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State v. Violette: Harsher Resentencing Encounters A Bolder Resumption of Vindictiveness

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STATE v. VIOLETTE: HARSHER RESENTENCING ENCOUNTERS A BOLDER PRESUMPTION OF VINDICTIVENESS

Twenty-one years ago in *Weeks v. State*,[1] the Maine Supreme Judicial Court, sitting as the Law Court, adopted a rule to prevent judicial vindictiveness when resentencing defendants who had successfully appealed their conviction and been reconvicted. The *Weeks* court adopted as a state due process protection the United States Supreme Court's rule laid down the preceding year in *North Carolina v. Pearce*.[2] The *Pearce* rule provides that harsher resentencing of such defendants creates a presumption of constitutionally prohibited vindictiveness unless the harsher sentence is explicitly based on some identifiable misconduct by the defendant since the prior sentencing.[3] Thus, the Law Court recognized under Maine's due process guarantee[4] exactly the same resentencing protection described in *Pearce* under the federal due process guarantee.[5]

The *Pearce* rule created a presumption of vindictiveness that seemingly arose whenever a harsher sentence was given, but the rule proved more complicated to apply than the language in *Pearce* suggested. The Supreme Court has since explained and narrowed the rule. Specifically, the Supreme Court in revising *Pearce* has required a likelihood of vindictiveness before applying the presumption and has recognized broader ground for rebutting the presumption.[6]

Until this year, the few cases giving the Law Court the opportunity to apply *Weeks* revealed no detectable differences between Maine's due process protection and the federal due process protection under *Pearce*. The Law Court's recent decision in *State v. Violette*,[7] however, raises a question whether the *Weeks* rule and the revised *Pearce* rule coincide.

In *Violette*, the defendant, after an appeal and upon a reconviction, received a harsher sentence from a judge who expressly noted that he was unaware of the initial sentence.[8] Unlike the Supreme

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1. 267 A.2d 641 (Me. 1970).
2. 395 U.S. 711 (1969).
3. *Id.* at 726.
4. "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof." ME. CONST. art. I, § 6-A.
5. "We therefore adopt for the courts of this State the constitutional guidelines of *Pearce*." 267 A.2d at 647.
6. *See infra* notes 24-49 and accompanying text.
7. 576 A.2d 1359 (Me. 1990).
8. *Id.* at 1360.

Court in recent applications of *Pearce*, the Law Court in *Violette* applied the presumption of vindictiveness without weighing the likelihood of vindictiveness.[9] The Law Court ruled in a 5-1 decision that the *Weeks* rule prevented a sentence harsher than the initial sentence despite the resentencing judge's lack of knowledge of the initial sentence.[10]

The significance of *Violette* is unclear because of the competing tones in the Law Court's decision and because there are no Supreme Court cases procedurally on point with *Violette*. Possibly, the Law Court hesitated in *Violette* to try to mirror a revised *Pearce* rule when operating in unexplored procedural waters. A bolder interpretation of *Violette* is that the Law Court declined to take notice of the Supreme Court's emaciation of the *Pearce* rule and has begun a process of distinguishing the state due process protection from federal due process. In addition, the Law Court raised the issue of sentencing disparity in *Violette* in noting that the two sentencing judges sentenced the same defendant differently using the same facts.[11] Thus, the Law Court may have been motivated in ruling as it did by a desire for sentencing consistency.

This Note will track the erosion of the *Pearce* rule, compare the pillars of *Violette* to the principal federal revisions of *Pearce*, and draw upon the language and context of *Violette* to explore the Law Court's motivation and the future of the *Weeks* rule. This Note credits the Law Court for the simplicity of its approach in *Violette*, but suggests that a state due process protection exceeding the federal due process protection will require the Law Court to functionally define identifiable misconduct or "recidivism"[12] and to readdress *Weeks* in the context of plea bargaining, as the Supreme Court has done with *Pearce*.

BACKGROUND

North Carolina v. Pearce[13] began as a federal habeas corpus proceeding involving a state prisoner. The defendant successfully appealed but was retried, reconvicted and resentenced to a longer term. This sentence was vacated in a federal habeas corpus action,

9. *Id.* at 1360-61.

10. *Id.* at 1361.

11. *Id.* at 1360-61.

12. The Law Court uses "recidivism" and "identifiable misconduct" interchangeably in *Violette* as justification for harsher resentencing under the due process rule it adopted. *Id.* at 1360.

13. 395 U.S. 711 (1969). *Simpson v. Rice*, a companion case, reported with *Pearce*, also began as a habeas corpus proceeding. The defendant, an Alabama prisoner, successfully withdrew from a guilty plea, was tried and convicted, and was resentenced more harshly without receiving credit for the time he had spent in prison on the original judgments. *Id.* at 714. Insofar as the imposition of a harsher sentence, *Simpson* was overturned by the Supreme Court in Alabama v. Smith, 490 U.S. 794 (1989).

and North Carolina sought the Supreme Court's review.[14]

The *Pearce* Court said that any judicial vindictiveness against a defendant for having successfully attacked his first conviction would violate due process under the fourteenth amendment.[15] Although there is no absolute constitutional bar against harsher resentencing of a defendant upon reconviction,[16] a harsher resentencing creates in effect a presumption of vindictiveness in violation of due process.[17] The *Pearce* Court created this presumption to protect against actual vindictiveness and to free defendants of apprehension of retaliation.[18]

The *Pearce* Court crafted specific requirements to rebut the presumption. To ensure the absence of a vindictive motivation in resentencing, a judge imposing a harsher sentence must base his reasons on "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."[19] The reasons must "affirmatively appear," and the facts upon which the harsher sentence is based must be put into the record.[20]

The Law Court adopted the constitutional guidelines of *Pearce* as a due process protection under the Maine Constitution in *Weeks v. State*.[21] The *Weeks* court recognized it was adopting an "inflexible rule" with "built-in protection" against vindictiveness in resentencing.[22] The court also acknowledged the chilling effect that a possible

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14. North Carolina v. Pearce, 395 U.S. at 713-14.

15. *Id.* at 725. The *Pearce* Court appeared to go further in the rule's applicability than subsequent decisions. *Pearce* seemed to be concerned with removing the chilling effect from the fear of possible vindictiveness felt by defendants exercising their right to appeal. The *Pearce* Court stated, "And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant *be freed of apprehension* of such a retaliatory motivation on the part of the sentencing judge." *Id.* (emphasis added). However, the Supreme Court shortly afterwards signaled that the *Pearce* rule was not about apprehension but was about presumption based on some likelihood of vindictiveness. An unfortunate attorney in Moon v. Maryland, 398 U.S. 319 (1970), relying on *Pearce* to overturn a harsher sentence in a reconviction, lost his case when he told the Supreme Court in oral argument, "I have never contended that Judge Pugh was vindictive," thereby rebutting any presumption. The Court noted in its three-page opinion that the counsel's statement was dispositive. *Id.* at 320.

16. North Carolina v. Pearce, 395 U.S. at 723. The Supreme Court in *Pearce* dismissed any violation of double jeopardy or equal protection violations of the fourteenth amendment by harsher resentencing after a successful appeal and a reconviction. *Id.*

17. *Id.* at 726.

18. *Id.* at 725.

19. *Id.*

20. *Id.*

21. 267 A.2d 641, 646-47 (1970).

22. *Id.* at 647. While the Law Court adopted the *Pearce* constitutional guidelines as part of state due process, it rejected an absolute bar against the passing of heavier sentences on reconviction and resentencing because of the public interest in basing

harsher sentence could have on a defendant's desire to have "an illegal sentence or an erroneously conducted trial" corrected.[23] The *Weeks* rule appeared to be the mirror image of the *Pearce* rule.

Due to the complexities inherent in the judicial process and the latitude generally given trial courts in sentencing,[24] the *Pearce* decision did not end disparities among the state courts and the lower federal courts as to when harsher sentencing is permissible upon a reconviction.[25] The confusion has presented the Supreme Court with opportunities to readdress the *Pearce* decision, and the Court has responded by restricting the rule much more than the *Pearce* decision conceivably allowed.

The Supreme Court has narrowed the circumstances under which the *Pearce* presumption of vindictiveness is evoked. In *Colten v. Kentucky*,[26] the Supreme Court declined to apply the presumption of vindictiveness when the defendant received a more severe sentence in a *de novo* trial than in his trial in an inferior court.[27] The Court said the possibility of vindictiveness is not inherent in a two-tiered court system and concluded that defendants would not be "deterred from seeking a second trial out of fear of judicial vindictiveness."[28] In *Chaffin v. Stynchcombe*,[29] a case involving sentencing by two juries, the Supreme Court held that the presumption did not apply where a jury unknowingly imposed a harsher sentence on re-

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sentencing on "the most complete and current information available at the time of sentencing." *Id.*

23. *Id.*

24. Sentencing should take into account "information concerning every aspect of a defendant's life." Williams v. New York, 337 U.S. 241, 250 (1949). *Williams* was cited by the Supreme Court in Wasman v. United States, 468 U.S. 559, 572 (1984), as providing the underlying philosophy of modern sentencing. Congress, however, changed the federal sentencing approach in 1987 by legislating federal sentencing guidelines. *See* 28 U.S.C. § 994 (Supp. 1987). For a discussion of the development of the federal sentencing guidelines, see Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988).

25. *See* Comment, *Limits on Enhanced Sentences Following Appeal and Retrial: Has Pearce Been Pierced?*, 19 CONN. L. REV. 973 (1987).

26. 407 U.S. 104 (1972).

27. Colten was convicted of disorderly conduct in the Quarterly Court of Fayette County, Kentucky, and fined $10. Colten exercised his right to a trial *de novo* in the Criminal Division of the Fayette Circuit Court and was convicted again and fined $50. Neither trial was before a jury. On appeal, the Kentucky Court of Appeals affirmed. *Id.* at 107-108.

28. *Id.* at 116. The Supreme Court found no basis to presume a possibility of vindictiveness where the trial court was not "asked to do over what it thought it had already done correctly." *Id.* at 116-17. The majority did not equate the *de novo* trial with a retrial after an appeal, but Justice Marshall, in dissent, disputed the point and said the danger of vindictiveness is exactly the same in both situations. *Id.* at 122-27 (Marshall, J., dissenting).

29. 412 U.S. 17 (1973). The defendant was convicted of robbery by open force or violence and sentenced by the jury. He successfully appealed and was retried, reconvicted and resentenced with a different judge and jury. *Id.* at 18-20.

trial than did the prior sentencer. The Supreme Court said that a minimal potential for abuse of the sentencing process by a jury exists in a properly controlled retrial.[30] First, the jury does not know the prior sentence. Second, the jury has no personal stake in the prior conviction and no motive for self-vindication. Finally, the jury is unlikely to be sensitive to institutional interests that might be an incentive to discourage meritless appeals.[31] Through *Colten* and *Chaffin*, the Court limited the application of the *Pearce* presumption only to those cases in which a realistic likelihood[32] of vindictiveness exists. Consequently, application of the *Pearce* rule now requires some assessment of the likelihood of vindictiveness.[33]

A decade later, the Supreme Court further clarified this more flexible application of the *Pearce* presumption of vindictiveness and, as importantly, widened the state's opportunity to rebut the presumption. In *Wasman v. United States*,[34] a defendant who had successfully appealed his conviction for willfully making false statements in a passport application was reconvicted before the same judge and sentenced more harshly than upon the original conviction. In upholding the harsher sentence, the Supreme Court said *Pearce* was only intended to bar harsher sentencing motivated by "actual vindictiveness" for having exercised constitutional rights.[35] Thus, either the situation must warrant a presumption of vindictiveness, or the defendant, without benefit of the presumption, must prove actual vindictiveness.[36]

The Supreme Court applied the presumption in *Wasman* but said the presumption was rebutted. The trial judge based the harsher sentence on the existence of a conviction that had been only a pend-

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30. *Id.* at 26.

31. *Id.* at 26-27.

32. The language, "realistic likelihood," is later used in referring to *Colten* and *Chaffin* in Blackledge v. Perry, 417 U.S. 21, 27 (1974). *See infra* note 33. Subsequently, in United States v. Goodwin, 457 U.S. 368, 373 (1982), and in Alabama v. Smith, 490 U.S. 794 (1989), the Supreme Court used the language, "reasonable likelihood," in discussing the possibility of vindictiveness.

33. The Court was explicit in Blackledge v. Perry, 417 U.S. at 27, that a realistic likelihood of vindictiveness was required to elicit the *Pearce* rule. "The lesson that emerges from *Pearce*, *Colten*, and *Chaffin* is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.' " *Id. Blackledge* involved an allegation of prosecutorial vindictiveness directed at a North Carolina prison inmate who chose to appeal a misdemeanor conviction of assault with a deadly weapon. While the appeal was pending, the prosecutor obtained a felony indictment covering the same conduct for assault with a deadly weapon with intent to kill and inflict serious bodily injury. The defendant pleaded guilty but applied for a federal writ of habeas corpus claiming a violation of due process. The writ was granted, and both the court of appeals and the Supreme Court affirmed. *Id.*

34. 468 U.S. 559 (1984).

35. *Id.* at 568.

36. *Id.* at 569.

ing charge at the original sentencing.[37] The Supreme Court said it could not logically distinguish between "events," in this case the conviction on a pending charge, and misconduct subsequent to the prior sentencing as a justification for harsher resentencing. The *Wasman* Court concluded that either is an adequate rebuttal for a presumption of vindictiveness.[38] Following *Wasman*, the scope of information that the state might use to rebut the presumption was no longer limited to factors primarily in the control of the defendant but could include events with roots preceding the initial sentencing.

The grounds for not applying the *Pearce* presumption were widened in *Texas v. McCullough*.[39] The defendant, whose conviction was overturned on appeal and who was reconvicted, received a harsher resentence from a judge who had heard evidence not before the sentencing jury in the first trial. The judge said the testimony of two new witnesses directly affected the strength of the state's case as to both guilt and punishment. In addition, the judge learned on retrial that the defendant had been released from prison only four months before committing the crime.[40] The *McCullough* Court found the *Pearce* presumption "inappropriate" when "there was no realistic motive for vindictive sentencing" under the facts of the case.[41]

The Supreme Court articulated three bases for *Pearce* not applying in *McCullough*.[42] First, the possibility of vindictiveness was speculative because the judge herself had granted the new trial in this instance.[43] Second, different sentencers were involved.[44] Third, the sentencer provided "an on-the-record, wholly logical, nonvindictive reason" for the harsher sentence.[45]

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37. *Id.* at 561-62. The defendant originally was sentenced to two years' imprisonment with all but six months suspended. Prior to his reconviction, he pleaded *nolo contendere* to a charge pending at the time of his first sentencing. Upon his reconviction, the judge sentenced the defendant to two years' imprisonment, none of it suspended. *Id.* The trial judge clearly explained in the record the basis for the harsher sentence: "I did not consider then [at the original sentencing] and I don't in other cases either, pending matters because that would result in a pyramiding of sentences. At this time he comes before me with two convictions. Last time, he came before me with one conviction." *Id.* at 569.

38. *Id.* at 571-72.

39. 475 U.S. 134 (1986).

40. The defendant, convicted of murder, received a sentence from the jury of 20 years' imprisonment. After a successful appeal and a reconviction by a new jury before the same trial judge, the defendant elected to have the judge sentence him. The judge sentenced him to 50 years' imprisonment. *Id.* at 136.

41. *Id.* at 139.

42. The Supreme Court noted in *McCullough* that "*Pearce* itself apparently involved different judges presiding over the two trials." However, the Court said the *Pearce* Court did not focus on that fact, leading to the conclusion that *Pearce* did not speak on the issue of separate sentencers. *Id.* at 140 n.3.

43. *Id.* at 138-39.

44. *Id.* at 140.

45. *Id.*

The basis for not applying the *Pearce* presumption also was widened in *Alabama v. Smith*,[46] in which a defendant successfully withdrew his plea bargain on appeal but was reconvicted and sentenced by the same judge to a longer term. The trial judge said the harsher sentence was based on "new information about the nature of [the] crimes and their impact on the victim, together with . . . observations of [the defendant's] 'mental outlook on [the offenses] and [his] position during the trial.' "[47] In upholding the longer sentence, the Supreme Court said that the trial judge may have "a fuller appreciation of the nature and extent of the crimes charged" after a trial, that the factors justifying "leniency as consideration for the guilty plea are no longer present," and that "the court is not simply 'do[ing] over what it thought it had already done correctly.' "[48] The *Smith* Court concluded that the *Pearce* presumption should not apply where "it cannot be said to be more likely than not that a judge who imposes [a harsher sentence] is motived by vindictiveness."[49]

The opportunities for the Law Court to interpret *Pearce* and *Weeks* have been more limited. The Law Court implicitly weighed the likelihood of vindictiveness in declining to apply the *Weeks* presumption of vindictiveness in *State v. Keegan*.[50] The defendant received a harsher sentence after a *de novo* jury trial in superior court[51] than he received as a result of a district court trial.[52] The Law Court, citing *Colten*,[53] upheld the sentence. The *Keegan* court found no basis for distinguishing between Maine's two-tiered court system at that time and the Kentucky system examined by the Supreme Court in *Colten*, and it held there was no state or federal due process violation.[54]

In two other cases preceding *Violette*, however, the Law Court relied on *Pearce*, as adopted by *Weeks*,[55] to remand cases for resentencing. In *State v. Sutherburg*,[56] in which a defendant suffered a

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46. 490 U.S. 794 (1989).

47. *Id.* at 797.

48. *Id.* at 801 (quoting in part Colten v. Kentucky, 407 U.S. 104, 117 (1972)).

49. *Id.* at 802.

50. 296 A.2d 483 (Me. 1972).

51. Until January 1, 1982, a defendant convicted in district court had a right to receive a trial *de novo* in superior court. M.D.C. CRIM. R. 37(a), 38, 39(b), 40. After that date, a defendant could appeal to the superior court for review only of questions of law. M.R. CRIM. P. 36(b).

52. The defendant received a sentence of 30 days in the county jail upon his conviction for assault and battery in district court. On a conviction for assault by a superior court jury, he was sentenced to 60 days. State v. Keegan, 296 A.2d at 484.

53. 407 U.S. 104 (1972).

54. 296 A.2d at 486.

55. The Law Court, for no detectable reason, referred in some decisions to *Pearce* instead of *Weeks* despite having adopted in *Weeks* the *Pearce* guidelines.

56. 402 A.2d 1294 (Me. 1979). The defendant was fined $150 upon a conviction in district court for operating a motor vehicle while under the influence of alcohol. After

larger fine following a superior court conviction than was imposed in district court, the Law Court found the judge's justification that the defendant should reimburse the state for "the needless expense that the State was put to" for a jury trial constituted vindictiveness in violation of federal due process.[57] In *State v. Palmer*,[58] the Law Court found that the judge in resentencing more harshly had violated the *Weeks* standard by failing to state an objective reason based on identifiable conduct by the defendant since the original sentencing.[59]

The Law Court in *State v. Keefe*,[60] however, decided that neither *Weeks* nor *Palmer* precluded a harsher sentence on a single count in resentencing if the aggregate sentence had not been enhanced.[61] The Law Court said the defendant lost nothing by his appeal; he only failed to realize a net gain. The case nevertheless was remanded for resentencing because of other difficulties.[62]

THE STUDY CASE

In *Violette*, the defendant was tried without counsel[63] and was convicted by a district court for operating a motor vehicle while under the influence of alcohol (OUI).[64] Violette was fined and sen-

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a conviction by a superior court jury in a *de novo* trial, the judge fined the defendant $750. *Id.* at 1295.

57. *Id.* at 1296.

58. 468 A.2d 985 (Me. 1983).

59. *Id.* at 988-89. With consecutive sentences and suspension of a two-year sentence, the defendant under the original sentencing would have served six months in jail and made restitution payments to the victims of $3,564. After the reviewing justice found the sentence in violation of state law, the original trial judge resentenced the defendant to two years' imprisonment and the same restitution. The judge said he had previously suspended part of the defendant's sentence only to help insure restitution and was not imposing a more severe sentence out of retaliation. *Id.* at 986-87.

60. 573 A.2d 20 (Me. 1990). The defendant was originally convicted on six counts, including counts of aggravated assault and attempted murder. The sentence on the count of aggravated assault was four years' imprisonment with no probation. The defendant successfully appealed the attempted murder conviction. On remand for resentencing, the defendant's original sentence on the count of aggravated assault was increased to eight years with all but four years suspended and four years probation. *Id.* at 21.

61. *Id.*

62. *Id.* at 22.

63. Record at 3 (Feb. 5, 1988), State v. Violette, 576 A.2d 1359 (Me. 1990) (No. 87-18834, 87-18835, 87-18769).

64. ME. REV. STAT. ANN. tit. 29, § 1312-B (Supp. 1990). The statute reads in part:

> 1. **Offense.** A person is guilty of a criminal violation under this section if he operates or attempts to operate a motor vehicle:
>
> A. While under the influence of intoxicating liquor or drugs or a combination of liquor and drugs; or
>
> B. While having 0.08 percent or more by weight of alcohol in his blood.

tenced, as requested by the prosecutor,[65] to a sentence of sixty days in jail, with all but thirty days suspended, and nine months probation with other conditions. After a successful appeal, he was reconvicted in district court.[66] The same prosecutor made the same sentencing request.[67] The judge, who did not participate in the original trial and did not know the prior sentence imposed,[68] fined and sentenced the defendant to six months in jail, with all but forty-five days suspended, and one year probation with other conditions.[69] The trial judge considered in the resentencing that the conviction was the defendant's third offense and that the defendant had fled from the arresting officer.[70] Those factors, however, were known to the court at the original sentencing.[71] The defendant appealed the sentence to superior court, which vacated the sentence as a violation of state due process and remanded for resentencing.[72] On appeal by the state, the Law Court affirmed.[73]

The state argued that in the absence of any basis to presume vindictiveness and of any proof of actual vindictiveness, and where the resentencing judge provided a logical, nonvindictive reason on the record for the sentence,[74] no basis existed to view the judge's harsher sentence on the defendant's reconviction as a violation of the defendant's right to due process. The state emphasized that the judge had no prior knowledge of the first sentence and that he instructed the defense that he did not wish to be informed of it so that the resentencing would be totally without reference to the previous sentence.[75] The state urged the Law Court to adopt the federal interpretations of *Pearce*, narrowing the circumstances in which the presumption of vindictiveness must be applied to ensure due process.[76] The state drew upon *Chaffin*,[77] in which the Supreme Court found no presumption of vindictiveness when the sentencing jury

65. Record at 48 (Feb. 5, 1988), State v. Violette, 576 A.2d 1359 (Me. 1990) (No. 87-18834, 87-18835, 87-18769).

66. State v. Violette, 576 A.2d at 1359.

67. Record at 43 (May 19, 1989), State v. Violette, 576 A.2d 1359 (Me. 1990) (No. 87-18834).

68. *Id.* at 44.

69. *Id.* at 45-46.

70. *Id.* at 45.

71. Record at 15, 26 and 48 (Feb. 5, 1988), State v. Violette, 576 A.2d 1359 (Me. 1990) (No. 87-18834, 87-18835, 87-18769). Record at 9, 13 and 43 (May 19, 1989), State v. Violette, 576 A.2d 1359 (Me. 1990) (No. 87-18834).

72. State v. Violette, 576 A.2d at 1360.

73. *Id.* at 1361.

74. Brief for Appellant, State of Maine, at 12-14, State v. Violette, 576 A.2d 1359 (Me. 1990) (No. YOR-90-63).

75. *Id.* at 13.

76. *Id.* at 14.

77. Chaffin v. Stynchcombe, 412 U.S. 17 (1973).

was not informed of the prior sentence by another jury,[78] and *McCullough*,[79] in which no presumption was applied because different sentencers gave the sentences.[80]

The defendant emphasized the prerogative of the Law Court to depart from the Supreme Court's interpretation of federal due process when interpreting state due process[81] and showed legislative sentiment against increases in sentences on review.[82] Finally, the defendant reminded the Law Court of the chilling effect of possible vindictiveness on the defendant's exercise of the constitutional right of appeal.[83]

In an *amicus curiae* brief, the Maine Civil Liberties Union (MCLU) asked the Law Court to affirm the Superior Court's remand for sentencing on the basis that the higher sentence was not justified by the defendant's behavior since the prior sentence. According to the MCLU, it was immaterial that the judge gave a logical, nonvindictive reason for a harsher sentence and was unaware of the prior sentence.[84] The MCLU emphasized the possible role that fear of vindictiveness would have in discouraging appeals and the institutional interests that create the risk of vindictiveness even when the sentencing is by different judges.[85]

The MCLU attempted to distinguish *Violette* from Supreme

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78. Brief for Appellant, State of Maine, at 10-11, State v. Violette, 576 A.2d 1359 (Me. 1990) (No. YOR-90-63).

79. Texas v. McCullough, 475 U.S. 134 (1986).

80. Brief for Appellant, State of Maine, at 11-12, State v. Violette, 576 A.2d 1359 (Me. 1990) (No. YOR-90-63).

81. Brief for Appellee at 4-5, State v. Violette, 576 A.2d 1359 (Me. 1990) (No. YOR-90-63).

82. The defendant cited ME. REV. STAT. ANN. tit. 15, § 2156 (1)(A), (B) (Supp. 1990) forbidding the increase of sentences on review. Brief for Appellee at 8, State v. Violette, 576 A.2d 1359 (Me. 1990) (No. YOR-90-63). The text of the statute reads in part:

> 1. **Substitution of sentence or remand.** If the Supreme Judicial Court determines that relief should be granted, it may:
>
> A. Substitute for the sentence under review any other disposition that was open to the sentencing court, provided however, that the sentence substituted shall not be more severe than the sentence appealed; or
>
> B. Remand the case to the court that imposed the sentence for any further proceedings that could have been conducted prior to the imposition of the sentence under review and for resentencing on the basis of such further proceedings, provided however, that the sentence shall not be more severe than the sentence originally imposed.

83. Brief for Appellee at 10, State v. Violette, 576 A.2d 1359 (Me. 1990) (No. YOR-90-63).

84. Brief of *Amicus Curiae* Maine Civil Liberties Union at 5-6, State v. Violette, 576 A.2d 1359 (Me. 1990) (No. YOR-90-63).

85. *Id.* at 7-8.

Court decisions on procedural bases.[86] The defendant in *Violette* was sentenced and resentenced by different judges in the same court. The harsher resentence in *Colten v. Kentucky*[87] was in a trial *de novo*. *Chaffin v. Stynchcombe*[88] involved sentencing and resentencing by different juries. Further, the MCLU distinguished *United States v. Goodwin*,[89] by noting that the case involved a prosecutor's pretrial decision to file increased charges. In *Texas v. McCullough*,[90] the judge resentenced more harshly than a jury initially had sentenced. Finally, in *Alabama v. Smith*,[91] the defendant's initial sentence had been plea bargained. None of these cases involved sentencing by two judges in the same court.

The Law Court, in an opinion written by Chief Justice McKusick, affirmed in *Violette* the superior court's decision vacating the sentence and remanding the case for resentencing. Using the primacy method[92] of state constitutional decision-making embraced in *State v. Cadman*,[93] the Law Court looked first to the state constitution to resolve the due process issue. The court said the due process guarantee of the Maine Constitution[94] protects the defendant from vindictiveness playing any part in resentencing.[95] Reaffirming its prior adoption of the *Pearce* rule in *Weeks*, the Law Court stated:

> The rule, easy of application, effectively safeguards a successful appellant upon retrial from the possibility, however slight, of retaliatory vindictiveness following reconviction, and protects a convicted defendant's right to an appeal from any chilling effect emanating from the possibility that an enhanced second sentence might result from a retrial on the same facts.[96]

Significantly, the Law Court did not base its decision in *Violette* on

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86. *Id.* at 10.
87. 407 U.S. 104 (1972).
88. 412 U.S. 17 (1973).
89. 457 U.S. 368 (1982).
90. 475 U.S. 134 (1986).
91. 490 U.S. 794 (1989).
92. For discussion and analysis of the Maine Constitution's due process guarantee and the Maine Supreme Judicial Court's shift toward addressing issues under the state constitution before reaching a federal constitutional question, see Comment, *The Primacy Method of State Constitutional Decisionmaking: Interpreting the Maine Constitution*, 38 MAINE L. REV. 491 (1986). The primacy method involves a state court first examining any state constitutional issue raised by a litigant. Only if the litigant's claims fail under the state constitution will the state court examine the claims under the federal Constitution. The advantages of the primacy method are to give "clear direction to the bench and bar as to how state constitutional law claims are to be addressed" and to create "a primary and active role" for the state constitution. *Id.* at 495-97.
93. 476 A.2d 1148, 1150 (Me. 1984).
94. *See supra* note 4.
95. State v. Violette, 576 A.2d at 1360.
96. *Id.* at 1361.

the likelihood that vindictiveness was a factor in the harsher resentencing. Rather, the court indicated that discrepancy in sentences that are "inherently likely to occur when two different judges engage in sentencing on the same sentencing facts" should not be tolerated.[97]

Justice Collins, in a lone dissent, maintained that the presumption of vindictiveness triggering the *Weeks* rule was unwarranted when the resentencing judge was unaware of the previous sentence.[98] Even if the presumption of vindictiveness were applicable, the presumption should be rebutted by the judge's reliance on objective evidence. According to Justice Collins, it should not matter whether the evidence relates to the defendant's conduct before or after the initial sentencing.[99] "[T]he interests of justice would be better served" by the "less formalistic approach,"[100] thus embracing the Supreme Court's focus on the likelihood of vindictiveness and the allowance of "objective evidence to rebut the *Pearce* presumption," even when it does not involve the defendant's conduct since the initial sentencing and even when the first judge had the same evidence.[101]

DISCUSSION

The procedural setting of *Violette* puts the case in a gray area not addressed in the Supreme Court's rulings since *Pearce*. The argument for allowing harsher resentencing is strongest when the defendant has committed a crime since the initial sentencing. The argument is weakest when the resentencing judge knows the initial sentence and does not base the harsher sentence on some objective information beyond that which the initial sentencing judge possessed in the same court. *Violette* falls in the middle. In *Violette*, the judge resentenced the defendant more harshly without knowing the initial sentence imposed by a judge in the same court. No case before the Supreme Court has presented exactly this situation for applying *Pearce*.

Nevertheless, the Law Court, in examining the Supreme Court's applications of the *Pearce* rule, could have found support for concluding that the harsher resentence in *Violette* did not violate state or federal due process and could have refined the *Weeks* rule accordingly. As far back as *Colten*,[102] a case followed by the Law Court in *Keegan*,[103] the Supreme Court has engaged in a weighing of the

97. *Id.*
98. *Id.* at 1363 (Collins, J., dissenting).
99. *Id.* at 1364 (Collins, J., dissenting).
100. *Id.*
101. *Id.*
102. Colten v. Kentucky, 407 U.S. 104 (1972).
103. State v. Keegan, 296 A.2d 483 (Me. 1972).

likelihood of vindictiveness as the determinative factor in whether to apply the *Pearce* presumption. The Law Court could have seized upon the facts that two sentencers were involved, as in *McCullough*,[104] and that the sentencer unknowingly gave a harsher punishment at resentencing than was given after the original conviction, as in *Chaffin*,[105] to find insufficient likelihood of vindictiveness to justify a presumption of vindictiveness.[106]

The Law Court may have had a motivation distinct from the federal system for not retreating from the strictness and breadth of the *Weeks* rule. The context in which *Violette* was decided and the language in which the Law Court couched its decision suggest that consistency in judicial sentencing was an underlying driving force. In addition, *Violette* was an ideal case for requiring sentencing consistency.

Violette was decided in a new era of review of sentencing for consistency. The Maine Legislature in 1989, following a call for reforms in Maine's appellate review process of sentencing,[107] revised the procedure for the reviewing of the propriety of sentences by providing for a discretionary appeal of sentences to the Supreme Judicial Court.[108] In doing so, the Legislature restricted the ability of the reviewers to increase sentences and established the potential for developing a common law body of sentencing guidelines.[109] The development of some common law guidelines from published opinions of the court was advocated as an alternative to legislatively adopting

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104. Texas v. McCullough, 475 U.S. 134 (1986). The Supreme Court said the presumption of vindictiveness is "inapplicable because different sentencers assessed the varying sentences that McCullough received. In such circumstances, a sentence 'increase' cannot truly be said to have taken place." *Id.* at 140.

105. Chaffin v. Stynchcombe, 412 U.S. 17 (1977). The Supreme Court said, without equivocation, "[T]he first prerequisite for the imposition of a retaliatory penalty is knowledge of the prior sentence." *Id.* at 26.

106. Although *McCullough* involved a judge resentencing more harshly than a jury and *Chaffin* involved sentencing by two juries, several state courts have relied upon *McCullough* and *Chaffin* to reach a conclusion opposite to the Law Court's finding in *Violette*. *See, e.g.*, State v. Macomber, 244 Kan. 396, 769 P.2d 621 (1989) and State v. Saavedra, 108 N.M. 38, 766 P.2d 298 (1988). In both cases, it was found that the presumption of vindictiveness was not created where a different judge imposed the harsher sentence on resentencing.

107. Wathen, *Disparity and the Need for Sentencing Guidelines in Maine: A Proposal for Enhanced Appellate Review*, 40 MAINE L. REV. 1 (1988).

108. Leave to appeal a sentence is granted by a sentence review panel composed of three Supreme Judicial Court justices. Leave to appeal is granted if any of the three panelists vote in favor of granting leave. ME. REV. STAT. ANN. tit. 15, § 2152 (Supp. 1990).

The standard the court applies in reviewing sentences is whether there has been a "misapplication of principle. It is not enough that the members of this court might have passed a different sentence, rather it is only when a sentence appears to err in principle that we will alter it." State v. Hallowell, 577 A.2d 778, 781 (Me. 1990).

109. *See supra* note 82.

sentencing guidelines, as Congress has done.[110] The process of appeal to the full court replaced a system of appeal to an appellate division of the court composed of three justices.[111] The result in *Violette* of a consistent sentence thus conforms with a legislative and a judicial movement toward sentencing consistency, even though the issue in *Violette* was the legality of the sentencing and not the propriety of the sentencing.[112] The legality of the sentence pertains to rights, such as due process, whereas the propriety pertains to proportionality of the sentence to the crime.

The Law Court clothed the *Violette* decision in the language of sentencing consistency. The court first noted that the *Weeks* rule prevents inherent sentencing disparities and subsequently referred to the *Weeks* rule's ease of application and its effectiveness.[113] The Law Court, while not finding *Violette* "an appropriate occasion for departing from our *Weeks* rule," specifically asserted its prerogative to reexamine *Weeks* "in light of later federal developments in the *Pearce* rule."[114] One implication is that the Law Court did not commit to a rigid application of the *Weeks* rule in the future but may have found the rule convenient for sentencing consistency in this case.

The facts of *Violette* are conducive with sentencing consistency as an underlying motivation. The crime was the same, the offender and his character were the same, and the public interest presumably was the same in both the initial conviction and the reconviction. Both sentencers in *Violette* had the same significant information.[115] The underlying justification for both sentences was exactly the same, which eliminates a great obstacle in achieving sentencing consistency.[116] Indeed it would appear that the most significant variables

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110. The concern in Maine parallels a national trend toward consistency in sentencing. However, the federal approach toward sentencing consistency has been Congressional passage of sentencing guidelines developed by the United States Sentencing Commission. For a concise history of the development of federal sentencing guidelines, see Ogletree, *supra* note 24, at 1938.

111. Wathen, *supra* note 107, at 8-13.

112. *See* State v. Farnham, 479 A.2d 887, 888-89 (Me. 1984).

113. State v. Violette, 576 A.2d at 1359, 1361.

114. *Id.* at 1360.

115. Record (Feb. 5, 1988), State v. Violette, 576 A.2d 1359 (Me. 1990) (No. 87-18834, 87-18835, 87-18769); Record (May 19, 1989), State v. Violette, 576 A.2d 1359 (Me. 1990) (No. 87-18834).

116. Factors taken into account by the Supreme Judicial Court in its review of the propriety of sentences are specified by statute. Factors to be considered by Supreme Judicial Court, ME. REV. STAT. ANN. tit. 15, § 2155 (Supp. 1990), are:

> 1. **Propriety of sentence.** The propriety of the sentence, having regard to the nature of the offense, the character of the offender and the protection of the public interest; and
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> 2. **Manner in which sentence was imposed.** The manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.

at the two sentencings were the values and the sentencing philosophy the sentencers brought to the case, factors not providing a justification for wide sentencing discrepancy under the Law Court's review.[117] Therefore, it was entirely appropriate that the court's decision resulted in a consistent sentence.

The degree to which sentencing consistency was the motivator of the Law Court's decision in *Violette* may indicate the future shape of the *Weeks* rule. While the *Weeks* rule and the goal of sentencing consistency were compatible in *Violette*, they are likely to conflict at some point. For example, if new information was to come to light after the first sentence about the defendant's role in the crime, about the severity of the crime, or about the defendant's prior criminal record, the *Weeks* rule as characterized to date would seem to prohibit harsher resentencing. However, harsher resentencing in these examples would be favored in a system that truly achieves sentencing consistency.[118] If sentencing consistency was the prime reason for the *Violette* decision, the Law Court will be tempted to soften the *Weeks* rule and adopt a more expansive view of what constitutes identifiable misconduct.[119] *Violette* then would prove to be a narrow decision that does not presume a state due process protection significantly broader than federal due process under *Pearce*.

Violette, then, can be explained in one of two ways. Either the

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Variables within each of the three considerations in weighing propriety of sentence usually are individualistic to the case and subjectively measured. *See* Wathen, *supra* note 107, at 7.

Sentencing factors taken into account in Maine include the gravity of the offense; its relation to the victim; the defendant's degree of culpability; the defendant's background, including his criminal record and any undesirable behavior pattern; the defendant's character, including his personality and social traits, age, education, employment record, remorse, repentance and cooperativeness; the defendant's subjectivity to rehabilitation; the public interest in retribution and deterrence; and the public's right to protection against crime. State v. Samson, 388 A.2d 60, 67-68 (Me. 1978).

However, where, as in *Violette*, the defendant is the same person in the two sentences being compared, and where there is not misconduct by the defendant since the prior sentencing, these factors are likely to be constants.

The defendant's criminal record was different at the two sentencings, but it was more damning at the initial sentencing. The initial sentencing included a conviction for operating a vehicle after suspension. Record at 46 (Feb. 5, 1988), State v. Violette, 576 A.2d 1359 (Me. 1990) (No. 87-18834, 87-18835, 87-18769). The defendant also was convicted of possession of drug paraphernalia. *Id.* at 47. The conviction for operating after suspension was overturned on appeal and the charge dropped prior to the defendant's reconviction for OUI and his resentencing. Telephone interview with Thomas Van Houten, attorney for defendant (Nov. 13, 1990).

117. ME. REV. STAT. ANN., tit. 15, § 2155 (Supp. 1990). Justice Wathen cites several examples in which variations or undue emphasis in judicial philosophy was responsible for inappropriate sentences. Wathen, *supra* note 107, at 16-17.

118. *See supra* note 116. *See also* 28 U.S.C.A. § 994(d) (West Supp. 1990).

119. *See* Wasman v. United States, 468 U.S. 559 (1984). *See also* Alabama v. Smith, 490 U.S. 794 (1989); Texas v. McCullough, 475 U.S. 134 (1986).

Law Court wanted to wait until the Supreme Court decides a procedurally similar case, serving the goal of sentencing consistency in the narrowness of a *Violette*-like case. Or the Law Court was sincerely disturbed about the due process implications[120] and took this occasion to depart from the Supreme Court's interpretations of the *Pearce* rule.

The Law Court's language in *Violette* could be read as having significantly distinguished the *Weeks* rule from the reinterpreted *Pearce* rule. The Law Court showed a much greater concern in *Violette* than has the Supreme Court for the chilling effect that possibly harsher resentencing creates on defendants' exercise of their right to appeal.[121] Although the Law Court was clear that it did not believe there was vindictiveness in the case at hand,[122] it emphasized the *Weeks* rule's value in safeguarding against even the possibility of vindictiveness, "however slight."[123] The Law Court also praised the *Weeks* rule for its ease of application.[124] In adhering to a rigid rule formally applied, the Law Court avoided the mire of weighing the justifications for applying or denying the presumption of vindictiveness, a problem that is likely to persist for the federal courts.

While the *Pearce* rule has its problems, developing *Weeks* separately from the *Pearce* model poses difficulties as well. The Law Court in future cases may be asked to define identifiable misconduct in a manner which broadens the grounds for rebutting the presumption of vindictiveness,[125] to narrow the circumstances in which the presumption applies,[126] to decide if *Weeks* bears on resentencing after a withdrawn guilty plea,[127] and even to assess whether lack of remorse could be a basis for a harsher resentence. *Violette* does not resolve these questions.

The Law Court in *Weeks*, in adopting the rule from *Pearce*, implied that identifiable misconduct or recidivism constituted continu-

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120. *See supra* note 97 and accompanying text.

121. *See* Texas v. McCullough, 475 U.S. at 143. "[T]his Court has never recognized this 'chilling effect' as sufficient reason to create a constitutional prohibition against considering relevant information in assessing sentences." *Id.*

However, the chilling effect of harsher resentencing by a judge who does not know the initial sentence is conceivable. A defendant contemplating an appeal obviously would have no way to predict, should he win an appeal and be reconvicted, whether a judge would elect to be uninformed of the prior sentence so as to exercise the full latitude of his sentencing discretion. Also, a judge who harbored a vindictiveness toward the defendant simply could remain uninformed for the purpose of sentencing harshly.

122. State v. Violette, 576 A.2d at 1361.

123. *Id.*

124. *Id.*

125. *See supra* notes 34-38 and accompanying text.

126. *See supra* notes 39-45 and accompanying text.

127. *See supra* notes 46-49 and accompanying text.

ing "criminal activities."[128] That definition and the Law Court's emphasis on the chilling effect of harsher resentencing suggest that the Law Court could follow a different path than the Supreme Court chose in *Wasman*,[129] which broadened the basis for rebutting the presumption of vindictiveness. In allowing a conviction occurring after the initial sentencing to justify a harsher sentence, the *Wasman* Court allowed an event to rebut the *Pearce* presumption.[130] However, the Law Court has yet to expand on what it means by identifiable misconduct or recidivism. So long as the Law Court defines identifiable misconduct or recidivism narrowly, the defendant's conduct since the prior sentencing is arguably the element that is the most controllable by the defendant and therefore theoretically should have the least chilling effect on the defendant's decision whether to appeal.

If the Law Court is to focus on the chilling effect of harsher resentencing, then the Law Court might favor wider borders for the presumption than the Supreme Court allowed in *McCullough*.[131] New information on the crime, on the defendant's involvement in the crime, or on the defendant's background should be disregarded in the resentencing if chilling is to be avoided. As Justice Marshall so vigorously cautioned in his dissent in *McCullough*,[132] a judge inevitably will be able to find new information in a trial on which to base a harsher sentence should he desire. Consequently, to allow that new information unrelated to conduct since the initial sentencing to serve as grounds for avoiding a presumption of vindictiveness always allows a judge to avoid the *Pearce* presumption while resentencing more harshly.[133] The *Violette* decision does not address this point directly because there was no information that the second judge had that the first judge did not have.

Applying a *Weeks* presumption when the resentencing judge has new information would be the most problematic use of *Weeks* by the Law Court. The rule in *Weeks* that a resentencing judge may only consider identifiable misconduct since the last sentence as a ba-

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128. Weeks v. State, 267 A.2d 641, 647 (Me. 1970).

129. Wasman v. United States, 468 U.S. 559 (1984).

130. *Id.* at 571-72.

131. Texas v. McCullough, 475 U.S. 134 (1986). The Supreme Court did not apply the *Pearce* presumption and allowed a harsher resentence because the possibility of vindictiveness was speculative, different sentencers were involved, and the resentencing judge provided a logical, nonvindictive reason for the harsher sentence. *Id.* at 139-40.

132. *Id.* at 154 (Marshall, J., dissenting).

133. Justice Marshall's dissent says:

> The Court then reaches out to render the guarantee of little value to all defendants, even to those whose plight was the explicit concern of the *Pearce* Court in 1969. To renege on the guarantee of *Pearce* is wrong. To do so while pretending not to is a shame.

Id. at 156.

sis for imposing a harsher sentence conflicts with the public interest identified in *Weeks* of "assess[ing] a sentence, whether after a first or second trial, upon the most complete and current information available at the time of sentencing, including in the case of resentence new factual data involving conduct of the defendant which arose since the first sentence."[134] This conflict between the *Weeks* rule and the interest in assessing the sentence upon the most complete and available information is a significant weakness of the *Weeks* rule.[135]

The hypothetical that evidently influenced the Supreme Court in *McCullough*[136] illustrates the problem. The defendant is sentenced to a short prison term after a conviction on a nonviolent offense. Following a successful appeal and a reconviction, the resentencing judge learns that the defendant's alias had hidden a long criminal record for other nonviolent and violent crimes. Under a *Weeks* rule that rigidly applied a presumption of vindictiveness barring a harsher sentence absent misconduct, the Maine courts would not be able to take into account the defendant's newly discovered criminal record.

If *Violette* represents a departure from *Pearce*, the Law Court may be asked whether *Weeks* applies to resentencing in cases when the defendant has successfully withdrawn a guilty plea on appeal. Defendants in this situation are a possible target for judicial vindictiveness upon a reconviction.[137] The Supreme Court in *Alabama v. Smith*,[138] however, concluded that harsher sentences for defendants who have withdrawn from guilty pleas should not be attributed to vindictiveness.

After withdrawing from two guilty pleas which resulted in concurrent thirty-year sentences for burglary and rape, Smith was found guilty by a jury on both charges and on a sodomy charge. He was resentenced by the same judge to life imprisonment for burglary, life imprisonment for sodomy, and a consecutive term of 150 years for rape. The Supreme Court, noting that the judge learned new information about the nature of the crimes and their impact on the victim together with the defendant's mental outlook on the crimes, said

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134. Weeks v. State, 267 A.2d at 647.

135. Justice Collins, in his dissent, noted that there was no dispute in *Violette* that the number of convictions and the flight from an arresting officer would normally be appropriate factors to consider in sentencing for operating under the influence. State v. Violette, 576 A.2d at 1363. However, this information was known at the defendant's first sentencing. Under the *Weeks* rule, this information could not overcome the presumption of vindictiveness even if it had not been known at the first sentencing.

136. Texas v. McCullough, 475 U.S. 134, 141 (1986).

137. For a discussion of guilty pleas, see Aplin, *Sentence Increases on Retrial After North Carolina v. Pearce*, 39 U. CIN. L. REV. 427, 462-64 (1970).

138. 490 U.S. 794 (1989).

the resentencing judge's fuller appreciation of the case is sufficient justification for a harsher sentence.[139]

The rationale for not applying a *Pearce* presumption in this circumstance derives partly from the Supreme Court's decision in *Brady v. United States*[140] justifying the use of plea bargaining. The Court, in a decision otherwise unrelated to *Pearce*, said that while the attraction of a lesser sentence from plea bargaining may discourage defendants from the exercise of their trial rights, the imposition of such choices is inherent in any system that tolerates the negotiation of pleas. Therefore, the fear instilled in the defendant of a potentially harsher penalty if he chooses a trial is not coercion in violation of the fifth amendment right against compelled self-incrimination.[141] The degree of leniency simply is not offered or is withdrawn when the defendant puts the state to the effort of a trial.

An alternate approach to *Smith* is to view the *Weeks* rule as categorically applicable only to instances when the defendant has had two trials. The distinction avoids justifying the increased sentence on the basis of new information garnered in the second trial related to conduct preceding the first sentencing. Justifying the harsher resentence on new information creates more opportunities for erosion of the *Weeks* rule than does making a more basic delineation, similar to *Brady*, that plea bargaining is a waiver of the trial and the protections it affords.[142]

Of course, defendants who have withdrawn plea bargains still would be left relatively unprotected from actual vindictiveness at the resentencing. The defendant would have the burden of proving that the harsher sentence was vindictive, exactly the burden that the *Weeks* rule was intended to remove. In practical terms, however, for the plea bargaining system to function, the court cannot be bound by the prior sentence that was a product of the bargain.

Remorse, or the lack of it, presents another potential dilemma in resentencing under the *Weeks* restriction. The degree of remorse, repentance, or cooperativeness is an accepted factor in sentencing in Maine.[143] On a request for leniency, a defendant's exercise of the right of trial can be weighed by the sentencing judge in Maine as one of many factors in testing the genuineness of the defendant's

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139. *Id.* at 801. The Supreme Court recognized that *Smith* was inconsistent with *Simpson v. Rice*, the companion case of *Pearce*, but attributed the change in view to "important developments in the constitutional law of guilty pleas." *Id.* at 802.

140. 397 U.S. 742, 751 (1970) (defendant pleaded guilty to kidnapping to avoid the possibility of a death penalty).

141. *Id. See also* Parker v. North Carolina, 397 U.S. 790 (1970) (defendant pleaded guilty to first-degree burglary); North Carolina v. Alford, 400 U.S. 25 (1970) (defendant pleaded guilty to second-degree murder).

142. *See* Brady v. United States, 397 U.S. at 748.

143. State v. Samson, 388 A.2d 60, 67-68 (Me. 1978).

remorse.[144] However, suppose a defendant's request for leniency is warmly received at the first sentencing. Then the defendant successfully appeals and is reconvicted before the same judge. At the resentencing, the judge detects significantly less remorse. Should the judge be precluded from sentencing more harshly?

Lack of remorse clearly plays a role in the public interest in sentencing, and leniency could be a commodity equally withdrawable here as after a withdrawn guilty plea. Applying the *Weeks* rule, the issue becomes whether a perceived diminution in the defendant's remorse, in the extreme, could constitute identifiable misconduct.

If lack of remorse can justify harsher sentencing, a concern about possible vindictiveness and its chilling effect should require that the judge's determination of diminished remorse be based on some objective fact, which fairly resembles plain misconduct. Otherwise, determining the degree of remorse is inherently subjective, and allowing lack of remorse as a justification guts the *Weeks* rule, presenting the same dilemma which Justice Marshall raised in his dissent in *McCullough*[145] that a judge could hide vindictiveness under such a cover.

CONCLUSION

The Supreme Court in *Pearce* created a presumption of vindictiveness regulating harsher resentencing of defendants who successfully appealed a conviction and were reconvicted. The Law Court adopted the *Pearce* rule in *Weeks* and described the rule in terms of barring harsher resentencing unless there was identifiable misconduct since the initial sentencing. While the Supreme Court has since narrowed the application of the presumption and broadened the grounds for rebutting it, Maine has had few opportunities to readdress the rule. *Violette* presented one of the rare opportunities, and the Law Court declined to delve into the federal revisions. To the extent that the Law Court in *Violette* declined to weigh the likelihood of vindictiveness and emphasized the chilling effect of even a slight possibility of vindictiveness, the Law Court appears to distinguish the rule of *Weeks* from its federal mold, *Pearce*.

The decision in *Violette*, whatever its significance, may have been driven in part by an underlying concern for consistency in sentencing. On the principle of consistency, the resentencing of a defendant

144. State v. Farnham, 479 A.2d 887 (Me. 1984). In *Farnham* the court found that the assessment of the genuineness of a defendant's remorse for purposes of sentencing may include among the factors the defendant's insistence on a trial. *Id.* at 891. The dissent, however, pointed out that this would result in the accused being penalized for exercising his constitutional right to trial. *Id.* at 895 (Glassman, J., dissenting).

145. Texas v. McCullough, 475 U.S. 134 (1986) (Marshall, J., dissenting). *See supra* note 133 and accompanying text.

after a successful appeal and reconviction should not justify a harsher sentence unless there is new information or misconduct since the prior sentence. However, consistency in sentencing may sometimes conflict with the due process rule of *Weeks*, if *Weeks* is applied so as to preclude harsher sentencing unless there is misconduct since the initial sentence. Consequently, the degree to which the Law Court viewed *Violette* as an issue of consistency in sentencing portends future tensions for the *Weeks* rule.

The Law Court found the simplicity and effectiveness of an unrevised *Weeks* rule attractive. Indeed, by declining to measure the likelihood of vindictiveness, the Law Court avoided a mire that has engaged the Supreme Court. However, a *Weeks* rule that departs from the revised *Pearce* rule will require the Law Court to apply different standards for state due process than the Supreme Court has provided in its application of *Pearce*.

Notably, a reasonable question remains whether a harsher sentence can be imposed in resentencing in any circumstances absent identifiable misconduct by the defendant. Although the Law Court reached for simplicity, the *Weeks* rule requires further testing.

Thomas C. Bradley