonment, consisting of 120 months on the harboring counts and 156 months on the hostage-taking counts (all to be served concurrently), and 84 months on the Section 924(c) count (to be served consecutively). Pet. App. 4, 15. On appeal, petitioner's counsel saw no grounds for relief and moved to withdraw as counsel of record. See *Anders* v. *California*, 386 U.S. 738 (1967). The court of appeals granted counsel's motion and affirmed the convictions and sentence in an unpublished opinion. 419 Fed. Appx. 712.

2. In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his Section 924(c) conviction on the ground that hostage taking, the "crime of violence" underlying the Section 924(c) conviction, no longer qualified as a crime of violence in light of this Court's decision in *Johnson* v. *United States*, 576 U.S. 591 (2015), which held that the "residual clause" of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. See 576 U.S. at 596; see also Pet. App. 5; PSR ¶ 5. Because the original district

judge had by then retired, the case was reassigned to a different district judge. Pet. App. 5. In 2019, the new judge granted petitioner's motion to vacate the Section 924(c) conviction and set a hearing for resentencing. *Ibid.*; see PSR ¶ 6.

At the resentencing hearing, the district court made clear that petitioner's new sentence would not necessarily be equal to or shorter than the original sentence. C.A. E.R. 19. Even without the Section 924(c) conviction, petitioner's hostage-taking convictions exposed him to a sentence of up to life imprisonment, see 18 U.S.C. 1203(a), and the advisory Sentencing Guidelines recommended a sentence of life imprisonment, see PSR ¶ 99. Petitioner's counsel stated that he was "sure [petitioner] understood those risks" when the motion for postconviction relief was filed. C.A. E.R. 19. Petitioner requested a new sentence amounting to time served—approximately 13 years. *Id.* at 33-34.

Before pronouncing the revised sentence, the district court highlighted the "staggering amount of individuals that [petitioner had] harmed mentally and emotionally and basically scarred for life." C.A. E.R. 36. The new district judge acknowledged that the district judge that had originally sentenced petitioner likely "had access to the same information," but he explained the "need" to give his own "consideration to all of the victims in the case," and he found petitioner's conduct "so incredibly outrageous" as to "warrant a significant sentence." *Id.* at 37. The district judge noted, among other factors, that petitioner's offenses had "affected many victims" and involved a firearm, demands for money, and "verbal violent threats"; that a witness had indicated that petitioner had "personally beat[en] him, stole his money, and locked him in a closet"; and

that petitioner had refused to accept responsibility for his conduct and had a more severe criminal history than his codefendants. *Id.* at 38. The court then sentenced petitioner to 120 months of imprisonment on the harboring counts and 180 months on the hostage-taking counts, to be served consecutively, for a total of 300 months of imprisonment. *Id.* at 39. The revised sentence was 60 months more than the original sentence but below the Sentencing Guidelines recommendation of life imprisonment. The court found that sentence "sufficient but not greater than necessary" to "provide[] [petitioner] with just punishment," "protect the public," "reflect[] the seriousness of" petitioner's offense, and "serve to deter [petitioner] and * * * others from committing similar crimes." *Id.* at 41.

3. The court of appeals affirmed. Pet. App. 1-17.

a. Petitioner challenged his sentence on the ground that "his new, higher sentence reflects judicial vindictiveness and constitutes an effort to punish him for his successful collateral attack on his section 924(c) conviction." Pet. App. 5-6. He relied on this Court's decision in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), which held that "[d]ue process of law * * * requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Id.* at 725. The Court in *Pearce* "concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear" and "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726.

The court of appeals accepted that *Pearce* can apply when a defendant has successfully attacked his conviction or sentence in ways other than by obtaining a new trial. Pet. App. 6. The court observed, however, that this Court has clarified that "'the evil the Court sought to prevent' in *Pearce* was not the imposition of 'enlarged sentences' as such but rather the 'vindictiveness of a sentencing judge.'" *Ibid.* (quoting *Texas* v. *McCullough*, 475 U.S. 134, 138 (1986)). And the court of appeals explained that, "[f]or that reason, the 'presumption of vindictiveness' recognized in *Pearce* 'does not apply in every case where a convicted defendant receives a higher sentence on retrial.'" *Ibid.* (brackets omitted) (quoting *Alabama* v. *Smith*, 490 U.S. 794, 799 (1989)). The court then identified two independent reasons why *Pearce* did not require a presumption of vindictiveness in the specific circumstances of this case. *Id.* at 6-7.

First, the court of appeals emphasized that "the only reason a new sentencing occurred [in this case] is that the district court itself granted [petitioner's] motion under section 2255 to set aside his first sentence." Pet. App. 7. The court of appeals observed that, when a district court has itself granted the defendant's request for relief, that "hardly suggests any vindictiveness on the part of the judge towards [the defendant]." *Ibid.* (quoting *McCullough*, 475 U.S. at 138-139). It noted that, "'unlike [a] judge who has been reversed'" on appeal, "a judge who grants such a motion has 'no motivation to engage in self-vindication.'" *Ibid.* (quoting *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 27 (1973)). And it "s[aw] 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." *Ibid.*

Second, the court of appeals explained that no "presumption of vindictiveness" applies where, as here, the "new sentence was imposed by a different [district] judge than the judge who imposed his first sentence." Pet. App. 7 (citing *McCullough*, 475 U.S. at 140). The court observed that a district judge resentencing a defendant who was previously sentenced by another judge will have no personal stake in the first sentence and thus is unlikely to be prone to vindictiveness. See *ibid.*

The court of appeals then determined that petitioner could not carry his burden to show that his sentence was the product of actual vindictiveness. Pet. App. 11-13. The court observed that the record did not suggest that the district judge at resentencing had been motivated to punish petitioner for filing a successful motion under Section 2255. See *id.* at 11. The court instead emphasized that the new district judge had "consider[ed] the factors prescribed in [18 U.S.C. 3553(a)], giving particular weight to the seriousness of the offense," which he had found "'so incredibly outrageous' as to 'warrant a significant sentence.'" Pet. App. 11. The court of appeals determined that the district court had "permissibly exercised its discretion and committed neither procedural nor substantive error in determining [petitioner's] sentence." *Ibid.*

b. Judge Fletcher concurred. Pet. App. 14-17. He agreed with the majority that petitioner's vindictiveness claim failed under existing law, but took the view that a resentencing judge should not be able to "impose a longer sentence when the only change in the record is the fact that petitioner successfully challenged part of the original sentence as unconstitutional." *Id.* at 17.

ARGUMENT

Petitioner renews his contention (Pet. 11-20) that *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), entitles him to a presumption that the higher sentence he received on resentencing was the product of judicial vindictiveness. The court of appeals correctly rejected that contention. The court's decision—which identified two independent reasons for declining to apply a presumption of vindictiveness in the circumstances here—does not meaningfully conflict with any decision of another federal court of appeals. Moreover, even if the question presented warranted further review, this case would not be a suitable vehicle for considering it, because the record overwhelmingly demonstrates that petitioner's second sentence was based on a permissible application of the sentencing factors in 18 U.S.C. 3553(a). Thus, even if petitioner were entitled to a presumption of vindictiveness, that presumption would be rebutted in this case. This Court previously denied a petition for a writ of certiorari raising a similar issue, see *United States* v. *Mathurin*, 139 S. Ct. 55 (2018) (No. 17-7988), and it should follow the same course here.

1. The court of appeals correctly rejected petitioner's argument that a presumption of judicial vindictiveness applies to his sentence. In *Pearce*, this Court concluded that, "to assure the absence of" any motivation of vindictiveness against a defendant for having successfully challenged his conviction, "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear," and "[t]hose reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at

726. "Otherwise, a presumption arises that a greater sentence has been imposed for a vindictive purpose." *Alabama* v. *Smith*, 490 U.S. 794, 798-799 (1989).

Since *Pearce*, however, this Court has clarified that "[t]he *Pearce* requirements * * * do not apply in every case where a convicted defendant receives a higher sentence" on resentencing. *Texas* v. *McCullough*, 475 U.S. 134, 138 (1986). Instead, the *Pearce* presumption applies only in circumstances giving rise to a "'reasonable likelihood' that the increase in sentence is the product of actual vindictiveness" on the part of the sentencing court. *Smith*, 490 U.S. at 799 (citation omitted). "Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness." *Id.* at 799-800. And for at least two independent reasons, no reasonable likelihood of vindictiveness applies to petitioner's second sentence.

First, petitioner's second sentence was imposed by a different district judge. In *McCullough*, this Court held that the *Pearce* presumption "is * * * inapplicable" where two different sentencers—there, a jury and then a judge—impose a defendant's sentences. 475 U.S. at 140. It "may often be that the second sentencer will impose a punishment more severe than that received from the first. But it no more follows that such a sentence is a vindictive penalty for seeking a new trial than that the first sentencer imposed a lenient penalty." *Ibid.* (brackets omitted) (quoting *Colten* v. *Kentucky*, 407 U.S. 104, 117 (1972)). In cases involving different sentencers, this Court reasoned, *Pearce* "require[s] no more" than "an on-the-record, wholly logical, nonvindictive reason" for the second sentence. *Ibid.*

Contrary to petitioner's assertion, this Court in *McCullough* unmistakably viewed the involvement of

different sentencers not as "merely a factor" to be considered, Pet. 17, but as sufficient on its own to preclude a presumption of vindictiveness. In a case with different sentencers, the Court said, "a sentence 'increase' cannot truly be said to have taken place" at all. *McCullough*, 475 U.S. at 140; see *Rock* v. *Zimmerman*, 959 F.2d 1237, 1257 (3d Cir.) (en banc) (describing that holding in *McCullough* as "an alternative, independent basis for finding the *Pearce* presumption inapposite"), cert. denied, 505 U.S. 1222 (1992), abrogated in part on other grounds by *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993).

As in *McCullough*, "[t]he facts of this case provide no basis for a presumption of vindictiveness." 475 U.S. at 138. A different judge imposed petitioner's second sentence and provided a detailed explanation for that sentence. C.A. E.R. 36-39. The fact that both sentences in this case were imposed by judges—whereas in *McCullough* a jury imposed the first sentence and a judge imposed the second—is immaterial. In both situations, the second sentencer did not impose the original sentence, and therefore, "'[u]nlike the judge who has been reversed,'" he "had 'no motivation to engage in self-vindication.'" *McCullough*, 475 U.S. at 139 (quoting *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 27 (1973)).

Petitioner notes (Pet. 17), as this Court acknowledged in *McCullough*, that "*Pearce* itself apparently involved different judges presiding over the two trials." *McCullough*, 475 U.S. at 140 n.3. But *McCullough* found that fact unimportant, pointing out that the involvement of different sentencers in *Pearce* "may not have been drawn to the Court's attention," that it "does not appear anywhere in the Court's opinion," and that "[c]learly the Court did not focus on it as a consideration

for its holding." *Ibid.* The Court in *McCullough* additionally observed that its post-*Pearce* decisions had "elucidated the basis for the *Pearce* presumption" and explained that "the presumption derives from the judge's 'personal stake in the prior conviction,'" which the Court determined was "clearly at odds with reading *Pearce* to answer the two-sentencer issue." *Ibid.* (quoting *Chaffin*, 412 U.S. at 27).[2]

Petitioner also portrays the court of appeals' decision as inconsistent with the Ninth Circuit's own precedent applying the *Pearce* presumption to a successive decision of a parole board even where the board's membership had changed. Pet. 14 (discussing *Nulph* v. *Cook*, 333 F.3d 1052 (9th Cir. 2003)). But this Court does not grant review to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, the decision below identified a meaningful difference between a collective, continuing entity like a parole board and different district judges, who are "truly different sentencers" with their own independent authority. Pet. App. 8 (quoting *Bono* v. *Benov*, 197 F.3d 409, 418 (9th Cir. 1999)).

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[2] Petitioner asserts (Pet. 17) that "the second sentencer issue * * * was discussed extensively throughout the oral argument" in *Pearce*. But the involvement of different sentencers was discussed only in two brief exchanges during oral argument that shed little light on the importance of that issue to this Court's decision in the case. See 2/24/69 Tr. at 13-14, 21-22, *Pearce*, *supra* (No. 413, 1968 Term). In any event, to whatever extent the Court explored the issue at oral argument, the Court's decision in *Pearce* "[c]learly * * * did not focus on it as a consideration for its holding," and the Court's post-*Pearce* decisions establish that a presumption of vindictiveness has no place in a case involving different sentencers. *McCullough*, 475 U.S. at 140 n.3.

Second, as the court of appeals correctly recognized, a presumption of vindictiveness is inappropriate here for the additional reason that the district court itself brought about petitioner's resentencing by granting him postconviction relief. The *McCullough* Court, in addition to relying on the involvement of different sentencers, also found "no basis for a presumption of vindictiveness" because the defendant's "second trial came about because the trial judge herself [had] concluded that the prosecutor's misconduct required it." 475 U.S. at 138. The Court observed that the judge's decision to "[g]rant[] [the defendant's] motion for a new trial hardly suggests any vindictiveness on the part of the judge towards him." *Id.* at 138-139.

The same logic applies here, where the purportedly vindictive district judge himself occasioned the resentencing by granting petitioner's Section 2255 motion to set aside the first sentence. Pet. App. 7. "'[U]nlike the judge who has been reversed,' the trial judge here had 'no motivation to engage in self-vindication.'" *McCullough*, 475 U.S. at 139 (brackets in original) (quoting *Chaffin*, 412 U.S. at 27). Given that the district judge himself found petitioner's motion for postconviction relief to have merit, this case raises no plausible concerns about judges imposing higher second sentences to punish and discourage appeals or motions that they perceive as meritless. See *ibid.*

Petitioner's attempts to distinguish *McCullough* are unsound. He emphasizes that the district court was "bound" to grant his Section 2255 motion (and therefore, in his view, more likely to be vindictive at resentencing). Pet. 13-15. But trial courts granting postconviction relief typically do so only where they deem the circumstances to require that result. Indeed, in *Mc-*

Cullough, the trial judge had granted the defendant a new trial because she "concluded that the prosecutor's misconduct *required* it." 475 U.S. at 138 (emphasis added). And contrary to petitioner's suggestion (Pet. 13), his successful Section 2255 motion did not "dramatically alter[] the sentencing calculus" or "tie the Court[']s hands." After vacating petitioner's Section 924(c) conviction, the district court remained free to sentence him up to life imprisonment—which was also the sentence recommended by the Sentencing Guidelines. See 18 U.S.C. 1203(a); PSR ¶ 99.

Finally, petitioner argues that a higher second sentence is always "unjustifiable" "absent something like a new trial and the acquisition of new information after the original sentencing," which occurred in *McCullough*. Pet. 13; see *id.* at 15; see also 475 U.S. at 143. But as the court of appeals explained, "[a] court conducting a resentencing may * * * base its decision on a reevaluation of information that was available to an earlier sentencer" without triggering a presumption of vindictiveness. Pet. App. 11 (emphasis omitted); see *Macomber* v. *Hannigan*, 15 F.3d 155, 157 (10th Cir. 1994) ("[I]t is not necessary that the second sentencing judge rely on and provide facts not available at the time of the first sentence to support the more severe sentence."); *Rock*, 959 F.2d at 1257-1258 (same). As *McCullough* recognized, a higher sentence by a second sentencer does not inherently suggest a "vindictive penalty"; it may simply reflect, among other things, that "the first sentencer imposed a lenient penalty." 475 U.S. at 140 (brackets and citation omitted). Accordingly, an "on-the-record, wholly logical, nonvindictive reason" for a higher second sentence, *ibid.*, need not be a reason that was unavailable to the first sentencer.

2. Contrary to petitioner's contention, the court of appeals' recognition that the *Pearce* presumption of vindictiveness is inapplicable in this case does not conflict with any decision of another federal court of appeals.

a. Petitioner asserts (Pet. 19) that the courts of appeals are divided about whether the *Pearce* presumption is foreclosed in a case involving two different sentencers "only if the second sentencer states objective, non-vindictive reasons for imposing the greater sentence." As a threshold matter, this case would be an unsuitable vehicle for addressing any such disagreement. The district court here did provide objective, non-vindictive reasons for the sentence—most compellingly, the "incredibly outrageous" conduct in petitioner's massive hostage-taking—so the *Pearce* presumption would be unavailable to petitioner under any circuit's approach. Pet. App. 11; see pp. 4-5, *supra* (summarizing the district court's explanation of the sentence).

In any event, petitioner fails to show that any differences in courts of appeals' descriptions of *Pearce* meaningfully affect the application of *Pearce*. In some cases involving two different sentencers, courts have stated that the resentencing district judge must give "objective, non-vindictive reasons" for the second sentence. See *United States* v. *Rodriguez*, 602 F.3d 346, 358-359 (5th Cir. 2010) (collecting cases); compare, *e.g.*, *Macomber*, 15 F.3d at 157 (including such a requirement), with *Gonzales* v. *Wolfe*, 290 Fed. Appx. 799, 813 (6th Cir. 2008) (omitting it), cert. denied, 555 U.S. 1144 (2009). But as the court of appeals explained in this case, requiring the sentencing court to state "non-vindictive reasons" in order to avoid a presumption of vindictiveness is "pointless" and redundant, because sentencing courts are *always* "required to explain the reasons for

a sentence." Pet. App. 8-9; see 18 U.S.C. 3553(c) ("The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence."); *Rita* v. *United States*, 551 U.S. 338, 356 (2007). And "[i]f the stated reason is vindictive, there is no need for a presumption of vindictiveness; the defendant can show actual vindictiveness." Pet. App. 9. Petitioner cites no case in which a court of appeals applied the *Pearce* presumption in a case involving different sentencers because of a failure to provide non-vindictive reasons for the second sentence. See *ibid.* (noting similar absence of conflicting decisions). Any linguistic variation in certain circuits' judicial-vindictiveness opinions therefore lacks demonstrated substantive significance and does not warrant this Court's review.

b. Review is likewise not warranted to address a conflict in the courts of appeals as to whether the *Pearce* presumption applies only when a "triggering event"—for example, reversal by a higher court—"prods the sentencing court into a posture of self-vindication." Pet. 18-19; see *Plumley* v. *Austin*, 574 U.S. 1127, 1128 (2015) (Thomas, J., dissenting from denial of certiorari). When the Fourth Circuit in *Austin* v. *Plumley*, 565 Fed. Appx. 175 (2014) (per curiam), cert. denied, 574 U.S. 1127 (2015), applied the *Pearce* presumption even outside such circumstances, *id.* at 190, Justice Thomas, joined by Justice Scalia, observed that such an approach was "in tension with [the Court's] precedents" and took the view that this Court should have granted a writ of certiorari to resolve a "disagreement between the Courts of Appeals" on the issue, 574 U.S. at 1130-1131. The Court's intervention is likewise unwarranted here.

Nearly 40 years ago, the Eleventh Circuit in *United States* v. *Monaco*, 702 F.2d 860 (1983), applied the

Pearce presumption when a trial judge had granted the defendant's motion for a new trial that brought about the defendant's resentencing. See *id.* at 884 (suggesting that trial judges may be just as likely to be vindictive "after granting a new trial motion" as "after a new trial is made necessary by a successful appeal"). But *Monaco* was decided three years before this Court explained in *McCullough* that, unlike "'the judge who has been reversed,'" a trial judge who herself granted a new trial "had 'no motivation to engage in self-vindication,'" 475 U.S. at 138-139 (quoting *Chaffin*, 412 U.S. at 27), and accordingly declined to apply a presumption of vindictiveness in such circumstances. *Monaco* was thus overtaken by *McCullough*.[3]

In another pre-*McCullough* case, the Seventh Circuit stated that *Pearce* "would prohibit a district court from increasing a sentence upon a defendant's successful" motion in the district court to correct his sentence. *United States* v. *Paul*, 783 F.2d 84, 88 (1986). In addition to predating *McCullough*, that comment was dictum in the context of affirming the sentence, see *id.* at 87 (rejecting the *Pearce* claim because there was "no increase in sentence" at all), as was a similar statement made by the Seventh Circuit after *McCullough*, see *United States* v. *Brick*, 905 F.2d 1092, 1096-1097 (1990) (citing *Paul*, 783 F.2d at 88); see also *ibid.* (rejecting the

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[3] In support of its decision, the Eleventh Circuit in *Monaco* cited a Second Circuit case, *United States* v. *Markus*, 603 F.2d 409 (1979), applying *Pearce* "when a defendant was resentenced after he attacked his first conviction, not by appeal, but by a 28 U.S.C. § 2255 motion." *Monaco*, 702 F.2d at 884 n.44 (citing *Markus*, 603 F.3d at 411). But *Markus* was likewise overtaken by *McCullough*. In addition, *Markus* did not discuss the probability of judicial vindictiveness without a reversal-type event. See 603 F.2d at 411-415.

argument that *Pearce* required "the precise consideration" of the defendant's mitigating conduct at resentencing). Moreover, the only case cited to support the original statement in *Paul*, 783 F.2d at 88, actually involved a classic *Pearce* "triggering event"—vacatur of the defendant's sentence by an appellate court. See *United States* v. *Jefferson*, 760 F.2d 821, 825 (7th Cir.), vacated and remanded on other grounds, 474 U.S. 806 (1985).

Somewhat more recently, the Fourth Circuit in *Austin* applied the *Pearce* presumption of judicial vindictiveness without any reversal-type "triggering event." 565 Fed. Appx. at 190. But the court did so in an unpublished, nonprecedential opinion that neither the Fourth Circuit nor any other court of appeals has cited since. Furthermore, *Austin* presented a "unique scenario" that was one of "first impression" in the Fourth Circuit "and elsewhere." *Id.* at 186. In that case, which came to the federal court on a petition for writ of habeas corpus by a state prisoner, the prisoner had moved the state trial court to correct his sentence and then, before receiving a decision, asked the state supreme court "to direct the sentencing court to rule on the motion or void his sentence entirely," after which the sentencing court within days increased the defendant's sentence, "citing a reason that [was] clearly unsupported by the record." *Ibid.* The Fourth Circuit took the view that the sentencing court "was in a unique position," and that applying the *Pearce* presumption was appropriate despite the absence of a "triggering event." *Id.* at 190. Whether or not the court of appeals' conclusion was correct, its nonprecedential opinion in a factually peculiar case does not give rise to a conflict warranting this Court's review of the different circumstances of this case. See *ibid.* ("[I]n

this narrow case, the requirement of a 'triggering event' does not logically apply.").

3. Even if the scope of the *Pearce* presumption of vindictiveness might warrant review in an appropriate case, this case would not be a suitable vehicle. Because the district court's sentence was plainly not vindictive, any presumption of vindictiveness here would be rebutted, and a decision in petitioner's favor would have no practical effect. See *Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1882) (explaining that this Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties).

The sentencing transcript leaves no doubt that petitioner's higher—though still below-Guidelines—second sentence was based not on vindictiveness but instead on "objective information in the record justifying the increased sentence." *United States* v. *Goodwin*, 457 U.S. 368, 374 (1982). The district court acknowledged the length of petitioner's first sentence and that the previous district judge likely "had access to the same information" that was available at resentencing. C.A. E.R. 36-37. But after reviewing the case file and considering the parties' statements at the resentencing hearing, the court applied the sentencing factors in Section 3553(a) and took a different view of the severity of petitioner's offenses and their effect on the victims. *Id.* at 36-39. The court stated that it needed to give "consideration to all of the victims in the case," and it highlighted the "staggering amount of individuals" that petitioner harmed, the "incredibly outrageous" nature of his conduct, and several particularly troubling features of his offenses, including his possession of an AK-47 rifle and his personal participation in beating and stealing from

a victim. *Ibid.* The sentence thus "reflect[ed] simply a fresh look at the facts and an independent exercise of discretion" by the district court. *Rock*, 959 F.2d at 1257; see *United States* v. *Anderson*, 440 F.3d 1013, 1017 (8th Cir. 2006) ("With th[e] new sentencing judge came a new point of view and a new approach to the exercise of the considerable discretion afforded under 18 U.S.C. § 3553(a)."); *Hurlburt* v. *Cunningham*, 996 F.2d 1273, 1276 n.3 (1st Cir. 1993) (per curiam) ("[T]he differing sentence may simply represent the different sentencing perspective which a different judge brings to bear on a given sentencing situation."); see also *McCullough*, 475 U.S. at 140.

Petitioner asserts (Pet. 15) that the *Pearce* presumption can be rebutted only by "new evidence not known to the original judge." But a court need not base a second sentence on "conduct or events that occurred subsequent to the original sentencing proceedings." *McCullough*, 475 U.S. at 141 (quoting *Wasman* v. *United States*, 468 U.S. 559, 572 (1984)). Although *McCullough* itself involved information about the underlying crime that had not come out at the defendant's original trial, see *id.* at 143-144, this Court has not held that such information is invariably required to rebut the *Pearce* presumption. And courts of appeals that have relied on the absence of new information have done so in cases that, unlike this case, did not involve different sentencers. See, *e.g.*, *United States* v. *Resendez-Mendez*, 251 F.3d 514, 518 (5th Cir. 2001). It would make little sense to apply such a requirement in a different-sentencers case, in which *all* the evidence is necessarily "new" to the second sentencer, who is making up his mind in the first instance, not changing it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
KEVIN J. BARBER
Attorney

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