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 No. 080982 CA A154662 SC S063867

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW ON REVIEW STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Lincoln County
Honorable THOMAS O. BRANFORD, Judge

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

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INTRODUCTION

This case concerns a trial court's exercise of discretion in resentencing a defendant on multiple counts of conviction, after the defendant's original convictions were reversed on appeal. The question on review is whether this court should impute a vindictive motive to the trial court when, in resentencing defendant for a different group of convictions than those at issue in the first sentencing, it increased a sentence on a single count but imposed a significantly shorter overall prison sentence.

Defendant was originally convicted of five counts stemming from his sexual abuse of a 13-year-old child. The court imposed a total of 170 months' imprisonment on three felony counts (two 75-month sentences on two counts of first-degree sexual abuse and one 20-month sentence for attempted second-degree sodomy) and concurrent 60-month probationary sentences on the two misdemeanor counts (furnishing alcohol to a minor and sexual harassment). After defendant appealed and obtained a remand for a new trial, however, defendant pleaded guilty to one felony (first-degree sexual abuse) and one misdemeanor (furnishing alcohol to a minor) in exchange for dismissal of the remaining charges.

As a result, the trial court—on remand—faced a different array of

convictions than it had faced at the original sentencing, which caused the court to reassess the sentences it would impose. The court explained on remand that it viewed defendant's furnishing-alcohol crime as "malicious"—just as the court had at the initial sentencing—because defendant had given alcohol to the 13-year-old victim to "facilitate" sexual abuse. At the initial sentencing, however, defendant had received over 14 years of prison time on *other* counts, so the court felt that it was not necessary to impose incarceration on the furnishing-alcohol count. On remand, the court faced convictions that, although fewer in number, nonetheless reflected malicious conduct warranting significant incarceration time. To ensure that defendant's total sentence was commensurate to that conduct, the court imposed a 75-month mandatory minimum sentence for the felony and a 12-month jail term for the misdemeanor furnishing-alcohol count.

Defendant now urges that, in light of the change to the misdemeanor sentence, this court should presume that the trial court was vindictively motivated and that the sentence violated his due-process rights. As an initial matter, this court should not reach that question because no statute confers appellate jurisdiction where, as here, a defendant pleads guilty and then presses a due-process challenge to his misdemeanor sentence. In any event, this court should not presume the trial court vindictive—thereby requiring the court to

affirmatively explain why it was *not* vindictive—when it increased a single sentence on remand but did not impose a greater total sentence. As the trial court's sentencing decision demonstrates, when resentencing a defendant in a multi-count case following the defendant's successful appeal, trial courts legitimately may and should consider the counts as a whole. As a result, trial courts possess discretion to increase an individual sentence on remand to arrive at an appropriate overall sentence. This court should not attribute a vindictive motive to that exercise of discretion, so long as the overall sentence does not exceed the original.

First Question Presented

Does an appellate court have jurisdiction when a defendant pleads guilty to a felony charge and a misdemeanor charge, and then appeals, challenging the misdemeanor sentence on due-process grounds?

First Proposed Rule of Law

No. Where a defendant challenges the imposition of a misdemeanor sentence following a guilty plea, the statute that sets out the permissible grounds for appeal—ORS 138.050—does not authorize a due-process challenge to the misdemeanor sentence. And the separate provision that allows a defendant to "appeal a judgment of conviction based on the sentence for a felony"—ORS 138.222(7)—does not confer jurisdiction merely because the judgment also contains a separate, unchallenged felony sentence.

Second Question Presented

When, in resentencing a defendant on multiple counts following his successful appeal, a trial court increases a single sentence within the sentencing package but imposes a total sentence that is no greater than the original, does the Due Process Clause require an appellate court to presume that the increase reflects a vindictive attempt to punish the defendant for a successful appeal?

Second Proposed Rule of Law

No. It is proper for a trial court in a multi-count case to take into account the overall package of sentences in assigning a sentence on each count. Accordingly, a trial court should not be presumed vindictive when, upon considering a different group of convictions than it did originally, it changes an individual sentence but does not increase the overall sentence.

Summary of Argument

The Due Process Clause of the United States Constitution forbids a trial court from imposing a more severe sentence on remand if it does so for the "vindictive" purpose of punishing the defendant for having obtained a reversal of the initial convictions. Where there is evidence that a trial court has imposed a sentence for that purpose, the sentence violates due process.

Here, defendant has made no effort to prove actual vindictiveness on the part of the trial court. Instead, he invites this court to impute a vindictive motive to the trial court, under *North Carolina v. Pearce*, 395 US 711, 89 S Ct

2072, 23 L Ed 2d 656 (1969), and *State v. Partain*, 349 Or 10, 239 P3d 232 (2010). Each case establishes that a trial court should be presumed vindictive when it increases a total sentence on remand, following a successful appeal, without providing a non-vindictive reason for that increase. Defendant asserts that this court should extend that rule further, to situations where, without imposing a greater overall sentence, the court increases a sentence "for *any* offense" in resentencing a multi-count case.

This court should decline that request. As a threshold matter, and as explained in the state's motion to determine jurisdiction, this court should not consider defendant's arguments because it lacks jurisdiction over this appeal.

In any event, no such expansion of the *Pearce* presumption is warranted. Under *Pearce*, when a trial court imposes a greater total sentence on remand following a successful appeal, the greater total sentence is presumptively vindictive and triggers a duty to articulate a non-vindictive reason for the increase. But in sentencing a defendant in a multi-count case on remand, trial courts legitimately may consider the counts together and increase an individual sentence to arrive at an appropriate overall sentence. Doing so does not trigger a presumption of vindictiveness, so long as the total sentence does not increase on remand.

That is the result reached by the several state and federal appellate courts

that have considered the issue. Those decisions rest on the principle that, when a package of sentences unravels because some counts are reversed or some sentences are vacated, the trial court must fashion new individual sentences, and a new total sentence, to accurately address the gravity of the crimes now at issue. In an effort to do so, a trial court legitimately may decide to increase an individual sentence for a particular conviction; such an increase cannot, by itself, trigger a presumption that the court is acting vindictively. A presumption of vindictiveness is appropriate only if the aggregate sentence on remand exceeds the sentence initially imposed.

That same principle applies here. Oregon courts, like those in other jurisdictions, are free to consider the overall package of sentences in assigning individual sentences in a multi-count case. And, contrary to defendant's assertion, courts that have declined to attribute vindictiveness to an increase in an individual sentence in a multi-count case have not done so for reasons unique to the federal sentencing guidelines. Indeed, among the state and federal appellate courts that have reached that conclusion, most courts—including several federal courts in the pre-guidelines era—have done so in cases where the federal guidelines did not apply. This court should do the same.

ARGUMENT

A. This court lacks jurisdiction over defendant's due-process challenge to his misdemeanor sentence.

As explained in the state's motion to determine jurisdiction,[1] this court should dismiss this appeal for lack of jurisdiction. Because defendant is challenging the imposition of a misdemeanor sentence following a guilty plea—and nothing more—ORS 138.050(1) sets out the permissible grounds for appeal. *See State v. Cloutier*, 351 Or 68, 91, 261 P3d 1234 (2011) (explaining that ORS 138.050 limits "appeal and review of sentences for misdemeanor offenses"). But ORS 138.050(1) authorizes an appeal only under circumstances not present here: when a "defendant makes a colorable showing" that the sentence "[e]xceeds the maximum allowable by law" or "[i]s unconstitutionally cruel and unusual."[2] That statute does not authorize an appeal "on the ground

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[1] This court deferred consideration of the state's motion until after hearing oral argument in this case. (9/7/16 Order on Motion to Determine Jurisdiction, Setting Briefing Schedule, and Rescheduling Oral Argument).

[2] ORS 138.050(1) provides:

> Except as otherwise provided in ORS 135.335 [describing conditional pleas], a defendant who has pleaded guilty or no contest may take an appeal from a judgment or order described in ORS 138.053 [setting out the form and content of an appealable judgment or order] only when the defendant makes a colorable showing that the disposition:
>
> (a) Exceeds the maximum allowable by law; or

Footnote continued…

that the process by which [a] misdemeanor sentence was imposed violates the Due Process Clause." *Cloutier*, 351 Or at 94. Accordingly, this court lacks jurisdiction.

Defendant's arguments to the contrary do not compel a different conclusion. Defendant contends that, for purposes of determining jurisdiction, this court should look to ORS 138.222(7)—the provision governing appeal "of sentences imposed for felonies." *Cloutier*, 351 Or at 91. Under ORS 138.222(7), a defendant "may appeal a judgment of conviction based on the sentence for a felony." In defendant's view, "the 'sentence' referenced by the statute is the total punishment for the convictions contained in the qualifying judgment." (Pet's Response to Motion to Determine Jurisdiction (Resp) at 2). Defendant contends that, in fact, his due-process challenge is directed at his felony sentence, not just his misdemeanor sentence, because he is challenging "the increase in the total sentence for his misdemeanor *and* felony." (Resp at 6-7 (emphasis in original)).

To be sure, defendant is correct that the *trial court* may properly consider "the total punishment for the convictions contained in the qualifying judgment" in arriving at an appropriate sentence on individual counts. (Resp at 2). The

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(…continued)

(b) Is unconstitutionally cruel and unusual.

state likewise agrees that the "later-enacted remedy provisions" of ORS 138.222(5)[3] reveal the legislature's intent that *trial courts* may reconsider individual sentences imposed on individual convictions when resentencing in multi-count cases. (Resp at 2). Thus, when an appellate court has jurisdiction over an appeal, ORS 138.222(5) may require a remand so that a trial court may reassess the interrelated sentences in a multi-count case.

The problem, however, is that defendant cannot establish, as an initial matter, that this court has jurisdiction under ORS 138.222(7). That provision

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[3] ORS 138.222(5) provides:

> (a) The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court's factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for resentencing. If the appellate court determines that the sentencing court, in imposing a sentence in the case, committed an error that requires resentencing, the appellate court shall remand the entire case for resentencing. The sentencing court may impose a new sentence for any conviction in the remanded case.
>
> (b) If the appellate court, in a case involving multiple counts of which at least one is a felony, reverses the judgment of conviction on any count and affirms other counts, the appellate court shall remand the case to the trial court for resentencing on the affirmed count or counts.

The first two sentences of ORS 138.222 were enacted in 1989. Or Laws 1989, ch 790, § 21. The final two sentences of subsection (a) were added in 1993, and subsection (b) was added in 2005. Or Laws 1993, ch 692, § 2; Or Laws 2005, ch 563, § 1.

confers appellate jurisdiction when a defendant challenges "the sentence for a felony," not when a defendant challenges a "total punishment" that is "based, at least in some part, on a conviction for a felony." (Resp at 2). And, although defendant now contends otherwise (Resp at 6), his challenge to his misdemeanor sentence does not depend on the existence of his felony sentence. Defendant's attack on the increase in his misdemeanor sentence would be the same even if the felony sentence had not been imposed; defendant would still be claiming that the trial court's change to the misdemeanor sentence, from a term of probation to a term of jail, was the result of vindictiveness, and thus violated due process. Because neither ORS 138.050 nor ORS 138.222(7) confers jurisdiction here, this court should dismiss this appeal.

B. This court should not attribute a vindictive motive to the trial court when, following defendant's appeal, it increased a sentence on a single count but did not impose a sentence that was greater overall.

The United States Supreme Court has presumed that a trial court's sentencing decision was vindictively motivated in just one circumstance: when a trial court increases a defendant's total sentence following a successful appeal, yet no legitimate reason is apparent for that increase. But the Court has extended that presumption no further; instead, it has cautioned that the presumption should not be applied in any way that might interfere with a trial court's legitimate response to criminal conduct. Heeding that caution, dozens

of state and federal appellate courts have declined to presume a trial court vindictive when, faced with a different group of counts in sentencing on remand, the court increases a sentence on a single conviction without imposing a greater total punishment. For the reasons set out below, this court should reach the same result here.

1. The presumption of vindictiveness is a prophylactic rule that applies only when a trial court increases a total sentence on remand.

In *North Carolina v. Pearce*, 395 US 711, 89 S Ct 2072, 23 L Ed 2d 656 (1969), two criminal defendants claimed that, after they succeeded in having their convictions and sentences set aside, the trial court punished them for their success by imposing overall sentences on remand that were greater than their original sentences. *See Pearce*, 395 US at 713-14 (explaining that one defendant initially received a term "aggregating 10 years" on four charges and then received a total of 25 years on three charges, while the other defendant initially received 12 to 15 years on a single charge and then received "a longer total sentence than that originally imposed"). That sentencing purpose, the Court agreed, would violate the Due Process Clause: Because a "defendant's exercise of a right of appeal [or to otherwise challenge his conviction] must be free and unfettered," trial courts may not "put a price" on challenging a conviction. *Id.* at 724 (internal quotation marks omitted).

In an effort "to assure the absence of such a motivation," and to ensure that future criminal defendants would not be deterred from challenging their criminal convictions, the Court in *Pearce* adopted a prophylactic rule—a presumption of vindictiveness. *Id.* at 726. When, as in *Pearce*, a trial court imposes a greater total sentence on remand, courts should presume that the greater sentence is "based on improper considerations, such as a judge's unarticulated resentment at having been reversed on appeal, or his subjective institutional interest in discouraging meritless appeals." *Michigan v. Payne*, 412 US 47, 52-53, 93 S Ct 1966, 36 L Ed 2d 736 (1973).

The Court recognized, however, that even when a trial court imposes a greater total sentence on remand after a successful appeal, it can have legitimate, non-vindictive reasons for doing so: the court might have learned information about the defendant or his conduct that was unknown at the time of the original sentencing. *Pearce*, 395 US at 726; *Texas v. McCullough*, 475 US 134, 141-42, 106 S Ct 976, 89 L Ed 2d 104 (1986) (stating that the presumption may be overcome by "objective information * * * justifying the increased sentence" (internal quotation marks omitted)). Accordingly, a trial court may overcome the presumption by identifying a non-vindictive reason for the increase in total sentence.

Under the circumstances of *Pearce*, the Court could discern no legitimate

explanation for the trial court's decision to increase the total sentence on remand. As a result, the Court thought it appropriate to apply a "prophylactic" rule by presuming that the greater total sentence was the result of a "retaliatory motivation." *Chaffin v. Stynchcombe*, 412 US 17, 25, 37, 93 S Ct 1977, 1982, 36 L Ed 2d 714 (1973). As the Court has since made clear, however, even an increase in total sentence is not alone sufficient to trigger the presumption, where the circumstances reveal a legitimate reason for the increase.

Indeed, since *Pearce*, the Court has repeatedly refused to apply a presumption of vindictiveness, even when a defendant receives a higher total sentence after successfully challenging an initial conviction. No such presumption is warranted, for example, where the circumstances reveal "enough justifications for a heavier second sentence that it cannot be said to be more likely than not that [the second sentence] is motivated by vindictiveness." *Alabama v. Smith*, 490 US 794, 801-02, 109 S Ct 2201, 104 L Ed 2d 865 (1989) (rejecting presumption when the first sentence was based on a guilty plea and the second was the result of a trial after a successful appeal, because the second sentence will "usually" be the result of more information and different "sentencing considerations"). And no presumption is warranted when the sentencing decision can be explained by "some valid reason associated with the need for flexibility and discretion in the sentencing process." *Chaffin*, 412 US

at 26-27 (rejecting presumption when a new jury imposed the second sentence); *see McCullough*, 475 US at 138-40 (rejecting presumption when the trial court itself ordered the new trial); *Colten v. Kentucky*, 407 US 104, 116-17, 92 S Ct 1953, 32 L Ed 2d 584 (1972) (rejecting presumption when a defendant received a greater total sentence after trial *de novo* in superior court following conviction and sentencing in inferior court).

In each of those cases, the Court refused to presume vindictiveness because the challenged sentencing decision—which, in each case, resulted in a greater total sentence than originally imposed—was not "more likely than not attributable to the vindictiveness on the part of the sentencing judge." *Smith*, 490 US at 801. The Court in *Pearce*, then, did not announce a "rule of sweeping dimension"; it announced a narrow rule—one that should not apply to block a "'legitimate response to criminal conduct.'" *Smith*, 490 US at 799 (quoting *United States v. Goodwin*, 457 US 368, 373, 102 S Ct 2485, 73 L Ed 2d 74 (1982)).

This court applied that narrow rule—and did not suggest any need to broaden it—in *Partain*. There, the trial court "imposed various sentences" on 12 convictions, so that, "[a]ltogether, the sentences required defendant to serve 420 months in prison." *Partain*, 349 Or at 12. In sentencing the defendant following his successful appeal, "the trial court discharged the four sentences

that had been the focus of defendant's appeal, but structured the remaining sentences in a way that resulted in an overall term of 600 months in prison." *Id.* at 13. That 180-month increase in overall sentence, imposed on fewer convictions than were originally at issue, triggered a presumption of vindictiveness under *Pearce*. Accordingly, this court instructed the trial court to reduce its sentence to that originally imposed or provide "nonvindictive reasons" for the overall increase:

> On remand, the trial court may choose to impose a sentence that does not exceed the original total sentence of 420 months, which would not require a statement of the court's reasons for imposing the sentence. If the court chooses, instead, to impose a longer or otherwise more severe total sentence, it must place on the record one or more nonvindictive reasons for doing so.

Id. at 26.

In sum, the presumption of vindictiveness is a narrow prophylactic rule that applies when, following a defendant's successful appeal, a trial court imposes a total sentence that exceeds the original total sentence. Even when a trial court increases a total sentence on remand, however, due process does not require the presumption unless the sentence is more likely than not attributable to vindictiveness—rather than the valid exercise of sentencing discretion—on the part of the trial court.

2. This court should not attribute a vindictive motive to a trial court that, in resentencing a multi-count case, increases an individual sentence without increasing the original total sentence.

At defendant's initial sentencing, the trial court imposed a total sentence of 170 months, and, at resentencing, the court imposed a total sentence of 87 months. Because the sentence on remand did "not exceed the original total sentence," *Partain*, 349 Or at 26, no vindictive motivation is attributable to the trial court here.

Defendant offers no valid reason to expand the rule in *Pearce* to situations where a trial court, following remand, increases a sentence on a single conviction without imposing a greater total punishment. To start, defendant is mistaken that the possibility for "self-vindication," present whenever a judge reconsiders any decision, justifies a presumption of vindictiveness in this case or any other (App Br 19); the presumption is meant to address retaliatory, vindictive motivations. Beyond that, no presumption of vindictiveness should arise here because—as dozens of state and federal appellate courts have recognized—altering individual sentences on remand in a multi-count case is a necessary, legitimate exercise of discretion in sentencing. That is as true under Oregon law as it is in other jurisdictions. Contrary to defendant's argument, courts that have refused to presume vindictiveness in the circumstances here have not done so based on "features unique to the federal

sentencing guidelines." (App Br 5).

a. The possibility of "self-vindication" that may arise whenever a judge reconsiders an issue does not, by itself, justify a presumption of vindictiveness.

In contrast to the narrow presumption of vindictiveness identified in *Pearce* and *Partain*, defendant conceives of the presumption as something wholly different. Defendant contends that the presumption should apply when "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." (App Br 13). Focusing on the possibility of "self-vindication," defendant catalogs a number of "psychological phenomena" that could impact judicial decision-making when the same judge considers a case on remand. (App Br 19-25). Relying on the premise that a judge on remand faces "the unavoidable and inappropriate influence of [the] judge's prior decisions," defendant contends that a judge should be presumed vindictive when any increase to an individual sentences "makes the total punishment closer" to the original sentence than it otherwise would be. (App Br 19, 24).

But that conception of the presumption of vindictiveness cannot be squared with *Pearce* or the cases applying it. As the Supreme Court has made clear, the presumption is meant to address vindictiveness directed at a defendant or future litigants: It is meant to remedy "a judge's unarticulated resentment at

having been reversed on appeal" or "institutional interests in discouraging meritless appeals." *Payne*, 417 US at 52-53; *Partain*, 349 Or at 26 (explaining that "a trial court lawfully may impose a harsher sentence on a defendant after retrial or remand, as long as the court's grounds for doing so are not directed at punishing the defendant for appealing his or her original convictions or sentences"). To be sure, those vindictive motives will not likely be present when a different judge imposes a sentence on remand. *See Chaffin*, 412 US at 27 (so stating). That an appellate court requires the same judge to revisit an earlier decision, however, is not alone sufficient to justify a presumption that the judge acted vindictively on remand and thereby violated due-process principles. *See, e.g.*, *Smith*, 490 US at 802 (rejecting presumption where same judge imposed sentence on remand).

b. As several state and federal appellate courts have held, increasing an individual sentence on resentencing in a multi-count case does not justify a presumption of vindictiveness.

In crafting a sentence in a multi-count case, a trial court legitimately may consider the total sentence, as well as individual sentences on various counts. For that reason, nearly every state or federal appellate court to consider the issue has refused to attribute vindictiveness to a trial court that, on remand following an appeal, increases an individual sentence in a multi-count case without imposing a greater overall sentence.

As several state supreme courts have recognized,[4] no presumption of vindictiveness should apply in that circumstance because the increase in an individual sentence may well reflect, when the overall sentence is considered, "a legitimate response to criminal conduct," *Goodwin*, 457 US at 373, and a proper exercise of "discretion in the sentencing process," *Chaffin*, 412 US at 25. In particular, trial judges who consider "multiple related counts stemming from a single course of conduct typically craft sentences on the various counts as part of an overall sentencing scheme." *State v. Hudson*, 293 Ga 656, 660, 748 SE 2d 910, 913 (2013). Thus, it is "only realistic, and not necessarily undesirable to a defendant, that a [trial] court may, as it imposes individual sentences on individual counts, consider each sentence as part of an integrated whole." *State v. Harrington*, 805 NW2d 391, 395-96 (Iowa 2011), *cert den*, 132 S Ct 1915 (2012). That holistic approach gives room for the "fact-intensive

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[4] *See, e.g.*, *People v. Johnson*, 2015 CO 70, ¶ 37, 363 P3d 169, 181 (Colo 2015); *State v. Hudson*, 293 Ga 656, 660-61, 748 SE 2d 910, 913 (2013); *State v. Harrington*, 805 NW2d 391, 395-96 (Iowa 2011), *cert den*, 132 S Ct 1915 (2012); *State v. Wade*, 297 Conn 262, 284, 998 A2d 1114, 1127 (2010); *State v. Keefe*, 573 A2d 20, 22 (Me 1990); *see also Sanjari v. State*, 981 NE 2d 578, 583 (Ind Ct App 2013); *State v. Larson*, 56 Wash App 323, 328, 783 P2d 1093, 1096 (1989).

As explained below, *infra* at 30-32, the three state decisions that defendant cites as contrary authority rest on state statutes or state constitutional provisions, or depend on features of the state sentencing system that Oregon does not share.

analysis in which the trial court must engage when sentencing a defendant on multiple interrelated convictions." *People v. Johnson*, 2015 CO 70, ¶ 26, 363 P3d 169, 178 (Colo 2015).

In light of those considerations, when a sentencing package "unravels due to elimination of some of the original counts, the judge should be given a wide berth to fashion a new sentence that accurately reflects the gravity of the crimes for which the defendant is being resentenced." *Hudson*, 293 Ga at 660, 748 SE2d at 913. When the court does fashion that new sentence, no improper motive should be presumed if the court increases one sentence among many—unless, in doing so, the court also increases the aggregate sentence. *Id.* The aggregate approach safeguards a defendant's right to appeal but allows trial courts to "retain their broad discretion in sentencing a defendant both before and after remand." *Johnson*, 2015 CO at ¶ 37, 363 P3d at 181.[5]

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[5] If a presumption of vindictiveness is applied in a way that limits sentencing discretion on remand in multi-count cases, that could lead courts to impose higher sentences as an initial matter. *See Colten*, 407 US at 119 (refusing to presume a state superior court vindictive where it imposed a higher sentence than an inferior court, because doing so "might, to the detriment of both defendant and State, diminish the likelihood that inferior courts would impose lenient sentences whose effect would be to limit the discretion of a superior court judge or jury if the defendant is retried and found guilty"); *Johnson*, 2015 CO at ¶ 32, 363 P3d at 180 (explaining that, if trial judges could not revisit individual sentences in a multi-count case, judges making initial sentencing decisions "might impose a harsher sentence on each count in order to protect against a claim of vindictiveness after a future resentencing");

Footnote continued…

Relying on those same fundamental principles, federal appellate courts have likewise refused to presume vindictiveness when a trial court increases an individual sentence in a multi-count case without increasing the total punishment.[6] As the Ninth Circuit has explained, "a sentencing judge does not merely evaluate the gravity of each separate crime upon which a conviction was obtained, and then select a punishment that would be appropriate for each if considered independently of any other crimes"; individual sentences are "inextricably" tied to others. *United States v. Bay*, 820 F2d 1511, 1514 (9th Cir

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(…continued)
Harrington, 805 NW2d at 396 n 5 ("Consider, for example, how the [sentencing] court in this case might have felt compelled to apply [sentencing] enhancements in the original sentence if it had known that it would not have the discretion to revise the sentence if remanded.").

[6] *See, e.g.*, *United States v. Pimienta-Redondo*, 874 F2d 9, 15 (1st Cir 1989); *United States v. Weingarten*, 713 F3d 704, 714 (2d Cir 2013); *Kelly v. Neubert*, 898 F2d 15, 18 (3d Cir 1990); *United States v. Gray*, 852 F2d 136, 138 (4th Cir 1988); *United States v. Campbell*, 106 F3d 64, 68 (5th Cir 1997); *United States v. Rodgers*, 278 F3d 599, 604 (6th Cir 2002); *United States v. Mancari*, 914 F2d 1014, 1020 (7th Cir 1990); *United States v. Evans*, 314 F3d 329, 334 (8th Cir 2002); *United States v. Bay*, 820 F2d 1511, 1514 (9th Cir 1987); *United States v. Sullivan*, 967 F2d 370, 374 (10th Cir 1992); *United States v. Fowler*, 749 F3d 1010, 1019 (11th Cir 2014).

Although the Second and Eleventh Circuits initially applied the "remainder aggregate" approach—comparing the total sentence for the counts at issue on remand with the total sentence originally imposed on those counts—the Eleventh Circuit has abandoned that approach, *Fowler*, 749 at 1019, and the Second Circuit has refused to apply the presumption in circumstances like those here, where the trial court enhanced a single sentence on remand without imposing a greater total sentence, *Weingarten*, 713 F3d at 714.

1987). Accordingly, when one or more sentences in a multi-count case is vacated, "common sense dictates that the judge should be free to review the efficacy of what remains in light of the original plan, and to reconstruct the sentencing architecture upon remand, within applicable constitutional and statutory limits, if that appears necessary in order to ensure that the punishment still fits both crime and criminal." *United States v. Pimienta-Redondo*, 874 F2d 9, 14 (1st Cir 1989).

To summarize, the state and federal courts have limited the *Pearce* presumption to situations where a trial court imposed a more severe total sentence on remand. That approach protects trial courts' discretion, but ensures that defendants are freed of any apprehension that their total sentences might unjustifiably increase as a result of a successful appeal. *See United States v. Horob*, 735 F3d 866, 870-71 (9th Cir 2013) ("If there is a possibility of a sentence reduction and no risk of a sentence increase, defendants will continue to appeal."). That limited application of the presumption thus ensures that it is applied "where its objectives are thought most efficaciously served." *McCullough*, 475 US at 138 (internal quotation marks omitted). And where the presumption does not apply, a defendant may still seek to affirmatively demonstrate "actual vindictiveness." *Smith*, 490 US at 799-800.

c. As in other jurisdictions, Oregon law provides that individual counts in multi-count cases are interdependent and part of a broader sentencing package.

In urging this court to take a different approach—to presume vindictiveness when a court, on resentencing, increases any one sentence in a multi-count case—defendant portrays sentencing in Oregon as a mechanical, segmented process. In defendant's view, trial courts in Oregon cannot take other counts, other sentences, or the overall sentence into account when considering how to sentence an individual count. Instead, defendant asserts, a trial court "is specifically tasked with determining the proper sentence for each offense in the first instance" and then, with whatever individual sentence results, the court must impose concurrent or consecutive sentences to arrive at a total sentence. (App Br 18). Because, in defendant's view, Oregon law requires courts to consider each count in a vacuum, that makes it all the more likely that any increase in an individual sentence on remand reflects vindictiveness, as opposed to a legitimate attempt to construct an appropriate overall sentence that takes each conviction into account.

Although defendant is correct that, in Oregon, trial courts impose separate sentences for each conviction in a multi-count case, it does not follow that a trial court must consider each individual sentence while ignoring the sentences that may be imposed for the other counts in the case. Defendant cites

no authority that requires a court to take such a constricted view of its task at sentencing. To the contrary, and as explained below, the Oregon legislature has recognized that trial courts may consider the total sentence, and the relationship among individual sentences, in arriving at a sentence on each count.

As an initial matter, the various individual sentencing components in a multi-count case—misdemeanor sentences, sentences under the felony guidelines, and mandatory minimum sentences—each require the court to make a number of complex decisions. *See* ORS 137.010 (specifying sentencing requirements for misdemeanors); *State v. Speedis*, 350 Or 424, 256 P3d 1061 (2011) (describing sentencing guidelines); ORS 137.700 (setting mandatory minimum sentences for certain crimes); *State ex rel. Huddleston v. Sawyer*, 324 Or 597, 603-04, 932 P2d 1145 (1997) (explaining the relationship between mandatory minimum sentences and presumptive sentences). Those decisions grow more complex still as the court considers whether those sentences will run concurrently or consecutively. The trial court has discretion, within the limits imposed by statute, to impose concurrent or consecutive sentences, given the particular sentences at hand and the particular circumstances of the case. *See* ORS 137.123.[7] In that respect, individual sentences in Oregon are like building

[7] Under ORS 137.123, a sentencing court may impose consecutive sentences if it finds (1) that the offenses that gave rise to those convictions did

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blocks that a trial court may permissibly combine to form an overall punishment for the criminal conduct at issue.

Nothing in Oregon's sentencing scheme requires a court to assign individual sentences for individual counts without regard for how the court will fit those sentences together to arrive at a total punishment. Instead, the Oregon legislature has recognized that, in multi-count cases, the individual building-block sentences are interdependent and part of a larger sentencing package. Under both ORS 138.222(5)(a) and ORS 138.222(5)(b), for example, trial courts may reevaluate sentences on individual counts when, in a multi-count case, an appellate decision disturbs a sentence on any conviction or reverses a conviction on any individual count.

Under ORS 138.222(5)(a), "If the appellate court determines that the sentencing court, in imposing a sentence in the case, committed an error that requires resentencing, the appellate court shall remand the entire case for resentencing. The trial court may impose a new sentence for any conviction in the remanded case." That statute was enacted in response to the Court of Appeals' decision in *State v. Smith*, 116 Or App 558, 842 P2d 805 (1992),

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not occur as part of the same continuous and uninterrupted course of conduct, or (2) even if the offenses occurred as part of the same course of conduct, one offense was not incidental to the other or the two offenses resulted in separate harms.

adh'd to on recons, 120 Or App 438, 852 P2d 934 (1993), which held that, on remand following sentencing error on some counts, the court could address only those counts affected by the error, not reassess other sentences to arrive at the same total sentence that was previously imposed.

With the enactment of ORS 138.222(5)(a), the legislature rejected that approach and recognized that, in imposing various sentences in a multi-count case, the trial court considers each individual sentence as part of one "sentencing package." *See State v. Edson*, 329 Or 127, 138-39, 985 P2d 1253 (1999) (recounting legislative history showing that statutory change "was intended to require appellate court that finds error on one of many convictions to remand entire case, so that trial court has the ability to reconsider whole sentencing 'package'"). As this court explained in *Partain*, ORS 138.222(5)(a) "allows sentencing courts to replace terms in a prior sentencing decision respecting certain counts that were favorable to defendant with less favorable ones respecting those counts." 349 Or at 20. Because a trial court may arrive at an individual sentence in light of the overall sentence, on resentencing the court may alter individual sentences to arrive at an appropriate overall punishment.

The same considerations inform a related statute, ORS 138.222(5)(b),[8]

[8] ORS 138.222(5)(b) provides that, "if the appellate court, in a case involving multiple counts of which at least one is a felony, reverses the

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which "extends the general approach of ORS 138.222(5)(a) [by] allowing trial courts to resentence a defendant on any judgments of convictions that are affirmed on appeal, if any other judgment of conviction in the same case is reversed on appeal." *Partain*, 349 Or at 20-21. In other words, ORS 138.222(5)(b) broadly requires resentencing on all affirmed convictions when any one conviction, among a group of convictions that contains any felony conviction, is disturbed on appeal. That statute, like ORS 138.222(5)(a), thus reflects the legislature's recognition that it is proper for a trial court to structure individual sentences not in isolation, but in light of sentences imposed on other convictions.

In accord with those principles, the trial court here, on remand, properly revisited the sentence on the misdemeanor furnishing-alcohol count to account for changes in the package of convictions before the court. Rather than reflecting an impermissible motive, that approach reflected a permissible choice, one that the Oregon legislature has explicitly approved.

d. The aggregate approach is not the product of unique features of the federal sentencing guidelines.

Defendant's remaining contention—that the aggregate approach makes

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judgment of conviction on any count and affirms other counts, the appellate court shall remand the case to the trial court for resentencing on the affirmed count or counts."

sense only under the federal sentencing guidelines—likewise fails. In defendant's view, the aggregate approach "may meet the due process test because of unique aspects of the federal sentencing guidelines not shared by Oregon sentencing." (App Br 32 (emphasis omitted)). Defendant argues that, because the "complex scoring system of the federal sentencing guidelines significantly limits sentencing discretion and opportunities for vindictiveness," the federal appellate courts have declined to impose a presumption of vindictiveness unless a trial court increases the aggregate sentence on remand. (App Br 34). Relatedly, defendant contends that "[i]t is for those reasons unique to the federal system that several states have found the federal court decisions inapposite to the application of *Pearce*." (App Br 35). For several reasons, those arguments are unavailing.

First, nearly all of the federal courts that have adopted the aggregate approach did so in cases where the guidelines did not apply. *See* United States Sentencing Commission, Guidelines Manual, at 2 (2015) ("The federal sentencing guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date."). In *Pimienta-Redondo*, for example, the First Circuit noted that guidelines did not apply in that case but explained that the aggregate approach was appropriate to accommodate "the trial judge's broad sentencing discretion" in the pre-guidelines era. 874 F2d at 14 & n 4; *see*

also United States v. Hagler, 709 F2d 578, 579 (9th Cir 1983); *United States v. Moore*, 710 F2d 270, 271 (6th Cir 1983); *United States v. Bay*, 820 F2d 1511, 1513 (9th Cir 1987); *United States v. Gray*, 852 F2d 136, 138 (4th Cir 1988); *United States v. Mancari*, 914 F2d 1014, 1020 (7th Cir 1990).

Second, the rationale for the aggregate approach—whether a sentence is imposed under the advisory federal sentencing guidelines or not—is the same: "When an appellate court subsequently reverses a conviction (or convictions) that was part of the original sentence, the [trial court's] job on remand is to reconsider the entirety of the (now-changed) circumstances and fashion a sentence that fits the crime and the criminal." *United States v. Campbell*, 106 F3d 64, 68 (5th Cir 1997). Indeed, state courts have recognized that, even where a "sentencing scheme is distinguishable from the intricacies of the federal sentencing guidelines system," it remains true that trial courts "consider each sentence part of an integrated whole." *Harrington*, 805 NW2d at 395-96. It is that basic principle—and not some unique feature of the federal sentencing guidelines—that has guided federal and state courts to adopt the aggregate approach. *Id.*[9]

[9] The Eleventh Circuit has cited the federal sentencing guidelines as a reason to join other federal appellate courts in applying the aggregate approach. *United States v. Fowler*, 749 F3d 1010, 1019 (11th Cir 2014). The court explained that, in the pre-guidelines era, federal courts had "almost

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Third, defendant is incorrect that the few state decisions on which he relies compel the conclusion that the aggregate approach is suited only to federal sentencing decisions but not those made under Oregon law. (App Br 35). To the extent that those decisions compare state and federal sentencing systems, that comparison does not help defendant. The Ohio Supreme Court, for example, distinguished Ohio's sentencing laws from the federal system, but in doing so it highlighted features of federal sentencing that Oregon shares. *See, e.g.*, *State v. Saxon*, 109 Ohio St 3d 176, 178-79, 846 NE 2d 824 (2006) (explaining that, "in a direct [federal] appeal from multiple-count criminal convictions, the [federal] appellate court has the authority to vacate all sentences even if only one is reversed on appeal," but Ohio appellate courts do not). The remaining decisions defendant cites did not offer any description of

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unfettered discretion to select prison sentences for federal offenders, subject to virtually no appellate review, so long as the sentences fit within the customarily wide statutory boundaries set by Congress." *Id.* at 1020 (internal quotation marks omitted). The court went on to adopt the aggregate approach because the federal sentencing guidelines, though advisory, "channeled" the discretion of trial judges by establishing guideline ranges and factors to determine whether to impose a sentence within or without a guidelines range. *Id.* at 1020-21.

Fowler does not help defendant here. As with the advisory federal sentencing guidelines, Oregon's sentencing statutes and guidelines channel the discretion of the trial judge in applying individual sentences, and in applying consecutive or concurrent sentences, in any given case. *Fowler*'s adoption of the aggregate approach thus counsels for, not against, the adoption of the aggregate approach in this case.

the state sentencing systems at issue. *See State v. Abram*, 156 NH 646, 656, 941 A2d 576, 584 (2008); *Wilson v. State*, 123 Nev 587, 591, 170 P3d 975, 981 (2007).

In any event, none of those decisions addresses the question at issue here: whether the *federal Due Process Clause* compels an appellate court to attribute vindictiveness to a trial court, even when the court did not impose a greater total sentence on remand. *See Saxon*, 109 Ohio St 3d at 178, 846 NE2d at 826-27 (deciding, under Ohio statute, whether an appellate court may vacate a sentence on one count where the defendant's appeal only challenges a sentence on another count); *Abram*, 156 NH at 656, 941 A2d at 655-56 (explaining that "public policy considerations militate against adopting the sentencing package doctrine in this State" and noting that "[s]tates are free to provide greater protections in their criminal justice system than the Federal Constitution requires"); *Wilson*, 123 Nev at 596, 170 P3d at 980 (deciding the case under the Nevada Constitution's Double Jeopardy Clause). The state and federal courts that have addressed that question have, time and again, declined to attribute vindictive motivations to trial courts that increase a sentence on a single count on resentencing without imposing an overall greater total sentence. This court should do the same here.

3. The trial court here should not be presumed vindictive for exercising its discretion to craft appropriate individual sentences, and an appropriate package of sentences, in light of changed circumstances on remand.

As explained above, the trial court here was not required to expressly articulate a non-vindictive reason for increasing the sentence, on remand, for the misdemeanor furnishing-alcohol count. Nonetheless, the court did articulate such a reason. Its explanation helps underscore why, when resentencing a defendant in a multi-count case following the defendant's successful appeal, courts legitimately may and should consider the counts as a whole, and possess discretion to increase an individual sentence in order to impose an appropriate overall sentence. Doing so does not trigger a presumption of vindictiveness, so long as the total sentence has not increased.

In crafting its original sentence on the five counts at issue, the court imposed consecutive sentences on three felony counts—75 months in prison (first-degree sexual abuse); 75 months in prison (first-degree sexual abuse); and 20 months in prison (attempted second-degree sodomy)—for a total of 170 months. In determining an appropriate sentence on the two remaining misdemeanor counts (furnishing alcohol to a minor and sexual harassment), the court had the option to impose a 12-month jail term.

But given the existing total 170-month prison sentence on the felony counts, the court concluded that additional jail time was not warranted. The

court explained, on remand, that it had not imposed "additional jail time" on the misdemeanor counts initially because, in "the overall scheme," the existing mandatory-minimum and guidelines sentences imposed on the felony counts were "enough." (Tr 22). And although the court initially could have imposed a concurrent jail term on the furnishing-alcohol count, imposing a probationary term had allowed the court to ensure that defendant complied with the terms of probation while serving his prison term. If defendant had violated those terms while serving his initial sentences, the court could then have imposed a sentence of additional jail time.

The court faced a different sentencing landscape at the resentencing, after defendant pleaded guilty to one count of first-degree sexual abuse and one count of furnishing alcohol to a minor. As the court explained on remand, it viewed defendant's furnishing-alcohol crime—and had done so at the initial sentencing—as "malicious": Defendant had committed that crime as part of an effort to sexually abuse the 13-year-old victim. (Tr 26). The court explained that if there had been no "first trial and if this came [before the court] today for sentencing" (Tr 28), it would have imposed incarceration time on the furnishing-alcohol count. But because defendant had received over 14 years of prison time on *other* counts the first time, it had not been necessary to impose incarceration time on the furnishing-alcohol count to ensure that defendant's

total sentence was commensurate to the conduct that he was convicted of committing. On remand, the court was faced with convictions—for one count of first-degree sexual abuse count and one count of furnishing alcohol to a minor—that, although fewer in number, nonetheless reflected malicious conduct warranting significant incarceration time. To ensure that the individual sentences, and the overall sentence, reflected the maliciousness of defendant's conduct, the trial court was entitled to impose a jail term on the furnishing-alcohol count, even though it had not done so the first time.

At the initial sentencing and on remand, then, the trial court endeavored to select among the various sentencing options to craft an appropriate, balanced sentencing package to reflect the criminal conduct at issue. Because the trial court's actions were a wholly legitimate aspect of sentencing in a multi-count case, this court should not presume that the trial court's imposition of the misdemeanor sentence was the result of improper, vindictive motives. And because defendant has made no effort to establish that the misdemeanor sentence was the result of actual vindictiveness, he has not shown that the trial court violated due process in imposing that sentence.

CONCLUSION

This court should dismiss this appeal for lack of jurisdiction. If this court concludes that it has jurisdiction, it should affirm the decision of the Court of Appeals and the judgment of the circuit court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on November 2, 2016, I directed the original Brief on the Merits, Respondent on Review, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and David Ferry, attorneys for petitioner on review, by using the court's electronic filing system.

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

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 8,082 words. I further 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(2)(b).

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