

In the  
**Supreme Court of Ohio**

STATE OF OHIO,	:	Case No. 2015-1892
	:	
Plaintiff-Appellee,	:	On Appeal from the Hamilton County
	:	Court of Appeals, First Appellate
v.	:	District
	:	
MALIK RAHAB,	:	Court of Appeals No. C-150186
	:	
Defendant-Appellant.	:	

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**BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL  
MICHAEL DEWINE IN SUPPORT OF APPELLEE STATE OF OHIO**

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## INTRODUCTION

The U.S. Constitution affords a “presumption of honesty and integrity in those serving as adjudicators”—overcoming that presumption is a “difficult burden.” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The U.S. Supreme Court only departs from that general presumption of judicial impartiality in one narrow instance: when a trial judge is reversed on appeal and subsequently imposes a harsher sentence after reconvicting the defendant. *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969). *Pearce* has no application here. Rahab has not successfully appealed, has not been reconvicted, and has not been given a higher sentence. Instead, Rahab asks this Court to extend *Pearce* by applying a presumption of judicial vindictiveness when an *offered plea deal* is followed by a higher sentence after trial. App. Br. at 1. The U.S. Supreme Court has repeatedly refused to extend *Pearce*’s presumption in this way.

*First*, plea bargaining is “very different” from the facts of *Pearce*. *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (citation omitted). It involves a *bargain*—i.e., an offer of a lower sentence—so a later higher sentence is unsurprising when the offer is rejected. It also necessarily involves government officials “persuad[ing] the defendant to forgo his right to plead not guilty.” *Id.* at 364. That this may “discourag[e]” a defendant from exercising his right to go to trial is a necessary part of that system, not a violation of Due Process. *Id.* (citation omitted). *Second*, a sentencing judge has more information after trial than when overseeing a plea. *Pearce* applies in the post-appeal context only because, upon remand, the judge is operating under “roughly the same sentencing considerations” as when the judge first sentenced the defendant, so “any unexplained change” is suspect. *Alabama v. Smith*, 490 U.S. 794, 802 (1989). During the course of trial, the court gathers more information about the defendant and the crime, and so is in a better position to give an accurate sentence. *Third*, after trial “the factors that may have indicated leniency as consideration for the guilty plea are no long present.” *Id.* at

801-02 (“a guilty plea may justify leniency”). Remorse is a legitimate sentencing concern, and a guilty plea is better evidence of genuine remorse than a statement made after conviction. *See Brady v. United States*, 397 U.S. 742, 753 (1970) (a guilty plea “afford[s] hope for success in rehabilitation over a shorter period of time than might otherwise be necessary”). *Fourth*, this case raises no “institutional bias” against retrial, as it did not involve “a complete retrial after [a defendant] had been once tried and convicted” like *Pearce*. *United States v. Goodwin*, 457 U.S. 368, 376 (1982). Without that bias, there is no presumption of vindictiveness. *See Alabama*, 490 U.S. at 801; *Texas v. McCullough*, 475 U.S. 134, 138 (1986); *Chaffin v. Stynchcombe*, 412 U.S. 17, 27 (1973); *Colten v. Kentucky*, 407 U.S. 104, 117 (1972).

*Alabama*, in particular, shows why *Pearce* cannot apply here. *Alabama* was factually much closer to *Pearce* than this case. That defendant accepted the plea deal and pleaded guilty before the judge; Rahab never reached that stage. 490 U.S. at 795. After that plea was reversed on a successful appeal, that defendant was resentenced; Rahab was only sentenced once. *Id.* If *Pearce* did not apply there, it does not apply here.

Finally, there is no direct evidence of actual vindictiveness. *Wasman v. United States*, 468 U.S. 559, 569 (1984). Burglary in Ohio gets two to eight years, and Rahab got six. *Op.* at 1. The Court reviews a sentence only for “clear and convincing” evidence that it is contrary to law. *State v. Marcum*, \_\_ Oh. St. 3d \_\_, 2016-Ohio-1002 ¶ 23. While the trial court discussed the plea offer at sentencing, it did so after the issue was raised by Rahab himself, who asserted that counsel had forced him to go to trial. The sentence was not based on any retaliation. To the contrary, “the record establishes that the trial court based Rahab’s sentence on his personal history,” including an extensive juvenile record; on “the facts of the case, including the trauma suffered by the victim”; and on Rahab’s lack of genuine remorse. *Op.* at 3.

## STATEMENT OF AMICUS INTEREST

As Ohio's chief law officer, the Attorney General has a keen interest in the proper application of Ohio's laws, and defends the judicial process and criminal convictions against constitutional challenges. Given that role, he has a strong interest in seeing that broad-based presumptions like the one at issue here are limited to their proper scope. Accordingly, the Attorney General's involvement in this case focuses on the proper scope of the presumption rather than the specific facts of this case.

## STATEMENT OF THE CASE AND FACTS

The Attorney General adopts the statement of the case and facts set forth by Appellee, the State of Ohio.

## ARGUMENT

### **Amicus Curiae Ohio Attorney General's Proposition of Law:**

*There is no due process presumption of judicial vindictiveness if a defendant receives a higher sentence after trial than offered after an earlier guilty plea or during plea bargaining; rather, a reviewing court presumes that a within-guidelines sentence is based on the facts proven at trial absent clear and convincing evidence of actual retaliation by a judge.*

The lower court rightly found that no presumption of vindictiveness applies here. In fact, no presumption of vindictiveness *ever* applies when comparing a plea bargain or guilty plea to a sentence after trial.

It is a serious matter to accuse trial courts of abusing their sentencing discretion to retaliate against a party before them. It is even more serious, then, to *presume* that those courts have acted vindictively, which "may operate in the absence of any proof of an improper motive." *United States v. Goodwin*, 457 U.S. 368, 373 (1982). "Given the severity of such a presumption," *id.*, the Supreme Court has repeatedly refused to apply it in plea-bargaining cases like this one. It is of course true that "sentencing discretion . . . must not be exercised with the

purpose of punishing” a defendant’s exercise of constitutional rights. *Alabama v. Smith*, 490 U.S. 794, 798 (1989); *State v. O’Dell*, 45 Ohio St. 3d 140, 147 (1989) (“a defendant is guaranteed the right to a trial and should never be punished for exercising that right for refusing to enter a plea agreement”). But, equally obvious, due process allows a sentence to be higher than the offered plea deal.

**A. The U.S. Supreme Court only applies a presumption of vindictiveness to higher resentencing after appeal and retrial.**

The U.S. Supreme Court has only applied a presumption of vindictiveness in two narrow circumstances. Due process “requires that vindictiveness against a defendant . . . play no part in the sentence he receives.” *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969). Although there was no actual evidence of it, *Pearce* applied a presumption of vindictiveness after a defendant successfully appealed, got his conviction vacated, and then on remand received a higher sentence after reconviction. *Id.* Nothing had changed, the Court reasoned, so judicial retaliation was the likely explanation for the higher sentence. *Id.* That presumption could be rebutted if “the reasons for” the higher sentence “affirmatively appear[ed]” in the record. *Id.* at 726.

The *only* other instance where the Supreme Court applied a presumption of vindictiveness occurred in a state-specific ruling in *Blackledge v. Perry*, 417 U.S. 21 (1974). *Blackledge* applied a presumption of vindictiveness where a prosecutor re-indicted an offender on a felony charge *after* the defendant invoked an appellate remedy to challenge a misdemeanor conviction. *Id.* at 23. Under North Carolina’s two-tiered system at the time, simply taking an appeal entitled a defendant to a second de novo trial in the superior court. *Id.* at 22. So under that system, the prosecutor’s decision to re-indict acted just like the court’s resentencing in *Pearce*, it meant an “increased punishment upon retrial after appeal” because the felony charge meant a higher sentence than the misdemeanor charge. *Id.* at 27. The presumption did not

apply, the Court hastened to add, if the new charges were based on new information not available to the State “at the outset.” *Id.* at 29 n.7.

Ever since, the Court has refused to extend *Pearce*. “Because of its severity, the Court has been chary about extending the *Pearce* presumption of vindictiveness when the likelihood of vindictiveness is not as pronounced as in *Pearce* and *Blackledge*. . . . [O]peration of the presumption often blocks a legitimate response to criminal conduct.” *Wasman v. United States*, 468 U.S. 559, 566 (1984) (plurality opinion) (citations, brackets, and quotation marks omitted); *Alabama*, 490 U.S. at 799 (“subsequent cases have made clear” that *Pearce* does not apply just because a “defendant receives a higher sentence on retrial” (citation omitted)). The Court refused to apply a presumption when the later sentence was imposed by a different court in a de novo trial. *Colten v. Kentucky*, 407 U.S. 104, 117 (1972) (“It no more follows that such a sentence is a vindictive penalty . . . than that the inferior court imposed a lenient penalty.”). It refused to apply *Pearce* when the higher sentence after a successful appeal was imposed by a second jury instead of a judge. *Chaffin v. Stynchcombe*, 412 U.S. 17, 28 (1973). And it refused to apply *Pearce* when the trial court itself, not a higher court, granted a defendant’s motion for a new trial, even though the same trial court then gave the defendant a higher sentence after reconviction. *Texas v. McCullough*, 475 U.S. 134, 137 (1986). In fact, at least one federal circuit has held that *Pearce*’s “presumption is no longer defensible in the present federal sentencing regime.” *United States v. Fowler*, 749 F.3d 1010, 1021 (11th Cir. 2014); *cf. Alabama*, 490 U.S. at 802 (limiting *Pearce* because of later “important developments in the constitutional law of guilty pleas”).

**B. The Supreme Court has rejected a presumption of vindictiveness when a defendant receives a higher sentence after trial than a defendant would have received under a plea bargain or guilty plea.**

The U.S. Supreme Court has flatly and repeatedly refused to extend *Pearce*'s presumption of vindictiveness to a context like this one involving plea bargaining or a guilty plea. See *Alabama*, 490 U.S. at 795 (“no presumption of [judicial] vindictiveness arises when the first sentence was based upon a guilty plea, and the second sentence follows a trial”); *Goodwin*, 457 U.S. at 372-73 (no presumption of prosecutorial vindictiveness when prosecution offered plea bargain on misdemeanor charges, defendant refused, and was later indicted and convicted on felony charges); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (no presumption of vindictiveness when prosecutor carries out a threat made during plea negotiations to re-indict on more serious charges if defendant did not plead guilty to original charges). These cases cite at least four reasons why this context is so different from *Pearce*.

1. *Nature of Plea Bargaining.* The facts of *Pearce* and *Blackledge* are “‘very different from the give-and-take negotiation common to plea bargaining.’” *Id.* at 362 (emphasis added; citation omitted). Extending *Pearce* to this different context would require rejecting the idea of plea bargaining. Most convictions rest on guilty pleas, “a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than . . . after a trial.” *Brady v. United States*, 397 U.S. 742, 752 (1970) (emphasis added); cf. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”).

That is, by its very nature plea bargaining involves a *bargain* and so a lesser sentence than a defendant would otherwise receive. “Plea bargaining flows from the ‘mutuality of advantage’”—a defendant pleads guilty and waives trial in exchange for a lower sentence. *Bordenkircher*, 434 U.S. at 363 (citation omitted). It is no surprise, then, if a defendant receives

a higher sentence after trial when a defendant rejects the plea. Plea bargaining also must involve government officials actively “persuad[ing] the defendant to forgo his right[s] to plead not guilty.” *Id.* at 364. Those rights are protected by other procedural safeguards, i.e., a plea must be knowing, voluntary, and intelligent. *Id.* at 363 (“Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion.”). Plea bargaining may of course still “have a ‘discouraging effect on the defendant’s assertion of his trial rights’”—indeed it is a poor plea bargain that does *not* have such an effect. *Id.* at 364 (citation omitted). But that is an “‘inevitable’—and permissible—‘attribute of any legitimate’” plea system. *Id.* (quoting *Chaffin*, 412 U.S. at 31). *Pearce*’s presumption, after all, is concerned about judicial retaliation, *not* about the possibility that a defendant may be deterred from going to trial. *Id.* at 363.

Each of these reasons applies here just as much as in *Bordenkircher*. Rahab’s dispute is with the very idea of plea bargaining, not with the actions of the trial court. All the trial court did was note, for the record, that a plea bargain had been offered, that Rahab himself had declined it, and that Rahab understood the decision. *See* Trial Tr. at 3-4. Whether or not this means the court “engaged in plea or sentence bargaining” (it did not), *see* Op. at 2, *Pearce* simply does not and cannot apply.

2. *More Information.* A judge overseeing a plea “usually [has] considerably less” information “than that available after a trial.” *Alabama*, 490 U.S. at 801. The post-trial sentence is likely based on that additional information. In *Pearce*, by contrast, the judge could “be expected to operate in the context of roughly the same sentencing considerations after the second trial as he does after the first,” suggesting “any unexplained change” was caused by vindictiveness. *Id.* at 802.

“[I]n the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes.” *Id.* at 801. In *McCullough*, for example, a trial judge vacated defendant’s sentence, retried him, and re-sentenced him to fifty years instead of twenty, stating candidly that the initial sentence was “unduly lenient in light of significant evidence not before the sentencing jury in the first trial.” 475 U.S. at 136, 140 (upholding sentence). In *Alabama*, the judge imposed multiple life sentences on resentencing after trial, instead of the 30-year concurrent terms after an earlier guilty plea vacated on appeal. 490 U.S. at 796 (same). The judge explained that hearing all the evidence at trial convinced him that the original sentence was “too lenient.” *Id.* at 797.

In addition, “[t]he defendant’s conduct during trial may give the judge insights into his moral character and suitability for rehabilitation.” *Id.* at 801; *cf. Goodwin*, 457 U.S. at 381 (“the prosecutor’s assessment of the proper extent of prosecution may not have crystallized”). In *Alabama* the judge chose a higher sentence in part based on “observations” of the defendant’s “mental outlook” and “position during the trial.” *Id.* at 797 (citation omitted). For instance, after the earlier guilty plea, the defendant had chosen to withdraw his statement and offer an alibi. *Id.* at 796.

Both explanations came into play here. Rahab chose to proceed to trial, and doing so gave the trial court more information about the case against Rahab. Before trial, those facts may not have been as fleshed out. As the First District explained, “[t]he record establishes that the trial court based Rahab’s sentence on his personal history and the facts of the case, including the trauma suffered by the victim.” *Op.* at 3. It showed an extensive juvenile record, including similar offenses. Trial Tr. at 465. The trial court also was surprised to learn that Rahab had no

defense whatsoever. *Id.* at 469-70. Even without these explanations in the record, *Pearce*'s presumption would not apply. The higher sentence is best explained by the intervening trial.

3. *Leniency and Remorse.* “[A]fter trial,” a judge may find that “the factors that may have indicated leniency as consideration for the guilty plea are no longer present.” *Alabama*, 490 U.S. at 801. Under Ohio’s discretionary felony sentencing, a lack of “genuine remorse” suggests a likelihood of recidivism and a showing of remorse suggests the opposite. R.C. 2929.12(D)(5) & (E)(5). The Federal Sentencing Guidelines provide for a decrease in offense level for “acceptance of responsibility,” and consider a guilty plea prior to trial “*significant evidence* of acceptance of responsibility.” U.S.S.G. Manual § 3E1.1(a) cmt. n.3 (emphasis added). That “significant evidence” exists if a defendant takes the plea bargain; it is absent if a defendant chooses to go to trial instead. *Alabama*, 490 U.S. at 802 (“A guilty plea may justify leniency.”). As *Brady* explained, a defendant “demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.” 397 U.S. at 753.

That did not happen here. The trial court noted that before trial Rahab “wouldn’t take responsibility,” and after trial chose to “throw [his] attorney under the bus.” Trial Tr. at 469-70. Given these factors, the court could not credit his apology. *Id.* at 460 (“it’s like, yeah, now that it’s all over, oh I’m sorry I got caught. . . . To me, too late”).

4. *Institutional Bias Against Retrial.* Both *Pearce* and *Blackledge* involved retrial and resentencing after a defendant exercised his right to appeal. This evoked what the Court called a judge’s “institutional bias inherent in the judicial system against the retrial of issues that have already been decided.” *Goodwin*, 457 U.S. at 376. A judge has no desire “to do over what it

thought it had already done correctly,” *Colten*, 407 U.S. at 117, and may act “in self-vindication,” *Chaffin*, 412 U.S. at 27. For this reason, the Supreme Court has drawn a hard line between “pre-[trial]” and “post-trial” decisions when applying *Pearce*’s presumption. *United States v. Yarbough*, 55 F.3d 280, 282 (7th Cir. 1995); see *Goodwin*, 407 F.3d at 376 (“Both *Pearce* and *Blackledge* involved . . . a complete retrial after [defendant] had been once tried and convicted.”). This institutional bias does not come into play pre-trial.

Where this institutional bias does not come into play, there can be no presumption of vindictiveness. Both *McCullough* and *Chaffin* refused to apply a presumption absent any “justifiable concern” about “a judge desirous of discouraging what he regards as meritless appeals.” *McCullough*, 475 U.S. at 138 (quoting *Chaffin*, 412 U.S. at 27). And in both *Alabama*, 490 U.S. at 801, and *Colten*, 407 U.S. at 117, the Court explained that the absence of this institutional bias meant *Pearce*’s presumption could not apply. See also *Savina v. Getty*, 982 F.2d 526 (table), 1992 WL 369923, \*2 (8th Cir. 1992) (no presumption of vindictiveness unless both “the initial sentence was reversed by a higher tribunal” and a higher sentenced followed); *Kindred v. Spears*, 894 F.2d 1477 (5th Cir. 1990) (same). Indeed, the Supreme Court has expressed some disdain for any extension of this reasoning to other circumstances. *McCullough*, 475 U.S. at 139 (“We decline to adopt the view that the judicial temperament of our Nation’s trial judges will suddenly change upon the filing of a successful post-trial motion.”).

So here, there is no basis for applying *Pearce* because the institutional bias against retrial does not come into play. Rahab received only one trial and only one sentence from the court. See, e.g., *United States v. Taglia*, 925 F.2d 1031, 1034 (7th Cir. 1991) (“The sentence set forth in the plea agreement was an understanding between [defendant] and the prosecutors. . . . The court was not a party to the agreement.”).

\* \* \*

It is true that some of these cases involved prosecutorial discretion, not judicial discretion, but the same reasoning still applies here. Indeed, *Alabama did* involve judicial discretion, and is several steps closer to *Pearce* than is this case. There the defendant actually took the plea deal and pleaded guilty before the judge, here the defendant heard the court's warnings and proceeded to trial anyway. 490 U.S. at 795. Like *Pearce*, the defendant in *Alabama did* successfully appeal and get his first sentenced reversed, and he was reconvicted after trial and resentenced upon remand. *Id.* Here, there was only one sentence, no appeal resulting in a reversal, no reconviction, and no resentencing. If the Court refused to extend *Pearce*'s presumption to *Alabama*'s facts, then it certainly would refuse to extend it to the facts of this case.

**C. An appellate court reviews a within-guidelines sentence for clear and convincing evidence that it is contrary to law—i.e., based on judicial vindictiveness—or that the record does not support the sentence.**

Absent a presumption of vindictiveness, the defendant may still present direct evidence of actual vindictiveness. *Wasman*, 468 U.S. at 569. But in doing so, it should presume that a within-guidelines sentence is based on the facts pled in the indictment and proved at trial. *See State v. Marcum*, \_\_ Ohio St. 3d \_\_, 2016-Ohio-1002 ¶ 13 (“[J]udicial factfinding” is “not necessary for imposing” a within-range sentence (citing *State v. Foster*, 109 Ohio St. 3d 1 syl., 2006-Ohio-856)). When reviewing Rahab's within-guidelines sentence, then, this Court defers to the trial court. *Marcum* held that appellate courts may only “vacate or modify” a within-guidelines sentence if it is “clearly and convincingly contrary to law” or if clear and convincing evidence shows “that the record does not support the sentence.” *Marcum*, 2016-Ohio-1002 ¶ 23.

The record does *not* show—especially by clear and convincing evidence—that the trial court gave Marcum a higher sentence in retaliation for going to trial. Instead, as the First District

found, “[t]he record establishes that the trial court based Rahab’s sentence on his personal history and the facts of the case, including the trauma suffered by the victim.” Op. at 3. The trial court also expressed concern about Rahab’s lack of genuine remorse. *Id.*; Trial Tr. at 456, 460, 469-70. While Rahab eventually apologized for his crime at sentencing, the trial court could “plausibly have found that Rahab’s offered apology was disingenuous.” Op. at 4. After all, he said several times that he did not think his offense “deserved” multiple years of imprisonment and “attempted to blame his attorney” for his predicament. Op. at 4.

### CONCLUSION

For the foregoing reasons, this Court should affirm the lower court’s judgment.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellee was served on July 26, 2016, on the following:

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