IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. ROGER ROBERT FEBUARY, Defendant-Appellant Petitioner on Review.	Lincoln County Circuit Court Case No. 080982 CA A154662 SC S063867

PETITIONER'S BRIEF ON THE MERITS

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Lincoln County
Honorable Thomas O. Branford, Judge

Affirmed with Opinion: November 12, 2015
Author of Opinion: Tookey, Judge
Before: Sercombe, Presiding Judge, and Tookey, Judge, and Edmonds, Senior Judge

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STATEMENT OF THE CASE

Defendant was convicted of three felonies and two misdemeanors in 2009. The trial court sentenced him to two consecutive prison terms of 75 months, and one consecutive 20-month term for the felony convictions, and it suspended imposition of sentence on the misdemeanors. The Court of Appeals held that the trial court erred in admitting prior bad acts evidence and reversed. On remand, defendant pleaded guilty to one of the felonies and one of the misdemeanors (furnishing alcohol to a minor). The trial court again sentenced defendant to 75 months in prison on the felony, and added a consecutive, 12-month jail sentence for furnishing.

Defendant appealed, arguing that the trial court's sentence was presumptively vindictive under *State v. Partain* and *North Carolina v. Pearce* because it imposed a 12-month jail term for furnishing when it previously had suspended imposition of any sentence for that crime. The Court of Appeals declined to apply the presumption because the total of his sentences for the two offenses remaining after remand was shorter than the total of his five sentences for the crimes for which he previously had been convicted. Defendant petitioned this court for review.

Question Presented and Proposed Rule of Law

Question Presented

Due process requires that vindictive motivations, including self-vindication and institutional interests, play no part in successive sentencings. Reviewing courts must employ a rebuttable presumption whenever the circumstances make such motivations reasonably likely. Is there a reasonable likelihood of vindictiveness when, after reversal and subsequent dismissal of a majority of a defendant's charges, a sentencing court makes the total punishment closer to what it previously imposed by increasing the sentence on a surviving conviction?

Proposed Rule of Law

Because Oregon's sentencing scheme requires trial courts to determine the appropriate sentence for each offense, a reasonable likelihood of vindictiveness exists whenever a trial court increases a defendant's punishment for *any* offense after successful appeal. Therefore, when a trial court wishes to increase the punishment for any offense at a successive sentencing, it must provide a sufficient, non-vindictive explanation for the increase to rebut the presumption of vindictiveness.

Summary of Argument

Due process requires that vindictiveness play no part in the sentencing of a defendant after a successful attack on a prior conviction or sentence. An increase in sentence is "vindictive" when it arises not from the criminal conduct or characteristics of the defendant, but from a court's personal motivations or institutional interests, including self-vindication and efforts to deter challenges.

Because a trial court's motives are complex and difficult to prove, reviewing courts must presume vindictiveness whenever the circumstances of a successive sentencing create a reasonable likelihood that vindictiveness led to an increase in punishment. The presumption may be rebutted by identifying facts in the record that were not known at the original sentencing and that satisfy a reviewing court that vindictiveness played no part in the increase. When a sentencing court fails to identify adequate, non-vindictive reasons for the increase, reviewing courts must vacate the sentence.

Under Oregon's sentencing scheme, a reasonable likelihood of vindictiveness exists whenever a trial court increases the sentence for any offense on remand. Oregon's sentencing statutes require trial courts to determine the appropriate sentence for each offense of conviction, including misdemeanors, based on the defendant's conduct and personal characteristics. Misdemeanor sentencing is largely unstructured but permits a jail term of up to one year for each offense. Felony sentencing is subject to guidelines under

which the legislature has set ranges intended to include the appropriate sentence for each offense, and specific rules for deviating from those ranges based, again, on the defendant's conduct or characteristics. Those rules were adopted to control trial court discretion to prevent excessive variation in sentencing across Oregon courts. Trial courts may adjust the total punishment for multiple offenses via its statutory authority to implement some sentences consecutively, but that process is separate from the initial determination of the appropriate sentence length for each offense. Thus, under the Oregon system, a sentencing court is specifically tasked with determining the correct sentence for each offense when it imposes sentence.

Because an Oregon trial court will have previously determined the sentence it believed to be appropriate for each offense, there is a reasonable likelihood of vindictiveness when the same court changes a sentence to impose a greater punishment after a defendant has succeeded in having the trial court reversed. That is especially true when the increase in an individual sentence coincides with a decrease in the total amount of culpable conduct subject to sentencing. Under such circumstances, both human nature and institutional biases suggest that it is reasonably likely that the trial court's decision to increase an individual sentence is meant to minimize any reduction from the total punishment the trial court previously found appropriate. A sentence so motivated by self-vindication is impermissible under Supreme Court

precedents, inconsistent with the presumption of innocence that re-attaches to reversed counts, and violates due process. Accordingly, whenever an Oregon court increases a sentence under those circumstances, it must provide an explanation that rebuts the presumption of vindictiveness or due process will require vacation of the new sentence.

Federal court precedent is not to the contrary. Federal courts apply the test noted above when determining whether successive sentencing triggers a presumption of vindictiveness: asking if there is a reasonable likelihood of vindictiveness under the circumstances. But they apply that test to different circumstances than Oregon courts—resentencing under the federal sentencing guidelines. A majority of federal courts have adopted an "aggregate" or "package" approach based on the conclusion that the federal sentencing system does *not* create a reasonable likelihood of vindictiveness unless the total sentence is increased after remand. But the reasonability of that approach depends on features unique to the federal sentencing guidelines, features not shared by Oregon's system.

Specific attributes of the federal system drive the analysis of what sentencing changes are likely to suggest a "reasonable likelihood of vindictiveness" in federal sentencing. The federal sentencing guidelines use a complicated set of calculations to generate a combined offense level that determines a single, comprehensive sentence range for all of a defendant's

offenses. Unlike the Oregon system, each offense does *not* receive its own sentence. Moreover, offenses that are sufficiently related to the conduct involved in other offenses do not add to the combined sentencing score. Thus, by design, some offenses have no impact on the sentence (and, therefore, reversal of those convictions may not provide a basis for reducing the total sentence). In addition, the system provides adjustments to the offense level for things that are unrelated to any individual offense, like cooperation and assistance with other investigations.

Oregon's system is not comparable. Oregon sentencing statutes uniformly assume a per-offense sentencing system—every offense gets its own sentence. Oregon permits only limited interplay between sentences created by secondary questions involving the limited discretion under ORS 137.123 to impose some sentences consecutively, and by rules that shift individual

sentence ranges when an offense occurs during the same criminal episode against the same victim as a more serious offense.[1]

Because increases in individual sentences during Oregon resentencings create a likelihood of vindictiveness, such increases warrant application of the presumption even if the total of all sentences is not increased. Because an appropriate sentence is determined for each offense under Oregon's system, when significant offenses are reversed on appeal, vindictiveness will be indicated on resentencing not only when the total of all sentences is increased, but also when the total of all sentences is not reduced in an amount commensurate with the reduction in criminal liability. Thus, when it appears that a trial court may be compensating for "lost" convictions by increasing the sentence on a remaining conviction, it is required to provide a non-vindictive reason for that increase.

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[1] It is not necessary to resolve here whether a reasonable likelihood of vindictiveness exists whenever a trial court makes consecutive what was previously concurrent, or increases a sentence for an offense that had received a lower crime-seriousness score because of a same-criminal-episode rule. Those issues are not necessary to the resolution of this case. Here, the trial court established a reasonable likelihood of vindictiveness with a straight-forward and significant increase in the jail term imposed for defendant's furnishing conviction.

ARGUMENT

I. Due process requires that vindictive motivations, including motives to self-vindicate, deter challenges and punish defendants for appealing, play no part in a sentence imposed after a successful appeal.

The Supreme Court has held that due process of law[2] "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives." *North Carolina v. Pearce*, 395 US 711, 725, 89 S Ct 2072, 23 L Ed 2d 656 (1969).

A sentence is improperly vindictive when it is motivated in any part by: (1) "self-vindication" on the part of the trial court, or (2) "institutional interests" or "biases," including specific motivation to deter challenges and punish defendants for appealing. *Chaffin v. Stynchcombe*, 412 US 17, 27, 93 S Ct 1977, 36 L Ed 2d 714 (1973); *Texas v. McCullough*, 475 US 134, 138-39, 106 S Ct 976, 89 L Ed 2d 104 (1986). A likelihood of vindictiveness may arise when a court is asked "to do over what it thought it had done correctly," has a "personal stake" in the outcome, or is otherwise likely to be motivated by "self-vindication." *United States v. Goodwin*, 497 US 368, 383, 102 S Ct 2485, 73 L Ed 2d 74 (1982). "As a matter of logic, vindictiveness becomes a danger" when an event, like a reviewing court's determination of improper action, prods

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[2] The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

a court "into a posture of self-vindication." *Bono v. Benov*, 197 F3d 409, 417-18 (9th Cir 1999).

In *Chaffin*, the court considered whether the *Pearce* presumption should have applied when a second sentencing jury, without knowing what the prior jury had done, imposed a longer sentence on a defendant after reversal. The court explained that the system avoided the likelihood of "vindictiveness" because, "unlike the judge who has been reversed, [the jury] will have no personal stake in the prior conviction and no motivation to engage in self-vindication." 412 US at 27. "Similarly, the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals." *Id.*

In *McCullough*, the court reviewed a trial court's imposition of a sentence longer than that previously imposed by a sentencing jury, after the trial court had granted the defendant's motion for a new trial based on prosecutorial misconduct. 475 US at 135-36. The court reiterated the two ways in which a sentence could be vindictively motivated in resentencing situations. 475 US at 139. Specifically, in determining that there was no presumption of vindictiveness, the court found that: (1) because the trial judge was not the original sentencer and had not been reversed (but, rather, had granted the defendant's new trial motion himself), he had "no motivation to engage in self-vindication"; and (2) "[i]n such circumstances, there is also no justifiable

concern about 'institutional interests'" that might motivate a sentencing increase. *Id.* (quoting *Chaffin*, 412 US at 27).

A. Because motives are complex and difficult to prove, due process requires a presumption of vindictiveness whenever "a reasonable likelihood of vindictiveness exists."

To protect against the risk of vindictiveness, *Pearce* established that reviewing courts should employ a rebuttable presumption:

> "In order to assure the absence of such a motivation, we have 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. 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. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."

395 US at 726. The court subsequently modified the *Pearce* rule to permit rebuttal of the presumption with "new, probative evidence supporting a longer sentence," even if it that evidence did not concern conduct that occurred "after the time of the original sentence." *McCullough*, 475 US at 143.

The Supreme Court has further explained that, because a trial court's "[m]otives are complex and difficult to prove," the presumption of vindictiveness should be employed in cases "in which a reasonable likelihood of vindictiveness exists." *Goodwin*, 457 US at 373; *see also Blackledge v. Perry*, 417 US 21, 27-28, 94 S Ct 2098, 40 L Ed 2d 628 (1974) (the "lesson that

emerges" from caselaw is that the presumption applies under circumstances "that pose a realistic likelihood of 'vindictiveness'"). Thus, the presumption will often apply under circumstances in which the sentence increase follows retrial of issues that have already been decided because there is a "deep-seated" institutional bias inherent in the judicial system against post-decision change. *Goodwin*, 457 US at 376. For example, in *Perry* the Court held that, even though there was no evidence of *actual* vindictiveness, the presumption should have been applied because a reasonable likelihood of vindictiveness exists when a prosecutor obtains a felony indictment only after the defendant exercises his right to *de novo* review of a misdemeanor conviction. 417 US at 27-28.

On the other hand, the Court has found that there is no reasonable likelihood of vindictiveness (and, therefore, no presumption) when a sentence is increased by a different sentencer, unaware of the first sentencing. For example, under Georgia's jury sentencing system, there is no need for the presumption of vindictiveness when a second jury imposes a significantly longer sentence than a previous jury because the second juries are unaware of the initial proceedings. *Chaffin*, 412 US at 27. The second jury lacked any reason to be vindictive because it had "no personal stake," "no motivation to engage in self-vindication," and was "unlikely to be sensitive to the institutional interests." *Id.*

Similarly, there is no reasonable likelihood of vindictiveness inherent in Kentucky's two-tier system for adjudicating less serious criminal cases. *Colten v. Kentucky*, 407 US 104, 92 S Ct 1953, 32 L Ed 2d 584 (1972). In that system, a defendant can opt for a trial to an inferior court with the right to *de novo* review in a court of general criminal jurisdiction. The system does not create a likelihood of vindictive sentencing because the "trial *de novo* represents a completely fresh determination of guilt or innocence" in a proceeding in which "the record from the lower court is not before the superior court and is irrelevant to its proceedings." *Id.* at 117-18 (noting further that "In all likelihood, the trial de novo court is not even informed of the sentence imposed in the inferior court and can hardly be said to have 'enhanced' the sentence.").

Based on federal precedent, this court has held that the presumption of vindictiveness must be applied to resentencing in Oregon such that:

> "If an Oregon trial judge believes that an offender whom the judge is about to resentence should receive a more severe sentence than the one originally imposed, the judge's reasons must affirmatively appear on the record. Those reasons must be based on identified facts of which the first sentencing judge was unaware, and must be such as to satisfy a reviewing court that the length of the sentence imposed is not a product of vindictiveness toward the offender. Absent such facts and reasons, an unexplained or inadequately explained increased sentence will be presumed to be based on vindictive motives, and will be reversed."

State v. Partain, 349 Or 10, 25-26, 239 P3d 232 (2010).

Thus, a presumption of vindictiveness exists when a trial court increases a sentence after retrial following a successful appeal because those circumstances present a reasonable likelihood of vindictiveness. But the circumstances may not justify the presumption if a different sentence, unaware of the original sentence, imposes a greater sentence.

B. Under Oregon's sentencing system, a "reasonable likelihood of vindictiveness" exists when a trial court imposes the maximum incarceration term for a misdemeanor for which it previously suspended imposition of sentence.

Here, defendant was resentenced by the same judge, after one of the judge's rulings was reversed, and after that judge previously had come to a conclusion on the appropriate sentence for defendant's misdemeanor conviction. Accordingly, the court was operating under the same circumstances that suggested a reasonable likelihood of vindictiveness as the judges in *Pearce* and *Partain*. Those circumstances were unlike those in *Chaffin* and *Colten*, because the trial court may have had a personal stake in defendant's sentencing, creating a risk that it was motivated, at least in part, by self-vindication. For that reason, the trial court was required to identify appropriate, non-vindictive reasons for increasing defendant's sentence in order to comply with *Partain*.

The Court of Appeals, however, relied on a federal resentencing rule to hold that the *Pearce* presumption did not apply because the total of all of defendant's sentences in the second proceeding did not exceed the first. But

whatever it might indicate under the federal system,[3] the fact that the trial court did not increase the total "aggregate" sentence did *not* logically eliminate the likelihood of vindictiveness under Oregon's sentencing scheme.

In Oregon, unlike in the federal system, sentencing courts must determine the proper sentence for each and every offense of conviction. Here, the trial determined the appropriate sentence for each of defendant's offenses at his initial sentencing. At resentencing, without any new information related to the culpability of defendant's conduct, or related to defendant himself, the trial court changed the punishment for defendant's furnishing conviction from no incarceration (suspended imposition of sentence) to the maximum sentence allowed by law (12 months in jail). As set out below, against the backdrop of Oregon's per-offense sentencing system, those circumstances plainly suggest a reasonable likelihood of vindictiveness. And that is so regardless of the fact that the trial court imposed a shorter total term of incarceration for the two crimes for which it resentenced defendant than it had previously imposed for five offenses.

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[3] Defendant explains, below, why features of the federal sentencing scheme may make it reasonable to find that there is little likelihood of vindictiveness in federal resentencings unless the total sentence is increased.

i. Oregon statutes create a per-offense sentencing system.

In Oregon, all sentencing authority is provided by the legislature. ORS 137.010 specifically provides trial courts with the authority to impose a sentence whenever a person is convicted of "an offense." The primary sentencing laws currently used in Oregon were promulgated by the Oregon Criminal Justice Council and became law by vote of the legislature in 1989. *State v. Davis*, 315 Or 484, 486-87, 847 P2d 834 (1993). The Council was tasked with setting out the guidelines for both felonies and misdemeanors, though it never created misdemeanor guidelines. Oregon Criminal Justice Council, *Oregon Sentencing Guidelines Implementation Manual* 4 (Sept. 1989). However, because "[t]he process and criteria for the development of misdemeanor guidelines are comparable to those applicable to felony guidelines," one can gain insight into the purposes and principles behind misdemeanor sentencing in Oregon by reviewing what it created for felony sentencing. *Oregon Sentencing Guidelines Implementation Manual* at 4 n 4.

Under OAR 213-002-0001(1), the "primary objectives of sentencing are to punish each offender appropriately" to ensure security of the people of Oregon. Further, "the appropriate punishment for *a* felony conviction should depend on the seriousness of *the crime of conviction* when compared to all *other crimes* and the offender's criminal history." OAR 213-002-0001(3)(d)

(emphasis added). Subject to discretion to deviate in recognition of aggravating and mitigating circumstances, the system "should seek to respond in a consistent way to like crimes combined with like criminal histories." OAR 213-002-0001(3)(e). Thus, the Oregon sentencing system tasks trial judges to consider the offense and offender characteristics, find *the* appropriate sentence for each offense of conviction, and guided by "truth-in-sentencing" principals, set a determinate sentence for each such offense. Commentary, *Oregon Sentencing Guidelines Implementation Manual* at 7.

Those statutes establish that, although trial courts in other states might seek first to divine an appropriate total sentence based on the full array of a defendant's misconduct, Oregon's sentencing system was not so designed. Rather, in order to bring more consistency to sentencing across courts,[4] Oregon created a per-offense system in which each offense must be given a single, appropriate sentence. *See* ORS 137.010(1) ("The statutes that define offenses impose a duty upon the court having jurisdiction to pass sentence in accordance with this section or, for felonies * * * [the] rules of the Oregon Criminal Justice Commission * * *."); OAR 213-002-0001(3)(d) (the appropriate punishment for each conviction should depend on the seriousness of the crime of conviction

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[4] *See* Commentary, *Oregon Sentencing Guidelines Implementation Manual* at 7 ("express principle" of enabling legislature was to insure "reasonably uniform and proportional" sentences across judges).

when compared to all other crimes and the offender's criminal history). Although trial courts have some discretion in the exact length of each sentence (based on the applicable gridblock values), and additional discretion in how they build sentences together (with the consecutive sentencing authority provided by ORS 137.123), the system is a build-up model, *not* a gestalt model. *See* OAR 213-004-0001 *et seq* (providing basic building-block structure for Oregon felony sentencing); ORS 137.123 (establishing presumption of concurrent sentencing, and providing criteria for determining when consecutive sentences may be imposed). Thus, the sentencing rules do *not* instruct courts to use their individual judgment to intuit the correct total punishment for a defendant, but instead were designed to reduce the disparity that would be engendered by such individualized decision-making. *Oregon Sentencing Guidelines Implementation Manual* at 5; Commentary, *Oregon Sentencing Guidelines Implementation Manual* at 7. The system serves that goal by establishing the "appropriate punishment" for each conviction, and by permitting the stacking of offenses only when justified by statutory criteria. *Oregon Sentencing Guidelines Implementation Manual* at 5; ORS 137.123.

In a system that does not require sentences for each offense, it might be reasonable to assume that the failure of a trial court to provide a sentence for a particular offense, or to provide too low a sentence, was a direct consequence of having other offenses available. Under such a system, non-vindictive reasons

for imposing or increasing sentences would regularly exist when other offenses become unavailable.

But in Oregon, a trial court is specifically tasked with determining the proper sentence for each offense in the first instance. If the trial court does not wish to increase the total punishment when it imposes such a sentence, it need do nothing beyond announce the sentence. That is because the Oregon legislature established that all sentences imposed in the same proceeding are presumed to be concurrent. ORS 137.123(1). If a trial court wishes to make some, or all, of the sentence consecutive to a different sentence, it must comply with the authority provided in ORS 137.123 for doing so. Thus, in Oregon, because trial courts are presumed to follow the law, it is reasonable to assume that the trial court's original sentence for any individual crime is the sentence that it found to be the appropriate, lawful sentence for that particular offense and that particular offender.

ii. Under the appropriate-sentence-for-each-offense paradigm, an increase in an individual offense, without a change in offense or offender-related facts, suggests a reasonable likelihood of vindictiveness.

Under a system requiring imposition of individually appropriate sentences for each offense, there is a reasonable likelihood of vindictiveness whenever a judge, who holds a previous, self-generated conception of the total appropriate punishment for a defendant, increases any individual sentence on remand in a way that makes the total punishment closer to the previous mark. When a court acts in that manner while addressing a reduced array of convictions and available punishments (because a reviewing court has reversed a previous judgment), it is reasonably likely that the court is motivated by self-vindication.

a. Psychological studies show a likelihood of self-vindication by judges under relevant circumstances.

Asserting that self-vindication is likely to motivate trial courts at resentencing is not intended to disparage judges. In fact, psychological studies have demonstrated that mental processes, including "cognitive dissonance," "confirmation bias," and the "anchoring-and-adjustment heuristic," to name a few, create a near-ubiquitous human tendency to insufficiently adjust to new information after previously taking a position. *See, e.g.*, Leon Festinger and James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58

Journal of Abnormal and Social Psychology 203 (1959) (classic study demonstrating effects of "cognitive dissonance" in which subjects come to internalize espoused (inaccurate) previous position absent adequate external explanations); Raymond S. Nickerson, *Confirmation Bias, Ubiquitous Phenomenon in Many Guises*, 2 Rev Gen Psych 175 (1998) (explaining mental processes that cause people to seek and find information that confirms already held opinions, and ignore or under-appreciate contradictory evidence); Wayne A. Wallace, *The Effect of Confirmation Bias on Criminal Investigative Decision Making*, Walden University Doctoral Dissertation, (2015) (study of confirmation bias in criminal investigations); Nicholas Epley and Thomas Gilovich, *Are Adjustments Insufficient?*, 30 Personality and Social Psychology Bulletin 447 (2004) (describing robust evidence of anchor-and-adjustment heuristic which causes people to insufficiently adjust to new information when they have a self-generated, pre-existing "anchor"); Nicholas Epley, Boaz Keysar, Leaf Van Boven, and Thomas Gilovich, *Perspective Taking as Egocentric Anchoring and Adjustment*, 87 Journal of Personality and Social Psychology 327 (2004) (finding that people insufficiently adjust from prior personal opinion (egocentric anchors) when given additional information).

Such studies reveal that, once a person takes a position, they insufficiently adjust to new information. Specifically, because of cognitive dissonance, a judge subconsciously may be motivated to justify a prior decision

by finding ways to view it as correct, thus resolving the dissonance created by reversal after a conviction and sentencing decision. Similarly, confirmation bias creates a tendency to search for, and makes it more likely that one will find, evidence that supports one's prior position. And finally, the anchor and adjustment heuristic causes the human mind to reason from a prior position, or anchor, in a way that fails to adequately adjust to new information. That results in a final position that is far nearer the prior position than the available information can logically support. In sum, studies like those cited above establish that people hold onto prior positions too strongly in the face of new information—they self-vindicate.[5]

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[5] Notably, in addition to providing support for finding self-vindication "reasonable likely" when the same judge resentences a defendant, the research of Epley and Gilovich also suggests that the best way to reduce the magnitude of the adjustment-based anchoring biases is to foster the willingness and ability to seek more accurate assessments (that is, assessments based more accurately on the full information available). Nicholas Epley and Thomas Gilovich, *The Anchoring-and-Adjustment Heuristic, Why the Adjustments Are Insufficient*, 17 Psychological Science 316 (2006). Thus, requiring trial courts to provide reasoned explanations for an increase in sentence based on appropriate criteria could serve to reduce the effect of prior "anchors" by incentivizing further fact-finding. Because the tendency towards self-vindication of prior sentencing decisions is also inconsistent with the re-attachment of the presumption of innocence after reversal of a conviction, requiring those explanations both reduces the likelihood of vindictiveness and promotes fair sentencing practices based on proper factors. Of course, given the ubiquity of confirmation biases, making judges seek additional evidence to support a sentence increase is not likely to eradicate self-vindication altogether.

Studies have also revealed that judges are just as human as everybody else in that regard.[6] *See*, *e.g.*, Birte Englich, Thomas Mussweiler, and Fritz Strack, *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 Personality and Social Psychology Bulletin 188 (2006) (finding that experienced judges are no less susceptible to anchor and adjustment heuristic as others); Eyal Peer, Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 Court Review 114 (2013).

In James P. Monacell, *An Application of Cognitive Dissonance Theory to Resentencing and Other Reappearances by the Same Judge*, 1 Law and Human Behavior 385 (1977), Monacell reviewed the robust findings concerning cognitive dissonance and applied them to the circumstances that face judges during resentencing. He explained that cognitive dissonance applies to resentencings because sentencing courts are likely to experience "great" dissonance at sentencing. Monacell, *An Application of Cognitive Dissonance*

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[6] Although self-vindication is a ubiquitous tendency in humans, it is especially problematic when employed by judges. It is at odds with fundamental concepts of fair procedure. When it involves a continued belief in a criminal defendant's culpability as found previously, it may be contrary to the presumption of innocence that must re-attach to a charge after a conviction has been reversed. But even when it simply causes a judge to insufficiently adjust to new information or changed circumstances, it influences sentencing decisions in ways that are unrelated to the merits of the case. Accordingly, when the circumstances of a resentencing procedure create the likelihood of such self-vindication, due process requires use of the *Pearce* presumption.

Theory to Resentencing and Other Reappearances by the Same Judge, at 387-90. Judges' sentencing decisions are important and difficult. They weigh social needs against significant portions of defendants' lives. *Id.* at 389. Because of the conflicting pulls in such sentencing decisions, judges are likely to be under continuing, internal pressure to justify (vindicate) their decisions to resolve the dissonance. *Id.* A remand for resentencing then focuses on the judge's remaining dissonance, and is, therefore, likely to result in unconsciously "freezing" the prior decision, even if it requires the judge to "alter beliefs concerning the validity of factually matters pertaining to each sentencing alternative" in order to be consistent with the sentence. *Id.* Trial courts may also experience dissonance because their need to know that they perform their weighty sentencing function appropriately (knowledge important to the protection of their psyche), may create dissonance with the appellate court's decision reversing the prior judgment.

Monacell noted that cognitive dissonance research actually suggests two, diametrically opposed, possible affects. First, judges may seek to justify their prior decisions, freezing them even if it requires changing their beliefs regarding relevant facts to validate the prior sentence. On the other hand, particularly authoritative appellate judgments (like from particularly prestigious courts or judges) might cause some judges to drastically change the sentence by *overly*-focusing on the new information. That is, they might be driven to

resolve the dissonance by explaining their prior inaccuracy through external sources, particularly, new developments in the law. However, "[i]n either case the judge tends to make the resentencing decision on the basis of personal psychological motivations rather than the merits of the case." *Id.* at 390. Consequently, Monacell concluded that, despite the costs, different judges should be used at resentencing because of the unavoidable and inappropriate influence of a judge's prior decisions on resentencing. *Id.* at 390-401.[7]

The risk of self-vindication exists in Oregon when the same judge increases a sentence on any particular offense, after reversal by an appellate court, so that the total punishment more closely approximates the prior punishment. Cognitive dissonance theory predicts that a sentencing court that has at one time determined what the proper punishment was for a defendant, and imposed it on him, may be under internal pressures to vindicate that prior punishment independent of the merits of the case. Other psychological phenomena also increase the likelihood that a judge subconsciously will seek to justify the prior punishment through self-vindication unrelated to legitimate sentencing factors. For example, confirmation bias suggests that a judge will

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[7] Monacell also noted that at least one panel of the Ninth Circuit has held that the same judge is not permitted to hear claims that he was improperly influenced by prior, uncounseled convictions, because cognitive dissonance may inhibit the judge's ability to give it a full and fair hearing. Monacell, *An Application of Cognitive Dissonance Theory to Resentencing and Other Reappearances by the Same Judge*, at 399.

have an unconscious motivation to seek evidence confirming the appropriateness of the prior punishment, and also suggests that he will disproportionately find it. And the anchor and adjustment heuristic establishes that it is quite unlikely that the judge will sufficiently adjust away from the prior punishment amount (the anchor), despite the changes in relevant circumstances.

b. As illustrated by this case, the likelihood of self-vindication is not limited to circumstances in which only the total punishment is increased.

Nothing about the likelihood of self-vindicating motivations for increasing individual-offense sentences under Oregon's system is logically related to whether the resentencing punishment exceeds the total punishment previously imposed. In fact, self-vindication may be particularly likely to lead a court to impose the *same* total punishment on resentencing, or as near as the court may approximate, even after the appellate court has reversed convictions and significantly reduced the amount of culpable conduct for which defendant is liable. *See*, *e.g.*, Monacell, *An Application of Cognitive Dissonance Theory to resentencing and Other Reappearances by the Same Judge*, at 389-90 (discussing likelihood of judges' "freezing" prior decisions). Put another way, because Oregon judges are tasked with determining the correct sentence the first time, when post-conviction decisions significantly reduce the number of offenses for which a defendant is liable, a failure to reduce the total term of

imprisonment suggests possible vindictiveness. Accordingly, the presumption of vindictiveness should be triggered when an Oregon trial court increases any individual sentence such that it minimizes the reduction in total punishment after reversal of some of a defendant's convictions.

This case is illustrative. Nothing inherent in the fact that all of defendant's convictions had been vacated (returning his presumption of innocence), or that the state had dismissed a majority of his previous charges, justified a change in that prior determination to increase his punishment for either of the two remaining convictions. Nevertheless, the trial court imposed the maximum incarceration term—12 months in jail—for his misdemeanor furnishing conviction, when it previously had suspended imposition of sentence for that crime. Consequently, there is a reasonable likelihood that the trial court was motivated by self-vindication, and it was required to put reasons for the sentence increase on the record.

The likelihood of vindictiveness was not altered by the fact that the trial court did not exceed the prior total of defendant's sentences. On remand, the trial court had only two offenses to sentence—an 8I-gridblock felony subject to a 75-month mandatory minimum, and misdemeanor furnishing. The maximum authorized sentence for those crimes was 87 months of incarceration (75 months prison + 12 months jail). The previous total sentence (170 months) was made up of punishments for five convictions, including three times the number

of felony offenses. No matter how vindictively motivated the trial court may have been, it could not have exceeded the prior punishment. Under those circumstances, the mere fact that the trial court did not do what it could not have done does not logically reduce the likelihood of a vindictive motivation.

The fact that the total punishment was necessarily reduced by the absence of two felony convictions provides no logical basis for excusing the trial court from the requirement that it provide adequate reasons for increasing a sentence that it had determined to be appropriate for the same offense and offender before. At resentencing, defendant was no longer convicted of the reversed and dismissed crimes. He was, instead, presumed to be innocent of them. Thus, no additional punishment for the culpable conduct related to those crimes should have been imposed by the trial court at the resentencing. If no additional punishment was warranted by the dismissed offenses, then the fact that the new, total punishment was necessarily reduced by their absence is irrelevant to the trial court's motivation in increasing the punishment on the furnishing count.

On the other hand, the trial court increased defendant's punishment for furnishing from no incarceration to the maximum allowed by law. When doing so, it pointed to no new information suggesting that defendant engaged in more culpable conduct than it previously had relied on in determining the appropriate sentence for that offense. Thus, the record contains a substantial increase in defendant's furnishing sentence, and no evidence of a non-vindictive

explanation for that increase, and that is true regardless of the fact that the trial court did not exceed the total, prior punishment.

The following is another example that illustrates the need for a per-offense rule in Oregon to ensure that vindictiveness plays "no role" in resentencing. A trial court finds defendant guilty of furnishing alcohol to 12 minors at a party. The trial court announces sentence, stating that because each offense harmed a different victim, defendant should serve one month in jail for each, for a total of 12 months. On appeal, defendant establishes that the evidence was insufficient to prove that he provided any of the alcohol except for a single beer that he handed to a single minor as charged in Count 12. At resentencing, the trial court increases the sentence on Count 12 from one to 12 months, stating that it is not acting vindictively but simply believes that defendant needs his irresponsibility corrected.

Under an "aggregate" approach, a reviewing court would not employ a presumption of vindictiveness, and the defendant's sentence would be affirmed for failure to prove that the trial court acted vindictively. Under defendant's proposed rule, the reviewing court would reverse and remand, requiring the trial court to provide a specific, non-vindictive reason for the 1,200% increase in punishment on Count 12.

The latter outcome is required by due process. At the resentencing, the hypothetical defendant must be presumed innocent of furnishing alcohol for the

other 11 minors at the party. But the trial court previously held that he was guilty of that conduct, and crafted an appropriate punishment based on that finding. Under such circumstances, imposing the same sentence on remand, without non-vindictive explanation, suggests a strong likelihood of self-vindication. It would not be unlikely for the trial court to be influenced by its prior determinations, perhaps continuing to believe that the defendant's actual culpability extends to all the charged crimes, despite the reversal, and therefore merited the same sentence. Yet even with the likelihood that that motivation affected the trial court's sentencing decision, the new sentence would pass the Court of Appeals' "aggregate" approach. Accordingly, that approach is insufficient to ensure that vindictiveness "play no role" in resentencing in Oregon.

iii. The same rule should apply to felony sentencing, and changes from concurrent to consecutive sentences, but those issues do not need to be resolved in this case.

This case does not involve an increase in sentence under Oregon's felony sentencing guidelines, nor does it involve an increase in sentence that is solely the result of changing a sentence's implementation from concurrent to consecutive. Consequently, this court may resolve this case without addressing whether the same rule would apply in the felony context and to consecutive sentencing decisions. It is clear from *Partain* that *at least* the aggregate approach applies to such questions because the successive sentence in *Partain*

was longer in the aggregate than the prior sentence, and the trial court achieved that result through modification of its consecutive sentencing decisions. 349 Or at 12-13. However, the *Partain* court was not asked to address whether an individual sentence could be presumptively vindictive even if the total punishment did not exceed a previous total, and it did not specifically consider the nature of the consecutive sentencing decision itself.

Although it is not necessary to resolution of this matter, the reasonable likelihood of vindictiveness test suggests that increases in individual felony sentences should be treated as requiring the presumption for the same reasons as increases to misdemeanor sentences. Similarly, a change from a sentence previously imposed concurrently to make it consecutive would also smack of likely vindictiveness if done without explanation. It may be that the types of explanations that would be sufficient to rebut the presumption of vindictiveness in such cases would be different than those in the misdemeanor context, but the need for the presumption would be the same. For example, it may be that, under some circumstances, restructuring concurrent sentences will be required when resentencing a complicated case after an appellate ruling that affects only some of the sentences. And that sort of need for restructuring the sentence could provide a sufficient justification to rebut the presumption in some cases. But that mere possibility would not defeat the need for the presumption as a

general rule whenever sentences are effectively increased by a change from concurrent to consecutive implementation.

To illustrate: A trial court convicts a defendant of attempting to murder two different individuals, and two additional counts of unlawful use of a weapon (UUW) for pointing a gun at them. At sentencing, the court determines that defendant is a 9A on the guidelines grid (66-72 months) for the attempted murders, and imposes 90-month sentences on each conviction under Ballot Measure 11. The trial court makes them consecutive because the crimes involved harm to two victims. The trial court also imposes concurrent 25-month prison sentences on the UUW convictions (under guidelines gridblock 6A), noting that those offenses may have been incidental to the attempted murders. Thus, the trial court imposes a total punishment of 180 months in prison.

On appeal, the defendant establishes that there was insufficient evidence that he intended to murder the second "victim." On resentencing for the remaining count of attempted murder, the trial court imposes an upward departure sentence (because defendant had been on supervision at the time of the offense) of 130 months in prison. The court then imposes two, consecutive terms of 25 months for the UUW convictions, stating that the trial court now believes that the defendant evidenced a willingness to commit separate crimes. Thus, the court again imposes a total punishment of 180 months in prison.

Under those circumstances, a rule requiring a non-vindictive explanation for that sentence would not only be appropriate, but necessary to make sure that vindictiveness played "no role" in the resentencing. Without such an explanation, vindictiveness seems a likely explanation for why the defendant was given the same sentence for trying to kill a single person that the trial court previously determined was appropriate for trying to kill two. The fact that the second sentence was not greater than the total prior punishment, and was otherwise permissible under the guideline rules and through operation of the consecutive sentencing statute, does not logically dispel the likelihood of vindictiveness indicated by the new sentences.

C. The federal "aggregate" or "package" approach may meet the due process test because of unique aspects of the federal sentencing guidelines not shared by Oregon sentencing.

The Court of Appeals erroneously relied on federal precedents to hold that the *Pearce* presumption is not required when the total of resentenced punishments does not exceed the total of prior sentences, regardless of the number of prior convictions acquitted, vacated, or dismissed. As discussed above, that conclusion is not warranted under Oregon's sentencing scheme. Federal precedents do not suggest otherwise. Rather, the federal cases are based on an entirely different sentencing scheme, one in which it is a close question whether a "reasonable likelihood of vindictiveness" exists when a

resentencing court imposes a similar, but not higher, sentence even after an appellate court has reduced the total number of convictions.[8]

There are many reasons why a reasonable likelihood of vindictiveness may not exist under the federal sentencing guidelines unless the successive sentence exceeds the original, even when some of the underlying convictions have been reversed. The federal sentencing guidelines, unlike Oregon's, bundle all crimes being sentenced at one time and require calculation of a single, "combined offense level" from a plethora of criteria. That score corresponds to a specific range of sentences from which district courts select the appropriate single sentence for the entire bundle. *See* United States Sentencing Commission, *Guidelines Manual*, §3D, intro. comment., p 362 (Nov. 1, 2015). The system is designed to "limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct." *Id.* Accordingly, "[c]onvictions on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not

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[8] The closeness of the question under the federal sentencing guidelines is demonstrated by the split among federal courts on the question. *See, e.g., United States v. Campbell*, 106 F2d 64, 67-68 (1997) (noting split). A majority of federal district courts have employed an "aggregate" or "package" approach that presumes no vindictiveness unless the total punishment after remand exceeds the prior amount of punishment. *Id.* But a minority of district courts use either a "remainder aggregate" (comparing aggregate sentence that would have been imposed based only on *nonreversed* counts to new sentence), or a "count-by-count" approach. *Id.*

otherwise accounted for by the guidelines," but instead are treated as "constituting a single offense." *Id*. The guidelines also include "adjustments" for facts that are not necessarily related to the conduct underlying individual crimes. *See, e.g.*, USSG §3E (2 level reduction in score for demonstrating acceptance of responsibility, 1 additional level for timely pleading guilty); USSG §5K1.1 (availability of departure for assistance to authorities). Consequently, under the federal system, individual convictions can be reversed without significantly altering the combined score and, thereby, the ultimate sentence.

Thus, the complex scoring system of the federal sentencing guidelines significantly limits sentencing discretion and opportunities for vindictiveness. It relies on components that may require only specific, automatic changes on remand (like adjustment to criminal history and baseline scoring of included, independent offenses). If a federal court somehow increases the *combined offense level*, and thus the total sentence, after a defendant succeeds in an appellate challenge, that increase suggests an abnormal result of the scoring system indicative of manipulation that is likely due to vindictiveness. However, because the rigorous scoring system does *not* invite general estimation of appropriate sentencing, but instead utilizes a mechanistic calculation that does *not* provide additional punishment for each individual offense, a successive sentence that is similar, but not greater, than a prior one does not necessarily

suggest a likelihood of vindictiveness. The likelihood that vindictiveness explains a similar sentence is further reduced by the fact that not all offenses contribute to the combined offense level, and some scoring factors are independent of any particular offense.

It is for those reasons unique to the federal system that several states have found the federal court decisions inapposite to the application of *Pearce* to specific state sentencing systems. *See, e.g.*, *State v. Abram*, 156 NH 646, 655, 941 A2d 576 (2008) (rejecting application of "sentencing package" doctrine because it "is uniquely adapted to federal sentencing law," and holding that application of the doctrine in the state's sentencing system would permit sentences that are vindictively-motivated); *State v. Saxon*, 109 Ohio St 3d 176, 179-80, 846 NE2d 824 (2006) (noting that "sentencing package" doctrine makes "good sense" in the federal system because of single-combined-offense-level model of Federal Sentencing Guidelines that treats groups of offenses as a single offense, but rejecting application in Ohio because Ohio statutes suggest a "one offense at a time" focus); *cf. Wilson v. State*, 123 Nev 587, 170 P3d 975 (2007) (distinguishing complexity of federal sentencing law, and noting that state does not adhere to federal "sentencing 'package' doctrine" because of difference, then finding state double jeopardy protection applicable despite inapplicability of federal version).

This court, too, should apply the "reasonable likelihood of vindictiveness" test to the circumstances that arise under the state's sentencing system. And it should decline to borrow a federal approach that may be justified by system features that Oregon does not share.

CONCLUSION

For the above reasons, this court should reverse the decision of the Court of Appeals and remand this case to the trial court for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8, 004 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on May 19, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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