

No. 22-

IN THE
Supreme Court of the United States

CAVON CLARK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), this Court held that the Due Process Clause 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. The Court explained that due process requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. *Pearce*, 395 U.S. at 725. The *Pearce* Court held that whenever a judge imposes a “more severe” sentence after a successful appeal, the reasons for doing so must affirmatively appear. *Id.* at 726. Absent such affirmative reasons, a presumption arises that the more severe sentence has been imposed for a vindictive purpose. *Texas v. McCullough*, 475 U.S. 134, 142 (1986).

This case presents the following questions:

1. Must a “more severe” sentence of incarceration be numerically longer than the sentences of incarceration previously imposed; and if not
2. At a third resentencing hearing after two successful appeals of recidivist enhancements, does a court render a “more severe” sentence when it sentences a defendant consecutively when the sentencing court had previously sentenced the defendant concurrently.

PARTIES TO THE PROCEEDING

Cavon Clark, petitioner on review, was the defendant-appellant below. The United States of America, respondent on review, was the plaintiff-appellee below.

RELATED PROCEEDINGS

Decision below in the U.S. Court of Appeals for the Ninth Circuit:

United States v. Clark, No. 21-30185 (9th Cir.) (August 17, 2022) (unpublished)(panel decision holding that presumption of vindictiveness can only apply to sentences which are numerically longer than prior sentences)(Pet. App. 1a-4a).

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Cavon Clark respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit in this case.

INTRODUCTION

Cavon Clark pled guilty to production of child pornography and transportation of child pornography without a plea agreement. At his first sentencing hearing, the District Court erroneously concluded that Mr. Clark had two qualifying prior convictions, making him a recidivist for sentencing purposes, and sentenced him to fifty-five years for production and thirty years for transport, to run concurrently. On appeal, the Ninth Circuit reversed the sentence based on the District Court's consideration of facts in applying the categorical approach.

At his second sentencing hearing, the District Court again erroneously concluded that Mr. Clark's two prior convictions qualified as predicate offenses. The District Court again sentenced Mr. Clark to fifty-five years for production and thirty years for transport, to run concurrently. On appeal, the Ninth Circuit concluded as a matter of law that Mr. Clark's prior convictions did not qualify as predicate offenses, and reversed and remanded for resentencing without recidivist enhancements.

At Mr. Clark's third sentencing hearing, the District Court sentenced him to thirty years for production and eight years for transportation. However, for the first time, the District Court ordered that the sentences for those two counts should run consecutively, for an aggregate sentence of thirty-eight years.

The District Court only utilized the more severe procedure of consecutive sentencing after Mr. Clark successfully appealed the determination of whether his prior convictions qualified as predicate convictions supporting recidivist sentencing. Because consecutive sentencing was more severe than concurrent sentencing, the presumption of vindictiveness applied and insufficient reasons existed to justify a more severe sentence at the third sentencing hearing.

OPINIONS BELOW

The Third Circuit's opinion is unpublished. Pet. App. 1a-4a.

JURISDICTION

The Ninth Circuit judgment became final upon the entry of judgment by the Court of Appeals on August 17, 2022. This Court's jurisdiction rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

Procedural Background

A grand jury indicted Cavon Clark on one count of production of child pornography pursuant to 18 U.S.C. § 2251, and one count of transporting child pornography pursuant to 18 U.S.C. § 2252A. With no prior qualifying convictions, the punishment for production was 15-30 years, and for transportation was 5-20 years. With one prior qualifying conviction, the punishment for production was 25-50 years and for transportation was 15-40 years. With two prior qualifying convictions, the punishment for production was 35 years to life. Mr. Clark ultimately entered a plea of guilty to the indictment without a plea agreement.

At his first sentencing hearing, Mr. Clark argued that his two prior state convictions for possession of child pornography did not qualify as predicate convictions supporting enhancement. The District Court concluded that those state convictions did qualify as predicates for recidivist purposes, and therefore he was subject to 35 years to life for production and 15-40 years for transportation of child pornography. The District Court sentenced Mr. Clark to fifty-five years for production and forty years for transport, to run concurrently.

Mr. Clark appealed and argued that the District Court erroneously concluded that he had two qualifying predicate convictions. A Ninth Circuit panel issued an unpublished memorandum which held that the District Court erroneously considered Mr. Clark's conduct in applying the categorical approach, and reversed and remanded for resentencing.

On remand, Mr. Clark argued that his prior state convictions did not qualify as predicates for recidivist enhancement purposes. The District Court overruled the objections and found two qualifying predicate convictions. The District Court once again imposed a sentence of fifty-five years on Count 1 and forty years on Count 2, to run concurrently.

Mr. Clark appealed again. This time, the Ninth Circuit determined, as a matter of law, that Mr. Clark's prior state convictions did not qualify as predicate convictions for recidivist enhancement purposes. The Ninth Circuit remanded for resentencing without recidivist enhancements.

An amended P.S.R. was filed that concluded that the statutory sentencing range for production was fifteen to thirty years, and for transportation the statutory sentencing range was five to twenty years. The amended P.S.R. concluded that because the guideline range would have been life based on the adjusted offense level and criminal history category, the guideline range was 600 months (50 years), based on the 360-month maximum term for production and 240-month maximum term for transportation, run consecutively.

The government argued for a fifty-year sentence, based on the 18 U.S.C. §3553(a) factors. In his sentencing memorandum, Mr. Clark presented numerous arguments in support of a twenty-year term of incarceration under the 18 U.S.C. § 3553(a) factors and argued that the Court had never previously sentenced Mr. Clark consecutively, and to do so at the second resentencing would constitute vindictive sentencing.

After a protracted resentencing hearing, the District Court sentenced Mr. Clark to thirty years' imprisonment on production and eight years' imprisonment on transportation, to run consecutively. This—his third sentencing hearing in this case—was the first time the District Court utilized consecutive sentencing. The District Court stated that it did not intend to sentence vindictively, and believed it was impossible to do so since the prior 55-year sentence exceeded the maximum possible consecutive sentence of fifty years. Although the District Court stated that transportation caused harm separate and apart from the production, the District Court failed to explain why it had not previously sentenced consecutively and why consecutive sentencing was now necessary and appropriate in the third sentencing hearing.

On appeal, the Ninth Circuit ultimately determined that no presumption of vindictiveness could arise, since the thirty-eight year sentence was shorter than the prior fifty-five year sentences. (App. 2a).

Reasons For Granting the Petition

I. DUE PROCESS DICTATES THAT DEFENDANTS SHOULD NOT BE PUNISHED FOR EXERCISING THEIR RIGHT TO APPEAL

“To punish a person because he has done what the law plainly allows him to do, is a due process violation of the most basic sort ...” *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). A criminal defendant may not be punished for exercising his constitutional or statutory rights. *United States v. Goodwin*, 457 U.S. 368, 372 (1982). 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. *Wasman v. United States*, 468 U.S. 559, 568 (1984).

The Due Process Clause “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), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). *Pearce* established that a presumption of vindictiveness must apply whenever a defendant received a greater sentence after a new trial was granted. 395 U.S. at 725-26. *Smith* overruled *Pearce*, in part, holding that the *Pearce* presumption of vindictiveness would not apply where the first sentence was based on a guilty plea and the second sentence followed a trial. 490 U.S. at 795.

The original sentence must act as a ceiling above which no additional penalty is permitted unless: (1) the reasons for imposing the greater sentence affirmatively appear; (2) these reasons are based on objective information; and (3) the factual data on which the greater sentence is based is

part of the record. *Pearce*, 395 U.S. at 726. The rule against vindictive sentencing is no mere procedural nicety. Due process “requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.” *Pearce*, 395 U.S. at 725.¹ Otherwise, the rights of defendants—such as Mr. Clark—to seek redress on appeal will be significantly chilled. *Id.* at 724.

The *Pearce* presumption of vindictiveness will apply unless the district court plainly articulates reasons for the increased sentence that are unrelated to the exercise of the defendant’s constitutional and statutory rights. *Smith*, 490 U.S. at 798-99. Once a presumption of vindictiveness arises, the burden falls on the government or the sentencing authority to rebut it. *Wasman*, 468 U.S. at 569. Where the presumption applies, the government bears the burden to show by “objective information” that the increased sentence was predicated upon something other than the vindictive purpose of punishing the defendant for exercising his right to appeal. *Smith*, 490 U.S. at 799 (*quoting Texas v. McCullough*, 475 U.S. 134, 142 (1986) and *Goodwin*, *supra*, 457 U.S. at 374).

Reasons justifying the Court’s sentence must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.” *Id.* at 726; *see also Wasman v. United States*, 468 U.S. 559, 572 (1984) (holding that sentence increase at resentencing did not violate due process because the judge clearly explained that the increase was based upon a new, intervening offense and conviction; *see also North Carolina v. Pearce*, 395 U.S. 711 (1969); *Moon v. Maryland*, 398 U.S. 319 (1970); *Odom v. United States*, 400 U.S. 23 (1970); *Colten v. Kentucky*, 407 U.S. 104 (1972); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973); *Michigan v.*

¹ The same rule applies where the resentencing occurs after an appeal of the original sentence, rather than the conviction. *United States v. Rapal*, 146 F.3d 661, 663 (9th Cir. 1998).

Payne, 412 U.S. 47 (1973); *Ludwig v. Massachusetts*, 427 U.S. 618 (1976); *Wasman v. United States*, 468 U.S. 559 (1984); *Texas v. McCullough*, 475 U.S. 134 (1986); *Alabama v. Smith*, 490 U.S. 794 (1989). “The reason [for the harsher sentence] must have at least something to do with conduct or an event, other than the appeal, attributable in some way to the defendant.” *United States v. Rapal*, 146 F.3d 661, 664 (9th Cir. 1998).

II. THE DECISION BELOW IS WRONG

The Ninth Circuit decision, and those relied upon therein, miss the point of this Court’s vindictive sentencing jurisprudence. The *ratio decendi* of *North Carolina v. Pearce* and cases following it is that the appearance of vindictive sentencing may deter future defendants from appealing. The Ninth Circuit, however, focused exclusively on the numbers, while ignoring the fact that judicial manipulation of consecutive sentencing could have the same deterrent effect as sentencing to a longer term of imprisonment.

At least one Sixth Circuit Judge has argued that the vindictiveness presumption should apply when a component of the sentence is increased on remand, even if the overall sentence does not increase. *United States v. Bond*, 171 F.3d 1047, 1050 (6th Cir. 1999) (Merritt, J., dissenting). In *Bond*, the defendant was originally sentenced to 276 months, which was an upward departure from a Guidelines sentence of 168 months. *Id.* at 1050. The upward departure was vacated on appeal and the case was remanded. *Id.* On remand, the district court significantly increased the defendant’s criminal history category by two levels, in order to increase the overall Guideline range, and then resentenced

the defendant to 188 months, which was the high end of the new Guideline range. *Id.* While the majority did not find this to be an abuse of discretion since the new sentence was lower than the original sentence, Judge Merritt disagreed, arguing that the presumption of vindictiveness should apply: “an increase in either component on resentencing, even without a higher total sentence, should raise the fairness issues and presumptions” attending vindictive sentences. *Id.* at 1051 & n.2. In *Bond* there was no “intervening conduct or event to warrant the increase” in the Guideline range, and the only reason the district court increased the defendant’s Criminal History Category (and the resulting Guideline range) was to reverse engineer a Guideline range that would support the court’s sentence. *Id.* at 1051-52. “If not judicial vindictiveness pure and simple,” this was “at least judicial gamesmanship sufficient to require us to reverse once again.” *Id.* at 1052.

Just as in *Bond*, where the District Court’s original sentence had been undercut on appeal, Mr. Clark’s District Court was attempting to “go around behind the barn and slip in through the back door to get the chickens.” *Id.*; *see also id.* at 1052 (stating “I do not believe [the district court] was free to increase defendant’s criminal history category to achieve what he otherwise knew he could not do because our court had reversed his first upward departure.”). The District Court had previously determined that concurrent sentencing was appropriate after considering all the facts and circumstances. To reverse that determination based on the legal determination that Mr. Clark’s prior convictions did not qualify for recidivism was akin to that decried by Judge Merritt in *Bond, supra*. Because the district court relied on facts existing at the original sentencing to sentence consecutively, and thereby achieve what the Ninth Circuit had otherwise prohibited by determining that recidivist

enhancements do not apply, the same concerns of fairness underlying the presumption of vindictiveness should apply here. *Id.*

This Court has always voiced its concern that more severe sentences should not be imposed on appeal where doing so could chill defendants from appealing their cases. It could be tempting to sweep aside such vindictiveness concerns in a case like this one because the 38-year sentence was less than the prior 55-year sentences, and surely defendants would continue to appeal so long as they don't risk receiving longer sentences. Real-world concerns, however, make it less certain that defendants will continue to pursue appeals if sentencing gamesmanship such as that employed here continues is employed by district courts.

One such real-world consideration is housing and transport. After Mr. Clark was sentenced for the first time in 2012, he was transported to the United States Penitentiary in Tucson, Arizona. He has been housed at USP Tucson at all times since then, with the exception of detention while he has been transported back to Spokane, Washington for resentencing. Tucson is almost 1,500 miles from Spokane. When Mr. Clark has twice been transported from Tucson to Spokane, he has not flown direct—instead, he has traveled by bus, and spent varying amounts of days at jails and BOP facilities along the way. Those trips have consumed weeks, not just hours and days, and have resulted in him being housed for days at a time at unfamiliar jails, often in general population. Such environments pose severe danger of harm for a sex offender such as Mr. Clark.

Defendants who become aware of such judicial gamesmanship could well decide that it is not worth it to undergo a weeks- or months-long journey for a resentencing hearing when the sentencing judge can manipulate the guidelines or the statutory sentencing framework to approximate

the sentence that had been handed down and reversed by an appellate court. Long-term prisoners such as Mr. Clark establish a routine and a life at their prisons. Those lives often involve long-term schooling or other programming could be disrupted should they have to travel back for resentencing. Disrupting such programs can require defendants to start all over again, or even worse—wait in line for months or year before starting such programming again.

To assure the absence of vindictiveness, this Court has concluded that “whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear.” *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969); *Texas v. McCullough*, 475 U.S. 134, 138 (1986) (“[b]eyond doubt, vindictiveness of a sentencing judge is the evil the [*Pearce*] Court sought to prevent rather than simply enlarged sentences after a new trial”). Here, there has were no changes in fact which would justify sentencing Mr. Clark consecutively when he has previously always been sentenced concurrently. There were no additional facts presented about the nature of the offenses, nor was there additional testimony to strengthen the case for separate harms. The record on this re-sentencing was the functional equivalent of the prior records on sentencing.

Under all these circumstances, the presumption should apply. Should it not, despite employing the more severe consecutive sentencing method as opposed to concurrent sentencing, real-world concerns could lead defendants to forego appeals and resentencing, based on sentencing courts’ judicial gamesmanship.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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