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The Dos and Don'ts of Massachusetts Sentencing

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THE DOS AND DON'TS OF MASSACHUSETTS SENTENCING

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I. INTRODUCTION

The following is an attempt to explain factors that guide justices of the district and superior courts when sentencing a defendant. Massachusetts judges are given broad latitude in the factors that they may consider when imposing a sentence.[1] While the Massachusetts Sentencing Commission has formulated and proposed sentencing guidelines, the legislature has not adopted them, and therefore they are not law. Practically speaking, every criminal offense in Massachusetts has a sentence prescribed by statute. The scope of judicial discretion in determining a sentence, and the circumstances in which it may be exercised, remains largely based on case law. This article will explore in detail both the factors that a judge may and may not use in structuring a sentence.

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[1] *See* 2 ERIC D. BLUMENSON ET. AL., MASSACHUSETTS CRIMINAL PRACTICE § 39.1F (1998) [hereinafter BLUMENSON]; see also United States v. Tucker, 404 U.S. 443, 446 (1972); Commonwealth v. Celeste, 358 Mass. 307, 310 (1970); Commonwealth v. Ferguson, 30 Mass. App. Ct. 580, 586 (1991).

II. DISCUSSION

A. Factors That May Be Considered in Structuring a Sentence

1. The Nature and Seriousness of the Present Criminal Offense and the Conduct Surrounding the Commission of the Crime

When sentencing a criminal defendant, judges may take into consideration the nature and seriousness of that particular defendant's present criminal offense(s).[2] Furthermore, it is permissible for a judge to take into consideration the defendant's conduct surrounding the commission of the crime for which he is to be sentenced.[3]

In *Commonwealth v. Derouin,*[4] the appeals court held, in an O.U.I. case, that the trial judge had properly considered the defendant's conduct surrounding the commission of her crime, including "foul and repulsive" language used toward an arresting police officer, when imposing a ten-day committed sentence for the offense.[5] The defendant appealed the sentence, alleging that she was punished for having used obscenities, rather than for driving while under the influence — the crime for which she had been convicted.[6] In upholding the lower court, the appeals court reasoned that the judge had properly considered the defendant's conduct for the purpose of determining her level of intoxication.[7] The defendant's intoxication was at issue, as she had passed portions of the field sobriety test, and had provided explanations for both her erratic driving and her inability to pass a portion of the field sobriety test.[8] Considering the defendant's conduct to be indicative of intoxication, however, the judge stated: "I believe that such foul language used during the arrest shows the degree of intoxication of the defendant."[9] Used to infer intoxication, the defendant's conduct rebutted her claims of medical and geographical reasons for her driving and test failure, and properly aided the trial court judge in fashioning an appropriate sentence.[10]

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[2] *See* BLUMENSON, *supra* note 1, at §39.1G.

[3] *See id.*; *see also* Commonwealth v. Joseph, 11 Mass. App. Ct. 879, 882 (1981).

[4] 31 Mass. App. Ct. 968 (1992).

[5] *Id.* at 970-71.

[6] *Id.* at 967.

[7] *Id.* at 970.

[8] *Id.* (stating defendant "testified that surgery, not alcohol consumption, rendered her unable to walk a straight line, heel to toe. Any erratic driving was due to the fact, according to her testimony, that she had become lost after leaving the highway to find a gas station").

[9] *Id.* at 970-71.

[10] *Id.* at 971.

In *Commonwealth v. Morse,*[11] following a bench trial conviction, the defendant appealed for a trial de novo and a jury then convicted him of assault and battery.[12] The trial judge sentenced the defendant to two years in the house of corrections, eighteen months to be served, with the balance suspended.[13] On appeal to the Supreme Judicial Court, the defendant challenged his sentence, arguing that he had been punished for claiming his right to a trial de novo.[14] The SJC disagreed, finding no evidence that the trial judge had based his sentence on anything improper. During sentencing, the trial judge explained he had taken into consideration the defendant's use of alcoholic beverages on the night of the incident, his criminal record, his flight from the scene and his violent struggle with the police both at the scene of his arrest and at the station, all of which are appropriate factors for consideration.[15]

While a judge may take into consideration the nature and seriousness of the defendant's present criminal offense and the conduct surrounding the commission of the crime, there are limitations. In *Commonwealth v. Burr,*[16] the appeals court held that while a criminal defendant's conduct during the commission of the present crime can be taken into consideration by a trial judge when *sentencing,* these factors alone may not permit a reduction of a *verdict.*[17] In *Burr,* a jury found three criminal defendants guilty on indictments charging each of them with a single count of trafficking in cocaine in an amount no less than 100 grams,[18] which carried a mandatory prison sentence of ten years.[19] Despite the conviction, the judge used his powers under Massachusetts Rules of Criminal Procedure 25(b)(2)[20] to reduce the conviction to the lesser-included offense of posses-

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[11] 402 Mass. 735 (1988).

[12] *Id.* at 735-36.

[13] *Id.* at 739.

[14] *Id.* at 738 (describing argument as "The defendant contends that the greater sentence imposed after the jury trial was vindictive punishment for the defendant's insistence on his right to a trial de novo").

[15] *Id.* at 739-40.

[16] 33 Mass. App. Ct. 637 (1992).

[17] *Id.* at 643.

[18] *Id.* at 637.

[19] *Id.* at 638.

[20] *See* MASS. GEN. LAWS ch. 278, § 33E (providing in relevant part that "[i]n a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree"); MASS. R. CRIM. P. 25(b)(2)(providing in relevant part that "if a verdict of guilty is returned, the judge may on motion set aside the verdict and order a new trial, or order the entry of a finding of not guilty, or order the entry of a finding of guilty of an offense included in the offense charged in the indictment or complaint"); Commonwealth v. Gualden, 383 Mass. 543, 555 (1981) (holding that "a trial judge, acting under Rule 25(b)(2), should be guided by the same con-

sion with intent to distribute, and imposed sentences shorter than ten years for each of them.[21] Among the factors that the judge used in reducing the verdict and imposing a shorter sentence was the defendants' conduct during the course of their offenses.[22]

The appeals court reversed the lower court's ruling and held that, while a criminal defendant's conduct during the commission of his present crime can be taken into consideration by a trial judge when *sentencing*, absent a contrary legislative mandate, these factors alone do not permit a reduction of a *verdict* under Massachusetts Rules of Criminal Procedure 25(b)(2), because there must be an evidentiary basis for reduction or an error of law.[23] The court further reasoned that, although the SJC has taken into consideration the personal qualities of the defendant and other appropriate sentencing factors in exercising its powers under Massachusetts General Laws chapter 278, section 33E, or in reviewing a trial judge's action under rule 25(b)(2), in all cases cited the court has given weight to those factors only where a review of the evidence or an error of law warranted a reduction of the verdict.[24]

2. Prior Criminal Record

a. Tried and Convicted Criminal Offenses

A judge may properly consider a criminal defendant's past indictments or evidence of similar or recurrent "tried and convicted" (or "guilty plea and convicted") criminal conduct if relevant in assessing the defendant's *character* and *propensity* for rehabilitation.[25] A judge may not, however, consider previously charged conduct for which a defendant has been acquitted.[26] And, a judge cannot, in the case before him for sentencing now, punish the defendant for previous convictions.[27]

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siderations that have guided this court [the Supreme Judicial Court] in the exercise of its powers and duties under [MASS. GEN. LAWS ch. 278] § 33E to reduce a verdict").

[21] *Burr*, 33 Mass. App. Ct. at 638.

[22] *Id.* at 640.

[23] *Id.* at 643.

[24] *Id.* at 642.

[25] *See* Commonwealth v. Sanchez, 405 Mass. 369, 381 (1989); Commonwealth v. Coleman, 390 Mass. 797, 805 (1984); Commonwealth v. Joseph, 11 Mass. App. Ct. 879, 882 (1981); Commonwealth v. Celeste, 358 Mass. 307, 310 (1970); BLUMENSON, *supra* note 1, at §39.1G.

[26] Commonwealth v. Goodwin, 414 Mass. 88, 91 (1993)

[27] Commonwealth v. LeBlanc, 370 Mass. 217, 221 (1976) (providing that "a sentencing judge may not undertake to punish the defendant for *any* conduct other than that for which the defendant stands convicted in the particular case") (emphasis added).

In *Commonwealth v. Sanchez,*[28] the SJC did not consider it improper that during the sentencing argument after a conviction for forcible rape of a child, the prosecutor set forth the details of the defendant's prior sexual offenses for which he had been convicted.[29] Furthermore, the SJC held that it was permissible for the trial judge to consider these remarks in his determination of the criminal defendant's sentence.[30] The trial judge sentenced the criminal defendant to two consecutive life sentences and two other concurrent life sentences for his convictions of four counts of forcible rape of a child.[31] The SJC explained that information regarding prior criminal convictions as well as the details of these offenses is proper for a judge to use in his sentencing determinations because this information is highly probative of a defendant' s likelihood of rehabilitation.[32]

3. Subsequent Good or Bad Behavior

a. Subsequent Good Behavior

A sentencing judge may take into account any *good* behavior of a criminal defendant subsequent to the date of the commission of the crime or crimes for which he is being sentenced.[33]

In *Osborne v. Commonwealth,*[34] the SJC vacated the defendant's sentence and held that counsel's failure to alert the court to his client's good behavior subsequent to the commission of the crime for which he was sentenced denied him effective assistance of counsel.[35] In *Osborne,* the defendant plead guilty to murder in the second degree, assault with intent to commit rape, and armed robbery.[36] The defendant was sentenced to consecutive terms of life imprisonment on the convictions of murder in the second degree and for assault with intent to commit rape, and fifteen to twenty-five years on the indictment for armed robbery, to be served from and after the two consecutive sentences.[37] On appeal, the SJC upheld the

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[28] 405 Mass. 369 (1989).

[29] *Id.* at 380-81.

[30] *Id.* at 381.

[31] *Id.* at 379.

[32] *Id.* at 381.

[33] *See* United States v. Tucker, 404 U.S. 443, 446 (1972) (commenting that scope of sentencing judge' s inquiry is largely unlimited either as the kind of information he may consider or the source from which it may come); Osborne v. Commonwealth, 378 Mass. 104, 115 (1979); Commonwealth v. Celeste, 358 Mass. 307, 310 (1970) (sentencing judge may consider hearsay, the defendant's behavior, family, life, employment, and various other factors); BLUMENSON, *supra* note 1, at §39.1G.

[34] 378 Mass. 104 (1979).

[35] *Id.* at 113-15.

[36] *Id.* at 104-05.

[37] *Id.* at 105.

three convictions and the mandatory life sentence imposed on the murder indictment but vacated the sentences imposed on the indictment for armed robbery and assault with intent to commit rape.[38] The SJC relied in part on the fact that the defendant's trial counsel at the sentencing hearing failed to mention the good behavior of the defendant subsequent to the commission of the crimes for which he had been sentenced.[39] For instance, evidence that authorities at the jail where defendant was being held on bail awaiting trial had considered the defendant trustworthy enough to take on certain responsibilities or the fact that while in jail he attempted to save the life of a fellow prisoner who committed suicide should have been presented to the judge for consideration in determining a sentence.[40]

b. Subsequent Bad Behavior

Alternatively, it is also permissible for a sentencing judge to take into account a criminal defendant's *bad* behavior *subsequent* to the commission of the crime or crimes for which he is being sentenced.[41] Often, a criminal defendant's bad behavior subsequent to the crime or crimes for which he is being sentenced comes in the way of tried and untried criminal offenses. These topics are discussed in detail within sections (A)(2) and (B)(1).

4. Physical/Psychological Difficulties the Victim Suffered as a Result of the Crime

In assessing the gravity of the offense(s) for which a defendant is being sentenced, a judge may consider the version given by the victim during trial of the physical and psychological injuries the victim suffered as a result of the crime.[42] In *Commonwealth v. Drane,*[43] after an initial mistrial, the defendant was convicted of two counts of robbery.[44] He appealed both convictions on numerous counts, one of which was that the trial judge im-

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[38] *Id.* at 116.

[39] *Id.* at 113.

[40] *Id.* at 113.

[41] *See* Commonwealth v. Franks, 372 Mass. 866, 867 (1977) (stating "Contrary to the defendant's contention, the existence of pending criminal charges may be disclosed to the sentencing judge and considered by him"); Commonwealth v. LeBlanc, 370 Mass. 217, 220 (1976) (commenting "there is no constitutional bar against a sentencing judge considering a convicted defendant' s record of arrests, unresolved criminal charges against him, or other evidence of criminal conduct by him for which there has been no conviction").

[42] *See* Commonwealth v. Banker, 21 Mass. App. Ct. 976, 977-79 (1986); BLUMENSON, *supra* note 1, at §39.1G.

[43] 47 Mass. App. Ct. 913 (1999).

[44] *Id.*

properly punished him for electing a trial by jury by taking the victim's psychological injuries from testifying into account in fashioning the defendant's sentence.[45] The appeals court denied defendant's appeal, reasoning that the judge had properly considered the victim's ongoing psychological injuries, suffered as a result of the crime, and *not* as a result of testifying at trial.[46] The gist of the judge's remarks in this case was to the effect that the sentence would reflect the lasting psychological damage to the victims, as shown by the victim impact statements, and that he wanted the sentence to show the victims that the court took their trauma seriously. The defendant was not punished for electing a trial by jury.[47]

In addition to having the right to address the judge orally at a defendant's sentencing hearing to explain the impact of the crime on the victim and his family, the victim may also offer a sentence recommendation.[48] Alternatively, the victim may submit a written statement to the court, which shall be made available to the defendant before disposition.[49] The district attorney's office may also prepare a "victim impact statement" that might include documentation of the victim's financial loss and the psychological effect of the crime on the victim and his family, if any.[50]

5. Defendant's Cooperation with Police During Ongoing Criminal Investigation

It is not *"vindictive"* for a sentencing judge to take into consideration whether a defendant cooperates with the police in an ongoing investigation, unless the defendant's silence is an assertion of the privilege against self-incrimination.[51] In *Commonwealth v. Damiano,*[52] the appeals court held that the trial judge properly considered the defendant's lack of

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[45] *Id.* at 913-14.

[46] *Id.* at 914.

[47] *Id.*

[48] *See* MASS. GEN. LAWS ch. 279, § 4B (providing in relevant part that "[b]efore disposition in any case where a defendant has been found guilty of any felony or any crime against the person or crime where physical injury to a person results ... the district attorney shall give the victim actual notice of the time and place of sentencing and of the victim's right to make a statement to the court, orally or in writing at the victim's option, as to the impact of the crime and as to a recommended sentence"); *see also* Victim's Bill of Rights, MASS. GEN. LAWS ch. 258B, § 3(p) (providing "for victims to be heard through an oral and written impact statement at sentencing or the disposition of the case against the defendant about the effects of the crime on the victim and as to a recommended sentence ... [t]he victim also has a right to submit a victim impact statement to the parole board for inclusion in its records regarding the perpetrator of the crime.").

[49] MASS. GEN. LAWS ch. 279, § 4B.

[50] *Id.*

[51] *See* BLUMENSON, *supra* note 1, at §39.1G; *see also* Commonwealth v. Damiano, 14 Mass. App. Ct. 615, 625 (1982).

[52] 14 Mass. App. Ct. 615 (1982).

cooperation with the police in an ongoing investigation that involved a "sex ring" of which the defendant was an active member.[53] The defendant had plead guilty to thirty-seven indictments charging him with unnatural sexual intercourse with and abuse of children.[54] The Superior Court judge accepted the defendant's pleas to twenty-three indictments and sentenced him to twenty-three concurrent life terms, dismissing the remaining fourteen indictments.[55] The appeals court reasoned that it was proper for the trial judge to take into consideration a defendant's cooperation or lack thereof with police, as "few facts available to a sentencing judge are more relevant to the likelihood that a defendant will transgress no more, and the degree to which he does not deem himself at war with his society."[56]

6. Defendant's Refusal to Refrain From Unlawful Activities

A criminal defendant's character and propensity for rehabilitation are relevant sentencing considerations and, as such, a defendant's refusal to refrain from unlawful conduct in the future is a permissible factor for a sentencing judge to consider.[57] In *Commonwealth v. Cotter,*[58] the SJC held that a sentence of imprisonment, imposed after a defendant refused to accept as a condition of his probation that he *not* participate in unlawful activities, is not a punishment for future criminal conduct and is, therefore, a permissible factor for a judge to take into consideration at the defendant's sentencing hearing.[59]

In *Cotter,* a jury found the defendant guilty of criminal contempt for violation of a preliminary injunction based on his conduct at an abortion counseling and service center.[60] The trial judge initially proposed a two-and-one-half-year sentence in the house of correction, one year to serve, and the balance suspended for a period of three years.[61] The judge stated, "[a]s a condition of that suspended sentence, during that three-year period of time, Mr. Cotter is to have no participation in any unlawful activities of Operation Rescue Boston [an anti-abortion group] or any other such similar group."[62] The defendant refused to accept the condition that he not participate in the aforementioned unlawful activities and the judge then

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[53] *Id.* at 625.
[54] *Id.* at 615-16.
[55] *Id.* at 616.
[56] *Id.* at 625.
[57] *See* Commonwealth v. Cotter, 415 Mass. 183, 188 (1993); Commonwealth v. Coleman, 390 Mass. 797, 805 (1984); BLUMENSON, *supra* note 1, at §39.1G.
[58] 415 Mass. 183 (1993).
[59] *See id.* at 188.
[60] *Id.* at 183.
[61] *Id.* at 185.
[62] *Id.*

imposed the entire committed two-and-one-half-year sentence to the house of correction, stating "if he [the defendant] cannot accept my terms of the suspended portion of the sentence, then that will not be part of the sentence."[63] The SJC affirmed the lower court's sentence, holding that the judge was fair in his sentencing considerations and had not punished or retaliated against the criminal defendant for refusing to refrain from unlawful activities with any anti-abortion groups.[64] The court reasoned "a defendant's refusal in open court to agree to comply with the law presented strong evidence that his propensity for rehabilitation was not good."[65]

7. Parole Consequences of Sentencing

When imposing a sentence, a judge may consider parole eligibility dates.[66] However, when deciding to revise or revoke a sentence, a judge may not consider the denial of previous parole requests made by the defendant.[67] In *Commonwealth v. Amirault,*[68] subsequent to the denial of parole for two defendants, a superior court judge granted their motions, under Massachusetts Rules of Criminal Procedure 29(a),[69] to revise or revoke their no less than eight "up to twenty-year" sentences to sixty-four months.[70] The judge ruled that he revised the sentences because he had "intended at the time of the original sentencing to sentence the defendants to 64 months."[71] On appeal, the SJC vacated the revised sentences, finding it improper that the trial judge had considered the parole board's previous refusal of the defendants' request for parole.[72] The court reasoned that allowing a motion to revise or revoke a sentence because a judge had intended a defendant to be paroled, and wasn't, was an overreaching of the court's authority, and an interference with the parole board's function.[73]

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[63] *Id.* at 186-87.

[64] *Id.* at 188 n.3.

[65] *Id.* at 188.

[66] *See* Commonwealth v. Amirault, 415 Mass. 112, 117 n.10 (1993); BLUMENSON, *supra* note 1, at §39.1G.

[67] *See Amirault,* 415 Mass. at 117.

[68] 415 Mass. 112 (1993).

[69] *See* MASS. R. CRIM. P. 29(a) (providing that "[t]he trial judge upon his own motion or the written motion or the written motion of a defendant filed within sixty days after the imposition of a sentence, within sixty days after receipt by the trial court of a receipt issued upon affirmance of the judgment or dismissal of the appeal, or within sixty days after entry of any order or judgment of an appellate court denying review of, or having the effect of upholding, a judgment of conviction, may upon such terms and conditions as he shall order, *revise or revoke* such sentence if it appears that justice may not have been done") (emphasis added).

[70] *Amirault,* 415 Mass. at 112-13.

[71] *Id.* at 116.

[72] *Id.* at 116-17.

[73] *Id.*

8. Hearsay

When imposing a sentence, a judge may take into consideration statements that are hearsay and normally considered inadmissible as evidence in a criminal trial.[74] "Unlike the trial itself where strict rules determine what evidence may be considered by the fact finder, after the conviction of a defendant, a judge may consider many factors which would not be admissible as evidence in the trial of a case ... [including] hearsay."[75]

B. Factors That May Not Be Considered in Structuring a Sentence

1. Defendant's Untried Prior Criminal Conduct

One of the most difficult issues in determining appropriate sentences arises in the context of prior alleged misconduct for which the defendant has not been charged or tried. It is clear that a defendant can not be *punished* for untried or uncharged conduct, or charges that should have been brought but were not.[76] A judge may not permit a sentence to vary

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[74] *See* Commonwealth v. Celeste, 358 Mass. 307, 310 (1970); BLUMENSON, *supra* note 1, at §39.1G.

[75] Commonwealth v. Settipane, 5 Mass. App. Ct. 648, *653* (1977) (quoting *Celeste,* 358 Mass. at 309-10); *see* Commonwealth v. Coleman, 390 Mass. 797, 805 (1984) (commenting "[I]n imposing a sentence ... [h]earsay evidence of the defendant's character, family life, and employment situation may be evaluated"); *Celeste,* 358 Mass. at 310 (stating when imposing a sentence, "[t]he judge may consider hearsay"); Commonwealth v. Ferguson, 30 Mass. App. Ct. 580, 586 (1991) (commenting "In fashioning a disposition after conviction ... [t]he judge may take into account hearsay information regarding the defendant's behavior, family life, employment, and various other factors"). *See generally* United States v. Tucker, 404 U.S. 443, 446 (1972) (holding "[A] trial judge ... has wide discretion in determining what sentence to impose . . . a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come").

[76] *See* Commonwealth v. Henriquez, 56 Mass. App. Ct. 775, 778 (2002), *appeal granted,* 438 Mass. 1108 (2003); Commonwealth v. Goodwin, 414 Mass. 88, 93 (1993); Commonwealth v. O'Connor, 407 Mass. 663, 674 (1990) (holding sentence of two-and-one-half years, which was imposed upon defendant following conviction on charges of assault and battery, was not improper; trial judge's remark that jury's finding that the defendant was not guilty of more serious charges against him did not have anything to do with the sentence judge was about to impose, but was merely a restatement of principle that factors the judge considered in sentencing were wholly distinct from and much broader than those jury could take into account in making findings of guilt or non-guilt at trial); *Coleman,* 390 Mass. at 805; Commonwealth v. Sitko, 372 Mass. 305, 313 (1977) (deciding even if defendant's failure to appear to commence service of his sentence was voluntary, a judge cannot punish the defendant merely for failing to appear and should not have considered such failure to appear in any revision of the sentence); Commonwealth v. Franks, 372 Mass. 866, 867 (1977); BLUMENSON, *supra* note 1, at §39.1 G. *Contra* Commonwealth v. Mack,

because he believes the defendant is guilty of other untried or uncharged conduct. This remains true even if the judge has a strong basis for concluding that the defendant is guilty of the other crime(s).[77] If it appears that the defendant has been punished for untried conduct, an appellate court can remand the case for resentencing before a different judge.[78]

This does not mean, however, that a judge may never consider uncharged or untried conduct during the sentencing proceedings. Similar to a judge's ability to look to a defendant's past tried and convicted criminal conduct,[79] the SJC has held that if it is relevant and sufficiently reliable,[80] untried or uncharged conduct may be considered for the *limited* "proper purpose" of assessing a criminal defendant's character and propensity for rehabilitation.[81] Herein lies the difficulty: there is a fine line between what constitutes a "proper purpose" versus a "punishment," and one side of the line reflects appropriate consideration in sentencing, while the other may require the case be remanded for resentencing. The distinction between a judge's consideration of uncharged prior misconduct for the proper purpose of assessing a defendant's character and propensity for rehabilitation, and for the improper purpose of punishing the defendant for such uncharged prior misconduct, can be most effectively clarified by a brief review of Massachusetts case law concerning the topic.

Nos. 98-P-1321, 98-P-2034, 2000 WL 1476087, at *2 (Mass. App. Ct. July 13, 2000) (stating record did not reveal that the judge took the defendant's prior conduct into account in sentencing). During the colloquy the judge indicated that she would merely comment on the defendant's conduct because "I think it is important." (Tr. IV-8). *Id.* The record did not reveal that the judge suggested imposing additional punishment for the defendant's previous misconduct. *Id.*; *see also LeBlanc,* 370 Mass. at 221.

[77] *See Sitko,* 372 Mass. at 313; BLUMENSON, *supra* note 1, at §39.1G; *see also* Commonwealth v. Molino, 411 Mass. 149, 155-56 (1991) (holding judge's exceeding of prosecutor's recommendation did not appear to be based upon contempt citations of defendant during trial).

[78] *See* Commonwealth v. Lewis, 41 Mass. App. Ct. 910, 911 (1996).

[79] *See* MASS. R. CRIM. P. 28(d)(1) (providing that "[t]he probation officer shall inquire into the nature of every criminal case or juvenile complaint brought before the court and report to the court information concerning all prior criminal convictions or juvenile complaints, if any, and the disposition of each such prosecution, except where the defendant was found not guilty").

[80] *See Goodwin,* 414 Mass. at 94 (finding the information "sufficiently reliable to be considered by the judge," the court pointed to the fact that "[t]he material went beyond mere accusations and provided detailed and specific information related by professional reporters). The reports describe the prior incidents in the words and actions of the children and provide graphic accounts of sexual abuse which carry their indicia of trustworthiness." *Id.*

[81] *See id.* at 93-94.

a. Untried or Uncharged Conduct May Be Considered So Long As it is Used For a "Proper Purpose"

Commonwealth v. Goodwin[82] is a good example of a judge's appropriate use and consideration of uncharged conduct in determining a sentence.[83] In *Goodwin,* the defendant pled guilty to three indictments of child rape and one indictment of kidnapping.[84] The defendant appealed his sentence of concurrent ten to fifteen year sentences on two of the rape convictions, and thirty to forty years from and after on the third.[85] In arguing for resentencing, defendant alleged the judge "improperly considered the defendant's prior misconduct that had resulted in neither a finding nor a formal complaint."[86] The prior misconduct in question, which was included in the commonwealth's sentencing memorandum, was information that the defendant had allegedly sexually assaulted six other children in the past. In one instance, the defendant had been tried and acquitted on the criminal charge of sexual misconduct, and the other five instances had never been tried.[87] While it was improper for the prosecutor to present the judge with information of a prior prosecution in which the defendant was found not guilty, the sentencing judge clearly explained that she was not taking the prior charge on which the defendant had been acquitted into consideration in determining sentencing.[88] Because this improperly presented information was not relied on, the SJC found that no resentencing was required.[89]

The trial judge did take into consideration the uncharged sexual misconduct in her determination of the sentence for the third rape conviction.[90] The question remains, therefore, whether it is appropriate to consider uncharged or untried conduct for any purpose. The SJC answered this question in the affirmative, holding that it is appropriate to consider untried or uncharged prior misconduct *for the limited purpose* of establishing the defendant's character with regard to the potential for rehabilitation, so long as a judge does not *punish* a defendant for such uncharged conduct.[91] Citing academic research regarding sexual offenders,[92] the SJC found that

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[82] 414 Mass. 88 (1993).
[83] *See id.* at 93-94.
[84] *Id.* at 89.
[85] *Id.* at 89-91.
[86] *Id.* at 88-89.
[87] *Id.* at 90.
[88] *Id.* at 91.
[89] *Id.* at 92.
[90] *Id.* at 90.
[91] *Id.* at 94.
[92] *Id.* at 93-94. (explaining "[r]ecent scholarly studies emphasize the importance of understanding the full background of sexual offenders so that proper probationary and treatment terms can be established. Additionally, it is recognized that recidivism rates

there was sufficient reason for the judge to want to look to this defendant's background with regard to any prior sexual misconduct.[93] Further, the SJC looked to the reliability of the information of past misconduct presented to the trial judge, as well as the trial judge's having given the defendant an opportunity to rebut or deny such information, in determining the appropriateness of her consideration of the information in sentencing.[94] Ultimately, because the trial judge's statement of reasons for the sentence satisfied the court that "she did not consider the information about the defendant's past sexual misconduct impermissibly to punish the defendant for crimes with which he had not been charged, [but r]ather she viewed the information as bearing on the defendant's character," the SJC found resentencing was not required.[95]

b. Where the Record is Unclear Regarding "Punishment" for Uncharged Conduct, Resentencing of the Criminal Defendant May Be Required

It is critical for judges in considering uncharged conduct in sentencing a defendant to do so only for appropriate reasons and to state clearly for what purpose they are doing so.[96] In *Commonwealth v. Henriquez*,[97] the appeals court vacated a sentence because it was unclear whether the sentencing judge had taken into consideration uncharged conduct in determining the length of the defendant's sentence, and raised issues about whether she had used the sentence to *punish* the defendant for the uncharged conduct.[98] The defendant in *Henriguez* pled guilty to sexual assault crimes committed against his 7-year-old daughter during a period of five months and was sentenced to concurrent forty-five to sixty-year sentences.[99] After the sentences were read, the judge stated, "I did want to add that one of the reasons that I am deviating from the guidelines is because I do not believe that this was an incident that occurred four times. I do believe the child when she states that this has been going on for the last couple of years."[100] The appeals court vacated the sentences imposed by the trial court judge and remanded for resentencing.[101] The court reasoned that the judge's statement could be read as punishment for rapes that had allegedly occurred over a couple of years, and for which the defendant had not

among child molesters are particularly high").

[93] *Id.*

[94] *Id.* at 94-95.

[95] *Id.* at 94.

[96] *See* Commonwealth v. Henriguez, 440 Mass. 775, 782-83 (2002).

[97] 56 Mass. App. Ct. 775 (2002).

[98] *Id.* at 778-82.

[99] *Id.* at 775.

[100] *Id.* at 778.

[101] *Id.* at 782.

been charged.[102] The court further pointed to the Commonwealth's improper request to the judge that "[i]n considering the punishment, I want you to understand that [the victim] said that this abuse occurred for a couple of years,"[103] and the Commonwealth's recommended sentence of fifty to seventy years. The appeals court found that these factors, taken in conjunction with the sentence imposed by the judge of forty-five to sixty years, constituted significant "indicia" of punishment for uncharged conduct.[104] Finally, there was no explanation by the judge that would put to rest the concerns about why she had considered the uncharged conduct.[105]

The SJC granted the Commonwealth's application for further appellate review, and affirmed the decision of the appeals court.[106] Holding that "[a]mbiguity as to whether a defendant has been improperly sentenced as punishment for other offenses creates a sufficient concern about the appearance of justice that resentencing is required," the SJC remanded the case for resentencing.[107] Furthermore, the SJC affirmed the appeals court instructions that a different judge conduct the resentencing, to best ensure the appearance of fairness.[108] Where the record is unclear and is susceptible to the possibility of punishment for improper reasons, as here, resentencing of the defendant is required.[109]

c. *Pending Criminal Charges*

In *Commonwealth v. LeBlanc,*[110] the SJC addressed "the extent to which a judge imposing a sentence may be advised of, give consideration to, or conduct an investigation of other criminal charges pending against the defendant."[111] The court held that the existence of unrelated pending criminal charges may be disclosed to a sentencing judge and considered by him in assessing a defendant's character; however, it is inappropriate to be influenced by the ability or failure of a defendant to establish his innocence on the unrelated pending charge.[112] In *LeBlanc,* the defendant pled guilty to assault with intent to rape and assault and battery by means of a dangerous weapon, and was sentenced to a committed term of five to seven

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[102] *Id.* at 780.
[103] *Id.*
[104] *Id.* at 780-81.
[105] *Id.* at 781-82.
[106] Commonwealth v. Henriguez, 440 Mass. 1015, 1015 (2003).
[107] *Id.* at 1016.
[108] *Id.*
[109] *See Henriquez,* 56 Mass. App. Ct. at 782.
[110] 370 Mass. 217 (1976).
[111] *Id.* at 218.
[112] *Id.* at 224.

years.[113] During the sentencing proceedings, the trial judge inquired into the details of an unrelated kidnapping charge pending against the defendant in another county in Massachusetts.[114] After sentencing, defendant filed a motion to revise or revoke, arguing that he was denied his constitutional right to due process of law because "no pending case should be considered in sentencing."[115] The trial court denied defendant's motion.

On appeal, the SJC reversed the court's order denying the defendant's motion to revise and revoke his sentence, and remanded the case for resentencing.[116] While finding that it is appropriate for a trial judge to consider the existence of pending criminal charges in sentencing, the SJC found that in this case, "the judge pursued the subject further than he should have, perhaps to the defendant's prejudice."[117] The existence of unrelated pending criminal charges may be disclosed to the sentencing judge and considered by him in order to assess the defendant's character.[118] Further, a defendant's prior criminal record should be disclosed to the sentencing judge so that if the defendant has never incurred any other criminal charges, the judge will have this information to consider in fashioning a sentence.[119] However, as in this instance where the trial judge asked the defendant for details and an explanation regarding the pending kidnapping charge during the sentencing proceedings, the inquiry had the effect of requiring the defendant to defend himself on the pending charge in order to establish an appropriate sentence in the current proceeding.[120] Holding such use and consideration of pending criminal charges inappropriate, the SJC remanded the case for resentencing.[121]

d. A Trial Judge May Not Consider a Defendant's Alleged Perjury on the Witness Stand in Determining a Sentence

In Massachusetts, despite the holdings of the United States Supreme Court and other state courts, the SJC has held that a trial judge shall *not*

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[113] *Id.* at 218-19. *But see* Commonwealth v. Morales, 56 Mass. App. Ct. 1110 (2002) (holding there was no impropriety in a judge considering the defendant's history of arrests, *unresolved* criminal charges, and other evidence of past or recurrent criminal conduct, as reflected in his criminal history). Such matters were especially appropriate to consider there because they "tended to contradict the representations by defendant's counsel as to his allegedly good recent record, the 'minimal' nature of his prior record, and his supposed future ability and intention to be 'in full compliance.'" *Id.*

[114] Commonwealth v. LeBlanc, 370 Mass. 217, 224 (1976) (noting the trial judge "asked for the defendant's explanation of why he had an 8-year-old girl in his car").

[115] *Id.* at 219.

[116] *Id.* at 224-25

[117] *Id.* at 224.

[118] *Id.*

[119] *Id.* at 224.

[120] *Id.*

[121] *Id.* at 225.

consider a defendant's alleged perjury on the witness stand in determining what punishment to impose.[122] In *Commonwealth v. Coleman,*[123] the defendant was convicted and sentenced for aggravated rape, kidnapping, and assault and battery by means of a dangerous weapon.[124] During the sentencing hearing, the defendant admitted to committing perjury in his testimony at trial.[125] Consequently, the trial judge considered this alleged perjury when making his sentencing determination.[126] In fact, the judge chastised the defendant for attempting to fool him with his testimony and for his "outrageous conduct."[127]

The SJC vacated the sentence and held that, by considering a defendant's alleged perjury on the witness stand in deciding what sentence to impose for his rape, kidnapping and assault and battery convictions, the trial judge had "effectively punished this defendant for an offense, without the procedural safeguards of an indictment and trial," and therefore erred.[128] In addition to improperly punishing a defendant for uncharged conduct, the court reasoned that permitting judges to consider the alleged perjury of a defendant on the witness stand could have the consequence of limiting the ability of criminal defendants to plead not guilty and to testify on their own behalf at trial, a constitutionally protected right.[129]

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[122] *See* Commonwealth v. Coleman, 390 Mass. 797, 810 (1984); Commonwealth v. Souza, 390 Mass. 813, 818 (1984) (holding "that to allow a judge to consider, in sentencing, his belief that a defendant has lied in his defense impermissibly burdens a defendant's right to plead not guilty and to testify"); *see also* Commonwealth v. Murray, 4 Mass. App. Ct. 493, 495-99 (1976) (holding error for judge to state at sentencing that he was punishing defendant "for coming up here and lying and for his whole attitude"). *But see* Commonwealth v. Dicks, 49 Mass. App. Ct. 1119 (2000). The defendant claimed prosecutor's statements at sentencing were impermissible and that these statements resulted in the judge imposing a harsher sentence on him than he otherwise would have received. *Id.* In particular, the defendant objected to the following:

> This court also heard testimony of an individual who took the stand and I suggest gave less than candid testimony to the jury. He got on that stand and I suggest he lied to a jury of his peers. And the jury was able to see through what he was trying to perpetrate. And I suggest perpetrate in fraud.

Dicks, 49 Mass. App. Ct. 1119. The prosecutor's intimating to the judge that he consider at sentencing a factor that the judge is forbidden to take into account — the defendant's alleged, unindicted perjury — is improper. This case is unlike *Coleman* in that there is no evidence that the judge sentenced the defendant for any conduct other than that for which he was tried and found guilty. *Id.*

[123] 390 Mass. 797 (1984).

[124] *Id.* at 797.

[125] *Id.* at 800-01.

[126] *Id.* at 810.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 810.

2. Other Miscellaneous Criminal Conduct Considerations

In considering the prior criminal record of a defendant during sentencing, a trial judge may only look to convictions for which the defendant has been found guilty, and may only look to those convictions, which are reliable. Although judges are forbidden to rely upon questionable convictions in determining an appropriate sentence, the burden is often on the defendant to show that the trial judge *relied upon* a questionable conviction in structuring a sentence.

a. Conviction Later Declared Invalid

When deciding what sentence to impose, if a judge takes into account a conviction, which has since been declared invalid, the defendant must be resentenced.[130] The mere existence of a previously vacated conviction is not sufficient, however, to infer prejudice in sentencing.[131] In *Commonwealth v. Lovell,*[132] the appeals court held that to succeed under this argument a defendant must show that his sentence was enhanced *as a result* of the prior invalidated conviction.[133] In *Lovell,* the defendant appealed his sentence, arguing that the judge had improperly considered a separate and unrelated conviction that had subsequently been vacated on the grounds that counsel had not effectively represented the defendant.[134] In rendering its decision against the defendant, the appeals court looked to the explanation given by the trial judge in determining sentencing, in which he "made clear that the severity of the crime weighed heavily in the severity of the sentence."[135] Furthermore, although the defendant had been previously convicted of a crime, which conviction was later vacated, the defendant had a substantial criminal record apart from the vacated conviction.[136] The appeals court found no evidence that the defendant's sentence had been enhanced as a result of the vacated conviction, and as such, held that resentencing was not required.[137]

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[130] *See* Commonwealth v. Lovell, 20 Mass. App. Ct. 952, 952 (1985); BLUMENSON, *supra* note 1, at § 39.1G.

[131] *Lovell,* 20 Mass. App. Ct. at 952.

[132] 20 Mass. App. Ct. 952 (1985).

[133] *Id.* (commenting that "in order to challenge successfully a presumptively valid sentence on the basis of the *Tucker* case, a defendant must show that his sentence was enhanced by reason of the prior conviction which was subsequently rendered invalid").

[134] *Id.* at 952-53.

[135] *Id.*

[136] *Id.* at 953.

[137] *Id.*

b. Uncounseled Convictions

Similar to a sentence based on a conviction later declared invalid, a sentence based upon uncounseled convictions must be remanded for resentencing.[138] The Supreme Court held in *Gideon v. Wainwright*[139] "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[140] Accordingly, convictions obtained against a defendant are unconstitutional unless the defendant had a lawyer, or validly waived one. The SJC later stated that "[t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person ... to enhance punishment for another offense ... is to erode the principle of that case."[141]

In *Commonwealth v. Guerro,*[142] the defendant argued that in sentencing, the trial judge had impermissibly relied upon uncounseled convictions.[143] The appeals court held that in order for a defendant to prevail on this claim, he has the burden of demonstrating "that the court *relied* on that information. Conclusory assertions are insufficient to meet this burden."[144] Finding that the defendant failed to meet his burden, having provided no factual support for his assertions that the sentencing judge improperly relied upon uncounseled convictions, the appeals court held that resentencing was not required. [145]

c. Foreign Convictions of Dubious Weight

When deciding what sentence to impose, foreign convictions of dubious or doubtful offenses, such as political crimes, should not be accorded any weight by the trial judge.[146] To successfully challenge a sentence for this reason, the defendant bears the burden of showing that the sentencing judge relied upon such foreign convictions.[147] In *Commonwealth v.*

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[138] *See* United States v. Tucker, 404 U.S. 443, 448-49 (1972) (holding "that prior convictions obtained in violation of an accused's Sixth Amendment right to counsel may not be relied upon in a subsequent sentencing to enhance punishment"); Commonwealth v. Guerro, 14 Mass. App. Ct. 743, 746 (1982); BLUMENSON, *supra* note 1, at § 39.1G.

[139] 372 U.S. 335 (1963).

[140] *Id.* at 344.

[141] Burgett v. Texas, 389 U.S. 109, 114 (1967).

[142] 14 Mass. App. Ct. 743 (1982).

[143] *Id.* at 746.

[144] *Id.*

[145] *Id.* at 746-47.

[146] *See* Commonwealth v. Rosadilla-Gonzalez, 20 Mass. App. Ct. 407, 415 n.5 (1985); BLUMENSON, *supra* note 1, at § 39.1G.

[147] *Rosadilla-Gonzales,* 20 Mass. App. Ct. at 415.

Rosadilla-Gonzales,[148] the defendant appealed his convictions of assault and battery, assault with intent to murder and armed robbery.[149] One of his arguments on appeal was that the trial judge had improperly relied upon information regarding the defendant's previous Cuban convictions, in determining how to sentence defendant.[150] Defendant's Cuban convictions were for the Cuban political crime of arguing with a "guard family" and for allegedly causing the "untimely demise of a cow," and subsequently selling the cow on the black market.[151] Finding no evidence that the judge had relied on the defendant's prior Cuban convictions, the appeals court did not find resentencing to be necessary.[152] The court commented, however, that "[g]iven the questionable validity of the Cuban convictions, the prosecutor was ill-advised to offer the information to the judge, who was foreclosed from relying on the convictions."[153]

3. Defendant's Assertion of Various Procedural Rights

It is improper for a court to take into account a criminal defendant's exercise of his assertion of various procedural rights.[154] If it appears that a sentencing judge has improperly considered a defendant's exercise of such rights in determining an appropriate sentence, and sought to punish the defendant for exercising his rights, it may be necessary to vacate the sentence and remand for resentencing. The question before an appellate judge will often be whether or not the trial judge was "vindictive" in structuring the defendant's sentence.

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[148] 20 Mass. App. Ct. 407 (1985).

[149] *Id.* at 408.

[150] *Id.* at 414-15.

[151] *Id.* at 415 n.5.

[152] *Id.* at 415.

[153] *Id.* at 415 n.5.

[154] *See* Commonwealth v. Ravenell, 415 Mass. 191, 194-95 (1993) (stating a stiffer sentence after trial than may have been offered in a plea bargain does not by itself betoken vindictiveness, not least because the willingness of the defendant to admit guilt and so taking the first step toward rehabilitation); Commonwealth v. Tart, 408 Mass. 249, 266-67 (1990) (explaining defendant failed to show that sentence imposed for violation of statute requiring state commercial fishermen permit for landing raw fish in the commonwealth for purpose of sale was particularly harsh or was motivated by desire on part of judge to punish defendant for exercising right to trial); Commonwealth v. Coleman, 390 Mass. 797, 804 n.7 (1984); Commonwealth v. Ford, 35 Mass. App. Ct. 752, 757-58 (1994); Commonwealth v. Lebon, 37 Mass. App. Ct. 705, 708 (1994); Commonwealth v. Carney, 31 Mass. App. Ct. 250, 255-56 (1991) (sentence not retaliatory despite judge's suggestion after first witness that defendant seriously consider guilty plea); Commonwealth v. Johnson, 27 Mass. App. Ct. 746, 750 (1989); Commonwealth v. Joseph, 11 Mass. App. Ct. 879, 880-82 (1981) (holding there is no presumption that a judge punished a defendant for going to trial, even if she told him that a more severe sentence would result than on a guilty plea); *see also* Johnson v. Vose, 927 F.2d 10, 11 (1st Cir. 1991); Letters v. Commonwealth, 346 Mass. 403, 405 (1963); BLUMENSON, *supra* note 1, at § 39.1G.

In determining *"vindictiveness,"* the appropriate standard arises from *North Carolina v. Pearce*[155] (Pearce presumption"), a United States Supreme Court Case.[156] In *Pearce,* a defendant whose conviction had been reversed on appeal was retried and again found guilty.[157] The same judge presided over both trials and following the second trial, the judge imposed a more severe sentence than after the first trial.[158] The issue before the U.S. Supreme Court was whether *vindictiveness* played a part in the second more severe sentence.[159] The court held that "[w]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring *after* the time of the original proceeding."[160] Furthermore, the court held that the sentencing judge must make the information considered in enhancing the defendant's sentence a part of the record, to ensure the ability of appellate courts to review the constitutionality of the enhanced sentence and eliminate the possibility of vindictiveness as a motive.[161]

The so-called Pearce Presumption has been applied in other settings where a defendant receives some form of an increased sentence, but in cases other than retrials, "the presumption [of vindictiveness] arises only in circumstances in which there is a reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentenc-

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[155] 395 U.S. 711 (1969).

[156] *See id.*; *Ravenell,* 415 Mass. at 193-94. *But see* Alabama v. Smith, 490 U.S. 794, 799 (1989). While *Pearce* appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that its presumption of vindictiveness does not apply in every case where a convicted defendant receives a higher sentence on retrial. The evil *Pearce* sought to prevent was not the imposition of "enlarged sentences after a new trial," but the "vindictiveness of a sentencing judge." Because the presumption

> may operate in the absence of any proof of an improper motive," we have limited its application, like that of "'other judicially created means of effectuating the rights secured by the Constitution,'" to circumstances "where its objectives are thought most efficaciously served. Such circumstances are those in which there is a 'reasonable likelihood' that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness.'

Smith, 490 U.S. at 799 (internal citations omitted) (quoting United States v. Goodwin, 457 U.S. 368, 373 (1982); Texas v. McCullough, 475 U.S. 134, 138 (1986)).

[157] *Pearce*, U.S. at 713.

[158] *Id.*

[159] *Id.*

[160] *Id.* at 726 (emphasis added).

[161] *Id.*

ing authority."[162] Without a reasonable likelihood of vindictiveness, the defendant has the burden of proving actual vindictiveness.[163]

a. A Defendant's Exercise of his Right to a Jury Trial

It is improper for a sentencing judge to take into consideration a defendant's exercise of his right to a jury trial.[164] In *Commonwealth v. Lebon,*[165] the defendant was convicted in district court after a bench trial for violating a stay away order, was sentenced to six months in the house of correction (suspended for two years) and subsequently appealed on the ground that the judge had coerced him into giving up his right to be tried by a jury.[166] Prior to the start of trial, the judge informed defendant's counsel that he would sentence Lebon to a period of committed incarceration in the case of a guilty verdict from a jury, but that should the defendant stand trial jury-waived, the judge would not impose a period of committed incarceration.[167] Consequently, the defendant chose the jury-waived option, was convicted and was given a suspended sentence.[168] The appeals court held, "offering substantially lighter punishment in return for the defendant not electing a jury trial so dampened the defendant's right to trial by jury as to deprive him of it."[169] Because a defendant may not be deprived of his or her constitutionally protected right to a trial by jury, the appeals court reversed the trial judge's conviction and sentence in favor of the defendant.[170] The court contrasted such coercion with cases in which a trial results in a stiffer sentence than that offered in a plea bargain, which is appropriate because "[t]he willingness of the defendant to admit guilt (and so taking the first step toward rehabilitation) is a proper factor in more lenient sentencing."[171]

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[162] *See* Commonwealth v. Ravenell, 415 Mass. 191, 194-95 (1993).

[163] *Id.*

[164] *See Lebon,* 37 Mass. App. Ct. at 706 (holding that "because the right to a jury trial is exalted in our system of justice, a judge may not punish a defendant for exercising his right to trial and the verdict of a jury"); *see also Letters,* 346 Mass. at 406 (holding that to tell a defendant straight out that punishment will be more severe if he elects to stand trial is coercion as a matter of law).

[165] 37 Mass. App. Ct. 705 (1994).

[166] Commonwealth v. Lebon, 37 Mass. App. Ct. 705, 705-06 (1994).

[167] *Id.*

[168] *Id.* at 706.

[169] *Id.*

[170] *Id.*

[171] *Id.* at 707 (quoting *Johnson,* 27 Mass. App. Ct. at 750-51).

b. A Defendant's Exercise of His Right to Pursue an Appeal or a Trial De Novo

It is improper for a sentencing judge to take into consideration a defendant's exercise of his right to pursue an appeal or a trial de novo.[172] While there is no absolute prohibition on a judge imposing a harsher sentence when a defendant appeals a conviction, obtains a reversal, and is once again convicted, when a criminal defendant has been convicted after a successful appeal and there is no post-conviction misconduct, a harsher sentence than was imposed on the first conviction may be presumed *"vindictive"* absent certain circumstances and written reasons that justify it.[173]

The SJC has held that after a successful appeal and retrial that results in a conviction, the judge imposing the second sentence may impose a harsher sentence *only* if her reasons appear on the record, and are based on information that was not before the judge determining the first sentence.[174] Similarly, in cases tried under the former de novo system, the defendant may receive a greater penalty in a jury-of-six session after de novo appeal, provided that she is not being punished for having claimed the appeal.[175]

In *Commonwealth v. Ravenell,*[176] the defendant was convicted for armed robbery, sentenced to twenty years in prison and appealed for post-conviction relief.[177] His conviction was affirmed.[178] In a subsequent appeal, he argued that the trial judge had sentenced him vindictively for exercising his rights to trial.[179] The defendant claimed that before his scheduled trial the judge made statements to his attorney in a lobby conference that she would sentence the defendant to eight to ten years if he were to plead

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[172] *See* Commonwealth v. Gresek, 390 Mass. 823, 828 (1984) (holding "a judge violates principles of due process by penalizing a defendant for invoking a statutory right to appeal a conviction").

[173] *See* BLUMENSON, *supra* note 1, at § 39.1G; *see also* Commonwealth v. Ravenell, 415 Mass. 191, 193-94 (1993).

[174] *See* Commonwealth v. Hyatt 419 Mass. 815, 823 (1995) (stating "We adopt as a common law principle a requirement that, when a defendant is again convicted of a crime or crimes, the second sentencing judge may impose a harsher sentence or sentences only if the judge's reason or reasons for doing so appear on the record and are based on information that was not before the first sentencing judge."); *see also* Commonwealth v. Repoza, 28 Mass. App. Ct. 321, 329-31 (1990) (stating after reversal and conviction of lesser charge, it was improper for judge to impose harsher sentence based on defendant's lengthy incarceration nor to retrial).

[175] *See* Commonwealth v. Morse, 402 Mass. 725, 738-40 (1988); *see also Gresek,* 390 Mass. at 827-28.

[176] 415 Mass. 191 (1993).

[177] *Ravenell,* 415 Mass. at 191-92.

[178] *Id.* at 192.

[179] *Id.*

guilty, and twelve to twenty if he went to trial and was convicted.[180] The defendant chose to go forward with his trial, was convicted and subsequently sentenced to twelve to twenty years.[181] On appeal, the SJC rejected the defendant's challenge to the sentence and, using the *Pearce* analysis, held that no presumption of vindictiveness was operative that would have required objective information in the record justifying the increased sentence.[182] The SJC reasoned that the judge's pre-trial statements alone were not sufficient to show a "reasonable likelihood" of vindictiveness.[183] The court found that the judge's offer of a more lenient sentence if defendant pled guilty could be likened to plea bargaining, which is consistent with the policy of rewarding a criminal defendant for his willingness to accept responsibility.[184] While the court discouraged judges from taking part in plea-bargaining,[185] it found that where there is an alternative explanation to vindictiveness (here, the "back and forth" of plea bargaining, where a defendant can get "rewarded" for accepting responsibility), and where there was no evidence suggesting the judge wanted to avoid trial, the defendant had the burden of proving vindictiveness, which he failed to do in this case.[186]

c. Defendant's Maintaining His Innocence at Trial

It is improper for a sentencing judge to punish a defendant for maintaining his innocence at trial. In *Commonwealth v. Burke,*[187] the SJC held that while it is improper to threaten to punish a criminal defendant if he did not confess his guilt, it is permissible for a judge to inquire in a sentencing hearing whether any factors exist that might mitigate the defendant's guilt.[188] In *Burke,* the defendant was convicted in the district court by a jury of breaking and entering in the nighttime with the intent to commit a felony and was sentenced to two-and-one-half years committed in the house of correction.[189] At the sentencing hearing, the trial judge asked the defendant the following question: "What is there that you can tell me, Mr. Burke, if anything, that would mitigate the circumstances that I find myself

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[180] *Id.*

[181] *Id.*

[182] *Id.* 193-95.

[183] *Id.* at 195.

[184] *Id.*

[185] *Id.* at 193 n.1 (stating "we reiterate the admonition of the appeals court that participation by a trial judge in plea bargaining, although not proscribed in Massachusetts [as it is by FED. R. CRIM. P. 11], is discouraged").

[186] *Id.* at 195.

[187] 392 Mass. 688 (1984).

[188] *Id.* at 695.

[189] *Id.* at 688-94.

confronted with here?"[190] On appeal to the SJC, the defendant relied on this question to argue that the trial judge impermissibly enhanced his sentence, because he didn't believe the defendant's answer.[191] The SJC didn't credit the defendant's argument, finding in fact that the judge was attempting to identify whether any factors existed to mitigate defendant's guilt, which is proper for a judge to do in imposing a sentence.[192] The SJC contrasted this to instances "where a judge has improperly threatened to punish a defendant if he did not confess his guilt," finding that not to be the case here.[193]

4. General Deterrence

While specific deterrence of criminal defendants is one of the criteria, which can appropriately guide sentencing decisions,[194] a judge may not base a defendant's sentence on the general deterrence of other criminals.[195] In *Commonwealth v. Howard,*[196] the appeals court addressed the issue of "whether it is permissible to [use sentencing to] target a message to residents of a particular town for the object of deterrence."[197] The defendant in *Howard* was convicted of forcible rape of a child and sentenced to a prison term of eight to twelve years.[198] On appeal, he argued that the sentencing judge had improperly attempted to use defendant's sentence as a method of general deterrence to other criminals.[199] Because Massachusetts had not yet addressed this issue, the court looked to other jurisdictions for guidance,[200] ultimately finding it inappropriate to use a sentence as a means of

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[190] *Id.* at 695.

[191] *Id.*

[192] *Id.*

[193] *Burke*, 392 Mass. at 695.

[194] *See* Commonwealth v. Power, 420 Mass. 410, 414 (1995) (holding "In general, when imposing a sentence, the judge should consider several goals: punishment, deterrence, protection of the public, and rehabilitation").

[195] *See* BLUMENSON, *supra* note 1, at § 39.1G; *see also* Commonwealth v. Howard, 42 Mass. App. Ct. 322, 326-28 (1997).

[196] 42 Mass. App. Ct. 322 (1997).

[197] *Id.* at 327.

[198] *Id.* at 322-23.

[199] *Id.* at 326 (stating judge stated that "the nature of this rape ... for purpose of punishment *and deterrence* in the Athol area called for a sentence above the guidelines. The Athol area seems to have more than its share of child abuse cases and a large number of young shiftless men who have little or no regard for the personal or property rights of others") (emphasis added).

[200] *Id.* at 328 n.3 ("[W]here judge aggravated sentence to make example of defendant to other drug dealers, court stated, 'We do not believe ... that a trial judge should be allowed to use the sentencing process as a method of sending a personal philosophical or political message' ...") (quoting Beno v. State, 581 N,E.2d 922, 924 (Ind. 1991)), ("[W]here trial judge imposed harsh sentence declaring, 'I've determined that my sentence

achieving general deterrence.[201] The court reasoned that this would constitute punishing the defendant for the conduct of others or for conduct other than that for which the defendant was convicted; something a sentencing judge can not do.[202]

5. Inaccurate Information

A sentence based on misleading or inaccurate information must be vacated. The SJC has held that "[d]ue process would require resentencing if the sentencing judge had relied on information which was inaccurate or misleading."[203] In *Commonwealth v. Ferrara,*[204] the defendant was convicted in Superior Court of possession of heroin with intent to distribute, trafficking in cocaine and possession of a rifle without a firearm identification card, and was subsequently sentenced to twelve to fifteen years in state prison.[205] In addition to seeking reversal of his conviction on other grounds, the defendant argued that the judge relied on misinformation in determining his sentence, and as such his sentence should be vacated.[206] The prosecutor had recommended to the judge, during the defendant's sentencing hearing, that he be given a sentence of twelve to fifteen years.[207] The judge asked the prosecutor what effect such a sentence would actually have, and the prosecutor responded that the defendant would serve four years.[208] The judge then sentenced the defendant accordingly.[209] The prosecutor's statement to the judge that a twelve to fifteen year sentence would result in the defendant serving four years was incorrect, and it is for this reason that defendant sought to have his sentence vacated.[210] Finding it "unclear whether the misinformation influenced the sentence," the appeals court ruled that "[i]n fairness to the defendant, we conclude that the trial judge should have the opportunity to reconsider the sentence..."[211] Accordingly, the court remanded the case for resentencing.[212]

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is a sentence for you personally and a message to send out to the citizens of our state and county ...,' court stated that "message to community" was improper, though sentence affirmed on other grounds") (quoting State v. Richardson, 256 Kan. 69, 79 (1994)).

201 *Howard,* 42 Mass. App. Ct. at 327-28.

202 *Id.* at 328.

203 Commonwealth v. LeBlanc, 370 Mass. 217, 221 (1976).

204 31 Mass. App. Ct. 648 (1991).

205 *Id.* at 648-55.

206 *Id.* at 649.

207 *Id.* at 655.

208 *Id.*

209 *Id.*

210 *Id.* at 655.

211 *Id.* at 656.

212 *Id.*

6. Physical/Psychological Difficulties the Victim Suffered as a Result of Testifying in Court

In determining an appropriate sentence, a judge may not consider the impact on a victim of testifying in court.[213] In *Commonwealth v. Banker,*[214] resulting in a conviction of rape following trial, the appeals court upheld the defendant's convictions but vacated his sentences of concurrent terms of imprisonment, finding it improper that the sentencing judge may have considered the victim's suffering and depression resulting from testifying at trial, as opposed to from the crimes.[215] It was unclear from the transcript of the sentencing hearing whether the trial judge had taken the victim's post-trial depression into consideration when sentencing the defendant; therefore in the interests of justice, the appeals court felt it necessary to vacate the sentences and remand the matter for resentencing before another judge.[216] The court reasoned that a line exists between "punishing the defendant for trauma caused by the crime and punishing him for a consequence incidental to his claim of a constitutional right to have a jury decide his guilt.[217]

7. Sentence Not Imposing Committed Time

Finally, when imposing a sentence for a crime against a person, the penalty for which includes imprisonment, and the judge does not impose such a sentence, a judge must include in the record specific reasons for not imposing a sentence of imprisonment.[218] This record is public, not withstanding any general or special law to the contrary. [219]

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[213] *See* Commonwealth v. Banker, 21 Mass. App. Ct. 976, 978 (1986) (stating "If a defendant can suffer increased punishment for [claiming his constitutional right to a jury trial], almost every case will justify an added sentence because in almost every case the victim suffers some emotional disturbance by coming to court to testify").

[214] 21 Mass. App. Ct. 976 (1986).

[215] *Id.* at 978-79.

[216] *Id.* (holding "A judge may not punish a defendant for the exercise of his constitutional right to have his guilt decided after trial by a jury . . . [i]n fairness, we think that the sentencing phase of this case must be free of any suggestion of impropriety on the part of the judge. That purpose can only be satisfied by vacating the sentences and ordering resentencing. We also think that the appearance of fairness requires that resentencing take place before another judge").

[217] *Id.* at 978.

[218] *See* MASS. GEN. LAWS ch. 265, § 41 (providing in relevant part that "In sentencing a person for a violation of any provision of this chapter, the penalty for which includes imprisonment, a judge ... who does not impose such sentence of imprisonment shall include in the record of the case specific reasons for not imposing a sentence of imprisonment"). *See also* Commonwealth v. Renderos, 440 Mass. 422, 428 (2003) (holding where judge suspended defendants s incarceration, he entered findings pursuant to MASS. GEN. LAWS ch.

III. CONCLUSION

"Perhaps no single duty of a trial judge is more serious and more unpleasant than sentencing."[220] Similarly, "[a] trial court is faced with no more difficult task than imposing sentence . . . the heavy burden on the court is a reflection of the importance of the sentence to the public interest as well as to the defendant who is most directly affected."[221] I have attempted in this article to convey in practical terms the most important considerations facing a trial judge when sentencing a criminal defendant. This is certainly not an attempt to capture every facet of sentencing. For example, I have consciously chosen to leave out any discussion of the role of plea bargaining, the use of sentencing memoranda, the impact of recent Supreme Court decisions on sentencing guidelines, and the like. It is my hope that counsel and judges alike will find this discussion useful in understanding one of the most important areas of our justice system.

265, § 41, "that the defendant had no criminal record and that he was the sole support of his family, including a seriously ill child, to justify his decision not to sentence the defendant to a term of imprisonment").

[219] MASS. GEN. LAWS ch. 265, § 41.

[220] United States v. Campbell, 684 F.2d 141, 154 (D.C. Cir. 1982).

[221] United States v. Bryant, 442 F.2d 775, 777 (D.C. Cir. 1971).