No. 14-271

IN THE
SUPREME COURT OF THE UNITED STATES

MARVIN PLUMLEY, WARDEN

Petitioner

v.

TIMOTHY AUSTIN

Respondent

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

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

The presumption of judicial vindictiveness that this Court recognized in *North Carolina v. Pearce*, 395 U.S. 711 (1969) applies when a defendant exercises his right to challenge his sentence and the sentencing court then increases that sentence without a justification explaining the increase. In the current case, Timothy Austin filed a Rule 35 motion with a state sentencing judge, and when the judge did not timely respond, Mr. Austin filed a mandamus petition with a state appellate court, asking the court to either correct his sentence or void it altogether. Four days after Mr. Austin filed the mandamus petition—and before the appellate court had ruled on it—the sentencing judge issued an amended sentencing order that added three years to Mr. Austin's maximum sentence, providing an explanation for the increase that the Fourth Circuit said was "clearly unsupported by the record." App. 25.

The question presented is: Whether the Fourth Circuit correctly found—based on the circumstances surrounding the increased sentence—a reasonable likelihood of judicial vindictiveness under *North Carolina v. Pearce*.

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STATEMENT OF THE CASE

This case concerns (1) a state sentencing judge increasing a defendant's sentence after that defendant challenged the sentence, and (2) the Fourth Circuit's determination that the circumstances surrounding the increase warranted a presumption of judicial vindictiveness.

Timothy Austin was serving a one-to-fifteen year sentence in West Virginia for breaking and entering when he walked away from a work crew. Charged with escape, he pled guilty to the lesser-included offense of attempted escape, which carries a one-to-three year sentence. App. 4. At his November 2009 sentencing hearing, the judge considered the following three options regarding how Mr. Austin's attempted escape sentence should interact with his existing breaking and entering sentence: (1) it could run purely concurrent with the breaking and entering sentence; (2) it could run purely consecutive to the breaking and entering sentence; or (3) it could run "partially concurrent" with the breaking and entering sentence. App. 5-6, 71-72. Each option would impose consequences on Mr. Austin, as shown in the following chart:

Sentence Structure	Commencement Date of Attempted Escape Sentence	Delay in Parole Eligibility (In Months)	Maximum Sentence for Both Offenses (In Years)
Purely Concurrent	November 12, 2009 (Date of Sentencing Hearing)	8	15
Purely Consecutive	Upon Parole Eligibility for Breaking and Entering Conviction	12	18
Partially Concurrent	March 2010	12	15

Ultimately, the sentencing judge rejected the first two options and chose the third—a partially concurrent sentence. App. 6, 71-72. He set March 2010 as the effective date because that was the next time the parole board would consider Mr. Austin's parole eligibility for his breaking and entering offense. *Id*. The net effect of delaying the effective date to March 2010 was to add an additional year before Mr. Austin became parole-eligible (as opposed to the 8-month delay if the sentence had run completely concurrent), thus making him parole-eligible in March 2011. *Id*. The sentencing judge stated that this delay in parole eligibility was the basis for choosing the partially concurrent sentence. *Id*.

Mr. Austin challenged that sentence in August 2010 under West Virginia Rule of Criminal Procedure 35(a). App. 94, 96-98. He did so because the parole board was meeting at his institution in November 2010 and because he would have been parole-eligible at that meeting had the sentencing judge given him a purely concurrent sentence.[1] Accordingly, Mr. Austin made two basic arguments in his Rule 35 motion. First, he argued that West Virginia law did not allow the partially concurrent sentence that the judge imposed. App. 95-96. Second, he argued that the 8-month delay in parole eligibility under a purely concurrent sentence would effectuate the judge's stated intent in the original sentencing order (i.e., the intent

[1] Mr. Austin was parole-eligible for the breaking and entering offense in March 2010, so giving him a purely concurrent sentence (with an effective date in November 2009) would have delayed his parole-eligibility by roughly 8 months (i.e., from March 2010 to November 2010 because the minimum sentence on the attempted escape offense was one year). App. 98.

to delay Mr. Austin's parole). App. 98. Given the imminence of the parole board meeting, he requested an expedited decision. *Id*.

When Mr. Austin received no response to his Rule 35 motion for almost two months, he submitted a "Petition for Writ of Mandamus or in the alternative Original Petition for Writ of Habeas Corpus" in the Supreme Court of Appeals of West Virginia. App. 75. It asked the court to require the sentencing judge to decide the Rule 35 motion, to correct the sentence itself, or to void the sentence altogether. *Id*. The sentencing judge received a courtesy copy on October 18, 2010. App. 59. Four days later—before the appellate court had ruled on the petition—the sentencing judge (noting that he had received the mandamus petition) changed Mr. Austin's sentence on the attempted escape to run purely consecutive to the breaking and entering sentence, thereby increasing Mr. Austin's maximum sentence by three years. App. 9, 59-60. The sentencing judge suggested that the amended sentencing order was necessary "to clarify the original Sentencing Order." App. 59. He also stated that, in the original sentencing order, "[i]t was the intent of this sentencing court that the sentence imposed on November 12, 2009 be served consecutively with the unrelated sentence [Mr. Austin] was already serving on November 12, 2009."[2] *Id*. Mr. Austin appealed the amended order to the Supreme Court of Appeals of

[2] The State says in its petition that "the judge wanted to punish the defendant for his attempted escape, which could not be accomplished by running the escape sentence concurrently with the breaking-and-entering sentence." Pet. at 2. This statement is incorrect. The purely concurrent sentence, like the partially concurrent sentence that the sentencing judge imposed, would have delayed Mr. Austin's parole eligibility (8-month delay for purely concurrent and 12-month delay for partially concurrent). App. 98.

West Virginia, but that court accepted the sentencing judge's explanation regarding the need to clarify the intent of the original order. App. 55-56.

Mr. Austin then challenged his increased sentence all the way to the Fourth Circuit, which ruled in Mr. Austin's favor on two key issues. First, it said the record was "crystal clear" that the sentencing judge did not intend to impose a consecutive sentence in the original sentencing order. App. 18-19 (relying on explicit statements made by the judge at the sentencing hearing and in the original sentencing order). Consequently, the Supreme Court of Appeals of West Virginia's finding to the contrary was based on an unreasonable determination of the facts. App. 20. The State did not ask this Court to review that ruling in its petition. Second, the Fourth Circuit found that Mr. Austin was entitled to a presumption of judicial vindictiveness given the circumstances surrounding his increased sentence. App. 25-34. It is the Fourth Circuit's ruling on this second issue that the State has asked this Court to review. Pet. at i.

REASONS FOR DENYING THE STATE'S PETITION

The Fourth Circuit did nothing out of the ordinary here. It applied well-established law on the presumption of judicial vindictiveness to the "unique factual scenario" in Timothy Austin's case, ultimately finding a "reasonable likelihood" that Mr. Austin's increased sentence was the product of actual vindictiveness by the sentencing judge. App. 25, 36 (noting, among other things, that the sentencing judge increased Mr. Austin's sentence four days after receiving a copy of Mr. Austin's mandamus petition and then gave an explanation for the increase that was

"clearly unsupported by the record"). But the State has attempted to frame this case as being about something larger. Specifically, the State's petition argues that the Fourth Circuit erred in applying the presumption of judicial vindictiveness because the state appellate court had not yet ruled on Mr. Austin's mandamus petition when the sentencing judge announced that he was increasing Mr. Austin's sentence. In other words, the State believes that the presumption of judicial vindictiveness should be "limited to the core facts" of *North Carolina v. Pearce*, 395 U.S. 711 (1969), meaning that it should apply "only where there has been a harsher sentence after reversal, as in *Pearce*." Pet. at i, 2.

To convince this Court to grant certiorari and address this question, the State makes two arguments: (1) that the federal circuit courts and state courts are split on whether the *Pearce* presumption is limited to the core facts of *Pearce*, and (2) that the Fourth Circuit's application of the *Pearce* presumption under a set of facts different from those in *Pearce* "contravened" this Court's precedent. Pet. at 10-11. This Court should reject those arguments and deny certiorari for three primary reasons.

First, no court—including the ones cited by the State—has held that the *Pearce* presumption applies only in the context of a harsher sentence after reversal. Second, this Court has never limited *Pearce* in the fashion requested by the State. Instead, it has instructed lower courts to apply the *Pearce* presumption where a reasonable likelihood of vindictiveness exists, which is exactly what the Fourth Circuit did below. Finally, the Fourth Circuit correctly described this as a "narrow

case" involving a "unique factual scenario," meaning that lower courts have not frequently encountered—and will not frequently encounter—the issue presented here. App. 25, 34. For these reasons, Mr. Austin respectfully requests that this Court deny the State's petition for certiorari.

I. No split of authority exists on whether *North Carolina v. Pearce* should be limited to its facts.

The State argues in its petition that the Fourth Circuit "deepened" a split of authority on whether the *Pearce* presumption of judicial vindictiveness should be limited to the facts of *Pearce* itself. Pet. at 10-16 (citing cases out of the Fifth, Eighth, and Ninth Circuits as applying *Pearce* only in the context of a harsher sentence after reversal). But no state or federal court of appeals has expressly limited *Pearce* in the fashion requested by the State, while several, now including the Fourth Circuit, have expressly rejected the State's proposed limitation. The State's selective quotes from cases in the Fifth, Eighth, and Ninth Circuits simply create the appearance of a split, and its reliance on those cases is misplaced for at least four reasons.

1. First, not one of the cases cited in the State's petition holds that the *Pearce* presumption applies only to harsher sentences after reversal. While all of them say that a harsher sentence after a reversal can trigger the *Pearce* presumption, none explicitly restricts the *Pearce* presumption to that context. *See, e.g., Kindred v. Spears*, 894 F.2d 1477, 1480 (5th Cir. 1990) (listing "reversal on appeal" and "an order to the lower tribunal to grant a new hearing" as events that

trigger the *Pearce* presumption, but never stating, or even implying, that the *Pearce* presumption applies only after one of those two events has occurred).[3]

2. Second, every circuit that the State cites as limiting *Pearce* to its facts has—in cases subsequent to those cited by the State—either implicitly or explicitly rejected the idea that *Pearce* must be applied so narrowly. *See, e.g., Nulph v. Cook*, 333 F.3d 1052, 1057-58 (9th Cir. 2003) (noting that a reasonable likelihood of vindictiveness does not exist "unless there is some 'triggering event' such as a reversal and remand") (emphasis added); *Waring v. Delo*, 7 F.3d 753, 758 (8th Cir. 1993) ("A sentence is unconstitutionally vindictive if it imposes greater punishment because the defendant exercised a constitutional right, such as the right to jury trial or the right to appeal.") (emphasis added); *United States v. Vontsteen*, 950 F.2d 1086, 1089 n.2 (5th Cir. 1992) (en banc) ("To the extent the panel majority in this case suggested that a defendant must undergo a new trial to invoke *Pearce,* we disagree. In *Pearce* the vindictive sentence was indeed imposed after retrial, and the Court referred to resentencing 'after a new trial' when it formulated the rule. But we do not read that language as limiting *Pearce*'s application to sentencing after a new trial. We have found no case that expressly limits *Pearce* this way.").

3. Third, the cases that the State relies on in its petition involve different facts than Mr. Austin's case. For example, the facts of *Kindred*—which the State

[3] Even if the Fifth Circuit had explicitly stated that the *Pearce* presumption applied only in the context of a harsher sentence after reversal (which it simply did not), everything the Fifth Circuit said in *Kindred* regarding the scope of the *Pearce* presumption was dicta. *See Kindred*, 894 F.2d at 1482 (overturning the defendant's sentence enhancement because of the parole board's failure to follow internal procedures).

says is a "leading decision"[4] on limiting the *Pearce* presumption to the context of a harsher sentence after a reversal—in no way support the State's argument. Pet. at 11. *Kindred* involved a sentence upgrade given by a parole board during a "statutorily mandated" parole review. *Kindred*, 894 F.2d at 1478, 1480. It did not involve a defendant—like Mr. Austin here—who received an increased sentence after affirmatively challenging his original sentence to a higher authority. *See id.* It also did not involve a sentencing authority—like the state sentencing judge here—who retained jurisdiction over a defendant while that defendant appealed (thus allowing the sentencing authority to penalize the defendant before a reversal could occur). *See id*. In other words, *Kindred*—the case on which the State most heavily relies—has no bearing on Mr. Austin's case.[5]

[4] The Fifth Circuit decided *Kindred* in 1990. If true that *Kindred* is a "leading decision" that limited *Pearce* in the way the State says, it exemplifies how infrequently lower courts face this issue. In the nearly 25 years since the decision was issued, the Fifth Circuit has cited *Kindred* only 6 times and other federal and state courts have cited it only 23 times (i.e., roughly once a year).

[5] The same is true for the two other cases that the State primarily relies on, *Weaver* (a Ninth Circuit decision from 1995) and *Savina* (an unpublished Eighth Circuit decision from 1992 that has never been cited in any other decision). Neither case involved a sentencing authority retaining jurisdiction over a defendant while that defendant appealed. And in both cases the courts found that the defendants did not receive harsher sentences. *See Weaver v. Maass*, 53 F.3d 956 (9th Cir. 1995); *Savina v. Getty*, No. 92-1068, 1992 WL 369923 (8th Cir. Dec. 17, 1992) (unreported table opinion).

4. Finally, the Fifth,[6] Eighth, and Ninth Circuits do not apply the law of the *Pearce* presumption any differently than the Fourth Circuit. Just like the Fourth Circuit, they simply look to the circumstances of each case to determine whether a reasonable likelihood of judicial vindictiveness exists. *See, e.g., United States v. Rodriguez*, 602 F.3d 346, 354 (5th Cir. 2010) (explaining that "the circumstances of resentencing must be examined to determine whether they carry such an inherent threat"); *Nulph*, 333 F.3d at 1057 (noting that the *Pearce* presumption applies to all cases "in which there is a 'reasonable likelihood' that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority") (quoting *Alabama v. Smith*, 490 U.S. 794, 799 (1989)). That is exactly what this Court instructed lower courts to do in *Pearce* and *Smith*, and that is exactly what the Fourth Circuit did below. App. 34-36 (determining, based on the circumstances surrounding the increase to Mr. Austin's sentence, that a reasonable likelihood of vindictiveness existed).

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[6] In fact, like the Fourth Circuit in this case, the Fifth Circuit in *Kindred* explicitly relied on the "purpose" and "logic" of *Pearce* in determining the scope of the *Pearce* presumption—something that the State, in its petition, repeatedly criticizes the Fourth Circuit for doing. *Compare* Pet. at 3, 9, 14, 23 (arguing that the Fourth Circuit's reliance on the "spirit and logic" of *Pearce* "is more likely to erroneously impugn the integrity of a judge") *with Kindred*, 894 F.2d at 1479-80 (recognizing that "the Supreme Court's purpose in fashioning the presumption in *Pearce* was to protect a defendant's right to appeal his conviction against the chill of a vindictive tribunal" and that the "logic" of *Pearce* requires courts to apply the presumption any time "where an event prods the sentencing court into a posture of self-vindication") (emphasis added).

II. The Fourth Circuit's decision is consistent with this Court's precedent.

The State argues that applying the *Pearce* presumption in Mr. Austin's case "contravened" this Court's precedent. Pet. at 16-21 (citing *Smith*, 490 U.S. at 799; *Texas v. McCullough*, 475 U.S. 134 (1986); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973); and *Colten v. Kentucky*, 407 U.S. 104 (1972)).[7] This Court should reject that argument—just as the Fourth Circuit did—for at least three reasons.

1. First, this Court has never barred lower courts from applying the *Pearce* presumption outside the specific context of *Pearce*. Rather, it has given lower courts guidelines for determining when the *Pearce* presumption should apply. For example, in *Pearce*, this Court said that the presumption of vindictiveness should apply any time "the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction." *Pearce*, 395 U.S. at 725. And in *Smith*, this Court said that the presumption should apply to all cases "in which there is a reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing

[7] The brief of Former Federal District Judges Cassell, Orlofsky, and McFadden asserts that the Fourth Circuit's application of the *Pearce* presumption also is inconsistent with *Caperton v. A.T. Massey Coal Company*, 556 U.S. 868 (2009). Judges' Amici Brief at 9-12. That's simply not true. *Caperton* involved a state appellate judge who had refused to recuse himself from a case involving a major contributor to the judge's election campaign. *Caperton*, 556 U.S. at 872. The Court examinined "all the circumstances" surrounding the relevant contribution and ordered the judge's recusal after determining that his "probability of actual bias" was too high to be permissible under the Due Process Clause. *Id.* That's no different than what the Fourth Circuit did here. App. 25, 36 (examining the "circumstances of resentencing" in Mr. Austin's case and determining that those circumstances showed a "reasonable likelihood of vindictiveness" on the part of the sentencing judge).

authority." *Smith*, 490 U.S. at 799 (internal quotation marks omitted). In other words, this Court has never given lower courts a categorical rule on when the presumption applies. It has instead instructed lower courts to apply the presumption when it would be unreasonable not to do so. *See, e.g., Somerville v. Hunt*, 695 F.3d 218, 223 (2d Cir. 2012) (explaining that the Supreme Court has never announced "a categorical rule as to when *Pearce* always or never applies").

2. Second, in all four of the cases relied on by the State, the defendants' enhanced sentences were either (a) issued by a separate sentencing authority that had no reason to be vindictive, or (b) based on additional information obtained by the sentencing authority about the severity of the defendant's offense. *See Smith*, 490 U.S. at 794 (enhanced sentence was based on additional information); *McCullough*, 475 U.S. at 134, 138 (enhanced sentence was issued by separate sentencing authority); *Chaffin*, 412 U.S. at 17 (enhanced sentence was issued by separate sentencing authority); *Colten*, 407 U.S. at 116–17 (enhanced sentence was issued by a separate sentencing authority). Not one of those cases involved the same sentencing authority imposing an "unexplained" increase to a defendant's sentence four days after that defendant filed a mandamus petition with a higher court that asked the higher court to vacate the defendant's sentence. *See id.*; App. 13, 22-25, 31-32, 36. That is what happened in Mr. Austin's case, and as the Fourth Circuit recognized, failing to apply the presumption of vindictiveness under these circumstances would chill future defendants' willingness to file mandamus petitions. App. 31, 34.

3. Finally, in arguing that the presumption of vindictiveness cannot apply outside the context of a reversal by a higher authority, the State ignores *Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (applying the "analogous" prosecutorial vindictiveness doctrine in a case that did not involve reversal on appeal).[8] In *Blackledge*, the defendant exercised a statutory right to a trial de novo on a misdemeanor conviction. *Id.* at 22. The prosecutor then filed—before the new trial—a felony indictment against the defendant based on the same conduct. *Id.* at 23. At the time the prosecutor filed the felony indictment, no court had reversed the misdemeanor conviction or had in any way rebuked the prosecutor. The defendant had simply exercised his "absolute" right to a de novo trial. *Id.* at 22. This Court nevertheless applied the presumption of vindictiveness because the prosecutor had a "considerable stake in discouraging convicted misdemeanants from appealing." *Id.* at 23, 28-29 (citing *Pearce* and stating that defendants should be free of the fear of retaliation in deciding whether to appeal). That same principle applies to Mr. Austin's case because the sentencing judge had the same "stake" in discouraging defendants from exercising their right to seek mandamus review. That is why the

[8] The National District Attorneys Association, in its amicus brief, goes even further. It presses the Court to overturn *Pearce* altogether, arguing that *Pearce* has no basis in the Constitution (or the Magna Carta). NDAA Amicus Brief at 6-11. The Court should reject that argument for at least three reasons. First, the State never made it below. Second, it assumes that this Court ignored the Constitution (and the Magna Carta) in creating the presumption (and in allowing it to stand for the last 45 years). Third, the presumption, rooted in the Constitution's Due Process Clause, combats a chilling effect on defendants' willingness to exercise their right to challenge their sentences.

Fourth Circuit applied the presumption here, and that it why its decision to do so is consistent with this Court's precedent. App. 29-30.

III. This is a "narrow case" involving "unique" facts, and certiorari is therefore unwarranted.

The Fourth Circuit correctly observed that this case involved a "unique factual scenario" and that it was "one of first impression in this circuit, and elsewhere." App. 25. Then it found—in its non-precedential, unpublished opinion—that the *Pearce* presumption of judicial vindictiveness should apply "in this narrow case." App. 34. The reason the Fourth Circuit repeatedly described Mr. Austin's case as "unique," "narrow," and "one of first impression," is because no reported decision of any state or federal court has ever addressed the *Pearce* presumption in this mandamus context.[9] The absence of cases addressing this "narrow" issue demonstrates that this decision will have virtually no effect on the availability of

[9] Specifically, (1) the defendant files a Rule 35 motion, (2) the sentencing judge delays ruling on that motion for nearly two months, (3) the defendant files a mandamus petition with an appellate court, (4) the sentencing judge, who retains jurisdiction over the defendant while the mandamus petition is pending, receives a copy of the mandamus petition, (5) four days later, and before the appellate court rules, the sentencing judge increases the defendant's sentence, citing the mandamus petition in the new order and giving an explanation for the increase that the Fourth Circuit concluded was "clearly unsupported by the record." App. 25, 36.

the presumption, and this Court's review of the Fourth Circuit's decision is therefore unwarranted.[10]

CONCLUSION

The Fourth Circuit's application of the *Pearce* presumption in a case like Mr. Austin's is not—as the State asserts—a "grave affront to the integrity of the judiciary." Pet. at 4. It merely ensures that defendants like Mr. Austin may challenge their sentences without fear of retribution. *Blackledge*, 417 U.S. at 28 (stating that defendants should be "freed of apprehension" of retaliation). The Fourth Circuit even explicitly recognized these basic points in its opinion. App. at 37 n. 7 ("We emphasize that the *Pearce* presumption is a prophylactic measure meant to protect a defendant's due process rights, and our application thereof is not at all a commentary on the propriety of the State Sentencing Court."). The Fourth Circuit also recognized that if a sentencing judge can preempt appellate review of a mandamus petition and immediately impose a harsher sentence, defendants will be less likely to exercise their right to seek mandamus review. That chilling effect would undermine the prophylactic measures erected by this Court in *Pearce* and reinforced by it in *Smith*. That's why no court has restricted *Pearce* to the context of

[10] The brief of Former Federal District Judges Cassell, Orlofsky, and McFadden says that the *Pearce* presumption "remains under constant pressure from defendants seeking its expansion." Judges' Amici Brief at 18 ("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.") (emphasis added). But out of the twenty-plus cases that the Judges cite to prove this point, only two actually applied the *Pearce* presumption. Nothing about the Fourth Circuit's application of the presumption in the "narrow," unpublished, and non-precedential opinion in Mr. Austin's case will change that low success rate.

a harsher sentence after reversal; that's why the Fourth Circuit got it exactly right below; and that's why this Court should deny the State's petition.

Respectfully submitted,

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