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Criminal Procedure - Due Process is Not Violated When Prosecutor Carries Out Threat to Bring Increased Charges after Defendant Refuses to Plead Guilty during Plea Bargaining Session

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CRIMINAL PROCEDURE—DUE PROCESS IS NOT VIOLATED WHEN PROSECUTOR CARRIES OUT THREAT TO BRING INCREASED CHARGES AFTER DEFENDANT REFUSES TO PLEAD GUILTY DURING PLEA BARGAINING SESSION.

Bordenkircher v. Hayes (U.S. 1978)

Following an indictment by a Kentucky grand jury, Paul Lewis Hayes was arraigned for forgery of a check in the amount of $88.30. During a pretrial conference, the prosecutor offered to recommend a five year prison term if Hayes would plead guilty, but advised Hayes that he would also be charged under Kentucky's habitual criminal statute if he refused to plead guilty. After the defendant insisted upon a full trial, the prosecutor proceeded to obtain a second indictment which charged Hayes as an habitual offender. Subsequently, Hayes was found guilty of the forgery offense and a mandatory life sentence was imposed pursuant to the habitual criminal statute.


2. 547 F.2d at 43. It should be noted that Hayes' counsel was also present at the conference.

3. 547 F.2d at 42 & n.1, 43. At the time of Hayes' conviction, Kentucky law provided for a mandatory sentence of life imprisonment for any person convicted of three felonies. See KY. REV. STAT. § 431.190 (1973) (current version at KY. REV. STAT. § 532.080 (Int. Supp. 1977)). Under the present habitual offender statute, a persistent felony offender could be sentenced to a maximum of 20 years imprisonment. KY. REV. STAT. § 532.080(6)(b) (Int. Supp. 1977). The current statute also requires the imposition of a prison sentence of at least one year for each of the two prior felony convictions. Id. § 532.080(3)(a). Additionally, the offender must have been over 18 years of age when the prior offenses were committed, or have been on probation or parole when the offense was committed, and must have completed service of the prior sentence within five years of the date the current offense was committed, or have been on probation or parole when the offense was committed, or have been discharged from probation or parole within five years of its commission. Id. § 532.080 (3)(a)-(c).

4. In 1961, at the age of 17, Hayes pleaded guilty to a charge of detaining a female and served five years in the state reformatory. 434 U.S. at 359 n.3. In 1970, Hayes was convicted of robbery and sentenced to another five year term, but was released immediately on probation. Id. Under the current statute, Hayes could not have been subjected to the enhanced sentencing “because none of [the statute's] conditions were satisfied.” 547 F.2d at 42 n.1. See 434 U.S. at 359 n.3.

5. After the forgery conviction, the terms of the plea bargain were described during cross-examination of Hayes at subsequent trial proceedings on the habitual offender charge, when the prosecutor asked:

"Isn't it a fact that I told you at that time (the initial bargaining session) that if you did not intend to plead guilty to five years for this charge and . . . save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?"

Id. at 355 n.1.

4. 547 F.2d at 43. On appeal, the Supreme Court indicated: "It is not disputed . . . that Hayes' refusal to plead guilty to the original charge was what led to his indictment under the habitual criminal statute." 434 U.S. at 359.

5. 547 F.2d at 43. After returning a guilty verdict on the forgery charge, the jury, in a separate proceeding, found that Hayes had been convicted of two prior felonies. 434 U.S. at 359. See note 3 supra.

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The Kentucky Court of Appeals, rejecting Hayes' constitutional objections, held that the prosecutor's decision to indict Hayes as an habitual offender was a legitimate exercise of prosecutorial leverage in the plea bargaining process. On a petition for habeas corpus relief, the United States District Court for the Eastern District of Kentucky also concluded that the action of the prosecutor was constitutional. The United States Court of Appeals for the Sixth Circuit, in reversing the decision of the district court, found that a "potential for impermissible vindictiveness exists when a prosecutor is allowed to bring an habitual offender indictment against a defendant who has refused to plead guilty to an indictment for the same unenhanced substantive offense," and thus held that Hayes' due process rights had been violated. On writ of certiorari, the United States Supreme Court reversed, holding that due process is not violated whenever a prosecutor, after threatening to indict a defendant on a more serious charge if he should refuse to plead guilty to a lesser offense, obtains such an additional indictment. Bordenkircher v. Hayes, 434 U.S. 357 (1978).

The use of plea bargaining in criminal cases has become "a persuasive practice" in which a prosecutor, in return for a plea of guilty, may promise "to reduce charges, to dismiss charges, not to charge other offenses, or to seek or obtain a certain sentence." The Supreme Court of the United

6. 434 U.S. at 359. The opinion of the Kentucky Court of Appeals was not published. Id.
7. 547 F.2d at 43. The district court first referred the petition to a magistrate to determine whether leave to proceed in forma pauperis should be granted pursuant to 28 U.S.C.§ 1915(a) (1976). 547 F.2d at 42-43. While finding that Hayes' claims were not so frivolous that leave should not be granted, the magistrate nonetheless concluded that the petitioner's claims were "patently without merit," and recommended dismissal of the petition. Id. at 43. In an unpublished decision, the district court adopted these recommendations and dismissed the petition. Id. The court concluded that the mandatory life sentence was not cruel and unusual punishment, and that Hayes had not been arbitrarily prosecuted as an habitual criminal. Id.
9. 547 F.2d at 44.
10. See U.S. CONST. amend. XIV, § 1. This section provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." Id.
11. 547 F.2d at 45. The case was remanded by the Sixth Circuit upon an order to discharge Hayes, except for imprisonment for the forgery offense. Id.
12. Bordenkircher v. Hayes, 431 U.S. 953 (1977). Hayes' motion to proceed in forma pauperis was also granted. Id.
13. ABA STANDARDS RELATING TO PLEAS OF GUILTY § 3.1(b), Commentary at 60-61 (App. Draft 1968) [hereinafter cited as ABA STANDARDS]. These standards are set forth in part as follows:

3.1 Propriety of plea discussions and plea agreements.

(b) The prosecuting attorney, in reaching a plea agreement, may agree to one or more of the following, as dictated by the circumstances of the individual case:

(i) to make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere;

(ii) to seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to defendant's conduct; or

(iii) to seek or not to oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty or nolo contendere.

Id. §3.1(b), Commentary at 60. The Federal Rules of Criminal Procedure contain similar provi-
States has recognized this procedure as "an essential component of the administration of justice." Since the defendant, in pleading guilty, waives many constitutional rights, there must be adequate assurances that the waivers are "voluntary" and "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." The
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roles of the prosecutor,\textsuperscript{17} the judge,\textsuperscript{18} and the defense counsel\textsuperscript{19} must therefore be examined whenever a defendant is encouraged to plead guilty.

\textsuperscript{17} For a discussion of the problem of innocent defendants who plead guilty to criminal charges, see Barkai, \textit{Accuracy Inquiries For All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?}, 126 U. Pa. L. Rev. 88 (1977).

\textsuperscript{18} It has been generally recognized that \textit{"prosecutors must avoid mischarging, overcharging and threats of heavier sentences for those who do not plead guilty."} United States v. Gallington, 488 F.2d 637, 640 (8th Cir. 1973), cert. denied, 416 U.S. 907 (1974) (footnote omitted). One court, however, has stated that in procuring a plea, \textit{"[a] threat to prosecute under state law where the facts warrant prosecution should not be considered as coercive or intimidating."} Ford v. United States, 418 F.2d 855, 859 (8th Cir. 1969). See also Barber v. Gladden, 327 F.2d 101, 104 (9th Cir. 1964). Nonetheless, if the prosecutor threatened indictment is impermissible under state and federal law, a guilty plea induced under such circumstances is involuntary. See Lassiter v. Turner, 423 F.2d 897, 900, 903 (4th Cir.), cert. denied, 400 U.S. 852 (1970) (prosecutor unlawfully threatened to revive charge of secret assault). See also Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973) (holding that a prosecutor may not, in return for a plea of guilty, promise and/or make a recommendation for an illegal sentence). Restrictions are also placed on prosecutors by the ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350(3) (1975), which states in pertinent part: (3) \textit{Improper Pressure}. The prosecutor shall not seek to induce a plea of guilty or nolo contendere by exerting such undue pressures as:

(a) charging or threatening to charge the defendant with a crime not supported by facts believed by the prosecutor to be provable;

(b) charging or threatening to charge the defendant with a crime not ordinarily charged in the jurisdiction for the conduct allegedly engaged in by him; or

(c) threatening the defendant that if he pleads not guilty, his sentence may be more severe than that which is ordinarily imposed in the jurisdiction in similar cases on defendants who plead not guilty.

\textit{Id.}

For an interesting discussion of the prosecutor’s role in the plea bargaining process, see Alschuler, \textit{The Prosecutor’s Role in Plea Bargaining}, 36 U. Chi. L. Rev. 50, 52-112 (1968). See also notes 29-39 and accompanying text infra.


\textsuperscript{19} If defense counsel erroneously predicts the sentence to be imposed upon the defendant, a plea based upon these expectations is not involuntary and cannot be withdrawn. See, e.g., Masciola v. United States, 469 F.2d 1057, 1058-59 (3d Cir. 1972); Wellnitz v. Page, 420 F.2d 935, 936 (10th Cir. 1970); Swanson v. United States, 304 F.2d 865, 866 (8th Cir.), cert. denied, 371 U.S. 894 (1962); Domenica v. United States, 292 F.2d 483, 485 (1st Cir. 1961). Similarly, counsel’s misjudgment as to the admissibility of a confession does not necessarily render the plea unintelligent. See McMann v. Richardson, 397 U.S. 759, 769-71 (1970); Parker v. North Carolina, 397 U.S. 790, 796-98 (1970). Further, an attorney’s alleged conflict of interest may not in itself provide a reason for vacating a plea. See Dukes v. Warden, Conn. State Prison, 406 U.S. 250, 257 (1972). However, defense counsel cannot coerce a plea of guilty by threatening to withdraw from a case. See Edmonds v. Lewis, 546 F.2d 566, 569 (4th Cir. 1976) (Butzner, J., dissented).
The United States Supreme Court has developed certain safeguards to protect a defendant from judicial and prosecutorial vindictiveness following a successful challenge to a conviction. In North Carolina v. Pearce, the Court examined the constitutional limitations on harsher sentencing on retrial of a conviction of the same charges which had been set aside on constitutional grounds. In Pearce, each defendant had been sentenced to a longer prison term at a subsequent retrial. The Court, finding these sentences unconstitutional, determined that "[d]ue 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." In order to protect a defendant from any retaliatory motivation on the part of the sentencing judge at retrial, the Court required that the judge's reasons for imposing a more lengthy sentence "must affirmatively appear. Those reasons must be based upon information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."

In subsequent decisions, the Supreme Court clarified that it did not intend to suggest that due process was "offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.'" The Court, then, did not find a violation of due process where a higher sentence had been imposed after a trial de novo in another court. The Court reached the same conclusion

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20. See notes 21-35 and accompanying text infra.
22. Id. at 713.
23. Id. at 713-14.
24. Id. at 725. Moreover, the Court reasoned that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." Id. (footnote omitted). The Court reached this conclusion after rejecting constitutional arguments based upon the double jeopardy and equal protection clauses. Id. at 717-23, construing U.S. CONST. amends. V, XIV.

In Simpson v. Rice, 395 U.S. 711 (1969), the companion case to Pearce, the defendants had also received increased sentences on retrial of the same charges. Id. at 726. The Court limited the defendants' sentences at retrial to the original sentences imposed. Id.
25. 395 U.S. at 726. Furthermore, the Pearce Court directed that "the factual data upon which the increased sentence is based . . . be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed upon appeal." Id.
27. See Colten v. Kentucky, 407 U.S. 104 (1972). In Kentucky, there exists a two-tier system under which any person convicted of a misdemeanor, rather than relying exclusively on ordinary appellate review of the original conviction, may seek a trial de novo in a higher court. Id. at 113, citing KY. REV. STAT. § 23.033 (1971). Following his conviction on a disorderly conduct charge and the imposition of a $10 fine, Colten obtained a new trial pursuant to the Kentucky statute and was fined $50. 407 U.S. at 108. The Court distinguished Pearce, finding that the hazard of judicial vindictiveness was not inherent in the Kentucky system. Id. at 116. It reasoned that since the new trial was in a different court, that court would have no reason to act vindictively toward the defendant. Id. at 117.
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where a different jury imposed an increased sentence after a conviction on retrial. 28

Beyond the issue of judicial vindictiveness, the Supreme Court was confronted with the problem of prosecutorial vindictiveness in *Blackledge v. Perry*. 29 The defendant in *Perry*, while in prison, had a fight with an inmate and was consequently convicted of a misdemeanor. 30 After the prisoner filed for a trial de novo, 31 the prosecutor obtained a felony indictment arising out of the same conduct as the prior conviction, and the defendant pleaded guilty to the charge. 32 Justice Stewart, applying the rationale of *Pearce*, 33 reasoned that "[a] person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to significantly increased potential period of incarcera-

28. See Chaffin v. Stynchcombe, 412 U.S. 17 (1973). In *Chaffin*, the defendant was found guilty of robbery and was sentenced to 15 years imprisonment. *Id.* at 18. Following the reversal of the conviction on constitutional grounds, the defendant was retried before a different judge and jury and was again found guilty. *Id.* at 19. At retrial, however, the jury returned a sentence of life imprisonment. *Id.*. Rejecting the defendant's contention that the higher sentence was invalid under the *Pearce* rationale, the Court stated: "The potential for such abuse of the sentencing process by the jury is, we think, de minimis in a properly controlled retrial." *Id.* at 26. Since the retrial jury was unaware that the defendant had previously been tried and convicted of the same offense, the Court found that the jury would have no motive to be vindictive. *Id.* at 26-27. In addition, "the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals." *Id.* at 27 (footnote omitted). Moreover, the Court rejected the defendant's argument that harsher sentences on retrial have a "chilling effect" on the defendant's right to appeal. *Id.* at 29-35.

In dicta, the *Chaffin* Court also rejected the possibility of prosecutorial vindictiveness against the defendant since the death penalty had been sought at both trials. *Id.* at 27 n.13. Justice Powell reasoned:

Prosecutors often request more than they can reasonably expect to get, knowing that the jury will customarily arrive at some compromise sentence. The prosecutor's strategy also might well vary from case to case depending on such factors as his assessment of the jury's reaction to the proof and to the testimony of witnesses for and against the State. Given these practical considerations, and constrained by the bar against his informing the jury of the facts of prior conviction and sentence, the possibility that a harsher sentence will be obtained through prosecutorial malice seems remote.

*Id.* (citation omitted).


30. *Id.* at 22. Perry was tried without a jury and was convicted of assault with a deadly weapon. *Id.*


32. 417 U.S. at 23. Perry was charged with the felony of assault with a deadly weapon with intent to kill and inflict serious bodily harm. *Id.*

33. For a discussion of *Pearce*, see notes 21-25 and accompanying text supra.
The Supreme Court thus concluded "that it was not constitutionally permissible" for the prosecutor to act in such a vindictive manner. While the principles enunciated by the Court in *Pearce* and *Perry* had not been applied in the context of plea bargaining prior to *Bordenkircher*, the vindictiveness analysis has received a rather broad application by the lower courts. In the pretrial situation, for example, some federal courts have required that a subsequent indictment be dismissed if the prosecutor followed through on his threat to bring additional charges against a defendant who had refused to waive his statutory right to a trial by a district judge. Similarly, where the prosecutor obtained a forty-one count indictment after the defendant's guilty plea to two counts of a four count indictment had been vacated on appeal, the conduct was held violative of the defendant's due process rights. Where the increased counts were those

34. 417 U.S. at 28 (footnote omitted). Justice Stewart reasoned that since a trial de novo would result in increased work for the prosecutor, the prosecutor could discourage many defendants from pursuing this relief "by 'upping the ante' through a felony indictment." *Id.* at 27-28.

35. *Id.* at 28-29. The Court indicated in dicta that the case would have been very different "if the State had shown that it was impossible to proceed on the more serious charge at the outset." *Id.* at 29 n.7.

36. The rule established in *Pearce* and *Perry* has been applied by the lower courts in a number of circumstances beyond the retrial-after-appeal situation detailed in the two Supreme Court cases. The rule has been applied to a wide variety of situations in which courts have detected a significant possibility of prosecutorial retaliation against defendants who have exercised their rights.


37. United States v. Lippi, 435 F. Supp. 808, 809-10, 816 (D.N.J. 1977). Although the prosecutor argued that the new indictment was based upon the discovery of new evidence, the district court determined that the prosecutor had "failed to carry the burden of dispelling this appearance of vindictiveness." *Id.* at 514. The court noted that "the atmosphere of improper coercion and retaliation" had "infect[ed] this indictment with fatal taint." *Id.* For other cases applying the vindictiveness analysis developed in *Pearce*, see, e.g., United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.), cert. denied, 434 U.S. 827 (1977) (where prosecutor threatened additional counts if defendant exercised his right to change of venue, *Pearce* and *Perry* were controlling); United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976) (where defendant refused to waive the right to trial by jury, and prosecutor then added two felony counts, the "mere appearance of vindictiveness" placed burden on prosecution to show the contrary). But see United States v. Sturgill, 563 F.2d 307, 309 (6th Cir. 1977) (although two counts were added after the defendant refused to waive his trial rights, since the government had filed a notice of intent not to prosecute the count with the longer sentence, due process was not violated); United States v. Butler, 414 F. Supp. 394, 396 (D. Conn. 1976) (after breakdown in plea negotiations, where second indictment was sought based on acts occurring after conduct giving rise to original indictment, no potential for vindictiveness existed).

38. United States v. Johnson, 537 F.2d 1170, 1171-73 (4th Cir. 1976). The Fourth Circuit noted that *Perry* assures a right to appeal without fear of retaliation by the imposition of more serious charges should the original conviction be reversed. *Id.* at 1173. Since the prosecutor had received no new information to support the added counts, "the superseding indictment denied [the defendant] due process of law." *Id.* For additional applications of the *Perry* rule, see United States v. Jamison, 505 F.2d 407, 413, 416 (D.C. Cir. 1974) (defendant denied due process when charged with first-degree murder following mistrial on second-degree murder charge; *Pearce* and *Perry* interpreted to require restrictions on increased charges after mistrials); United States v. Gerard, 491 F.2d 1300, 1306-07 (9th Cir. 1974) (in a pre-*Perry* decision, where defendant withdrew his plea during sentencing and prosecutor then added an additional count
Against this backdrop, the Supreme Court in *Bordenkircher* began its analysis by emphasizing that Hayes, during the plea negotiations, knew that the prosecutor intended to obtain the recidivist indictment if he did not plead guilty.\(^{40}\) Justice Stewart, writing for the Court, determined that "this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as a part of the plea bargain."\(^{41}\) In contrast, the majority noted that the Sixth Circuit considered the timing of the added indictment to be of critical importance in determining whether or not prosecutorial vindictiveness was present.\(^{42}\) The majority criticized the circuit court for focusing upon the

Based upon facts which were known initially, *Pearce* required its dismissal). But see United States v. Preciozo-Gomez, 529 F.2d 935, 938 (9th Cir.), cert. denied, 425 U.S. 953 (1976) (where facts upon which subsequent indictments were based were unknown or unproved at time of original indictment, courts should not interfere with prosecutor's rights to press more serious charges); United States v. Rodriguez, 429 F. Supp. 520, 523-25 (S.D.N.Y. 1977) (bringing of second indictment during pendency of appeal, charging different offenses from those contained in original indictment, was permissible where government had legitimate and good faith reasons for delay). For a discussion of a proposed plea bargaining system which might remove the potential for vindictiveness upon retrial, see Borman, supra note 15, at 694-715.

\(^{39}\) See, e.g., *Martinez v. Estelle*, 527 F.2d 1330, 1332 (5th Cir.), cert. denied, 429 U.S. 924 (1976) (where, pursuant to plea agreement, prosecutor waived habitual offender count in exchange for defendant's waiver of jury trial, but on retrial defendant rejected identical offer, increased sentence due to conviction on recidivist count was not the result of prosecutorial vindictiveness); United States v. Anderson, 514 F.2d 583, 588 (7th Cir. 1975) (after guilty plea was vacated, reinstatement of all initial charges was not retaliatory since the situation reverted to the preplea stage); Arechiga v. Texas, 469 F.2d 646, 647 (5th Cir. 1972), cert. denied, 414 U.S. 932 (1973) (where prosecutor originally waived habitual offender charge in exchange for defendant's waiver of jury trial, but on retrial defendant sought a jury trial and recidivist count was added, vindictiveness was not found since prosecutor's identical offer had been rejected by the defendant); People v. McCutcheon, 68 Ill. 2d 101, 109, 368 N.E.2d 886, 891 (1977) (when defendant repudiates guilty plea, prosecution can reinstate charge dismissed pursuant to original plea bargain).

\(^{40}\) 434 U.S. at 360. Although the prosecutor did not seek the indictment until after the plea negotiations had ended, his intent was apparent from the outset. *Id.* Justice Stewart, writing for the majority, found this factual situation distinguishable from one in which the prosecutor, without notice, brings additional and more serious charges after plea bargaining has failed. *Id.*

The Court did not discuss the constitutionality of habitual offender statutes, which have repeatedly withstood challenges grounded upon principles of double jeopardy, cruel and unusual punishment, due process, equal protection, and privileges and immunities. See, e.g., *Spencer v. Texas*, 385 U.S. 554, 559-60 (1967); *Graham v. West Va.*, 224 U.S. 616, 623-31 (1912); *Moore v. Mississippi*, 159 U.S. 673, 678 (1895). Recently, these statutes have been upheld against constitutional challenges that they vest the prosecutor with unlimited discretion and that their enforcement is unreasonably selective. See *Brown v. Farratt*, 560 F.2d 303, 303-05 (8th Cir. 1977); *Martin v. Farratt*, 549 F.2d 50, 52 (8th Cir. 1977). At least one court, however, has restricted the application of these statutes where the punishment is excessive and wholly disproportionate to the offenses charged. See *Hart v. Coiner*, 483 F.2d 130, 139-43 (4th Cir. 1973). For a discussion of the arguments against habitual offender statutes, see *Brown v. Farratt*, 560 F.2d at 305-09 (Heaney, J., concurring); Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFFALO L. REV. 99, 105-20 (1971).

\(^{41}\) 434 U.S. at 360-61.

\(^{42}\) *Id.* at 361, citing 547 F.2d at 44-45. Justice Stewart indicated that the Sixth Circuit had drawn "a distinction between 'concessions relating to prosecution under an existing indictment,'
“substance of the plea offer” rather than the circumstances surrounding the negotiations, such as the presence of counsel, the keeping of a public record to indicate the voluntariness of the plea, and the performance of all promises made by the prosecutor during the bargaining process.

Reviewing its holdings in *Pearce* and *Perry*, the Court distinguished the imposition of a penalty upon a defendant who has chosen to attack his original conviction as “a situation 'very different from the give-and-take negotiation common in plea bargaining between the prosecution and the defense, which arguably possess relatively equal bargaining power.'” Justice Stewart interpreted the earlier cases finding due process violations as grounded not in a fear that the assertion of legal rights would be inhibited, but rather in a concern “that the State might be retaliating against the accused for lawfully attacking his conviction.”

While acknowledging that punishing a person for doing “what the law plainly allows him to do is a due process violation of the most basic sort,” the Court declared that plea bargaining posed no such threat of retaliation, since the defendant “is free to accept or reject the prosecutor’s offer.” The court explained, the acceptance of the legitimacy of plea bargaining precludes the notion that a plea is constitutionally involuntary simply because it is the result of the bargaining process. Although the Court recognized and threats to bring more severe charges not contained in the original indictment—a line it thought necessary in order to establish a prophylactic rule to guard against the evil of prosecutorial vindictiveness.” 434 U.S. at 361 (footnote omitted), quoting 547 F.2d at 44. Justice Stewart further remarked that the Sixth Circuit apparently concluded that a prosecutor acts vindictively “whenever his charging decision is influenced by what he hopes to gain” from the plea. 434 U.S. at 361. Moreover, the Court concluded that the Sixth Circuit’s determination that the prosecutor had acted vindictively was based on the prosecutor’s admission that the threatened recidivist indictment was an effort to induce a guilty plea. Id., citing 547 F.2d at 45. Possible support for the Court’s conclusion can be found in the following statement by the Sixth Circuit: “In this case, a vindictive motive need not be inferred. The prosecutor has admitted it.” 547 F.2d at 45.
that a defendant faced with the possibility of harsher punishment may be discouraged from asserting his trial rights, it nevertheless concluded that this choice was a permissible aspect of a system which utilizes plea bargaining. Furthermore, Justice Stewart recognized "the simple reality" that in bargaining with the defendant, the prosecutor's objective is to persuade him to forego his right to plead not guilty.

Emphasizing that Hayes was properly chargeable under the recidivist statute, the Court noted that the decision whether or not to prosecute and what charge to file generally rests within the prosecutor's discretion. The majority reasoned that "some selectivity in enforcement" does not violate the Constitution as long as the prosecutor acted within the limits established by the legislative definition of the offense and "the selection was (not) deliberately based upon an unjustifiable standard." Moreover, the Court indicated that a rigid rule prohibiting "a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged." Limiting its holding to "the course of conduct engaged in by the prosecutor in this case," the Court found that there had been no due process violation, but that the defendant had only been faced "with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution.

Justice Blackmun, in a dissenting opinion, urged that the Court's decision in Pearce and Perry required affirmation of the Sixth Circuit's decision. The dissent maintained that due process seemingly mandates "that response to prosecutorial persuasion, and [are] unlikely to be driven to false self-condemnation." Id. (citation omitted). Justice Stewart further noted that a plea could be induced simply by the defendant's fear of more severe punishment upon conviction at trial. Id. at 364, citing Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973). The "trial rights" referred to by the Chaffin Court included the defendant's right to a jury trial and the right to plead not guilty. 412 U.S. at 30.

55. Id. at 364, citing Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973). The "trial rights" referred to by the Chaffin Court included the defendant's right to a jury trial and the right to plead not guilty. 412 U.S. at 30.

56. 434 U.S. at 364.

57. Id. However, Justice Stewart recognized that "there are undoubtedly constitutional limits" on the discretion vested in the prosecutor. Id. at 365.


59. 434 U.S. at 365 (citation omitted). See note 14 supra.

60. 434 U.S. at 365.

61. Id.

62. Id. at 365-66 (Blackmun, J., dissenting). Justices Brennan and Marshall joined in this opinion. Justice Blackmun reasoned that although the majority limited its holding to the particular factual situation presented, the decision was either "departing from, or at least restricting the principles" enunciated in Pearce and Perry. Id. Since the prosecutor admitted that his reason for seeking the recidivist indictment was to discourage Hayes from exercising his right to trial, Justice Blackmun argued that vindictiveness must be present to the same extent as in those cases. Id. at 367 (Blackmun, J., dissenting). The dissent concluded that even if the prosecutor's motives had not been apparent, "when plea negotiations, conducted in the face of the
the prosecution justify its action on some basis other than discouraging" the defendant's right to trial. Justice Blackmun thus asserted that "prosecutorial vindictiveness in any context is still prosecutorial vindictiveness," which is prohibited by the due process clause.

In a separate dissenting opinion, Justice Powell, after reviewing the facts of Hayes' prior felony convictions, urged that the question to be answered was whether the prosecution might have reasonably charged Hayes initially as an habitual offender. Noting that the prosecutor must have initially determined that it was not in the public interest to charge Hayes under the habitual offender statute, Justice Powell concluded that the prosecutor's subsequent actions were "calculated solely to deter the

less serious charge under the first indictment, fail, charging by a second indictment a more serious charge for the same conduct creates 'a strong inference' of vindictiveness." Id., quoting 547 F.2d at 45.

Justice Blackmun required this element of justification because the prosecutor must have determined that it was not in the public interest to charge Hayes initially with the more serious offense. Id.

Justice Blackmun argued that the majority's "holding gives plea bargaining full sway despite vindictiveness." Id. A contrary holding, it was suggested, would require that the prosecutor bring the more severe charge initially. Id. Although the accused would then "bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea," it would be "far preferable to hold the prosecution to the charge it was originally content to bring." Id. Noting that prosecutors may bring charges "more serious than they think appropriate for the ultimate disposition of a case in order to gain bargaining leverage with a defendant," Justice Blackmun remarked that the Court has never openly sanctioned such practices. Id. at 368 n.2 (Blackmun, J., dissenting). The dissent, however, suggested that even if such "overcharging is to be sanctioned," the more serious charge should be brought initially, "rather than as a filliped threat at the end." Id. Justice Blackmun maintained that this would require that the prosecutor charge without any knowledge of the defendant's willingness to plead guilty. Id. Thus, a defendant who is innocent would not "be subject to quite such a devastating gamble," since he could go to trial without fear of retaliation. Id. The dissent further argued that such a requirement would make the charging practices more visible to the public, and political bodies could then evaluate the fairness of the prosecutor's actions. Id.

Although neither of Hayes' prior convictions had resulted in imprisonment, Justice Powell noted that the addition of a conviction on charges involving the $88.30 check subjected Hayes to a mandatory life sentence under the recidivist statute. Id. at 370 (Powell, J., dissenting). As the dissent observed: "Persons convicted of rape and murder often are not punished so severely." Id. Justice Powell further noted the prosecutor's conceded purpose was to discourage Hayes' assertion of his constitutional rights. Id.

While noting that courts would probably accord deference to the decision of the prosecutor to charge Hayes initially as a recidivist, Justice Powell argued that the prosecutor evidently made a reasonable, responsible judgment not to subject an individual to a mandatory life sentence when his only new offense had societal implications as limited as those accompanying the uttering of a single $88 forged check and when the circumstances of his prior convictions confirmed the inappropriateness of applying the habitual criminal statute. I think it may be inferred that the prosecutor himself deemed it unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment.

Id. (footnote omitted).
Although the Bordenkircher majority reasoned that there is no distinction between the prosecutor seeking an indictment initially on a more serious charge and then offering concessions, and threatening to indict on the more serious charge if the accused refuses to plead guilty to a lesser offense, it is submitted that this analysis is inconsistent with the Court's earlier decisions. In Perry, the Supreme Court found the potential for prosecutorial vindictiveness when increased charges were brought after the defendant filed for an appeal. It is suggested that Hayes' refusal to plead guilty in Bordenkircher and his subsequent indictment and conviction on the habitual offender charges presents an analogous situation. Although the Bordenkircher majority argued that when the prosecutor brought charges was insignificant, the Perry Court suggested that the case would have been distinguishable if the charges could not have been brought initially.

67. Id. at 373 (Powell, J., dissenting). Justice Powell acknowledged that there may be situations in which a prosecutor would be justified in seeking a new indictment on a more serious charge, especially when it "would have been reasonable and in the public interest initially to have charged the defendant with the greater offense." Id. at 371-72 (Powell, J., dissenting). Under such circumstances, Justice Powell agreed with the majority that "the situation would not differ materially from one in which the higher charge was brought at the outset." Id. at 372 (Powell, J., dissenting), citing 434 U.S. at 360-61.

Moreover, the dissent suggested that a court would not be inclined to inquire into the prosecutor's motive for seeking a "harsher indictment." 434 U.S. at 372 (Powell, J., dissenting). In the instant case, however, Justice Powell argued that such an inquiry was unnecessary because the prosecutor had acknowledged his motive. Id., Justice Powell thus viewed the prosecutor's conduct as falling within the ambit of earlier Supreme Court pronouncements which recognized that "if the only objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.'" Id. quoting Chaffin v. Stynchcombe, 412 U.S. 17, 32 n.20 (1973), quoting Shapiro v. Thompson, 394 U.S. 618, 631 (1969). Furthermore, Justice Powell noted the distinction between the situation presented in Brady v. United States, 397 U.S. 742 (1970), and a "situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty." 434 U.S. at 372 (Powell, J., dissenting), quoting 397 U.S. at 751 n.8. In Brady, the defendant initially pleaded not guilty to a kidnapping charge. 397 U.S. at 743. "Upon learning that his codefendant, who had confessed . . . would plead guilty and be available to testify against him," the defendant decided to plead guilty. Id. The trial judge accepted the defendant's plea only after having questioned him twice regarding the voluntariness of the plea. Id. Defendant was represented by competent counsel throughout these proceedings. Id.

Finally, Justice Powell recognized the essential function of plea bargaining and noted that prosecutors had to be given broad discretion in the negotiating process. 434 U.S. at 372 (Powell, J., dissenting). Since a defendant is usually represented by counsel, Justice Powell stated that "[o]nly in the most exceptional case should a court conclude that the scales of the bargaining are so unevenly balanced as to arouse suspicion." Id. In the present case, however, since the prosecutor admitted that his objective was to discourage Hayes from exercising his constitutional rights, Justice Powell concluded that Hayes was denied due process. Id. at 372-73 (Powell, J., dissenting).

68. 434 U.S. at 361. See text accompanying note 41 supra.
70. See notes 1-4 and accompanying text supra.
71. Blackledge v. Perry, 417 U.S. 21, 29 n.7 (1974) (dictum). The Perry Court explained that such a situation would exist where the more serious crime was not complete at the time of
if one were to ignore this distinction in timing, it is submitted that the prosecutor should be required to justify his actions. As Justice Blackmun observed, due process seems to "require that the prosecution justify its action on some basis other than discouraging respondent from the exercise of his right to a trial." Since the *Pearce* Court insisted that a judge's reasons for increasing a sentence upon retrial must be apparent, similar justifications should be required of a prosecutor.

This approach has apparently been adopted by the lower federal courts. For example, where, after a mistrial following a second-degree murder conviction, the prosecutor brought a first-degree murder charge against the defendant, the District of Columbia Circuit has required that the prosecutor's reasons and the factual bases for increasing the charge to a more serious offense must appear. Similarly, in a factual situation closely paralleling *Bordenkircher*, where increased charges were brought after the defendant refused to waive his right to trial before a district judge or federal jury, the Ninth Circuit imposed upon the prosecution the burden of proving that any increase in charges was not motivated by vindictiveness. The Sixth Circuit in *Bordenkircher* had also concluded that the prosecutor should justify his action, since by initially obtaining a less severe indictment, he had made a "discretionary determination that the interests of the State are served by not seeking more serious charges." It is therefore submitted that the prosecutor, absent a sufficient justification for imposing a more serious charge, should be limited to the charges contained in the initial indictment.

It is further suggested that the majority in *Bordenkircher* adopted too simplistic an approach to the procedure of plea bargaining. The Court, rec-

the initial indictment, as when an assault victim dies and the defendant is subsequently charged with homicide. *Id.* Another possible situation excusing the delay would be that all the facts had not been discovered prior to the first indictment. See United States v. Jamison, 505 F.2d 407, 416-17 (D.C. Cir. 1974).

72. 434 U.S. at 367 (Blackmun, J., dissenting). See text accompanying note 63 supra. Justice Powell suggested a similar analysis in *Bordenkircher*. 434 U.S. at 372 (Powell, J., dissenting). While recognizing that courts would not be inclined to inquire into a prosecutor's motive for obtaining a more serious indictment, Justice Powell argued that when a prosecutor has clearly admitted that his objective was to discourage the defendant from exercising his constitutional rights, due process has been denied. *Id.* See note 67 supra.


74. See notes 75 & 76 and accompanying text infra.

75. United States v. Jamison, 505 F.2d 407, 408, 416-17 (D.C. Cir. 1974). The *Jamison* court, noting that the record did not disclose the reason why the first-degree charges had not been brought initially, found that the defendant had been denied due process. *Id.* at 417. The indictments for first-degree murder were subsequently dismissed. *Id.*

76. United States v. Ruesga-Martinez, 534 F.2d 1367, 1368-69 (9th Cir. 1976). The court indicated that "the mere appearance of vindictiveness is enough to place the burden on the prosecution." *Id.* at 1369 (emphasis in original). See also United States v. Johnson, 537 F.2d 1170, 1173 (4th Cir. 1976) (defendant need not prove he was an actual victim of retaliation, but need only show fear or apprehension of vindictiveness).

77. 547 F.2d at 45.

78. *Id.* at 44.
ognizing that "the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system," 79 viewed plea bargaining as a "give-and-take" situation. 80 As one commentator has observed, however, "[fear of a] heavier sentence after retrial and deference to advice of defense counsel might lead defendants to accept virtually all plea agreements." 81 Moreover, since the majority of all plea negotiations are carried on between the prosecutor and the defense attorney in the absence of the defendant, 82 it is quite conceivable that time demands may not permit an attorney to pursue the most advantageous bargain for his client. 83 With these considerations in mind, it is doubtful whether, as the majority states, the defendant is truly "free to accept or reject the prosecution's offer." 84

Furthermore, it is submitted that this decision has severely restricted the applicability of Pearce 85 and Perry. 86 The vindictiveness analysis in these cases would seem to require a different conclusion since, as one lower court has explained, "the evil to which Pearce is directed is the apprehension on the defendant's part of receiving a vindictively-imposed penalty for the assertion of rights." 87 The Court's attempt to distinguish a plea bargaining situation does not withstand analysis where, as in Bordenkircher, the prosecutor

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82. See id. at 578. The author observed that since prosecutors dislike tripartite negotiations, they would rather confer solely with the defense attorney, with whom they have greater rapport. Id. See also Alschuler, supra note 18, at 1135.
83. See Transformation of the Criminal Process, supra note 14, at 578. It has been stated that "[p]ublic defenders, by persuading their clients to plead guilty, can relieve the burden of heavy caseloads and maintain rapport with prosecutors with whom they work repeatedly." Id. (footnotes omitted). See Unconstitutionality of Plea Bargaining, supra note 14, at 1390. The Supreme Court has indicated that in determining the validity of a plea conviction, a federal court must inquire "whether the guilty plea had been made intelligently and voluntarily with the advice of competent counsel." Tollett v. Henderson, 411 U.S. 258, 265 (1973) (emphasis added). It is questionable whether this is an adequate safeguard to ensure that a defendant is receiving the most propitious bargain. The Bordenkircher Court, however, was convinced that competent counsel and procedural safeguards adequately protect the defendant during the plea bargaining process. 434 U.S. at 363. See note 54 supra.

One commentator has urged that all defendants should be allowed to attend plea bargaining sessions. Alschuler, supra note 18, at 1135-36. The presence of the defendant would hopefully "encourage more vigorous advocacy on the part of defense attorneys and discourage the depreciating banter, the invocation of improper considerations, and the granting of improper favors that may sometimes occur between friends." Id. at 1135. Although this may discourage some beneficial exchanges, the author's position is that the ultimate choice of how to proceed must be left with the defendant. Id. at 1136.

84. 434 U.S. at 363.
85. For a discussion of Pearce, see notes 21-25 and accompanying text supra.
86. For a discussion of Perry, see notes 29-35 and accompanying text supra.
has virtually admitted a retaliatory motive. It is submitted that vindictiveness does not disappear merely because the defendant knew about the possibility of a recidivist charge before entering a plea. When, after the failure of plea bargaining, the prosecutor follows through on his threat to bring a recidivist charge, the inevitable conclusion must be that the prosecutor had a retaliatory purpose.

The impact of the decision in Bordenkircher will depend upon whether or not the lower courts recognize that the Court's holding was limited to "that course of conduct engaged in by the prosecutor in this case." It is submitted, however, that as a result of this decision, the lower courts will restrict their application of the doctrine of prosecutorial vindictiveness.

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88. See 434 U.S. at 361 n.7, citing 547 F.2d at 45. The Sixth Circuit had concluded: "In this case, a vindictive motive need not be inferred. The prosecutor has admitted it." 547 F.2d at 45. See notes 3 & 4 and accompanying text supra.
89. See 434 U.S. at 367-68 (Blackmun, J., dissenting).
90. In Chaffin v. Stynchcombe, 412 U.S. 17 (1973), the Supreme Court, in finding a de minimis potential for vindictiveness, had especially noted that [as was true in Colten, the second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction. Thus, the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication.]
Id. at 27, citing Colten v. Kentucky, 407 U.S. 104 (1972). For a discussion of these cases, see notes 27 & 28 and accompanying text supra. It is submitted that these same considerations should apply in the instant case, in which the same prosecutor obtained both indictments.
91. 434 U.S. at 365. See text accompanying note 60 supra.