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Thinking Inside the Box: Placing Form Over Function in the Application of the Statutory Sentencing Procedure in State of Maine v. Eugene Downs

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THINKING INSIDE THE BOX: PLACING FORM
OVER FUNCTION IN THE APPLICATION OF THE
STATUTORY SENTENCING PROCEDURE IN *STATE
OF MAINE v. EUGENE DOWNS*

Matthew E. Lane

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THINKING INSIDE THE BOX: PLACING FORM OVER FUNCTION IN THE APPLICATION OF THE STATUTORY SENTENCING PROCEDURE IN *STATE OF MAINE v. EUGENE DOWNS*

*Matthew E. Lane**

I. IDENTIFYING THE PROBLEM

Consider the following hypothetical: You are a Maine Superior Court justice sitting in Waldo County. As you don your robe and proceed to the court room, you are keenly aware of your responsibility today. Today you will be presiding over a sentencing hearing. A week ago, you presided over a Rule 11¹ proceeding in which Jonathan Lowell² entered an open guilty plea³ to eighteen counts of burglary⁴ and theft,⁵ and one count of arson.⁶ Over the course of five months, Mr. Lowell had engaged in what can only be described as a crime spree. The counts break down as follows: six counts of Class B burglary of a dwelling place or residence;⁷ three counts of Class C burglary of a business;⁸ one count of Class B theft of a firearm,⁹ one count of Class B theft;¹⁰ five counts of Class C theft;¹¹ two counts of Class D theft;¹² and one count of Class A arson.¹³ Mr. Lowell has no prior criminal record.

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1. ME. R. CRIM. P. 11 (Pleas; Acceptance of a Plea to a Charge of a Class C or Higher Crime).

2. This name is a creation of the author. It is not intended as a representation of any person living, or deceased.

3. An *open plea*, also called a *blind plea*, is a guilty plea made “without the promise of a concession from either the judge or the prosecutor.” BLACK’S LAW DICTIONARY 538 (3d Pocket ed. 1996).

4. ME. REV. STAT. ANN. tit. 17-A, § 401(1)(A) (2006) (“A person is guilty of burglary if . . . [t]he person enters or surreptitiously remains in a structure knowing that that person is not licensed or privileged to do so, with the intent to commit a crime therein.”).

5. *Id.* § 353(1)(A) (“A person is guilty of theft if . . . [t]he person obtains or exercises unauthorized control over the property of another with intent to deprive the other person of the property.”).

6. *Id.* § 802(1)(A) (“A person is guilty of arson if he starts, causes, or maintains a fire or explosion . . . [o]n the property of another with the intent to damage or destroy property thereon . . .”). Jonathan Lowell burglarized a machine shop where he previously worked. Upon leaving the shop, he set fire to his former boss’s office.

7. *Id.* § 401(1)(B)(4) (stating that if the violation is “against a structure that is a dwelling place,” the violation “is a Class B crime.”).

8. *Id.* § 401(1)(A) (“Violation of this paragraph is a Class C crime . . .”).

9. *Id.* § 353(1)(B)(2) (if the property stolen is “a firearm or an explosive device,” the violation “is a Class B crime.”).

10. *Id.* § 353(1)(B)(1) (if the property stolen is valued at “more than \$10,000,” the violation “is a Class B crime.”).

11. *Id.* § 353(1)(B)(4) (if the property stolen is valued at “more than \$1,000 but not more than \$10,000,” the violation “is a Class C crime.”).

12. *Id.* § 353(1)(B)(5) (if the property stolen is valued at “more than \$500 but not more than \$1,000,” the violation “is a Class D crime.”).

13. *Id.* § 802(3) (“Arson is a Class A crime.”).

In the week leading up to the sentencing hearing, you have been burdened with the task of sorting through the various offenses and attempting to impose a sentence that meets the purposes of criminal sentencing found in the Maine Criminal Code.¹⁴ You have sought to impose a sentence that will balance the appropriate deterrent effect and the required restraint of Mr. Lowell in the interest of public safety¹⁵ with the goal of minimizing correctional experiences which might promote further criminality.¹⁶ Moreover, you want to promote general deterrence¹⁷ and uniformity of sentences¹⁸ while still imposing a differentiated sentence to facilitate equitable individualization of sentences.¹⁹ In addition, you must also ensure that the sentence does not diminish the gravity of the convicted criminal conduct²⁰ and at the same time encourage restitution whenever possible.²¹ Pursuant to Maine Rule of Criminal Procedure 32, if you impose a sentence of one year or more, you must set forth on the record the reasons for that sentence.²²

As you sift through possible prison terms and review the pre-sentence investigation report,²³ you examine your options in setting the final sentence for

14. *See generally id.* § 1151 (2006). This statute describes the purposes of criminal sentencing as follows:

1. To prevent crime through the deterrent effect of sentences, the rehabilitation of convicted persons, and the restraint of convicted persons when required in the interest of public safety;
2. To encourage restitution in all cases in which the victim can be compensated and other purposes of sentencing can be appropriately served. [sic]
3. To minimize correctional experiences which serve to promote further criminality;
4. To give fair warning of the nature of the sentences that may be imposed on the conviction of a crime;
5. To eliminate inequalities in sentences that are unrelated to legitimate criminological goals;
6. To encourage differentiation among offenders with a view to a just individualization of sentences;
7. To promote the development of correctional programs which elicit the cooperation of convicted persons; and
8. To permit sentences that do not diminish the gravity of offenses, with reference to the factors, among others, of:
 - A. The age of the victim; and
 - B. The selection by the defendant of the person against whom the crime was committed or of the property that was damaged or otherwise affected by the crime because of the race, color, religion, sex, ancestry, national origin, physical or mental disability, sexual orientation or homelessness of that person or of the owner or occupant of that property.

Id.

15. *Id.* § 1151(1).

16. *Id.* § 1151(3).

17. *See id.* § 1151(4).

18. *See id.* § 1151(5).

19. *Id.* § 1151(6).

20. *Id.* § 1151(8).

21. *Id.* § 1151(2).

22. ME. R. CRIM. P. 32(a)(3) (“If the court imposes a sentence of one year or more, it shall set forth on the record the reasons for the sentence.”).

23. *Id.* 32(c)(2) (requiring that “[t]he report . . . shall contain any prior criminal record of the defendant and such information on the defendant’s characteristics, the defendant’s financial condition, and the circumstances affecting the defendant’s behavior”).

nineteen serious offenses. In the interest of fairness and efficiency, you decide that it is appropriate to reach a sentence that considers the broader course of the offender's conduct. With this in mind, how will you articulate your sentencing calculation? The framework of the analysis has been supplied by the Legislature.²⁴ Title 17-A, section 1252-C of the Maine Revised Statutes was enacted in 1995, when the 117th Maine Legislature sought to make the Law Court's articulated sentencing procedure in *State v. Hewey*²⁵ part of the criminal code. Pursuant to title 17-A, section 1354, subsection 2, the Criminal Law Advisory Commission (CLAC)²⁶ submitted to the Legislature a bill that made the Law Court's process part of the criminal code.²⁷ As a result, *An Act to Include the Law Court's Imprisonment Sentencing Procedure in the Maine Criminal Code* was enacted.²⁸ The Legislature took pains to make sure the codification was simply a statutory replication of the procedure in *Hewey* and nothing more.²⁹ In the twelve years since its enactment, the statute has not been amended.³⁰ The statute currently reads as follows:

§ 1252-C. SENTENCING PROCEDURE RELATING TO THE IMPOSITION OF IMPRISONMENT.

In imposing a sentence alternative pursuant to section 1152 that includes a term of imprisonment relative to murder, a Class A, Class B or Class C crime, in setting the appropriate length of that term as well as any unsuspended portion of that term accompanied by a period of probation, the court shall employ the following 3-step process:

1. The court shall first determine the basic term of imprisonment by considering the particular nature and seriousness of the offense as committed by the offender.
2. The court shall next determine the maximum period of imprisonment to be imposed by considering all other relevant sentencing factors, both aggravating and mitigating, appropriate to that case. These sentencing factors include, but are not limited to, the character of the offender and the offender's criminal history, the effect of the offense on the victim and the protection of the public interest.

24. See ME. REV. STAT. ANN. tit. 17-A, § 1252-C (2006).

25. 622 A.2d 1151, 1154-55 (Me. 1993).

26. The Criminal Law Advisory Commission exists "for the purpose of conducting a continuing study of the criminal law in Maine." ME. REV. STAT. ANN. tit. 17-A, § 1351 (2006). It is a nine-member panel appointed by the Attorney General by virtue of their knowledge and experience in the criminal law. *Id.* § 1352(1).

27. ME. REV. STAT. ANN. tit. 17-A, § 1354(2) (2006) ("The commission shall submit to the Legislature, at the start of each session, such changes in the criminal laws and in related provisions as the commission may deem appropriate.").

28. P.L. 1995, ch. 69, §1; see also L.D. 542, Statement of Fact (117th Me. Legis. 1995) ("This bill enacts into positive law the Law Court's 3-step sentencing procedure for felonies, established in *State v. Hewey*, 622 A.2d 1151, 1154-55 (Me. 1993), when imposing a sentence alternative involving a term of imprisonment.").

29. See L.D. 542, Comm. Amend. A, Statement of Fact (117th Me. Legis. 1995). The final sentence of the Legislature's original codification of *Hewey* step three read: "The [sentencing] court shall specify the place of imprisonment or commitment to the Department of Corrections." L.D. 542 (117th Me. Legis. 1995). This sentence was stricken from the statute by the Criminal Justice and Public Safety Committee because "it [was] not part of the 3-step sentencing procedure and [was] only misleading." L.D. 542, Comm. Amend. A, Statement of Fact (117th Me. Legis. 1995).

30. Compare P.L. 1995, ch. 70, §1 (enacting section 1252-C), with ME. REV. STAT. ANN. tit. 17-A, § 1252-C (2006).

3. The court shall finally determine what portion, if any, of the maximum period of imprisonment should be suspended and, if a suspension order is to be entered, determine the appropriate period of probation to accompany that suspension.³¹

In *State v. Hewey*, the Maine Supreme Judicial Court found that the sentencing court erred in imposing a sentence that exceeded the maximum applicable period of incarceration for a Class A crime and accordingly vacated the sentence.³² Perhaps more importantly, the Law Court used the case as an “opportunity for clarification of [its] review of an appeal from a sentence imposed by the trial court.”³³ A unanimous court sought to clear up some inconsistencies in previous decisions regarding “the terminology used to define each of the three steps” of the sentencing process by better describing the procedure “by which the significant purposes [of criminal sanction] and relevant factors may be articulated by the trial court in an individual case.”³⁴ Moreover, the court opined that the three steps were “necessary . . . to achieve a greater uniformity in the sentencing process and to enable [the Law Court] to apply the correct standard of review to each of those steps.”³⁵ The court’s decision in *Hewey* was an attempt to help sentencing judges more clearly articulate their sentencing rationale which would allow for more efficient review.³⁶ The resulting process is commonly referred to as the *Hewey* analysis.³⁷

In applying the *Hewey* analysis to Jonathan Lowell’s case, you must first determine the “basic period of incarceration.”³⁸ The basic period of incarceration is calculated “solely by reference to the offender’s *criminal conduct* in committing the crime, that is, by ‘considering the particular nature of the offense without regard to the circumstances of the offender.’”³⁹ Law Court precedent has illuminated that you should place the criminal conduct “on a continuum for each type of offense ‘to determine which act justifies the imposition of the most extreme punishment.’”⁴⁰ For

31. ME. REV. STAT. ANN. tit. 17-A, § 1252-C(1)-(3) (2006).

32. *Hewey*, 622 A.2d at 1155. The court overturned the sentence because the judge had miscalculated the maximum period of incarceration. The “original” sentence limit for a Class A offense was twenty years, while the “extended” limit, at the time, was forty. *Id.* (citing ME. REV. STAT. ANN. tit. 17-A, § 1252(2)(A) (1983 & Supp. 1992)). In the sentencing of Class A offenses, the extended period of incarceration is reserved for the “most heinous and violent crimes committed against a person.” *State v. Lewis*, 590 A.2d 149, 151 (Me. 1991). Because the court found that Hewey’s crime could not be viewed as one of the most heinous and violent crimes against a person, it was an error in principle for the sentencing judge to impose on Hewey a maximum period of incarceration of any amount over twenty years. *Hewey*, 622 A.2d at 1155.

33. *Hewey*, 622 A.2d at 1154.

34. *Id.* The three part procedure was developed in prior case law. *See, e.g.*, *State v. Weir*, 600 A.2d 1105, 1106 (Me. 1991) (citing *Lewis*, 590 A.2d at 150, for the proposition that the basic sentence should be set “by considering the particular nature and seriousness of the offense, without regard to the circumstances of the offender”).

35. *Hewey*, 622 A.2d at 1154.

36. *See id.* at 1155.

37. *State v. Sweet*, 2000 ME 14, ¶ 11, 745 A.2d 368, 372.

38. *Hewey*, 622 A.2d at 1154.

39. *Id.* (quoting *Weir*, 600 A.2d at 1106); *see also* ME. REV. STAT. ANN. tit. 17-A, § 1252-C(1) (2006) (codifying the first step of the *Hewey* analysis).

40. *State v. Corbett*, 618 A.2d 222, 224 (Me. 1992) (quoting *State v. St. Pierre*, 584 A.2d 618, 621 (Me. 1990)).

example, in *State v. Corbett*, the Law Court vacated the sentence of a drug runner⁴¹ because, without minimizing the seriousness of the crimes, “in the hierarchy of drug trafficking, that includes sales by street runners, dealers, wholesalers, and international cartels, the activity of a runner, particularly one convicted of selling only a small quantity of narcotics, must be considered to be a relatively less serious offense.”⁴²

Next, you are required to set the maximum period of incarceration.⁴³ In doing so, you should consider the factors particular to Mr. Lowell’s circumstance in order that you “may appropriately individualize [his] sentence.”⁴⁴ Here, you are asked to evaluate the various aggravating and mitigating factors “peculiar to that offender.”⁴⁵ Finally, as a third step in the process, you may suspend a portion of the period of maximum incarceration if you determine that society will “better be protected by affording a period of supervised probation.”⁴⁶ Thus, the maximum period of incarceration and the stated portion of that period that is suspended would be, when implementing the so-called *Hewey* analysis, the final sentence you impose as the sentencing court.⁴⁷

In applying this framework to Jonathan Lowell’s many offenses, you are immediately confronted with an awkward dilemma. What factors can you consider when placing Lowell’s “criminal conduct” on a scale of seriousness? A rigid reading of section 1252-C might lead you to understand that you have to set a basic sentence for all nineteen counts. Perhaps you could determine the basic sentence for groups of crimes, thereby limiting your calculations. However, Lowell’s counts are most readily broken up into no less than six different groups.⁴⁸ Even if you selected a representative crime from each group, you would still need to determine the basic sentence for each. You would need to place on a seriousness continuum, one count each of: arson; theft of over \$500; theft of over \$1,000; theft of a firearm, theft of over \$10,000; burglary of a residence; and burglary of a business. Still, based on Mr. Lowell’s specific circumstances, any one crime in a group might be more serious than the next. Then a another thought enters your deliberations: if your goal is appropriately addressing the broader course of criminal conduct, perhaps each offense is made more serious by the conviction of multiple crimes in the crime spree. Can you consider the spree itself in evaluating the “criminal conduct”?

41. *Id.* at 225. Corbett was convicted of aggravated trafficking in scheduled drugs, which is a Class A crime. ME. REV. STAT. ANN. tit. 17-A, §§ 1103, 1105-A (2006).

42. *Corbett*, 618 A.2d at 224.

43. *Hewey*, 622 A.2d at 1154.

44. *Id.*; see also ME. REV. STAT. ANN. tit. 17-A, § 1151(6) (2006).

45. *Hewey*, 622 A.2d at 1154. Section 1252-C, subsection 2, enumerates a non-exclusive list of factors including the “offender’s criminal history.” ME. REV. STAT. ANN. tit. 17-A, § 1252-C(2) (2006). Returning to *Corbett* as an example, the court found that the defendant’s involvement in the Lewiston drug trade for many years was an aggravating factor “properly considered only after the basic sentence [was] determined.” *Corbett*, 618 A.2d at 224 n.2.

46. *Hewey*, 622 A.2d at 1155.

47. *Id.*

48. The groups would most readily be determined by offense and class. Thus, the six groups would be: (1) Class A arson; (2) Class B burglary; (3) Class C burglary; (4) Class B theft; (5) Class C theft; and (6) Class D theft.

Your analysis here is critical because of the standards of review clearly articulated by the Law Court in *Hewey*.⁴⁹ In the Law Court's sentence review, different standards of review are applied depending on which step of the *Hewey* analysis is at issue.⁵⁰ The first step in the process is reviewed for misapplication of principle.⁵¹ This standard is less deferential than the abuse of discretion standard applied for the latter two. Because the trial court is in a superior position to evaluate the factors "peculiar to the particular offender," the reviewing court grants greater deference to the weight and effect given these individualized factors by the sentencing court in determining the maximum period of incarceration and the amount that shall, if any, be suspended.⁵² However, the difficulty lies in defining the "principle" to be applied. Placement of the offense on a continuum of seriousness seems no less subjective than determining to what degree an aggravating factor is outweighed by a mitigating one. The Law Court gave the following explanation in seeking to provide guidance to the sentencing courts:

Because of the two different standards applicable in our review of the sentencing process, the desirability of a clear articulation by the trial court of its compliance with the three-step procedure becomes apparent. This articulation will aid us not only in distinguishing and applying the appropriate standard of appellate review . . . but it will also facilitate a greater degree of uniformity in the sentencing process.⁵³

Considering the wrong factors during the first step of the analysis can easily lead to a reversible sentence, which may put you right back where you started on remand.

Cognizant that your sentence in this case should recognize the broader course of the defendant's criminal conduct, you decide not to rigidly apply section 1252-C and, in the interest of fairness and efficiency, take a broader approach. You explore sentencing Mr. Lowell for his crime spree as an aggregate course of criminal conduct that requires an overall sentence that will be sufficiently individualized while not excessive. Subsequent to the enactment of section 1252-C, the Law Court, in several decisions, approved an aggregated method of sentencing.⁵⁴ This process involves consecutive, high sentencing on a few counts (facilitated by consideration of the crime spree itself during the first step of the *Hewey* analysis) to achieve your overall

49. *Hewey*, 622 A.2d at 1155.

50. *See id.*

51. *Id.*; *see also* State v. Hallowell, 577 A.2d 778, 781 (Me. 1990) ("It is not enough that the members of this court might have passed a different sentence, rather it is only when a sentence appears to err in principle that we will alter it.").

52. *Hewey*, 622 A.2d at 1155.

53. *Id.*

54. *See* State v. Pfeil, 1998 ME 245, ¶ 15, 720 A.2d 573, 577 (in setting the basic period of incarceration in step one "[t]he multiplicity of the offenses is not an impermissible factor"); State v. Brown, 1998 ME 129, ¶¶ 4, 12, 712 A.2d 513, 515, 517 (affirming sentence of fifty-nine years comprised of consecutive terms of imprisonment for eight of thirty-three convicted counts of burglary, robbery, and theft); State v. Frechette, 645 A.2d 1128, 1129-30 (Me. 1994) (approved process where judge used one primary crime to meet incarceration objective, consecutive sentences to meet probation objective, and concurrent sentences for the remainder of the crimes; however, the total sentence of eighty years, all but eight years suspended, and twenty-four years of probation, when "considered in combination," was excessive).

sentencing objective and assigning concurrent sentences on the remainder.⁵⁵ In addition, other state courts have approved various aggregated approaches.⁵⁶

Now that you have settled on a framework, you attempt to set the sentence. At the sentencing hearing, pursuant to Rule 32, you provide your rationale. Looking at the crimes with which Jonathan Lowell is charged, the arson conviction seems the logical choice for the primary sentence. In light of the eighteen other crimes committed, you set the basic period of incarceration for the Class A arson at thirty years.⁵⁷ Next, you evaluate the aggravating and mitigating factors, which in this case, you determine results in no change and a maximum period of thirty years.⁵⁸ You then suspend all but twelve years of the sentence. For one count of Class B burglary, you set a basic period of incarceration of ten years and make no adjustments, setting a maximum period of ten years. You then suspend the entire sentence and impose it consecutively to the primary sentence. Each sentence carries a five year period of probation. This results in a total aggregate sentence of forty years, all but twelve years suspended, and ten years of probation. You set the sentences for the remaining seventeen counts at two-thirds the statutory maximum⁵⁹ and impose them concurrently to the primary sentence for the arson.⁶⁰ Finally you order \$15,000 in restitution based on your determination that Mr. Lowell will be capable, in the first nine years of his probation, of repaying this amount.⁶¹

In the interest of fairness and efficiency, you explain at the sentencing hearing that you have imposed the sentence by considering the broader course of Mr. Lowell's

55. See *State v. Downs*, 2007 ME 41, ¶ 31, 916 A.2d 210, 218 (Alexander, J., dissenting).

56. See *State v. Miranda*, 794 A.2d 506, 528 (Conn. 2002) (in sentencing for multiple offenses judges often impose individual sentences for each crime "merely as component parts or building blocks of a larger total punishment for the aggregate convictions"); see also *People v. Calderon*, 20 Cal.App.4th 82, 88 (Ct. App. 1993) ("At some point a judge *should* evaluate the sentence in the aggregate."); *Hall v. State*, 145 P.3d 605, 609 (Alaska 2006) (footnote omitted) ("When we review the composite sentence that a defendant has received for two or more criminal convictions, our duty is to assess whether the composite sentence is clearly mistaken, given the whole of the defendant's conduct and history.")

57. The maximum term of imprisonment that may be imposed for a Class A crime is thirty years. ME. REV. STAT. ANN. tit. 17-A, § 1252(2)(A) (2006). Considering the broader course of criminal conduct you have the flexibility to impose a high sentence for the arson in order to achieve your overall sentencing objective.

58. Perhaps the most important mitigating factor here would be the fact that Mr. Lowell has no prior criminal record. However, the effect on so many victims probably negates any benefit Mr. Lowell receives for having not been caught previously.

59. See ME. REV. STAT. ANN. tit. 17-A, § 1252(2) (2006).

60. Consecutive sentences must be constructed with careful consideration. The statute permitting consecutive and concurrent sentences reads in pertinent part:

3. A defendant may not be sentenced to consecutive terms for crimes arising out of the same criminal episode when:

.....

B. One crime consists only of a conspiracy, attempt, solicitation or other form of preparation to commit, or facilitation of, the other;

Id. § 1256(3)(B). Basically, consecutive sentences cannot be imposed for separate charges that arise out of the same incident. For example, in the case of Jonathan Lowell, if one of the thefts was facilitated by the Class B burglary (he broke in to the building *and* stole goods), the sentences for those crimes would need to be imposed concurrently.

61. See *id.* § 1151(2).

conduct. Rather than mechanically analyzing each offense pleaded to, you have chosen an aggregated approach in order to save time and more effectively meet your burden of achieving the goals of criminal punishment found in section 1151. You are satisfied that you have met this burden to the best of your human abilities. Predictably, Mr. Lowell appeals.

II. THE *STATE V. DOWNS* DECISION

In *State v. Downs*,⁶² Defendant Eugene Downs committed an extended string of burglaries and thefts.⁶³ With one or two accomplices, Downs burglarized several unoccupied seasonal camps and businesses from January 2002 through September 2004.⁶⁴ Some locations were targeted multiple times.⁶⁵ As a result of a law enforcement investigation, Downs was identified and eventually confessed and provided information to police in their continuing investigation.⁶⁶ On January 12, 2005, Eugene Downs was indicted by a Somerset County Grand Jury on thirty-eight counts of burglary and thirty-eight counts of theft.⁶⁷ At his Rule 11 proceeding,⁶⁸ Downs, in an open plea, pleaded guilty to all seventy-six counts.⁶⁹

On May 6, 2005, Justice Nancy Mills, sitting in the Maine Superior Court for Somerset County, imposed a sentence based, in part, on her application of the *Hewey* analysis to the circumstances of the offenses.⁷⁰ Downs was sentenced on Count 3, Class B burglary, to ten years in prison with all but six years suspended and four years of probation.⁷¹ On Count 11, Class B burglary, the court sentenced Downs to ten years, all suspended, and four years probation to run consecutively to the sentence for Count 3.⁷² On Count 40, Class B theft of a firearm, the court imposed a sentence of ten years, all suspended, and four years of probation to run consecutively to the sentence for Count 11.⁷³ All told, Downs was sentenced to a maximum period of incarceration totaling thirty years and an unsuspended period of six years. In addition,

62. 2004 ME 41, 916 A.2d 210.

63. *Id.* ¶ 2, 916 A.2d at 211.

64. *Id.*

65. *Id.*

66. *Id.*

67. Brief on Behalf of the State of Maine-Appellee at 1, *State v. Downs*, 2007 ME 41, 916 A.2d 210 (No. SPR-05-422) [hereinafter Brief for the State]. Downs was indicted on the following seventy-six counts: sixteen counts of burglary of a residence, Class B; two counts of theft of a firearm, Class B; one count of burglary of a motor vehicle, Class C; twenty-one counts of burglary, Class C; nine counts of theft, Class C; seven counts of theft, Class D; and twenty counts of theft, Class E. *Downs*, 2007 ME 41, ¶ 3 n.1, 916 A.2d at 211 n.1.

68. ME. R. CRIM. P. 11.

69. *Downs*, 2007 ME 41, ¶ 3, 916 A.2d at 211.

70. *Id.* ¶ 9, 916 A.2d at 213; *see also* Brief for Appellant at 4, *State v. Downs*, 2007 ME 41, 916 A.2d 210 (No. SPR-05-422).

71. *Downs*, 2007 ME 41, ¶ 4, 916 A.2d at 212.

72. *Id.*

73. *Id.* Superior Court Justice Nancy Mills imposed the following sentences on the remaining counts: Class B counts, six years to run concurrently with Count 3; Class C counts, five years all but two years suspended, to run concurrently with Count 3 and two years probation; Class D counts, nine months, concurrent with sentence imposed on Count 3; Class E counts, five months, concurrent with the sentence on Count 3. *Id.* at n.2.

he was ordered to pay \$57,172.66 in restitution within the first eleven years of the twelve year probationary period following his prison term.⁷⁴ Downs appealed the sentence to the Supreme Judicial Court of Maine, sitting as the Law Court.

On appeal, Downs contended that the sentencing court erred in its application of the *Hewey* analysis.⁷⁵ He argued that the sentencing judge failed to compare his conduct on a scale of seriousness against all the various means of committing burglary or to determine where it fell on that continuum.⁷⁶ Instead, the court immediately set the basic period at the statutory maximum: ten years.⁷⁷ Moreover, Downs contended that the court cited inappropriate factors in determining the basic sentence.⁷⁸ The court indicated that it was considering, *inter alia*, the “number of burglaries” and the “sheer amount of criminal activity” in determining that the basic period of incarceration should be ten years on the Class B offenses.⁷⁹ While Justice Mills had “no question about it . . . on the Class B offenses,”⁸⁰ Downs argued that, specifically, the number of burglaries and the extended time period over which these crimes occurred were impermissible factors in determining the basic period of incarceration.⁸¹ While Downs conceded that some of the factors considered in step one might be “appropriate for consideration as aggravating factors in the second step” of the *Hewey* analysis,⁸² he urged that there was “*nothing* particularly serious” about any of the crimes committed and, therefore, the court erred in not placing his crimes somewhere in the lower third of the continuum of seriousness for each offense.⁸³

Downs also argued that the court abused its discretion when weighing the aggravating and mitigating factors in step two because the court applied some factors that had been used in step one, thereby “unfairly consider[ing] some aggravating factors twice.”⁸⁴ Furthermore, he contended that the court imposed illegal consecutive sentences in violation of title 17-A, section 1256(3)(B).⁸⁵ Downs’s contention was that there were thirty-eight criminal episodes, each consisting of a burglary that facilitated the accompanying theft.⁸⁶ In the Brief for the Appellant, Attorney Jason Jabar explained the alleged error:

74. *Id.* ¶ 5, 916 A.2d at 212.

75. Brief for Appellant, *supra* note 70, at 6.

76. *Id.* at 7. In fact, Downs argued that the court could not have appropriately concluded that these burglaries were committed in the most serious manner of committing burglary. *Id.* at 8. The seasonal camps were deliberately chosen to avoid any risk of confrontation, yet the court, Downs argued “specifically refused to recognize that a break-in of a seasonal camp, known to be unoccupied, is of a less serious nature than a nighttime home invasion involving a violent or dangerous confrontation. *Id.*”

77. *Id.* at 7.

78. *Id.*

79. *Downs*, 2007 ME 41, ¶ 9, 916 A.2d at 213.

80. *Id.*

81. Brief for Appellant, *supra* note 70, at 7-8.

82. *Id.*

83. *Id.* at 9.

84. *Id.* Downs contended that the sentencing judge had inappropriately considered the fact that some victims were burglarized more than once when setting the basic period of incarceration, and then again when the maximum period was set. *Id.*

85. *Id.* at 11.

86. *Id.* at 12.

In this case, the offending sentences are for Count 39, Burglary (Class C) and for Count 40, Theft of a Firearm (Class B). The sentence for Count 39 was a sentence of five years, with all but two years suspended, and three years of probation. That sentence was made concurrent with Count 3. The sentence for Count 40 was a ten-year sentence, all suspended, with four years of probation, and that sentence was made *consecutive* to Count 3, which means it was made consecutive to Count 39. However, Count 39, the burglary was committed against a business, Azziz Auto Body, and so was Count 39 [sic] the theft of the firearm.⁸⁷

In essence, Downs asked the Law Court to confirm that two crimes in one episode could not be punished with consecutive sentences.⁸⁸

Finally, Downs argued that the sentencing court abused its discretion in determining that he had the ability to pay \$57,173.66 in probationary restitution.⁸⁹ According to Downs, the court based this decision entirely on the testimony of his mother that he was “very good at being a mechanic.”⁹⁰ He contended that after six years in jail and with seventy-six convictions, including forty-nine felonies, on his record, it would be next to impossible to be able to pay back over \$57,000 in eleven years.⁹¹ Thus, when he inevitably fails to pay this amount, thereby violating the terms of his probation, he will be forced back to prison for the remaining suspended period of twenty-four years.⁹²

In response, the State contended that there was no misapplication of principle in setting the “basic sentence” under the *Hewey* analysis because, logically, the “sheer number of the offenses makes an offense more serious.”⁹³ The State argued that the use of a weapon or the presence of a victim in the residence at the time of the burglary were not the only factors capable of making an offense serious.⁹⁴ The sentencing court

87. *Id.* at 11-12; *see also id.* at 12 n.2 (explaining that the sentence for Count 11 was illegal because the sentence for Count 12 was made concurrent to the sentence for Count 3, and therefore, the sentence for Count 11 ran consecutively to the sentence for Count 12).

88. Downs also argued that the final sentence was excessive because the sentences were consecutive. *Id.* at 12. His contention that his sentence was too harsh in light of his lack of prior criminal history was met with a swift rebuff by the sentencing court. *Id.* at 13. Justice Mills found his lack of criminal history to be most unpersuasive. *See Downs*, 2007 ME 41, ¶ 9, 916 A.2d at 213 (“He made basically a career for sixteen months out of committing criminal offenses. . . . it’s almost disingenuous to say he had no prior record when this sheer amount of criminal activity went on for this amount of time”).

89. Brief for Appellant, *supra* note 70, at 15. Restitution is authorized by statute. ME. REV. STAT. ANN. tit. 17-A, § 1325(1) (2006). In determining the amount of restitution authorized, the court must factor in the present and future financial capacity of the offender to pay. *Id.* § 1325(1)(C). Additionally, restitution is not authorized if the amount and method of payment creates “an excessive financial hardship on the offender” based on, *inter alia*, present income and potential future earning capacity. *Id.* § 1325(2)(D)(4). However, the defendant bears the burden of demonstrating that he is not capable of paying the amount of restitution imposed by the court. *Downs*, 2007 ME 41, ¶ 10, 916 A.2d at 214. In perhaps questioning Downs’s ability to repay those he harmed, the Law Court made note of the fact that Downs “attended high school through the eleventh grade and had a sporadic work history.” *Id.* ¶ 5, 916 A.2d at 212.

90. Brief for Appellant, *supra* note 70, at 14.

91. *Id.*

92. *Id.* at 14-15.

93. Brief for the State, *supra* note 67, at 12 (noting that “progressively the more burglaries the more serious” each one becomes).

94. *Id.*

had found that sixteen Class B residential burglaries, including some repeat victims, were serious enough to warrant the maximum allowable basic period of incarceration for each offense.⁹⁵ The State also argued that the sentencing judge had acted within her discretion when setting the maximum period of incarceration by evaluating the various aggravating and mitigating factors.⁹⁶ The State also directly refuted Downs's contention that the sentencing court had applied the same factor, the number of crimes, at two different steps in the analysis.⁹⁷

Furthermore, the State argued that the sentencing court properly exercised its discretion in setting the final sentence in step three.⁹⁸ In setting the final sentence in accordance with step three of the *Hewey* analysis, the sentencing court turned to the purposes of criminal punishment codified in section 1151.⁹⁹ The sentencing court emphasized several goals: preventing crime through deterrence, encouraging restitution in all cases where the victim can be compensated, giving fair warning of the nature of the sentences that could be imposed on the conviction of a crime, and minimizing correctional experiences that might promote further criminality.¹⁰⁰ The State posited that, clearly in this case, the sentencing court did not abuse its discretion.¹⁰¹ Regarding consecutive sentences, the State argued that the court properly exercised its discretion in "impos[ing] consecutive sentences that did not result in an overall excessive sentence."¹⁰² However, the State conceded that some of the consecutive sentences had been misaligned in violation of section 1256(3)(B).¹⁰³ The State requested that because the sentencing intention was "clear and legal," Downs's sentence should merely be "structured so as to be in compliance with §1256(3)."¹⁰⁴

By a 4-3 majority, the Law Court vacated the sentence and remanded it to the superior court for resentencing.¹⁰⁵ The majority held that the sentencing court failed to place Downs's crimes properly along a "continuum of means by which burglary and theft crimes can be committed."¹⁰⁶ The counts selected did not justify imposition of the maximum basic sentence because, in light of the lack of violence and the intentional avoidance of confrontation, were Downs's crimes to be placed on the required continuum, they "must [have been] considered less serious than the most serious ways of committing these offenses."¹⁰⁷ In addition, the court held that the sentencing court also erred when it "took into consideration the number of crimes

95. *Id.* at 12-13.

96. *Id.* at 14.

97. *Id.* at 16. In setting the basic sentence, the trial court looked at "the number of burglaries . . . [and] that he burglarized places more than one time." *Id.* In contrast, when evaluating the aggravating and mitigating factors, "the Court considered the effects of the Appellant's crimes on his victims." *Id.* The State argued that this was "not using the same factor twice." *Id.*

98. *Id.* at 18.

99. *See generally* ME. REV. STAT. ANN. tit. 17-A, § 1151 (2006) (setting forth the statutory purposes of the general sentencing provisions); *see also supra* note 14 (quoting the full text of § 1151).

100. Brief for the State, *supra* note 67, at 18.

101. *Id.* at 19.

102. *Id.* at 21.

103. *Id.* at 20.

104. *Id.*

105. *State v. Downs*, 2007 ME 41, ¶ 14, 916 A.2d 210, 215.

106. *Id.* ¶ 11, 916 A.2d at 213.

107. *Id.*

committed when setting the basic sentences for individual Class B counts.¹⁰⁸ Therefore, the sentencing court misapplied principle “by failing to analyze properly the particular nature and seriousness of the offense being sentenced and by considering other crimes when determining the basic sentence for a particular crime.”¹⁰⁹

The majority viewed the selection of the sentencing process appropriate for Downs’s case as one of first impression, stating that the court had “not previously opined on the appropriate sentencing analysis when the defendant is convicted of multiple crimes resulting from what appears to be a crime spree.”¹¹⁰ In addition, the Legislature had not “enacted any statutes relating to the sentencing analysis for crime sprees.”¹¹¹ However, the court placed significant weight on the Legislature’s “mandated” process for general sentencing.¹¹² In so doing, the court concluded that the three-step *Hewey* analysis was the “process to be followed whether the court is sentencing a defendant for a single offense, several offenses, or as here, for multiple crimes as part of a crime spree.”¹¹³

While the court held that Downs’s sentence was miscalculated, the majority recognized the infeasibility of applying the three-step analysis to seventy-six counts individually. In a case such as this, the court found it appropriate for the sentencing court to “choose a representative or primary offense for analysis in the first step of the *Hewey* process.”¹¹⁴ The court found the number of crimes to be an aggravating factor relevant in setting the maximum sentence, but not until step two of the analysis should the fact that Downs committed multiple offenses have been considered.¹¹⁵ The majority held that “it is in the second *Hewey* step that the court can increase the basic sentence because of the number of other offenses.”¹¹⁶

Because the court vacated Downs’s entire sentence, the majority failed to reach several of his additional contentions, but did offer advice to the sentencing court upon remand.¹¹⁷ In a footnote, the court instructed the superior court to “avoid a technical error” in the original sentencing.¹¹⁸ The consecutive sentences indeed violated section 1256(3)(B), thus making the sentence illegal.¹¹⁹ In addition, the majority did not reach the issue of the consecutive periods of probation creating a total period of probation

108. *Id.* ¶ 12, 916 A.2d at 213. However, while factors “extrinsic to the particular nature and seriousness of the specific offense at issue, such as the number of other crimes committed,” were generally irrelevant considerations at the first step of the analysis, they might be relevant if the crime was part of a “multiplicity of offenses” that indicated a degree of planning undertaken to commit the crime at issue. *Id.* ¶ 17, 916 A.2d at 214 (citing *State v. Pfeil*, 1998 ME 245, ¶ 15, 720 A.2d 573, 577 (child victim was “groomed” to be abused through the development of a friendship with abuser over a period of months which was betrayed by a series of sexual assaults)).

109. *Id.* ¶ 13, 916 A.2d at 214.

110. *Id.* ¶ 6, 916 A.2d at 212.

111. *Id.*

112. *See id.*

113. *Id.*

114. *Id.* ¶ 12, 916 A.2d at 214.

115. *Id.*

116. *Id.*

117. *Id.* ¶ 14, 916 A.2d at 214.

118. *Id.* ¶ 14 n.4, 916 A.2d at 214 n.4.

119. *Id.*

long enough to pay “an otherwise impossibly large amount of restitution.”¹²⁰ In another footnote, the majority quoted the sentencing judge’s rationale for the extended period of probation, perhaps questioning whether the restitution was excessive if a long probation was needed to facilitate the payment of the amount ordered.¹²¹

In dissent, Chief Justice Saufley argued that the court erred in its legal analysis by inappropriately assuming that the court in *Hewey* and the Legislature, in later codifying the sentencing process, “both intended to apply *Hewey*’s individual crime, tri-partite analysis to the sentencing of multiple offenses committed in a crime spree.”¹²² In addition, Chief Justice Saufley argued that the court ignored its own precedent in which the court “specifically approved the aggregated sentencing approach employed by the sentencing judge in this case,” thereby invalidating an effective, reasonable, and long-used sentencing process in Maine.¹²³ While Chief Justice Saufley agreed that the majority’s approach was an option,¹²⁴ she contended that a judge confronted with the prospect of sentencing an individual for a substantial series of crimes requires a legitimate second sentencing option.¹²⁵ In such cases, a judge could use the aggregated sentencing approach applied by the judge in sentencing Downs.¹²⁶

Chief Justice Saufley argued that section 1252-C did not contemplate the sentencing predicament in which the superior court justice found herself.¹²⁷ The prospect of requiring a sentencing judge to rigorously perform the analysis for all seventy-six counts would “complicate and obfuscate the sentencing process.”¹²⁸ The Chief Justice further pointed out that the majority attempted to solve this problem of judicial economy by admitting the possibility that a judge might need only to perform the analysis for a few representative offenses.¹²⁹ This, however, was merely a “tacit recognition that the . . . section 1252-C analysis simply does not work for crime spree sentencing.”¹³⁰

In addition, Chief Justice Saufley offered that the same conclusion could be reached through an examination of the court’s prior decisions. In *State v. Pfeil*, the Law Court held that a sentencing judge *could* consider the number of crimes committed when setting the basic sentence during the first step, plainly stating that the “multiplicity of the offenses is not an impermissible factor.”¹³¹ In several prior cases, the court had approved the same aggregated sentencing approach the lower court had

120. *Id.* ¶ 14, 916 A.2d at 214.

121. *See id.* ¶ 14 n.5, 916 A.2d at 214 n.5.

122. *Id.* ¶ 16, 916 A.2d at 215 (Saufley, C.J., dissenting).

123. *Id.* The “aggregated sentencing approach” is a process in which the sentencing judge imposes “consecutive, high sentencing on a few counts to achieve the overall sentencing objective and then concurrent sentences on the majority of the counts.” *Id.* ¶ 31, 916 A.2d at 218 (Alexander, J., dissenting).

124. Chief Justice Saufley had concerns that a rigid application of the *Hewey* analysis might “inappropriately consume the court’s time and resources.” *Id.* ¶ 17 n.6, 916 A.2d at 215 n.6 (Saufley, C.J., dissenting).

125. *Id.* ¶ 17, 916 A.2d at 215.

126. *Id.*

127. *Id.* ¶ 18, 916 A.2d at 215.

128. *Id.*

129. *Id.*

130. *Id.*

131. *State v. Pfeil*, 1998 ME 245, ¶ 15, 720 A.2d 573, 577.

applied in this case.¹³² Chief Justice Saufley argued that a sentencing judge should be allowed to consider the broader course of criminal conduct when determining a sentence that fulfills the statutorily defined purposes of sentencing.¹³³ She would have held that a judge sentencing for a crime spree should have the discretion to use the *Hewey* analysis for each offense, or to use the aggregated approach previously approved by the court.¹³⁴

Justice Alexander wrote a separate dissent in which he argued that the majority's approach was wholly against "long-standing, well-accepted, and often utilized trial court practice for sentencing individuals convicted, at one time, of multiple, serious felonies."¹³⁵ He took umbrage with the majority's statement that the court had not previously "opined on" the appropriate sentencing analysis for multiple crimes.¹³⁶ As Chief Justice Saufley did, Justice Alexander cited several cases in which the court had approved consideration of multiple crimes in the first part of the sentencing analysis and approved the aggregated approach utilized by the sentencing court in this case.¹³⁷ Additionally, he argued that section 1256, authorizing concurrent and consecutive sentences, was legislative approval of the aggregated sentencing approach.¹³⁸

Justice Alexander argued that in practice, judges imposing sentences for multiple crimes in a crime spree had:

- (i) considered the crimes as a group; (ii) determined the overall sentence desired to be achieved; (iii) selected a few of the more serious crimes; (iv) imposed maximum or near maximum and consecutive sentences on those few to achieve the overall sentencing objective; and then (v) imposed lower, concurrent sentences for most of the crimes being sentenced.¹³⁹

He also analyzed a report of sentencing statistics for 1997 produced by Justices Dana and Saufley.¹⁴⁰ The study examined 438 Class B burglaries which often involved sentencing for multiple offenses.¹⁴¹ On 224 occasions, the Class B burglary was sentenced as a primary offense that "received the highest sentence in cases where multiple offenses were sentenced simultaneously."¹⁴² Justice Alexander argued that these primary offense sentences necessarily considered other pending charges in order

132. *Downs*, 2007 ME 41, ¶ 19, 916 A.2d at 215-16 (Saufley, C.J., dissenting).

133. *Id.* ¶ 20, 916 A.2d at 216; *see also* ME. REV. STAT. ANN. tit. 17-A, § 1151 (2006); *supra* note 14 (quoting the full text of § 1151).

134. *Downs*, 2007 ME 41, ¶ 24, 916 A.2d at 217 (Saufley, C.J., dissenting).

135. *Id.* ¶ 26, 916 A.2d at 217 (Alexander, J., dissenting).

136. *Id.* ¶ 27, 916 A.2d at 217.

137. *Id.* ¶¶ 28-31, 916 A.2d at 217-18.

138. *Id.* ¶ 33, 916 A.2d at 218.

139. *Id.* ¶ 40, 916 A.2d at 220; *see, e.g.*, *State v. Pfeil*, 1998 ME 245, ¶¶ 9-19, 720 A.2d 573, 577-78; *State v. Brown*, 1998 ME 129, ¶¶ 11-12, 712 A.2d 513, 517; *State v. Sweet*, 2000 ME 14, ¶¶ 19-34, 745 A.2d 368, 374-77.

140. *Downs*, 2007 ME 41, ¶ 39 n.8, 916 A.2d at 220 n.8; *see* HOWARD H. DANA JR. & LEIGH I. SAUFLEY, SENTENCING STATISTICS FOR ALL CRIMES CHARGED IN FISCAL YEAR 1997 IN ALL SUPERIOR COURTS IN THE STATE OF MAINE (2001). Justice Alexander noted that this was the only comprehensive study of Maine Superior Court sentencing statistics. *Downs*, 2007 ME 41, ¶ 39 n.8, 916 A.2d at 220 n.8.

141. *Downs*, 2007 ME 41, ¶ 41, 916 A.2d at 220.

142. *Id.* (citing DANA & SAUFLEY, *supra* note 140).

to achieve the appropriate overall sentencing objective.¹⁴³ He cited five cases in which the court had approved the consideration of multiple crimes in setting the sentence for the primary offense.¹⁴⁴ He argued that “such a well-accepted, responsibly employed practice cannot be a ‘misapplication of principle.’”¹⁴⁵

In addition to arguing that the majority ignored legislative history, trial court practice, and the court’s own precedent, Justice Alexander contended that the “one-crime-at-a-time sentencing regime” imposed by the court was a waste of judicial resources¹⁴⁶ and, in the case of *Downs*, merely resulted in harmless error.¹⁴⁷ He contended that the majority’s opinion suggested that the trial court erred merely by considering the multiple offenses in the first step of the *Hewey* analysis rather than the second.¹⁴⁸ Similarly, if the trial court had considered the *planning* undertaken by *Downs* for the multiple offenses, perhaps it would not have been error at all.¹⁴⁹ Justice Alexander questioned the logic of vacating this sentence and suggested it should be harmless error when the trial court would have been correct “had it mentioned the multiple felonies just a few sentences later in its sentencing analysis.”¹⁵⁰ He argued further that the court’s refusal to invoke harmless error analysis indicated that: (1) the court had “more fundamental objections than are articulated in its opinion”¹⁵¹; and (2) the court utilized its sentence review authority to “overturn a sentence it deem[ed] too long.”¹⁵²

III. *STATE V. DOWNS* WRONGLY DENIED THE SENTENCING JUDGE THE DISCRETION TO CONSIDER THE DEFENDANT’S BROADER COURSE OF CRIMINAL CONDUCT

The *Downs* court woodenly applied the codified sentencing procedure, thereby denying the legitimacy and necessity of considering the broader course of the offender’s conduct when imposing a sentence for multiple crimes. As Chief Justice Saufley illuminated in her dissent, sentencing judges must be enabled by the sentencing process to “reach sentences that serve the statutory purposes of sentencing.”¹⁵³ The majority decision unnecessarily constricts the ability of the sentencing judge to perform those very duties by giving section 1252-C more weight than it deserves. From the start, the majority seemed more concerned with what process the Legislature had “mandated”¹⁵⁴ than with the true purposes of the criminal sanction.

The majority effectively closed the door through which many sentencing judges had passed in reaching fair and efficient sentences. Especially when confronted with a sentencing task of this magnitude, judges must be allowed a certain degree of

143. *Id.*

144. *Id.* ¶ 48, 916 A.2d at 222.

145. *Id.* ¶ 41, 916 A.2d at 221.

146. *Id.* ¶ 48, 916 A.2d at 222.

147. *Id.* ¶ 37, 916 A.2d at 219.

148. *Id.* ¶¶ 35-36, 916 A.2d at 219.

149. *Id.* ¶ 38, 916 A.2d at 219-20.

150. *Id.* ¶ 36, 916 A.2d at 219.

151. *Id.* ¶ 37, 916 A.2d at 219.

152. *Id.* ¶ 48, 916 A.2d at 222.

153. *Id.* ¶ 20, 916 A.2d at 216 (Saufley, C.J., dissenting).

154. *See id.* ¶ 6, 916 A.2d at 212 (majority opinion).

creativity in imposing sentences. By previously approving an aggregated approach when an offender had committed multiple serious crimes, or gone on a crime spree, a necessary alternative to strict application of the *Hewey* analysis was maintained. Rigidly applying the tri-partite analysis of section 1252-C to all of Down's seventy-six counts would indeed "complicate and obfuscate the sentencing process."¹⁵⁵ In fact, such an application may result in a sentence that runs afoul of some of the purposes found in section 1151. An excessively long sentence, the result of the sheer number of offenses committed, might not appropriately "minimize correctional experiences that may promote further criminality."¹⁵⁶ On the other hand, a sentence might diminish the gravity of the offenses if each offense, examined in a vacuum, only warrants a small punishment.¹⁵⁷ The majority opinion acknowledged that a sentencing court could perhaps undertake the three-part analysis for a few representative or primary offenses and forgo the strict application on the remainder.¹⁵⁸ However, this undermines the majority opinion that each and every crime should be evaluated, thereby indicating that each and every crime is unique in its placement on the seriousness continuum. Strict application of section 1252-C for crime spree sentencing simply does not work.

Sentencing judges will, from time to time, be presented with cases that require more than routine accounting work or checking the right boxes. Statutorily guided creativity, not mandated process, is the only way to reach sentences that serve the purposes of criminal punishment while remaining fair and efficient. The judge should have the discretion, in sentencing multiple crimes at the same time, to apply the section 1252-C analysis to each crime or use the aggregated and broader approach. Chief Justice Saufley's rationale is wholly on point:

A sentencing judge who has both options is better able to enter a sentence that prevents crime through deterrence, rehabilitation, and restraint of offenders; encourages the payment of restitution; minimizes correctional experiences that promote further criminality; communicates to the broader community the type of sentence that may be imposed upon conviction of an offense; eliminates inequalities in sentences that are unrelated to legitimate criminological goals; encourages differentiation to promote just, individualized sentences; and acknowledges the gravity of the offense.¹⁵⁹

Moreover, it is only through contemplation and recognition of the broader course of criminal conduct that one judge may hope to achieve these goals.

The majority opinion held that the number of crimes committed was not a permissible factor to be used during the first step of the section 1252-C sentencing process. In doing so, they effectively overruled the finding in *Pfeil* that a sentencing judge *could* take the multiple crimes into consideration when setting the basic sentence. More significantly, the majority narrowly construed section 1252-C, subsection 1. The statute calls a sentencing judge to consider the "nature and seriousness of *the offense*

155. *Id.* ¶ 18, 916 A.2d at 215 (Saufley, C.J., dissenting).

156. ME. REV. STAT. ANN. tit. 17-A, § 1151(3) (2006).

157. *Downs*, 2007 ME 41, ¶ 20, 916 A.2d at 216 (citing ME. REV. STAT. ANN. tit. 17-A, § 1151(8) (2006)).

158. *Id.* ¶ 12, 916 A.2d at 214 (majority opinion).

159. *Id.* ¶ 24, 916 A.2d at 217 (Saufley, C.J., dissenting).

as committed by the offender.”¹⁶⁰ The statute does not indicate that “the offense” should be interpreted as “each offense.” Too narrowly interpreting the language of section 1252-C was incorrect because it failed to consider the concept of the broader course of criminal conduct. Ultimately each offense becomes more serious when coupled with additional serious offenses. One burglary alone is not as serious as one burglary that was part of a string of ten in three months.

The majority found that, because the multiplicity of offenses was considered during the first step of the “mandated” analysis, a misapplication of principle occurred on the part of the sentencing judge. However, the question becomes: what principle? The 4-3 split of the court clearly indicates that the “principle” is not so clear. Perhaps it is not plausible to set a bright line principle about what factors are to be considered in the first part of the analysis and which are to be considered in the latter phases and therefore subject only to abuse of discretion review. The misapplication of principle standard should depend on the sentencing court’s discretion to choose the appropriate sentencing approach, the court’s recognition of the broader course of criminal conduct, and its responsibility to “set forth on the record the reasons for the sentence.”¹⁶¹

The majority’s rigidity and machine-like analysis generates an interesting question about the underlying rationale for the decision. Justice Alexander in dissent leaps to the conclusion that the majority thought the sentence was “too long.”¹⁶² If the majority felt that the sentence was excessive, they could have vacated the sentence on that ground. But they failed to reach that issue. It remains unclear why the sentence was vacated for the judge applying the wrong factor at the wrong time. Justice Alexander makes a fair point when he argues that this should merely be harmless error,¹⁶³ but the majority obviously did not seem to think a misapplication of principle was harmless. However, forcing the sentencing court to resentence Downs is counter to any notion of judicial economy. One could easily presume that the sentencing judge could simply use the multiplicity of offenses as an aggravating factor and issue the same sentence.¹⁶⁴ This, most certainly, was not the unstated rationale behind vacating the entire sentence. Perhaps the majority’s rationale was lost in the fog of trying to forcibly apply a rigid, legislatively “mandated” sentencing process to a case in which it was utterly unworkable.

160. ME. REV. STAT. ANN. tit. 17-A, § 1252-C(1) (2006) (emphasis added).

161. ME. R. CRIM. P. 32(a)(3).

162. *Downs*, 2007 ME 41, ¶ 48, 916 A.2d at 222 (Alexander, J., dissenting).

163. *Id.* ¶ 36, 916 A.2d at 219.

164. In fact, on remand, it appears that Justice Mills may have done exactly that. Eugene Downs was resentenced to “an almost identical sentence” of thirty years in jail, with all but six years suspended, followed by a probationary period of twelve years. *Skowhegan Man Jailed in Spree*, KENNEBEC J., Sep. 14, 2007, available at <http://kennebecjournal.maintoday.com/news/local/4277194.html>. The sentence decreased the amount of restitution from over \$57,000 to around \$11,000 presumably in response to the Law Court’s warning that the original amount might have been excessive. *Id.* However, Justice Mills clearly was able to recalculate the sentence to obtain the same result perhaps by, as Justice Alexander pointed out, mentioning the “multiple felonies just a few sentences later in [the] sentencing analysis.” *Downs*, 2007 ME 41, ¶ 36, 916 A.2d at 219 (Alexander, J., dissenting).

IV. POSSIBLE LEGISLATIVE SOLUTIONS

The majority decision in *State v. Downs* held that the sentencing process that the Legislature “mandated” in section 1252-C be generally employed for sentencing was the process to be followed “whether the court is sentencing a defendant for a single offense, several offenses or, as here, for multiple crimes as part of a crime spree.”¹⁶⁵ In doing so, the majority placed too much emphasis on the form of the process to be used and failed to recognize the ultimate function of the criminal sentencing process. The purpose of the *Hewey* analysis is to provide sentencing judges with a framework from which to meet their requirement found in Rule 32.¹⁶⁶ The subsequent articulation of that analysis assists the appellate court in reviewing the sentence on appeal.¹⁶⁷ However, the ultimate purpose of criminal sanction remains the meeting of the goals set forth in section 1151. These “purposes,” coupled with the offender’s broader course of criminal conduct, are the foundation upon which Rule 32, the appellate review process, the *Hewey* analysis, and the aggregated approach are built.

A legislative solution is the proper course of action to rectify the dilemma presented by the majority’s decision. The simplest course would be to amend the statute to give sentencing courts the flexibility to employ other options. This could be achieved by merely changing the word “shall” to “may.” The first sentence of the statute could be amended to read:

In imposing a sentence alternative pursuant to section 1152 that includes a term of imprisonment relative to murder, a Class A, Class B, or Class C crime, in setting the appropriate length of that term as well as any unsuspended portion of that term accompanied by a period of probation, the court *may* employ the following 3-step process

This change would allow a trial judge to follow a different pathway to an appropriate sentence if presented with a case that warranted a broader approach. However, the fact that the Law Court’s sentencing analysis was codified, while other equally appropriate approaches were not, intentionally or unintentionally favors the use of one method over others. Amending the statute will provide flexibility, but sentencing judges may still find themselves forced to think within a rigid framework before considering the broader course of conduct or the purposes of criminal sanction.

Moreover, *State v. Downs* is potentially the leading edge of what inevitably might be a string of cases in which sentencing courts feel compelled to follow the framework set out in section 1252-C when it may not be the best or most practical approach. In light of the majority decision, the statute appears not to allow for a broader and aggregated process in the case of an extensive crime spree. However, the question then becomes: What about the next case on which the Law Court has not “previously opined”?¹⁶⁸ Amending the statute would alleviate the problem, but it is not a solution. Considering the importance of observing the broader course of conduct and the

165. *Downs*, 2007 ME 41, ¶ 6, 916 A.2d at 212 (majority opinion).

166. ME. R. CRIM. P. 32(a)(3).

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

168. *Downs*, 2007 ME 41, ¶ 6, 916 A.2d at 212.

ultimate purposes of the criminal law, this problem demands a more permanent solution.

A better course is to repeal section 1252-C. As Chief Justice Saufley asserted, the *Hewey* analysis is not the only process or option that needs to be in the sentencing judges' tool bag when it comes to a complex sentencing task.¹⁶⁹ Moreover, over-emphasizing the three-step process to be followed by judges while neglecting broader objectives pushes the judge to focus primarily on the form of the sentence rather than its overall function. The statute paved the way for the decision in *Downs* in which the statutory process was deemed the *only* process by which a sentence may be calculated. The statute, even if amended, grants too much weight to the *Hewey* procedure and supplants analysis of legislative intent for careful reflection of Supreme Judicial Court precedent. Moreover, the mystery of what exactly the "principle" is that must be applied in the first step makes it difficult to believe that the Legislature intended for the sentencing courts to cease to use their sound judgment and for the Law Court to vacate sentences on technicalities of narrow statutory construction.

V. CONCLUSION

In 2005, the Criminal Law Advisory Commission submitted a bill to the Maine Legislature entitled *An Act To Eliminate the 3-step Sentencing Procedure Relating to the Imposition of Sentencing Alternatives That Include Imprisonment*.¹⁷⁰ Specifically, the proposed act repealed section 1252-C and proposed enacting section 1252-D which would read:

The procedure for imposition of a sentence that includes a term of imprisonment relative to murder or a Class A, B, or C crime must be as set forth in the Maine Rules of Criminal Procedure, Rule 32(a)(3) and as determined by the Law Court in cases involving appellate review of sentences.¹⁷¹

Essentially, the proposed statute required that the sentencing court "set forth on the record the reasons for the sentence"¹⁷² and apply the procedure appropriate for the individual case whether it be individual *Hewey* analyses or a broader, aggregated approach. The bill was submitted to the Criminal Justice and Public Safety Committee of the Maine Legislature.¹⁷³ After discussions and debate, the committee submitted a report and unanimously recommended that the bill ought not to pass.¹⁷⁴

This bill should be re-proposed during the next session of the Maine Legislature. Repealing section 1252-C and replacing it with section 1252-D¹⁷⁵ better serves the

169. *See id.* ¶ 24, 916 A.2d at 217 (Saufley, C.J., dissenting).

170. L.D. 1516 (122nd Me. Legis. 2005).

171. *Id.* § 5.

172. ME. R. CRIM. P. 32(a)(3).

173. L.D. 1516, Summary (122nd Me. Legis. 2005).

174. *Id.*

175. Section 1252-D would be largely surplusage. The *Hewey* analysis was an attempt by the Law Court to assist sentencing judges in articulating their reasoning pursuant to Rule 32. *See State v. Hewey*, 622 A.2d 1151, 1154 (Me. 1993). Additionally, it is rather predictable that the sentencing courts would look to Law Court precedent for guidance when there is no statutory mandate. However, there is no harm in adding a legislative reminder that, despite the lack of a statutory procedure, the rationale for the overall sentence imposed must be articulated. *See* ME. R. CRIM. P. 32(a)(3).

purposes of criminal sentencing because it properly places the emphasis of the analysis on those very purposes. It allows for the judicial creativity necessary to impose fair and equitable sentences while keeping judicial economy and efficiency in mind. Moreover, it allows the sentencing judge to consider the broader course of criminal conduct when confronted with seventy-six counts of burglary and theft.

State v. Downs is a stark example of the sentencing procedure in title 17-A, section 1252-C unnecessarily hamstringing a sentencing judge into rigidly following a process that was wholly inadequate for the task at hand. Repealing section 1252-C will restore the sentencing judges' discretion to choose the appropriate sentencing tool applicable to the cases in front of them. Sentences should be vacated if the sentence does not sufficiently meet the purposes of criminal sanction. Sentences should not be vacated because, while the sentence was a fair sentence in light of the broader course of criminal conduct, the judge miscalculated. Judges need the flexibility to use their discretion in selecting a process that will meet the purposes of imprisonment and punishment, without being restricted by an unworkable process. The majority in *Downs* restricted the options necessary for a sentencing court to properly meet its burden of imposing sentences that fulfill the aims of the criminal law. The statute forced the majority to place form over function and, like a grade-school math test, the sentence was given a failing grade, not because the answer was wrong, but because the sentencing judge did not show her work within the box.