IN THE SUPREME COURT OF THE UNITED STATES

No._____

In re JOHN D. SEXTON,

Petitioner,

vs.

MICHAEL KEMNA,

Respondent.

Petition For A Writ Of Habeas Corpus
Pursuant To Rule 20's "Procedure On
Petition For An Extraordinary Writ"

PETITION FOR A WRIT OF HABEAS CORPUS

John D. Sexton
Register No. 522950
Crossroads Correctional Center
1115 East Pence Road
Cameron, Missouri 64429

Petitioner Pro-Se

QUESTION PRESENTED

I. WHEN A DEFENDANT SUCCESSFULLY APPEALS A CONVICTION AND AS A RESULT OF THAT CONVICTION HE IS FOUND TO BE GUILTY OF FEWER NUMBER OF SERIOUS CRIMES, IF ON RE-SENTENCING THE COURT IMPOSES THE SAME SENTENCE, IS IT IN FACT A HARSHER SENTENCE AND A DUE PROCESS VIOLATION UNDER THE RULE IN **NORTH CAROLINA V. PEARCE**, IN THE ABSENCE OF A RECORD BY THE SENTENCING COURT JUSTIFYING THE REIMPOSITION OF THE SAME SENTENCE?

This is a petition for an extraordinary writ, pursuant to Section 1651, and Supreme Court Rule 20.1, seeking this Court's Judicial Review and resolution of the split between the federal court's of appeals regarding the proper application of judicial vindictiveness under North Carolina v. Pearce.

OPINIONS BELOW

The Eighth Circuit's decision denying Sexton's petition for a writ of habeas corpus is published at Sexton v. Kemna, 278 F.3d 808 (8th Cir. 2002), and is also published in the Appendix at A-1.

Sexton has not made application to the district court, because that court would, in all probability, construe the instant petition to be a second or successive habeas petition. Moreover, the district court does not have authority to resolve the split between the circuits on this issue. In as much, adequate relief cannot be obtained in any other court or any other form. See Rules 20.1 and 20.4(a).

Finally, it is apparent that the Court's resolution of the split between the circuits "will be in aid of this and lower federal Court's appellate jurisdiction,...."

STATEMENT OF THE CASE

This case presents am important and recurring question of federal law on which the lower courts are hopelessly divided: How does the Due Process Clause's guarantee against judicial vindictiveness in criminal sentencing, as established in North Carolina v. Pearce, 395 U.S. 711 (1969), apply to sentencing after a successful appeal involving multiple-count convictions? This is a Constitutional question that has been left unresolved.

1. On January 26, 1994, Sexton was convicted in a Missouri State court on five counts of sodomy and one count of rape. Although under Missouri law the trial judge could have imposed six consecutive life sentences on those counts, see Mo. Rev. Stat. Sections 566.030, 566.060 (1991), he instead imposed five concurrent twenty-year sentences on the sodomy counts, and a consecutive twenty-year sentence on the rape count, for a total prison term of forty-years. Petitioner appealed, arguing that the court had improperly admitted evidence of uncharged misconduct. On February 1, 1995, the Missouri Court Of Appeals agreed, overturned the convictions, and remanded the case for re-trial.

2. A second jury acquitted petitioner of the rape charge, but again convicted him of the five sodomy charges. After this second conviction, the trial judge doubled the sentences he had previously imposed on the sodomy counts, giving petitioner five concurrent forty-year sentences. Thus, despite his acquittal on the rape charge, petitioner's total prison sentence was the same forty-year sentence he had received after the first trial.

In his remarks to the trial judge before imposition of sentence, counsel for petitioner argued that doubling petitioner's sentence on the sodomy counts after his successful appeal and subsequent acquittal on the rape charge was "punitive" with respect to petitioner's successful appeal. The trial judge, nonetheless, sentenced petitioner to forty-years imprisonment, and was completely silent as to his reasons for doubling the petitioner's sentences on the sodomy convictions.

3. On direct appeal petitioner argued that the new, doubled sentences of forty-years imprisonment violated Pearce. The Missouri Court Of Appeals overturned one sodomy conviction for insufficient evidence but upheld the other four convictions and petitioner's forty-year sentence.

4. Petitioner then sought post-conviction relief from the Missouri State Courts, arguing, inter alia, that the trial court had imposed an increased sentence after his appeal in violation of Pearce. The Circuit Court Of Jackson County, Missouri, denied petitioner relief, and the Missouri Court Of Appeals affirmed.

5. Petitioner filed a federal petition for a writ of habeas corpus, arguing that the state court violated Pearce by doubling his sentence on the sodomy counts after he successfully appealed his initial convictions. The district court denied relief, but granted petitioner a Certificate Of Appealablity.

6. A divided panel of the Eighth Circuit affirmed. The panel majority rejected petitioner's argument that his doubled

sentences violated Pearce, on the ground that the total punishment given by the second sentences had not increased beyond the total punishment imposed by the original sentence. The majority premised its conclusions largely on the fact that "most of its sister circuits had concluded that the total sentences should be compared" and on this Court's post-Pearce decisions that "have not broadly extended the Pearce presumption of vindictiveness." See Eighth Circuit Opinion, Id., citing Alabama v. Smith, 490 U.S. 794 (1989); Chaffin v. Stynchcombe, 412 U.S. 17 (1973).

7. Judge Richard Arnold dissented, arguing that "quite simple," petitioner did receive "a more severe sentence" because he "was convicted of fewer crimes at his second trial. Yet his sentence was the same as that following his first trial." Judge Arnold added that "our sister circuits are split on the application of Pearce to multi-count cases," but that in his view, "the better approach is that used by the Second and Eleventh Circuits." Id., citing U.S. v. Markos, 603 F.2d 409 (2d Cir. 1979) and U.S. v. Monaco, 702 F.2d 860 (11th Cir. 1983). In Judge Arnold's view, the majority's conclusion was "precisely the type of result that chills appeals by criminal defendants, who may believe that the increased sentence after retrial results from judicial vindictiveness."

8. Petitioner's petition for rehearing en banc was denied by the Eighth Circuit on March 29, 2002. Judge Morris Arnold would have granted rehearing en banc. On July 29, 2002, Sexton filed a petition for a writ of certiorari in this Court. That

petition was denied on October 7, 2002. Thereafter, petitioner filed a Petition For Rehearing under Rule 44.2. That petition was denied on January 13, 2003. Both petitions were denied by this Court through summary orders and without written opinion.

9. Petitioner now seeks an extraordinary writ from this Court for judicial review and resolution of the split between the federal courts of appeals regarding the proper application to be made under Pearce. Petitioner is requesting liberal construction of his pro se pleading in accord with Haines v. Kerner, 404 U.S. 519, 520 (1972).

REASONS FOR GRANTING THE WRIT

This case presents a significant & recurring issue which will undoubtedly will resurface again and again. This is due to the fact that numerous U.S. Courts Of Appeals and numerous State Supreme Courts have sharply split and divided themselves from this Court's decision in North Carolina v. Pearce, 395 U.S. 711 (1969). They have sharply divided themselves on the proper application of Pearce's presumption of vindictiveness where multiple-count indictments and convictions are involved.

This monumental split has occurred for 2 primary reasons: First, "North Carolina v. Pearce is a decision that is over 5 decades old." Second, "this Court has not, within those 5 decades, clarified pearce's presumption of vindictiveness principles involving multi-count indictments & convictions. Without this Court's guidance over the past 5 decades, the U.S. Courts of

278 F.3d 808

**UNITED STATES COURT OF APPEALS,
FOR THE EIGHTH CIRCUIT.**

John SEXTON, Petitioner—Appellant,
v.
Mike KEMNA, Respondent—Appellee.

No. 00-2764.

Submitted: Sept. 12, 2001.
Filed: Jan. 29, 2002.
Rehearing and Rehearing En Banc Denied
March 29, 2002.

Before LOKEN, RICHARD S. ARNOLD, and FAGG, Circuit Judges.

LOKEN, Circuit Judge.

Missouri inmate John Sexton appeals the denial of his petition for a writ of habeas corpus. Sexton argues that the state courts violated *North Carolina v. Pearce,* 395 U.S. 711 (1969), by imposing the same forty-year sentence for fewer counts of conviction after Sexton successfully appealed his initial conviction. He further argues the evidence was constitutionally insufficient to convict him of sodomy, he was denied his constitutional right to confront the victim at trial, and he was denied effective assistance of counsel. We affirm.

I. Background.

In January 1994, a jury convicted Sexton of one count of rape and five counts of sodomy.

The victim was Sexton's minor stepdaughter, R.C. The trial court sentenced him to five concurrent twenty-year sentences on the sodomy counts and a consecutive twenty-year sentence