**RETALIATION IN SENTENCING EPISODE NOTES**

**Wade: Hello folks, and welcome to another edition of “The Good Judge-ment Podcast. I am Wade Padgett**

*Tain: And I’m Tain Kell. In other episodes we have discussed that there is no such thing as a “trial tax” where a judge automatically imposes a more harsh sentence if the defendant goes to trial and is found guilty of a crime.*

**Wade: That’s right. People refer to that as a trial tax. Now to be clear, if a defendant rejects a plea offer and does go to trial, the trial judge is not bound or limited by the sentence that had been discussed as part of a plea bargain.**

*Tain: That’s true. The judge cannot announce that if a plea offer is rejected that a more severe penalty would be imposed after the trial. The judge may find that the defendant failed to accept responsibility for his/her actions and consider that fact as part of the sentence to be imposed – but the judge cannot simply announce that any sentence that would be imposed following a trial would be greater than what had been offered as part of a plea bargain.*

**Wade: Tain, we have discussed that any time a judge has discretion and makes some sort of policy or practice of not ever exercising that discretion, that act is actually an abuse of discretion. And what we are discussing with the trial tax is exactly that sort of refusal to exercise discretion.**

*Tain: But Wade, we are running those this issue and that is not even what we mean when we say we are discussing “Retaliation in Sentencing.” correct?*

**Wade: That’s right Tain – let’s jump in and explain what we mean when we are discussing retaliation in sentencing.**

Just to finish (and cite) what we mean by a “trial tax”

As a general rule, “A trial judge fixing a sentence after a guilty verdict must prescribe a sentence for a specific number of months or years that must be within the minimum and maximum prescribed by law as the punishment for the crime.” O.C.G.A. § 17-10-1(a)(1)(A); *West v. State*, 241 Ga. App. 877, 878 (2000).

U.S.C.R. 33.6(b) essentially outlaws the “trial tax”

“The judge should not impose upon a defendant any sentence in excess of that which would be justified by any of the rehabilitative, protective, deterrent or other purposes of the criminal law merely because the defendant has chosen to require the prosecution to prove the defendant's guilt at trial rather than to enter a plea of guilty or nolo contendere.”

BUT, “ ‘It is not error for the trial judge to impose a greater sentence upon a defendant after he has heard the evidence at trial than he might have imposed in conjunction with a guilty plea.’ “ *West*, at 878, citing  *Baldwin v. State,* 217 Ga.App. 866, 868(3) (1995); See also *Cobb v. State*, 356 Ga. App. 187, 190 (2020).

We have recognized that a trial court does not engage in unconstitutional ‘vindictiveness' by imposing a harsher sentence following a jury trial than may have been imposed if the defendant had accepted a plea bargain.” (Citation omitted.) *Gidey v. State,* 228 Ga.App. 250, 253 (1997). As the trial court here acknowledged, entry of a guilty plea may constitute a sentencing consideration warranting leniency. *Allen v. State,* 193 Ga.App. 670, 671–672 (1989); see also *Townes v. State,* 298 Ga.App. 185, 189–190 (2009).”

 In imposing a harsher sentence following trial, the trial court is “merely following through on the inevitable and permissible threat which is implicit in any plea bargain situation—that rejection of the plea bargain may diminish or destroy the very rationale for the imposition of a lenient sentence.” (Citation and punctuation omitted.) *Allen*, supra, 193 Ga.App. at 671, 388 S.E.2d 889. The trial court indicated that its primary concern was to sentence similarly situated defendants equitably, and its acknowledgment that criminal defendants who plead guilty may receive leniency does not undermine the validity of Richardson's sentence or establish that the trial court acted vindictively or with a retaliatory motive.

*Richardson v. State*, 305 Ga. App. 363, 368 (2010).

So we have spent the entire episode thus far in telling our listeners what we are NOT talking about

Honestly, what we wanted to focus on and the issues we have already raised ARE related – but the factual scenario we wanted to focus on was after a case goes up on appeal and is reversed for some reason, what sentence can be imposed

This topic was requested by a listener who wanted us to address what to do after a remand or reversal on appeal

And yes, both of us have had cases reversed or remanded following an appeal!

There are vast differences between what can happen following a remand or reversal – it really depends on whether the direction from the appellate court is to simply resentence the defendant OR if the direction requires a retrial. So it would be difficult to examine all of the potential scenarios here.

But one topic that stuck out to us that needs to be addressed is the prohibition against retaliation in sentencing following a reversal or remand

The concept of “retaliation” is frequently referred to as “vindictiveness” in the appellate cases.

Rooted in due process – US Supreme Court has ruled in *Alabama v. Smith*, 490 U.S. 794 (1989) that, following a successful appeal, if the “second sentence” imposed by the judge is more severe than the first sentence that the judge imposed before the appeal, that there must be evidence in the record that something additional was learned before that second sentence was imposed. If there is no “aggravating circumstances” that came to light before the second sentence was imposed, there is a presumption of vindictiveness by the trial judge.

[Interestingly, *Alabama v. Smith* also found that the presumption of vindictiveness has no application to a sentence imposed after a trial versus a sentence that was imposed in connection with a guilty plea that was withdrawn or overturned on appeal. *Arnold v. State*, 324 Ga. App. 58, 60-61 (2013)]

Georgia acknowledged and adopted the rule from *Alabama v. Smith* in its opinion in *State v. Hudson*, 293 Ga. 656 (2013).

Stated plainly, *Hudson* held, “To prevent such fear of retaliation from deterring defendants in the exercise of their appeal rights, the Supreme Court held that vindictiveness will be presumed whenever a more severe sentence is imposed after a retrial or remand, and that to overcome this presumption, the reasons justifying the increased sentence must ‘affirmatively appear’ and be based on ‘objective information’ in the record regarding ‘identifiable conduct on the part of the defendant.’” *Hudson*, at 657.

But the devil is always in the details.

The Court in *Hudson* asked an even more basic question – after citing all of the different US Supreme Court rulings which have clarified this concept of vindictiveness, the *Hudson* Court noted, “However, nowhere in this jurisprudence has the Court prescribed a particular method for determining whether a subsequent sentence is in fact more severe than the first. This case presents us with the opportunity to reassess our approach to this issue.” *Hudson*, at 657.

In order to understand this issue, we need to lay out the undisputed facts from *Hudson*.

Following a jury trial, Claude Wayne Hudson was convicted on one count of aggravated sexual battery and one count of child molestation. On the aggravated sexual battery count, Hudson was sentenced to life in prison, with 25 years in confinement and the remainder served on probation. On the child molestation count, Hudson was sentenced to 30 years in prison, with 10 years in confinement and the remainder probated. The sentences were to run concurrently. On appeal, the Court of Appeals, holding that the two convictions should have merged, vacated Hudson's sentences and remanded to the trial court for resentencing. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I705f99357d9411e0b63e897ab6fa6920&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=5a1bfd24bc1a442a84547535eb914324&Rank=11&RuleBookModeDisplay=False&ppcid=4a72c0799bfe4ba3b479e92acba71a38&contextData=(sc.Search))*Hudson v. State,* 309 Ga.App. 580(2), 711 S.E.2d 95 (2011). On remand, the trial court resentenced Hudson on the child molestation count to a term of 30 years, with 25 years to be served in confinement and the remainder probated. Hudson appealed again, contending this sentence was more severe than his initial sentence and was thus presumed to have been motivated by trial court vindictiveness….

Our old friend, MERGER

*Hudson*, at 657-658.

[So we are acknowledging that if a more severe sentence is imposed in the second sentencing, there is a presumption of vindictiveness which can only be rebutted by objective evidence on the record that was not a part of the record at the time the initial sentence was imposed]

Previously, Georgia had employed a “count-by-count” approach when reviewing a sentence for vindictiveness. Looking at each count individually and comparing the sentence initially imposed for that count against the sentence imposed for that count during the re-sentencing. If the judge imposed any sentence for any count of the indictment more harshly than the judge imposed for that count initially, the presumption arose.

HOWEVER, the *Hudson* Court acknowledged that the more proper analysis was an “aggregate approach.” Instead of comparing the sentences count-by-count, look instead at the total original sentence as compared to the total sentence after resentencing. (reversing decades of precedent)

The Court noted that judges, when imposing sentence on different counts which are all based upon a single course of conduct, typically fashion the sentence collectively or in the aggregate and a count-by-count analysis does not consider the overall sentencing scheme a judge may have employed. *Hudson*, at 660-661.

Remember that the evil that is being sought to correct is vindictiveness in sentencing, not whether a defendant receives a greater sentence on remand. That may seem to be a splitting of hairs – but it really informs on why the aggregate approach is the better path – it says so in *Hudson*!

Let’s consider a couple of hypotheticals:

Consider a case involving sex crimes against minors – the conduct was indicted in a way that involved multiple charges of child molestation, sexual battery, aggravated child molestation, etc.

After applying merger principles, let’s assume the trial judge imposed a sentence that results in 30 years in prison, followed by 20 years on probation.

(Of course it has to be a split sentence under O.C.G.A. § 17-10-6.2 – unless there is a life sentence because you cannot ever probate a life sentence….)

So under the hypothetical, assume that on appeal, it was determined that the evidence did not support the aggravated child molestation count of the indictment for which the judge initially sentenced the defendant to 29 years to serve with one year on probation.

The case is then remanded for sentencing.

At re-sentencing, the judge knows that he/she is essentially “capped” at 30 years to serve, followed by 20 years on probation. After deliberation, the judge continues to believe that 30 in, 20 out is an appropriate sentence. Based upon the surviving counts, the judge needs to change a sentence on one count of child molestation from 20 years consecutive probation to a sentence of 10 years in confinement, 1 on probation, consecutive to the other counts.

Under a “count-by-count” analysis, the presumption of vindictiveness would apply and it could not be rebutted by any additional information because nothing else was presented after the remand.

As noted in *Cobb v. State*, 356 Ga. App. 187 (2020), the aggregate approach is now Georgia law and would apply in such a situation.

One more hypothetical where I see this issue arising – possession of a firearm counts – or any crime where the sentence must be consecutive and/or cannot be probated.

As we have discussed in our episodes where we deal with bees in our judicial bonnet, it drives me crazy when parties enter into a plea agreement with counts that must be consecutive to one another or which have sentences that are limited (i.e. 3 years for possession of meth) as part of a 10 in, 10 out plea agreement for other crimes. Parties do not have a suggested resolution to the mandatory minimum or maximum sentences that do not fit within the 10 in, 10 out agreement, But I digress….

In our hypothetical, the case is remanded for re-sentencing for whatever reason and the judge is faced with a situation where there are mandatory minimum sentences or mandated consecutive sentences that do not fit with the original sentence.

Under that scenario, the judge is going to have to make some choices – either to reduce the original sentence imposed to fit the surviving counts, or find himself/herself in a vindictiveness analysis during the second appeal which follows the entry of a sentence that was greater than the original sentence

[In my mind, I would note the issue at the time of the second sentencing and then reach back to an earlier part of this episode note where we noted that the evil which the law is attempting to address is vindictiveness by a judge in punishing the defendant for exercising the right to appeal. As we noted earlier, the fact that a defendant receives a greater sentence is NOT the issue – instead it is potentially evidence of vindictiveness. If the judge remains convinced that the original amount of time in confinement is appropriate for the severity of the crime, state that on the record and sentence the counts that must be consecutive, etc, accordingly. See *Adams v. State*, 287 Ga. 513, 515 (2010) and the discussion of the US Supreme Court decision in *Texas v. McCullough*, 475 U.S. 134, 137 (1986).]

[Of course the other option is to simply reduce the original sentence to fit the surviving crimes….]

**Well let’s recap what we’ve learned today. We do not recognize any form of the phrase “trial tax”**

*The law clearly allows judges to impose any sentence that is within the statutory framework for that crime. The law even recognizes that a sentence imposed after a trial can be more harsh than what was offered as part of a plea bargain that was rejected. But do not use those words, “trial tax” or anything like them. Those are bad words.*

**If a case is reversed or remanded and the trial judge is required to impose sentence, there is a presumption of vindictiveness if that second sentence is more harsh than the one originally imposed.**

*But we no longer follow a count-by-count approach – the appellate courts review the new sentence in the aggregate.*

**When imposing that second sentence, make sure that you are aware of the presumption of vindictiveness and use that prior sentence as a “cap.”**

*Unless, of course, additional information is presented that would negatively impact the judge’s view of the defendant’s conduct. Like at a re-trial which we do not wish on anyone.*

**Well, folks, as always, we hope this has been helpful to you in your daily practice. If you’d like more information, don’t forget to check our website at goodjudgepod.com where we will post the episode notes (including the citations of authority). We also need to take a moment to thank our listener for suggesting a discussion of what to do upon a remand or reversal. I realize we did not address that broad topic directly but we will attempt to nibble around the edges until we address it all.**

*Nibble around the edges? Did your grandmother share that gem with you? Anyway, be sure to follow The Good Judge-ment podcast on your favorite platform and “like” us – I think it really matters but I am just now sure how. I mean, I like to be liked – that’s always a good thing. Five stars is better than 4 stars.*

**Well, with all of that disclosure and deep thought, that wraps up today’s episode. I’m Wade Padgett**

*And I’m Tain Kell… [insert funny thing]*