FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. RUFINO VALDEZ-LOPEZ, *Defendant-Appellant.*	No. 20-10004 D.C. No. 2:07-cr-00428- SPL-1 OPINION

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding

Argued and Submitted February 5, 2021
Phoenix, Arizona

Filed July 16, 2021

Before: William A. Fletcher, Eric D. Miller, and Danielle J. Forrest,[*] Circuit Judges.

Opinion by Judge Miller;
Concurrence by Judge W. Fletcher

[*] Formerly known as Danielle J. Hunsaker.

SUMMARY[**]

Criminal Law

The panel affirmed a new, longer sentence imposed following a defendant's successful motion under 28 U.S.C. § 2255 to set aside one of several counts on which he had been convicted.

The defendant was convicted for multiple counts of conspiracy, harboring illegal aliens, and hostage taking, as well as one count of possession of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). The district court granted the defendant's motion to vacate the § 924(c) conviction on the ground that hostage taking no longer qualified as a crime of violence in light of the Supreme Court's decision in *Johnson v. United States*. The district court resentenced the defendant to a longer term than the sentence originally imposed by a different district judge, who had since retired.

The panel concluded that no presumption of judicial vindictiveness applied because there was not a reasonable likelihood that the increase in sentence was the product of actual vindictiveness where the district court itself granted the § 2255 motion, and the two sentences were imposed by different judges.

Because the defendant did not otherwise demonstrate vindictiveness, and because the second sentence was both

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

procedurally and substantively reasonable, the panel affirmed.

Concurring, Judge W. Fletcher wrote that he concurred in the opinion and agreed that the presumption of vindictiveness did not apply in the circumstances of this case. Judge W. Fletcher wrote separately to suggest that the Court of Appeals' resentencing law has gone astray in allowing for a resentencing judge to impose a longer sentence when the only change in the record is the fact that the defendant successfully challenged part of the original sentence as unconstitutional.

COUNSEL

David J. Teel (argued), Law Office of David J. Teel PLLC, Phoenix, Arizona, for Defendant-Appellant.

Raymond K. Woo (argued), Assistant United States Attorney; Krissa M. Lanham, Appellate Division Chief; Michael Bailey, United States Attorney; United States Attorney's Office, Phoenix, Arizona; for Plaintiff-Appellee.

OPINION

MILLER, Circuit Judge:

After successfully moving to set aside one of several counts on which he had been convicted, Rufino Valdez-Lopez was resentenced by a different district judge but received a longer sentence than he had before. He now challenges that sentence as the product of judicial vindictiveness. We conclude that no presumption of vindictiveness applies. Because Valdez-Lopez has not otherwise demonstrated vindictiveness, and because the second sentence was both procedurally and substantively reasonable, we affirm.

On April 5, 2007, Immigration and Customs Enforcement agents in Grand Rapids, Michigan, received a call reporting that someone the caller knew was being held hostage at gunpoint by alien smugglers in Arizona. The smugglers had said that they would not release the hostage unless his family wired $3,000 to a bank in Mexico. Agents arranged for a phone call between the hostage and his uncle, and they traced the smugglers' phone to a house in Peoria, Arizona. Agents then raided the house, where they found 75 hostages, six smugglers, and an AK-47 rifle.

A grand jury returned an indictment charging Valdez-Lopez, one of the smugglers, with multiple counts of conspiracy, harboring illegal aliens, and hostage taking, as well as one count of possessing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). A jury found Valdez-Lopez guilty on all counts, and the district court sentenced him to 240 months of imprisonment.

Eight years later, Valdez-Lopez filed a motion under 28 U.S.C. § 2255 to vacate his section 924(c) conviction on the ground that hostage taking no longer qualifies as a "crime of violence" in light of the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015). By that time, the district judge who had presided over the trial and imposed the sentence, Judge Earl H. Carroll, had retired, so the case was reassigned to Judge Steven P. Logan. The district court granted Valdez-Lopez's motion, vacated the section 924(c) conviction, and held a new sentencing hearing.

At the hearing, the district court stated that Valdez-Lopez had harmed "a staggering amount of individuals . . . mentally and emotionally and basically scarred [them] for life" by causing them "[t]o be held in a small location, basically treated like . . . animal[s] with the threat that [they] could be shot down by an AK-47." The court acknowledged the previous sentence, explaining that the court was "pretty confident that Judge Carroll had access to the same information" that it did. But it went on to observe that it "need[ed] to give some . . . consideration to all of the victims in the case," one of whom had testified that Valdez-Lopez "personally beat him, stole his money, and locked him in a closet." It concluded that Valdez-Lopez's conduct was "so incredibly outrageous" as to "warrant a significant sentence." The court sentenced Valdez-Lopez to 300 months of imprisonment.

Valdez-Lopez argues 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. He relies on *North Carolina v. Pearce*, 395 U.S. 711 (1969), in which the Supreme Court held that the Due Process Clause "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. "In order to assure the absence of such a motivation," the Court in *Pearce* held "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 "[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." *Id.* at 726. Although *Pearce* referred to a "new trial," the rule it established applies regardless of the procedure a defendant has used in "successfully attacking a conviction or sentence." *Nulph v. Cook*, 333 F.3d 1052, 1057 (9th Cir. 2003).

But the Supreme Court has since made clear 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." *Texas v. McCullough*, 475 U.S. 134, 138 (1986). For that reason, the "presumption of vindictiveness" recognized in *Pearce* "do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial." *Alabama v. Smith*, 490 U.S. 794, 799 (1989) (alteration in original) (quoting *McCullough*, 475 U.S. at 138). Instead, the presumption applies only in circumstances where there is a "'reasonable likelihood' that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." *Id.* (citation omitted) (quoting *United States v. Goodwin*, 457 U.S. 368, 373 (1982)). Two features of Valdez-Lopez's resentencing independently make the presumption of vindictiveness inapplicable here.

First, the only reason a new sentencing occurred is that the district court itself granted Valdez-Lopez's motion under

section 2255 to set aside his first sentence. In *McCullough*, the Supreme Court considered a resentencing that occurred after "the trial judge herself concluded that the prosecutor's misconduct required it." 475 U.S. at 138. "Granting [a defendant's] motion for a new trial," the Court observed, "hardly suggests any vindictiveness on the part of the judge towards him." *Id.* at 138–39. And "unlike the judge who has been reversed," a judge who grants such a motion has "no motivation to engage in self-vindication." *Chaffin v. Stynchcombe*, 412 U.S. 17, 27 (1973). We see no reason to presume that a judge would act vindictively in resentencing a defendant after determining that the defendant's section 2255 motion was meritorious.

Second, Valdez-Lopez's new sentence was imposed by a different judge than the judge who imposed his first sentence. The presumption of vindictiveness is "inapplicable [when] different sentencers assessed the varying sentences." *McCullough*, 475 U.S. at 140; *accord Chaffin*, 412 U.S. at 26–28; *Colten v. Kentucky*, 407 U.S. 104, 116–18 (1972). That is because "the presumption derives from the judge's 'personal stake in the prior conviction,'" which does not exist when the prior proceedings were conducted by a different judge. *McCullough*, 475 U.S. at 140 n.3 (quoting *Chaffin*, 412 U.S. at 27). And when a second sentencer imposes a greater penalty, "it no more follows that such a sentence is a vindictive penalty . . . than that the [first sentencer] imposed a lenient penalty." *Colten*, 407 U.S. at 117. Applying *McCullough*, we have recognized that "[w]hen different courts impose different sentences, . . . there is no presumption of vindictiveness." *United States v. Newman*, 6 F.3d 623, 630 (9th Cir. 1993); *accord United States v. Curtin*, 588 F.3d 993, 999 (9th Cir. 2009).

Valdez-Lopez relies on cases involving parole boards to argue that a presumption of vindictiveness can apply even when different sentencers are involved. We have applied a presumption of vindictiveness to decisions by a parole board to increase a sentence or extend a parole date after a prisoner has successfully challenged a decision of the board, even when the board's membership has changed in the interim. *See Nulph*, 333 F.3d at 1058; *Bono v. Benov*, 197 F.3d 409, 418–19 (9th Cir. 1999). But our decisions in those cases treated parole boards as "singular" and "unified institutional entit[ies] capable of the vindictiveness contemplated in *Pearce*," not as different sentencers. *Bono*, 197 F.3d at 419. By contrast, different district judges are "truly different sentencers," so when a different district judge imposes a higher sentence, the potential for vindictiveness is not present. *Id.* at 418. In this context, a presumption of vindictiveness does not apply.

Valdez-Lopez next argues that a presumption of vindictiveness applies unless the second sentencer provides non-vindictive reasons for the sentence. We recognize that our decision in *Newman* could be read to suggest that a presumption of vindictiveness applies if the second sentencer does not provide an "on-the-record, wholly logical, nonvindictive reason for the sentence." 6 F.3d at 630 (quoting *McCullough*, 475 U.S. at 140); *see also United States v. Rodriguez*, 602 F.3d 346, 358 (5th Cir. 2010). But we reject that interpretation because it would introduce pointless complexity to sentencing law. Under 18 U.S.C. § 3553(c), a court is already required to explain the reasons for a sentence. *See United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc) ("Once the sentence is selected, the district court must explain it sufficiently to permit meaningful appellate review."). If the stated reason is vindictive, there is no need for a presumption of

vindictiveness; the defendant can show actual vindictiveness. *See Smith*, 490 U.S. at 799–800. A requirement that the court state non-vindictive reasons would therefore add nothing to what section 3553(c) already demands. In any event, the district court here gave non-vindictive reasons for Valdez-Lopez's sentence, and Valdez-Lopez has identified no case suggesting that this circuit—or any other circuit—would apply a presumption of vindictiveness in these circumstances. *See United States v. Anderson*, 440 F.3d 1013, 1016 (8th Cir. 2006) (collecting cases).

We also disagree with Valdez-Lopez's suggestion that a presumption of vindictiveness applies unless a district court imposing a higher sentence at resentencing articulates "reasons for increasing the sentence." Although a court must give reasons for whatever sentence it selects, it need not specifically justify a deviation—whether upward or downward—from any sentence that might have been imposed before. By way of analogy, an administrative agency adopting a new policy must "show that there are good reasons for the new policy," but that does not mean that it must "demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The same principle applies here.

Valdez-Lopez emphasizes that in his case "there were no intervening events subsequent to the imposition of the initial sentence to warrant an increase in the sentence." As the district court observed, "Judge Carroll had access to the same information that I do." But the law does not require the second sentencer to offer reasons that were unavailable to the first sentencer. *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."); *accord Rock v. Zimmerman*, 959 F.2d 1237, 1257–58 (3d Cir. 1992) (en banc). A district court has broad discretion to select a sentence that is "sufficient, but not greater than necessary," to achieve the purposes specified in 18 U.S.C. § 3553(a). *Carty*, 520 F.3d at 991 (quoting 18 U.S.C. § 3553(a)). Congress has provided that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. That principle applies at a resentencing as well as at an initial sentencing, as the Supreme Court made clear when it held that a court conducting a resentencing may examine the defendant's conduct following the imposition of the first sentence—information that necessarily was not available at the first sentencing. *See Pepper v. United States*, 562 U.S. 476, 488–90 (2011). The converse is equally true: A court conducting a resentencing may, if it deems it appropriate, base its decision on a reevaluation of information that *was* available to an earlier sentencer. Sometimes that will be to the defendant's advantage; other times it will be to the defendant's disadvantage. Either way, a court conducting a resentencing may exercise its independent judgment, and nothing in the Due Process Clause or the Sentencing Reform Act suggests that the court must be constrained by the prior sentencer's choices.

In the absence of a presumption of vindictiveness, "the burden remains upon [Valdez-Lopez] to prove actual vindictiveness," and he cannot do so. *Smith*, 490 U.S. at 799. The district court permissibly exercised its discretion and committed neither procedural nor substantive error in

determining Valdez-Lopez's sentence. The court began, as it was required to do, by calculating the applicable sentencing range under the advisory Sentencing Guidelines. *Carty*, 520 F.3d at 991. Valdez-Lopez does not challenge that calculation, which yielded a Guidelines sentence of life. The court then went on to consider the factors prescribed in section 3553(a), giving particular weight to the seriousness of the offense, which it described as "so incredibly outrageous" as to "warrant a significant sentence." Those statements do not show that the court penalized Valdez-Lopez for seeking relief under section 2255. *See United States v. Horob*, 735 F.3d 866, 871–72 (9th Cir. 2013) (per curiam). Valdez-Lopez does not argue that a sentence of 300 months is substantively unreasonable, and we conclude that it is not. *See Carty*, 520 F.3d at 993–94.

Instead, Valdez-Lopez argues that the district court erred because it impermissibly relied on Valdez-Lopez's decision to go to trial. In support of that argument, he points out that, at several times during the hearing, the district court noted that Valdez-Lopez had chosen to go to trial. We have held that a district court may not penalize a defendant "for his assertion of protected Sixth Amendment rights," including the right to go to trial. *United States v. Hernandez*, 894 F.3d 1104, 1110 (9th Cir. 2018). But we also have recognized that it is not reversible error for a court to "note[] the fact that the defendant went to trial, so long as the court bases its final decision on the facts of the case and record as a whole." *United States v. Rojas-Pedroza*, 716 F.3d 1253, 1270 (9th Cir. 2013).

That is what the district court did here. In one of the statements to which Valdez-Lopez objects, the district court noted, "there is no acceptance of responsibility. You went to trial." A defendant's decision to go to trial cannot be the sole

basis for denying a Guidelines reduction for acceptance of responsibility. *Hernandez*, 894 F.3d at 1111; *United States v. Ochoa-Gaytan*, 265 F.3d 837, 842 (9th Cir. 2001). But it is a relevant consideration because "a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse" is not ordinarily entitled to the reduction. U.S.S.G. § 3E1.1 cmt. n.2; *see United States v. Ramos-Medina*, 706 F.3d 932, 940–42 (9th Cir. 2013). It was therefore appropriate for the district court to acknowledge Valdez-Lopez's decision to go to trial. And because Valdez-Lopez did not contest the denial of an adjustment for acceptance of responsibility, the district court had no need to engage in a more extensive discussion of the subject. *See Carty*, 520 F.3d at 992–93.

Valdez-Lopez also objects that in response to defense counsel's argument about sentencing disparities with his codefendants, the district court asked the rhetorical question, "Which codefendants went to trial?" There was nothing improper about that observation either. Valdez-Lopez's codefendants had received shorter sentences after pleading guilty, and a codefendant's acceptance of a guilty plea is a permissible explanation for a sentencing disparity. *See United States v. Carter*, 560 F.3d 1107, 1121 (9th Cir. 2009).

The district court's other passing comments do not indicate that the court was punishing Valdez-Lopez for going to trial. In *Hernandez*, "the district court's comments regarding [the defendant's] decision to go to trial comprised virtually the entirety of the explanation for the sentence," such that it was "impossible to avoid the centrality of the comments about [the defendant's] decision to go to trial." 894 F.3d at 1111. Here, by contrast, the district court extensively discussed the sentencing factors and explained

how they applied to Valdez-Lopez's case. *See Rojas-Pedroza*, 716 F.3d at 1270–71. The district court did not err.

AFFIRMED.

W. FLETCHER, Circuit Judge, concurring:

Rufino Valdez-Lopez was convicted of five counts related to hostage smuggling and was sentenced to twenty years in federal prison. He successfully moved to vacate the conviction on one of the counts based on the unconstitutionality of the statute. That count had been responsible for seven years of his original sentence. A different district judge then resentenced Valdez-Lopez to twenty-five years on the four remaining counts, five years more than the original sentence. We affirm the sentence.

I concur in Judge Miller's careful opinion. I agree that the presumption of vindictiveness does not apply in the circumstances of this case. I write separately to suggest that our resentencing law has gone astray.

I

In 2007, following a six-day jury trial, Valdez-Lopez was convicted on five counts arising out of his participation in a conspiracy to hold hostage aliens who had been smuggled into the United States. Count 5 was brandishing a firearm "during and in relation to [a] crime of violence" under 18 U.S.C. §§ 924(c)(1)(A)(ii) and (c)(3)(B). Count 5 carried a mandatory minimum consecutive sentence of seven years. The Government recommended a twenty-year total sentence.

At sentencing, District Judge Earl Carroll said, "With respect to the Government's recommendation of [] twenty years, I believe that's a responsible recommendation considering the record in this case and considering the fact that the defendant in fact faced a possible sentence of life in prison." He went on, "So I find that for the reasons that I've stated, that I will accept the Government's recommendation. I believe it's appropriate and responsible for the Government to make that recommendation." Judge Carroll sentenced Valdez-Lopez to 120 months (ten years) on Counts 1 and 2, and 156 months (thirteen years) on Counts 3 and 4, all to be served concurrently, and to 84 months (seven years) on Count 5, a mandatory minimum consecutive sentence. The total sentence was twenty years.

In 2016, Valdez-Lopez filed a habeas petition challenging his conviction on Count 5 in the wake of the Supreme Court's decision in *United States v. Johnson*, 576 U.S. 591 (2015). The Court in *Johnson* had struck down as unconstitutionally vague a residual clause providing a sentence enhancement under the Armed Career Criminal Act ("ACCA") for a crime of violence, defined as a crime that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). Three years later, in *United States v. Davis*, 139 S. Ct. 2319, 2326 (2019), the Court recognized there was "no material difference in the language or scope" between the residual clause of the ACCA and § 924(c)(3)(B), which defined a crime of violence as an "offense . . . that by its nature, involves a substantial risk that physical force against the person or property of another may be used[.]" The Government agreed with Valdez-Lopez that his motion to vacate his conviction on Count 5 should be granted in light of *Johnson* and *Davis*.

Judge Carroll had retired, so Valdez-Lopez's § 2255 petition was assigned to District Judge Steven Logan. Judge Logan vacated Count 5 and granted Valdez-Lopez's petition.

Valdez-Lopez had been well behaved in prison, and the information in the record about his crime and background was unchanged. The new pre-sentence report recommended a sentence of 180 months (fifteen years) on the remaining four counts. The Government recommended 240 months (twenty years), the same length as the original sentence.

Judge Logan stated that he was "pretty confident that Judge Carroll had access to the same information" as he did and "that Judge Carroll sentenced [the defendant] based on what he saw and what he heard." "But," he continued, "I also think that I need to give some . . . consideration to all of the victims in the case." Judge Logan sentenced Valdez-Lopez to 120 months (ten years) concurrent on Counts 1 and 2, and to 180 months (fifteen years) concurrent on Counts 3 and 4, to be served consecutively to the sentence imposed under Counts 1 and 2. The total sentence was 300 months (twenty-five years), 60 months (five years) longer than Valdez-Lopez's original sentence.

II

If Valdez-Lopez had been convicted on Counts 1 through 4, if he had the same criminal history and personal background, and if he had come before Judge Logan for sentencing as an original matter rather than for resentencing, Judge Logan's twenty-five year sentence would be unobjectionable. However, that is not what happened, and that is not the question before us. The question is whether on resentencing a judge (whether the original judge or a replacement judge) may impose a longer sentence when one count of conviction, responsible for a substantial portion of

the original sentence has been set aside, and when the record is otherwise unchanged. If I were writing on a clean slate, I would say "no."

A resentencing judge may not increase the sentence vindictively, as a punishment for a prisoner who has the effrontery to challenge a conviction and/or a sentence. This is current law. *See North Carolina v. Pearce*, 395 U.S. 711 (1969); *Nulph v. Cook*, 333 F.3d 1052 (9th Cir. 2003). This makes sense, for a "vindictive" judge is the antithesis of a neutral magistrate. Further, a resentencing judge may impose the same sentence as before, even when one or more counts have been set aside. This is also current law. *See United States v. Handa*, 122 F.3d 690 (9th Cir. 1997). This also makes sense, for the original sentence may have been a "package" in which the judge had decided on an appropriate total length of time based on the nature of the crime and the character and history of the defendant, and had then imposed sentences for the specific counts calculated to reach that total.

What does not make sense, and should not be the law, is for a resentencing judge 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.