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

REPLY BRIEF OF PETITIONER

PATRICK MORRISEY
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
State Capitol
Building 1, Room E-26
Charleston, WV 25305
EL@wvago.gov
(304) 558-2021

ELBERT LIN
Solicitor General
Counsel of Record

MISHA TSEYTLIN
Deputy Attorney General

CHRISTOPHER S. DODRILL
JULIE MARIE BLAKE
Assistant Attorneys General

Counsel for Petitioner

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REPLY BRIEF

This case presents a question of great importance to the administration of justice: when must a reviewing court *presume* that a trial judge violated the judicial oath and the United States Constitution by punishing a defendant out of sheer vindictiveness, without requiring any evidence to support this accusation of serious judicial misconduct. The Petition and the Opposition offer two fundamentally different answers to this question, both of which have been endorsed by a number of courts throughout the country.

The Petition follows the approach articulated by Judge Shedd on the Fourth Circuit panel below, the federal district court judge in this case, and three federal courts of appeals. Under that view, the presumption of judicial vindictiveness that this Court adopted in *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), is extremely narrow and can only be triggered in the most extraordinary circumstance: where the trial court increases a defendant's sentence in response to being reversed by a higher tribunal. Such a limited application of the *Pearce* presumption respects the "honesty and integrity [of] those serving as adjudicators," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), and comports with this Court's repeated refusal to extend the presumption beyond the facts of *Pearce* itself. Outside the resentencing-after-reversal scenario, a defendant who wishes to establish that a trial judge acted vindictively must satisfy traditional rules of proof

and affirmatively demonstrate the veracity of the allegations of judicial misconduct.

In contrast, the Opposition follows the approach adopted by the Fourth Circuit panel majority below, the Seventh Circuit, and several state high courts. On this view, the *Pearce* presumption of judicial vindictiveness is not limited only to cases where there has been resentencing after a reversal. Instead, reviewing courts are permitted to consider a limitless range of factors to determine on a case-by-case whether a judge will be presumed to have acted vindictively, without any proof of actual misconduct. Courts are guided only by the "spirit and logic" of *Pearce*, App. at 28, and the open-ended instruction to "apply the presumption when it would be unreasonable not to do so," BIO at 11. This approach attributes little significance to the fact that this Court has never applied the *Pearce* presumption outside of the resentencing-after-reversal context, reasoning that this Court simply has never faced a sufficiently compelling "factual scenario." App. at 25, 27–29.

As urged in the Petition, this case presents an ideal vehicle for this Court to resolve the disagreement between the two divergent approaches. The Fourth Circuit panel majority's expansive application of the presumption of judicial vindictiveness is—in the words of *amici curiae* Former Federal District Judges—"offensive to the trial judges of this Nation." Judges' *Amicus Curiae* Br. at 2. This Court should grant review, bring

clarity to this area of law, and end that ongoing affront to the judiciary.

I. Courts Are Sharply Divided As To Whether The *Pearce* Presumption Of Judicial Vindictiveness Can Apply Outside Of The Resentencing-After-Reversal Context.

The Petition explains that numerous federal appellate and state high courts clearly disagree as to whether the *Pearce* presumption of judicial vindictiveness applies beyond the limited circumstance where a judge increases a defendant's sentence after being reversed by a higher tribunal. Pet. at 11–16. Judge Shedd and the district court sided with the Fifth, Eighth, and Ninth Circuits in concluding that the presumption is limited to the resentencing-after-reversal context. Pet. at 11–13. Determining that the presumption is not so confined, the two judges on the Fourth Circuit panel majority followed decisions of the Seventh Circuit, the Supreme Court of Vermont, the Texas Court of Criminal Appeals, and the District of Columbia Court of Appeals. Pet. at 11, 13–16.

The Opposition does not contest several critical points. It does not dispute that the four federal judges in this case divided evenly among these two divergent approaches to the *Pearce* presumption. Nor does it dispute that the two judges on the Fourth Circuit panel majority took an approach that has been adopted by the Seventh Circuit and several state high courts, and that is directly contrary to the approach advocated by the Petition. BIO at 6 (asserting that "several [courts], now including the

Fourth Circuit, have expressly rejected the State's proposed limitation").

The Opposition's only disagreement is with the Petition's claim that the Fifth, Eighth, and Ninth Circuits have adopted the view advanced by the Petition and espoused by Judge Shedd and the district court below. *See* BIO at 6 ("[N]o state or federal court of appeals has expressly limited *Pearce* in the fashion requested by the State."). But as shown below, this lone contention lacks merit. Respondent's understanding of the decisions of the Fifth, Eighth, and Ninth Circuits is incorrect.

To begin, the Fifth Circuit's decision in *Kindred v. Spears*, 894 F.2d 1477 (5th Cir. 1990), stands for precisely the principle espoused by Judge Shedd, the district court, and the Petition: a "reversal by a higher tribunal" is required for the *Pearce* presumption of judicial vindictiveness to apply. *Kindred*, 894 F.2d at 1479. Respondent points out that the factual circumstances in *Kindred* differ from those here, but he offers no answer to the *reasoning* in that case. BIO at 7–8. While that case involved resentencing by a parole commission rather than a trial court, the Fifth Circuit's reasoning in refusing to apply the *Pearce* presumption was not limited to the circumstances before it. *Kindred*, 894 F.2d at 1479. Specifically, the prisoner had claimed that the *Pearce* presumption applies so long as there is any "motive for self-vindication in the original sentencing authority." *Ibid.* Rejecting this argument, the Fifth Circuit explained that "[r]eversal on appeal or an order to the lower tribunal to grant a new hearing" is

necessary to "trigger[]" the presumption. *Id.* at 1480. This was consistent with the Fifth Circuit's prior case law, which had rejected application of the *Pearce* presumption where the trial court "was not reversed or corrected by another court." *United States v. Cataldo*, 832 F.2d 869, 874 (5th Cir. 1987); *ibid.* ("The *Pearce* presumption of vindictiveness applies after a successful appeal by the defendant.").[1]

Respondent cites *United States v. Vonsteen*, 950 F.2d 1086 (5th Cir. 1992) (en banc), and *United States v. Rodriguez*, 602 F.3d 346 (5th Cir. 2010), as evidence that the Fifth Circuit has departed from its holding in *Kindred* and has applied the *Pearce* presumption outside the resentencing-after-reversal context. BIO at 7, 9. But neither case supports his assertion, as both cases involved a reversal by a higher tribunal. In *Vonsteen*, the Fifth Circuit explained that the *Pearce* presumption can apply after the reversal by the higher tribunal even if there is no retrial and only resentencing. 950 F.2d at 1088–89 n.2. In *Rodriguez*, the Fifth Circuit considered and rejected the application of the *Pearce* presumption after the reversal by the higher tribunal

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[1] Respondent's passing suggestion that "everything the Fifth Circuit said in *Kindred* regarding the scope of the *Pearce* presumption was dicta," BIO at 7 n.3, is refuted by the fact that more recent panels of the Fifth Circuit have cited those parts of *Kindred* as controlling precedent, *see, e.g.*, *Sepcich v. Whitley*, 26 F.3d 1118, 1994 WL 286168, at * 1 n.2 (5th Cir. 1994) (unpublished table decision).

when a different judge conducts the resentencing on remand. 602 F.3d at 350–60.[2]

Respondent is similarly mistaken in claiming that the Eighth Circuit has not followed the *Kindred* approach of limiting the *Pearce* presumption of judicial vindictiveness to the resentencing-after-reversal context. *See* BIO at 8. As noted in the Petition and unchallenged by Respondent, the Eighth Circuit set forth in *Savina v. Getty* the same limitations on the *Pearce* presumption. Citing *Kindred*, the court held that "to establish a presumption of vindictiveness which would support a finding that due process rights have been violated, one must show that: 1) the initial sentence was reversed by a higher tribunal; and 2) a harsher sentence was imposed the second time around." 982 F.2d 526, 1992 WL 369923, at * 2 (8th Cir. 1992) (unpublished table decision) (citing *Kindred*, 894 F.2d at 1479).

Respondent argues that the Eighth Circuit took a different approach a year later in *Waring v. Delo*, 7 F.3d 753 (8th Cir. 1993), but it did not. *See* BIO at 7. In that case, the Eighth Circuit said the following:

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[2] The passage that Respondent quotes from *Rodriguez*, *see* BIO at 9 (quoting 602 F.3d at 354), says nothing about whether a reversal by a higher tribunal is required to trigger the *Pearce* presumption and, in any event, is taken entirely out of context. The quotation does not even reflect any judicial reasoning by the Fifth Circuit, but rather is plucked from a part of the opinion in which the Fifth Circuit is merely summarizing one of this Court's post-*Pearce* decisions.

> 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. When the same judge imposes a greater sentence after the defendant successfully appealed the first conviction, a presumption arises that the sentence is, in this sense, vindictive. *See North Carolina v. Pearce*, 395 U.S. 711 (1969).

Waring, 7 F.3d at 758. The first sentence—the only one quoted by Respondent—states the undisputed principle that a judge may not vindictively punish a defendant for exercising the right to trial or right to an appeal. The second sentence—conspicuously ignored by Respondent—concerns the circumstances in which vindictiveness is to be presumed and is fully consistent with the Eighth Circuit's previous decision in *Savina*. Vindictiveness is presumed only in the resentencing-after-reversal context: "[w]hen the same judge imposes a greater sentence *after the defendant successfully appealed the first conviction*." *Ibid.* (emphasis added).

Finally, there is also no merit to Respondent's claim that the Ninth Circuit has refused to adopt the *Kindred* approach of limiting the *Pearce* presumption of judicial vindictiveness to the resentencing-after-reversal context. *See* BIO at 7–9. The Ninth Circuit has twice specifically cited *Kindred* in cases rejecting application of the *Pearce* presumption, noting in one case that the sentencing authority "did not react to any reversal of [the]

prison term order by a higher authority," *Weaver v. Maass*, 53 F.3d 956, 960 (9th Cir. 1995), and agreeing in the second case with the government's assertion that "the *Pearce* presumption does not apply where a harsher sentence received after a successful appellate challenge is not issued in response to the reversal by a higher authority," *Bono v. Benov*, 197 F.3d 409, 416 (9th Cir. 1999). Respondent makes no serious effort to dispute Petitioner's characterization of these cases, other than repeating the irrelevant observation that one of these two cases arose in a factual context more similar to *Kindred* than to the present case. BIO at 8 n.5.

Respondent primarily relies on *Nulph v. Cook*, 333 F.3d 1052 (9th Cir. 2003), as proof that the Ninth Circuit has "rejected" its previous decisions and decided to apply the *Pearce* presumption outside the resentencing-after-reversal context. BIO at 7, 9. But again, Respondent's cited authority is unavailing. Contrary to Respondent's assertion, *Nulph* did not apply the presumption of judicial vindictiveness outside the resentencing-after-reversal context; it involved precisely that circumstance. Just as in *Pearce*, the sentencing authority imposed a harsher sentence on "direct remand" after a "successful challenge" on appeal to the original sentence. *Id.* at 1058. Nothing in *Nulph* suggests the possibility of applying the *Pearce* presumption in a case where there is no reversal by a higher tribunal.

II. This Case Presents The Ideal Vehicle For This Court To Make Clear That A Trial Judge Cannot Be Presumed To Have Acted Vindictively Outside Of The Resentencing-After-Reversal Context.

Consistent with its repeated refusal to expand the presumption of judicial vindictiveness beyond the facts of *Pearce* itself, this Court should grant review to squarely hold that *Pearce* created a narrow and *sui generis* exception to the general "presumption of honesty and integrity [of] those serving as adjudicators." *Withrow*, 421 U.S. at 47. As the Petition explains, in every case since *Pearce* was decided 45 years ago, this Court has declined to extend this extraordinary presumption beyond the most extraordinary context: where a trial judge increases the defendant's sentence after being reversed by a higher tribunal. Pet. at 16–21. This Court has specifically refused "to adopt the view that the judicial temperament of our Nation's trial judges will suddenly change upon the [mere] filing of a successful post-trial motion," since "[p]resuming vindictiveness on th[at] basis alone would be tantamount to presuming that a judge will be vindictive toward a defendant merely because he seeks an acquittal." *Texas v. McCullough*, 475 U.S. 134, 139 (1986). In line with this reasoning, this Court should now affirmatively hold that actual reversal by a higher tribunal is necessary to take the serious step of *presuming* that a judge, in violation of the judicial oath and the law, has acted vindictively. Pet. at 18–25.

Respondent does not dispute that this Court has rejected every request to extend the presumption of judicial vindictiveness beyond the core facts in *Pearce* itself, but nonetheless reads those precedents to permit an *ad hoc* inquiry that could allow for such an expanded application of the presumption. Under Respondent's understanding of this Court's cases, this Court's only instruction to lower courts has been "to apply the presumption when it would be unreasonable not to do so." BIO at 11. The Fourth Circuit was thus entirely correct to reach a case-specific determination about the application of the presumption, based solely on the "unique factual scenario" and the court's own understanding of the "spirit and logic" of *Pearce*. App. at 25, 28–29. According to Respondent, this Court has never applied the *Pearce* presumption outside of the resentencing-after-reversal context only because it has never faced a sufficiently compelling factual scenario. BIO at 10–12.

Respondent's argument only bolsters the case for review. As the Petition explains, Respondent's understanding of this Court's *Pearce* cases—adopted by the Fourth Circuit and other courts—is an unpredictable approach to when the presumption applies. Trial judges cannot know whether they will suffer the indignity of being presumed to have violated the judicial oath and the Constitution. Pet. at 22–24. Respondent treats the *ad hoc* approach as a feature, not a bug, explaining that the Fourth Circuit's decision should not be reviewed precisely because its reasoning may or may not extend to other cases and other judges. BIO at 13–14. But such an

uncertain state of affairs is at odds with the esteem with which we hold our Nation's judges, as it is more likely to erroneously "'impute to [them] a lack of firmness, wisdom, or honor.'" *Republican Party of Minn. v. White*, 536 U.S. 765, 796 (2002) (Kennedy, J., concurring) (quoting *Bridges v. California*, 314 U.S. 252, 273 (1941)); *see generally* Judges' *Amicus Curiae* Br. at 2–3. A definitive ruling that the *Pearce* presumption applies only under the facts of *Pearce* would be more in line with our traditional respect for judges. It would make clear that outside of the extraordinary circumstance exemplified by *Pearce*, a person making the grave accusation that a judge has essentially abandoned his or her duty must actually prove the truth of such a weighty allegation.

Indeed, as noted in the Petition, the outcome of this case highlights the potential unfairness of the Fourth Circuit's *ad hoc* rule. Respondent makes no serious attempt to defend the absurdity of *presuming*, as the Fourth Circuit did, that the trial judge here acted vindictively. Judge Murensky originally imposed a "split the baby" sentence on Respondent, which attempted to give Respondent a term between a purely concurrent and purely consecutive sentence. App. at 71. When Respondent filed a motion explaining that such a middle ground was not legally available under state law, and then sought an order from the West Virginia Supreme Court of Appeals to require the Judge to decide the motion, Judge Murensky responded simply by resentencing Respondent to one of the two sentences that Respondent himself had argued were legally

permissible.[3] App. at 59–60. As the Petition pointed out—and as the Opposition concedes by its silence—the only way that Judge Murensky could have been sure to avoid being presumed to have acted vindictively would have been to impose upon Respondent the lower of the two sentences. Pet. at 24–25. The dilemma this creates for the next trial judge, facing another "unique factual scenario," is manifest.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3] Respondent conveniently omits from his Opposition the fact that he himself argued that a purely consecutive—and therefore longer—sentence was legally permissible. *See* BIO at 2–3.

[4] Respondent points out that *Blackledge v. Perry*, 417 U.S. 21 (1974), held that a presumption of vindictiveness can apply to a *prosecutor* who files an indictment in response to a criminal defendant's filing of a notice of appeal. BIO at 12–13. But prosecutors and judges are in different postures with respect to a defendant. A prosecutor is in an inherently adversarial posture to a defendant, and thus has a "considerable stake" in discouraging appeals from even being filed, since an appeal "will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free." *Blackledge*, 417 U.S. at 27. In contrast, judges in the American judicial system are neutral arbiters between adverse parties, and we do not "presum[e] that a judge will be vindictive towards a defendant merely because he seeks an acquittal." *McCullough*, 475 U.S. at 139. There is simply no reason in logic or precedent to apply the presumption of vindictiveness with the same vigor to both prosecutors and judges.

Respectfully submitted,

Patrick Morrisey
Attorney General

Elbert Lin
Solicitor General
Counsel of Record

Misha Tseytlin
Deputy Attorney General

Christopher S. Dodrill
Julie Marie Blake
Assistant Attorneys General

Office of the Attorney General
State Capitol
Building 1, Room E-26
Charleston, WV 25305
EL@wvago.gov
(304) 558-2021

Counsel for Petitioner

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