No. _____

In The

Supreme Court of the United States

JOHN GILCREASE
Petitioner

vs.

THE STATE OF LOUISIANA
Respondent

On Petition for Writ of Certiorari to
The Louisiana Supreme Court and Louisiana Court of Appeal, Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Were John Gilcrease's due process rights violated when, after his plea and original sentence for obstruction of justice that exceeded the maximum statutory term was vacated and remanded, the court imposed a more onerous, consecutive sentence? Does the harsher sentence violate his right to appeal and conflict with the decision of the Supreme Court of the United States, *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) concerning the presumption of judicial vindictiveness?

Particularly where the State had not objected to or appealed the concurrent sentences originally imposed, did increasing the sentence on remand by ordering that it be served consecutively violate due process?

Where on remand, after originally imposing a sentence beyond statutory limits, the district court failed to articulate any objective information concerning conduct on the part of defendant occurring *subsequent* to the original sentencing, did the Court violate John Gilcrease's due process rights by adding the condition of consecutive sentences to the sentence?

Did the Louisiana Second Circuit Court of Appeal err in affirming an increased sentence on remand in a case where the defendant entered a plea and there was no new information on remand? Did the Louisiana Supreme Court err in denying discretionary review?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page:

State of Louisiana, through the Office of the Caddo Parish District Attorney

John Gilcrease, an individual incarcerated in the State of Louisiana

No other cases are directly related.

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The original opinion of the State of Louisiana Court of Appeal, Second Circuit, in this matter, *State v. Gilcrease,* 329 So. 3d 1173, 54,122 (La.App. 2 Cir. 11/17/21), is attached as Pet. App. "A." The second opinion of the State of Louisiana Court of Appeal, Second Circuit, in this matter, *State v. Gilcrease*, No. 54,905 (La.App. 2 Cir. 11/30/22); 352 So.3d 153, 2022 La. App. LEXIS 2068; 2022 WL 17332361, *after remand*, is attached as Pet. App. "B." The opinion of the Supreme Court of Louisiana denying the defendant's application for a Writ of Certiorari for discretionary review, *State v. Gilcrease*, No. 2022-01845 (La. 05/31/23); – So.3d –, 2023 La. LEXIS 1193, 2023 WL 3734757, is attached as Pet. App. "C." [1]

JURISDICTION

The Louisiana Supreme Court entered judgment against the Petitioner, denying discretionary review, on May 31, 2023. This petition is filed within 90 days of that date. Accordingly, this Court has jurisdiction to review the judgment of the Louisiana Supreme Court, declining to review the decision of the Louisiana Court of Appeal, Second Circuit. SUP. CT. R. 13(1); 28 U.S.C. § 1257(a).

[1]Hereafter, citations to the appendices will be cited as "Pet. App. A or B." Citations to the record below will be cited as "R.__" according to the designations set for the appellate record filed with the Louisiana, Second Circuit Court of Appeal.

CONSTITUTIONAL PROVISIONS AND AUTHORITIES INVOLVED

1. *The Fifth Amendment to the United States Constitution* provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

2. *The Fourteenth Amendment to the United States Constitution* provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

John Gilcrease and his wife, Connie Cliburn, got in an alcohol and drug induced physical altercation on May 27, 2019, resulting in John Gilcrease's arrest.[2] A protective order was issued prohibiting him from contacting Ms Cliburn. Despite the protective order, Mr. Gilcrease made phone calls and wrote letters from jail to Ms Cliburn, asking her to drop the charges. There was no allegation that he threatened to harm her in the calls or letters. Rather, he asked her to recant her statement to police. He told her he could not live without her, and he would kill himself if she did not take his calls.[3]

The calls and letters resulted in fourteen misdemeanor counts of violating a protective order and a felony obstruction of justice charge for tampering with evidence to disrupt the results of an investigation, in violation of La. R.S. 14:130.1.(R.3) On the day of trial, Mr. Gilcrease withdrew his not guilty pleas and entered pleas of guilty to all charges. (Vol.2, R.178-203). Initially, on October

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[2]They gave differing accounts as to whether they were married or not. The details of the offenses are recounted in *State v. Gilcrease* 329 So. 3d 1173, 54,122 (La.App. 2 Cir. 11/17/21). Pet. App. "A."

[3]*State v. Gilcrease* p.4, 329 So. 3d 1173; 54,122 (La.App. 2 Cir. 11/17/21) Pet. App. "A."

8, 2020, Mr. Gilcrease was sentenced on the obstruction charge to ten years to be served *concurrently* with the six year sentence for second degree battery and the misdemeanor sentences for false imprisonment and protective order violations. On appeal, the Louisiana Second Circuit Court of Appeal upheld the six year battery sentence. However, the ten year sentence for obstruction of justice, *which exceeded the statutory limit of five years*, was vacated and the case remanded. *State v. Gilcrease* 329 So. 3d 1173, 54,122 (La.App. 2 Cir. 11/17/21). **Pet. App. "A."**

On remand, John Gilcrease had newly appointed counsel who had never spoken to him before the scheduled zoom sentencing hearing, but the attorney and the defendant said they were ready for sentencing nonetheless, believing it to be a ministerial correction. John Gilcrease was re-sentenced on March 17, 2022 to four years at hard labor, but the Louisiana First Judicial District judge added that the sentence for obstruction would be served *consecutively* to those in the other case. (**Pet. App. "D"** R.2,10-16)

Mr. Gilcrease's attorney timely filed a Motion to Reconsider based on the constitutional errors. It was denied on April 4, 2022. He timely filed a second Motion for Appeal on April 7, 2022. On November 30, 2022, the Louisiana Second Circuit Court of Appeal affirmed the re-sentencing. *State v. Gilcrease* 2022 La. App. LEXIS 2068; 54,905 (La.App. 2 Cir. 11/30/22); 2022 WL 17332361, –So.3d–. **Pet. App. "B.**" On May 31, 2023, the Supreme Court of Louisiana denied discretionary review of the defendant's application for a Writ of Certiorari, *State v. Gilcrease*, No. 2022-01845 (La. 05/31/23); – So.3d –, 2023 La. LEXIS 1193, 2023 WL 3734757. **Pet. App. "C."** The constitutionality of the increase to a consecutive sentence on remand on the obstruction charge, and its chilling effect on his constitutional right to appeal, are the subjects of this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

John Gilcrease's original ten year, concurrent sentence was vacated and remanded because it exceeded the statutory maximum of five years for obstruction of justice under Louisiana law. The district court on remand imposed a sentence of four years, within the statutory parameters, but added a new restriction that it be served consecutively. In doing so, the court on remand cited no changes in facts or circumstances that occurred after the original sentence. The order for a consecutive sentence, particularly where the State had never objected to or appealed the original concurrent sentence, violates due process and makes the sentence on remand retaliatory and vindictive.

The Louisiana Second Circuit Court of Appeal erred in upholding the increase to a consecutive sentence on remand in violation of the defendant's due process rights. John Gilcrease had pleaded guilty and appealed only his sentences. There was no change in facts or additional circumstances occurring between the original sentencing and sentencing on remand. The State never objected to, or appealed, the original concurrent sentence. By requiring on remand that the four year sentence be served *consecutively* to the six year sentence on the related second degree battery charge (Pet.App.D, R. 2,14-16), the presumption of vindictiveness arose. The Louisiana Supreme Court denied discretionary review. (Pet.App.C)

The Fifth and Fourteenth Amendments guarantee due process, which includes the right to be tried and sentenced absent prosecutorial or judicial vindictiveness against a defendant who has successfully attacked his first sentence.[4] The fear of such vindictiveness or retaliation by way of

[4]See, e.g., *Thigpen v. Roberts*, 468 U.S. 27, 30, 104 S. Ct. 2916, 82 L. Ed. 2d 23 (1984) (citing *Blackledge v. Perry*, 417 U.S. 21, 27, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974) (prosecutorial vindictiveness); *North Carolina v. Pearce*, 395 U.S. 711, at 723-24, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) (judicial vindictiveness), overruled in part by *Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865, 109 S. Ct. 2201 (1989).

imposition of a harsher sentence would deter a defendant from exercising his right to appeal.[5] The seminal case of *North Carolina v. Pearce*, rendered in 1969, considered two consolidated cases. In the first, Pearce was convicted at trial but his conviction was vacated. After re-trial, Pearce was given a greater sentence by the new trial judge. The Court found that due process of law forbids imposition of "a heavier sentence upon every re-convicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside". *Id*. at 723-24.

In the second case, *Simpson v. Rice*, Rice had pleaded guilty to four separate charges of second-degree burglary and was sentenced to a total of ten years.[6] The guilty pleas were vacated on appeal. On remand, Rice went to trial rather than plead on three of the charges. After he was convicted, his sentences totalling twenty-five years were upheld. The Supreme Court in *Rice* held that the judicially created presumption of vindictiveness did not apply when the increased re-sentence came after a trial where the judge learned relevant sentencing information.

The Court in *Pearce* held that, not only does *actual* vindictiveness violate due process, but also, the "apprehension of such a retaliatory motivation on the part of the sentencing judge" does so as well, because "the fear of such vindictiveness may unconstitutionally deter" defendants from exercising any rights to appeal and collateral attack. *Id*. at 725. Therefore, the Court adopted a prophylactic rule, holding a presumption of vindictiveness applies when defendant receives a greater sentence after a new trial, *unless*: the sentencing court affirmatively states objective reasons for that

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[5]*North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled in part on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865, 109 S. Ct. 2201 (1989).

[6]*Simpson v. Rice*, 396 F.2d 499, 1968 U.S. App. LEXIS 6718 (5th Cir. Ala., 1968); *Simpson v Rice*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)

sentence; and, those reasons are based upon "information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding". *Id*. at 726.

The facts from the original appellate decision (Pet.App.A) were used by the district court in sentencing on remand and by the Second Circuit in their second decision. No new facts appear on the re-sentencing record. (Pet.App. D) The State presented *no evidence* at re-sentencing to the judge. The transcript of the prior plea was not admitted into evidence. The police report was not admitted into evidence. The defendant's rap sheet was not admitted into evidence. There was no pre-sentence investigation. To dispel the presumption of vindictiveness, the record had to show the sentencing court affirmatively stated objective reasons for the increase to consecutive sentence; and, that those reasons are based upon "information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. Because the re-sentencing relied entirely on the prior facts set forth in the original court of appeal's decision, the *Pearce* standard could not be met. There is no factual basis for imposing the harsher restriction of consecutive sentences.

The sentence for obstruction of justice under the Louisiana statute to which John Gilcrease pleaded guilty had a five year maximum, yet he was illegally sentenced to ten years.[7] On remand, maintaining the concurrent sentences would have put his sentence within statutory parameters. But by ordering the sentence to be consecutive to the six year sentence, the district court manufactured a way to maintain the ten year term that was vacated on first appeal. John Gilcrease's effective jail term was doubled without objective reason by the district court ordering the sentence be served

[7] La. R.S. 14:130.1(B):"When the obstruction of justice involves any other criminal proceeding, the offender shall be fined not more than $10,000, imprisoned for not more than five years with or without hard labor, or both."

consecutively, rather than concurrently. Consecutive sentences are harsher than concurrent sentences and are one way to add to the term of a sentence. They are not preferred in Louisiana.[8] In light of the *Pearce* decision, the trial judge's failure to articulate reasons for a more severe sentence necessitates that this Petition for Writ be granted and that the new proviso that the sentence be served consecutively. sentences be vacated.

In *Pearce*, the Supreme Court suggested that events subsequent to the first trial that throw new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities" may be objective reasons for increasing a sentence after remand. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. However, the reasons must be *new* and only learned after the original sentencing. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. The Court in *Resendez-Mendez*[9] held that the standard of review for claims of vindictiveness on re-sentencing is *de novo.* The factual data upon which the increased sentence is

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[8]Under Louisiana law, consecutive sentences are not favored, absent articulated aggravating circumstances. See *State v. Gaspard*, 09-1516 (La.App. 3 Cir. 10/13/10) and *La.Code Crim.P. art. 883.* La. C.Cr.P. Art. 883 provides, "If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. Other sentences of imprisonment shall be served consecutively unless the court expressly directs that some or all of them be served concurrently....." Where consecutive sentences are ordered, the sentencing court must consider "[T]he defendant's criminal history; the gravity or dangerousness of the offense; the viciousness of the crimes; the harm done to the victims; whether the defendant constitutes an unusual risk of danger to the public; the defendant's apparent disregard for the property of others; the potential for the defendant's rehabilitation; and whether the defendant has received a benefit from a plea bargain." *Gaspard*, supra.

[9]*United States v. Resendez-Mendez,* 251 F.3d 514 (5th Cir. 2001)

based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Mr. Gilcrease pleaded guilty and only appealed his sentences. The State did not appeal the concurrent sentences, nor apply for review when Mr. Gilcrease succeeded on appeal. Mr. Gilcrease did not go to trial on remand and no new facts were learned. There was no new information to justify the change to consecutive sentences in this case. Moreover, where the district court had previously ordered concurrent sentences, the re-sentencing addition of a consecutive sentence is presumptively vindictive and retaliatory under *Pearce.*

This Petition should be granted as, "Tolerance of a court's vindictiveness might 'chill' a defendant's right to seek an appeal of (his) sentence."[10] Due process requires that a defendant not face increased punishment solely as retribution for successfully appealing an illegal sentence. The Court in *Pearce* said, "punishing the defendant for his having succeeded in getting his original conviction set aside," or "penalizing those who choose to exercise" constitutional rights to appeal is "patently unconstitutional."[11] A court is "without right to . . . put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered. . . . It is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice."[12]

John Gilcrease exercised his constitutional right to criminal appeal under La. Const. Art. 1, Sec. 19 and was successful. But even if the first conviction had been set aside for nonconstitutional

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[10]*Pearce* also applies to resentence on remand. *U.S. v. Campbell*, 106 F.3d at 67 (5th Cir. 1997)

[11] *Pearce*, at 723; *United States* v. *Jackson*, 390 U.S. 570, 581, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).

[12]*Worcester* v. *Commissioner*, 370 F.2d 713, 718. See *Short* v. *United States*, 120 U.S. App. D. C. 165, 167, 344 F.2d 550, 552.

error, the imposition of a harsher penalty for having successfully pursued a statutory right would be no less a violation of due process of law. A new, stiffer sentence, with enhanced punishment, based upon vindictiveness or retribution, would be "a flagrant violation of the rights of the defendant."[13] In this case, John Gilcrease's original sentence exceeded the statutory authority, imposing six years past the maximum, a violation of the due process clauses of the federal and state constitutions. Yet he was penalized for exercising his constitutional rights when, after his successful first appeal, his sentence was ordered to be served consecutively on remand, rather than concurrently as originally imposed.

Louisiana courts have heeded *Pearce* generally.[14] In *State v. Allen* 446 So. 2d 1200 (La. 1984), the Court concluded that, since Allen's sentence was significantly increased on remand without articulated reasons for the more severe sentence as required by *North Carolina v. Pearce, supra*, the

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[13] *Pearce*, supra, citing Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606 (1965); Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

[14]The Louisiana Supreme Court adopted the *Pearce* rule in *State v. Rutledge*, 259 La. 544, 250 So.2d 734 (1971). In *State v. Roberts,* 704 So. 2d 368; 97-787 (La.App. 3 Cir. 12/10/97), the Court found as error patent in the second appeal that the trial court imposed a more severe sentence on remand for distribution of cocaine even though part of the longer sentence was suspended. The Court said, "In order for the trial court to impose a more severe sentence upon a defendant, due process requires that the trial court state in the record reasons for doing so and the reasons must be based on objective information concerning *conduct* of a defendant *occurring **after** the original sentencing.*

In *State v. Swan,* 569 So. 2d 155 (La. 1 Cir. App. 1990), on remand for resentencing, the sentences imposed were considerably lower than the original sentences but included probation conditions which could result in possible jail time. Because it was possible that a more severe sentence would result, and the trial court gave no reasons for the new requirement, the *Swan* court deleted the conditions that made the sentence more severe.

In *State v. Upton,* 396 So. 2d 1309 (La. 1981), Upton's suspended sentence with conditions was vacated on appeal. On remand, Upton was sentenced to jail time. The Court found that the only reason given for the change was to avoid complications with a suspended sentence. The district court's failure to articulate reasons for the more severe sentence necessitated a second remand for resentencing. The Court cited *North Carolina v. Pearce*, supra.

sentence had to be vacated and the case remanded to the trial court for re-sentencing.[15] Louisiana Supreme Court Justice Crichton noted in a concurrence in *State v. Gasser* 346 So. 3d 249; 2022-00064 (La. 06/29/22) that a defendant's constitutional right to appeal[16] would be impermissibly chilled if he was subject to a greater offense after appeal and wrote, citing federal law:

> "Due process of law requires that avenues of appellate review, once established, must be kept free of obstacles that impede open and equal access to the courts. *Rinaldi v. Yeager*, 384 U.S. 305, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966). Any penalization, even incidental, for those who choose to exercise constitutional rights "would be patently unconstitutional." *United States v. Jackson*, 390 U.S. 570, 581-82, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968). Appeals have always been favored in Louisiana. *Davidge v. Magliola*, 346 So. 2d 177 (La. 1977)"

In the original sentencing in this case, the district court determined that the sentences should be served concurrently. The State did not file a Motion to Reconsider the concurrent sentences imposed, nor did the State appeal. The concurrent nature of the sentences was never contested. Despite the lack of objection to concurrent sentences at any stage, in its second decision, in order to uphold the consecutive sentence imposed on remand, the Court of Appeal tried to step back from its original decision and fault the original sentence. The Louisiana Second Circuit Court of Appeal incorrectly faulted the original sentencing judge for imposing concurrent sentences and opined that consecutive sentences would have been appropriate at original sentencing, to avoid considering whether it was constitutionally imposed on re-sentencing.

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[15]The Court also cited *State v. Rutledge*, supra, *State v. Franks*, 391 So.2d 1133 (La. 1980), and *State v. Upton*, 396 So.2d 1309 (La. 1981).

[16]Citing *generally* La. Const. Art.1,§19, right to appeal in criminal cases; La. Const. Art. 5, § 10 appellate jurisdiction over criminal cases; La. Const. art. 1, § 22 "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."

The *original* concurrent sentence was not in dispute in the appeal of the re-sentencing. Yet, instead of examining whether the district court *on remand* had provided objective reasons to support the add a consecutive sentence, the Court mistakenly went back and faulted the original sentence.[17] The Court erroneously claimed that the original sentencing judge focused on the details of the battery only, ignored the obstruction charge, and did not pay enough attention.

The original court that sentenced John Gilcrease clearly and correctly intended the concurrent sentence. John Gilcrease was being sentenced for making phone calls and writing letters from jail to Ms Cliburn, asking her to drop the charges. There was no allegation that he threatened to harm her in the calls or letters. Rather, he asked her to recant her statement to police. He told her he could not live without her, and he would kill himself if she did not take his calls. The original sentencing judge had issued the protective orders and was very aware of the defendant's conduct and that it was all part of, or related to, the same incident. It is disingenuous to claim that the concurrent sentence was a mistake just to excuse the impermissible change to consecutive sentences on remand.

It was not John Gilcrease's burden to show actual vindictivenss in re-sentencing. Rather, it was the State's burden to rebut the presumption of vindictiveness that arose when the consecutive sentence order was added. The Court has recognized the *institutional bias* inherent in the judicial system against the retrial of issues that have already been decided.[18] The Court noted that a lower court may be vindictive, knowingly or not, when a case is remanded because "the court with whose

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[17] Pet.App.B: Second Cir. Op., p.10-11: "The court ordered that the two sentences were to be served concurrently, although they arose out of separate and distinctly different criminal acts by the defendant." Second Cir. Op. p. 6: "The difference is that the factors in Art. 894.1(B) listed by the original judge related only to the second degree battery against Ms. Cliburn,"

[18] *United States v. Goodwin*, 457 U.S. 368, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982)

work [defendant] was sufficiently dissatisfied to seek a different result on appeal, . . . is asked to do over what it thought it had already done correctly."[19]

John Gilcrease successfully appealed the original sentence as the illegal term of ten years for obstruction of justice exceeded the statutory authority. Under the Constitution, and according to his comments at re-sentencing, he expected to be fairly sentenced without the court penalizing him for seeking that appeal. Fear of judicial vindictiveness would have forced him to choose between serving a sentence that exceeded statutory authority or risk a more onerous sentence, such as the consecutive sentences. Such a "chilling effect" on defendant's right to appeal would be impermissible and unconstitutional."[20]

The Louisiana Second Circuit in its second decision, after remand, affirmatively stated that "the facts" of the case have not changed.[21] Indeed, the facts relied on by the Louisiana district court in sentencing on remand and the Court of Appeal in its second decision were those that were set forth in the original sentencing and in the original appellate decision. (See Pet.App.A,B,D) The State presented *no evidence* at re-sentencing to the judge. The transcript of the prior plea was not admitted into evidence. The police report was not admitted into evidence. The defendant's rap sheet was not admitted into evidence. There was no pre-sentence investigation. There was no objective reason for the court, on remand, to increase the sentence by ordering consecutive sentences.

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[19]The same institutional pressure that supports the doctrines of *stare decisis*, res judicata, the law of the case, and double jeopardy might also subconsciously motivate a vindictive prosecutorial or judicial response to a defendant's exercise of his right to obtain a retrial of a decided question. *Colten v. Kentucky*, 407 U.S. 104, 116-117, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972)

[20]*Jackson*, 390 U.S. at 582; *State v. Goodley*, 423 So. 2d 648, 652 (La. 1982)

[21] La. Second Cir. Ct. App. Op. p. 9, Pet.App. C

Since the *Pearce* decision in 1969, the Supreme Court has narrowed the application of this broad presumption of judicial vindictiveness in specific situations that do not apply herein. In *Colten v. Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972), the Court found that Kentucky's two-tier criminal court system did not require the *Pearce* prophylactic rule. There is no two tier system in Louisiana to protect John Gilcrease from this judicial vindictiveness.

In *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973), the Court found that the *Pearce* presumption did not apply when a *jury*, rather than a *judge*, imposed a greater sentence after retrial. *A* jury would not (*should not*) know of the prior sentence; would have no institutional interest in discouraging meritless appeals; and the jury had no personal stake in the prior conviction and no motivation to engage in self-vindication". *Id*. at 27. John Gilcrease pleaded guilty and no jury was involved in any stage to buffer judicial vindictiveness.

In *Texas v. McCullough*, 475 U.S. 134, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986) the Court found that the *Pearce* presumption did not apply after a jury verdict was vacated on a successful motion for new trial and, after re-trial, McCullough's sentence was increased by the judge that McCullough requested preside. There was no presumption of vindictiveness where the judge gave objective findings of fact, based on information from the retrial, as to why the sentence was greater.

The Court last addressed judicial vindictiveness in *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), where, after *pleading guilty*, Smith appealed and was granted a trial before the judge who had accepted the earlier guilty plea. The Court upheld the greater sentence imposed after Smith was convicted and a second sentence imposed, because the trial judge had the benefit of trial testimony and details that were not known at the original sentence on the plea.

The judge who increased John Gilcrease's sentence to consecutive sentences did not hear a trial or anything new before imposing the harsher sentence.

This case is a pure application of the *Pearce* standard. The Louisiana Second Circuit erred in failing to follow *Pearce.* The narrowing decision in *Alabama v. Smith* does not apply to the present case. Mr. Gilcrease's sentence on his original plea was vacated as it exceeded statutory authority and the case was remanded solely for re-sentencing. There was no new trial. There were no additional facts heard. The Court in *Alabama v. Smith* emphasized that the *Pearce* presumption applies *only* where "*there is a reasonable likelihood* that the increase in sentence is the product of *actual vindictiveness* on the part of the sentencing authority." *Id*. at 799-800 Here, the district court's sole role was sentencing. Without any objective, new information, it is reasonably likely that the court required the sentence be served consecutively, instead of concurrently as previously ordered, due to judicial vindictiveness. This Petition for Writ should be granted to vacate the order for a consecutive sentence.

In *Resendez-Mendez*,[22] the original sentence of 57 months was vacated because the district court had failed to afford defendant the opportunity to speak in mitigation. On remand, the judge resentenced defendant to 71 months in prison. The Court in *Resendez-Mendez* held that the great deference usually owed to a district courts' sentencing is erased by the *Pearce* presumption when a harsher sentence is imposed on resentencing. For a harsher, stiffer sentence to stand on remand, the prosecution must rebut the presumption of vindictiveness by articulating specific reasons, grounded in particularized facts that arise either from newly discovered evidence or from events that occur after the original sentencing. In *Resendez-Mendez*, the Court said the defendant's statements at re-

[22]*United States v. Resendez-Mendez*, 251 F.3d 514 (5th Cir. 2001)

sentencing did not constitute either objective information newly acquired by the court following the original sentencing or sentence-enhancing occurrences post-dating the original sentencing.

Even though there was no evidence that the district court was actually motivated by subjective vindictiveness in imposing the harsher sentence in *Resendez-Mendez*, because the district court neither expressed nor indicated any objective reason sufficient to rebut the *Pearce* presumption of vindictiveness, the Court vacated the sentence that was imposed on remand and remanded again.

The presumption of vindictiveness, if not actual vindictiveness, was not rebutted by the prosecution in this case. The original ten year *concurrent* sentence was vacated by the Louisiana Court of Appeal in *State v. Gilcrease* 329 So. 3d 1173, 54,122 (La.App. 2 Cir. 11/17/21) (Pet.App.A) because the correct sentencing range was zero to five years under La. R.S. 14:130.1(B). When John Gilcrease was re-sentenced, the district court deliberately calculated that, by adding the requirement of consecutive sentences, the original, illegal term of ten years could be maintained. On remand, the district court imposed the upper range sentence of four years at hard labor, but imposed the harsher requirement of *consecutive sentence,* thereby maintaining a ten year sentence. (R.2,10-16) The vindicitveness of the court is apparent in its mission to insure that John Gilcrease did not receive any benefit from the successful appeal of the illegal sentence.

In a very similar case, the trial court increased the defendant's punishment to consecutive sentences on re-sentencing with the purpose of maintaining the original sentence in *State v. Merrell*, 511 So.2d 1234 (La.App. 2 Cir. 1987). In *Merrell,* the Louisiana Second Circuit presumed vindictiveness and held, in pertinent part and with emphasis added:

> "We conclude the trial judge erred in increasing defendant's original sentence by ordering it to be served consecutive to any other sentence because the trial judge failed to articulate, for the record, any conduct on the part of defendant *occurring*

> *subsequent to the original sentencing* proceeding which would justify increasing the original sentence.....The trial judge, therefore, in resentencing defendant to serve a twelve year hard labor sentence *to be served consecutive to his prior six year sentence,* ***has reimposed, for all practical purposes, a prison term equal in length to the original*** *eighteen year illegal sentence.*
>
> The trial judge, in resentencing defendant, relied upon the same factual information considered by the trial judge who imposed the original illegal sentence. Increasing defendant's original sentence, *without new and additional justification, therefore, violated defendant's due process rights because it creates the appearance of vindictiveness against defendant for successfully attacking his sentencing.* The sentence must be vacated and the case remanded for resentencing." *Id.* at 1236-37

In the case under review, instead of applying *Merrell* which had correctly applied *Pearce,* the Louisiana Second Circuit mistakenly relied on "findings" by the re-sentencing judge that were only recitations of the elements of the obstruction statute, not actual facts or recently learned facts about Mr. Gilcrease's conduct. The Court said:

> "Judge Hathaway identified two aggravating circumstances related to the obstruction of justice charge under Art. 894.1, namely (7) subsequent to the offense the offender used threats with the intent to influence the conduct or outcome of the criminal proceedings, and (8) the offender committed the offense (obstruction) in order to conceal or facilitate the commission of another offense (battery)."

These so called new "findings" are merely a recitation of the very definition of the offense of obstruction of justice for which Mr. Gilcrease was being sentenced. The district court and the Court of Appeal relied totally on the facts found by the original judge, as set forth in the original decision to remand. (Pet.App.A). The "findings" are nothing new and no constitute no new conduct of Mr. Gilcrease. The sentence cannot be enhanced by reciting the definition of the offense.[23] As elements

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[23] La.R.S. § 14:130.1 (A), in pertinent part, states that "The crime of obstruction of justice is any of the following when committed with the knowledge that such act has, reasonably may, or will affect an actual or potential present, past, or future criminal proceeding as described in this Section:
(2) Using or threatening force toward the person or property of another with the specific intent to:
(a) Influence the testimony of any person in any criminal proceeding;
(b) Cause or induce the withholding of testimony or withholding of records, documents, or other

of the offense, they are already included in the sentencing range set by the legislature. Moreover, these "findings" are not something that happened *after* the original sentencing.

Sentencing is a critical stage of the proceeding, at which there is a right to the effective assistance of counsel. A defendant is entitled to the effective assistance of counsel during both the guilt and sentencing phases.[24] This principle is sacrosanct and is firmly ensconced in our federal and state constitutions.[25] It is striking that John Gilcrease's counsel at the zoom hearing for re-sentencing had never met him prior to the on-line hearing where they were not in the same location and could not confer privately. (Pet.App. D, R.10-12) There is no indication that she reviewed the previous decision. She did not know of any mitigating evidence that was previously introduced. Yet counsel told the court she was ready for sentencing. The re-sentencing was perfunctory, without either side introducing any evidence. (See Transcript, Pet.App. D) The defendant himself objected to the sentence. (R.15-16) A few days later, defense counsel filed a motion to reconsider the sentence and cited the law on the constitutionality of more onerous sentences on remand, but it was denied.

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objects from any criminal proceeding;

[24] *Lafler v. Cooper*, 566 U.S. 156, 165, 132 S.Ct. 1376, 1385-86, 182 L.Ed.2d 398 (2012) ("The precedents also establish that there exists a right to counsel during sentencing in both noncapital, and capital cases." (citations omitted)); *State v. Carpenter*, 390 So.2d 1296, 1299 (La. 1980) ("the sixth amendment right to counsel applies to all critical stages, including sentencing"), and the right to the effective assistance of counsel also applies, *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 1449, n.14, 25 L.Ed.2d 763 (1970) ("The right to counsel is the right to the effective assistance of counsel."); *Glover v. United States*, 531 U.S. 198, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001) (error resulting in the increase of sentence of any amount can result in ineffective assistance).

[25] The *Sixth Amendment to the United States Constitution* provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." *See also* U.S. Const. Amends. XIV; La. Const. art. I, § 13 ("At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment.").

As to the obstruction of justice case for which he was being re-sentenced, as acknowledged in the original decision, the facts are that Mr. Gilcrease made phone calls and wrote letters from jail to Ms Cliburn, asking her to drop the charges. There was no allegation that he threatened to harm her in the calls or letters. Rather, he asked her to recant her statement to police. He told her he could not live without her, and he would kill himself if she did not take his calls.[26] Along with fourteen misdemeanor counts of violating a protective order, second degree battery and false imprisonment, John Gilcrease pleaded guilty to the obstruction of justice charge in this case, for which he was being re-sentenced.

John Gilcrease's conduct was the least severe means of violating the obstruction of justice statute. For that reason, the district court had imposed concurrent sentences at the original sentencing. There was no new evidence or intervening facts presented at re-sentencing to justify the increase to consecutive sentences. Nothing in the district court's remarks on remand provide a sufficient basis for imposing the harsher, consecutive sentence. The district court did not provide a single objective reason based on Mr. Gilcrease's conduct *after* the original sentencing, or new information received *after* the original sentencing, for changing that designation to *consecutive* sentences. The presumption of judicial vindictiveness was not rebutted. John Gilcrease was entitled to the obvious, Constitutional due process protections provided by the straight-forward application of *North Carolina v. Pearce*, supra. His Petition for Writ of Certiorari should be granted and the order for consecutive sentences removed.

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[26]*State v. Gilcrease,* p.4, 329 So. 3d 1173; 54,122 (La.App. 2 Cir. 11/17/21) (Pet.App.A)

CONCLUSION

In view of the facts and law set forth herein and the entire record of the case, the defendant-Petitioner, John Gilcrease, prays that this Honorable Court grant this Petition for Writ of Certiorari and find that the defendant's due process were violated by the imposition of a consecutive sentence on remand for re-sentencing, after concurrent sentences were originally imposed. The Louisiana Second Circuit Court of Appeal's decision to uphold the consecutive sentence imposed on remand (Pet. App. B) is against settled U.S. Constitutional principles that the Louisiana Supreme Court declined to address. (Pet. App. C) The lower courts did not follow this Court's well-marked precedent of *North Carolina v. Pearce*, supra. The Court should grant review, find that the Louisiana Second Circuit erred in upholding district court's retaliatory and vindictive imposition of a consecutive sentence, and remand again with an order that the restriction for a consecutive sentence should be removed.

Respectfully submitted,

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