No. 14-271

IN THE
Supreme Court of the United States

MARVIN PLUMLEY, WARDEN,
Petitioner,

v.

TIMOTHY AUSTIN,
Respondent.

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

BRIEF OF *AMICI CURIAE* FORMER FEDERAL DISTRICT JUDGES PAUL G. CASSELL, STEPHEN M. ORLOFSKY, AND FRANKLIN H. MCFADDEN, IN SUPPORT OF PETITIONER

MATTHEW A. FITZGERALD
Counsel of Record
MYRA H. CHAPMAN
MCGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 775-4716
mfitzgerald@mcguirewoods.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Supreme Court Cases

Other Federal Cases

State Cases

Statutes

Articles

STATEMENT OF INTEREST[1]

Amici are former federal trial judges. As former members of the Nation's judiciary, amici have the experience and perspective necessary to comment on the presumption of judicial vindictiveness announced in *North Carolina v. Pearce*. Amici have a strong interest, both personally and institutionally, in addressing the proper scope of any presumption of impropriety leveled against judges.

SUMMARY OF ARGUMENT

Resentencing a defendant more harshly *because* he elected to appeal and succeeded is obviously improper. Amici's experience, however, concurs with this Court's 1973 observation that such behavior "is not a common practice." Judges are well aware of their oath, and a judge who cannot be fair after appellate reversal is the rare exception, not the rule.

Labeling a judge "vindictive" goes to the heart of his or her function and is a severe attack, even in the exceptional case where some evidence of it may exist. *Presuming* a judge will be vindictive based on

---

[1] Counsel of record for both parties received timely notice of the intent to file this brief. *See* S.Ct. Rule 37. Counsel for both parties have consented to the filing of this brief, and their consents have been filed with this Court. No counsel for either party authored the brief in whole or in part, and neither party nor their counsel made any monetary contribution intended to fund the brief's preparation or submission.

circumstances outside that judge's control should be rare and narrowly applied.

Appropriately, the *Pearce* presumption of judicial impropriety is a very unusual concept in American law. The more common and more fitting presumption is the "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Republican Party of Minnesota v. White*, 536 U.S. 765, 796 (Kennedy, J., concurring) ("We should not . . . impute to judges a lack of firmness, wisdom, or honor"); *Texas v. McCullough*, 475 U.S. 134, 154 (1986) (Marshall, J., dissenting) ("There is neither any reason nor any need for us to believe that dishonest and unconstitutionally vindictive judges actually hold sway in American courtrooms."); *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 891 (Roberts, C.J., dissenting) ("All judges take an oath . . . to apply the law impartially, and we trust that they will live up to this promise.").

Pearce is properly seen as a narrow exception—a presumption applicable only when (1) a harsher sentence is imposed; (2) by the same judge; (3) after appellate reversal. Here, the Fourth Circuit has purported to follow the "spirit and logic" of *Pearce* and has expanded the presumption to apply when there has been no appellate reversal. That holding brings the Fourth Circuit into conflict with Circuits that have refused to similarly broaden the presumption. *See* Pet. 11–13.

Moreover, the Fourth Circuit's expansion of the *Pearce* presumption is offensive to the trial judges of this Nation. Expanding *Pearce* beyond appellate

reversal means appellate courts will *assume* that sentencing judges will be spiteful and retaliatory—simply because the defendant *filed* an appeal. That assumption is not supported by amici's experiences on the bench. Nor is it supported by developments in modern law, both inside and outside the *Pearce* line of cases.

First, sentencing in particular is an area where this Court broadly trusts the propriety and discretion of trial judges. For most of this country's history, sentences within statutory limits were effectively unappealable. Even in the modern Guidelines era, all sentences, regardless of the Guidelines, are reviewed under a "deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007).

Second, this Court's recent approach to a similar issue of judicial bias under the Due Process clause also suggests that expansions of the *Pearce* presumption are going the wrong way. In *Caperton v. A.T. Massey Coal Company*, 556 U.S. 868 (2009), no justice wanted to make any sort of sweeping pronouncement or broad rule suggesting impure motives or judicial bias. The *Caperton* majority crafted a multi-factor analysis (far from any presumption), designed to apply only in "rare" circumstances, to "extreme facts." 556 U.S. at 888, 890. Chief Justice Roberts, for four dissenters, wanted no rule at all and simply would have "trust[ed] that [judges] will live up to [their oath]." *Id.* at 891.

Third, even cases in the *Pearce* line have consistently avoided expanding the presumption of judicial vindictiveness. Just four years after *Pearce*, this Court conceded that "Judicial impropriety in the resentencing process . . . surely is not a common practice." *Michigan v. Payne*, 412 U.S. 47, 54 (1973).

Ever since, the Court has held over and over that the presumption should *not* expand. It does not apply after a defendant invokes his right to a new trial in a second court (1972). It does not apply when a new jury imposed the second sentence (1973). It does not apply when the trial court itself ordered the new proceeding (1986). And it does not apply when the first sentence was based on a guilty plea (1989). Based on the trajectory of *Pearce* over the last forty years, the Fourth Circuit's focus on its "spirit and logic," App. 28, should not have encouraged its expansion.

Finally, although this Court has not addressed the scope of the *Pearce* presumption since 1989, that issue remains important. Criminal defendants still urge the application, and expansion, of the *Pearce* presumption in case after case.

Amici respectfully support a grant of certiorari in this case.

ARGUMENT

The Fourth Circuit's recent extension of the *North Carolina v. Pearce* presumption of judicial vindictiveness has expanded a split of authority over its proper scope. The State of West Virginia accurately points out that the Fourth Circuit, in applying the presumption in this case, split from other Circuits that would not do so. Pet. 11–13; *Compare* App. 28 (extending the *Pearce* presumption to apply, based on its "spirit and logic," even when the appellate court never acted on Austin's mandamus petition) with *Kindred v. Spears*, 894 F.2d 1477, 1479 (5th Cir. 1990) (construing *Pearce* as capturing "the notion of vindictiveness in the discrete occurrence of a reversal on appeal") and *Bono v. Benov*, 197 F.3d 409, 416 (9th Cir. 1999) (agreeing with *Kindred* that "there is no presumption of vindictive motivation when the [tribunal] reopens a case on its own, because there is no remand from a successful appellate challenge").

This split is important. It addresses the circumstances under which appellate courts will *presume* that a sitting trial judge has ignored his oath of impartiality and violated the Due Process clause. The Fourth Circuit's expansion of that presumption is a development that warrants this Court's attention.

I. Unlike the *Pearce* presumption, most of the law operates under the presumption that judges act with honesty and integrity.

Due 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." *North Carolina v. Pearce,* 395 U.S. 711, 725 (1969). Aiming to protect this constitutional right, *Pearce* announced a prophylactic presumption of judicial vindictiveness. That presumption applies "whenever a judge imposes a more severe sentence upon a defendant after a new trial." *Pearce*, 395 U.S. at 726. Rebutting the presumption requires the sentencing judge to "affirmatively" justify the longer sentence with "objective information." *Id.*

The *Pearce* presumption was a notable innovation the day the Court announced it.[2] As Justice Black pointed out in dissent, solving the possible due process problem identified in *Pearce* using a detailed presumption—especially a presumption that sentencing judges are vindictive—had "never previously been suggested by this Court." 395 U.S. at 472 (dissent).

Justice Black believed that "the possibility that judicial action will be prompted by impermissible motives is a particularly poor reason" for inventing new "rules of procedure [that] are constitutionally

[2] *Pearce* was announced on June 23, 1969—the last day of the Warren Court.

binding in every state and federal prosecution." *Id.* at 741–42. He noted "many perfectly legitimate reasons that a judge might have for imposing a higher sentence." *Id.* at 742. Absent a case-specific "finding of actually improper motivation," Justice Black would have let harsher second sentences stand. *Id.*

The presumption of judicial vindictiveness was thus recognized and criticized as innovative in 1969. Ever since, further developments in the law reflect the broader assumption that judges act with integrity. *Pearce* should be narrowly applied.

1. This Court places broad trust in trial judges to perform sentencing—even in the Guidelines era.

Outside of *Pearce*, this Court consistently has supported broad discretion for sentencing judges.

For most of this country's history, sentencing was almost entirely reserved to the open discretion of district judges. By the 1970s, "long-established authority in the United States vest[s] the sentencing function exclusively in the trial court." *Dorszynski v. United States*, 418 U.S. 424, 440 N.14 (1974). The "traditional powers of sentencing judges" were "discretion . . . virtually free of substantive control or guidance." *Id.* (citation omitted).

Such an open sentencing system could never have existed without strongly presuming the integrity of trial judges. Indeed, it was generally recognized that "the task of fashioning an appropriate sentence called

for an exercise of discretion" that some "regarded as the zenith of the judicial craft." Gerald, F. Uelmen, *Federal Sentencing Guidelines: A Cure Worse Than the Disease*, 29 Am. Crim. L. Rev. 899, 900 (1991–92).

For the federal system, Congress enacted the Sentencing Guidelines in 1984. This Court has maneuvered under the Guidelines with the same eye toward broad judicial discretion.

First, after Guidelines legislation imposed appellate review over sentencing, the Court held that abuse of discretion, not *de novo*, was the proper standard. *Williams v. United States,* 503 U.S. 193, 205 (1992) ("Although the Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion"); *Koon v. United States*, 518 U.S. 81, 98 (1996) ("A district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court").

Second, shortly after Congress superseded *Koon* by explicitly requiring *de novo* review for Guideline departures, this Court excised that provision as part of its *Booker* remedy. 543 U.S. 220, 261 (2005) (discussing and excising 28 U.S.C. § 3742(e)). The *Booker* Court happily returned to a deferential "reasonableness" standard for reviewing sentences outside the applicable Guidelines range.

Under the reasonableness standard, courts of appeals could presume that sentences imposed

within the Guidelines are reasonable, *Rita v. United States*, 551 U.S. 338, 347 (2007), but they could *not* presume that sentences *outside* the Guidelines are *unreasonable*. *Id.* at 356 ("The law leaves much… to the judge's own professional judgment."). Finally, in *Gall v. United States*, the Court clarified that all sentences—"whether inside, just outside, or significantly outside the Guidelines range"—must be reviewed under a "deferential abuse-of-discretion standard." 552 U.S. 38, 41 (2007). This approach, in the Court's view, valued the sentencing judges' "credibility determinations," "knowledge of the facts," "insights," and experience. *Id.* at 51.

Even as Congress has placed more structure on federal sentencing, this Court has continued to recognize wide discretion by sentencing judges. The consistent refrain is that sentencing is the district court's job—and that this Court implicitly trusts the district courts to do it right.

2. A broadly-applied *Pearce* presumption contrasts with this Court's approach to judicial bias in *Caperton*.

A broadly-applied presumption of judicial vindictiveness in resentencing also contrasts sharply with this Court's approach to the similar issue of alleged judicial bias in *Caperton v. A.T. Massey Coal Company*, 556 U.S. 868 (2009).

In *Caperton*, the Court addressed whether the Due Process clause required recusal by a state appellate judge. The judge had provided the deciding vote to overturn a $50 million jury verdict against a

company whose president had spent $3 million to support the judge's election—while the appeal was pending. *Id.* at 872–74. Applying an objective but multi-factored and extremely narrow analysis, the *Caperton* majority found "a serious . . . risk of actual bias" and required recusal. *Id.* at 886.

Pearce and *Caperton* began in similar positions. Both faced circumstances that could suggest possible improper judicial motives. *Pearce*, 395 U.S. at 723 (annoyance at being reversed); *Caperton*, 556 U.S. at 872 (bias in favor of a major financial supporter). Both cases would implicate Due Process if the judge acted on those possible improper motives. *Pearce*, 395 U.S. at 725 ("Due process of law, then, requires that vindictiveness against a defendant for having successfully attached his first conviction must play no part in the sentence he receives after a new trial."); *Caperton*, 556 U.S. at 877, 883 (referring to situations when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable" and adding that "actual bias, if disclosed, no doubt would be grounds for appropriate relief"). In both cases, the Court even recognized the difficulty in enforcing Due Process. *Pearce*, 395 U.S. at 725 n.20 (retaliatory motivation by a sentencing judge is "extremely difficult to prove"); *Caperton*, 556 U.S. at 883 (noting "difficulties of inquiring into actual bias").

After that, however, *Pearce* and *Caperton* diverged. Whereas *Pearce* fashioned a presumption of judicial vindictiveness, the *Caperton* majority articulated an objective standard that required in-depth case-by-case analysis. 556 U.S. at 881. The

Caperton majority found Due Process required recusal only under a swarm of unusual-sounding facts: "a person with a personal stake in a particular case [i] had a significant and disproportionate influence [ii] in placing the judge on the case [iii] by raising funds or directing the judge's election campaign [iv] when the case was pending or imminent." 556 U.S. at 884. The *Caperton* majority added that the "relative size" of the donation would matter, as well as "the total amount spent in the election," and the "apparent effect such contribution had on the outcome of the election." *Id.* Far from making any sort of presumption of judicial bias, the *Caperton* majority went out of its way to attempt to make the rule it announced as narrow as possible.

The *Caperton* majority (Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer) repeatedly emphasized the rarity of, and "extreme facts" necessary to support, finding too much risk of judicial bias. The majority opinion repeatedly referred to the facts the case as "extreme," *id*. at 886–88, and noted that the "parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances of this case." *Id*. at 887. Moreover, the majority maintained that the application of due process to disqualification disputes will be "rare," *id*. at 890, and that the Court was doing "nothing more than what the Court has done before." *Id*. at 888.

For the *Caperton* dissenters (Chief Justice Roberts and Justices Scalia, Thomas, and Alito), the majority's "rare" and "extreme" facts-only rule was still not narrow enough. The dissents essentially

believed there should be no such test at all under the due process clause. *Id.* at 891 (Roberts, C.J., dissenting). Pointedly the dissent noted "'the presumption of honesty and integrity in those servicing as adjudicators.'" *Id.* (quoting *Withrow*, 421 U.S. at 47 (1975)). "All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise." *Id.* In short, the dissenters believed that even a narrow case-by-case analysis requiring recusal only in "rare" and "extreme" situations was a bad idea.

Even a narrow, case-by-case analysis (far short of a presumption like *Pearce's*) was thought unfair to judges, unworkable, and damaging to public perception of the judiciary. Justice Scalia's dissent worried that it would contribute to the "eroding public confidence in the Nation's judicial system." *Id.* at 903 (dissenting). Chief Justice Roberts posited that it "would lead to an increase in allegations that judges are biased, however groundless those charges may be," and added that such Due Process analyses would "erode public confidence in judicial impartiality." *Id.* at 891 (dissenting).

In sum, no justice in *Caperton* wanted to make any sort of sweeping pronouncement or broad rule suggesting judicial bias or impure motives. *Caperton* suggests that broad readings or expansions of *Pearce* are headed in the wrong direction.

3. Even cases in the *Pearce* line have consistently limited the presumption of vindictiveness.

The history of the *Pearce* presumption itself is a broad, sweeping announcement followed by hasty and consistent clarification and retrenchment. As the Fourth Circuit in this case aptly described: "The broad sweep of *Pearce* has been limited." App. 22.

Early on, in *Michigan v. Payne*, 412 U.S. 47 (1973), this Court refused to apply the *Pearce* presumption retroactively. The Court recognized that retroactive application "would require the repudiation of many sentences . . . in which there was no genuine possibility that vindictiveness played a role." *Id.* at 53–54. In contrast to a broad reading of *Pearce,* the Court asserted that "Judicial impropriety in the resentencing process . . . surely is not a common practice." *Id.* at 54.

For cases that pre-dated *Pearce*, the *Payne* Court was content to allow due process claims only when "some evidence of retaliatory motivation exists." *Id.* at 55. The Court said that "if retroactive, *Pearce* would apply to innumerable cases in which no hint of vindictiveness appears." *Id.* Just four years after announcing the *Pearce* presumption, the Court recognized explicitly that it was a broad prophylactic rule—aimed at a narrow and rare problem.

Similarly, almost immediately after *Pearce,* the Court began to hem it in in other ways. In 1972, the Court ruled that the *Pearce* presumption did not apply to a harsher sentence imposed after a

defendant invoked his right to a new trial in a different court. *Colten v. Kentucky*, 407 U.S. 104, 116 (1972). The next year, the Court ruled the presumption did not apply when a new jury imposed the harsher sentence. *Chaffin v. Stynchcombe*, 412 U.S. 17, 27 (1973). As the Court itself later described, "because of its severity . . . the Court has been chary about extending the *Pearce* presumption of vindictiveness when the likelihood of vindictiveness is not as pronounced as in *Pearce*." *Wasman v. United States*, 468 U.S. 559, 566 (1984).

Next, in *Texas v. McCullough*, the Court refused to apply the *Pearce* presumption to a harsher sentence when the "trial judge herself" had granted the defendant's motion for a new trial. 475 U.S. 134, 135, 138 (1986). Calling the "possibility of vindictiveness" too "speculative" for the presumption to apply, the Court expressed confidence in the "judicial temperament of our Nation's trial judges." *Id*. at 139. Even Justice Marshall, dissenting, noted that "[t]here is neither any reason nor any need for us to believe that dishonest and unconstitutionally vindictive judges actually hold sway in American courtrooms" and "even less call for us to doubt the integrity" of the particular judge in the case. *Id*. at 154.

Most recently, in *Alabama v. Smith*, the Court again limited the application of the *Pearce* presumption. 490 U.S. 794, 795 (1989) ("[N]o presumption of vindictiveness arises when the first sentence was based upon a guilty plea."). Wary of a rule that "'may operate in the absence of any proof of an improper motive,'" *id*. at 799, the Court rejected

any presumption of "sweeping dimension" and instead limited it to circumstances in which there is a "reasonably likelihood" of "actual vindictiveness on the part of the sentencing authority." *Id.*

"The broad sweep of *Pearce* has been limited" indeed, App. 22, and no precedent from this Court suggests that sweep should be expanded now.

II. The Fourth Circuit's expansion of the *Pearce* presumption undercuts the much broader presumption of judicial integrity.

In *Austin v. Plumley*, the Fourth Circuit expanded the *Pearce* presumption. App. 1–40. In the Fourth Circuit's words:

> [T]he West Virginia court . . . sentenced Appellant to a term of imprisonment that was neither purely concurrent nor purely consecutive to his original sentence. Appellant filed an expedited motion to correct that sentence . . . and when it was not ruled upon for nearly 50 days, Appellant filed a petition . . . ask[ing] the State Supreme Court to direct the [trial court] to act on Appellant's motion . . . . Four days after the [same trial court] received a copy of the petition, it entered an amended order, changing Appellant's sentence to a purely consecutive one.

App. 3. Because the court's order resulted in an increased sentence, the Fourth Circuit held that the "*Pearce* presumption of vindictiveness applies to this case." App. 34. Indeed, the scope of the presumption was the dispositive issue. The Fourth Circuit

expressly disclaimed any "finding of actual vindictiveness." App. 37 n.7.

That is, at the same time as it not only invoked, but *expanded* the presumption of judicial vindictiveness as a legal rule for other cases, the Fourth Circuit specifically declined to find "actual vindictiveness" in this case, and even went out of its way to avoid negative "commentary on the propriety of [Judge Murensky]." App. 37 n.7.

With good reason. In defense of Judge Murensky, the sentences here are easily explained without recourse to vindictiveness. At the first sentencing, the judge recognized that Austin's offense (walking away from a work camp) was not dangerous or violent, and that he had already suffered somewhat for it by likely loss of good time and chances for parole. But Judge Murensky added, "I do think you should serve some time for it." App. 6. So he "split the baby" by ordering a partly-concurrent, partly-consecutive sentence. *Id.*

Austin's motion to correct his sentence gave the judge two choices: fully concurrent or fully consecutive. Judge Murensky elected a consecutive sentence, with credit for time served between arraignment and sentencing. App. 9. He had always made clear that he was unwilling to order an entirely concurrent sentence—unwilling to give effectively no additional confinement as punishment for fleeing custody. App. 6. The facts of this case do not appear to either set up or demonstrate a vindictive scenario. Nonetheless, the Fourth Circuit found that "the spirit and logic" of *Pearce* required

expanding the presumption to apply in this case. App. 28.

The Fourth Circuit gave little regard to the fact that there had been no appellate reversal of the trial judge here. It concluded that the defendant was in the role of an "'errant schoolboy'" filing a petition to "force his 'elder' to act." App. 33–34. To the Fourth Circuit, the defendant created enough danger of vindictiveness essentially just by seeking an appeal. App. 28–29.

However, in *McCullough* this Court rejected a similar line of thinking—that simply pursuing an appeal or filing post-trial motions would themselves invoke vindictiveness. *McCullough*, 475 U.S. at 139 (calling it "speculative" that a trial judge would be vindictive simply because defendants file post-trial motions, and declining "to adopt the view that the judicial temperament of our Nation's trial judges will suddenly change upon the filing of successful post-trial motion.").

As in *McCullough*, no appellate court in this case ever identified any error. The Fourth Circuit brushed that issue aside, opining that the "posture" here meant vindictiveness "was reasonably possible." App. 33; *cf.* App. 40 (Shedd, J., dissenting) ("I agree with the district court that in this case, nothing occurred to trigger the presumption of vindictiveness because there was no reversal or similar event prodding the sentencing court into a posture of self-vindication.") (marks and alterations omitted).

The Fourth Circuit expanded *Pearce* to apply the presumption of vindictiveness more broadly than this Court ever has. Its action reflects an unwarranted lack of confidence in the honesty and integrity of trial judges—particularly those who *have not been reversed.*

III. The scope of the *Pearce* presumption matters, and remains under constant pressure from defendants seeking its expansion.

Although this Court has not re-examined the *Pearce* presumption or its scope since 1989, the issue is very much alive in our Nation's courts. Given that *Pearce* offers a presumption of an unconstitutional sentence, criminal defendants urge application and expansion of *Pearce* in case after case.

In just the past couple of years, federal district courts have heard dozens of cases in which defendants argued that the *Pearce* presumption does or should apply. *E.g., Rodrigues v. Kaplan*, Civ. No. 9:11-cv-0132, 2014 WL 1875346 at *8 (N.D.N.Y. May 9, 2014) (finding "no presumption of vindictiveness should apply in the instant case" after examining at length the explanations of the sentencing judge); *Barker v. McKune*, No. 10-3055-SAC, 2013 WL 100127, at *5–6 (D. Kan. Jan. 8, 2013) (finding "no presumption of vindictiveness appears" when the resentencing court replaced concurrent sentences with consecutive ones, so long as "the length of the controlling sentence is not increased"); *Martin v. Warden, Chillicothe Corr. Inst.*, No. 1:11-CV-052, 2012 WL 930959, at *9 (S.D. Ohio Mar. 19, 2012),

report and recommendation adopted, 2012 WL 2031221 (June 6, 2012) (finding that "the *Pearce* presumption of vindictiveness stands unrebutted on the record" after a judge adjusted concurrent sentences to consecutive ones to yield the same term of imprisonment as before the appeal); *Izaguirre v. Lee*, 856 F. Supp. 2d 551, 578 (E.D.N.Y. 2012) (finding that the "unrebutted *Pearce* presumption" required a new sentencing after the judge awarded the statutory maximum).

Likewise, defendants—in particular those who have no *actual* evidence of vindictiveness—commonly seek to expand the *Pearce* presumption to cover their cases. *E.g., Thomas v. Timme*, Civ. A. No. 13-cv-01378, 2013 WL 5548371, at *4 (D. Colo. Oct. 8, 2013) (defendant sought to apply the *Pearce* presumption "to address the sentence imposed after [his] probation [was] revoked"); *Honaker v. Bunting*, No. 1:12-cv-69, 2012 WL 6770836, at *7 (N.D. Ohio Oct. 31, 2012), *report and recommendation adopted,* 2013 WL 57044 (Jan. 3, 2013) (defendant sought to apply the *Pearce* presumption when the court of appeals had found *sua sponte* that the initial sentence was a nullity based on a change in the law); *Butler v. Hobbs*, No. 5:12-CV-00337 JLH, 2013 WL 6230952, at *5 (E.D. Ark. Dec. 2, 2013) (defendant sought to apply the *Pearce* presumption when the resentencing judge had participated, but not sentenced him, in the earlier case, and when the longer second sentence had been the jury's non-binding recommendation); *Bryant v. Sec'y, Dep't of Corr.*, No. 4:08-CV-442-RH-GRJ, 2012 WL 1071930, at *6 (N.D. Fla. Feb. 15, 2012), *report and recommendation adopted*, 2012 WL 1071899 (Mar.

28, 2012) (defendant sought to apply the *Pearce* presumption based on an "*appearance* of vindictiveness" when the facts did not match *Pearce* (emphasis added)); *Ochoa v. Uribe*, No. ED CV 12-586-RGK (PLA), 2013 WL 866118 (C.D. Cal. Jan. 28, 2013), *report and recommendation adopted*, 2013 WL 866167 (Mar. 7, 2013) (defendant sought to apply the *Pearce* presumption even when the second sentence, nineteen years and eight months, was effectively shorter than the initial sentence of fifteen years to life plus ten years).

The federal appeals courts also frequently adjudicate sentence challenges based on the *Pearce* presumption. *E.g., Austin v. Plumley*, App. 1–40; *United States v. Fowler*, 749 F.3d 1010, 1021 (11th Cir. 2014) (finding the vindictiveness presumption "no longer defensible in the present federal sentencing regime"); *United States v. Weingarten*, 713 F.3d 704 (2d Cir. 2013); *United States v. Ward*, 732 F.3d 175 (3d Cir. 2013); *United States v. Strother*, 509 F. App'x 571 (8th Cir. 2013); *United States v. Horob*, 735 F.3d 866 (9th Cir. 2013); *Goodell v. Williams*, 643 F.3d 490 (6th Cir. 2011); *United States v. Rodriguez*, 602 F.3d 346 (5th Cir. 2010); *United States v. Baugham*, 613 F.3d 291 (D.C. Cir. 2010).

Scores of state courts also have recently entertained sentence challenges based on *Pearce*. *E.g., Ferguson v. State*, 309 P.3d 831, 835 (Wyo. 2013) (refusing to apply the *Pearce* presumption when different judges had sentenced the defendant); *State v. Miller*, 822 N.W.2d 360 (Neb. 2012) (addressing *Pearce*, *McCullough, Colten, and Chaffin*

and refusing to apply the presumption to a second sentencing by a different judge); *State v. Clark*, 818 N.W.2d 739 (N.D. 2012) (refusing to apply the *Pearce* presumption when the second sentence came after a trial and the first had been after a guilty plea); *Butler v. State*, 384 S.W.3d 526 (Ark. 2011) (addressing an ineffective assistance of counsel claim based on failure to raise the *Pearce* presumption; analyzing the *Pearce* cases at length and finding the presumption did not apply anyway); *State v. Bullplume*, 251 P.3d 114, 118 (Mont. 2011) (addressing a *Pearce* claim and finding it inapplicable, among other reasons, because there is no "right" to parole, so adjustments to parole eligibility do "not necessarily constitute an increased sentence").

Indeed, split-creating issues have arisen entirely because of the *Pearce* presumption. The Petitioner in this case has addressed at length the circuit split on whether the *Pearce* presumption can apply beyond when the sentencing judge has been reversed on appeal. Pet. 11–13. This split further demonstrates the pressure that defendants constantly bring to expand *Pearce*.

CONCLUSION

For these reasons, *amici* respectfully believe that this case warrants a grant of certiorari.

Respectfully submitted,

MATTHEW A. FITZGERALD
Counsel of Record
MYRA H. CHAPMAN
MCGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 775-4716
mfitzgerald@mcguirewoods.com

Attorneys for Amici Curiae

October 2014