

3.05 Presumptions Accorded Defendant in a Criminal Proceeding

- (1) In a criminal proceeding, the defendant is presumed to be innocent. As a result, the People are required to prove a defendant's guilt of a charged offense beyond a reasonable doubt.**
- (2) (a) In a hearing to determine whether a pretrial identification procedure was unduly suggestive, a rebuttable presumption that the procedure was suggestive arises when the People either fail to preserve photographs, whether in physical form or computer-generated, that the identifying witness viewed or fail to preserve a photograph of a lineup that the identifying witness viewed.**
(b) The People may rebut the presumption by proof of procedures used to safeguard against suggestiveness.
- (3) (a) Where a defendant is successful on appeal in having a judgment of conviction reversed or in having the appellate court order a resentence, a rebuttable presumption of vindictiveness may arise when the defendant is subsequently sentenced for the same offense and given a greater sentence than was imposed after the defendant's initial conviction, irrespective of whether the same judge presided over both sentences. The presumption is inapplicable when the defendant is given the same sentence as was imposed on the initial conviction.**
(b) The presumption may be rebutted where the trial court identifies reasons based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

Note

Subdivision (1) sets forth the bedrock principle of American criminal jurisprudence (CPL 300.10 [2]; *Estelle v Williams*, 425 US 501, 503 [1976] [“The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice” (citation omitted)]; *Taylor v Kentucky*, 436 US 478, 490 [1978] [“the trial court’s refusal to give petitioner’s requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment”]; *In re Winship*, 397 US 358, 363 [1970] [“The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence”]; *People v Antommarchi*, 80 NY2d 247, 252 [1992] [“Manifestly, the burden of proving guilt beyond a reasonable doubt in a criminal proceeding must always remain with the People”]).

Subdivision (2) is derived from *People v Holley* (26 NY3d 514 [2015] [computer-generated array of photographs]) and *People v Simmons* (158 AD2d 950 [4th Dept 1990] [lineup photograph]), cited with approval by *Holley*. As *Holley* explained:

“the People have the burden of producing evidence in support of the fairness of the identification procedure. If this burden is not sustained, a peremptory ruling against the People is justified. If the People meet their burden of production, the burden shifts to the defendant to persuade the hearing court that the procedure was improper. . . .

“[T]he failure of the police to preserve a photographic array [shown to an identifying witness] gives rise to a rebuttable presumption that the array was suggestive. The rebuttable presumption fits within the burden-shifting mechanism in the following manner. Failure to preserve a photo array creates a rebuttable presumption that the People have failed to meet their burden of going forward to establish the lack of suggestiveness. To the extent the People are silent about the nature of the photo array, they have not met their burden of production. On the other hand, the People may rebut the presumption by means of testimony detailing the procedures used to safeguard against suggestiveness, in which case they have met their burden, and the burden shifts to the defendant” (*Holley* at 521-522 [internal quotation marks and citations omitted]).

Holley noted that “Appellate Division cases have found that the People overcame the presumption when the detective’s testimony detailed ‘the sheer volume of the photographs viewed, as well as the fact that the police had not yet focused upon defendant as a particular suspect’” (*Holley* at 524). In the *Holley* case itself, the Court found that the presumption was rebutted, there being support for

the finding that the detective “entered enough information about the perpetrator’s physical features to ensure that the photo manager system would generate ‘a fair selection of photos,’ rather than an array in which defendant’s image would stand out as markedly different” (*Holley* at 525, quoting *People v Holley*, 116 AD3d 442, 442 [1st Dept 2014]; see *People v Busano*, 141 AD3d 538, 540-541 [2d Dept 2016] [presumption was rebutted where the officer who administered the identification procedure testified that the “complainant’s daughter was shown computer-generated photo arrays shortly after the attack occurred. The officer further testified as to the specific information that was entered into the photo manager system, which included the perpetrator’s race and approximate age, height, and weight. The officer testified that approximately 230 photographs fit the search criteria that was entered into the photo manager system and that these photographs were displayed in arrays consisting of six photographs at a time” (citations omitted)]; *People v Brennan*, 222 AD2d 445, 445 [2d Dept 1995] [presumption of suggestiveness from the failure to preserve a photograph of a lineup was rebutted where “photographs of the lineup fillers were taken approximately 10 months after the original lineup was held, and the police officer who was present at the lineup testified about the height and weight of the fillers, whether they had gained or lost any weight between the lineup and the reconstruction, and their positions in the lineup”]).

Subdivision (3) is derived from *People v Flowers* (28 NY3d 536 [2016]), *People v Young* (94 NY2d 171 [1999]) and *People v Van Pelt* (76 NY2d 156 [1990]). The rule has its origins in the Federal Constitution (*North Carolina v Pearce*, 395 US 711 [1969]).

The presumption was designed “to insure that trial courts do not impose longer sentences to punish defendants for taking an appeal” (*Young*, 94 NY2d at 176). As summarized by *Flowers*, “the presumption of vindictiveness applies only to ‘defendants who have won appellate reversals’ who are ‘given *greater* sentences . . . than were imposed after their initial convictions’ (*People v Young*, 94 NY2d 171, 176 [1999] [emphasis added]). The presumption is inapplicable where, as here, the same term of imprisonment is imposed upon resentencing” (*Flowers*, 28 NY3d at 541-542).

The presumption may be rebutted (*People v Young*, 94 NY2d at 182 [“Once the presumption arises, it can be rebutted only if the trial court identifies reasons ‘based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding’ (*North Carolina v Pearce, supra*, 395 US, at 726)”]; *People v Miller*, 65 NY2d 502, 508 [1985] [the presumption “may be overcome by evidence that the higher sentence rests upon a legitimate and reasoned basis”]; e.g. *People v Bludson*, 15 AD3d 912, 913 [4th Dept 2005] [“The retrial and sentencing thereon were before a different justice and, in enhancing defendant’s sentence following the retrial, the court noted that it was doing so because, in the court’s view, defendant had committed perjury at the retrial. Thus, the record before us does not support defendant’s contention

that there is a reasonable likelihood that the enhanced sentence was the result of vindictiveness” (citations omitted)].

What may trigger the presumption in other situations depends on “the opportunity which the particular situation presents for vindictiveness and the reasonable likelihood that the prosecutor or sentencing authority is improperly motivated by what has occurred” (*Miller*, 65 NY2d at 508).

The presumption therefore does not normally arise when a plea of guilty has been set aside and the defendant is then convicted after a trial (*Alabama v Smith*, 490 US 794, 795 [1989] [“no presumption of vindictiveness arises when the first sentence was based upon a guilty plea, and the second sentence follows a trial”]; *Miller*, 65 NY2d at 509 [“Having accepted the exercise of discretion to lower the original sentence in return for a plea in order to protect the victim, the defendant should not be heard to complain that a higher sentence is imposed after conviction following a retrial at which, by requiring that the victim testify, he has removed from consideration the element of discretion involved”]).

“Similarly,” *Young* explained, “the Supreme Court has held that the presumption does not arise in other instances where, although there was an ‘opportunity’ for vindictiveness, there was not a ‘realistic likelihood’ that the enhanced sentence was the result of impermissible vindictiveness (*United States v Goodwin* [457 US 368, 384 (1982)] [no presumption of vindictiveness where defendant was charged with a felony after refusing to plead guilty to misdemeanor charges]; *see also, Colten v Kentucky*, 407 US 104, 117-120 [1972] [no presumption of vindictiveness where, following conviction in inferior court, defendant sought trial de novo in superior court under Kentucky’s two-tiered system and received greater sentence]). Where there is no ‘reasonable likelihood’ of vindictiveness, ‘the burden remains upon the defendant to prove actual vindictiveness’ (*Alabama v Smith* [490 US at 799-800])” (*Young*, 94 NY2d at 177-178).

Where a defendant receives a “greater sentence on an individual count, but an equal or lesser over-all sentence, courts must examine the record to determine whether there is a reasonable likelihood that the enhanced sentence on the individual count was the result of vindictiveness” (*Young*, 94 NY2d at 179).

While the presumption of vindictiveness on resentence “does not apply” under the Federal Constitution when “a different Judge imposes the longer sentence,” as a matter of State constitutional law, the presumption does apply (*Young*, 94 NY2d at 178). That “a different Judge imposes the second sentence is but a factor to be weighed with others in assaying whether the presumption has been overcome” (*Van Pelt*, 76 NY2d at 161).

A claim that the sentence imposed was presumptively vindictive must be preserved for appellate review as a question of law (*People v Olds*, 36 NY3d 1091 [2021]).