No. 14-271

IN THE

Supreme Court of the United States

MARVIN PLUMLEY, WARDEN,

Petitioner,

v.

TIMOTHY JARED AUSTIN,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National District Attorneys Association (NDAA) is the world's oldest and largest professional organization representing prosecutors.[1] Its members—found in the offices of district attorneys, state's attorneys, attorneys general, and county and city prosecutors—prosecute criminal violations in every State and territory of the United States. Founded in 1950, the NDAA has sought to provide local prosecutors with a national perspective on issues that appear and recur in their offices nationwide. The NDAA also advocates at the national level regarding those issues. The NDAA's underlying objective, like that of its individual members, is to see that justice is done under the rule of law.

To that end, the NDAA seeks to advance the criminal justice system by supporting efforts designed to preserve the honor and integrity of America's state and local prosecuting attorneys, improve and facilitate the administration of justice, and promote the study of law and the diffusion of knowledge of the law through the continuing education of prosecuting attorneys, lawyers, law-enforcement personnel, and other members of the interested public. It is vitally interested in enabling prosecutors to perform their duties to their utmost by most effectively using the limited resources entrusted to them. It thus urges legislatures to adopt clear and practicable

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* National District Attorneys Association certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

statutes in defining the duties and responsibilities of prosecutors, and courts to make clear and practicable interpretations in construing and applying statutory or constitutional texts.

The interests of the NDAA and its members are directly implicated by this case. In the decision below, the Fourth Circuit dramatically expanded the substantive due-process right to a presumption of judicial vindictiveness in resentencing cases announced in *North Carolina v. Pearce*, 395 U.S. 711 (1969). This is a serious concern for the NDAA as the presumption of vindictiveness also applies to prosecutors. *See Blackledge v. Perry*, 417 U.S. 21 (1974). Further, any expansion of the *Pearce* rule—either in the judicial or prosecutorial context—is problematic as the presumption of vindictiveness, even narrowly confined, "may block a legitimate response to criminal conduct." *United States v. Goodwin*, 457 U.S. 368, 373 (1982). The Fourth Circuit's unwarranted reliance on the "spirit and logic" of *Pearce*, Appendix ("App.") 28-29, to expand a dubious precedent undermines the adminsitration of justice and needlessly hamstrings the NDAA's members' ability to perform the vital functions that the public has entrusted to their offices.

SUMMARY OF ARGUMENT

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), this Court held that there is a rebuttable presumption of judicial vindictiveness that arises under the Due Process Clause of the Fourteenth Amendment when "a trial judge [is] reversed on appeal and then impose[es] a harsher sentence on the defendant after reconviction for the same crime." Petition For Writ of Certiorari ("Pet.") at 1. The

question presented here is whether, under *Pearce*, "a reviewing court may *presume* that a trial judge acted 'vindictively' in giving a defendant a higher sentence after resentencing, when no higher court had vacated the trial judge's original sentence." *Id.* at *i.* Because the lower courts are divided on this question, *see id.* at 10-16, the Court should grant certiorari to decide it.

There is a more fundamental reason why this Court should grant review, however. The premise the petition accepts, *viz.*, that criminal defendants have a due-process right to a presumption of judicial vindictiveness which requires the trial court to bear the heavy burden of proving neutrality through objective evidence in the record, is irrevocably flawed as an original matter and should be reconsidered in an appropriate case.

To be sure, the Due Process Clause forbids a judge from imposing a harsher sentence out of vindictiveness for prevailing on appeal. But it did not create a substantive right to a presumption of vindictiveness that must be disproven so the criminal defendant may be "freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Pearce*, 395 U.S. at 725. The right to "due process" is the right to a trial in accordance with the "law of the land" as that phrase was first used in the Magna Carta. *See Murray's Lessee v. The Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855). It includes the right to notice, an opporuntity to be heard, and a trial in compliance with the laws as promulgated by the legislature. *See In re Winship*, 397 U.S. 358, 378-86 (1970) (Black, J., dissenting). It does not include, however, "any such power as [the Court] is using here …. This is pure legislation if there ever was legislation."

Pearce, 395 U.S. at 740-41 (Black, J., concurring in part and dissenting in part). The Due Process Clause is not a "secret repository of substantive guarantees against 'unfairness.'" *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 598-99 (Scalia, J., dissenting). When presented with the opportunity, the Court should overrule *Pearce*.

In this case, however, the Court need only decline to extend *Pearce* beyond its facts to overturn the judgment below. Pet. at 16-25. This Court has a long tradition of ensuring that questionable decisions are not applied more broadly than their facts require. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 469 (2008). Indeed, that is the policy the Court has followed with regard to *Pearce*. Since issuing the opinion, the Court has repeatedly refused to expand the presumption of judicial vindictiveness beyond the facts presented in that case. Pet. at 19-21 (discussing *Alabama v. Smith*, 490 U.S. 794 (1989); *Texas v. McCullough*, 475 U.S. 134 (1986); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973); *Colten v. Kentucky*, 407 U.S. 104 (1972)). There is no basis for accepting the Fourth Circuit's reliance on the "spirit and logic" of *Pearce* to extend the presumption to new categories of cases at this juncture. App. 28-29.

In truth, the Court has every reason to stand firm in its refusal to extend the *Pearce* rule. The presumption of vindictiveness is disrespectful to judges as it assumes that they are somehow unable to remain impartial simply because a decision was reversed on appeal. Any such doctrine should be strictly limited. Moreover, the *Pearce* rule elevates vindictiveness arising from appellate reversal over judicial bias at sentencing due to the defendant's race, religion, or political affiliation. It is inconceivable that there would be a due-process right to a

presumption of bias with regard to the former but not the latter. If a legal rule this bizarre is going to be retained, it certainly should not be expanded.

Finally, the *Pearce* rule distorts the administration of justice. Because the presumption applies to prosecutors as well, *see Blackledge v. Perry*, 417 U.S. 21 (1974), any expansion of this rule will negatively impact the ability of these public servants to ensure that those convicted of crimes are appropriately sentenced. The natural response will be for prosecutors to seek maximum sentences (and for judges to impose them) to ensure flexibility on resentencing in the event of a successful appeal. The *Pearce* rule thus occasionally will benefit individual defendants as it has Respondent; in the main, however, it will operate to the detriment of defendants seeking leniency at sentencing. Aside from its doctrinal flaws, then, the practical concerns associated with this mistaken rule provide ample reason to cabin it to the facts of *Pearce*.

As the petition thoroughly explains, the Fourth Circuit's decision is unsustainable unless the *Pearce* rule is dramatically expanded based on its "spirit and logic." App. 28-29. By its terms, the presumption of vindictiveness applies only "when the same sentencing authority gives the same defendant a harsher sentence in response to a *reversal* by a higher tribunal." Pet. at 18 (emphasis added). That is not what happened here. There was no reversal by a higher tribunal; indeed, Respondent did not even seek reversal as *Pearce* uses that concept. He filed a mandamus petition, which was never acted on, asking the West Virginia Supreme Court to compel the sentencing court to act on a motion for corrected sentence. That situation is far afield from the facts of *Pearce*. The Court should grant review and reverse the judgment below.

ARGUMENT

I. *North Carolina v. Pearce* Has No Basis In The Constitution, And The Court Should Overrule It In An Appropriate Case.

This Court has held that "it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." *Pearce*, 395 U.S. at 723-24. As the Court explained, "the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy" would violate "due process of law." *Id.* at 724 (citations omitted). "Due process of law" therefore "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives" on remand. *Id.* at 725. This pronouncement is uncontestable as a matter of first principles. *See id.* at 738-39 (Black, J., concurring in part and dissenting in part).

But *Pearce* did not just reaffirm the long established principle that judicial vindictiveness violates due process. Had it, the decision would have been unobjectionable. The decision went an order of magnitude further in holding that "due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Id.* at 725 (footnote omitted). To meet this concern, the Court invented a presumption that requires the sentencing court to shoulder the burden of *disproving* vindictiveness when the new

sentence is harsher than the one overturned on appeal. Under this presumption of vindictiveness, "the reasons for [imposing the harsher sentence on remand] must affirmatively appear" in the record 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." *Pearce*, 395 U.S. at 726. Put simply, "the Court fashioned what in essence is a 'prophylactic rule'" in order to guard against the risk of judicial vindictiveness. *Wasman v. United States*, 468 U.S. 559, 564 (1984) (citation omitted); *see also Michigan v. Payne*, 412 U.S. 47, 53 (1973).

This presumption of vindictiveness lacks foundation in the Constitution. *See Pearce*, 395 U.S. at 740 (Black, J., concurring in part and dissenting in part) ("[N]othing in the Due Process Clause grants this Court any such power as it is using here."). "Punishment based on … impermissible motivation … is … clearly unconstitutional, and courts must of course set aside the punishment if they find, by the normal judicial process of fact-finding, that such a motivation exists." *Id.* at 740-41. Courts, however, "are not vested with any general power to prescribe particular devices '[i]n order to assure the absence of such a motivation.'" *Id.* at 741 (quoting *Pearce*, 395 U.S. at 726). Justice Black had it exactly right: "This is pure legislation if there ever was legislation." *Id.*; *see also Dickerson v. United States*, 530 U.S. 428, 459-60 (2000) (Scalia, J., dissenting) (concluding that *Pearce* "exhibits the same fundamental flaw as does *Miranda* when deprived (as it has been) of its original (implausible) pretension to announcement of what the Constitution itself required").

The *Pearce* presumption of vindictiveness certainly does not derive from "due process of law" as that concept was originally understood. The right to due process carries into our Constitution the Magna Carta's promise of a trial according to the "law of the land." *Murray's Lessee*, 59 U.S. (18 How.) at 276; 2 Edward Coke, Institutes of the Laws of England ch. 29, at 50 (explaining that English common law employed "due process of law" and "law of the land" interchangeably); Raoul Berger, *Government by Judiciary*: *The Transformation of the Fourteenth Amendment* 194 (1977) ("No statement to the contrary will be found in any of the constitutional conventions, in the First Congress, nor in the 1866 debates."); *Stovall v. Denno*, 388 U.S. 293, 305 (1967) (Black, J., dissenting).

In turn, the right to a trial in accordance with "the law of the land" imposed only procedural limits on the King's authority. *See* 1 William Blackstone, Commentaries 137-38. It directed that "[n]o man be put to answer without presentment before justices, or things of record, or by due proces[s], or by writ original[], according to the old law of the land." 2 Coke, *supra*, at 50. But "the law of the land" did not dictate the substance of the legal protections that the criminal justice system afforded the accused. Parliament had the exclusive authority to articulate legal rules, which became "the law of the land." As a consequence, "what the law is, every subject knows; or may know if he pleases: for it depends not on the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unless by authority of parliament." 1 Blackstone, *supra*, at 137.

"Due process of law" under our Constitution is the same. *See* 9 The Papers of Alexander Hamilton 35 (H.C. Syrett & J.E. Cooke eds., 1962); Berger, *supra*, at 200. "A

due process criminal trial means a trial in a court, with an independent judge lawfully selected, a jury, a defendant's lawyer if the defendant wants one, a court with power to issue compulsory process for witnesses, and with all the other guarantees provided by the Constitution and valid laws passed pursuant to it." *Pearce*, 395 U.S. at 744 (Black, J., concurring in part and dissenting in part) (citations omitted); *see also Masonic Grand Chapter of Order of Eastern Star v. Sweatt*, 329 S.W.2d 334, 337 (Tex. Civ. App. 1959) ("The term 'due process of law' is synonymous with 'the law of the land,' and its essential elements are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case."); *In re Oliver*, 333 U.S. 257, 273 (1948); *In re Winship*, 397 U.S. at 384 (Black, J., dissenting).

Due process of law therefore does not entitle a criminal defendant to any particular procedures or special protection against unfairness. *See Rogers v. Peck*, 199 U.S. 425, 435 (1905) ("Due process of law … does not require the state to adopt a particular form of procedure."); *see also Hurtado v. California*, 110 U.S. 516, 535 (1884) ("Due process of law … refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state."). Certainly, the Due Process Clause ensures "that our governments are governments of law and constitutionally bound to act only according to law." *In re Winship*, 397 U.S. at 382 (Black, J., dissenting) (footnote omitted). But it neither dictates the substance of those laws nor empowers federal judges to shape criminal proceedings to meet their peculiar sense of fairness. *See BMW of North America Inc. v. Gore*, 517 U.S. 559, 598-99 (1996) (Scalia, J., dissenting); *Perry v. New Hampshire*, 132 S. Ct. 716, 730 (2012) (Thomas, J., concurring).

The Court's introduction of the substantive fairness requirement betrays not only the Constitution's text and history, it turns a noble contribution into "an oxymoron." *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in the judgment); *see also McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring in part and concurring in the judgment) ("The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words."). The Due Process Clause does not empower "judges from day to day, generation to generation, and century to century, [to] decide [what] is fairest and best for the people." *Pearce*, 395 U.S. at 743-44 (Black, J., concurring in part and dissenting in part); *see also In re Winship*, 397 U.S. at 384 (Black, J., dissenting). If anything, it is the judicially fashioned notion of substantive due process—not its absence from constitutional doctrine—that conflicts with "the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969). Our Constitution is written—not "formulated by judges according to their ideas of fairness on a case-by-case basis." *Pearce*, 395 U.S. at 744 (Black, J., concurring in part and dissenting in part).

The *Pearce* presumption of vindictiveness has no greater merit than any other substantive due-process rule because it claims to enforce a right actually guaranteed by the Due Process Clause, *viz.* an unbiased judge. *See supra* at 6. "Numerous different mechanisms could be thought of, any one of which would" patrol for vindictiveness. *Pearce*, 395 U.S. at 741 (Black, J., concurring in part and dissenting in part). But the Fourteenth Amendment does not vest this

Court with "wideranging, uncontrollable power" to compel measures that meet its subjective standard of what would be the fairest way to protect criminal defendants against risk of judicial retribution. *Simmons v. United States*, 390 U.S. 377, 395 (1968) (Black, J., concurring in part and dissenting in part). When this Court takes it upon itself to invent greater rights for criminal defendants than is afforded by the Constitution, our Nation ceases to be governed according to the "law of the land" and instead becomes one governed ultimately by the "law of judges." *In re Winship*, 397 U.S. at 384 (Black, J., dissenting). The *Pearce* presumption of vindictiveness crossed the line from enforcing the guarantee of due process to inventing a right nowhere found in the Constitution. It should be overturned in an appropriate case.

II. The Court Should Grant Review And Reverse The Fourth Circuit's Decision To Ensure That *Pearce* Is Limited To Its Facts.

Although the Court should overrule *Pearce* at the first opportunity, it need not do so to reverse the decision below. *See* Pet. at 16-25. Rather, the Court need only take the more modest step of limiting this dubious decision to its facts: "when the same sentencing authority gives the same defendant a harsher sentence in response to reversal by a higher tribunal." *Id.* at 18. Doing so would serve vital institutional interests and make clear that those courts, including the Fourth Circuit in the case at bar, which "have broadened the presumption of judicial vindictiveness to circumstances well beyond its original application in *Pearce*" were in error. *Id.* at 1.

There is ample precedent for proceeding in this sensible fashion. *See, e.g.*, *CBOCS West, Inc.*, 553 U.S. at 469 ("[E]rroneous precedents need not be extended to their logical end, even when dealing with related provisions that normally would be interpreted in lockstep."); *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 186 (2004) ("While we share [Petitioner's] concern…, we decline to overrule our recent precedent. By the same token, we will not extend [the] holding…"); *Withrow v. Williams*, 507 U.S. 680, 687 (1993) ("[W]e have repeatedly declined to extend [the prior holding] beyond its original bounds."). At base, "this court in a very special sense is charged with the duty of construing and upholding the Constitution; and, in the discharge of that important duty, it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land." *Dimick v. Schiedt*, 293 U.S. 474, 485 (1935); *see also Haywood v. Drown*, 556 U.S. 729, 764 (2009) (Thomas, J., dissenting) ("[A] rule's infidelity to the text, structure, and history of the Constitution counsels against extending the principle any further than our precedent requires.").

That is the path the Court has always followed in this setting. "In the 45 years since *Pearce*, this Court has *never* extended the presumption of judicial vindictiveness to circumstances broader than those in *Pearce*." Pet. at 18. "Like other judicially created means of effectuating the rights secured by the Constitution," the Court carefully has "restricted the application of *Pearce* to areas where its 'objectives are most efficaciously served.'" *McCullough*, 475 U.S. at 138 (quoting *Stone v. Powell*, 428 U.S. 465, 487 (1976)). The Court thus has declined to extend *Pearce*

to resentencing by the court when a jury imposed the original sentence, *see id.* at 144, to cases in which a plea agreement was vacated on appeal, *see Smith*, 490 U.S. at 801, to resentencing by a jury when the second jury was unaware of the first jury's sentence, *see Chaffin*, 412 U.S. at 18, and to resentencing under a two-tiered system that allows the defendant to elect a *de novo* retrial in a court of criminal general jurisdiction, *see Colten*, 407 U.S. at 112-20. In sum, the Court has "been chary about extending the *Pearce* presumption of vindictiveness when the likelihood of vindictiveness is not as pronounced as it was in *Pearce* …." *Wasman*, 468 U.S. at 566; *Smith*, 490 U.S. at 799 (noting that decisions since *Pearce* "have limited its application").

The Court has every reason to maintain that course here. Foremost, the presumption is disrespectful to judges. "The power and the prerogative of a court to perform [its functions] rest … upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring); *see also Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). Other than in *Pearce* itself, then, the Court has steadfastly presumed the "honesty and integrity in those serving as adjudicators[.]" *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Expanding *Pearce* beyond its facts would violate the wise admonition that the Court "should not, even by inadvertence, 'impute to judges a lack of firmness, wisdom, or honor.'" *White*, 536 U.S. at 796 (Kennedy, J., concurring) (quoting *Bridges v. California*, 314 U.S. 252, 273 (1941)).

Like all of us, judges bring to work their own life "experiences and the attendant biases they may create." *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1372 (7th Cir. 1994) (en banc). But the public has shown confidence in the capacity of "judges [to] rise above these potential biasing influences." *Id.* With the isolated exception of *Pearce*, so has this Court. The presumption that judges are vindictive has real-world consequences. When attacks on judicial impartiality come with this Court's imprimatur, a rise in "impertinence, churlishness, discourtesy, and lack of respect for the dignity of the court" is all but inevitable. *United States v. Kelly*, 349 F.2d 720, 761 (2d Cir. 1965). At the end of the day, the *Pearce* presumption does "far more to erode public confidence in judicial impartiality than an isolated" instance of actual vindictiveness. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting).

Furthermore, *Pearce* curiously elevates concern for judicial vindictiveness over all other potential causes for bias against a defendant at sentencing. "The danger of improper motivation is of course ever present. A judge might impose a specially severe penalty solely because of a defendant's race, religion, or political views." *Pearce*, 395 U.S. at 742 (Black, J., concurring in part and dissenting in part). Similarly, the sentencing judge "might impose a specially severe penalty because a defendant exercised his right to counsel, or insisted on a trial by jury, or even because the defendant refused to admit his guilt and insisted on any particular type of trial." *Id.* But the Court has not seen fit to impose a presumption of bias that the trial judge must dispel through affirmative evidence in the record as to any of these equally (if not more) egregious violations of the oath. The exalted status the *Pearce* rule

affords vindictiveness is therefore troublesome enough. To expand the presumption further given this serious concern is simply unwarranted.

Extending the *Pearce* rule beyond its current bounds also would harm prosecutors given that the presumption operates against them too. *See Blackledge*, 417 U.S. at 28-29. As in the judicial context, the Court has consistently resisted expanding the presumption of prosecutorial vindictiveness beyond its core facts. *See Bordenkirker v. Hayes*, 434 U.S. 604, 608-09 (1978) (declining to extend the presumption to plea negotiations); *United States v. Goodwin*, 457 U.S. 357, 365 (1982) (declining to extend the presumption to pretrial demand for a jury trial). There can be no doubt that prosecutors perform a vital public service, "'which must be administered with courage and independence.'" *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) (quoting *Pearson v. Reed*, 44 P.2d 592, 597 (1935)). "[T]radition and experience justify [the Court's] belief that the great majority of prosecutors will be faithful to their duty." *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987). Expanding *Pearce* would erode the public's faith in those chosen to fill these important offices.

Indeed, carelessly extending the presumption "may block a legitimate response to criminal conduct." *Goodwin*, 457 U.S. at 373; *see also United States v. Esposito*, 968 F.2d 300, 303 (3d Cir. 1992) (The *Pearce* rule "may produce harsh results for which society ultimately bears the burden."). Suppose, for example, that a "district judge had originally concluded that [a defendant] should spend six years in jail for his part in [a] drug-related enterprise" for which he was convicted of two separate charges. *United States v. Pimienta-Redondo*, 874 F.2d 9, 16 (1st Cir. 1989)

(en banc). Further suppose that, to accomplish this goal, the court "sentenced him to six years' imprisonment on Count I and a term of probation on Count II." *Id.* If the conviction for Count I were for whatever reasons overturned on appeal, the *Pearce* rule would ensure this defendant "would not spend a day behind bars[.]" *Id.* "Such a result can scarcely be said to mirror the judge's original sentencing intentions, to honor the societal interest in condign punishment, or to be a necessary concomitant to treating a defendant fairly." *Id.*

Last, it should not be forgotten that the *Pearce* rule harms defendants as well. It encourages prosecutors to seek the stiffest punishment possible to ensure they are not hamstrung at resentencing if the defendant were to prevail on appeal. The presumption likewise causes "judges to impose heavier sentences on defendants in order to preserve their lawfully authorized discretion should defendants win reversals of their original convictions." *Pearce*, 395 U.S. at 743 (Black, J., concurring in part and dissenting in part). The collateral damage it inflicts upon the judicial system as a whole should not be ignored.

For all of these reasons, the Fourth Circuit's radical expansion of this questionable precedent should not be allowed to stand. And, as the petition comprehensively explains, the judgment is unsustainable if *Pearce* is limited to its facts. *See* Pet. at 16-25; App. 40 (Shedd, J., dissenting). Respondent was not subjected to a higher sentence "after reversal by a higher court." Pet. at 4. In fact, there was not even an appeal seeking reversal of the trial court in this case as Respondent simply "filed a mandamus petition with the state supreme court asking for an order directing the trial judge to decide the motion

to correct the sentence." *Id.* at 3. All the trial court did was acquiesce to Respondent's request "by choosing one of the two paths" he proposed and modifying the "escape sentence to a purely consecutive sentence." *Id.* That the Fourth Circuit thought the "spirit and logic" of *Pearce* reached this far shows that review is urgently needed. App. 28-29.

CONCLUSION

Amicus curiae respectfully requests that the Court grant the petition for a writ of certiorari and reverse the judgment below.

Respectfully submitted,

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