CHAPTER 24

OCTOBER, 2009

Selective or Vindictive Treatment

Written by Stanley Z. Fisher (1st edition)
and Eric Blumenson (this revision) [*]

Table of Contents:

Cross-References:
Defects in the complaint or indictment, ch. 20
Pretrial conference, ch. 14
Pretrial motions generally, ch. 15

Prosecutors enjoy broad discretion to choose which offenders to prosecute and which crimes to charge.[1] On occasion this power is misused to prosecute individuals for arbitrary or discriminatory reasons or to retaliate against defendants who assert their legal rights. Responding respectively to these dangers, the prohibitions against selective and vindictive prosecution may support a motion to dismiss the charge (and where seizures have resulted, a motion to suppress [1.5]). However, both federal[2] and state[3]

[*] With thanks to Laura Miller for research assistance.

[1] *See generally* Shepard v. Attorney General, 409 Mass. 398, 401ff . (1991).

[1.5] Commonwealth v. Lora, 451 Mass 425 (2008) (a defendant may seek suppression of evidence via a motion to suppress if evidence was seized during stop that was the product of selective enforcement, and defendant can use statistical information to shift burden).

courts tend to construe these doctrines narrowly, making successful defense on either ground difficult.

§ 24.1 SELECTIVE PROSECUTION

A defendant may move for dismissal of a charge motivated by impermissible reasons. The rule on selective prosecution applied in state courts closely parallels the federal rule, which judges such claims by ordinary equal protection standards.[4] A court will presume that a prosecution is undertaken in good faith, without intent to discriminate and place the initial burden on the defendant of demonstrating selective enforcement.[5] To meet this burden, "the defendant must present evidence which raises at least a reasonable inference" of an equal protection violation.[6] This requires more

[2] *See* United States v. Armstrong, 517 U.S. 456 (1996), discussed *infra*, erecting sturdy obstacles to defense discovery in support of selective prosecution claims.

[3] *See* Commonwealth v. Smith, 40 Mass. App. Ct. 770, 775 (1996) ("it is . . . no small thing to relieve a person of responsibility for a crime for reasons distinct from and extraneous to the crime. Thus the claims [of selective and vindictive prosecution] rarely succeed or deserve to succeed."). But even if the court rejects a motion to dismiss on grounds of discriminatory enforcement, cross examination on the subject may still be proper. Commonwealth v. Palacios, 66 Mass App. Ct. 13 (2006)(racial profiling).

[4] Wayte v. United States, 470 U.S. 598, 608 (1985). *See also* Yick Wo. v. Hopkins, 118 U.S. 356 (1886). Under the federal test, to overcome the threshold presumption that the prosecutor acted in good faith for proper reasons, the defendant must show both a "discriminatory effect" and "discriminatory intent." He must do this by making a prima facie demonstration that (1) while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. United States v. Penagaricano-Soler, 911 F.2d 833, 837 (1st Cir. 1990) (quoting United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974)). To win an evidentiary hearing, the defendant must allege only "sufficient 'facts 1) tending to show that [he] has been selectively prosecuted, and b) raising a reasonable doubt about the propriety of the prosecution's purpose.' " *Penagaricano-Soler, supra,* 911 F.2d at 838, *quoted in* United States v. Mavroules, 819 F. Supp. 1109, 1123–27 (D. Mass. 1993) (defendant failed to make required showing that he was singled out because of his political party affiliation). However, a court may refuse to hold a hearing if the government presents "adequate countervailing reasons to refute" the claim, and persuades the court that the hearing "will not be fruitful." United States v. Goldberg, 105 F.3d 770, 776 (1st Cir. 1997). *See also* United States v. Graham 146 F.3d 6 (1st Cir. 1998) (although defendant may have presented prima facie case of selective prosecution for bank fraud, government refuted presumption by revealing factors that guided its exercise of discretion).

[5] Commonwealth v. Dane Entertainment Servs. (No. 2), 397 Mass. 201, 203 (1986) (defendant made no showing that other violators of obscenity law in that county had not been prosecuted); Commonwealth v. Franklin, 376 Mass. 885, 894 (1978).

[6] Dane v. Entertainment Servs. (No. 2), 397 Mass. 201 (1986). According to United States v. Armstrong, 517 U.S. 456, 468 (1996) the discovery standard is satisfied by a showing of "'some evidence' tending to show the existence of the essential elements of the defense." However, "A discriminatory effect which is severe enough can provide sufficient evidence of discriminatory purpose." United States v. Tuitt, 68 F.Supp.2d 4 , 10 (D.Mass. 1999).

than simple disparity of treatment vis-a-vis other offenders.[7] "The defendant must show that a broader class of persons than those prosecuted has violated the law, that failure to prosecute was either consistent or deliberate, and that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex."[8] Once the defendant has met his initial burden in raising a reasonable inference of improper discrimination, the defendant is entitled to discovery,[9] and the Commonwealth must rebut that inference or the complaint or indictment will be dismissed.[10] To obtain a dismissal, the defendant must provide "clear evidence" that the Government's enforcement technique "had a discriminatory effect and that it was motivated by a

[7] *See* Commonwealth v. Hooks, 375 Mass. 284 (1978) (claimed unequal treatment relative to codefendants).

[8] United States v. Lewis, 517 F.3d 20 (2008) (citations omitted) ("a similarly situated offender is one outside the protected class who has committed roughly the same crime under roughly the same circumstances but against whom the law has not been enforced"); Commonwealth v. Hooks, 375 Mass. 284 (1978) (citations omitted). Discrimination based on political belief or affiliation is also impermissible. United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972). In addition, in Commonwealth v. Leo, 379 Mass. 34, 39 (1979), the S.J.C. left open the possibility that "general arbitrariness" unrelated to group membership might suffice. *But see* Commonwealth v. Smith, 40 Mass. App. Ct. 770, 774 (1996) (even if prison officials generally failed to notify district attorney when inmates were found carrying knives in violation of felony statute, and referred defendant for prosecution because he had won a suit against the Department of Correction, claim fails because referral was not based on "impermissible classification such as race, religion, or sex"); City of Cambridge v. Phillips, 415 Mass. 126 (1993) (upholding standardless police discretion to warn or cite motorist where no showing of discriminatory or arbitrary basis for decision).

[9] Commonwealth v. Bernardo, 453 Mass. 158 (2009) (defendant must make a threshold showing of relevance to obtain discovery regarding a selective prosecution claim). *But see* United States v. Armstrong, 517 U.S. 456 (1996) (in absence of credible evidence that the federal government did not prosecute similarly situated nonblack defendants for crack offenses, District Court erred in ordering discovery); Commonwealth v. Betances, 451 Mass. 457 (2008)(although officer's traffic stop reports may turn out to be "materially relevant" or "potentially exculpatory," they are not subject to automatic discovery rule but are only obtainable once defendant has made the necessary showing); United States v. Tuitt, 68 F.Supp.2d 4, 16 (D. Mass. 1999) (*Armstrong* standard met by presentation of data showing that no whites were prosecuted in federal court for crack cocaine offenses, while similarly situated whites were prosecuted in state court; in light of government's failure "to identify a policy or practice which accounts for the federal prosecution of blacks only in the time period at issue," substantial discovery ordered). *Armstrong* has been strongly criticized, *see, e.g.*, McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73. CHI.-KENT L. REV. 605 (1998).

[10] Commonwealth v. Franklin, 376 Mass. 885, 895 (1978) ("At that point, and where it appears that the government is in ready possession of the facts, it is not unreasonable to require the government to come forward with evidence and to make its records and evidence available"); Commonwealth v. King, 374 Mass. 5, 22 (1977); Commonwealth v. LaFaso, 49 Mass. App. Ct. 179 (2000) (affirming dismissal of complaints for common night walking because Commonwealth failed to rebut inference of selective prosecution based on sex). *Compare* Commonwealth v. Archer, 49 Mass. App. Ct. 185 (2000) (inference rebutted by evidence that Chelsea police developed a policy for enforcing sanctions against "johns," and had arrested men in "john stings"). *But see* United States v. Armstrong, 517 U.S. 456 (1996) (reserving decision on whether dismissal is the proper remedy for racially selective prosecution).

discriminatory purpose."[10.5] "To show discriminatory effect, 'the claimant must show that similarly situated individuals of a different race [or religion, etc.] were not prosecuted.'" [10.10] "To prove discriminatory intent, a defendant must show that the Government pursued its course for the forbidden reason; that is, it 'selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[10.15]

Selective prosecution claims are decided under the Fourteenth Amendment to the U.S. Constitution and articles 1 and 10 of the Massachusetts Constitution Declaration of Rights.[11] Because only *improper* discrimination is prohibited, prosecutors still have great discretion in deciding which case to prosecute.[12] At least in the area of selective prosecution involving possible sex discrimination, however, the state constitution affords additional protection beyond that found in the federal constitution because its equal rights amendment[13] requires "strict judicial scrutiny" of such practices.[14]

Although selective enforcement claims usually focus on improper actions by prosecutors, the identical analysis applies to discriminatory exercise of discretion by police or other public officials.[15]

[10.5] United States v. Daniels, 142 F.Supp.2d 140, 143 (2001), citing Wayte v. United States, 470 U.S. 598, 608 (1985).

[10.10] United States v. Daniels, 142 F.Supp.2d 140, 143-44 (2001) (black and Hispanic crack defendants, prosecuted in federal court, did not show "discriminatory effect" where failed to show that white crack defendants, prosecuted in state courts, resembled them in terms of amounts of crack involved, criminal histories, and propensity for violence) *citing* United States v. Armstrong, 517 U.S. 456 (1996).

[10.15] United States v. Daniels, 142 F.Supp.2d 140, 143 (2001) (black and Hispanic crack defendants, prosecuted in federal court, failed to show clear evidence of "discriminatory purpose" where government targeted predominantly black neighborhood for enforcement, but government justified targeting by reference to high incidence of crack-related activity and violence in that neighborhood), citing Wayte, 470 U.S. at 608.

[11] *See* Commonwealth v. Franklin Fruit Co., 388 Mass. 228, 229-30 (1983); Commonwealth v. Lora, 451 Mass 425 (2008).

[12] United States v. Peterson, 233 F.3d 101, 105 (1st Cir. 2000) (legitimate for prosecutors to select more culpable of drug codefendants, both convicted in state court, for subsequent prosecution in federal court); Commonwealth v. Latimore, 423 Mass. 129, 136–37 (1996) (deference to wishes of victim's family is permissible motive for prosecutor's refusal to accept plea offer); City of Cambridge v. Phillips, 415 Mass. 126 (1993); Commonwealth v. Franklin, 376 Mass. 885, 894 (1978).

[13] Amendments to the Constitution of the Commonwealth, art. 106, *amending* Mass. Const. Declaration of Rights art. 1.

[14] Commonwealth v. Bernardo, 453 Mass. 158 (2009)(granting discovery motion regarding male juvenile's selective enforcement claim for charges stemming from consensual sexual encounters with female juveniles who were not charged); Commonwealth v. LaFaso, 49 Mass. App. Ct. 179 (2000) (court upholds dismissal of complaints charging common night walker; unrebutted showing of police practice to arrest suspected female prostitutes but not male customers); Commonwealth v. An Unnamed Defendant, 22 Mass. App. Ct. 230, 235 (1986) (same).

[15] For discussion of constitutional limits on police discretion to invoke the criminal process *see* City of Cambridge v. Phillips, 415 Mass. 126 (1993) (applying same equal protection standards to exercises of police and prosecutorial discretion). *See also* Commonwealth v. LaFaso, 49 Mass. App. Ct. 179 (2000) (affirming dismissal of complaints for common night walking where police neither arrested male customers nor made any effort to

§ 24.2 VINDICTIVE PROSECUTION

24.2A. GENERALLY

Neither the prosecutor nor the judge may retaliate against a defendant for exercising constitutional or statutory rights.[16] This Fourteenth Amendment due process bar against prosecutorial and judicial vindictiveness has been interpreted narrowly by the U.S. Supreme Court and the Massachusetts courts, and challenges on those grounds rarely succeed. But at least two defendants whose vindictiveness claims were rejected by the Supreme Judicial Court afterwards succeeded on federal habeas corpus claims.[17] And the Supreme Judicial Court has adopted a common law principle barring retaliation for appealing that expands the federal due process protection.[18]

The Fourteenth Amendment protects not only against "actual" vindictiveness (e.g., purposely punishing the defendant for appealing), but also against penalties that create the appearance of retaliatory motivation, which if permitted might deter defendants from exercising their rights.[19] This restriction is particularly significant for defendants who appeal or refuse plea offers.

§ 24.2B. RETALIATION FOR APPEALING

To ensure that vindictiveness plays no part in the resentencing of a defendant following a successful appeal, the Supreme Court in *North Carolina v. Pearce*[20] established a rebuttable presumption of vindictiveness in cases of increased sentences. To rebut the presumption the judge must state objective reasons[21] on the record to

---

investigate or obtain additional evidence to support the prosecution of johns); Commonwealth v. Smith, 40 Mass. App. Ct. 770, 774 & n.5 (1996) (equal protection analysis of claim that illicit bias led prison officials to refer disciplinary matter for criminal prosecution).

[16] Commonwealth v. Latimore, 423 Mass. 129, 136 (1996). *See also* Commonwealth v. Smith, 40 Mass. App. Ct. 770, 774 (1996) (claimed retaliation against inmate for successful suit against Department of Corrections); *See also* United States v. Dwyer 287 F.Supp.2d 82 (2003); United States v. Cafiero, 292 F.Supp.2d 242 (2003); United States v. Bucci 468 F.Supp.2d 251 (2006).

[17] Mele v. Fitchburg Dist. Court, 696 F. Supp. 766 (D. Mass. 1988), discussed *infra;* Lovett v. Butterworth, 610 F.2d 1002 (1st Cir. 1979).

[18] Commonwealth v. Hyatt, 419 Mass. 815 (1995), discussed *infra*.

[19] North Carolina v. Pearce, 395 U.s. 711 (1969) (presumption of vindictiveness when defendant who successfully appealed an assault conviction was retried and given higher sentence than before). *Compare* Commonwealth v. Smith, 40 Mass. App. Ct. 770, 774 (1996) (no presumption applies where evidence of innocent motivation for government action; decision to refer defendant-inmate for criminal prosecution, after he was found carrying knife, could have been based on his flight to avoid detection, rather than retaliation for his successful suit against D.O.C.).

[20] 395 U.S. 711 (1969).

[21] *Pearce* held that the reasons must relate to "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." North Carolina v. Pearce, 395 U.S. 711, 726 (1969). But subsequent cases have eroded this requirement. *See, e.g.,* Texas v. McCullough, 475 U.S. 134, 141 et seq. (1986) (presumption overcome by new information regarding credibility of defense witnesses and defendant's release from prison only

justify the higher sentence. Although *Pearce* originally seemed to require justifying reasons in all cases of increased punishment on appeal, the Supreme Court has confined the presumption to cases where the increased punishment was imposed under circumstances that pose a "realistic likelihood of 'vindictiveness.' "[22] For example, in *Texas v. McCullough*, the Supreme Court refused to apply the presumption to a harsher sentence imposed by a different sentencer.[23] Based on state common law principles, the S.J.C. rule gives broader protection:

> [W]hen a defendant is again convicted of a crime . . . the second sentencing judge may impose a harsher sentence . . . only if the judge's . . . reasons for doing so appear on the record and are based on information that was not before the first sentencing judge.[24]

This Rule is meant to protect defendants against three evils: sentencing disparities that occur "for no better reason than a change in the identity of the sentencing judge," the possibility of retaliatory vindictiveness following reconviction, and the chilling effect of enhanced punishment on exercise of the right to appeal.[25]

The Supreme Court extended *Pearce* to prosecutorial actions in *Blackledge v. Perry*.[26] When Perry filed notice of appeal for trial de novo from a misdemeanor assault conviction, he was indicted and convicted on felony assault charges. Relying on *Pearce*, the Court reversed the felony conviction because of the "potential for vindictiveness."[27] However, as indicated below,[28] after the Court legitimated plea-bargaining in *Bordenkircher v. Hayes*[29] it retreated from the implications of *Perry*.

---

four months before committing the crime); Hurlburt v. Cunningham, 996 F.2d 1273 (1st Cir. 1993) (record shows sufficient nonvindictive reasons to rebut the presumption).

[22] Blackledge v. Perry, 417 U.S. 21, 27 (1974). Distinguishing *Pearce*, the Supreme Court has refused to presume vindictiveness in Alabama v. Smith, 490 U.S. 794 (1989) (increased sentence after trial following successful attack on guilty plea and sentence); Texas v. McCullough. 475 U.S. 134, 134 (1986) (increased sentence following successful motion for new trial); Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (increased sentence imposed by jury after retrial); Colten v. Kentucky, 407 U.S. 104 (1972) (increased sentence imposed by second court in two-tier trial system). *See also* United States v. Soto-Alvarez, 958 F.2d 473, 479–80 (1st Cir.) *cert. denied*, 506 U.S. 877 (1992), *following* United States v. Pimienta-Redondo, 874 F.2d 9 (1st Cir. 1989) (no presumption of vindictiveness where, on resentencing after successful appeal reversing one count of two-count drug conviction, judge increased penalty on surviving count to match total of original sentences on both counts), *cert. denied*, 493 U.S. 890 (1989).

[23] Texas v. McCullough, 475 U.S. 134, 140 (1986) (sentence after first trial imposed by jury, higher sentence after retrial imposed by judge).

[24] Commonwealth v. Hyatt, 419 Mass. 815, 823 (1995) (vacating harsher sentence following retrial, even though different judges presided over first and second trials, as record did not show that second judge relied upon information not before first judge). *Hyatt* is criticized in Comment, *Judicial Vindictiveness in the Resentencing of Criminal Defendants*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 529 (1997).

[25] *Id*. Contrast *McCullough, supra* at 143**,** discussed in *Hyatt, supra* at 821, making clear that the federal due process vindictiveness doctrine safeguards against neither sentencer disparity nor "chilling effect."

[26] 417 U.S. 21, 27 (1974).

[27] Blackledge v. Perry, 417 U.S. 21, 28 (1974).

[28] *See infra* § 24.2C.

[29] 434 U.S. 357 (1978).

In Massachusetts, cases involving alleged vindictiveness often arose in the context of the de novo system, which now governs only those cases originating prior to January 1, 1994. These cases describe several types of prohibited retaliation for the act of appealing. Bringing new charges (which could have been brought before) following appeal is presumptively vindictive.[30] And a district court judge may not increase a defendant's sentence in response to his appeal for trial de novo.[31] However, the Supreme Judicial Court[32] and the U.S. Supreme Court[33] have refused to apply the presumption of judicial vindictiveness to increased sentences at the second tier. Where a second-tier resentencing resulted from reversal of the first-tier conviction because of legal error rather than automatic de novo appeal, a federal district court found *Pearce's* presumption of vindictiveness applicable[34] but this was reversed[35] based on a Supreme Court case holding *Pearce* inapplicable where the first sentencing followed a plea and the second sentencing a trial.[36]

The vindictiveness doctrine also bars a sentencing court from punishing a defendant more severely for one crime on the assumption that the defendant's pending appeals in other cases will result in reduction of the original sentences.[37]

§ 24.2C. RETALIATION FOR EXERCISING RIGHT TO TRIAL

The Supreme Court has refused to presume vindictiveness when a prosecutor filed higher charges after the defendant claimed a jury trial.[38] Defendant's claim of a

[30] Lovett v. Butterworth, 610 F.2d 1002 (1st Cir. 1979) (indictment for breaking and entering a dwelling, after defendant appealed for trial de novo from conviction on erroneously charged lesser crime, posed realistic likelihood of vindictiveness). *Compare* United States v. Lanoue, 137 F.3d 656 (1st Cir. 1998) (prosecutor's reinstatement of dismissed charge following defendant's successful appeal of conviction and sentence, and his refusal to plead guilty to reversed counts, did not raise presumption of vindictiveness; even if it did, presumption rebutted by government explanation that new evidence was available).

[31] G.L. c. 279, § 1A.

[32] *See* Commonwealth v. Morse, 402 Mass. 735, 738–40 (1988) (not vindictive for de novo trial judge to increase defendant's sentence despite acquittal of three of four charges, and veiled threat of increased punishment at close of Commonwealth's case); Mann v. Commonwealth, 359 Mass. 661 (1971). *Similarly,* Gavin v. Commonwealth, 367 Mass. 331 (1975), *and* Walsh v. Commonwealth, 358 Mass. 193 (1970), *upheld in* Walsh v. Picard, 446 F.2d 1209 (1st Cir. 1971), permit sentence increases without reasons in Appellate Division reviews under G.L. c. 278, §§ 28A–28D.

[33] Colten v. Kentucky, 407 U.S. 104, 116–17 (1972).

[34] Mele v. Fitchburg Dist. Court, 696 F. Supp. 766 (D. Mass. 1988).

[35] Mele v. Fitchburg Dist. Court, 884 F.2d 5 (1st Cir. 1989).

[36] Under Alabama v. Smith, 490 U.S. 794 (1989), *Pearce's* presumption of vindictiveness is inapplicable in this situation.

[37] McHoul v. Commonwealth, 365 Mass. 465, 471–72 (1974) (improper to base longer sentence after retrial of 1962 charges on likelihood that same judge's sentences on 1966 charges would be reduced by pending appeal to the appellate division of the superior court).

[38] United States v. Goodwin, 457 U.S. 368 (1982). In Commonwealth v. McGovern, 397 Mass. 863 (1986), the S.J.C. stopped short of adopting the majority view in *Goodwin.* Finding no reasonable likelihood of vindictiveness in the indictment of a district court defendant who had claimed a first-instance jury trial, the S.J.C. distinguished *Goodwin.* According to the court, by avoiding the prospect of trials at both tiers of the district court the defendant reduced

right before any trial has occurred, it reasoned, does not invite the same risk of retaliation as a claim forcing a retrial.[39]

Nor does the vindictiveness doctrine apply to the normal plea bargaining process: prosecutorial threats of greater punishment for defendants who insist on the right to trial are considered legitimate.[40] However, excessive judicial involvement in plea bargaining may raise a vindictiveness claim. Mass. R. Crim. P. 12(c) requires disclosure of a plea agreement to the judge, and permits the judge to ratify or reject it. Although Rule 12 does not expressly bar the judge from participating in the negotiations,[41] Massachusetts judges are not supposed to do so.[42] A judge's involvement in the bargaining does not per se violate a defendant's rights,[43] but if the judge "strays beyond the limitations" of Rule 12,[44] for example, by pressuring the defendant to accept a plea, or by threatening to inflict greater punishment on the defendant if he goes to trial, the penalty after trial might be considered vindictive.[45] But

---

rather than increased the prosecutor's burden. Thus, the *Goodwin* dissent's concern that the enhanced charges were retaliatory is misplaced in the Massachusetts two-tier context.

[39] United States v. Goodwin, 457 U.S. 368, 383–84 (1982). *See also* United States v. Stokes, 124 F.3d 39, 45 (1st Cir. 1997) (presumption not triggered by decision to bring federal charges based on same conduct prosecuted in state court, where decision taken in order to obtain longer prison sentence). Commonwealth v. Johnson, 406 Mass. 533, 536–39 (1990) (where defendant was indicted for breaking and entering but pleaded guilty to district court complaint for same offense, which had not been dismissed, not presumptively vindictive to bring new indictment for possession of burglarious tools); Commonwealth v. McGowan, 400 Mass. 385, 387 (1987) (prosecutor's conduct in seeking indictment after district court judge had dismissed charges for want of prosecution does not trigger presumption of vindictiveness) (dictum).

[40] Prosecutorial threats of increased charges or penalties in the "give and take" of plea bargaining are legitimate. Commonwealth v. Souza, 390 Mass. 813, 820–21 (1984); Commonwealth v. Tirrell, 382 Mass. 502, 508–10 (1981); Bordenkircher v. Hayes, 434 U.S. 357 (1978). *See* also Alabama v. Smith, 490 U.S. 794 (1989) (because, in part, prior sentence probably was lenient in response to guilty plea, *Pearce* presumption of vindictiveness does not apply to increased sentence after trial following defendant's successful attack on plea). Nor does harsher sentencing of defendants convicted after trial than of similarly situated codefendants who pleaded guilty, by itself, trigger a presumption of vindictiveness. *See, e.g.*, United States v. Mena-Robles, 4 F.3d 1026, 1037 (1st Cir. 1993), *cert. denied,* 114 S. Ct. 1550 (1994).

[41] *Compare* Fed. R. Crim. P. 11(e)(1).

[42] In Massachusetts, participation by a trial judge in plea bargaining is discouraged. Commonwealth v. Ravenell, 415 Mass. 191, 193 & n.1 (1993) (quoting Commonwealth v. Johnson, 27 Mass. App. Ct. 746, 750–51 (1989), *habeas corpus denied sub nom.* Johnson v. Vose, 927 F.2d 10 (1st Cir. 1991)) (citing Commonwealth v. Damiano, 14 Mass. App. Ct. 615, 618–19 & n.7 (1982)). *See* Reporter's Notes to Mass. R. Crim. P. 12.

[43] Commonwealth v. Damiano, 14 Mass. App. Ct. 615, 618 n.6 (1982). The pleas in *Damiano* were entered prior to the effective date of Mass. R. Crim. P. 12.

[44] Commonwealth v. Damiano, 14 Mass. App. Ct. 615, 618 n.7 (1982).

[45] Commonwealth v. Johnson, 27 Mass. App. Ct. 746, 749–52 (1989) (concurrent nine-to-fifteen-year sentences not vindictive even though defendant had rejected judge's offer of concurrent six-to-nine-year sentences after close of evidence and final arguments, where no threats, pressure or other indicia of vindictiveness). If the defendant responds to the alleged threat by pleading guilty, then instead of claiming vindictiveness he will attack the plea as "coerced." *See generally* Commonwealth v. Damiano, 14 Mass. App. Ct. 615, 618–23 (1982); *infra* §§ 37.4C and 37.5B (coercive tactics by judge or prosecutor in plea bargaining); 2 CRIMINAL LAW ADVOCACY § 8.04(1) (D. Rossman ed. 1982).

even a judge's explicit pretrial statement that she will impose a heavier sentence after trial than on a plea will not trigger the presumption of vindictiveness if her statement is as consistent with "an appropriate promise of leniency as consideration for guilty pleas as with an intention to punish the defendant for electing to proceed to trial."[46]

[46] In Commonwealth v. Ravenell, 415 Mass. 191, 194–95 (1993) (citing Commonwealth v. Johnson, 27 Mass. App. Ct. 746, 750–51 (1989), *habeas corpus denied sub nom.* Johnson v. Vose, 927 F.2d 10 (1st Cir. 1991)), the S.J.C. found neither actual nor presumptive vindictiveness in a sentence of 12–20 years, after the judge allegedly said pretrial that she would impose 8–10 years on a guilty plea and 12–20 after trial. Absent evidence that the judge expressed an interest in avoiding trial or was displeased with the defendant's decision to go to trial, no presumption of vindictiveness arises.