UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
_____

No. 03-3752
_____

RODNEY WELLS,

                       Appellant

v.

BEN VARNER; THE DISTRICT ATTORNEY
OF THE COUNTY OF PHILADELPHIA; THE
ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 03-CV-00727)
District Judge: Honorable Jan E. Dubois

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Before: BARRY, SMITH and GARTH, <u>Circuit</u> <u>Judges</u>

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SUR PETITION FOR PANEL REHEARING
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The petition for panel rehearing filed by Appellant having been submitted to the judges who participated in the decision of this court and are not recused, it is hereby ORDERED that the petition for panel rehearing is GRANTED. The opinion and judgment filed May 14, 2009 are hereby VACATED.

The Clerk is requested to appoint a member of this Court's bar as *amicus curiae* on behalf of Appellant. On March 22, 2004, a Certificate of Appealability was granted by this Court on a single issue and therefore amicus counsel's representation is limited to the following issues:

(1) whether Wells is "actually innocent" of his offense under Pennsylvania's Corrupt Organizations Act, 18 Pa. C.S. § 911, because he claims his conduct involved only wholly illegitimate businesses. See Commonwealth v. Besch, 674 A.2d 655 (Pa. 1996) (holding that the PCOA, as originally enacted, does not apply to conduct involving only wholly illegitimate businesses); Kendrick v. Att'y Gen. of Phil. County, 488 F.3d 217 (3d Cir. 2007) (holding that Besch applies retroactively to cases on collateral review because it did not establish a new rule of law); and

(2) what effect, if any, would the panel's decision have on Wells's sentence.

The Clerk is further requested to issue a new briefing schedule and, upon completion of briefing, to calendar this appeal before the next available regular merits panel.

By the Court,

/s/ Leonard I. Garth
Circuit Judge

Dated: August 3, 2009
SLC/cc: Rodney Wells
               Thomas W. Dolgenos
               Anne Palmer