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## Department of Corrections v. Superior Court: Hear No Evil

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SUPERIOR COURT: HEAR NO EVIL*

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*DEPARTMENT OF CORRECTIONS v.  
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I. INTRODUCTION

On December 9, 1991, professional ethical and moral considerations prompted heated litigation in *Department of Corrections v. Superior Court*.<sup>1</sup> Justice Donald G. Alexander of Maine's Superior Court displayed considerable foresight while sentencing two borderline mentally retarded child sex offenders.<sup>2</sup> Although both defendants had committed repugnant crimes, Justice Alexander anticipated that they would be subjected to impermissible abuse if incarcerated in the Department of Corrections. He believed that preventive measures were necessary to ensure the safety of the defendants being sentenced and to avoid the potential that conditions of their incarceration would amount to cruel and unusual punishment.<sup>3</sup> Justice Alexander subsequently imposed special conditions upon the Department of Corrections.<sup>4</sup>

The Department of Corrections sought an injunction through a writ of mandamus or prohibition. The Department argued that the Superior Court had exceeded its statutory authority by imposing these special conditions. The Maine Supreme Judicial Court granted extraordinary relief.<sup>5</sup> Chief Justice Wathen relied on statutory language stating that the Commissioner of the Department of Corrections has "complete discretion" and is responsible for the supervision, management, and control of offenders in the Department.<sup>6</sup> On appeal, the Superior Court contended that it had the duty and authority to uphold the Constitutions of the United States and Maine and that the Department was limited by those considera-

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1. 622 A.2d 1131 (Me. 1993).

2. The defendants were Fawn Buzzell and Arthur Ellis; see *infra* note 82.

3. *Department of Corrections v. Superior Court*, 622 A.2d at 1133.

4. *Id.* at 1132.

5. *Id.* at 1134. Chief Justice Wathen, acting for the Maine Supreme Judicial Court, granted extraordinary relief. Although rule 81(c) of the Maine Rules of Civil Procedure abolishes extraordinary writs of mandamus and prohibition, it provides that relief in that nature can be obtained through proceedings under rule 80B. See RICHARD H. FIELD ET AL., MAINE CIVIL PRACTICE §§ 80B.1, 81.9, 81.10, at 312 & n.18, 337-39 (2nd ed. 1970); see also ME. REV. STAT. ANN. tit. 4, § 7 (West 1989) (providing that the Supreme Judicial Court "may issue all writs and processes, not within the exclusive jurisdiction of the Superior Court, necessary for the furtherance of justice or the execution of the laws in the name of the State"); ME. REV. STAT. ANN. tit. 14, § 5301 (West 1980) (providing that "[t]he Supreme Judicial Court and the Superior Court shall have and exercise concurrent original jurisdiction in proceedings in . . . prohibition . . . [and] mandamus").

6. *Department of Corrections v. Superior Court*, 622 A.2d at 1134.

tions.<sup>7</sup> The Supreme Judicial Court, sitting as the Law Court, held unanimously that a superior court has supervisory power over the Department of Corrections only when the appropriate vehicle is invoked.<sup>8</sup> The Law Court concluded that since no such vehicle had been invoked, the special conditions must be deleted.

The case raised the question of what could be done with defendants who suffer from either physical or mental disabilities. Could they be protected or would they remain powerless until actual violations of rights occur? This Note will analyze the decision in *Department of Corrections v. Superior Court* and the viability of existing options at the appellate and trial court levels that enable courts to address conditions of confinement. First, this Note will examine recent Maine sentencing law and national trends that have influenced it. Second, it will discuss the options provided by the Law Court in *Department of Corrections*. Third, it will analyze a recent case to help explain further Maine's treatment of conditions of confinement. Fourth, this Note will review the stance the Law Court has taken towards challenges of the sentencing court's determination of sentence. Fifth, the discussion will suggest where within the sentencing process the trial court may address conditions of confinement without violating the Law Court's sentencing principles. Last, the Author suggests specific changes to improve Maine's sentencing law.

## II. BACKGROUND

### A. Recent Trends in Sentencing Law

#### 1. The Federal Sentencing Guidelines

In the last decade there have been enormous changes in sentencing law. For years critics argued that unwarranted sentencing disparities stemmed from the unfettered discretion given to a sentencing judge.<sup>9</sup> In 1984, Congress responded to such criticism by enacting the Sentencing Reform Act.<sup>10</sup> This Act, which established the United States Sentencing Commission, sought to develop statutory sentencing guidelines, the goal of which was to "avoid[ ] unwar-

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7. *Id.* at 1135. The Law Court stated that this argument was asserted by the MCLU, which had been granted amicus curiae status. *Id.* It should be noted, however, that the sentencing court made these assertions when it denied the Department's motion to delete the conditions. See *infra* notes 88-89 and accompanying text.

8. *Department of Corrections v. Superior Court*, 622 A.2d at 1135 (citations omitted).

9. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227-28 (1993).

10. The Sentencing Reform Act is part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 211-239, 98 Stat. 1837, 1976, 1987-2040 (1984).

ranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct . . . ."<sup>11</sup>

The Federal Sentencing Guidelines, which became law in 1987,<sup>12</sup> tend to be mechanical in application. The sentencing judge need only address two things, the characteristics of the offense and the characteristics of the offender. After assigning values established by the Sentencing Commission to each criterion, the sentence range is located on a grid.<sup>13</sup>

Much debate exists on whether sentencing guidelines have actually reduced sentencing disparity.<sup>14</sup> Critics assert that the Guidelines fail to account for a variety of differentiating factors including age,<sup>15</sup> educational and vocational skills,<sup>16</sup> mental and emotional conditions,<sup>17</sup> physical condition or appearance,<sup>18</sup> drug and alcohol dependence,<sup>19</sup> employment record,<sup>20</sup> and public service.<sup>21</sup> The net result, critics claim, is the imposition of draconian sentences.<sup>22</sup> Successful or not, this enormous change in the federal sentencing system has spurred many states to reevaluate and change their existing sentencing law.<sup>23</sup>

11. 28 U.S.C.A. § 991(b)(1)(B) (West Supp. 1991).

12. *Id.* §§ 991-998.

13. See UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (1994). For a more detailed discussion, see Amy K. Tchao, *One Step Forward, One Step Back: Emergency Reform and Appellate Sentence Review in Maine*, 44 ME. L. REV. 345, 354-56 (1992).

14. See Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 4 FED. SENTENCING REP. 142 (1991).

15. See U.S.S.G. § 5H1.1 (Nov. 1992).

16. *Id.* § 5H1.2.

17. *Id.* § 5H1.3.

18. *Id.* § 5H1.4. See also *United States v. Rabins*, 63 F.3d 721 (8th Cir. 1995) (defendants with HIV/AIDS fail to present a circumstance that warrants downward departure).

19. U.S.S.G. § 5H1.4 (Nov. 1992).

20. *Id.* § 5H1.5.

21. *Id.* § 5H1.6.

22. See Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755 (1992) (citing Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992)). Judge Lay supports Professor Freed's criticism that "the guidelines have become unnecessarily rigid[,] . . . imprisonment policies [have become] unduly severe[,] . . . [and] courts of appeals have contributed to the rigidity of [the federal sentencing] process by restricting the authority of judges to depart from the guidelines in appropriate circumstances." *Id.* at 1762 (footnote omitted).

23. See Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 173 (1995) (Though "highly unpopular among judges, defense attorneys, and scholars, . . . [a]s of November 1994, 17 states had placed guidelines into effect, and five more had appointed commissions to implement or study this approach.").

## 2. Federal Courts' Treatment of Condition of Confinement Issues

Harsh conditions of confinement have caused some sentencing courts to account for a defendant's disabilities. A federal court may depart from a sentence prescribed by the Guidelines when valid reasons are submitted for the "departure."<sup>24</sup> The statutory basis for individualized sentencing pre-dates the Sentencing Guidelines themselves.<sup>25</sup> The authority to "individualize" a sentence provides the very discretion that the Sentencing Guidelines were designed to limit.<sup>26</sup>

Several circuits have departed from the Guidelines after considering specific offender characteristics. Some courts have addressed defendants' vulnerability in prison, as Justice Alexander did when he sentenced Fawn Buzzell and Arthur Ellis. Rather than imposing conditions on the prisons, these courts simply reduced the defendants' sentences. In *United States v. Lara*,<sup>27</sup> the sentencing court departed downward from the Guidelines because the defendant's "immature appearance, sexual orientation and fragility . . . made him particularly vulnerable to in-prison victimization."<sup>28</sup> Because extreme vulnerability was not considered adequately by the Sentencing Commission, the court held that departure from the Guidelines was warranted under 18 U.S.C. § 3553(b).<sup>29</sup> Similarly, the

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24. See Tchao, *supra* note 13, at 356 n.53 ("[A] court must presumptively impose a sentence within the Guideline range unless 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . .'" (citing 18 U.S.C.A. § 3553(b) (West Supp. 1991)); see also *United States v. Moe*, 65 F.3d 245, 250-51 (2d Cir. 1995) (supporting determination of district court judge that "there [were] grounds present for both upward and downward departure") (quoting Tr. of Afternoon Sentencing, July 13, 1994, at 17).

25. 18 U.S.C. § 3661 (1988). The statute provides: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." See also 18 U.S.C. § 3553(b) (1988), which provides: "The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . ."

26. See U.S.S.G. ch. 5, pt. H intro. comment (Nov. 1992) (stating that most offender characteristics are "not ordinarily relevant" to a court's sentencing decision). For an in-depth discussion of the conflicts, see Stacey M. Studnicki, *Individualized Sentencing: Federal Sentencing Departures Based Upon Physical Condition*, 1994 DET. C.L. REV. 1215, 1219-23 (1994). Studnicki discusses how federal courts have dealt with conditions of confinement issues under the Federal Guidelines. Parts II.A.1-2 of this Note are based primarily on Studnicki's comprehensive research and analysis of federal sentencing departures.

27. 905 F.2d 599 (2d Cir. 1990).

28. *Id.* at 603, 605.

29. *Id.* at 605. See also *United States v. Tucker*, 986 F.2d 278, 280 (8th Cir. 1993) (stating that "potential for victimization can provide a proper predicate for a departure") (citing *United States v. Lara*, 905 F.2d at 602-03).

appellate court in *United States v. Gonzalez*<sup>30</sup> upheld the district court's downward departure from the Guidelines. The court stated that the small size and feminine features of the defendant made him "susceptible to homophobic attacks."<sup>31</sup> Last, in *United States v. Long*,<sup>32</sup> the appellate court upheld the district court's downward departure from the Guideline range of forty-six to fifty-seven months to a sentence of five years probation. The district court based its decision on the defendant's unspecified physical condition, which rendered him "exceedingly vulnerable to possible victimization . . . ."<sup>33</sup>

There are grounds other than vulnerability in prison where the federal courts have departed from the Guidelines. In *United States v. McClean*,<sup>34</sup> the defendant had a severely impaired left leg that required crutches. The Bureau of Prisons prohibited him from using the metal crutches he had grown accustomed to for fear that other prisoners would use them as weapons.<sup>35</sup> The sentencing court departed downward from the Guideline range because this refusal would cause the defendant to suffer more than the average inmate and would make him vulnerable to other prisoners.<sup>36</sup> Other factors that may prompt or have prompted departure from the Guidelines include: age,<sup>37</sup> pregnancy,<sup>38</sup> deterioration of physical condition due to incarceration,<sup>39</sup> lack of ability by the prison system to accommodate a physical impairment,<sup>40</sup> and inability to provide suitable treat-

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30. 945 F.2d 525 (2d Cir. 1991).

31. *Id.* at 526-27.

32. 977 F.2d 1264 (8th Cir. 1992).

33. *Id.* at 1277.

34. 822 F. Supp. 961 (E.D.N.Y. 1993).

35. *Id.* at 962.

36. *Id.*

37. See UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 5H1.1 (Nov. 1993) (Guidelines limit consideration of age to where the defendant "is elderly and infirm and where a form of punishment (e.g., home confinement) might be equally efficient as and less costly than incarceration.") (emphasis added).

38. See *United States v. Pokuaa*, 782 F. Supp. 747, 748 (E.D.N.Y. 1992) (downward departure warranted to bedridden defendant, who risked losing permanent custody of child if incarcerated longer than 12 months, "to protect the health of the mother and child and to permit the mother to be united with her child . . .").

39. See *United States v. Mosesson*, No. 89 Cr. 40, 1989 U.S. Dist. LEXIS 13837, at \*1 (S.D.N.Y. 1989) (defendant's health was shown to be so fragile that incarceration might prove fatal); compare with *United States v. Martinez-Guerrero*, 987 F.2d 618 (9th Cir. 1993) (defendant who was legally blind failed to persuade court that it should depart downward because there was evidence that the prisons could accommodate blind prisoners); *United States v. Jefferson*, 786 F. Supp. 1267 (N.D. W. Va. 1992) (defendant failed to show that his worsening medical condition was acute or life-threatening).

40. See *United States v. Boy*, 1994 WL 59781 (9th Cir. Feb. 25, 1994) (court affirmed decision to depart downward from the Guidelines due to the patient's degenerative hip and knee, affliction with nonactive tuberculosis, and hyperactive adjustment disorder); compare with *United States v. Hilton*, 946 F.2d 955 (1st Cir.

ment.<sup>41</sup> The trend, however, indicates that the amendment process will continue to be used by the Sentencing Commission to further restrict the discretion of the sentencing courts to depart from the Guidelines.<sup>42</sup> Indeed, a proposed 1994 amendment by the Sentencing Commission stated that "dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range."<sup>43</sup>

Many states have not adopted systems similar to the Federal Sentencing Guidelines.<sup>44</sup> Instead, an alternative approach to sentencing guidelines has been tried. This approach entails the state legislature delegating to the judiciary the power to develop sentencing principles on a case-by-case basis. Maine has implemented such an approach.

### 3. *Maine's Choice: Judicial Common Law*

#### a. *Chief Justice Wathen's Proposal*

Sentence review in Maine is barely thirty years old.<sup>45</sup> Consistent with the attention sentencing disparity has received nationally,

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1991) (penal institution could accommodate defendant's chronic skin condition); *United States v. Kelly*, No. 89-5200, 1990 WL 74315 (4th Cir. May 11, 1990) (court held the prison could accommodate defendant's physical and mental injuries resulting from an automobile accident).

41. *See* *United States v. Greenwood*, 928 F.2d 645 (4th Cir. 1991) (defendant amputee required treatment at the Veteran's Administration Hospital, which would be unavailable if incarcerated); *compare with* *United States v. DePew*, 751 F. Supp. 1195, 1199 (E.D. Va. 1990) (court denied defendant's request for downward departure, stating "[d]efendant's AIDS infliction warrants sympathy, but not a departure").

42. An example is the response by the Sentencing Commission to the departure in *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990). In 1991 Studnicki noted that the Sentencing Commission amended § 5H1.4 to provide that a defendant's "physique, [sic] is not ordinarily relevant . . ." in determining the sentence. Physique essentially replaced the words "physical condition." *See* Studnicki, *supra* note 26, at 1237.

43. Studnicki, *supra* note 26, at 1218 (citing the proposed amendment to UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 5K2.0 comment (Nov. 1994)).

44. *See* Frase, *State Sentencing Guidelines*, *supra* note 23, at 174 n.1. Sentencing commissions in Connecticut, Maine, and Texas have recommended against guidelines. Sentencing commissions in Colorado, New York, South Carolina, and Washington, D.C. failed to convince their legislatures to pass sentencing guidelines.

45. In 1965, Maine adopted limited sentence review. P.L. 1965, ch. 419, § 1 (effective Dec. 1, 1965) (codified at ME. REV. STAT. ANN. tit. 15, §§ 2141-2144 (West 1980)), *repealed* by P.L. 1989, ch. 218, §§ 1-4 (effective Sept. 30, 1989). The law created the Appellate Division of the Supreme Judicial Court. It consisted of a three justice panel that could change legally imposed sentences found to be improper within the statutory range. Additionally, the panel possessed the direct power to increase or decrease a sentence, and the decision was deemed final. Chief Justice Wathen effectively described the impotence of the process:



Maine's sentencing law has also been criticized. Under the belief that sentencing disparity was a problem in Maine, Chief Justice Wathen (then Associate Justice) called for an expansion of appellate review in 1988.<sup>46</sup> Rather than advocating legislatively constructed guidelines, Chief Justice Wathen urged the Legislature to allow the Law Court to address the problem of sentencing disparity through the development of common law sentencing principles.<sup>47</sup> Chief Justice Wathen recognized that his urged expansion would create new law.<sup>48</sup> Much of Chief Justice Wathen's proposal became law in 1989.<sup>49</sup>

### b. *Maine's Current Sentencing Process*

To understand the allowable limits of sentence review in Maine, it is necessary to understand the process judges use to determine sentences. This is an area of confusion for many lawyers and even judges.<sup>50</sup> Until two years ago the sentencing process had been only partially defined.<sup>51</sup> The court in *State v. Hewey*<sup>52</sup> articulated the most complete explanation of the sentencing process to date. Justice Glassman, writing for a unanimous court, wrote that "we use

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Because the division was perceived as a tribunal for correcting the most egregious cases of sentence disparity, and not as a lawmaking body, its work was hampered. In twenty-four years of operation, it changed only twenty sentences and produced one useful opinion that included a workable set of criteria for distinguishing life sentences from sentences for a term of years.

Daniel E. Wathen, *Judges on Judging: Making Law the Old Fashion Way—One Case at a Time*, 52 OHIO ST. L.J. 611, 611-12 (1991) [hereinafter Wathen, *Judges on Judging*]. The one case to which Chief Justice Wathen refers is *State v. Anderson*, Nos. AD-78-37, AD-78-40 (Me. App. Div. June 30, 1980). For a detailed discussion of that case, see Daniel E. Wathen, *Disparity and the Need for Sentencing Guidelines in Maine: A Proposal for Enhanced Appellate Review*, 40 ME. L. REV. 1, 17-18 (1988) [hereinafter Wathen, *Disparity*].

46. Wathen, *Disparity*, *supra* note 45.

47. *Id.* at 5, 34-40.

48. "A review of criminal sentencing in Maine reveals the rather stark fact that, with few exceptions, there is no law of sentencing." *Id.* at 34. See also Wathen, *Judges on Judging*, *supra* note 45, at 612.

49. See Appellate Review Act, P.L. 1989, ch. 218, (effective Sept. 30, 1989) (codified at ME. REV. STAT. ANN. tit. 15, §§ 2151-2157 (West Supp. 1995-1996)), amended by P.L. 1991, ch. 525, § 4 (effective June 30, 1991) (codified at ME. REV. STAT. ANN. tit. 15, §§ 2151-2157 (West Supp. 1995-1996)) (the only significant change is that the Supreme Judicial Court now has to remand any changes to the sentencing court rather than order the changes itself). *Id.* § 2156(1-A). See discussion *infra* part II.B for a review of Supreme Judicial Court sentence review.

50. See *State v. Hewey*, 622 A.2d 1151, 1154 (Me. 1993).

51. See *State v. Weir*, 600 A.2d 1105 (Me. 1991) (discussing two steps of the three-step sentencing process); *State v. Lewis*, 590 A.2d 149, 150 (Me. 1991) (citing *State v. Hallowell*, 577 A.2d 778, 781 (Me. 1990)) (discussing only step one of the three-step sentencing process.).

52. 622 A.2d 1151.

this opportunity for clarification of our review of an appeal from a sentence."<sup>53</sup> The first step (Step I) of a sentencing court, which actually involves two parts, is to determine the "basic" period of incarceration.<sup>54</sup> The court locates the sentence range statutorily specified<sup>55</sup> for the crime of which the defendant has been convicted. Once the sentence range is determined, the court then evaluates the specific facts of the criminal conduct and gauges where on the statutory continuum the defendant's conduct falls. Courts consider the heinousness or seriousness of the crime and the basic sentences that courts have imposed on other defendants guilty of similar criminal conduct.<sup>56</sup>

In order to "individualize" the sentence, the second step (Step II) "consider[s] those factors peculiar to that offender."<sup>57</sup> At this stage, the sentencing judge adjusts the basic sentence to account for mitigating and aggravating factors.<sup>58</sup> Justice Glassman defined the second step as determining the "maximum" period of incarceration.<sup>59</sup>

Finally, the last step (Step III) involves deciding whether any portion of the maximum sentence should be suspended.<sup>60</sup> *Hewey* supplies only one example of a factor that would warrant a suspension in sentence. This occurs when a "court determines that society will be better protected by affording a period of supervised probation."<sup>61</sup> Case law fails to provide any other factors that should be considered in Step III, but it is apparent that this is the step where the court may take into consideration everything else not pertaining to the statute or the defendant. In other words, this is where a court

53. *Id.* at 1154.

54. *Id.* ("That determination is made *solely* by reference to the offender's *criminal conduct* in committing the crime, that is, 'by considering the particular nature and seriousness of the offense without regard to the circumstances of the offender.' ") (quoting *State v. Weir*, 600 A.2d at 1106).

55. ME. REV. STAT. ANN. tit. 17-A, §§ 1251-1258 (West Supp. 1995-1996).

56. *See State v. Lewis*, 590 A.2d 149 (Me. 1991). Defendant pled guilty of arson in violation of title 17-A, section 802 of the Maine Revised Statutes and the sentencing court imposed the maximum 20 year basic sentence, which was only "appropriate for the most serious crimes not involving heinous and violent conduct against a person." *Id.* at 151. On appeal of the sentence, the Law Court determined that a basic sentence of that length should not be applied because there was nothing in the record to suggest that the defendant's crime was of the most serious nature. The record indicated that the defendant had set fire to an automobile but put no other structure or person in danger. Therefore, the court decided that the principled basic sentence should only be ten years. *Id.*

57. *State v. Hewey*, 622 A.2d at 1154 (citing *State v. Weir*, 600 A.2d at 1106).

58. Mitigating factors may include "the favorable prospect of rehabilitation [and] . . . the offender's low probability of re-offense and, thus, [may] justify a diminution of the basic period of incarceration . . ." *Id.* An aggravating factor may be the "high probability of re-offense [(i.e., defendant's criminal record)], and, in order to protect the public, [may] justify enhancing the basic period of incarceration." *Id.*

59. *Id.* at 1155.

60. *Id.*

61. *Id.*

can assess how the defendant's sentence will affect others.<sup>62</sup> By the completion of Step III, any adjustment of the maximum sentence will become the defendant's final sentence.<sup>63</sup>

### B. Sentence Review in the State of Maine

Four review processes are available to an inmate seeking to have his sentence reviewed. The first and most direct route is a motion pursuant to Maine Rule of Criminal Procedure 35. A second option involves a direct application to the Maine Supreme Judicial Court for sentence review.<sup>64</sup> Third, an inmate can petition for post-conviction review.<sup>65</sup> The last option involves petitioning the Governor to exercise his executive commutation power.<sup>66</sup>

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62. Cf. *United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992). Although this case involved federal sentencing guidelines, the sentencing court's rationale for significantly reducing the defendant's sentence demonstrates the kind of decision implicated in Step III of Maine's sentencing process.

The rationale for a downward departure here is not that [the defendant's] family circumstances decrease her culpability, but that we are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing. [The sentencing judge] made it clear that the departure was not on the behalf of the defendant herself, but on behalf of her family.

*Id.* at 129.

63. These three steps are very similar to the language of the legislation granting the Supreme Judicial Court appellate review of sentencing. See ME. REV. STAT. ANN. tit. 15, § 2155 (West Supp. 1995-1996), which states in relevant part:

Factors to consider by the Supreme Judicial Court

In reviewing a criminal sentence, the Supreme Judicial Court shall consider:

1. Propriety of sentence. The propriety of the sentence, having regard to the nature of the offense [Step I], the character of the offender [Step II], the protection of the public interest [Step III], the effect of the offense on the victim [Step III] and any other relevant sentencing factors recognized under law . . . .

*Id.*

64. See ME. REV. STAT. ANN. tit. 15, §§ 2151-2157 (West Supp. 1995-1996); ME. R. CRIM. P. 40, 40A-40C.

65. See ME. REV. STAT. ANN. tit. 15, §§ 2121-2132 (West Supp. 1995-1996); ME. R. CRIM. P. 65-78. See discussion *infra* part III.A.2, where post-conviction review is discussed in more detail. Post-conviction review is not limited solely to sentence review but is available to review any criminal judgment that meets certain criteria. Though more comprehensive, its procedural requirements make it much less attractive to a defendant challenging his sentence than a motion pursuant to Rule 35. See ME. REV. STAT. ANN. tit. 15, §§ 2124, 2126 (West Supp. 1995-1996) (jurisdictional prerequisites and exhaustion requirements); see also 1 DAVID P. CLUCHEY & MICHAEL D. SEITZINGER, MAINE CRIMINAL PRACTICE, § 35.1 (Rev. Ed., Issue 0, 1992) (stating that a Rule 35 motion is the swiftest means of relief and does not preclude relief under other available options, including one under post-conviction review). *Id.* at VI-53.

66. See ME. CONST. art. V, pt. 1, § 11 which states: "[The Governor] shall have power to remit after conviction all forfeitures and penalties, and to grant reprieves, commutations and pardons . . . ." See also ME. REV. STAT. ANN. tit. 15, § 2161

Maine Rule of Criminal Procedure 35 permits an inmate to challenge the validity of his sentence. The rule affords a defendant three forms of relief. Two forms of relief are found in Rule 35(a),<sup>67</sup> which authorizes the sentencing court to correct either an illegal sentence or a sentence imposed in an illegal manner.<sup>68</sup> The third form of relief, found in Rule 35(c), authorizes the sentencing court to reduce a lawful sentence where the "original sentence was influenced by a mistake of fact which existed at the time of sentencing."<sup>69</sup> Rules 35(a) and 35(c) provide procedures that are available after commencement of execution but prior to a year of completed sentence.<sup>70</sup> Rule 35 is very attractive as it offers a swift remedy. Other avenues of relief involve civil actions that may take years, perhaps exceeding the length of the original sentence.<sup>71</sup>

Upon timely filing of the motion, the original sentencing judge will evaluate whether the complaint is appropriate for the motion and, if so, whether it warrants a correction of sentence. It should be

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(West Supp. 1995-1996) (requiring that the Attorney General, the District Attorney for the county where the case was tried, and the public, through means of a general circulation newspaper, have at least four weeks notice of such hearing).

67. ME. R. CRIM. P. 35(a) provides in relevant part: "Correction of Sentence. On motion of the Defendant or the attorney for the state, or on the court's own motion, made within one year after a sentence is imposed, the justice or judge who imposed sentence may correct an illegal sentence or a sentence imposed in an illegal manner."

68. See generally, CLUCHEY & SEITZINGER, *supra* note 65, § 35:

An illegal sentence is one which is not authorized by law, as where the court imposes a sentence of imprisonment in excess of the maximum term authorized by statute or less than the statutorily mandated minimum term. A sentence imposed in an illegal manner is a "legal" sentence insofar as its length or amount is authorized by law, but the procedure by which it has been imposed does not comply with these rules or otherwise is unlawful.

*Id.* at VI-54 (footnote omitted).

69. ME. R. CRIM. P. 35(c) provides:

(c) Reduction of Sentence After Commencement of Execution.

(1) *Timing of Motion.* On motion of the defendant or the attorney for the state, or on the court's own motion, made within one year after the sentence is imposed and before the execution of the sentence is completed, the justice or judge who imposed the sentence may reduce that incomplete sentence.

(2) *Ground of Motion.* The ground of the motion shall be that the original sentence was influenced by a mistake of fact which existed at the time of sentencing.

*Id.*

70. ME. R. CRIM. P. 35(a), 35(c)(1).

71. See *State v. Bonney*, 659 A.2d 1269 (Me. 1995). After serving almost two years of his four-year sentence, the defendant moved for a reduction of his sentence pursuant to ME. R. CRIM. P. 35(c). Given the remaining length of his sentence, it is obvious that seeking a remedy through a civil action, such as 42 U.S.C. § 1983, could take as long as the remaining length of the defendant's sentence. See *infra* note 101 and accompanying text. Moreover, a successful civil action usually results in a change of the prisoner's condition of confinement, not a reduction of his sentence length.

noted that a reduction in sentence pursuant to Rule 35(c) will occur only for a gross abuse of discretion.<sup>72</sup> If no "mistake" is found the sentencing judge will dismiss the motion. A dismissal can be appealed to the Law Court<sup>73</sup> and does not preclude the moving party from pursuing other avenues that are available. This motion "should be considered in conjunction with other avenues of relief . . . ."<sup>74</sup>

In 1989, Chief Justice Wathen's proposal became law.<sup>75</sup> This legislation enabled the Law Court to review the propriety of a sentence as well as the manner in which it was imposed.<sup>76</sup> Review by the Supreme Judicial Court can be the next step for an inmate whose motion for correction or reduction of sentence pursuant to Rule 35 was denied, or review can be pursued by a direct application. Maine Rules of Criminal Procedure 40 and 40A-40C<sup>77</sup> govern the procedure a defendant must follow.

A defendant given a sentence of one year or more can apply to the Law Court for sentence review.<sup>78</sup> A panel comprised of three Supreme Judicial Court justices screens the applications. If any one of the three panelists votes in favor of granting leave, the entire Law Court will hear the appeal and render a decision.<sup>79</sup> If none of the panelists votes in favor of granting leave, the appeal is denied and will not be subject to further adjudication.<sup>80</sup>

### C. *The Subject Case: Factual and Procedural Background of Department of Corrections v. Superior Court*

The action initiated in *Department of Corrections v. Superior Court*<sup>81</sup> resulted from the 1991 sentencing of two convicted, borderline mentally retarded, child sex offenders.<sup>82</sup> The sentencing court recognized that incarceration in the Department of Corrections posed a risk to the offenders due to the type of criminal conduct each had engaged in and their below average intellectual and physi-

72. See CLUCHEY & SEITZINGER, *supra* note 65, § 35.4 (citing *State v. Frost*, 582 A.2d 782 (Me. 1990); *State v. Emery*, 534 A.2d 1317, 1319 (Me. 1987); *cf. State v. Campbell*, 540 A.2d 474, 475 (Me. 1988)).

73. See ME. REV. STAT. ANN. tit. 15, §§ 2151-2157 (West Supp. 1995-1996); ME. R. CRIM. P. 40, 40A-40C.

74. See CLUCHEY & SEITZINGER, *supra* note 65, § 35.1.

75. ME. REV. STAT. ANN. tit. 15, §§ 2155-2157.

76. *Id.* § 2155.

77. ME. R. CRIM. P. 40, 40A-40C (effective October 2, 1989).

78. ME. REV. STAT. ANN. tit. 15, § 2151.

79. *Id.* § 2152.

80. *Id.*

81. 622 A.2d 1131 (Me. 1993).

82. The two defendants sentenced were Fawn Buzzell, a 56-year-old male convicted of one count of unlawful sexual contact with a seven-year-old boy, and Arthur Ellis, a 33-year-old male who pleaded guilty to rape and unlawful sexual contact with a 15-year-old girl. *Id.* at 1132.

cal capacity. The court viewed both defendants as offenders who “d[id] not have the intellectual capacity to look out for their own best interest[s], who [were] easily taken advantage of, and most likely [would] be subject to abuse and degradation without complaint.”<sup>83</sup> Although the court realized that issues surrounding conditions of confinement typically arise in post-sentencing civil actions or post-conviction review, the court reasoned that a different situation existed here, which warranted proactive intervention to prevent a sentence amounting to cruel and unusual punishment.<sup>84</sup> Consequently, the court ordered the Department to complete a pre-sentence investigation and develop an appropriate plan to “ensure the decent, safe incarceration of such individuals.”<sup>85</sup> Otherwise, the court reasoned, the court would have to incarcerate the defendants in county jail—a poor solution as each offender would receive less supervision. This would be in neither the inmates’ nor society’s best interest.<sup>86</sup>

Unsatisfied with the Department of Corrections’s pre-sentence investigation and plan, the court imposed “Special Conditions of Judgment and Commitment”<sup>87</sup> on the Department. In response, the Department filed a motion to delete the sentence conditions on December 19, 1991. After a hearing on January 2, 1992, the court denied the motion. The court reasoned that sentencing the defendants to the Department without the protection of the conditions would result in cruel and unusual punishment.<sup>88</sup> Additionally, the court

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83. *Id.* at 1133.

84. Specifically, cruel and unusual punishment would be in violation of U.S. CONST. amend. VIII and ME. CONST. art. I, § 9.

85. Department of Corrections v. Superior Court, 622 A.2d at 1133. Prior to the sentencing hearings, the Superior Court entered the following order: “[The] Department of Corrections shall prepare a plan for commitment and protection of the defendant if committed to the DOC. They shall *adequately consider the defendant’s mental condition and situation as a potentially committed child sex offender.*” *Id.* at 1132 (emphasis added).

86. *Id.*

87. *Id.* at 1132 n.2. The conditions at issue were:

1. Defendant to receive expedited classification.
2. Defendant to be transferred to Bucks Harbor or some other medium security facility after classifications.
3. While in the Department of Corrections facilities the Defendant to receive psychological and sex offender counseling.
4. A staff member shall have specific responsibility to monitor the defendant’s condition and circumstances while incarcerated, to recognize that the defendant, because of his condition, may not take the initiative to speak or act in his own behalf, and to attempt to assure that conditions which may subject the defendant to abuse do not arise during the defendant’s time at the Department of Corrections.
5. The conditions and statements of the Department of Corrections response of December 4, 1991, are incorporated by reference herein.

*Id.*

88. *Id.* at 1133.

concluded "that it had the inherent authority to impose the conditions in the discharge of its constitutional obligation to ensure that the sentences d[id] not violate [the Constitution] as well as the implicit authority flowing from 17-A M.R.S.A. § 1151."<sup>89</sup> Later that month, the Attorney General, on behalf of the Department, sought relief from the Supreme Judicial Court in the form of a writ of mandamus or prohibition pursuant to Maine Rule of Civil Procedure 81(c).<sup>90</sup> The Attorney General argued that "the Superior Court had exceeded its statutory authority by imposing the special conditions . . . and that sentencing proceedings are not the proper forum for dealing with *constitutional* concerns about conditions of confinement."<sup>91</sup> The Law Court ordered that the special conditions be deleted because they exceeded the statutory authority of the Superior Court.<sup>92</sup> The District Attorney and the Maine Civil Liberties Union, which had been granted *amicus curiae* status, appealed. They argued that the Superior Court "had the constitutional power

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89. *Id.* The Law Court did not expand on the sentencing court's rationale regarding title 17-A, section 1151 of the Maine Revised Statutes, which provides the purposes of the "General Sentencing Provisions." It appears from context that the sentencing court concluded it had implicit authority to impose the conditions in order to achieve the purposes set out in § 1151(1), (3), and (5), which provide:

1. To prevent crime through the deterrent effect of sentences, the rehabilitation of convicted persons, and the restraint of convicted persons when required in the interest of public safety;

. . . .

3. To minimize correctional experiences which serve to promote further criminality; [and]

. . . .

5. To eliminate inequalities in sentences that are unrelated to legitimate criminological goals[.]

ME. REV. STAT. ANN. tit. 17-A, § 1151(1)(3)(5) (West 1983 & Supp. 1995-1996) (emphasis added).

90. Department of Corrections v. Superior Court, 622 A.2d at 1134; *see infra* note 5.

91. Department of Corrections v. Superior Court, 622 A.2d at 1134 (emphasis added).

92. *Id.* The court's rationale, which was reiterated in the subsequent appeal, consisted of the following:

The Supreme Judicial Court relying primarily on 17-A M.R.S.A. § 1258 (Supp. 1992) (commissioner has "complete discretion" in determination of initial place of confinement), 34-A M.R.S.A. § 1402 (1988) (commissioner responsible for general supervision, management, and control of committed offenders in any correctional facility), and 34-A M.R.S.A. §§ 1201, 3061 (1988 & Supp. 1992), concluded that:

The sentencing justice is free to consider the likely disposition of the prisoner if incarcerated and even to recommend certain conditions to the Department. Under existing law, the sentencing justice has no authority to invade the exclusive province of the Department by mandating that such conditions be met.

*Id.*

and duty to address its concerns about the safety of the offenders if sentenced to the Department."<sup>93</sup>

On appeal, the Law Court recognized, of course, that "[t]he courts of this state always have the power and duty to uphold the State and Federal Constitutions"<sup>94</sup> when the constitutionality of a statute is at issue.<sup>95</sup> More precisely, the court stated: "[W]e think it axiomatic that the courts in this state, if their power is invoked by the appropriate process, have the power and duty to relieve prisoners from conditions of incarceration that amount to cruel or unusual punishment . . ."<sup>96</sup> The court held that the Superior Court, due to *statutory* limitations on its power, could make only recommendations to the Department because there was "no vehicle that invoked a supervisory power over the Department of Corrections."<sup>97</sup>

### III. DISCUSSION

#### A. *The Department of Corrections v. Superior Court Decision*

This Note discusses how the Law Court handled the conditions of confinement issue raised in *Department of Corrections v. Superior Court*. The underlying issue is how a sentencing court may properly address conditions of confinement when a defendant has special mental and/or physical disabilities. The Law Court recognized that the sentencing court, by imposing special conditions upon the Department of Corrections, attempted to prevent potentially cruel and unusual punishment. While proclaiming that in fact "the trial court had before it no vehicle that invoked the supervisory power over the Department of Corrections,"<sup>98</sup> the court offered three possible "vehicles" that would invoke the supervisory power.<sup>99</sup> The court stated: "Such proceedings would include actions under 42 U.S.C. § 1983 and 15 M.R.S.A. §§ 2122-2132 (Supp.1992) (post-conviction review). The trial court on motion or *sua sponte* can protect the defendant by staying the execution of any criminal judgment entered pending the conclusion of the collateral proceedings."<sup>100</sup>

#### 1. *An Action Pursuant to 42 U.S.C. § 1983*

The number of suits brought by inmates under 42 U.S.C. § 1983<sup>101</sup> has grown to awesome levels in the past fifteen years. Totalling almost 30,000, these suits constituted thirteen percent of the federal

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93. *Id.* at 1132.

94. *Id.* at 1134.

95. *Id.*

96. *Id.* at 1134-35.

97. *Id.* at 1135 (footnote omitted).

98. *Id.*

99. *Id.* at 1135 n.4.

100. *Id.*

101. 42 U.S.C. § 1983 (1988).



courts' total civil case filings in 1992.<sup>102</sup> Many commentators feel "that many of these suits harass state prison officials, drain time and resources from the state attorney general offices, and consume an unduly large percentage of federal magistrate and district court judge time."<sup>103</sup> In essence, prisoners' suits have a small constituency. Besides the sheer volume of suits, other problems make it difficult for prisoners to bring cognizable complaints.

Prisoner suits under Section 1983 are almost invariably brought *pro se* as there is no right to counsel.<sup>104</sup> Not surprisingly, because "most prisoners . . . [are] poorly educated, with only a rudimentary acquaintance with the English language[,] . . . prisoners who ha[ve] no legal representation simply [can] not effectively present their grievances."<sup>105</sup> Even assuming a prisoner understands the judicial system, inmate status presents obstacles to adequate discovery.<sup>106</sup> Consequently, many complaints fail to pass initial procedural stages and result in quick dismissals.<sup>107</sup>

102. Kim Mueller, Comment, *Inmates' Civil Rights Cases and the Federal Courts: Insights Derived from a Field Research Project in the Eastern District of California*, 28 CREIGHTON L. REV. 1255, 1259 (1995) (citing ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICAL TABLES FOR THE TWELVE MONTH PERIOD ENDED SEPT. 30, 1992, 18, 27 (1992)).

103. See Donald P. Lay, *Exhaustion of Grievance Procedures for State Prisoners under Section 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935, 936 (1986).

104. Mueller, *supra* note 102, at 1280 nn.99 & 100 (noting that of 53 Eastern District cases analyzed, 51 were *pro se* and of 33 requests for appointment of counsel, 30 requests were denied).

105. William Wayne Justice, *The Origins of Ruiz v. Estelle*, 43 STANFORD L. REV. 1, 2-3 (1990). Judge Justice has been recognized as having demonstrated "unusual initiative" in prisoners' rights cases. *Id.* at 1. He has performed, from the bench, cross-examinations for *pro se* inmates and has ordered the United States to appear as *amicus curiae* to ensure the plaintiff equal discovery opportunity. See *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part, vacated in part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1982).

106. See Justice, *supra* note 105, at 3.

107. See *id.* at 2. For example, Judge Justice described a procedure followed by his predecessor, the Honorable Joe W. Sheehy, which often resulted in dismissal of a prisoner's complaint:

The plaintiff would be sworn, and Judge Sheehy would ask him to tell his story. The prisoner would then give, to the best of his ability, a narrative account of the incident or incidents that had led him to file his complaint. . . .

The defendant state official would then have an opportunity to cross-examine the prisoner-plaintiff. Unlike the plaintiffs in these hearings, the defendants were always represented by counsel [and] . . . would have the services of an assistant attorney general . . . .

Next, Judge Sheehy would ask the plaintiff if he had any evidence, other than his own testimony, to present to the court. Plaintiffs may have had such evidence from time to time, but I never saw any presented at the hearings I attended. Defendants, on the other hand, usually would produce both witnesses and documentary evidence to bolster their accounts.

After the witnesses for the defense were examined, the plaintiff typically would attempt some halting cross-examination. This was more likely to be

Additionally, prisoners' civil rights cases often take longer than other civil actions. One study showed that the average duration for a prisoner's case was 260 days, which was approximately 100 days longer than other civil actions filed in the same time period.<sup>108</sup> Because of the duration of these actions, many prisoners (usually with the assistance of legal counsel) try to obtain a preliminary injunction, which is a remedy rarely granted.<sup>109</sup> For persons such as Fawn Buzzell or Arthur Ellis, this "vehicle" provides no real means of protection. This is a reactive process meant to correct past violations from reoccurring. To qualify for this vehicle, Fawn Buzzell would have to be raped or beaten and then be able to articulate what had happened to him, which would be an unlikely scenario given his mental capacity.

## 2. *The Impotence of Title 15, Sections 2121-2132 of the Maine Revised Statutes Annotated*

The second vehicle listed by the Law Court that may be used to invoke supervisory power is post-conviction review.<sup>110</sup> This is a process initiated by the inmate, not by the sentencing court. A close look at the statutory language makes it apparent that the Law Court either carelessly included this alternative or did not intend this vehicle to apply to the facts in *Department of Corrections*. Section 2122, entitled "Purpose," provides that post-conviction review is designed to remedy those restraints or impediments caused by an illegal criminal judgment or post-sentencing proceeding.<sup>111</sup> Section 2125, which provides the ground for relief, includes language that the criminal

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"backchat" and denial, rather than recognizable cross-examination. At the conclusion of the defendant's presentation, Judge Sheehy would ask the plaintiff if he had any rebuttal evidence to present. Invariably, the plaintiff would not. Judge Sheehy would then dismiss the complaint from the bench.

*Id.*

108. Mueller, *supra* note 102, at 1282 (citation omitted).

109. Telephone Interview with James A. Dumont, Esq., Partner of Keiner, Dumont & McCaffrey, P.C., Middlebury, VT (Nov. 14, 1995).

110. ME. REV. STAT. ANN. tit. 15, §§ 2121-2132 (West Supp. 1995-1996). It should be noted that post-conviction review replaces the remedies pursuant to post-conviction habeas corpus and common law habeas corpus, including habeas corpus as recognized in title 14, sections 5501, 5509, and 5546 of the Maine Revised Statutes. *Id.* § 2122.

111. *Id.* Section 2122 provides the following:

This chapter shall provide a comprehensive and, except for direct appeals from a criminal judgment, the exclusive method of review of those criminal judgments and of post-sentencing proceedings occurring during the course of sentences. *It is a remedy for illegal restraint and other impediments specified in section 2124 which have occurred directly or indirectly as a result of an illegal criminal judgment or post-sentencing proceeding.*

*Id.* (emphasis added).

judgment or sentence be unlawful or unlawfully imposed.<sup>112</sup> Consequently, an analysis of post-conviction review fails to illuminate a viable process that could invoke supervisory power for situations similar to those found in *Department of Corrections*. Recall that in *Department of Corrections* neither the two defendants nor the sentencing court alleged that there had been an unlawful criminal judgment or a judgment that was unlawfully imposed.

### 3. Trial Court, on Motion or Acting Sua Sponte, Holding a Collateral Proceeding

The last vehicle provided by the Law Court grants the Superior Court supervisory power to stay the execution of any criminal judgment entered pending the conclusion of a collateral proceeding.<sup>113</sup> This action is contingent upon a defendant's motion or the sentencing court acting *sua sponte*.<sup>114</sup> No rule of criminal procedure or statutory authority grants a superior court this right. Instead, the Law Court, citing *Cutler Associates, Inc. v. Merrill Trust Company*,<sup>115</sup> stated that the power to stay is inherent under the court's general supervisory power over its own process.<sup>116</sup> It is not surprising that Justice Alexander and the defense attorneys failed to use this vehicle. First, it is unclear what "collateral proceeding" means here. Second, defense counsel understandably would not have looked to *Cutler Associates* because it is a civil case. Last, this case has not been cited for this proposition in any other Maine case since it came down in 1978. Arguably, the ability to stay the execution of judgment was expanded in *Department of Corrections* to include criminal proceedings.

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112. Section 2125 states: "A person who satisfies the prerequisites of section 2124 may show that the *challenged criminal judgment or sentence is unlawful or unlawfully imposed*, or that the impediment resulting from the challenged post-sentencing procedure is unlawful . . ." (emphasis added).

113. *Department of Corrections v. Superior Court*, 622 A.2d 1131, 1135 n.4 (Me. 1993).

114. *Id.*

115. 395 A.2d 453 (Me. 1978). Suit was brought by Cutler Associates, Inc. to confirm an award decided by an arbitrator pursuant to a contract's arbitration provision. Appellant Merrill asserted that the Superior Court erred when it refused to stay the proceedings or entry of judgment until the resolution of another dispute concerning the same contract. The Law Court refused to conclude that the failure to stay the proceedings was error. "A stay of proceedings . . . is not a matter of right but a matter of grace. The grant or denial of the stay rests in the sound discretion of the court. It will only be granted when the court is satisfied that justice will be thereby promoted." *Id.* at 456 (citations omitted).

116. The Law Court stated: "It is within the inherent power of the Superior Court, under its general supervisory power over its own process, to stay temporarily a proceeding before it. It may temporarily stay the execution of its judgment whenever it is necessary to accomplish the ends of justice." *Id.* (footnote omitted) (citations omitted).

What collateral proceeding could have been initiated? The sentencing court may have had a collateral proceeding in mind when it ordered the Department of Corrections to conduct pre-sentence investigations. Perhaps justifiably, the Law Court did not qualify the sentencing court's attempts to force the Department to develop a plan as a collateral proceeding. This may be because the sentencing court was instructing a department of the Executive Branch, which was not a party to the case at hand, to perform extraordinary tasks. Since it is uncertain what action Justice Alexander could have taken to achieve the result sought, this final vehicle offered by the Law Court remains unclear and untested. Perhaps there is no collateral proceeding that would apply to the facts in *Department of Corrections* and the Law Court merely was attempting to outline potential vehicles.

The three vehicles offered by the Law Court pose significant problems to prisoners. The only procedure that definitively enables a court to address conditions of confinement is an action pursuant to 42 U.S.C. § 1983. Post-conviction review pursuant to title 15, sections 2121-2132 of the Maine Revised Statutes, is not practicable if the defendant is not challenging the legality of the sentence or the method by which it was imposed. Additionally, it remains unclear under what conditions a collateral proceeding would support the use of a power to stay on the facts of *Department of Corrections*.

#### B. State v. Bonney

The case of *State v. Bonney*<sup>117</sup> provides valuable insight into how a trial court applied *Department of Corrections*. On December 17, 1992, Derek Bonney accidentally ran John-Paul Parisien off the road.<sup>118</sup> Mr. Parisien was killed instantly when his car struck a stand of trees. Mr. Bonney soon was apprehended and results from tests taken later that night at the police station indicated a blood-alcohol level of .12 percent.<sup>119</sup> The defendant was indicted on January 4, 1993, for a number of offenses, including manslaughter.<sup>120</sup> Under a December 1993 plea agreement the defendant pled guilty to manslaughter and operating under the influence of intoxicating liquor. In return, the State recommended a cap of four years unsuspended sentence.<sup>121</sup>

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117. 659 A.2d 1269 (Me. 1995).

118. *Id.* at 1269.

119. Appellee's Brief at 1, *State v. Bonney* (No. OXF-95-10).

120. The list of offenses included manslaughter, aggravated OUI, leaving the scene of a personal injury accident, and driving to endanger. *Id.*

121. The defendant was incarcerated immediately after his sentencing hearing on March 10, 1994. He was sentenced to the maximum term allowable under the plea agreement: eight years, all but four suspended, plus six years probation. Record of Sentencing Hearing of 3/10/94 at 32, *State v. Bonney* (No. OXF-95-10) [hereinafter Sent. Hearing].

The defense mounted a persuasive argument based on expert testimony that convinced the court it should take into consideration the defendant's rare disease, reflex sympathetic dystrophy (RSD).<sup>122</sup> The illness became the most troubling factor for the court in its determination of a sentence.<sup>123</sup> Upon assurance from the prosecution that the Department of Corrections could care adequately for the defendant, the court felt as though its only alternative was to trust that the Department could and would provide adequate care.<sup>124</sup>

On June 17, 1994, Mr. Bonney filed a Rule 35(c)<sup>125</sup> motion *pro se*,<sup>126</sup> which alleged that the Department of Corrections could not care adequately for him.<sup>127</sup> Since the record showed that the sen-

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122. See Letter from Charles L. Robinson, Ph.D., Charles L. Robinson Clinical and Forensic Psychology, to Albert J. Beliveau, Jr., Esq., Bonney's Counsel (Feb. 24, 1994) (on file with the *University of Maine Law Review*). In 1985, Bonney accidentally shot a nailgun into his ankle, which resulted in the development of the rare disease, reflex sympathetic dystrophy (RSD). *Id.* at 2. Mr. Bonney is in the third stage of the disease, which does not have a cure. He suffers from spreading paralysis, extreme pain, and irreversible muscle and bone damage. *Id.* He has undergone nerveblock therapy five times, has had two experimental surgeries, and has a morphine pump implanted in his body. *Id.* at 3-5.

Dr. Charles L. Robinson wrote that, because of the disease, several factors should be considered in sentencing the defendant, such as frequent changes of clothes due to excessive perspiration, night time exacerbation of symptoms, infection control, his pattern of sleeplessness, high fevers, excruciating pain, the need for emergency room services, and self-medication with high doses of morphine. *Id.* at 6-7.

123. See Sent. Hearing, *supra* note 121, at 30-31:

The greatest difficulty in this particular case in fashioning an appropriate remedy is Mr. Bonney's medical condition. I wish I could take some actions to guarantee that his medical condition could be appropriately and humanely addressed by a Department of Corrections sentence.

. . . But our Supreme Court had made it quite clear that it is not for the trial judge to try to run the Department of Corrections facilities . . . number 1, in accordance with the constitutional directive, that they are not to be imposed to operate in a way that results in cruel and abusive treatment.

. . . We have to trust that they have the appropriate medical facilities.

124. *Id.*

125. See *supra* note 69.

126. Appellant's Brief at 2, *State v. Bonney* (No. OXF-95-10). Counsel was appointed by the court on July 1, 1994. *Id.*

127. See Motion to Correct or Reduce Sentence Pursuant to Rule 35 at 3-5, *State v. Bonney* (No. CR-93-20) (arguing that deficiencies of care consist of the following: changes in the times of medicating that aggravate his pain and often require a nurse to aid in the middle of the night; variances in the amount of time it takes a nurse to visit thereby leaving the defendant in acute pain; Department of Corrections' insistence on giving defendant a type of morphine that he is not accustomed to, which results in a lack of pain blocking; the location of the medical department lacks ramps necessary for the defendant's access (two flights of stairs away); inter-floor moving requires a guard and another inmate to actually lift the defendant in his wheelchair, risking fall; the defendant is not allowed to go to the gym to exercise his arms, causing his muscles to degenerate; the defendant is not allowed to go to the recreation room because there is no other way to get there besides stairs; the high risks to the

tencing court assumed the Department's ability to care adequately for Bonney,<sup>128</sup> the defendant argued that this constituted a "mistake of fact which existed at the time of sentencing."<sup>129</sup> Bonney argued that the criteria set out in Rule 35 had been satisfied and warranted a reduction of his sentence.

The State denied that the Department of Corrections could not care adequately for Bonney<sup>130</sup> and argued that granting the motion would result in the opening of a huge "Pandora's Box" of Rule 35 motions from inmates complaining of Department deficiencies.<sup>131</sup> Justice Alexander, who had imposed the "Special Conditions" in *Department of Corrections*, concluded that the dismissal of Bonney's Rule 35(c) motion was necessary in light of the Law Court's holding in *Department of Corrections*.<sup>132</sup> Justice Alexander, perhaps overreacting, interpreted the decision in *Department of Corrections* to say that the sentencing court lacks the authority to protect inmates, even those with severe disabilities, at the sentencing stage.<sup>133</sup> He concluded that the decision precluded his court from "address[ing]

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defendant in the event of a fire because of his need of assistance to descend stairs; and defendant's limitations on using the commissary since that too involves the use of stairs). *Id.*

128. *See supra* note 123.

129. ME. R. CRIM. P. 35(c)(2).

130. *See* State's Answer to Defendant's Motion to Reduce Sentence at 1, *State v. Bonney* (No. CR-93-20).

131. Record of Hearing on Bonney's Motion to Correct or Reduce Sentence Pursuant to Rule 35 of 12/29/94 at 6, 7-8, *State v. Bonney* (No. CR-93-20) [hereinafter Rule 35 Hearing]. This argument is illogical. If a defendant moves to have his sentence reduced under Rule 35(c), complaining of Department deficiencies of care, he will have to show that the deficiency, or the presumption that the deficiency did not exist, was a prevalent issue at the time of the sentencing, which influenced the sentencing court's determination of sentence. *See* ME. R. CRIM. P. 35(c)(2).

132. Throughout the hearing on Bonney's Rule 35 motion, Justice Alexander repeatedly stated that given the holding of the court in *Department of Corrections*, he doubted that Bonney's argument was appropriate for a Rule 35 motion. Justice Alexander stated: "I don't think in light of what the Law Court has said, the Department of Corrections [v.] Superior Court, this is likely—this is the way it's appropriate to go." Rule 35 Hearing, *supra* note 131, at 9-10. Obviously sympathetic to Bonney, Justice Alexander contemplated the effectiveness of civil routes noted in *Department of Corrections* (*i.e.*, action under 42 U.S.C. § 1983). He also recognized it likely would take too long. *Id.* at 5, 9. Justice Alexander stated that if he were to grant the Rule 35 motion there would be a lot of effort spent having a factual hearing and developing a workable record, whereby any ruling he issued potentially could be overruled by the Law Court. *Id.* at 11, 13. He deduced that the best route involved dismissing the motion immediately, so that when Bonney appealed, the Law Court would take the facts claimed as true for the purpose of a hearing. Justice Alexander was confident that the Law Court would render a quick decision if it believed that Bonney's argument was appropriate for a Rule 35 motion. *Id.* However, because Justice Alexander did not believe the Law Court would determine that the issue was appropriate for a Rule 35 motion, he urged Bonney to supplement the appeal with a civil action. *Id.* at 11-13.

133. *Id.*

conditions of incarceration issues on a Rule 35 motion."<sup>134</sup> Bonney appealed.

On appeal, both sides repeated their arguments presented in the Rule 35 motion hearing. Bonney also cited *Green v. State*<sup>135</sup> as authority for the proposition that he had a right to be sentenced on accurate information.<sup>136</sup> The State argued that the decision of *Department of Corrections v. Superior Court* precluded the sentencing court from considering a mistake of fact argument (i.e. comfort and safety of convicts).<sup>137</sup> Not in complete agreement with either party, the Law Court affirmed the dismissal.<sup>138</sup>

1. *The Law Court Narrows the Possibilities by Which a Court May Address Conditions of Confinement by Disallowing a Correction or Reduction of Sentence Pursuant to Rule 35(c)*

In *Bonney*, the court was presented with a clear-cut case. It was evident from the record that the sentencing court was concerned with the Department of Corrections's ability to care adequately for Bonney.<sup>139</sup> Justice Alexander wanted to ensure protection but felt he must assume the Department could offer Bonney adequate care. This suggests that Justice Alexander would have accounted for deficiencies in care by adjusting Bonney's original sentence. Despite the apparent appropriateness of the facts for a Rule 35(c) motion, the ambiguous meaning of a "mistake as to a material fact"<sup>140</sup> provided the Law Court with the opportunity to prevent a sentencing court from addressing conditions of confinement on such a motion.

The Law Court denied review under Rule 35(c), citing *State v. Hunter*.<sup>141</sup> *Hunter* involved a statute that allowed the sentencing court to reduce an inmate's sentence based on an evaluation of the

134. *State v. Bonney*, 659 A.2d 1269, 1270 (Me. 1995).

135. 247 A.2d 117 (Me. 1968).

136. *State v. Bonney*, 659 A.2d at 1270.

137. *Id.*

138. *Id.* The Law Court held that in spite of a record that demonstrates that the sentencing court may have relied on the Department of Corrections's ability to care adequately for Bonney (the court refers to this reliance as a prediction), this "prediction [could not] represent a fact which existed at the time of sentencing." *Id.*

139. *See supra* note 123.

140. The Law Court has provided only one example of an appropriate issue to raise on a Rule 35(c) motion. It was a hypothetical given in *State v. Frost*, 582 A.2d 782 (Me. 1990), which allows a correction of sentence pursuant to Rule 35(c) if a defendant was sentenced upon an inaccurate criminal record and if this misinformation influenced the sentencing court. *Id.* at 783. The court cited MAINE CRIMINAL PRACTICE, § 35.4 (1992) as authority. Ironically, MAINE CRIMINAL PRACTICE cites *Frost* for the same proposition. CLUCHEY & SEITZINGER, *supra* note 65, at VI-60 n.47.

141. *State v. Bonney*, 659 A.2d at 1270 (citing *State v. Hunter*, 447 A.2d 797 (Me. 1982)).

inmate's post-conviction behavior.<sup>142</sup> Under the statute, a prisoner could earn a chance to have his sentence reduced by being an exemplary inmate. In invalidating the statute, the Law Court held that the separation of powers mandated by the Maine Constitution requires that any power specifically granted to one branch cannot be exercised by another unless expressly permitted by Maine's Constitution.<sup>143</sup> The court equated the power of a court to reduce an inmate's sentence based on his good behavior with the Governor's power to commute a sentence.<sup>144</sup> In *Bonney*, the court held that "[f]or his part, Bonney fails to consider the constitutional limitations on a court's power to reduce a sentence previously imposed."<sup>145</sup> This reference was inaccurate, however, because Bonney's motion was based on a mistake of fact rather than on his exemplary behavior in prison.

The Law Court's decision should have been foreseen. Bonney's illness presented a Step II issue, arguably a mitigating factor. The court consistently has been reluctant to review Step II issues.<sup>146</sup> Bonney's illness was no exception. As a result, the decision in *Bonney* narrowed the interpretation of Rule 35(c) and reduced the overall opportunities of a court to address conditions of confinement. Consequently, we know of only one potential "mistake of fact" that will warrant review under Rule 35(c)—"a mistake about the nature or extent of a defendant's criminal record."<sup>147</sup>

## 2. *The Law Court Uses Bonney as a Tool to Reaffirm Its Position Stated in Department of Corrections Concerning Conditions of Confinement*

The Law Court did not concur with the State's proposition that *Department of Corrections* precluded the sentencing court from "consider[ing] the comfort, convenience, and safety of convicted persons . . ."<sup>148</sup> The court quoted directly from *Department of Corrections*: "We do not undermine the authority of the trial court to conduct a sentencing hearing and to inquire into the options available to aid the court's sentencing discretion."<sup>149</sup> The court further wrote that "[w]e also stated . . . 'that the courts in this state, if their power is invoked by the appropriate process, have the power and

142. The statute at issue was ME. REV. STAT. ANN. tit. 17-A, § 1255 (West 1983) (repealed 1983).

143. *State v. Hunter*, 447 A.2d at 799-800 (construing ME. CONST. art. III, §§ 1, 2).

144. *Id.* at 802.

145. *State v. Bonney*, 659 A.2d at 1270.

146. See discussion *infra* part III.C.

147. CLUCHEY & SEITZINGER, *supra* note 65, § 35.4; see also *supra* note 140.

148. *State v. Bonney*, 659 A.2d at 1270.

149. *Id.* (quoting *Department of Corrections v. Superior Court*, 622 A.2d 1131, 1135 (Me. 1993)).



duty to relieve prisoners from conditions of incarceration that amount to cruel and unusual punishment . . . .'<sup>150</sup> Based on that language, Justice Alexander may have misinterpreted *Department of Corrections* when he concluded that sentencing proceedings are not the proper forum for dealing with conditions of confinement.<sup>151</sup> Arguably, a reasonable reading of the opinion allows one to infer that a sentencing court can address conditions of confinement and stay proceedings but may not impose conditions upon the Department until an appropriate vehicle is invoked.

In *Bonney*, the Law Court reiterated its discussion in *Department of Corrections* concerning appropriate vehicles.<sup>152</sup> However, none of the vehicles offer effective protection to inmates. One may infer that the Law Court is reluctant to allow challenges to sentence determinations, especially by the sentencing court, *after* a sentence has been imposed. This leaves open the question of how a sentencing court can address issues of confinement in its determination of a sentence.

### C. *The Law Court's Reluctance to Change the Sentencing Court's Determination of the Maximum and Final Sentence*

"The discretion of the sentencing justice is virtually unrestrained when it is exercised within the statutory range of sentences."<sup>153</sup> Unfortunately, the inequities resulting from the unlimited discretion of sentencing judges continue despite Maine Supreme Judicial Court sentence review. Very little has changed to provide a "more effective and pervasive means of structuring sentencing discretion."<sup>154</sup> The current posture of the Law Court is highly deferential toward the sentencing court's analyses of Steps II and III.<sup>155</sup> With that in

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150. *Id.*

151. The conclusion that sentencing proceedings are not the proper forum for dealing with conditions of confinement was asserted by the Department of Corrections in argument but was never affirmed by the Law Court. See *Department of Corrections v. Superior Court*, 622 A.2d at 1134.

152. See *supra* part III.A.

153. Wathen, *Disparity*, *supra* note 45, at 34.

154. *Id.*

155. For Step II issues, see *State v. Tapley*, 609 A.2d 722, 723 (Me. 1992) (citing *State v. Weir*, 600 A.2d 1105, 1106 (Me. 1991)) (court affirmed defendant's sentence and held that the sentencing court, which has wide discretion in assessing aggravating factors, did not abuse its discretion); *State v. Collind*, 602 A.2d 1147, 1147 (Me. 1992) (court reviewed a dismissed Rule 35(c) motion and affirmed sentence of an HIV-positive defendant who contended there existed a mistake of fact because the sentencing court assumed he had a full life expectancy); *State v. Lemieux*, 600 A.2d 1099, 1101 (Me. 1991) (court found no error in sentencing court's evaluation of mitigating factors); *State v. Weir*, 600 A.2d 1105, 1106 (Me. 1991) (citing *State v. Rosa*, 575 A.2d 727 (Me. 1990)) (court held that sentencing court has wide discretion in determining aggravating and mitigating factors and affirmed sentencing court's individualization of defendant's sentence); *State v. Clark*, 591 A.2d 462, 464 (Me. 1991) (court affirmed the sentencing court's determination of weight given to the defend-

mind, it is useful to revisit the major goal sought by appellate review—to reduce sentencing disparity. How well has the new system performed?<sup>156</sup> All Law Court sentence modifications, except one,<sup>157</sup> stem specifically from Step I errors of principle.<sup>158</sup> It is ap-

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ant's potential for rehabilitation); *State v. Constantine*, 588 A.2d 294, 296 (Me. 1991) (court affirmed defendant's sentence on appeal where the defendant argued the sentencing court put too much emphasis on general deterrence and failed to take into account adequately his remorse and potential for rehabilitation); *State v. Frost*, 582 A.2d 782, 782 (Me. 1990) (court affirmed dismissal of defendant's Rule 35(c) motion that contended a mistake of fact existed because the prosecutor asserted that the defendant had seven burglary convictions rather than the correct number of four); *State v. Shortsleeves*, 580 A.2d 145, 151 (Me. 1990) (court held that the "sentencing justice did not err in determining that the circumstances of the defendant did not require any mitigation in the sentence"); *State v. Hallowell*, 577 A.2d 778, 781-82 (Me. 1990) (unpersuaded by defendant's argument that his sentences were excessive in length and failed to provide an incentive for rehabilitation, the court affirmed defendant's sentence); *State v. Emery*, 534 A.2d 1317, 1319 (Me. 1987) (court affirmed dismissal of defendant's Rule 35(c) motion contending that there existed no mistake of fact in the court's evaluation of defendant's prospects for rehabilitation).

For Step III issues see *State v. Fleming*, 644 A.2d 1034, 1036 (Me. 1994) (citing *State v. Howard*, 541 A.2d 1295 (Me. 1988)) (court gave deference to sentencing court's determination to factor in the victim's statements describing the impact of the defendant's crime); *State v. Kehling*, 601 A.2d 620, 625 (Me. 1991) (court affirmed sentence, referring to the need to protect the public and the sentencing court's discretion in relation to this factor (although the court treats "protecting the public" as an aggravating factor, this decision was handed down before *State v. Hewey*, 622 A.2d 1151, 1155 (Me. 1993), which articulated "protecting the public" as being included in Step III)).

156. As pointed out by Chief Justice Wathen in *Sentencing and Statistics*, 6 ME. BAR J. 290 (1991), "[t]here is no official or unofficial compilation of sentences imposed in felony cases and . . . the judicial system neither collects nor analyzes sentence data." *Id.* at 290. Until data is collected, it will be very difficult, if not impossible, to gauge the effectiveness of the new sentencing review process.

157. See *State v. Gonzales*, 604 A.2d 904, 907 (Me. 1992) (court remanded defendant's sentence for resentencing because the sentence was constitutionally impermissible in that the defendant, a Dominican with no prior criminal record, was arrested for selling just over one half of an ounce of cocaine and sentenced to 15 years rather than a lesser sentence in part because the prosecution argued that "the Dominicans dominate the drug trade in Lewiston").

It should be noted, however, that Chief Justice Wathen has expressed dissatisfaction with the enormous discretion given to the sentencing court regarding Step II determinations. See *State v. Weir*, 600 A.2d 1105, 1107-08 (Me. 1991) (Wathen, J., dissenting) (questioning the validity of the sentence imposed on the defendant in light of Step II factors). See also *State v. Hunter*, 447 A.2d 797, 805-06 (Me. 1982) (Wathen, J., dissenting) (arguing that progress towards a noncriminal way of life should remain an appropriate basis for sentence reduction).

158. See *State v. Bolduc*, 638 A.2d 725, 727-28 (Me. 1994) (court held that defendant's criminal conduct alone could not warrant the maximum statutory sentence, which had been imposed by the lower court as her basic sentence); *State v. Reynoso*, 604 A.2d 441, 442-43 (Me. 1992) (court remanded the defendant's 20-year sentence for reevaluation using the principles articulated in *State v. Lewis*, 590 A.2d 149, 151 (Me. 1991), and *State v. Clark*, 591 A.2d 462, 464 (Me. 1991), which allowed the imposition of the maximum basic sentence only when the crime is of the most serious nature, which the court determined was not the case here); *State v. Gosselin*,

parent that courts still retain a significant amount of discretion in determining sentences, which results in a formidable barrier for many defendants at the appellate review stage.<sup>159</sup> In other words, if a judge imposes the correct "basic" sentence, he will have free reign to determine the maximum (Step II) and final sentences (Step III). This assumes, of course, that the determination remains within permissible constitutional and statutory parameters. Chief Justice Wathen's intent in proposing Supreme Judicial Court sentence review was to reduce sentencing disparity. It is difficult to see how this goal can be achieved if the Law Court refuses to inquire into the validity of the sentencing court's determination of the maximum and final sentence.

*D. Where a Trial Court May Potentially Factor in a Defendant's Disabilities*

Sentencing courts retain as much discretion as they had prior to the implementation of Chief Justice Wathen's proposal. As long as a court determines Step I correctly, very few, if any, procedures can be initiated to challenge successfully a sentencing court's determination. Therefore, almost anything courts consider important can be factored into Step II or Step III of the sentencing process. For example, Justice Alexander could have accounted for Mr. Bonney's illness by rationalizing that a shorter length of incarceration, say two

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600 A.2d 1108, 1110 (Me. 1991) (court vacated and remanded for resentencing defendant's 40-year sentence, the maximum for manslaughter, which was determined excessive given the facts of the case and that the trial judge acquitted the defendant of murder, which has a 25-year minimum); *State v. Clark*, 591 A.2d 462, 464 (Me. 1991) (court *sua sponte* examined the defendant's 30-year sentence and determined that it was in excess of the sentences given for similar criminal conduct, because the rape he committed did not involve a "heightened degree of violence, injury, torture, or depravity"); *State v. Lewis*, 590 A.2d 149, 151 (Me. 1991) (court decreased defendant's basic sentence because the defendant's "crime [did] not present the sort of circumstances that the expanded limit for Class A crimes was intended to address"); *State v. Michaud*, 590 A.2d 538, 542 (Me. 1991) (court reduced defendant's maximum sentences because "gross sexual misconduct could be committed in much more aggravating and heinous ways"); *State v. St. Pierre*, 584 A.2d 618, 622 (Me. 1990) (since defendant's criminal conduct (murder) was not aggravated by extreme cruelty, the court reduced his sentence from the maximum sentence of life imprisonment to 45 years); *State v. Tellier*, 580 A.2d 1333, 1334-36 (Me. 1990) (court ruled that statute prohibits consecutive sentences when offenses arise from one criminal episode).

159. The Law Court has stated specifically that it gives sentencing courts broad discretion in determining sentences. *See State v. Fleming*, 644 A.2d 1034, 1036 (Me. 1994); *State v. Cooper*, 617 A.2d 1011, 1016 (Me. 1992); *State v. Lemieux*, 600 A.2d 1099, 1102 (Me. 1991); *State v. Smith*, 600 A.2d 1103, 1104 (Me. 1991); *State v. Weir*, 600 A.2d 1105, 1106 (Me. 1991); *State v. Rosa*, 575 A.2d 727, 730 (Me. 1990); *State v. Mudie*, 508 A.2d 119, 121 (Me. 1986); *State v. Cote*, 507 A.2d 584, 585 (Me. 1986); *State v. Dumont*, 507 A.2d 164, 167 (Me. 1986); *State v. Farnham*, 479 A.2d 887, 890 (Me. 1984); *State v. Samson*, 388 A.2d 60, 67 (Me. 1978); *Green v. State*, 247 A.2d 117, 120 (Me. 1968).

years rather than four, would achieve the necessary deterrence and retribution goals, because Bonney would suffer more day-to-day than the average inmate.

This fundamental understanding, however, provides no panacea and does not address the problem in *Department of Corrections*. Justice Alexander was concerned for the safety of the defendants he was sentencing to the Department of Corrections. Even if Justice Alexander had given the defendants only half of the sentence he imposed, it is likely that they still would be abused in prison. Justice Alexander could not elect to impose a suspended sentence because he had at least two competing interests: protection of the public and protection of the victims. It is likely that Justice Alexander knew the extent of his discretion but realized he could not balance these competing interests. As a creative alternative, he imposed conditions on the Department. The last sentence in the Law Court's opinion in *Department of Corrections* underscores Justice Alexander's dilemma: "The [sentencing] court's choices . . . are limited to the statutorily prescribed dispositions, no matter how unsatisfactory those options may be."<sup>160</sup>

#### E. Recommendations for Maine's Sentencing Law

The Law Court has provided factors that qualify as mitigating or aggravating circumstances<sup>161</sup> but not a comprehensive list. It would be helpful for judges and practitioners to know with more certainty what all the relevant factors are. Such a list would clarify for sentencing judges what can be considered in Step II of the process as well as provide prosecutors and defense attorneys with a solid basis for developing arguments at sentencing hearings. This clarification could be done in a Law Court opinion or through legislation.

There is also a need to make fundamental procedural changes in the Law Court's sentence review process. This type of review can be an efficient way to get a sentence modified, but there are numerous shortcomings. The first problem lies in the application stage. If the sentence was imposed by the superior court, the application must conform to Form 12 of the Appendix of the Superior Court Forms. If the sentence was imposed by the district court, it must conform to Form 14 of the Appendix of the District Court Forms.<sup>162</sup> Neither form allocates space for the petitioner to develop his argument.<sup>163</sup>

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160. *Department of Corrections v. Superior Court*, 622 A.2d 1131, 1135 (Me. 1993).

161. See, e.g., *State v. Hewey*, 622 A.2d 1151, 1154 (Me. 1993); *State v. Weir*, 600 A.2d 1105 (Me. 1991); Wathen, *Disparity*, *supra* note 45, at 17-18 (citing *State v. Anderson*, Nos. AD-78-37, AD-78-40 (Me. App. Div. June 30, 1980)).

162. ME. R. CRIM. P. 40(b).

163. Superior Court Form 12 and District Court Form 14 include the following: request for sentence appeal, the date the sentence was imposed, the proceeding during which the sentence was imposed, whether an appeal is pending pursuant to ME.

Consequently, the panel that grants or denies leave for review by the Law Court must do so *before* it hears the argument on which the appeal is based. Indeed, the panel views only the application, a copy of the docket entries, the charging instrument, the judgment and commitment, a copy of the pre-sentence report (if any), and copies of other exhibits and information used by the sentencing court.<sup>164</sup>

The second problem is that the panel submits no written decision of its denials. This means not only that the panel is uninformed as to the petitioner's argument on appeal but also that the prisoner's lawyer has no idea why the application was denied leave.<sup>165</sup> Where leave is granted, the full Law Court issues an opinion. However, since so few appeals are granted, very little sentencing law is made. For example, the panel granted leave to only nine appeals during 1994 and 1995. The development of Maine's sentencing law is advancing at a sluggish pace.

The Law Court uses the decisions of the Appellate Division,<sup>166</sup> which were issued before September of 1989, as a basis for some of its decisions in the current review process.<sup>167</sup> This is entirely appropriate but gives rise to another problem. The Appellate Division's decisions were reported in slip opinion form but never were published in the Maine Reporter or the Atlantic Regional Reporter. Consequently, the little sentencing law available is often next to impossible to locate.<sup>168</sup>

There are solutions to these problems. First, space should be allotted on Forms 12 and 14 to afford an applicant the opportunity to develop an argument when he petitions the panel of the Supreme Judicial Court—before the panel rules. Second, a written ruling

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R. CRIM. P. 37 (Rule 36 for Form 14), and the address of the applicant. *See also* Wathen, *Judges on Judging*, *supra* note 45, at 612 (discussing the procedural steps in Supreme Judicial Court sentence review).

164. ME. R. CRIM. P. 40(d).

165. *See* Wathen, *Judges on Judging*, *supra* note 45, at 613. Chief Justice Wathen points out that the new sentence appeal system received 150 applications in its first year of operation (1990), 92 of which were reviewed by the panel. Of the 92 reviewed, only 12 were granted leave to appeal by the panel. Neither the applications granted leave nor the applications denied leave have statements of reason provided by the screening panel. Thus, the vast majority of applicants are left wondering why their application was denied. *Id.*

166. *See supra* note 45.

167. *See* Wathen, *Disparity*, *supra* note 45, at 17-18. Chief Justice Wathen discusses *State v. Anderson*, Nos. AD-78-37, AD-78-40 (Me. App. Div. June 30, 1980), and the opinion's importance in providing a workable guideline for sentencing judges when determining a sentence for defendants convicted of murder.

168. *See* Wathen, *Disparity*, *supra* note 45, at 19. The problems cited by Wathen under the old system persist in the new. Wathen explicitly cited three problems that continue to beleaguer the current sentence review process: First, too few cases are decided to develop this area of law; second, the system does not allow for information to be disseminated; and third, the operation of the Appellate Division, with its high turn-over rate, was not conducive as a law-making body. *Id.*

should be documented and made available to the petitioner and the public. This could prevent certain issues from reoccurring if it is clear to practitioners that the argument they seek to present already has been rejected. Last, an effort should be made to gather the Appellate Division slip opinions. They should be copied, organized in a manageable format, and distributed so that they are available to the public.

There also exists a desperate need to tabulate the length of sentences that are imposed for the various types of criminal conduct.<sup>169</sup> Currently, no such compilation exists. If no statistical evidence is compiled, it is not possible to know if there was sentencing disparity, whether there is now, or whether the reform accomplished its goals.

Additionally, sentencing courts should be required to submit written explanations of the process used to determine sentences in each case. Too often the sentencing record fails to reflect clearly the sentencing court's analysis, making it needlessly difficult for the appellate court to review for errors in principle. Further, these explanations of the court's sentence determination should follow the steps provided in *State v. Hewey*,<sup>170</sup> thereby providing the Law Court with a standard template for its own analysis.

If the current system has not reduced sentencing disparity and the achievement of this goal remains a priority, Maine should implement sentencing guidelines through legislation. An adaptation of the policy underlying the Federal Guidelines would enable a judge to depart from the guidelines when it is appropriate. When a departure is deemed necessary, the court should state its reasoning, so that an appellate court may determine whether the departure from the guidelines is justified.<sup>171</sup>

Finally, recalling *Department of Corrections*, it is obvious that there is a need for an explanation by the Law Court of how to apply the "vehicles" it offered in that case to the facts of that case, or similar facts. How could Justice Alexander or the defendants have applied these vehicles to afford protection? Admittedly, this requires empathy for individuals who have committed egregious crimes, but the alternative is abuse in prison and, more likely than not, recidivism.

#### IV. CONCLUSION

*Department of Corrections* raised questions concerning whether a defendant's disabilities could be taken into account when determin-

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169. See Wathen, *Judges on Judging*, *supra* note 45, at 621-22.

170. See *supra* part II.A.3.b.

171. See *United States v. Amaya-Benitez*, 69 F.3d 1243 (2nd Cir. 1995) (sentence departing from the Federal Guidelines was vacated and remanded for resentencing because the sentencing court failed to state reasons for its departure).

ing his sentence. The Law Court spoke forcefully, holding that absent a vehicle invoking supervisory power a sentencing court was not to account for disabilities by imposing conditions upon the Department of Corrections. The Law Court offered three vehicles that would invoke supervisory power. It is apparent that these vehicles are only appropriate for a limited number of situations, none of which would have helped the defendants Justice Alexander was trying to protect in *Department of Corrections*. The Law Court's decision precludes a trial court from taking actions that expose the realities of prison. The Law Court effectively placed the complete responsibility of raising conditions of confinement issues on inmates—a class of people who often lack the resources to mount a viable legal challenge. As long as there is no mechanism that addresses the evils of prison, there will be no expensive problems to rectify.

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