21-8212

IN THE
SUPREME COURT of the UNITED STATES

ANTHONY NEAL OTT,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The New York court's opening the door standard utilized in the case at bar is no standard at all. Whether defense counsels opened the door to highly prejudicial evidence must be judge under the correct standard, which cannot be, under any circumstance "may have" created a misimpression. Only when the trial court has determined that a misimpression "has been" created does a prosecutor have a right to introduce otherwise inadmissible evidence to correct the misimpression that was created.

Moreover, there exists a presumption that a higher sentence after a successful appeal is vindictive. This case presents the opportunity for this Court to use this case to explain what "presumptively vindictive" means and why recognizing it when it occurs is an essential part of being a competent criminal defense lawyer. Furthermore, this case can be used to note the distinction between New York and federal law on this question.

The questions presented are:

I. Whether the New York Courts erred when they failed to adhere to Hemphill v. New York, and its progeny regarding the proper standard for door-opening?

II. Whether the presumption of vindictiveness that exists when an enhanced sentence is imposed after a successful appeal, can be ignored based upon counsel's failure to recognize it?

III. Whether counsel was ineffective?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings in the courts below.

RELATED CASES

Supreme Court, Appellate Division, Fourth Department, New York, 06-01424, 943, People v. Ott, 165 A.D.3d 1601, 85 N.Y.S.3d 647, October 5, 2018.

Supreme Court, Appellate Division, Fourth Department, New York, 06-01424, 412/11, People v. Ott, 153 A.D.3d 1135, 57 N.Y.S.3d 921 (Mem), August 23, 2017.

Court of Appeals of New York, People v. Ott, 26 N.Y.3d 1148, 51 N.E.3d 573, 32 N.Y.S.3d 62 (Table), February 26, 2016.

Supreme Court, Appellate Division, Fourth Department, New York, 11-02122, 251, People v. Ott, 126 A.D.3d 1372, 5 N.Y.S.3d 653, March 20, 2015.

Court of Appeals of New York, People v. Ott, 17 N.Y.3d 808, 953 N.E.2d 806, 929 N.Y.S.2d 568 (Table), July 27, 2011.

Supreme Court, Appellate Division, Fourth Department, New York, 06-01424, 412/11, People v. Ott, 85 A.D.3d 1658, 924 N.Y.S.2d 914 (Mem), June 10, 2011.

Supreme Court, Appellate Division, Fourth Department, New York, 06-01424, 412, People v. Ott, 83 A.D.3d 1495, 921 N.Y.S.2d 450, April 29, 2011.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Ott respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of New York.

OPINIONS BELOW

The opinion of the New York Court of Appeals (Pet. App. 1a) is published at 185 N.E.3d 972. The opinion of the Appellate Division of the New York Supreme Court, Fourth Judicial Department (Pet. App. 2a- 4a) is published at 200 A.D.3d 1642. The relevant order of the New York Supreme Court (Monroe County) is unpublished.

JURISDICTION

The judgment of the New York Court of Appeals was entered on March 17, 2022. Pet. App. 1a. The petition was filed on June 14, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides in relevant part: "No person shall be... compelled in any criminal case to be a witness against himself, nor without due process of law."

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defence."

The Fourteenth Amendment provides in relevant part: "... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

In 2005, the Petitioner, Anthony Ott, was charged by indictment along with his father, Edwin Perez, with murder in the second degree and assault in the first degree. After a joint jury trial before the Hon. Stephen R. Sirkin, Mr. Ott was convicted of both charges and Mr. Perez was convicted of manslaughter in the first degree. Judge Sirkin sentenced Mr. Ott to an indeterminate term of 20 years to life in prison on the murder conviction and a concurrent determinate term of 20 years in prison followed by 5 years of post release supervision on the assault conviction. Upon his initial direct appeal to the Appellate Division of the New York Supreme Court, Fourth Judicial Department, Mr. Ott's convictions were affirmed, but his case was remitted for resentencing on the murder sentence based upon a discrepancy between the sentencing minutes and the certificate of conviction (see, People v. Ott, 83 A.D.3d 1495 [4th Dept 2001]; Pet. App. 2a-4a).

The Hon. Francis Affronti heard the case upon remittal and ruled, after a hearing, that the minutes of the sentencing proceeding before Judge Sirkin were unambiguous and thus dispositive. Accordingly, Judge Affronti re-imposed the sentence of 20 years to life on the murder. The Appellate Division affirmed the resentence (see, People v. Ott, 126 A.D.3d 1372 [4th Dept 2015]). The People did not appeal.

Subsequently, Mr. Ott petitioned for and was granted coram nobis relief by the Appellate Division (see, People v. Ott, 153 A.D.3d 1135 [4th Dept 2017]). Upon Mr. Ott's de novo appeal, the

Appellate Division reversed Mr. Ott's convictions, and ordered a new trial on the indictment (see People v. Ott, 165 A.D.3d 1601 [4th Dept 2018]).

The Hon. Alex R. Renzi presided over Mr. Ott's retrial. Mr. Ott was represented by Paul J. Vacca, Jr., Esq. Mr. Ott was ultimately convicted as charged. He was sentenced by Judge Renzi to 22 years to life on the murder count (two years more than originally imposed by Judge Sirkin and confirmed by Judge Affronti) and 20 years on the assault count, to run concurrently.

This case concerns whether the state's improper use of Mr. Ott's post-arrest silence violated his Fifth Amendment right against Self-Incrimination. Invoking a state-law doctrine known as "opening the door," the New York Court of Appeals held that the admission in evidence that Mr. Ott declined to speak to a police investigator regarding the crimes that would otherwise have been barred by the Fifth Amendment privilege was admissible. According to the Court of Appeals, suspending the constitutional right against Self-Incrimination under such circumstances "are admissible if the defendant opens the door by presenting conflicting testimony" (People v. Reid, 971 N.E.2d 353, 357 [2012]).

If this analysis were right, then the very abuses that led our forefathers to include the Self-Incrimination Clause in the Bill of Rights would have been perfectly legitimate all along. And over two centuries of criminal trials in this country would have looked fundamentally different. The very act of disputing the prosecutions's allegations at trial would risk forefeiting

the right to insist that the prosecution prove its case through live testimony subject to cross-examination.

That has been - and should not now be - the law. The Self-Incrimination Clause enshrines in our Constitution a judgment about the proper way to seek the truth at trial. This fundamental procedural right is not subject to state rules of evidence or ad hoc notions of fairness. That is especially so where, as here, the defendant did not do anything wrong during the adversarial process or take any action inconsistent with invoking his right.

Moreover, the presumption of vindictiveness established in North Carolina v. Pearce (395 U.S. 711 [1969]), applies when a defendant receives a greater sentence after a retrial and violates the Due Process and Equal Protection Clauses of the Fourteenth Amentment, and this Constitutional guarantee cannot be overcome by a state procedural bar.

STATEMENT OF THE CASE

A. Legal background

Under New York Law, a party can "open the door" at trial to "otherwise inadmissible evidence" (People v. Massie, 809 N.E.2d 1102, 1104-05 [2004]). The "leading case" in this regard (id. at 1104), is People v. Melendez, 434 N.E.2d 1324 [1982]). In that decision, the New York Court of Appeals explained that "[t]he 'opening the door' theory... is not readily amenable to any prescribed set of rules" (id. at 1328). But in general, trial courts should decide "whether, and to what extent, the evidence or argument said to open the door is incomplete or misleading, and what if any otherwise inadmissible evidence is reasonably

necessary to correct the misleading impression" (Massie, 809 N.E.2d at 1105).

As this explanation indicates, the phrase "opening the door" is "notoriously imprecise" (21 Charles Alan Wright et. al., Federal Practice and Procedure § 5039 [2d ed. 2020] ["Wright & Miller"]). Courts sometimes confuse the concept with the doctrine of "curative admissibility" or the evidentiary rule of completeness (see id.). The New York Court of Appeals itself has sometimes intermingled citations to those principles (see e.g., Melendez, 434 N.E.2d at 1328). But, as New York and most other jurisdictions use the term, "opening the door" is distinct from those other principles. Curative admissibility permits the introduction of evidence, while the opening-the-door concept allows the introduction of evidence in response to proper uses of admissible evidence (see 21 Wright & Miller § 5039.3; 1 Kenneth S. Broun et al., McCormick on Evidence § 57 [8th ed. 2020]). The rule of completeness-presently codified in Federal Rule of Evidence 106 and state counterparts-can be triggered only when a party introduces a fragment of a statement or writing (Fed. R. Evid. 106; see also, e.g., Johnson v. O'Farrell, 787 N.W.2d 307, 312 [S.D. 2010]). In contrast, the opening-the-door concept can be triggered by any evidentiary submission-or "even argument"-that renders additional evidence material (21 Wright & Miller § 5039.1; see also, Massie, 809 N.E.2d at 1105 ["evidence or argument" can open the door]).

In short, the opening-the-door concept operates simply to "expand the realm of relevance" and (at least in New York) to

overcome any other competing evidentiary bars (21 Wright & Miller § 5039.1). "[A]s the parties offer relevant evidence to prove their cases, each bit of evidence opens up new avenues of refutation or confirmation... beyond those consequential facts expressed in the pleadings" (id.). The same is true with respect to each argument parties make at trial (id.). Under the opening-the-door concept, parties may introduce responsive evidence to "meet" or "contradict[]" the other party's evidence or argument-even if that responsive evidence would otherwise have been inadmissible (Massie, 809 N.E.2d at 1106).

New York's foundational opening-the-door cases all involved responsive evidence that was otherwise inadmissible on state-evidence-law grounds-for example, because it was hearsay (Melendez, 434 N.E.2d at 1328; see also, e.g., People v. Rojas, 760 N.E.2d 1265 [2001] [propensity evidence]). But in People v. Reid, 971 N.E.2d 353 [2012], the New York Court of Appeals extended the opening-the-door concept to allow the introduction of "testimony that would otherwise violate [a criminal defendant's] Confrontation rights" (id. at 356). Rejecting the state evidence law could not supersede this constitutional basis for excluding evidence, the Court of Appeals held that the prosecution may introduce evidence otherwise "barred by the Confrontation Clause" under the same circumstances as when defendants open the door to other responsive evidence (id. at 356-57). However, this Court abrogated Reid in the case of Hemphill v. New York (142 S.Ct. 681 [2022]).

Moreover, the law in New York requires that a claim of

vindictive sentencing be preserved, despite the fact there exists a presumption that a higher sentence after a successful appeal is vindictive.

B. Factual background

Here, the New York courts applied Reid to enable Mr. Ott's conviction to stand rather than take its guidance from this Court, and allowed a presumptively vindictive sentence to stand.

Mr. Ott has been incarcerated on this case since he was 21-years old, for almost 17 years now. He has spent nearly half his life imprisoned.

Briefly stated, the charges in the 2005 indictment emanated from a spontaneous melee that occurred on September 16, 2005 just prior to midnight in a parking lot that broke out between Mr. Ott and his father (Mr. Perez) and Travis Gray and Hank Hogan; Ott and Perez did not know Gray and Hogan, and the men only bumped into each other by happenstance as they were bar hopping in the "East End" district of Rochester, New York.

Evidence revealed that Mr. Gray and Mr. Hogan had been drinking heavily, and were highly intoxicated at the time of the melee: Mr. Gray had a blood alcohol content of .20 and Mr. Hogan had a blood alcohol content of .17. Mr. Hogan allegedly attempted to restrain Mr. Gray when the pairs of men passed each other in the parking lot heading in opposite directions. Unfortunately, a melee ensued; Mr. Gray and Mr. Hogan were stabbed, and Mr. Gray tragically died after several days in the hospital.

C. Procedural history

Mr. Ott's retrial commenced on February 25, 2019 and

concluded on March 4, 2019 after the Appellate Division reversed his conviction upon de novo review, after he sought and was granted coram nobis relief (Pet. App. 5a-6a). Multiple law enforcement officials and eyewitnesses testified at the retrial concerning the incident and subsequent investigation.

During the course of his summation, the prosecutor emphasized the testimony of one of the People's witnesses, Lieutenant Zenelovic, namely, that when Mr. Ott was arrested he was cockey, belligerent and refused to speak with the police; Mr. Vacca's timely objection to this latter statement by the prosecutor was sustained (665)[1]. No curative instruction was requested, however, nor was a mistrial motion made at that time. At the conclusion of the prosecutor's summation, Mr. Vacca moved for a mistrial based on the prosecutor's comment on Mr. Ott's constitutional right to remain silent (670). The court denied the motion but acknowledged that the comment by the prosecutor was indeed improper (671). It reasoned that "[i]t was part of the evidence, however, it's not to the level of a mistrial" (id.). The prosecutor's improper use of Mr. Ott's post-arrest silence violated his constitutional right against Self-Incrimination (see, U.S. Const. amend. V). A fundamental tenet of our law is the right to remain silent. The Self-Incrimination Clause assures that no person shall be compelled in any criminal case to be a witness against himself (id.).

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1 Unprefaced numbers in parenthesis refer to the relevant page of the Trial Transcripts.

In closing, the State relied on exploting Mr. Ott's invocation of his Fifth Amendment privilege as a consciousness of guilt. The Self-Incrimination Clause prohibits such an act.

The jury found Mr. Ott guilty as charged. On April 17, 2019, the court senteced him to prison for a term of twenty-two years to life (Pet. App. 14a-29a).

On appeal, Mr. Ott renewed his Self-Incrimination claim, and presented his vindictive sentence argument. The State responded that testimony was admissible under Reid, and the vindictive argument was unpreserved.

The Appellate Division agreed with the state. Applying Reid, the panel held "the admission in evidence of testimony that he declined to speak to a police investigator regarding the crimes does not require reversal because the defendant opened the door to the challenged testimony. It is well settled that 'statements taken in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) are admissible if a defendant opens the door by presenting conflicting testimony'" (Pet. App. 2a-4a, quoting Reid). Furthermore, they deemed the vindictive sentence argument unpreserved and declined to exercise their interest of justice discretion (id.).

The New York Court of Appeals denied leave to appeal and refused to review Mr. Ott's Self-Incrimination Clause claim despite the fact that this Court abrogated Reid, and the presumption of vindictiveness existed regarding the enhanced sentence (Pet. App. 1a).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT OPPORTUNITY FOR THIS COURT TO REAFFIRM THAT STATE AND FEDERAL COURTS ALIKE MUST ADHERE TO THIS COURT'S PRECEDENT.

In the case at bar, a unique dilemma presented itself. The Appellate Division of the New York Supreme Court, Fourth Judicial Department issued its opinion on December 23, 2021 affirming Mr. Ott's conviction. Applying the New York Court of Appeals' decision in the case of People v. Reid, 971 N.E.2d 353 (2012), the Appellate Division held "that statements taken in violation of Miranda v. Arizona (384 U.S. 436 [1966]) are admissible if a defendant opens the door by presenting conflicting testimony" (Pet. App. 2a-4a).

However, this Court abrogated Reid on January 20, 2022 in the case of Hemphill v. New York, 142 S.Ct. 681, and made clear the standard for door-opening, citing the New York Court of Appeals' decision in People v. Melendez (434 N.E.2d 1324 [1982]) as the leading case in New York on opening the door. Hemphill held that "the [opening the door] principle requires a trial court to determine whether one party's evidence and arguments, in the context of the full record, have created a 'misleading impression' that requires correction with additional material from the other side" (id.; emphasis added). This did not occur in Mr. Ott's case.

Here, the prosecution called Police Lieutenant Naser Zenelovic toward the end of the trial. Zenelovic was called-and permitted-to testify that Mr. Ott was "belligerent" and "rather cocky" when he was taken to the police department after his

arrest (525). On cross-examination, Mr. Vacca had very few questions, one of which was: "Q. And you interviewed him? A. I didn't. I went in and had a discussion with him" (530). On redirect, the prosecutor asked Lieutenant Zenelovic (who had identified himself on direct as the current commanding officer of the homicide unit): "Q. Mr. Vacca asked a question, sir. Were you able to have that discussion with Mr. Ott? A. I was not. Q. And why was that? A. He refused to speak to me" (531). This was outrageous, intentional, flagrant misconduct on the part of the prosecution that, by itself, was of such enormity as to deprive Mr. Ott of a fair trial. The veteran prosecutor and the homicide commander knew very well that Mr. Ott had a constitutional right to remain silent, and that the invocation of that right could not be used against him at trial. Yet they wanted to create a negative picture of Mr. Ott as cocky, belligerent, and, most important, guilty-in disregard of the rule of law. They should not be allowed to get away with this.

The prosecutor's improper use of Mr. Ott's post-arrest silence violated his constitutional right against Self-Incrimination (see U.S. Const. amend. V). A prosecutor's mission is not so much to convict as it is to achieve a just result. The duty of a prosecutor is to honor established legal principles, not to secure a conviction at all costs. As a quasi-judicial officer, a prosecutor is expected to act impartially and solely in the interests of justice. "He may prosecute with earnestness and vigor-indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much

his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one" (Berger v. United States, 295 U.S. 78, 88 (1935).

A fundamental tenet of our law is the right to remain silent. Evidence of a defendant's pretrial silence may have a disproportionate impact upon the minds of the jurors, creating a prejudicial inference of consciousness of guilt. While a prosecutor may describe a defendant's alleged actions, it is improper to even suggest that the jury draw and inference of guilt from a defendant's choice not to speak. Here, the prosecutor commented on Mr. Ott's alleged "belligeren[ce]" and "cock[iness]", as well as Mr. Ott's alleged "refus[al] to speak" with Lieutenant Zenelovic. This demeanor testimony from Zenelovic was improper, and no doubt encouraged the prosecutor to return to the same theme in summation. And Zenelovic's testimony about Mr. Ott's silence, which came in on redirect examination, was highly objectionable as well, although defense counsel did not object to the testimony at the time. Counsel did object, however, to the prosecutor's comments on summation regarding Mr. Ott's invocation of the right to remain silent.

As just noted, defense counsel did not object to Lieutenant Zenelovic's redirect testimony when he gave it. Perhaps the prosecutor figured on further silence from defense counsel on this issue, because in summation the prosecutor stated: "[Mr. Ott] didn't go for help; he ran. And then he started acting all belligerent back at the police station because remember, he was

arrested that night. He was detained and he refused to say anything to Investigator Zenelovic" (665 emphasis added). Mr. Vacca objected this time to the prosecutor's textbook misconduct, and the trial court properly sustained the objection (id.). Mr. Vacca did not ask for a curative instruction or a mistrial at that point, however.

Later, after the prosecutor concluded his summation and the jury was excused, Mr. Vacca moved for a mistrial: "The prosecution commented to the jury that my client refused to give a statement that evening, which obviously he's using as a consciousness of guilt before the jury, and I believe that totally denies my client of a fair trial by making that comment or statement to the jury. Why else would you say he refused to give a statement or he didn't give a statement unless you wanted the jury to come away with the impression that this is a consciousness of guilt" (670). The court denied Mr. Vacca's motion on the ground that "[i]t was part of the evidence, however, it's not to the level of a mistrial" (671).

On appeal, Mr. Ott renewed his Self-Incrimination claim. The State responded that the testimonial evidence was admissible under Reid. The Appellate Division agreed with the state. But, applying Reid, the panel held that: "because defense counsel's cross-examination of the investigator may have created a misimpression that the investigator did not fully investigate this incident, the People were entitled to correct that misimpression on redirect examination" (Pet. App. 2a-4a; emphasis added).

Although Reid was binding upon the Appellate Division when they rendered their opinion, it was abrogated by Hemphill while Mr. Ott's leave application was pending before the Court of Appeals. As Hemphill made clear that People v. Melendez, 434 N.E.2d 1324 (1982), not Reid was the leading case in New York on "opening the door", citing New York State Unified Court System, Guide to New York Evidence Rule 4.08 (2021) (explaing the "open the door" principle as a rule of evidence. Furthermore, "the principle requires a trial court to determine whether one party's evidence or argument, in the context of the full record, have created a 'misleading impression' that requires correction with additional material from the other side" (Hemphill, 142 S.Ct. 681, ____ [2022]; emphasis added).

Whether defense counsels opened the door to highly prejudicial evidence must be judged under the correct standard, which cannot be, under any circumstance, "may have" created a misimpression. Only when the trial court has determined that a misimpression "has been" created does a prosecutor have the right to introduce otherwise inadmissible evidence to correct the misimpression that was created. Again, that did not occur in Mr. Ott's case.

Accordingly, the New York Court of Appeals erred when it failed to take its guidance from this Court (which it's obligated to do) and ensure that the proper standard regarding "door opening" was utilized.

As such, certiorari relief premised thereupon is entirely appropriate.

II. THIS CASE PRESENTS THE OPPORTUNITY FOR THIS COURT TO EXPLAIN WHAT "PRESUMPTIVELY VINDICTIVE" MEANS AND WHY RECOGNIZING IT WHEN IT OCCURS IS AN ESSENTIAL PART OF BEING A COMPETENT CRIMINAL DEFENSE LAWYER.

Essential to the vitality of due process in the criminal justice system is the concept of fundamental fairness, and its lifeblood is embodied by the corollary ideals of impartiality and objectivity. Its constitutional imperative-well established in criminal jurisprudence-is that the accused, cloaked with a presumption of innocence, be adjudged guilty and punished appropriately only by persons and evidence untainted by bias or illegality. These basic principles must guide a fair analysis of the constitutional propriety of sentence enhancement for a defendant who is reconvicted at trial after his initial conviction is set aside because of a mode of proceedings error.

In North Carolina v. Pearce, 395 U.S. 711 (1969), this Court held that the Due Process Clause of the Fourteenth Amendment ordinarily prevents a sentencing judge from enhancing a defendant's sentence after he has successfully obtained appellate review of his conviction and sentence. The evil sought to be prevented is judicial **vindictiveness** or the apprehension of such **vindictiveness**. Due Process is offended only by situations which pose a realistic likelihood of **vindictiveness** (Blackledge v. Perry, 417 U.S. 21 [1974]; Thigpen v. Roberts, 468 U.S. 27 [1984]). This Court's case law has established a presumption of **vindictiveness** when a sentence is enhanced after a successful appeal (Texas v. McCullough, 475 U.S. 134 [1986]). This case involves an allegation of judicial **vindictiveness**. Simply stated,

Mr. Ott asks this Court to hold that Pearce's presumption of **vindictiveness** applies.

The case at bar compels a finding or presumptive vindictiveness because the evidentiary indicators for the Pearce rule exist on this record. Additionally, a contrary finding portends judicial abuse in the sentencing process and condones actual ineffectiveness. All the recognized indicators of presumptive vindictiveness are recorded in this case. In order to justify an increased sentence, a court must set forth its reasons, and those reasons must be based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" (Pearce, 395 U.S. at 726). "And the factual data upon which the increased sentence is based must be made part of the record, so that constitutional legitimacy of the increased sentence may be fully reviewed on appeal" (id.).

Here, the record is devoid of any "objective information" sufficient to rebut the presumption of vindictiveness that arose from the court's imposition of a sentence greater than that imposed after the initial conviction. Mr. Ott's original sentence oh his murder conviction was 20 years to life. On his first appeal to the Appellate Division his conviction was affirmed, but his case was remitted to clear up an ambiguity about the sentence. Supreme Court (Affronti, J.) held a hearing on the matter, and confirmed that the correct sentence was 20 to life. After a successful coram nobis Mr. Ott won a reversal and retrial. Upon the instant conviction, the sentencing judge

admitted that he searched for a reason to hit Mr. Ott with a heavier sentence: "I was trying to figure out if there was a way that I could really justify giving you more time without the Appellate Division looking at everything, scrutinizing it if I gave a harsh and excessive sentence when things might not have changed" (Pet. App. at 24a). Indeed, it was quite the opposite-the judge found that Mr. Ott had a "good record" and had "bettered himself" in prison (id.). Nevertheless, the court gave Mr. Ott 22 years to life in prison, apparently because the judge assumed that that was the original sentence imposed. It was not, as the aforementioned history of the case demonstrates. Specifically, the sentencing judge failed to place on the record "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" that would overcome the presumption and warrant a heavier sentence (Pearce, 395 U.S. at 726). For defense counsel not to protest the increase in sentence as presumptively punitive is the height of ineffectiveness (see Point III, infra). There was no strategic or legitimate reason not to call the court out on its transparently vindictive sentence. Moreover, and importantly in Mr. Ott's view, the Appellate Division did not disagree with his contention that the sentence was vindictive-the Appellate Division found that the error was unpreserved, but that the lawyer's failure to object was not ineffective (Pet. App. at 4a).

Mr. Ott respectfully asks this Court to use his case to explain what "presumptively vindictive" means and why recognizing it when it occurs is an essential part of being a competent criminal defense lawyer. Furthermore, this case can be used to note the distinction between New York and federal law on this question, inasmuch as the latter imposes a different standard when the higher sentence is imposed by a judge other than the judge who imposed the original sentence. As this Court will note, the Appellate Division here did not hold that the sentence was not vindictive, but only that such a claim was not preserved (Pet. App. at 4a). Additionally, the record is clear that Mr. Ott had done nothing but positive things between his successful appeal and this conviction (Pet. App. 15a-24a). Thus, the sentencing court, though it seemed to want to, was unable to put on the record any objective reasons for imposing a stiffer sentence (id. at 24a-27a). Upon sentencing Mr. Ott after his retrial, the trial judge's impartiality was permanently and effectively destroyed by his enhancement to 22 years to life, rendering an unconstitutional taint on his resentencing after Mr. Ott succeeded in setting aside his conviction.

Accordingly, this issue, too, warranted certiorari relief.

III. COUNSEL WAS INEFFECTIVE.

A defendant is entitled to "effective" representation by counsel under the Federal constitution (U.S. Const. amend. VI). To prevail on a claim of ineffective assistance of counsel under Federal constitutional standards, a defendant must show both that

counsel's performance fell below a reasonable level of professional competence and that the defendant was prejudiced as a result (see Strickland v. Washington, 466 U.S. 668, 694 [1984] [citing U.S. Const. amends. VI, XIV]). The "prejudice" required under the Federal standard is a "reasonable probability that, but for counsel's professionally deficient representation..., the result of the trial would have been different" (Henry v. Poole, 409 F.3d 48, 63 [2d Cir. 2005]). Counsel must "make reasonable investigations" or "make a reasonable decision that makes particular investigations unnecessary" (Strickland, 466 U.S. at 691). "The duty to investigate is essential to the adversarial process because the testing process generally will not function properly unless defense counsel had done some investigation into the prosecution's case and into various defense strategies" (Greiner v. Wells, 417 F.3d 305, 320 [2d Cir. 2005] [internal quotations omitted]).

In a long line of cases that includes Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause: "In all criminal prosecutions, the accused shall enjoy the right to... have Assistance of Counsel for his defence."

The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled (Adams v. United States ex rel McCann, 317 U.S. 269, 275 [1942]; see Powell v. Alabama, 287 U.S. at 68-69). Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained (see Argersinger v. Hamlin, 407 U.S. 25 [1972]). That a person happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. Regrettably, Mr. Ott was not afforded this luxury. Moreover, for that reason, this Court has recognized that "the right to counsel is the right to the effective assistance of counsel" (McMann v. Richardson, 397 U.S. 759, 771 n.14 [1970]). Counsel, however, can also deprive a defendant of the right to effective assistance by failing to render "adequate legal assistance" (Cuyler v. Sullivan, 446 U.S. 335, 344 [1980]). Unfortunately, this occurred in Mr. Ott's case.

Here, Mr. Ott presents two aspects of counsel's

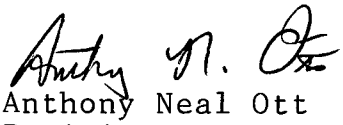
representation to the Court's attention. The first occurred during trial; and the second occurred at sentencing. As to the first instance of ineffectiveness, counsel failed to object to Investigator Zenelovic's testimony on redirect, where he and the prosecutor exploited Mr. Ott's invocation of his Fifth Amendment privilege, and used it as a consciousness of guilt (531). Additionally, counsel failed to immediately move for a mistrial upon his objection being sustained during the course of the prosecutor's summation (665), when he again exploited Mr. Ott's invocation of his right to remain silent. Regrettably, he waited until the prosecutor completed his summation to move for a mistrial (670). The court denied his motion (671). As to the second aspect of ineffectiveness, he inexplicably failed to recognize and take exception to the imposition of a presumptively vindictive sentence. Each of these examples satisfy Strickland's first prong i.e., "counsel's performance fell below a reasonable level of professional competence" (Strickland, 466 U.S. at 694).

The "prejudice" that resulted based upon counsel's derelictions easily demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (id. at 694). As to the first instance of counsel's ineffectiveness, had he objected during the course of Zenelovic's redirect examination, would have ensured Mr. Ott received a mistrial. As to the second instance of counsel's ineffectiveness, had he recognized and took exception to a presumptively vindictive sentence, Mr. Ott's sentence would be 20 to life, as opposed to 22 to life. Counsel was ineffective.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: June 14, 2022

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY NEAL OTT - PETITIONER

VS.

STATE OF NEW YORK - RESPONDENT.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.2(b), I certify that the petition for a writ of certiorari contains 22 pages, which is within the page limitations.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 14, 2022

Anthony N. Ott
(Signature)