the four individuals—Nave, Vann, McGuire, and Thomas—as being "in proximity" to each other and the Sebring. One witness also testified that Vann and Thomas had been whispering back and forth near the auto shop and that they "met" with Nave before he entered the shop.

Furthermore, the fact that Nave entered the auto shop specifically demanding the drugs indicates that he was working with the other individuals. Although McGuire and Vann had purchased drugs from Sanchez through Ayala-Martinez before, there is no evidence that Nave was involved in the prior deal. If Nave had not been conspiring with the others to steal and eventually distribute the cocaine, then he likely would not have known that the October 22, 2010, drug buy was going to take place. These facts presented sufficient evidence for a jury to conclude beyond a reasonable doubt that Nave worked with others to commit the crime.

Finally, a rational jury could obviously conclude beyond a reasonable doubt that Nave's actions constituted an "overt act" in furtherance of the conspiracy. As such, the evidence is sufficient to uphold Nave's conviction for criminal conspiracy.

We affirm Nave's convictions and sentences.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
DANIEL C. MILLER, APPELLANT.
822 N.W.2d 360

Filed October 12, 2012. No. S-12-019.

1. **Sentences: Due Process: Appeal and Error.** Whether the district court's resentencing of a defendant following a successful appeal violates the defendant's due process rights presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
3. **Due Process: New Trial: Convictions: Sentences.** Due process of law requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.
4. **Constitutional Law: Due Process: Convictions: Sentences: Appeal and Error.** Since the fear of vindictiveness may unconstitutionally deter a defendant's

exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

5. **New Trial: Judges: Sentences.** In order to ensure the absence of a retaliatory motivation, whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.
6. **Judges: Juries: Sentences: Presumptions.** Since its holding in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), the U.S. Supreme Court has limited the presumption of vindictiveness to cases that involve the same judge or jury handing down both the initial sentence and the second, harsher sentence.
7. **Trial: Sentences.** The possibility of a higher sentence is a legitimate concomitant of the retrial process.
8. **Sentences: Presumptions: Proof.** When the presumption of vindictiveness is not applied, the burden remains with the defendant to prove actual vindictiveness.
9. **Courts: Sentences.** Traditionally, a sentencing court is accorded very wide discretion in determining an appropriate sentence.
10. **Sentences.** When imposing a sentence, a sentencing judge can consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
11. ____. Ultimately, the appropriateness of a sentence is necessarily a subjective judgment.
12. **Judges: Sentences: Presumptions: Appeal and Error.** The vindictiveness presumption does not apply when a judge, different from the original sentencing judge, sentences a defendant to a harsher sentence after a successful appeal.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Kevin A. Ryan for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MCCORMACK, J.

NATURE OF CASE

After successfully appealing his conviction for first degree murder and use of a weapon to commit a felony, Daniel C.

Miller pled guilty upon remand to manslaughter and use of a weapon to commit a felony. Miller asserts that the second judge was vindictive because of Miller's successful appeal and, thus, imposed a harsher sentence for the weapons conviction in violation of Miller's due process rights. At issue is whether the presumption of vindictiveness applies when a different judge gives a greater sentence after the defendant successfully appeals. We hold that such a presumption does not apply when there is a different sentencing judge after a successful appeal.

BACKGROUND

A jury convicted Miller of first degree murder and use of a weapon to commit a felony. The district court sentenced Miller to life in prison on the murder conviction and 10 years in prison on the weapons conviction, to be served consecutively. On appeal, we overturned Miller's convictions because of an error in the jury instructions.[1]

The cause was remanded and assigned to a different district court judge. After plea bargain negotiations, Miller pled guilty to the lesser count of manslaughter and use of a weapon to commit a felony. Prior to sentencing, the district court reviewed the probation file, the police reports, the presentence investigation report, and the briefs and pleadings of the case. Based on its findings, the district court sentenced Miller to the maximum of 20 years in prison for manslaughter and 30 to 50 years in prison for the weapons conviction.

ASSIGNMENTS OF ERROR

Miller assigns that his sentence for the weapons conviction should be overturned for two reasons: (1) The district court's reasoning fails to overcome the presumption of vindictiveness that arises when the second sentence is significantly harsher than the original sentence and (2) the lack of affirmative explanation supporting the harsher sentence demonstrates actual vindictiveness.

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[1] See *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

STANDARD OF REVIEW

[1,2] Whether the district court's resentencing of a defendant following a successful appeal violates the defendant's due process rights presents a question of law.[2] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.[3]

ANALYSIS

Miller contends that the increased sentence on the weapons conviction violated his right to due process of law because it was vindictive. In support, Miller points to the U.S. Supreme Court opinion in *North Carolina v. Pearce*,[4] which gives a defendant the presumption of vindictiveness when a defendant's sentence is increased after a successful appeal.

[3-5] In *Pearce*, the U.S. Supreme Court overturned a harsher sentence because the sentence was the product of the judge's vindictiveness for the defendant's successful appeal of the first conviction.[5] The Court stated:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> In order to [en]sure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial,

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[2] See, *State v. King*, 275 Neb. 899, 750 N.W.2d 674 (2008); *State v. Bruna*, 14 Neb. App. 408, 710 N.W.2d 329 (2006), *affirmed* 272 Neb. 313, 721 N.W.2d 362.

[3] *State v. Kibbee, ante* p. 72, 815 N.W.2d 872 (2012).

[4] *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).

[5] *Id.*

> the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.[6]

Since *Pearce*, the U.S. Supreme Court has applied the presumption of vindictiveness to sentences increased after a successful appeal of the prior conviction.[7] However, the presumption has been limited since *Pearce* to cases which pose a reasonable likelihood that the increased sentence is the product of actual vindictiveness.[8] Without the presumption, the defendant is burdened with showing actual vindictiveness.[9]

Presumption of Vindictiveness

[6] Miller contends the presumption of vindictiveness is applicable because he received a harsher sentence for his conviction of use of a weapon to commit a felony. We disagree. Since its holding in *Pearce*, the U.S. Supreme Court has limited the presumption of vindictiveness to cases that involve the same judge or jury handing down both the initial sentence and the second, harsher sentence.[10]

In *Colten v. Kentucky*,[11] the U.S. Supreme Court refused to apply the presumption of vindictiveness to a two-tiered criminal court. In the State of Kentucky, a defendant accused of a misdemeanor is tried in an inferior court. If convicted, the defendant has an absolute right to a trial de novo in the superior court of general criminal jurisdiction. In *Colten*, the

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[6] *Id.*, 395 U.S. at 725-26.

[7] *Wasman v. United States*, 468 U.S. 559, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984).

[8] *Alabama v. Smith, supra* note 4.

[9] *Id.*

[10] *Alabama v. Smith, supra* note 4; *Texas v. McCullough*, 475 U.S. 134, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986); *Wasman v. United States, supra* note 7; *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973); *Colten v. Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972).

[11] *Colten v. Kentucky, supra* note 10.

defendant was sentenced to a greater punishment after his new trial in the superior court. The U.S. Supreme Court found that the possibility of vindictiveness is not inherent in the Kentucky two-tiered system. Rather, "[i]t may often be that the superior court will impose a punishment more severe . . . . But it no more follows that such a sentence is a vindictive penalty for seeking a superior court trial than that the inferior court imposed a lenient penalty."[12]

[7] In *Chaffin v. Stynchcombe*,[13] the presumption was held inapplicable when the sentences were determined by two different juries. The U.S. Supreme Court stated that the second jury will have no personal stake and no motivation to engage in self-vindication after a defendant's successful appeal.[14] Rather, the possibility of a higher sentence is a legitimate concomitant of the retrial process.[15]

In *Texas v. McCullough*,[16] a jury originally sentenced the defendant, but after a successful appeal and retrial, the trial judge imposed a harsher sentence on the defendant. The U.S. Supreme Court found the presumption too speculative because different sentencers, a judge and a jury, assessed the varying sentences and thus, a sentence increase cannot truly be said to have been given.[17]

The U.S. Supreme Court in *McCullough* indicated in dicta that it would not extend the presumption to cases when there were two different sentencing judges.[18] The Court stated:

> *Pearce* itself apparently involved different judges presiding over the two trials, a fact that has led some courts to conclude by implication that the presumption of vindictiveness applies even where different sentencing judges are involved. That fact, however, may not have been

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[12] *Id.*, 407 U.S. at 117.

[13] *Chaffin v. Stynchcombe, supra* note 10.

[14] *Id.*

[15] *Id.*

[16] *Texas v. McCullough, supra* note 10.

[17] *Id.*

[18] *Id.*

> drawn to the Court's attention and does not appear anywhere in the Court's opinion in *Pearce*. Clearly the Court did not focus on it as a consideration for its holding. . . . Subsequent opinions have also elucidated the basis for the *Pearce* presumption. We held in *Chaffin v. Stynchcombe*, 412 U. S. 17 (1973), for instance, that the presumption derives from the judge's "personal stake in the prior conviction," . . . a statement clearly at odds with reading *Pearce* to answer the two-sentencer issue. We therefore decline to read *Pearce* as governing this issue.[19]

The Court's refusal to read *Pearce* to govern the two-sentencer issue, along with the policy reasons for the presumption, casts a strong argument against extending the presumption to sentences handed down by a different judge after appeal.

Here, the procedural history does not support Miller's position that his successful appeal was the motivation for the greater sentence. After his appeal, a different district court judge handled the plea bargain and sentencing. There is no reason to presume the second judge had a personal stake in the prior conviction. Simply put, the possibility of vindictiveness is not inherent.[20] Absent evidence to the contrary, a harsher sentence is not presumed to be vindictive, because the sentence could be the product of the second judge's differing judicial philosophy. Such is a natural consequence when judges are allowed to use their discretion in sentencing.[21]

Therefore, we conclude that the presumption of vindictiveness does not apply when there are two different sentencers.

Actual Vindictiveness

[8] When the presumption of vindictiveness is not applied, the burden remains with the defendant to prove actual vindictiveness.[22] Miller gives four reasons to demonstrate that his weapons sentence was actually vindictive. We reject each

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[19] *Id.*, 475 U.S. at 140-41 n.3 (citations omitted).

[20] See *Colten v. Kentucky, supra* note 10.

[21] *State v. Bruna, supra* note 2, citing *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005).

[22] *Alabama v. Smith, supra* note 4.

reason and find that Miller has failed to meet his burden of demonstrating actual vindictiveness.

[9-11] In *Wasman v. United States*,[23] the U.S. Supreme Court held that due process does not forbid enhanced sentences. Rather, it only forbids enhancement motivated by actual vindictiveness toward the defendant for having exercised a guaranteed right.[24] Traditionally, a sentencing court is accorded very wide discretion in determining an appropriate sentence.[25] When imposing a sentence, a sentencing judge can consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.[26] Ultimately, the appropriateness of a sentence is necessarily a subjective judgment.[27]

For his first argument, Miller asserts that the increased sentence on the weapons conviction from 10 years to 30 to 50 years in prison demonstrates vindictiveness. We disagree. The increased sentence alone is not sufficient evidence of actual vindictiveness.[28]

Second, according to Miller, the district court judge demonstrated actual vindictiveness when she stated, "as the state said, he did get a benefit of that, a huge benefit, by pleading to manslaughter." However, such a conclusion by Miller is grounded in pure speculation. Prior to sentencing, the district court judge had reviewed the probation file, the police reports, the presentence investigation report, and the briefs and pleadings of the case. The district court judge understood the seriousness of the crime, and her statement could merely indicate the belief that Miller received leniency by pleading guilty to manslaughter.

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[23] *Wasman v. United States, supra* note 7.

[24] *Id.*

[25] *Id.*

[26] *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007).

[27] See *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

[28] See *North Carolina v. Pearce, supra* note 4.

Nothing about that statement, in and of itself, indicates actual vindictiveness for Miller's successful appeal of his first degree murder conviction.

Third, Miller alleges that the sentence for the conviction of use of a weapon to commit a felony should not increase when its companion conviction of first degree murder is reduced to manslaughter. We reject this argument as legally irrelevant. The crime of using a deadly weapon to commit a felony, as enacted under Neb. Rev. Stat. § 28-1205 (Cum. Supp. 2010), is an independent offense from the underlying felony.[29] The Legislature's purpose in enacting § 28-1205 was to discourage individuals from employing deadly weapons in order to facilitate or effectuate the commission of felonies and to discourage persons from carrying deadly weapons while they commit felonies.[30]

Based on the district court's review of the available record for sentencing, the second district court judge could quite readily find that Miller's use of a firearm to kill another man justified a severe punishment under § 28-1205. Contrary to Miller's assertion, pleading guilty to the lesser charge of manslaughter does not demand leniency on the sentence for using a weapon to commit a felony.

And finally, Miller asserts the district court failed to sufficiently explain the drastic increase in the sentence. Such an argument presupposes that the burden is on the district court to justify the increased sentence. The burden shifts to the district court only after the presumption of vindictiveness is applied.[31] Absent the presumption, the burden is on the defendant to show actual vindictiveness.[32]

Nothing in our review of the record demonstrates that the district court based the second sentences on impermissible considerations or vindictiveness. In light of the evidence provided for the guilty plea, the second judge apparently viewed

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[29] *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

[30] *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

[31] *North Carolina v. Pearce, supra* note 4.

[32] *Alabama v. Smith, supra* note 4.

the proper sentence for the weapons conviction differently than the original sentencing judge. The possibility of a higher sentence is a legitimate risk of resentencing[33] and is a natural consequence when judges are allowed to use their discretion in sentencing.[34] Therefore, we conclude that Miller has failed to meet his burden of proving actual vindictiveness by the second district court judge.

CONCLUSION

[12] We conclude that the vindictiveness presumption does not apply when a judge, different from the original sentencing judge, sentences a defendant to a harsher sentence after a successful appeal. Furthermore, we reject Miller's contention that the second district court judge acted with actual vindictiveness.

AFFIRMED.

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[33] *Chaffin v. Stynchcombe, supra* note 10.

[34] *State v. Bruna, supra* note 2.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JEREMY C. JORGENSON, RESPONDENT.

822 N.W.2d 367

Filed October 12, 2012. No. S-12-269.

Original action. Judgment of public reprimand.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

INTRODUCTION

Respondent, Jeremy C. Jorgenson, was admitted to the practice of law in the State of Nebraska on April 15, 2008. At all relevant times, he was engaged in the private practice of law in Omaha, Nebraska. On April 3, 2012, the Counsel for Discipline of the Nebraska Supreme Court filed