

63127-6

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No. 63127-6-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent,

vs.

WILLIAM F. JENSEN,  
Appellant.

2009 AUG 25 AM 10:32  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I

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**REPLY BRIEF**

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## A. INTRODUCTION

Mr. Jensen was originally convicted of four counts of solicitation to murder and received four 180-month sentences. Two of those four convictions were reversed on appeal and subsequently dismissed.

At resentencing, Jensen received two 240-month sentences. Thus, each sentence was now at the top, rather than the bottom of the range. The sentencing court which was fully aware of the facts and reasons supporting the original 180-month sentences and was put on notice of Jensen's intent to argue vindictiveness if a greater sentence was imposed, nevertheless failed to indicate any reason supporting an increase—from the minimum to the maximum.

In response, the State now argues that the presumption of vindictiveness should not apply because a different judge resented Jensen. Alternatively, the State argues that this Court should look only to the aggregate sentence, not the individual sentences imposed on each count.

To the contrary, the presumption of vindictiveness is not so narrow *especially where the sentencing court does not give any*

*reason justifying the increased sentence*, as Jensen demonstrates in this reply.

## **B. ARGUMENT**

### 1. Introduction

In *North Carolina v. Pearce*, 395 U.S. 711, 723-25, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989), the Court held that the imposition of a harsher sentence upon re-sentencing, may not, under the Due Process Clause, be the result of judicial vindictiveness. To guard against the possibility of vindictiveness, *Pearce* established a presumption that an increase in sentence upon re-sentencing reflects an improper motive on the part of the sentencing court. A court can easily overcome the presumption by citing new, objective information not previously available to the court, or other legitimate sentencing concerns. *Texas v. McCullough*, 475 U.S. 134, 142, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986).

In this case, the sentencing court imposed sentences 60 months greater than originally imposed without any explanation for

the increase. As a result, the presumption has not been rebutted. This Court should vacate the current sentence. Then, Jensen is entitled to be resentenced by another judge.

2. The Presumption Applies to Individual Increased Sentences

The United States Supreme Court has not spoken on the issue of exactly what constitutes an “increase” in prison sentence for purposes of applying the *Pearce* holding in a case involving multiple convictions. Because this issue goes to the heart of Appellant's argument, he begins there.

The State argues that two state cases adopt an “aggregate” sentence approach, applying the *Pearce* presumption only where the aggregate new sentence is greater than the prior aggregate sentence, no matter how different the configuration of convictions at the time of resentencing.

Contrary to the State's insistence, *State v. Franklin*, 56 Wn. App. 915, 920, 786 P.2d 795 (1989), does not support its argument. First, it appears that the *Franklin* court did not consider the “aggregate vs. count by count” analysis. It is a reach—at best—for the State to rely on a case that make no mention of a doctrine of law

to support its argument that it adopted that doctrine, and rejected a corresponding doctrine. Instead, *Franklin* is most accurately read as expressing no opinion on the issue.

In any event, no charges were dismissed in *Franklin*. Instead, in *Franklin* the defendant was resentenced on the same two counts and received the exact same sentence on each count. *Franklin* does not apply, here.

The State does no better relying on *State v. Larson*, 56 Wn. App. 323, 783 P.2d 1093 (1989), a case arising out of a situation where the trial court apparently failed to appreciate the rules governing the SRA when imposing sentence. *See* 56 Wn. App. at 325 (“The court commented that the murder was ‘egregious’ and sentenced Larson ‘to life’ for the murder and rape and ‘ten years’ for the arson. The court apparently intended to set maximum terms as prescribed by pre-SRA law.”). Eventually, the trial court imposed consecutive sentences totaling 363 months. However, the court’s unfamiliarity with the law resulted in the court failing to explicitly find a necessary aggravating factor. Because of this obvious confusion, this Court remanded “for resentencing permitting the trial

court to enter appropriate findings of fact and conclusions of law.”

*Id.* At that resentencing the sentencing court made its earlier intention clear. “The court said it had originally intended to sentence Larson to a total of 30 years, and that the consecutive sentences were merely a means of achieving that end.” *Id.* In the end, the sentencing court *reduced* Larson’s sentence by 3 months.

The *Larson* court found that any presumption of vindictiveness had been rebutted. “(T)he ‘increase’ in the murder sentence is fully explained by the trial court’s original sentencing intent. Thus, there is no hint of retaliation, and certainly no reasonable probability of actual vindictiveness.” *Id.* at 327. The sentencing court’s lack of command over the SRA further rebuts the presumption in *Larson*, which like *Franklin*, did not involve a case remanded for resentencing after the dismissal of convictions.

It is true that *Larson* discusses with approval the use by several federal courts’ the “aggregate” sentence analysis. However, that discussion is not necessary to the holding and constitutes *dicta*.

There is a split of federal authority on this issue. Some courts hold, in order to determine whether there has been an increase in

sentence upon re-sentencing in a case with multiple convictions, the court must compare the new sentence to the *total aggregate* sentence originally imposed for *all* convictions. See *United States v. Murray*, 144 F.3d 270, 275 (3d Cir.1998) (rejecting a due process claim based on *Pearce* because the appellant's new federal sentence, to life imprisonment, did not exceed the total length of his original sentence and there was no evidence of judicial vindictiveness); *Kelly v. Neubert*, 898 F.2d 15 (3d Cir.1990) (rejecting a *Pearce* challenge to a sentence imposed by a New Jersey state court, which, following the vacation of two of the defendant's convictions, had re-sentenced him to a lesser total aggregate sentence than originally imposed, but had increased the sentences on several of the individual remaining counts); *United States v. Campbell*, 106 F.3d 64 (5th Cir.1997) (rejecting a *Pearce* challenge to a sentence imposed by a federal district court which, following reversal of two of the defendant's convictions, had re-sentenced him to a lesser total aggregate sentence, but had increased substantially the sentence on his one remaining conviction; also expressly adopting the majority aggregate approach and summarizing the views taken by the other circuits);

*Sexton v. Kemna*, 278 F.3d 808 (8th Cir.2002) (rejecting a *Pearce* challenge to a sentence imposed by a Missouri state court, which had imposed the same total aggregate sentence following the defendant's retrial for rape and several counts of sodomy as it had imposed after his first trial, even though the defendant had been acquitted of rape upon the second trial, but not upon the first).

In contrast, other courts have adopted an alternate approach, referred to as the "count-by-count" or "remainder aggregate" approach, whereby the court compares the new sentence to the original sentence from which has been subtracted the sentence imposed for the reversed or dismissed counts. In other words, to compare quantitatively the original and new sentences under this approach, the court considers *only* those convictions that remain intact upon remand and re-sentencing. See *United States v. Monaco*, 702 F.2d 860, 885 (11th Cir.1983); *United States v. Markus*, 603 F.2d 409 (2d Cir.1979) (shortening sentence of federal prisoner to correct more severe sentence in violation of *Pearce* that resulted after a count was dropped on retrial).

In *Monaco*, the defendant received a total of four years of

imprisonment on three counts. He was granted a new trial, at which his motion to have count three dropped for insufficiency of the evidence was granted. He was convicted on the other two counts and sentenced to four years of imprisonment. Although his total first and second sentences were identical, he received a longer sentence on the convicted counts than he had at his first trial. The Eleventh Circuit held that his new sentence violated the rule in *Pearce*. See also *Midgett v. McClelland*, 547 F.2d 1194 (4th Cir.1977) (granting pre-AEDPA habeas relief to state prisoner who received same sentence at retrial, despite having been acquitted of one charge for which he originally received twenty-year term, as this was impermissible and appeared retaliatory on its face).

The problems with the “aggregate” approach urged by the State in this case are manifold. First, it allows a judge to order the same sentence or nearly the same total sentence regardless of any reduction in the defendant's convictions, provided that the statutory maximums for the convicted crimes are not exceeded. This results in defendants being given no “credit” for having been convicted of fewer offenses. They receive the same sentence despite fewer

convictions. It allows a sentencing court to in essence overrule an appellate court through its sentencing power.

Indeed, defendants convicted of multiple counts may be more likely to face retaliation upon dismissal of one or more of those counts than defendants convicted twice of a single count.

Second, under the SRA sentence ranges are determined by the crimes of conviction. The structure of the SRA provides that sentences should relate to offenses, the number and nature of which determines the punishment. At his second sentence, Mr. Jensen stood convicted of two less convictions. Nevertheless, the sentencing court imposed sentences that sought to eliminate that difference.

Increasing Mr. Jensen's individual sentences from the bottom to the top of the range where the only changed fact is the double jeopardy dismissal of two of the four counts appears to be retaliatory on its face. Of course, Jensen admits that a judge could have a benign reason for wishing to alter the sentences for each count in a multi-count context. Likewise, a judge imposing an original sentence in a multi-count case could be guided by the aggregate total

when deciding what sentence to impose on the individual counts. However, the point of *Pearce* is that the record must indicate these intentions. This requires very little of sentencing judges. They merely need to indicate their thought process on the record.

However, where the record is silent the presumption is not rebutted. That should be especially true in case like this where defense counsel raised the specter of vindictiveness prior to sentencing. RP 13-17. The sentencing court's silence in the face of the objection certainly falls far short of rebutting the presumption.

The question is not one of reasonableness of the individual or total sentence, as the State slyly seeks to reframe it. Instead, the originally sentencing court imposed four sentences, each at the bottom of the range. The original sentencing court expressed several reasons from its sentence, but said nothing of the aggregate total as influencing the individual sentence on each range. Further, when put on notice the second sentencing court said nothing to justify two individual sentence, each at the top of the range. Any reasonable explanation of non-vindictiveness would have sufficed. None was given.

3. The Presumption Applies Where a New Judge, Fully Informed about the Previous Sentence, Imposes Increased Sentences.

The State argues that no presumption of vindictiveness can be applied in this case because the first and second sentencing judges were not the same person, citing *State v. Parmelee*, 121 Wn. App. 707, 710-12, 90 P.3d 1092 (2004).

If *Parmelee* adopted an automatic “new judge” exception to the application of the presumption of prejudice, such a holding conflicts with federal law which defines the mandates of Due Process.

It is incorrect to characterize the presumption of vindictiveness law as strictly confined to certain circumstances and automatically exempt in others. Instead, the presumption of vindictiveness applies whenever there is a reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. *Alabama v. Smith*, 490 U.S. 794, 799, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

Certainly, if the second sentencing judge knew nothing of the first sentence, no presumption of vindictiveness could arise even if

the sentence was increased, measured either individually or in the aggregate. For example, in *Rock v. Zimmerman*, 959 F.2d 1237, 1257 (3d Cir. 1992), the Third Circuit determined that the *Pearce* presumption does not apply when the second sentence is imposed by a different judge *and* the record provides assurances that the more severe sentence simply reflects a fresh look at the facts and an independent exercise of discretion by the second sentencer. When a different judge imposes a more severe sentence than the sentence imposed in the initial trial and the second judge provides an “on-the-record, wholly logical, non-vindictive reason for the new sentence,” the *Pearce* presumption of vindictiveness does not apply. *Texas v. McCullough*, 475 U.S. at 140.

However, the record in this case is devoid of such evidence. In this case, the second judge was fully informed about the first sentencing judge’s sentence and the reasons for the sentence. Indeed, the second sentencing judge had the entire transcript of the first sentencing. However, perhaps most importantly, the State offered a possible non-vindictive reason supporting an increased sentence (RP 4), which was *not* adopted by the court.

Likewise, defense counsel urged a particular sentence—one that was consistent with the original sentence, in light of the two dismissed counts. RP 14-17. Once again, the sentencing court did not challenge or disagree with defense counsel’s analysis when it imposed its sentence. Thus, the sentencing court failed to offer any non-vindictive reason for its sentence despite the arguments of both parties calling for such an explanation if a different sentence was imposed on each of the two remaining counts.

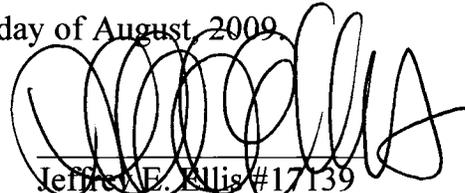
Vindictiveness is not a concern when the record affirmatively demonstrates that reasons unrelated to a defendant's successful challenge to the original judgment form the basis for the subsequent judgment. However, where a non-frivolous claim of vindictiveness is raised and the sentencing court offers no statement to contradict it, a reviewing court should apply the presumption of vindictiveness and find that it has not been overcome. After reversal and dismissal of one or more of multiple convictions, a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings.

In this case, despite the facts that both parties requested the sentencing court to provide an explanation accompany any change in the individual sentences, none was given. The presumption should apply. If applied, it is clearly un rebutted.

**C. CONCLUSION**

Based on the above, this Court should vacate the judgment and remand this case to King County Superior Court for a new sentencing hearing before a new judge.

DATED this 24<sup>th</sup> day of August, 2009



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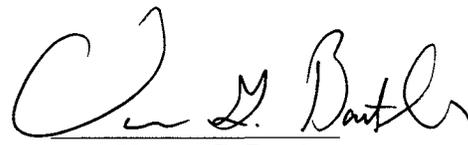
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**CERTIFICATE OF SERVICE**

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on August ~~19~~<sup>24</sup> 2009 I served the parties listed below with a copy of *Petitioner's Reply Brief* as follows:

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8-24-09 Sea, WA  
Date and Place

  
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