
Court of Appeals

State of New York

The People of the State of New York,

Plaintiff-Respondent,

vs.

Rudolph Young,

Defendant-Appellant.

Brief of the New York State Defenders Association

Amicus Curiae

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Interest of Amicus

The mission of the New York State Defenders Association (NYSDA) is to improve the quality and scope of publicly supported legal representation to low income people. NYSDA is a not-for-profit membership association of nearly 1400 public defenders, legal aid attorneys, assigned counsel, and private practitioners throughout the state. It operates the Public Defense Backup Center with funds provided by the state of New York.

The Backup Center offers legal consultation, research, and training to the more than 5,000 lawyers who serve as public defense counsel in criminal cases across New York, provides technical assistance to counties with regard to public defense, serves as a clearinghouse for defense services information, and conducts public education efforts concerning the criminal legal system. New York State contractually obligates NYSDA, through the Backup Center, "to review, assess and analyze the public defense system in the state, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." NYSDA has issued numerous reports identifying problems in the state's criminal legal system and has provided, often by invitation, comments to various entities dealing with criminal justice issues.¹

NYSDA's work with public defense providers gives the Association a unique opportunity to observe the criminal legal system. The Court of Appeals has granted

¹ For example, NYSDA provided comments to the Committee to Promote Public Trust and Confidence in the Legal System, appointed by Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman, in February, 1999.

NYSDA *amicus curiae* status in a number of important cases dealing with the rights of criminal defendants. Among these cases are: most relevantly, People v. Van Pelt, 76 N.Y.2d 156 (1990); more recently, People v. Garcia, 92 NY2d 726 (1999); and also People v. Grant, 91 N.Y.2d 989 (1998), People v. Burdo, 91 N.Y.2d 146 (1997), People v. Knowles, 88 N.Y.2d 763 (1996), People v. Ford, 86 N.Y.2d 397 (1995), People v. McKiernan, 84 N.Y.2d 915 (1994), People v. Seaberg, 74 N.Y.2d 1 (1989), People v. Pollenz, 67 N.Y.2d 264 (1986), and People v. Bigelow, 66 N.Y.2d 417 (1985).

This case presents important legal questions about the applicability and limits of the presumption of vindictiveness established in Van Pelt, *supra*, with regard to longer sentences imposed after appeals. Any erosion of Van Pelt's protection of the right of defendants to appeal without fear of retaliation would impact adversely on the public defense attorneys for whom NYSDA provides backup services, on the clients of those and other criminal defense lawyers, and on the state's criminal legal system as a whole.

If Van Pelt's protection is lessened, lawyers would have to advise their clients of the potential danger of vindictive sentencing following successful appeals. That advice—and the circumstances requiring it—would have a chilling effect on defendants' exercise of their right to appeal improperly obtained convictions and sentences. It would impact adversely on the attorney-client relationship, and lessen trust in the state's criminal justice system.

NYSDA's experience with and study of the New York State criminal legal system, and its role in providing support to public defense teams, gives it a strong interest in the principles involved in this case. These principles will be weakened or

destroyed by the affirmance of the lower court ruling that Appellant Rudolph Young was legally sentenced, after a successful appeal and retrial, to serve twenty-five years to life in prison as a persistent felony offender for a crime that originally yielded him only a two-to-four year sentence as a second felony offender.

The prosecutor and the court specifically relied, as a reason for permitting a persistent felony offender enhancement at the second sentencing, on Mr. Young's post-appeal acquittal of other charges [by a jury that, unlike the original jury, was not exposed to illegal, police-obtained evidence]. This enhancement was the mechanism by which Mr. Young received a huge increase in sentence for the one count on which he was reconvicted. To say that this was not vindictive because Mr. Young's original aggregate sentence (which included convictions obtained by means of unlawful police conduct) was greater than the sentence imposed after reconviction, is to erect a facade of legality camouflaging fundamental unfairness. To allow evasions of the bright-line rule of Van Pelt, *supra*, based on these or others of the myriad ways in which cases may differ factually, is to erode, if not to vitiate, Van Pelt's protection of fairness and the right of appeal.

Statement of Facts

After initial convictions on multiple counts in this case, the Appellate Division, Fourth Department, found that Appellant Rudolph Young had been illegally arrested. Evidence obtained as a result of unlawful police action² was suppressed. People v. Young, 202 AD2d 1024, 1026 (1994). On retrial, in the absence of the illegally obtained evidence, Mr. Young was convicted only of one count—Criminal Possession of Stolen Property in the Fourth Degree³ (CPSP4). The prosecutor then sought for the first time to have Mr. Young sentenced on that count as a persistent felony offender. The prosecutor also argued—and defense counsel contested—that the reversal of Mr. Young’s other convictions and his reconviction on only the one count were factors supporting an increase in the CPSP4 sentence. (Minutes of January 5, 1995, 4, 5-6, 7-8.⁴)

The retrial was heard by a judge other than the original sentencing judge. He found that the trial court retained sentencing discretion following the retrial and that an increased sentence for the CPSP4 was not presumptively vindictive under controlling

² Police officers had decided that the *modus operandi* of the instant charges matched that of earlier burglaries of which Mr. Young had been merely suspected, and had concluded on no proof that he was trespassing where he was found at the time of arrest. Having jumped to these conclusions, they arrested Mr. Young without a warrant.

³ Penal Law §165.45.

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“...The People did not ask at that time that the defendant be sentenced as a persistent violent felony offender on the [CPSP4], because we also had several other felonies—violent felonies that would be used to adjudicate the defendant a persistent violent felony offender. Since the [CPSP4] charge was not a violent felony, we did not include that in the information. And I believe there has been a change of circumstances at this time such that the People should be allowed to ask the Court to consider sentencing the defendant as a persistent felony offender.” (p. 6.)

“...At that time, the People could not foresee reasonably that the defendant would appeal that conviction, would receive a reversal, would have a new trial and would only be convicted of the [CPSP4] charge. That’s a tremendous burden to be placed upon the People at any time, for them to know in advance what will ultimately become of the case...” (p. 8)

law because the twenty-five-to life sentence was less than the aggregate of the sentences imposed on the charges of which Mr. Young was acquitted on retrial. The failure to impose a persistent felony offender enhancement of the CPSP4 after the first trial was excused on the ground that it would have been “superfluous.” (Minutes of January 19, 1995, 10-11.⁵)

Mr. Young’s original convictions and sentences and sentence following retrial were as follows:

Conviction/Sentence After 1st Trial	Verdict/Sentence After 2nd Trial
Burglary (1st degree) persistent violent felony offender: 25 years to life	Acquitted
Robbery (1st degree) persistent violent felony offender: 25 years to life	Acquitted
Burglary (2nd degree) persistent violent felony offender: 20 years to life (consecutive)	Acquitted
Criminal Possession Stolen Property (5th degree): 1 year	Not resubmitted ⁶
Criminal Possession Stolen Property (4th degree) second felony offender: 2 to 4 years (concurrent)	Criminal Possession Stolen Property (4 th degree) persistent felony offender: 25 years to life
Grand Larceny (4th degree) second felony offender: 2 to 4 years (concurrent)	Acquitted
Aggregate of six counts: 45 years to life	Sentence on one count: 25 years to life

The suppression hearing at which the facts warranting reversal were originally adduced had encompassed not only the instant case (Indictment No. 403), but a separate prosecution (Indictment No. 402 [hereafter case 402]). The charges in case 402

⁵

“...any sentence in that regard on the Criminal Possession of Stolen Property under the mandates of persistent felony offender would have been superfluous...in that the defendant had already been sentenced to a period of forty-five years to life on the Burglary and Robbery charges...”

⁶ This count pertained to a knife suppressed by the Appellate Division as illegally obtained evidence. Brief for Respondent, 3.

had been pending at the time of the original sentencing in the instant case; those charges were known to have been based on the same illegally obtained evidence involved in the instant case. After the instant case was reversed and retried, the defendant sought to set aside the convictions as well as the sentence arising from case 402, but the court, on procedural grounds, vacated only the sentence (*see e.g.* Minutes of March 10, 1995, 17, 25-28). Mr. Young was resentenced on case 402 on the same day that he was sentenced in the instant case. (Minutes of March 23, 1995, 147-148). Case 402 was later reversed on the same grounds upon which the original convictions in the instant case were reversed on appeal. People v. Young, __ A.D.2d __, 683 N.Y.S.2d 677 (4th Dept., 11/3/98).

The Appellate Division, Fourth Department, affirmed the judgment in the instant case on November 13, 1998. On March 8, 1999, leave to appeal was granted by an Associate Judge of this Court (Ciparick, J.).

TO PROTECT DUE PROCESS RIGHTS ON APPEAL AND TO MAINTAIN TRUST IN THE LEGAL SYSTEM, A BRIGHT-LINE PRESUMPTION OF VINDICTIVENESS TRIGGERED BY A LONGER SENTENCE UPON RECONVICTION FOLLOWING AN APPEAL SHOULD BE MAINTAINED.

A. Introduction.

An announced trial court policy of imposing heavier sentences on all reconvicted defendants for the specific purpose of punishing them for successfully appealing their original convictions would not survive scrutiny in any just legal system. Thirty years ago, the United States Supreme Court observed that such a policy would surely be a flagrant violation of the Due Process Clause of the Fourteenth Amendment. North Carolina v. Pearce, 395 U.S. 711, 723-724 (1969).

Acknowledging the practical difficulty of establishing a retaliatory motive in a given case (*id.*, 725 at n. 20), the Court imposed a presumption of vindictiveness, stating that more severe sentences following retrials would be permissible only if the record revealed “objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.” *Id.* at 726. While the prophylactic rule in Pearce has been somewhat narrowed over the years by case law claiming to focus on prevention of vindictiveness, not simply longer sentences upon reconviction, the impropriety of vindictiveness has never been repudiated. *See, United States v. Atehortva*, 69 F. 3d 679 (C.A. 2, 1995), *cert. denied sub nom. Correa v. United States*, 517 U.S. 1249 (1996); United States v. Coke, 404 F. 2d 836, 845 (C.A. 2 *en banc*, 1968).

One example of the limitations on Federal protections of the right to appeal⁷ is that when a different sentencer imposes an increased punishment on a defendant after appellate-required retrial, the Federal Constitution may not require that the increased sentence be presumed vindictive unless proven otherwise. *See, Texas v McCullough*, 475 U.S. 134 (1986). (Federal appellate courts may still, under their supervisory powers, call for increased sentences to be strictly limited to a few appropriate cases. *See, United States v. Atehortva, supra.*)

This Court, in *People v. Van Pelt*, 76 N.Y.2d 156 (1990), looked at New York's long-standing provision of appellate rights and found that the Due Process Clause of the State Constitution confers more stringent protection than its Federal counterpart. *Van Pelt*, under which the presumption of vindictiveness does apply to increased sentences by different judges, constitutes a more realistic evaluation of the dangers of institutional vindictiveness. Its rationale remains well grounded and just. Its reasoning—that sound policy and fundamental fairness call for the application of the *Pearce* presumption in cases beyond the facts of *Pearce*—should not be abandoned.

Several harms would result from a withdrawal of the presumption of vindictiveness in this and other cases. Among those harms are: injustice in individual cases; a chilling of the exercise of the statutory right to appeal; and erosion of trust in the legal system.

⁷ The right to pursue collateral remedies is also protected. *See, Pearce, supra*, at 724.

1. Fairness in Individual Cases Is the Goal and the Proof of a Just System.

A criminal case may entangle the courts that hear it at the trial and appellate levels in a multitude of policy issues, social concerns, judicial precedents, factual conundrums and legal analysis. At the core of the court's function, however, is to do justice to each litigant on the merits of that litigant's own case. United States v. Johnson, 457 U.S. 537, 555 (1982). While appeal (to the Appellate Division and to this Court) is a statutory rather than constitutional right,⁸ the appellate process has, in New York and across the nation, "come to be seen as the final guarantor of the fairness of the criminal process."⁹

An individual defendant who has been penalized for exercising this right to review has been treated unfairly, regardless of the legal label attached to or withheld from the unfairness—a violation of Federal constitutional due process guarantees,¹⁰ a denial of equal protection,¹¹ a failure to observe a state constitution,¹² or a contravening

⁸ See, e.g. In re Jones, 181 N.Y. 389 (1905), stating that the Court of Appeals has only such appellate jurisdiction as is given by statute. *And see*, Criminal Procedure Law, Article 450.

⁹ Rossman, "Were There No Appeal': The History of Review in American Criminal Courts," 81 J. of Criminal Law and Criminology 518 (1990). This law review article from the same year as the Van Pelt decision called appellate reversal "the quality control mechanism" of the criminal legal system, and noted that appellate courts "examine individual cases to ensure that convictions are not so infected with error that society should refuse to honor the trial court's judgment." *Id.* at 518-519. See, also, Hopkins, "Small Sparks From a Low Fire: Some Reflections on the Appellate Process," 38 Brooklyn L. Rev. 551, 568 (1972) in which a Justice of the Appellate Division, Second Department noted:

"...[T]here is a growing tide of opinion that in criminal appeals, at least, the appellate court should do more than merely act as umpire. This attitude proceeds not only from a disinclination to believe that the balance between the parties may always be even, but also from an attitude that a duty rests on the court to do justice. Justice may be a term undefined in the minds of those who hold those beliefs, yet it surely holds a measure of 'rightness' in its connotation of obtaining a fair result."

¹⁰ E.g. North Carolina v. Pearce, *supra*, finding that imposing a heavier sentence on defendants to punish them for a successful appeal would be a due process violation.

¹¹ *Id.*, at 723, finding that a more severe sentence imposed after appeal and retrial is not an automatic equal protection violation.

¹² See, People v. Van Pelt, *supra*.

of a statute.¹³ A defendant who has been punished for demanding via appeal that the state use only legal means in its efforts to link that defendant to an alleged crime (be it a Class A or a Class E felony) is harmed whether the punishment is imposed deliberately and consciously or through unrecognized institutional pressures. This was recognized in both Pearce and Van Pelt.

Institutional forces that can contribute to such vindictiveness are growing. Nearly a decade ago, *Amicus* noted that the number of new felony indictments per year had more than doubled from 1979 to 1987. This had increased the pressure to avoid retrials, which could easily take the form of, perhaps subconsciously, discouraging appeals. (See, People v. Van Pelt, *supra*, Brief of the New York State Defenders Association, Amicus Curiae, 15.) The same is truer today. The soaring of filings in New York’s criminal courts to all-time highs¹⁴ have put a premium on efficiency.

In Van Pelt, this Court recognized the danger of significant, individual injustices resulting from judicial vindictiveness in post-appeal sentencings, and chose not to relax its procedural vigilance against them. Van Pelt, *supra*, at 163. The Court should not relax that vigilance now.

2. Vindictiveness Chills the Exercise of Rights by Others.

This Court also recognized in Van Pelt that retaliation for the exercise of appellate rights not only hurt the individual retaliated against, but would chill the right of others to appeal: “Our analysis reflects concern, too, born of the threat that tougher

¹³ See, People v. Moore, 177 Ill. 2d 421 (1997), finding that Illinois had codified Pearce, *supra*, in Unified Code of Corrections §5-8-1(c).

¹⁴ State of the Judiciary Address, Chief Judge Judith S. Kaye, 2/8/99.

sentences upon reconviction after a successful appeal might cause defendants or their counsels to hesitate or forebear from the exercise of the important statutory right to appellate review in this State.” *Id.* It should be as improper under Van Pelt to chill the right to appeal lower-level criminal convictions as to chill the right to appeal convictions yielding lengthy sentences.

Yet if this Court upholds the increased sentence imposed upon Mr. Young for CPSP4 following retrial, appellate counsel in New York will need to carefully analyze potential outcomes of appealing any illegally obtained conviction carrying a sentence low enough that clients may have served it before appellate proceedings are complete. Counsel must then discuss the matter with the clients.¹⁵ They may decide that illegal convictions and sentences on lower counts would be less burdensome than the risk of increased sentences imposed on those counts not because of intervening conduct by the defendant but because higher counts have been overturned.¹⁶ This is not a choice that a just system should require.

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“The appellate defender shall have a clearly-articulated policy of discussing the merits, strategy, and ramifications of the proposed appeal with each client prior to the perfection and completion thereof. Such policies shall include discussing any possible adverse consequences or strategic problems when pursuing such appeal, even when there is an arguable issue to appeal...” National Legal Aid and Defender Association, Standards for Appellate Defender Offices (1980), Standard I.D.1.

¹⁶ Should this Court rule adversely to the defense position in this case, defendants facing appeal thereafter will not need hindsight to know that they may receive dramatically longer sentences on certain counts following retrial despite a lack of intervening conduct on their part. (*See* the prosecution argument that “hindsight” should play no role in this case, Brief for Respondent, 22 at note 8.) Given Van Pelt, *supra*, and New York’s count-by-count sentencing scheme [discussed more fully *infra* at subsection I.B.1., p. 16 *et seq.*], defendants such as Mr. Young reasonably did not expect that such vindictive sentencing after retrial would be allowed.

The increasing systemic pressures noted in subpart A.1., *supra*, may well increase the danger that the right to appeal lower-level counts will be chilled, especially as to defendants with low income. Increasing caseloads are squeezing the time (and energy) public counsel have to analyze and explain subtle, potential ramifications of proposed appeals and to protect clients from potential negative consequences. It may be too easy for counsel in multiple-count cases to simply suggest that lesser counts should not be appealed.

The dearth of resources for public defense is already contributing to doubts about the fairness achieved for clients with low incomes.¹⁷ This unfortunate situation should not be compounded by judicial cutbacks on procedural safeguards such as the presumption of vindictiveness. Such cutbacks can only add to the belief of many poor defendants—and others—that the criminal legal system lacks justice.

3. The Perception of Vindictiveness Will Erode Public Trust in the Legal System.

The public is not unaware of the problems in public defense, discussed above. That many people perceive unfairness in how the poor are treated in the criminal legal system was made clear in a recent report. “This [lack of resources] creates the impression that the poor are not receiving the attention their cases merit or that counsel takes the most expedient route, by plea bargaining or settling cases, because they are

¹⁷ As one recent source noted:

“The current pay scale has been considered inadequate for years, with critics charging that it keeps many of the most qualified attorneys from taking indigent defense work and leaving an overwhelming caseload for those who do.

Prosecutors, defense attorneys and judges said the low rates hurt the system by clogging the courts with delayed cases and adding to the public’s view that justice is for hire [emphasis added].” “Chief judge asks higher fee for assigned counsel,” *Times Union*, pg. B1, B12 (6/3/99).

not sufficiently compensated or do not have the time to vigorously pursue them."

Report to the Chief Judge and Chief Administrative Judge, The Committee to Promote Public Trust and Confidence in the Legal System, 10-11 (May, 1999). If a public defense attorney must advise a client that an appeal might be fruitless or worse because the trial court can add any sentence from an overturned count to the sentence for any remaining count, that attorney's client, along with observers of the process, may well conclude that the attorney was not working to find a way to protect the client's interest.¹⁸ And whenever a vindictive sentence is imposed following a successful appeal, the public has less reason to trust the system.

The harm done to public trust in the legal system by vindictive sentences—or by sentences perceived to be vindictive—following a successful appeal is not limited to cases involving public defense. The importance of avoiding the perception of unfairness grows from the importance of the legal system to the entire structure of government:

“It is in the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of our courts, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the

¹⁸ Client fears that public counsel may be working to keep the system moving rather than for the client's benefit have been documented at the trial level:

“Public defenders and assigned counsel, in discussing plea possibilities with clients, may encounter distrust and/or hostility based on fear that the attorney's true function is to plead out cases to keep the system moving. “The reasons for this are not difficult to identify. Assembly line justice has not been uncommon in America and [some] public defenders have played their part in it...’ N[atational] A[dvisory] C[ommission], Courts, Standard 13.13...” National Legal Aid and Defender Association, Performance Guidelines for Criminal Defense Representation (1994), Guideline 6.1, Commentary, note 9.

It is likely that such fears taint public counsel's appellate attorney/client relationships as well.

To suggest that appellate counsel might coercively advise clients about potential dangers of an appeal is not unrealistic:

“We further note that appellate counsel, in advising the defendant of his right to file a *pro se* brief, counseled the defendant that he ran the risk of a greater sentence by appealing in language that had a coercive tone.” People v. Melvin, __ A.D. 2d __ (2nd Dept., 6/28/99).

work of the courts, their respect for law and order will vanish with it to the great detriment of society.” Vanderbilt, *The Challenge of Law Reform*, Princeton University Press (1955), 4-5.

The prosecution may argue that public trust in the legal system requires harsher sentences for a partially successful appellant who will otherwise be thought to have evaded proper punishment on a “technicality.” In the instant case, petitions from the community urging that it would be an injustice to impose more than the original two-to-four-year sentence on Mr. Young were countered by requests from other members of the public that his sentence not be reduced. (Minutes of January 5, 1995, 9-10; Minutes of March 23, 1995, 106.) The court said that it was not relying on those documents in determining sentence (Minutes of March 23, 1995, 132), and this Court is not being asked to base its decision on the petitions presented on behalf of Mr. Young. However, the petitions demonstrate that there is great public interest in sentences and how they are imposed.

When that interest focuses on an individual case, the judge must avoid consideration of *ex parte* communications regarding sentencing,¹⁹ but may consider communications funneled through the defense or prosecution and submitted with notice to the other side. *See, People v. Michael M.*, 124 Misc. 2d 300 (1984). What judges may not do is allow bias—against an individual or against defendants generally—to

¹⁹ And perhaps must also avoid other sources of information on public opinion as well:

“The law, John Adams told a Massachusetts jury while defending British citizens on trial for murder, is inflexible, inexorable, and deaf: inexorable to the cries of the defendant; ‘deaf as an adder to the clamours of the populace [emphasis added].”

Commonwealth v. Louise Woodward, Memorandum and Order, November 19, 1997, quoted in Shute, “The Place of Public Opinion in Sentencing Law,” 1998 Criminal Law Review [Great Britain] 465 (1998).

compromise their judicial integrity. *See, e.g. Matter of Polito*, Determination of October 1, 1998, Commission on Judicial Conduct. For while anti-defendant bias may appear to engender popularity in the short run,²⁰ it will ultimately destroy public trust.

Similarly, a procedural ruling that allows an unpopular defendant to be denied relief following a successful appeal may seem in the short run to build public satisfaction in the courts. But in the long run, public trust can be engendered only by the observable existence of unbiased application of the rule of law. In *Van Pelt*, *supra*, this Court recognized that the harm caused by perceived vindictiveness in sentencing after appeals would clearly outweigh any burden placed on the sentencing process by the presumption established in *Pearce*, *supra*. This Court should reverse the erosion of that presumption.

B. The Presumption of Vindictiveness Established in *People v. Van Pelt*, 76 N.Y.2D 156 (1990), and Resting on the Principles of *North Carolina v. Pearce*, 395 U.S. 711, 723-724 (1969), Should Not be Eroded by an “Aggregate Sentence” Test.

The prosecution and lower courts in the instant case would turn the presumption of vindictiveness set out in *People v. Van Pelt*, *supra*, into a mere shell as to multiple-count cases by using an “aggregate” test. The courts below accepted the prosecution’s argument that Mr. Young’s new twenty-five-to life sentence for CPSP4 was not presumptively vindictive because, while it was a huge increase over the original CPSP4 sentence of two to four years, it was still less than the aggregate of the all sentences originally imposed, including the charges of which Mr. Young was acquitted on retrial.

²⁰ *See, Matter of Polito*, *id.* concerning a Supreme Court Justice who gained election after a campaign in which he ran advertisements bearing the legend “Crack Down on Crime” and containing other anti-defendant language.

1. New York's Reliance on Individual Counts Will Not Accommodate the Aggregate Test.

The aggregation test makes a mockery of New York's statutory sentencing scheme, in which individual sentences attach to individual counts. In our State, when a conviction is entered on more than one count of an accusatory instrument, the court must pronounce sentence on each count. C.P.L. §380.20. Failure of a court to do so is grounds for resentencing, as this Court noted in a case arising in the same county as the instant matter. People v. Sturgis, 69 N.Y.2d 816, 818 (1987).

Criminal appeals often result in reversal and dismissal of one or more counts, leaving one or more counts—and their sentences—intact. *See, e.g. People v. Ranson*, 251 A.D.2d 263 (1st Dept., 1998); People v. Johnson, 251 A.D.2d 428, 429 (2nd Dept., 1998). That a defendant may seek²¹ or ultimately obtain relief on only some portions of a multi-count conviction is eminently foreseeable, contrary to the prosecution's argument below. (Minutes of January 5, 1995, 7, 8.) The defense made this point forcefully in the trial court. (*Id.* at 9.)

The aggregation test proposed and relied on below disregards the focus of our State's procedures on individual counts rather than just the total sentence. Such a test was properly rejected by the First Department two decades ago.

In People v. Cwikla, 60 A.D.2d 40 (1st Dept., 1977), *rev'd on other grounds*, 46 N.Y.2d 434 (1979), the trial court had concluded that it could disregard the original sentence imposed for burglary in a multi-count case and impose whatever sentence for

²¹ *See, e.g. People v. Wallace*, 246 A.D.2d 676 (2nd Dept., 1998).

burglary it found to match the totality of the circumstances—circumstances which included acquittal on a felony murder charge upon post-appellate retrial. The Appellate Division noted that each crime for which a defendant is sentenced “must stand alone and be examined on the basis of the evident supporting that conviction [emphasis added].” *Id.* at 48. The court then found that due process, under Pearce, *supra*, barred an increased sentence for the burglary.²² Cwikla was correctly decided on this point.

The few cases that refer favorably to the aggregate test do so without scrutiny, and are unconvincing.²³ The Third Department’s decision in People v. Acevedo, 224 A.D.2d 727 (1996), *lv. denied* 88 N.Y.2d 875 (1996), distinguished that case from Van Pelt by noting that the sentence in question had been imposed after appellate remand for resentencing, not retrial, and that the sentencing court had adequately explained the reasons for the new sentence. The Appellate Division commented without analysis that the new sentence also had an aggregate minimum less than the original sentence.²⁴

The count-by-count nature of New York’s criminal procedure, which militates against use of the aggregate test, is demonstrated in cases where there is a reversal of only minor counts for which the defendant has already served the sentence, while other counts are affirmed. In these instances, appellate courts may order dismissal rather than

²² There was apparently not a different sentencing judge, so that Pearce clearly applied; in the instant case, where a different judge sentenced Mr. Young following retrial, the protections of Van Pelt, *supra*, should apply whether or not those of Pearce do (*see* Texas v. McCullough, 475 U.S. 134 [1986], and its progeny).

²³ *See, e.g.* People v. Justice, *infra* at note 25.

²⁴ In a recent decision, the First Department refused to rely on Acevedo to hold Van Pelt inapplicable to resentencings (as opposed to retrials) following appeal. In the course of its opinion, the First Department referred without comment to the aggregation aspect of the Acevedo opinion. People v. Gonzalez, ___ A.D.2d ___ (3rd Dept., 6/8/99).

retrial. *See, e.g. People v. Flynn*, 79 N.Y.2d 879 (1992) (defendant convicted of leaving the scene of an accident without reporting and “other crimes;” error found as to the leaving the scene conviction, and that count dismissed. *Id.* at 882); *cf. People v. Allen*, 39 N.Y.2d 916, 917-918 (1976). Had Mr. Young successfully raised reversible error in the instant case only as to the CPSP4 count, it is quite possible that it would have been dismissed.

Conversely, if he had not appealed that count at all, his sentence of two to four years on that unlawfully obtained conviction would have long been served, as he has noted. (Brief for Appellant, 12.)

2. The Federal Criminal System Differs From New York’s; the Federal Aggregate Test Should Not Be Applied Here.

The aggregate test is applied in Federal courts, and may have originated there. The prosecution in *Cwikla*, *supra*, relied on *United States v. Clutterbuck*, 445 F. 2d 839, 840 (C.A. 9, 1971), which in turn cited *Thurman v. United States*, 423 F. 2d 988 (C.A. 9, 1970). But *Thurman* involved a case in which everyone, including the defendant at the time of the second sentencing, believed he was receiving much more lenient treatment where the original twenty-five year prison term concurrent with a five-year-term was replaced by a suspended twenty-five year term that was set to run consecutively to the five-year term so that the five years of probation would begin upon the defendant’s release. *Id.* at 990. As the Ninth Circuit observed, saying that the second sentences were

more severe simply because they were consecutive was exalting form over substance.²⁵ Furthermore, Mr. Thurman had pled guilty following the appeal, presumably agreeing to the sentences later complained of. That is a far cry from the instant case, in which Mr. Young was acquitted of most charges on retrial, received a much harsher sentence on the one charge of which he was reconvicted, and objected to that sentence as soon as it became a possibility.

Clutterbuck, *supra*, like Thurman, involved second sentences that were to run consecutively where the originals had been concurrent. However, not only was the aggregate of the second sentences less than the aggregate of the first, but each individual sentence was also less—substantially less—as the appellate court had reduced the charges.²⁶ Mr. Young’s individual sentence, however, was substantially more.

New York should continue to reject the Federal aggregate test for reasons that go beyond factual distinctions. The Federal sentencing scheme is quite different from that of New York. In multiple-count cases, the Federal Sentencing Guidelines require a court to divide the counts into “Groups of Closely Related Counts,” determine what “offense level” applies to each Group by applying specified rules, then determine what

²⁵ The Fourth Department case of People v. Justice, 202 A.D.2d 981, 982 (4th Dept., 1994), which used the language of the aggregate test without citation or reasoning, is similar to Thurman in that the issue was whether consecutive sentences upon resentencing were *per se* improper. Mr. Justice received individual sentences that were each less than the sentences imposed for higher offenses after his first trial, and the aggregate was also less, despite the sentences imposed after retrial being made consecutive.

²⁶ Similar to the facts in People v. Justice, *supra* note 25.

combined offense level is applicable to all Groups taken together. *Federal Sentencing Guidelines Manual*, United States Sentencing Commission, Chap. 3, Pt. D, §3D1.1. (1998).

An aggregate test for determining whether a presumption of vindictiveness on resentencing applies under sentencing procedures where counts are combined for purposes of ascertaining an applicable guideline is quite different from use of such a test under procedures where every count must be considered individually. The aggregate test should not be transplanted to New York.

Furthermore, the limitations of the aggregate test in terms of its ability to protect the right to appeal have been noted even in the Federal system. Some courts accepting the test have nonetheless noted that “there is a potential for vindictiveness even though the aggregate sentence is reduced.” *Kelly v. Neubert*, 898 F. 2d 15, 18 (C.A. 3, 1990).

Trial courts have been urged to state their reasons for new sentences on the record. *Id.*, citing *Paul v. United States*, 734 F. 2d 1064 (C.A. 5, 1984) and *United States v. Shue*, 825 F. 2d 1111 (C.A. 7, 1987), *cert. denied* 484 U.S. 956 (1987). That is exactly what courts must do to overcome the presumption of vindictiveness—place on the record non-vindictive reasons for an increased sentence.²⁷ *E.g. Van Pelt, supra*, and *Pearce, supra*. The potential for vindictiveness that remains under the aggregate test is a sound reason for this court

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“While the record does not have to show that the judge was not actually punishing [the defendant] for taking the appeal, the record must show more than that the judge simply articulated some reason for imposing a more severe sentence. The reason must have at least something to do with conduct or an event, other than the appeal, attributable in some way to the defendant... [emphasis added].” *United States v. Rapal*, 146 F. 3d 661 (C.A. 9, 1998).

to reject that test, apply the presumption, and require lawful reasons for any increase in sentence following retrial.

Our own Federal Circuit has sought to address the deficiencies of the aggregate test by modifying it. While rejecting a simple “count-by-count comparison,” the court found that the proper procedure to determine whether a presumption of vindictiveness should apply was to compare the new aggregate sentence to only the aggregate of the original sentences for those counts for which there was a reconviction. United States v. Markus, 603 F. 2d 409, 413 (C.A. 2, 1979). Under this modified approach,²⁸ Mr. Young could receive a sentence no longer than what he received previously for the only crime of which he was reconvicted—the two-to-four-year sentence he originally received for the CPSP4.

3. Any Form of Aggregate Test May Chill the Exercise of Appellate Rights.

Modified or not, the aggregate test presents problems. The dissenting opinion in United States v. Pimienta-Redondo, 874 F. 2d 9 (C.A. 1, 1989) (Coffin and Bownes, J.J., dissenting) noted that, for example, a defendant appealing convictions on two counts faces three possibilities—both may be affirmed, both overturned, or only one overturned. To say that the only chance for actually winning any relief is to win on both counts is, as the court noted, “to lessen considerably the odds,” thereby chilling putative

²⁸ This test has been adopted also in the 11th Circuit. United States v. Monaco, 702 F. 2d 860, 885 (C.A. 11, 1983).

defendants. *Id.* at 19. To avoid the apprehension that vindictiveness will make appeals futile, the Pearce presumption should be applied to individual counts.

A trial court should not be able to “make up for” the dismissal or acquittal of some counts by simply increasing the sentence on remaining counts. Such action, whether done with subjectively “evil” vindictive intent²⁹ to punish a defendant for appealing or with a no less unfair, institutional³⁰ desire to evade appellate correction and maintain the sentencing status quo,³¹ violates due process. Only if there has been intervening conduct by the defendant should the sentence given on a particular count be permissibly increased following retrial after appeal.

C. The Factors Considered in Mr. Young’s Case Were Improper and Insufficient to Overcome the Van Pelt/Pearce Presumption.

Initially given a two-to-four-year sentence for the “lower-grade, nonviolent felony ‘property’ conviction...”³² of CPSP4, Mr. Young was given a twenty-five-years-to-life sentence for the same crime following reconviction after appeal and retrial. The mechanism used to obtain the increase was a determination by the second sentencing court that Mr. Young should be designated a persistent felony offender under Penal

²⁹ As noted above, the United States Supreme Court recognized in Pearce how difficult it would be to prove a retaliatory motive in a given case (North Carolina v. Pearce, *supra.*, at 725 at n. 20

³⁰ This Court emphasized in Van Pelt that it was protecting against longer sentences given punitively in the institutional, not personal, sense. Van Pelt, *supra.*, at 161.

³¹ *See, People v. Wilcox*, 60 A.D.2d 954 (3rd Dept. 1978) (The charges against a defendant had been reduced on appeal. He was then given a greater sentence, which was set aside, and another sentence imposed equal to the original sentence on the higher charges. Imposing the same sentence for lesser charges was found by the appellate court to be an abuse of discretion, and was reduced).

³² This description is taken from the prosecution’s brief below. (Respondent’s Brief in the Appellate Division, 23.)

Law 70.10. For the initial CPSP4 sentence, Mr. Young had been designated a second felony offender under Penal Law 70.06.

As is set out in the brief filed on Mr. Young's behalf in this Court, the first "reasons" given by the prosecution for seeking persistent felony offender designation for Mr. Young following retrial were that the Appellate Division had reversed Mr. Young's first convictions in this case and that he had been reconvicted of only CPSP4. (See, e.g. Letter of Cara Brings to Hon. A. Affronti, January 11, 1995, cited at Brief for Appellant, 35.)³³ These "reasons" do not overcome the presumption of vindictiveness created by a longer sentence but rather embody it.

Absent intervening conduct by Mr. Young, the original sentence on the CPSP4 was the proper sentence for that count. As noted above in subsection B.1., New York law is explicit and plain that in multiple-count cases, each count must be considered individually.³⁴ "If an accusatory instrument contains multiple counts and a conviction is entered on more than one count the court must pronounce sentence on each count." C.P.L. 380.20. This Court has made clear that the statutory mandate must be fulfilled. People v. Sturgis, 69 N.Y.2d 816 (1987). A sentencing court may, within the limits of statutory law, adjust the overall sentence by determining whether the sentences on

³³ The prosecution, while maintaining its position that the enhancement of Mr. Young's sentence was appropriate, has conceded in a footnote that the prosecutor in the sentencing court "mistakenly suggested that such procedural posture constituted 'new events' warranting a greater sentence...." The footnote continues that the trial prosecutor's position was taken without actual "animus," which is irrelevant. As is noted above, e.g. *supra* at note 30, vindictiveness in the institutional, not personal, sense is the primary target of the Van Pelt safeguard.

³⁴ Citations are noticeably lacking for the proposition that New York trial courts impose sentence for "one 'case'" in multiple-count situations. See, Brief for Respondent, 7.

various counts are to run concurrently or consecutively. Penal Law §70.25 (1). But this is in no way tantamount to imposition of a “general judgment.”³⁵

Given New York statutory and case law governing multiple-count cases, a determination as to the proper sentence status and the proper sentence for a defendant on a particular count should not be subject to increase following retrial after appeal absent intervening improper conduct by the defendant. Where, as in Mr. Young’s case, there is no such intervening conduct, an increased sentence on one count to “make up for” the overturning of other counts is impermissibly vindictive.

Knapp v. Leonardo, 46 F. 3d 170 (C.A. 2 1995), does not militate otherwise. The defendant in Knapp was originally convicted of a Class A-1 felony carrying the same potential sentence as a persistent felony offender enhancement.³⁶ In other words, pursuing persistent felony offender status would have been truly superfluous because the sentence on the same count would have been the same with or without enhancement. When Mr. Knapp was convicted of a lesser-included offense as to that count at retrial, enhancement as a persistent felony offender enabled the court to give him the same sentence he had received on the greater charge under the same count. *Amicus* New York State Defender Association does not endorse Knapp’s finding that such enhancement was proper.³⁷ But more importantly, Mr. Young’s situation is

³⁵ For an example of general judgments, *see*, Polinsky v. People, 11 Hun. 390 (1877), *aff’d*. 73 N.Y. 65 (1878).

³⁶ People v. Knapp, 113 A.D.2d 154 (3d Dept., 1985).

³⁷ Many of the policy arguments in this brief, such as unfairness and erosion of the public trust due to actual and apparent vindictiveness, would also apply in the Knapp situation. Neither the Appellate Division (Third Department) nor the Second Circuit opinions addressed such analysis in their short handling of the sentencing issue amid many others. *And see*, People v. Wilcox, *supra* note 31.

distinguishable from Knapp, because Mr. Young received not the same sentence for the same count *albeit* under a different statute, but a vastly increased sentence for the exact same offense. That was presumptively and actually vindictive.

Such vindictiveness was exacerbated by consideration, at sentencing after retrial, of charges that were known to the original sentencing court and that had led to convictions based on the same illegal evidence as the original convictions in the instant case. The prosecution and trial court erred by pointing to Mr. Young's conviction of charges in the case arising from Indictment 402 as a basis for enhancing his sentence for CPSP4 following retrial in the instant case.³⁸ (*See, e.g.* Minutes of January 19, 1995, 12; Minutes of March 30, 1995, 130.)

As defense counsel argued, case 402 was based on the same illegally obtained evidence as had supported the first convictions in the instant case and should not be considered as to sentencing in the instant case. (*E.g.* Minutes of March 10, 1995, 10-11). Mr. Young had sought to set the case 402 convictions aside. (*See, e.g.* Minutes of March 10, 1995, 2-4, 8). The court refused on procedural grounds to hear the motion. (Minutes of March 10, 1995, 28.) Those grounds, even if legally accurate (which is not conceded), provided no just reason for considering the convictions in case 402 as to the instant

³⁸ Because the trial court refused to set aside the conviction in case 402, but did set aside the sentence (Minutes of February 28, 1995), the sentencing proceedings held on March 23, 1995, actually encompassed both cases.

sentence, despite the prosecution's arguments.³⁹

The Appellate Division, Fourth Department, later overturned the convictions in case 402 due to the illegally obtained evidence. People v. Young, __ A.D.2d __, 683 N.Y.S. 2d 677 (4th Dept., 1998). The case 402 convictions should not have been considered as to sentencing in the instant case. Intervening convictions based upon indictments pending at the time of the original sentencing⁴⁰ for conduct predating that sentencing should not be used to overcome the Pearce/Van Pelt presumption of vindictiveness.⁴¹ Certainly where those convictions were obtained based on constitutional error they should not have been considered. *See, People v. Harris*, 61 N.Y.2d 9, 16 (1983).

³⁹ It is unfortunate that the illegality of the state action that led to eventual suppression of the evidence in both the instant case and case 402 is apparently perceived as something to be evaded or ignored rather than acknowledged and fixed. The court and prosecutor below might do well to take a lesson from the words of the Appellate Division in different circumstances, urging public servants to look beyond legal arguments. The court said in a civil case that "it would be far more consistent with the role assigned to the [agency in question] to resolve petitioner's problem than to steadfastly resist his efforts to secure a solution, however flawed they might be from a purely legal standpoint." In re Application of Johnson v. Torres, __ A.D.2d __ (1st Dept., 3/18/99).

In Mr. Young's case, the prosecution did not have to focus on legal procedures, arguing that the finding of illegality in the instant case had to be taken back to the Appellate Division in case 402 (*see*, Minutes of March 10, 1995, 21). The prosecution could have simply conceded that the illegal conduct condemned in the instant case had yielded evidence in case 402 as well, requiring a new trial and making the conviction in case 402 unavailable for consideration in the instant case. "It is familiar doctrine that a prosecutor serves a dual role as advocate and public officer... charged with the duty not only to seek convictions but also to see that justice is done." People v. Pelchat, 62 N.Y.2d 97, 105 (1984).

⁴⁰ Which the original sentencing court could have considered. *See, e.g. People v. Williams*, 181 A.D.2d 929 (2nd Dept. 1992).

⁴¹ Language to this effect can be found in United States v. Markus, *supra*, at 414.

CONCLUSION

FOR THE ABOVE-STATED REASONS, AND FOR THE REASONS STATED IN APPELLANT'S BRIEF, THE PERSISTENT FELONY DETERMINATION SHOULD BE VACATED AND A LEGAL, NONVINDICTIVE, SENTENCE IMPOSED.

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