10-1973

Blackledge v. Perry

Lewis F. Powell Jr.

7-30-73 JBO/gg

Call for Response
With view to Grant/Vacate

N.C. provides for a de novo trial in ~~a criminal case~~ a court of record following trial in an inferior court. Petr. was convicted of the ~~misdemeanor~~ misdemeanor of assault with deadly weapon, & appealed for de novo trial. Prior to such trial, Petr. was indicted on a felony charge for same assault. This was ~~properly~~ held to have put Petr. in double jeopardy. But he raised no such objection & pled guilty. CA4 held, contrary to one or more other circuits, that D/J. is a jurisdictional issue which cannot be waived. Conflict.

List 5, A.4.

No. 72-1660

Blackledge (state warden) v. Perry

State prisoner granted federal HC. Double jeopardy/guilty plea issue.

Cert to CA 4

NO RESPONSE

Does a guilty plea waive a double jeopardy claim? The USDC sitting in HC in this case held that it does not. CA 4 affirmed by order (Craven, Butzner, Russell). A number of other CAs have held that a guilty plea does waive a double jeopardy claim.

Petitioner received a 6 months sentence in a North Carolina trial court for the misdemeanor of assault with a deadly weapon. North Carolina has a two-tier system for adjudicating certain criminal cases, under which a person charged

with a misdemeanor may be tried first in an inferior court and, if dissatisfied with the result, may have a trial de novo in a court of general criminal jurisdiction but must risk a greater punishment if convicted. Such a system is permissible under the due process and double jeopardy clauses. Colten v. Kentucky, 407 U.S. 104 (1972) (Powell, J. in majority). Petitioner moved for a trial de novo. Up to that point, no constitutional problems appeared.

Double Jeopardy Issues

However, prior to trial de novo petitioner was indicted anew for the same offense, this time for the felony of assault with a deadly weapon with intent to kill. Thus, when Petitioner came to his trial de novo, he faced a much more serious offense. The USDC held this to be a violation of the Double Jeopardy Clause. It read Colten, supra, to mean that the state could allow trial de novo (with the risk of greater punishment) only where the charge at the new trial was identical to the charge at the original trial. This holding is, I believe, correct.

Guilty Plea Issues

The case is made complex, however because Petitioner pleaded guilty at the trial de novo. The state argues in its petition that the guilty plea waived any double jeopardy problems. There is CA authority for this position. The USDC, affirmed by CA 4, held to the contrary, on the theory that double jeopardy went to the jurisdiction of the de novo trial court, was a fundamental right, and was not waivable.

Cases from this Court aren't helpful. A split in the CAs does appear, although all CAs may not have faced the issue. The question might be certworthy. Call for a response

September 16, 1973 JBO

Await Discussion
Inclined to Join
Three or to Grant

Q - whether a double jeopardy
claim is waived by a plea of guilty

Dictum in Tollett v Henderson
indicates that claim is waived. But
CA 4 held D/J is "jurisdictional" &
cannot be waived.

No. 72-1660

RESPONSE RECEIVED

Blackledge (state warden) v. Perry

S.L. 5
p. 4

JJ. Brennan, White and Rehnquist joined you in seeking a response in this case. The issue presented is whether a guilty plea waives a double jeopardy claim.

Respondent appears via appointed counsel. Counsel notes wryly that respondent was released from the custody of state authorities pursuant to the order of USDC J. Larkins (E.D. No. Car.) "and his present whereabouts to counsel are unknown." Accordingly, with no knowledge of respondent's financial status, counsel moves the Court to dispense with printing requirements.

On the merits, respondent "concedes that certain language in the recent case of Tollett v. Henderson (this Court, OT 1972) . . . . would support a contention that the plea of guilty does

foreclose the raising of a constitutional claim, and limits an attack to the question of whether the voluntary and intelligent character of the guilty plea has been prejudicial (sic) by advice of counsel not 'within the range of competence demanded of attorneys in criminal cases.'" However, resp urges the court to heed the admonition of the dissent in Tollett that waiver should be decided on a case by case basis.

Resp also argues that his double jeopardy claim is controlled by a USSC case decided subsequent to his trial yet fully retroactive. (The case that allegedly controls is Price v. Georgia, 398 U.S. 323). Thus, Resp argues that it would be fundamentally unfair to argue that he waived a right that he did not know existed.

The latter argument is mildly ingenious, but I don't think it will wash. Price v. Ga. establishes that if you are charged with murder 1 but convicted of murder 2, you have in essence been found not guilty of murder 1. Therefore, if your conviction for murder 2 is ultimately overturned, you cannot be retried for murder 1 but only for murder 2. As you will see by glancing at the facts set out in the original memo in this case, resp does not have such a case. He has the traditional double jeopardy case of being tried and convicted of murder 2 and then reindicted and convicted for murder 1. Resp has no argument that any jury has implicitly found him not guilty of a higher offense in the process of conviction for a lesser offense. All of this means that Petr's case was controlled by longstanding double jeopardy principles (rather than by Price) and thus it cannot be said

Price v. Ga not applicable

that holding open to the full meaning of his policy plan would amount to forcing him to waive a right he could not have known existed.

Zoop also throws [redacted] in some speculation that his policy plan might have been induced by a Santobello violation (i.e., by a failure on the part of the state [redacted] to come through on its side of a plea bargain). This looks to be made up at least it can't be addressed on the [redacted] present record of this case.

The case looks like a great.

September 25, 1973 JBO

Await Discussion

DISCUSS (Enclined to grant)

I had over-looked Tollett v Henderson when I reviewed their Petition. Tollet, #11 U.S. 258, 267

Two issues: re controlling effect of guilty plea

1. Under a two tier system of trials (county ct + de novo in court of record) as in Ky (Colten) & Va., may State "up" the charge if Δ appeals for a de novo trial.

(Here Δ convicted for assault + on appeal State charged assault with intent to kill).

This is a due process issue (possible impermissible "chilling" of right to appeal)

2. Δ pled guilty. Does this waive a subsequent claim of D/Jeopardy in a H/C case? CA4 said "No" — that D/J in jurisdictional. I'm inclined to disagree.

S. List 5

No. 72-1660 SUPPLEMENTAL MEMO
Blackledge (state warden) v. Perry

H/C

As the attached memos indicate, the primary issue in this case is whether a guilty plea waives a double jeopardy claim. CA4 held that it did not, which may be error calling for summary reversal.

Byron is interested & put this on discuss list.

One of the clerks in J. White's chambers, Hal Scott, also thinks the case raises a potentially certworthy "double jeopardy" issue. As I expect J. White to add this case to the discuss list,* I think we can rely on him to carry the ball on this one, particularly since he authored the most relevant recent precedent, Colten v. Kentucky, 407 U.S. 104 (1972). This memo will therefore simply set out some skeletal background to assist you in evaluating J. White's presentation of the case

As you will remember from glancing at the earlier memos, the case involves the North Carolina two-tier criminal trial system, very similar to the Kentucky system approved by the Court in the Colten case, supra. At the NC District Court (the lower tier), [redacted] Respondent was found guilty of assault with a deadly weapon. He sought trial de novo ("appealed") in the NC Superior Court (the upper tier). However, in the interim the state brought down a new indictiment charging him [redacted] with the greater offense of assault with a deadly weapon with intent to kill. Respondent pleaded guilty at this point. Subsequently, he sought federal HC on due process (deterrence of the right to "appeal," etc) and double jeopardy grounds. The USDC (J. Larkin) granted HC on the ground that Resp's double jeopardy rights had been violated. CA4 (Braxton, Butzner, Russell) aff'd in a memo decision.

This indictment was based on the same incident.

The USDC concluded that Resp had a valid double jeopardy claim [redacted] despite Colten v. Kentucky. In that court's words:

> Although it is clear that Colton (sic) allows the state to operate a two tier system of criminal justice, with trial de novo upon appeal from the lower Court, the Court cannot say that a system is valid when the offense charged is not the same in both Courts. To allow the situation which has occurred in this case to be a part of such a system would be a gross miscarriage of justice. An absolute right of appeal is but a hollow phrase if a trial de novo is not held on the same offense as it was held on in the lower Court.
>
> If the State were allowed to try a defendant on a misdemeanor in the lower Court, and then to try the same defendant for a felony in the higher Court when the lower Court convictioon is contested, the result in the lower Court would be meaningless, and the District Court trial would be little more than a "proving ground" for the State's case. If a conviction can be secured on one of the essential elements of a felony in the lower Court, it would appear all the more simple to secure the felony conviction in the Superior Court. The State has, in effect, a choice in these matters. It may try the defendant for a misdemeanor in the District Court, or it may try a defendant for a felony in the Superior Court. But it may not try a defendant for both offenses arising out of the same incident, in two separate Courts. Once there has been an [redacted]

Note how the USDC switches to due process language

In other words, the USDC read Colten as setting the outside limits on what the states can do with two-tier trial systems. The offense charged must be the same at both tiers, even though the punishment can differ. Note that while the USDC spoke in Double Jeopardy terms, its holding was really based on the Due Process clause, which is what Colten is all about. Colten really deals with the question of whether trial de novo with the risk of enhanced punishment impermissible deters the right to "appeal" in a North Carolina v. Pearce, due process sense.

Hal Scott contends, and I think that J. White agrees, that what the state did in this case did not constitute double jeopardy and was permissible as a matter of due process with the limits of Colten. Thus, he thinks that the state wins in this one on either of two grounds--that there was no substantive constitutional violation to begin with, and that if there was, it was waived by the guilty plea. I agree with the latter point; I'm less certain of the first. For some of the reasons listed by the USDC, I would want to give very careful thought to whether, within the logic of Colten, the state could up the charge on the trial de novo. Hal says that once the defendant decides to have another crack at it, the slate is wiped entirely clean with regard to the first trial. That would expand Colten, in my mind, and I'm not sure that the expansion would be wise. It might tend to undermine what looks to be an efficacious system under present law.

In any event, defer to what J. White has to say about this case with regard to whether there is any substantive constitutional violation at all.

A concluding note: the USDC treated this as a double jeopardy case, when in truth it may be a due process, deterrence of the right to "appeal" case. Thus, it may be technically inaccurate to say (as I have repeatedly) that the primary issue is whether a guilty plea waives a double jeopardy claim. However, that probably doesn't make much difference, as I take it that a guilty plea would waive either a double jeopardy claim or a due process, "chill of appeal rights" claim.

This case is undoubtedly [redacted] going to have to be vacated and remanded. The task of the conference will be to decide what instructions to give the lower courts on remand--simply to clarify the impact of a guilty plea or to in addition speak to what the USDC said about substantive constitutional issues.

Conf 10/1/73

Court CA - 4 | Voted on ....., 19... | No. 72-1660

Argued ....., 19... | Assigned ....., 19...

Submitted ....., 19... | Announced ....., 19...

STANLEY BLACKLEDGE, WARDEN, ET AL., Petitioners

vs.

JIMMY SETH PERRY

Relist

6/11/73 Cert. filed.

Byrne doesn't think there was double jeopardy in this case. Appellant's guilty plea was entered pursuant to plea bargain. But State below - Petr Florida requested remand under Tollett. Rehnquist thinks Tollett controls. Petr - on principle & that is waived by guilty plea

Relist for Byrne + Bill R. to consider how to dispose of it.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Rehnquist, J.		✓		Grants & remands on Tollett									
Powell, J.		✓											
Blackmun, J.		✓											
Marshall, J.			✓										
White, J.		✓											
Stewart, J.		✓			Reverse summarily on Tollett								
Brennan, J.			✓										
Douglas, J.		✓											

Conf. 10/12/73

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 72-1660

BLACKLEDGE

vs.

PERRY

RELIST

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Rehnquist, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Douglas, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Conf. 2/22/74

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 72-1660

BLACKLEDGE

vs.

PERRY

Approved 7 to 1
I reserved my vote & will advise C.J.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING	
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Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

February 25, 1974

No. 7201660 Blackledge v. Perry

Dear Chief:

I "passed" at the Conference on Friday, and promised to let you hear from me further.

As I stated at the Conference, I had thought that this case was controlled by Tollett. I do not consider the defense of double jeopardy, even if it were applicable, to be jurisdictional. If, as I have thought, an uncoerced guilty plea with advice of counsel waives constitutional rights (e. g., jury trial) as well as procedural defects, I would have thought that such a plea would waive such right as the defendant had not to be charged with a more serious offense.

While I still incline to this view, I will reconsider my position in light of ~~my~~ his discussion at the Conference and particularly in view of what may be written. But for the time being, I am inclined to adhere to my initial view.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Stewart, J.

Circulated: APR 12 1974

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 72-1660

Stanley Blackledge, Warden, et al., Petitioners, *v.* Jimmy Seth Perry. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[April —, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

While serving a term of imprisonment in a North Carolina penitentiary, the respondent Perry became involved in an altercation with another inmate. A warrant issued, charging Perry with the misdemeanor of assault with a deadly weapon, N. C. Gen. Stat. § 14-33 (b)(1) (1969 ed.). Under North Carolina law, the District Court Division of the General Court of Justice has exclusive jurisdiction for the trial of misdemeanors. N. C. Gen. Stat. § 7A-272. Following a trial without a jury in the District Court of Northampton County, Perry was convicted of this misdemeanor and given a six-month sentence, to be served after completion of the prison term he was then serving.

Perry then filed a notice of appeal to the Northampton County Superior Court. Under North Carolina law, a person convicted in the District Court has a right to a trial *de novo* in the Superior Court. N. C. Gen. Stat. §§ 7A-290, 15-177.1. The right to trial *de novo* is absolute, there being no need for the appellant to allege error in the original proceeding. When an appeal is taken, the statutory scheme provides that the slate is wiped clean;

Received 4/13 1974

I will dissent on Tollett. Guilty plea disposes of due process issue. This op. does not reach D/J issue.

See Jack's notes & my notes on his copy of this Draft. I circulate note of

the prior conviction is annulled, and the prosecution and the defense begin anew in the Superior Court.[1]

After the filing of the notice of appeal, but prior to the respondent's appearance for trial *de novo* in the Superior Court, the prosecutor obtained an indictment from a grand jury, charging Perry with the felony of assault with a deadly weapon with intent to kill inflicting serious bodily injury, N. C. Gen. Stat. § 14–32. The indictment covered the same conduct for which Perry had been tried and convicted in the District Court. Perry entered a plea of guilty to the indictment in the Superior Court, and was sentenced to a term of five to seven years in the penitentiary, to be served concurrently with the prison sentence he was then serving.[2]

A number of months later, the respondent filed an application for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. He claimed that the indictment on the felony charge in the Superior Court constituted double jeopardy and also deprived him of due process of law. In an unreported opinion, the District Court dismissed the petition

[1] See generally *State* v. *Spencer*, 276 N. C. 535, 173 S. E. 2d 764; *State* v. *Sparrow*, 276 N. C. 499, 173 S. E. 2d 897.

[2] The respondent's guilty plea was apparently premised on the expectation that any sentence he received in the superior court would be served concurrently with the sentence he was then serving, as contrasted with the consecutive sentence imposed in the District Court. That expectation was fulfilled, but it turned out that the guilty plea resulted in increasing the respondent's potential term of incarceration. Under applicable North Carolina law, the five- to seven-year assault sentence did not commence until the date of the guilty plea, October 28, 1969. By that time, Perry had already served some 17 months of the sentence he was serving at the time of the alleged assault. Thus, the effect of the five- to seven-year concurrent sentence on the assault charge was to increase his potential period of confinement by these 17 months, as opposed to the six-month increase envisaged by the District Court's consecutive sentence.

for failure to exhaust available state remedies. The United States Court of Appeals for the Fourth Circuit reversed, holding that resort to the state courts would be futile, because the Supreme Court of North Carolina had consistently rejected the constitutional claims presented by Perry in his petition. 453 F. 2d 856.[3] The case was remanded to the District Court for further proceedings.

On remand, the District Court granted the writ. It held that the bringing of the felony charge after the filing of the appeal violated Perry's rights under the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784. The District Court further held that the respondent had not, by his guilty plea in the Superior Court, waived his right to raise his constitutional claims in the federal habeas corpus proceeding. — F. Supp. —. The Court of Appeals affirmed the judgment in a brief *per curiam* opinion. — F. 2d —. We granted certiorari, 414 U. S. 980, to consider the seemingly important issues presented by this case.

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[3] The Court of Appeals further instructed the District Court to await the ruling of this Court in *Rice* v. *North Carolina*, 434 F. 2d 297 (CA4), cert. granted, 401 U. S. 1008. *Rice* involved a challenge to the constitutionality of an enhanced penalty received after a criminal defendant had sought a trial *de novo* under North Carolina's two-tiered misdemeanor adjudication system. This Court did not reach the merits of this issue in *Rice*, instead vacating and remanding to the Court of Appeals for consideration as to whether the case had become moot. 404 U. S. 244.

Subsequently, in *Colten* v. *Kentucky*, 407 U. S. 104, we dealt with the merits of this issue, and held that the imposition of an increased sentence on trial *de novo* did not violate either the Due Process or the Double Jeopardy Clause. The District Court in the present case had the benefit of the *Colten* decision before issuing its opinion granting habeas corpus relief.

I

As in the District Court, Perry directs two independent constitutional attacks upon the conduct of the State in hailing him into court on the felony charge after he took an appeal from the misdemeanor conviction. First, he contends that the felony indictment in the superior court placed him in double jeopardy, since he had already been convicted on the lesser included misdemeanor charge in the District Court. Second, he urges that the indictment on the felony charge constituted a penalty for his exercising his statutory right to appeal, and thus contravened the Due Process Clause of the Fourteenth Amendment.[4] We find it necessary to reach only the latter claim.

Perry's due process arguments are derived substantially from *North Carolina* v. *Pearce*, 395 U. S. 711, and its progeny. In *Pearce*, the Court considered the constitutional problems presented when, following a successful appeal and reconviction, a criminal defendant was subjected to a greater punishment than that imposed at the first trial. While we concluded that such a harsher sentence was not absolutely precluded by either the Double Jeopardy or Due Process Clause, we emphasized that "imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process

[4] This Court has never held that the States are constitutionally required to establish avenues of appellate review of criminal convictions. Nonetheless, "it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi* v. *Yeager*, 384 U. S. 305, 310. See also *Griffin* v. *Illinois*, 351 U. S. 12; *Douglas* v. *California*, 372 U. S. 335; *Lane* v. *Brown*, 372 U. S. 477; *Draper* v. *Washington*, 372 U. S. 487; *North Carolina* v. *Pearce*, 395 U. S. 711, 724–725; *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 24 n. 11.

of law." *Id.*, at 724. Because "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial," *id.*, at 725, we held that an increased sentence could not be imposed upon retrial unless the sentencing judge placed certain specified findings on the record.

In *Colten* v. *Kentucky*, 407 U. S. 104, the Court was called upon to decide the applicability of the *Pearce* holding to Kentucky's two-tiered system of criminal adjudication. Kentucky, like North Carolina, allows a misdemeanor defendant convicted in an inferior trial court to seek a retrial *de novo* in a court of general jurisdiction.[5] The appellant in *Colten* claimed that the Constitution prevented the court of general jurisdiction, after trial *de novo*, from imposing a sentence in excess of that imposed in the court of original trial. This Court rejected the *Pearce* analogy. Emphasizing that *Pearce* was directed at insuring the absence of "vindictiveness" against a criminal defendant who attacked his initial conviction on appeal, the Court found such dangers greatly minimized on the facts presented in *Colten*. In contrast to *Pearce*, the court that imposed the increased sentence after retrial in *Colten* was not the one whose original judgment had prompted an appellate reversal; thus, there was little possibility that an increased sentence on trial *de novo* could have been motivated by personal vindictiveness on the part of the sentencing judge. Hence, the Court thought the prophylactic rule of *Pearce* unnecessary in the *de novo* trial and sentencing context of *Colten*

The *Pearce* decision was again interpreted by this Court last Term in *Chaffin* v. *Stynchcombe*, 412 U. S. 17,

[5] For a more exhaustive list of States employing similar two-tiered procedures, see *Colten, supra*, at 112 n. 4.

in the setting of Georgia's system under which sentencing responsibility is entrusted to the jury. Upon retrial following the reversal of his original conviction, the defendant in *Chaffin* was reconvicted and sentenced to a greater term than had been imposed by the initial jury. Concentrating again on the issue of vindictiveness, the Court found no violation of the *Pearce* rule. It was noted that the second jury was completely unaware of the original sentence, and thus could hardly have sought to "punish" Chaffin for his successful appeal. Moreover, the jury, unlike a judge who had been reversed on appeal, could hardly have a stake in the prior conviction or any motivation to discourage criminal defendants from seeking appellate review. Hence, it was concluded that the danger of vindictiveness under the circumstances of the case was *"de minimis," id.*, at 26, and did not require adoption of the constitutional rule set out in *Pearce*.

The lesson that emerges from *Pearce*, *Colten*, and *Chaffin* is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness." Unlike the circumstances presented by those cases, however, in the situation here the central figure is not the judge or the jury, but the prosecutor. The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case. We conclude that the answer must be in the affirmative.

A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the superior court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly

convicted defendant going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy, the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial.

There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal 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." 395 U. S., at 725. We think it clear that the same considerations apply here. 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 a significantly increased potential period of incarceration.[8] Cf. *United States* v. *Jackson*, 390 U. S. 570.

Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-

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[8] Moreover, even putting to one side the potentiality of increased incarceration, conviction of a "felony" often entails more serious collateral consequences than those incurred through a misdemeanor conviction. See generally Project, The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929, 955–960; Note, Civil Disabilities of Felons, 53 Va. L. Rev. 403, 406–408. Cf. *O'Brien* v. *Skinner*, — U. S. — (involving New York law, under which convicted misdemeanants retain the right to vote).

tiered appellate process. We hold, therefore, that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him at the trial *de novo*.[1]

II

The remaining question is whether, because of his guilty plea to the felony charge in the Superior Court, Perry is precluded from raising his constitutional claims in this federal habeas corpus proceeding. In contending that such is the case, the petitioner warden relies chiefly on this Court's decision last Term in *Tollett* v. *Henderson*, 411 U. S. 258.

The precise issue presented in *Tollett* was "whether a state prisoner, pleading guilty with the advice of counsel, may later obtain release through federal habeas corpus by proving only that the indictment to which he pleaded was returned by an unconstitutionally selected grand jury." *Id.*, at 260. The Court answered that question in the negative. Relying primarily on the guilty plea trilogy of *Brady* v. *United States*, 397 U. S. 742; *McMann* v. *Richardson*, 397 U. S. 759, and *Parker* v. *North Carolina*, 397 U. S. 790, the Court characterized the guilty plea as "a break in the chain of events which has preceded it in the criminal process." *Id.*, at 267. Accordingly, the Court held that when a criminal defend-

[1] This would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in *Diaz* v. *United States*, 223 U. S. 442. In that case the defendant was originally tried and convicted for assault and battery. Subsequent to the original trial, the assault victim died, and the defendant was then tried and convicted for homicide. Obviously, it would not have been possible for the authorities in *Diaz* to have originally proceeded against the defendant on the more serious charge, since the crime of homicide was not complete until after the victim's death.

ant enters a guilty plea, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Ibid.* Rather, a person complaining of such "antecedent constitutional violations," *id.*, at 266, is limited in a federal habeas corpus proceeding to attacks on the voluntary and intelligent nature of the guilty plea, through proof that the advice received from counsel was not "within the range of competence demanded of attorneys in criminal cases." See *McMann, supra,* at 771.

Much of the language in *Tollett* is sweeping, and might conceivably be read to support the arguments advanced by the petitioner in this case. We think, however, that there is a fundamental distinction between this case and *Tollett*. While the underlying claims presented in *Tollett* and the *Brady* trilogy were of constitutional dimension, none went to the very power of the State to bring the defendant into court to answer the charge brought against him. The defendants in *McMann* v. *Richardson,* for example, could surely have been brought to trial without the use of the allegedly coerced confessions, and even a tainted indictment of the sort alleged in *Tollett* could have been "cured" through a new indictment by a properly selected grand jury. In the case at hand, by contrast, the nature of the underlying constitutional infirmity is markedly different. Having chosen originally to proceed on the misdemeanor charges in the District Court, the State of North Carolina was, under the facts of this case, simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge in the Superior Court. Unlike the defendant in *Tollett,* Perry is not complaining of "antecedent constitutional violations" or of a "deprivation of constitutiontal rights that occurred prior to the entry of the guilty plea." Rather, the right that he asserts and that we today accept is the right not to be

hailed into court at all upon the felony charge. The very initiation of the proceedings against him in the superior court thus operated to deny him due process of law.

Last Term in *Robinson* v. *Neil*, 409 U. S. 505, in explaining why the Double Jeopardy Clause is distinctive, the Court noted that "its practical result is to prevent a trial from taking place at all, rather than to prescribe the procedural rules that govern the conduct of a trial." *Id.*, at 509. While our judgment today is not based upon the Double Jeopardy Clause, we think that the quoted language aptly describes the due process right upon which our judgment is based. The "practical result" dictated by the Due Process Clause in this case is that North Carolina simply could not permissibly require Perry to answer to the felony charge. That being so, it follows that his guilty plea did not foreclose him from attacking his conviction in the Superior Court proceedings through a federal writ of habeas corpus.

Accordingly, the judgment of the Court of Appeals for the Fourth Circuit is affirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

April 12, 1976

Dear Potter:

Please join me in your opinion for the Court in 73-1660 Blackledge v. Perry.

Sincerely,

William O. Douglas

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 15, 1974

Re: No. 73-1492 -- Maryland v. Perry

Dear Potter:

Please join me.

Sincerely,

TM

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

April 18, 1974

Re: No. 73-1503 - Blackledge v. Perry

Dear Potter:

I anticipate circulating a dissent in this case.

Sincerely,

WOD

Mr. Justice Stewart

Copies to the Conference

P. 9

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell ✓
Mr. Justice Rehnquist

3rd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: APR 16 1974

No. 72-1660

Stanley Blackledge, Warden, et al., Petitioners, *v.* Jimmy Seth Perry.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[April —, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

While serving a term of imprisonment in a North Carolina penitentiary, the respondent Perry became involved in an altercation with another inmate. A warrant issued, charging Perry with the misdemeanor of assault with a deadly weapon, N. C. Gen. Stat. § 14–33 (b)(1) (1969 ed.). Under North Carolina law, the District Court Division of the General Court of Justice has exclusive jurisdiction for the trial of misdemeanors. N. C. Gen. Stat. § 7A–272. Following a trial without a jury in the District Court of Northampton County Perry was convicted of this misdemeanor and given a six-month sentence, to be served after completion of the prison term he was then serving.

Perry then filed a notice of appeal to the Northampton County Superior Court. Under North Carolina law, a person convicted in the District Court has a right to a trial *de novo* in the Superior Court. N. C. Gen. Stat. §§ 7A–290, 15–177.1. The right to trial *de novo* is absolute, there being no need for the appellant to allege error in the original proceeding. When an appeal is taken, the statutory scheme provides that the slate is wiped clean;

the prior conviction is annulled, and the prosecution and the defense begin anew in the Superior Court.[1]

After the filing of the notice of appeal, but prior to the respondent's appearance for trial *de novo* in the Superior Court, the prosecutor obtained an indictment from a grand jury, charging Perry with the felony of assault with a deadly weapon with intent to kill inflicting serious bodily injury, N. C. Gen. Stat. § 14–32. The indictment covered the same conduct for which Perry had been tried and convicted in the District Court. Perry entered a plea of guilty to the indictment in the Superior Court, and was sentenced to a term of five to seven years in the penitentiary, to be served concurrently with the prison sentence he was then serving.[2]

A number of months later, the respondent filed an application for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. He claimed that the indictment on the felony charge in the Superior Court constituted double jeopardy and also deprived him of due process of law. In an unreported opinion, the District Court dismissed the petition

[1] See generally *State* v. *Spencer*, 276 N. C. 535, 173 S. E. 2d 764; *State* v. *Sparrow*, 276 N. C. 499, 173 S. E. 2d 897.

[2] The respondent's guilty plea was apparently premised on the expectation that any sentence he received in the superior court would be served concurrently with the sentence he was then serving, as contrasted with the consecutive sentence imposed in the District Court. That expectation was fulfilled, but it turned out that the guilty plea resulted in increasing the respondent's potential term of incarceration. Under applicable North Carolina law, the five- to seven-year assault sentence did not commence until the date of the guilty plea, October 29, 1969. By that time, Perry had already served some 17 months of the sentence he was serving at the time of the alleged assault. Thus, the effect of the five- to seven-year concurrent sentence on the assault charge was to increase his potential period of confinement by these 17 months, as opposed to the six-month increase envisaged by the District Court's consecutive sentence.

for failure to exhaust available state remedies. The United States Court of Appeals for the Fourth Circuit reversed, holding that resort to the state courts would be futile, because the Supreme Court of North Carolina had consistently rejected the constitutional claims presented by Perry in his petition. 453 F. 2d 856.[a] The case was remanded to the District Court for further proceedings.

On remand, the District Court granted the writ. It held that the bringing of the felony charge after the filing of the appeal violated Perry's rights under the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784. The District Court further held that the respondent had not, by his guilty plea in the Superior Court, waived his right to raise his constitutional claims in the federal habeas corpus proceeding. — F. Supp. —. The Court of Appeals affirmed the judgment in a brief *per curiam* opinion. — F. 2d —. We granted certiorari, 414 U. S. 980, to consider the seemingly important issues presented by this case.

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[a] The Court of Appeals further instructed the District Court to await the ruling of this Court in *Rice* v. *North Carolina*, 434 F. 2d 297 (CA4), cert. granted, 401 U. S. 1008. *Rice* involved a challenge to the constitutionality of an enhanced penalty received after a criminal defendant had sought a trial *de novo* under North Carolina's two-tiered misdemeanor adjudication system. This Court did not reach the merits of this issue in *Rice*, instead vacating and remanding to the Court of Appeals for consideration as to whether the case had become moot. 404 U. S. 244.

Subsequently, in *Colten* v. *Kentucky*, 407 U. S. 104, we dealt with the merits of this issue, and held that the imposition of an increased sentence on trial *de novo* did not violate either the Due Process or the Double Jeopardy Clause. The District Court in the present case had the benefit of the *Colten* decision before issuing its opinion granting habeas corpus relief.

I

As in the District Court, Perry directs two independent constitutional attacks upon the conduct of the State in hailing him into court on the felony charge after he took an appeal from the misdemeanor conviction. First, he contends that the felony indictment in the superior court placed him in double jeopardy, since he had already been convicted on the lesser included misdemeanor charge in the District Court. Second, he urges that the indictment on the felony charge constituted a penalty for his exercising his statutory right to appeal, and thus contravened the Due Process Clause of the Fourteenth Amendment.* We find it necessary to reach only the latter claim.

Perry's due process arguments are derived substantially from *North Carolina* v. *Pearce*, 395 U. S. 711, and its progeny. In *Pearce*, the Court considered the constitutional problems presented when, following a successful appeal and reconviction, a criminal defendant was subjected to a greater punishment than that imposed at the first trial. While we concluded that such a harsher sentence was not absolutely precluded by either the Double Jeopardy or Due Process Clause, we emphasized that "imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process

*This Court has never held that the States are constitutionally required to establish avenues of appellate review of criminal convictions. Nonetheless, "it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi* v. *Yeager*, 384 U. S. 305, 310. See also *Griffin* v. *Illinois*, 351 U. S. 12; *Douglas* v. *California*, 372 U. S. 335; *Lane* v. *Brown*, 372 U. S. 477; *Draper* v. *Washington*, 372 U. S. 487; *North Carolina* v. *Pearce*, 395 U. S. 711, 724–725; *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 24 n. 11.

of law." *Id.*, at 724. Because "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial," *id.*, at 725, we held that an increased sentence could not be imposed upon retrial unless the sentencing judge placed certain specified findings on the record.

In *Colten* v. *Kentucky*, 407 U. S. 104, the Court was called upon to decide the applicability of the *Pearce* holding to Kentucky's two-tiered system of criminal adjudication. Kentucky, like North Carolina, allows a misdemeanor defendant convicted in an inferior trial court to seek a retrial *de novo* in a court of general jurisdiction.[5] The appellant in *Colten* claimed that the Constitution prevented the court of general jurisdiction, after trial *de novo*, from imposing a sentence in excess of that imposed in the court of original trial. This Court rejected the *Pearce* analogy. Emphasizing that *Pearce* was directed at insuring the absence of "vindictiveness" against a criminal defendant who attacked his initial conviction on appeal, the Court found such dangers greatly minimized on the facts presented in *Colten*. In contrast to *Pearce*, the court that imposed the increased sentence after retrial in *Colten* was not the one whose original judgment had prompted an appellate reversal; thus, there was little possibility that an increased sentence on trial *de novo* could have been motivated by personal vindictiveness on the part of the sentencing judge. Hence, the Court thought the prophylactic rule of *Pearce* unnecessary in the *de novo* trial and sentencing context of *Colten*

The *Pearce* decision was again interpreted by this Court last Term in *Chaffin* v. *Stynchcombe*, 412 U. S. 17,

[5] For a more exhaustive list of States employing similar two-tiered procedures, see *Colten*, *supra*, at 112 n. 4.

in the setting of Georgia's system under which sentencing responsibility is entrusted to the jury. Upon retrial following the reversal of his original conviction, the defendant in *Chaffin* was reconvicted and sentenced to a greater term than had been imposed by the initial jury. Concentrating again on the issue of vindictiveness, the Court found no violation of the *Pearce* rule. It was noted that the second jury was completely unaware of the original sentence, and thus could hardly have sought to "punish" Chaffin for his successful appeal. Moreover, the jury, unlike a judge who had been reversed on appeal, could hardly have a stake in the prior conviction or any motivation to discourage criminal defendants from seeking appellate review. Hence, it was concluded that the danger of vindictiveness under the circumstances of the case was *"de minimis," id.*, at 26, and did not require adoption of the constitutional rule set out in *Pearce*.

The lesson that emerges from *Pearce*, *Colten*, and *Chaffin* is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness." Unlike the circumstances presented by those cases, however, in the situation here the central figure is not the judge or the jury, but the prosecutor. The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case. We conclude that the answer must be in the affirmative

A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the superior court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly

convicted defendant going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy, the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial.

There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal 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." 395 U. S., at 725. We think it clear that the same considerations apply here. 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 a significantly increased potential period of incarceration.[8] Cf. *United States* v. *Jackson*, 390 U. S. 570.

Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-

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[8] Moreover, even putting to one side the potentiality of increased incarceration, conviction of a "felony" often entails more serious collateral consequences than those incurred through a misdemeanor conviction. See generally Project, The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929, 955–960; Note, Civil Disabilities of Felons, 53 Va. L. Rev. 403, 406–408. Cf. *O'Brien* v. *Skinner*, — U. S. — (involving New York law, under which convicted misdemeanants retain the right to vote).

tiered appellate process. We hold, therefore, that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him at the trial *de novo*.[1]

II

The remaining question is whether, because of his guilty plea to the felony charge in the Superior Court, Perry is precluded from raising his constitutional claims in this federal habeas corpus proceeding. In contending that such is the case, the petitioner warden relies chiefly on this Court's decision last Term in *Tollett* v. *Henderson*, 411 U. S. 258.

The precise issue presented in *Tollett* was "whether a state prisoner, pleading guilty with the advice of counsel, may later obtain release through federal habeas corpus by proving only that the indictment to which he pleaded was returned by an unconstitutionally selected grand jury." *Id.*, at 260. The Court answered that question in the negative. Relying primarily on the guilty plea trilogy of *Brady* v. *United States*, 397 U. S. 742; *McMann* v. *Richardson*, 397 U. S. 759, and *Parker* v. *North Carolina*, 397 U. S. 790, the Court characterized the guilty plea as "a break in the chain of events which has preceded it in the criminal process." *Id.*, at 267.

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[1] This would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in *Diaz* v. *United States*, 223 U. S. 442. In that case the defendant was originally tried and convicted for assault and battery. Subsequent to the original trial, the assault victim died, and the defendant was then tried and convicted for homicide. Obviously, it would not have been possible for the authorities in *Diaz* to have originally proceeded against the defendant on the more serious charge, since the crime of homicide was not complete until after the victim's death.

Accordingly, the Court held that when a criminal defendant enters a guilty plea, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Ibid.* Rather, a person complaining of such "antecedent constitutional violations," *id.*, at 266, is limited in a federal habeas corpus proceeding to attacks on the voluntary and intelligent nature of the guilty plea, through proof that the advice received from counsel was not "within the range of competence demanded of attorneys in criminal cases." See *McMann, supra,* at 771.

While the petitioner's reliance upon the *Tollett* opinion is understandable, there is a fundamental distinction between this case and that one. Although the underlying claims presented in *Tollett* and the *Brady* trilogy were of constitutional dimension, none went to the very power of the State to bring the defendant into court to answer the charge brought against him. The defendants in *McMann* v. *Richardson,* for example, could surely have been brought to trial without the use of the allegedly coerced confessions, and even a tainted indictment of the sort alleged in *Tollett* could have been "cured" through a new indictment by a properly selected grand jury. In the case at hand, by contrast, the nature of the underlying constitutional infirmity is markedly different. Having chosen originally to proceed on the misdemeanor charges in the District Court, the State of North Carolina was, under the facts of this case, simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge in the Superior Court. Unlike the defendant in *Tollett,* Perry is not complaining of "antecedent constitutional violations" or of a "deprivation of constitutiontal rights that occurred prior to the entry of the guilty plea." Rather, the right that he asserts and that we today accept is the right not to be

hailed into court at all upon the felony charge. The very initiation of the proceedings against him in the superior court thus operated to deny him due process of law.

Last Term in *Robinson* v. *Neil*, 409 U. S. 505, in explaining why the Double Jeopardy Clause is distinctive, the Court noted that "its practical result is to prevent a trial from taking place at all, rather than to prescribe the procedural rules that govern the conduct of a trial." *Id.*, at 509. While our judgment today is not based upon the Double Jeopardy Clause, we think that the quoted language aptly describes the due process right upon which our judgment *is* based. The "practical result" dictated by the Due Process Clause in this case is that North Carolina simply could not permissibly require Perry to answer to the felony charge. That being so, it follows that his guilty plea did not foreclose him from attacking his conviction in the Superior Court proceedings through a federal writ of habeas corpus.

Accordingly, the judgment of the Court of Appeals for the Fourth Circuit is affirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM J. BRENNAN, JR.

April 16, 1974

RE: No. 73-1393 Blackledge v. Perry

Dear Potter:

I agree.

Sincerely,

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 15, 1974

Re: No. 72-1660 - Blackledge v. Perry

Dear Potter:

Please join me in your recirculation of

April 15.

Sincerely,

HAB

Mr. Justice Stewart

cc: The Conference

April 16, 1976

No. 75-1662 Blankinship v. Perry

Dear Potter:

As I voted "the other way", I will await Bill Rehnquist's dissent in the above case.

Sincerely,

Mr. Justice Stewart

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 24, 1974

Re: No. 72-1660 - Blackledge v. Perry

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

Copies to Conference

Substantial additions, as indicated

Judge --
I would
join part
II.

Jack

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

Circulated: 4/26

Recirculated: 5/7

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1660

Stanley Blackledge, Warden, et al., Petitioners, v. Jimmy Seth Perry. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[May —, 1974]

MR. JUSTICE REHNQUIST, dissenting.

I would find it more difficult than the Court apparently does in Part I in its opinion to conclude that the very bringing of more serious charges against respondent following his request for a trial *de novo* violated due process as defined in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). Still more importantly, I believe the Court's conclusion that respondent may assert the Court's newfound *Pearce* claim in this federal habeas action, despite his plea of guilty to the charges brought after his invocation of his statutory right to a trial *de novo*, marks an unwarranted departure from the principles we have recently enunciated in *Tollett* v. *Henderson*, 411 U. S. 158 (1973), and the *Brady* trilogy, *Brady* v. *United States*, 397 U. S. 742 (1970), *McMann* v. *Richardson*, 397 U. S. 759 (1970), and *Parker* v. *North Carolina*, 397 U. S. 790 (1970).

I

As the Court notes, in addition to his claim based on *Pearce* respondent contends that his felony indictment in the superior court violated his rights under the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969). Presumably because we have earlier held that "the jeopardy

incident to" a trial does "no textend to an offense beyond [the trial court's] jurisdiction," *Diaz* v. *United States*, 223 U. S. 442, 449 (1912), the Court rests its decision instead on the Fourteenth Amendment due process doctrine of *Pearce*. In so doing, I think the Court too readily equates the role of the prosecutor, who is a natural adversary of the defendant and who we observed in *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 27 (1973), "often request[s] more than [he] can reasonably expect to get," with that of the sentencing judge in *Pearce*. I also think the Court passes too lightly over the reasoning of *Colten* v. *Kentucky*, 407 U. S. 104 (1972), in which we held that imposition of the prophylatic rule of *Pearce* was not necessary in Kentucky's two-tier system for *de novo* appeals from justice court convictions, even though the judge at retrial might impose a more severe sentence than had been imposed by the justice court after the original trial.

The dissenting opinion in *Pearce*, 395 U. S. 711, 726, took the position that the imposition of a penalty after retrial which exceeded the penalty imposed after the first trial violated the guarantee against double jeopardy. But the opinion of the Court, relying on cases such as *United States* v. *Ball*, 163 U. S. 662 (1896), and *Stroud* v. *United States*, 251 U. S. 15 (1919), specifically rejected such an approach to the case. The Court went on to hold "that neither the double jeopardy provision nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction." 395 U. S., at 723. The Court concluded by holding that due process "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." 395 U. S., at 725. To make certain that those requirements of due proces were met, the Court laid down the rule that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." 395 U. S., at 726. Thus the avowed purpose of the remedy fashioned in *Pearce* was to prevent judicial vindictiveness from resulting in longer sentences after a retrial following successful appeal.

Since in theory if not in practice the second sentence in the *Pearce* situation might be expected to be the same as the first unless influenced by vindictiveness or by intervening conduct of the defendant, in theory at least the remedy mandated there reached no further than the identified wrong. The same cannot be said here. For while indictment on more serious charges after a successful appeal would present a problem closely analogous to that in *Pearce* in this respect, the bringing of more serious charges after a defendant's exercise of his absolute right to a trial *de novo* in North Carolina's two-tier system does not. The prosecutor here elected to proceed initially in the state district court where felony charges could not be prosecuted, for reasons which may well have been unrelated to whether he believed respondent was guilty of and could be convicted of the felony with which he was later charged. Both prosecutor and defendant stand to benefit from an initial prosecution in the District Court, the prosecutor at least from its less burdensome procedures and the defendant from the opportunity for an initial acquittal and the limited penalties. With the countervailing reasons for proceeding only on the misdemeanor charge in the District Court no longer applicable once the defendant has invoked his statutory right to a trial *de novo*, a prosecutor need not be vindictive

to seek to indict and convict a defendant of the more serious of the two crimes of which he believes the defendant guilty. Thus even if one accepts the Court's equation of prosecutorial vindictiveness with judicial vindictiveness, here, unlike *Pearce*, the Court's remedy reaches far beyond the wrong it identifies.

Indeed, it is not a little puzzling that the Court's remedy is the same that would follow upon a conclusion that the bringing of the new charges violated respondent's rights under the Double Jeopardy Clause. And the Court's conclusion that "the very initiation of the proceedings against [respondent] in the Superior Court operated to deny him due process of law" surely sounds in the language of double jeopardy, however, it may be dressed in due process garb.

II

If the Court is correct in stating the consequences of upholding respondent's constitutional claim here, and indeed the State lacked "the very power to bring him to trial," I believe this case is governed by cases culminating in *Tollett* v. *Henderson*, 411 U. S. 258 (1973). In that case the state no doubt lacked "power" to bring Henderson to trial without a valid grand jury indictment; yet that constitutional disability was held by us to be merged in the guilty plea. I do not see why a constitutional claim the consequences of which make it the identical twin of double jeopardy may not, like double jeopardy, be waived by the person for whose benefit it is accorded. *Kepner* v. *United States*, 195 U. S. 100, 131 (1904); *Harris* v. *United States*, 237 F. 2d 274, 277 (CA8 1956); *Kistner* v. *United States*, 332 F. 2d 978, 980 (CA8 1964).

In *Tollett* v. *Henderson*, *supra*, we held that "just as the guilty pleas in the *Brady* trilogy were found to foreclose direct inquiry into the merits of claimed ante-

cedent constitutional violations there, ". . . respondent's guilty plea here alike forecloses independent inquiry into the claim of discrimination in the selection of the grand jury." 411 U. S., at 266. Surely the due process violation found by the Court today is no less "antecedent" than the constitutional violations claimed to make the grand jury indictment invalid in *Tollett* v. *Henderson*, the confession inadmissible in *McMann*, or the exercise of the right to a jury trial impermissibly burdened in *Brady* and *Parker*. As the Court notes, we reaffirmed in *Tollett* v. *Henderson* the principle of the *Brady* trilogy that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." 411 U. S., at 267. We went on to say there:

> "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*." *Ibid.*

The assertion by the Court that this reasoning is somehow inapplicable here because the claim goes "to the very power of the State to bring the defendant into court to answer the charge brought against him" is little other than a conclusion. Any difference between the issue resolved the other way in *Tollett* v. *Henderson* and the issue before us today is at most semantic. But the Court's "test" not only fails to distinguish *Henderson;* it also fails to provide any reasoned basis on which to approach such questions as whether a speedy trial claim is merged in a guilty plea. I believe the Court's departure today

from the principles of *Henderson* and the cases preceding it must be recognized as a potentially major breach in the wall of certainty surrounding guilty pleas for which we have found constitutional sanction in those cases.

There is no indication in this record that respondent's guilty plea was the result of an agreement with the prosecutor. But the Court's basis for distinguishing the *Henderson* and *Brady* cases seems so insubstantial as to permit the doctrine of this case to apply to guilty pleas which have been obtained as a result of "plea bargains." In that event it will be not merely the State which stands to lose, but the accused defendant in the position of the respondent as well. For the State has little incentive to agree to reduce a charge against an accused defendant in exchange for a guilty plea, if the defendant may repudiate his part of the bargain at will upon his assertion that there was a constitutional infirmity at an earlier stage of the proceedings.

III

But if, as I believe, a proper analysis of respondent's constitutional claim produces at most a violation of the standards laid down in *North Carolina* v. *Pearce, supra,* I agree with the Court, though not for the reasons it gives, that respondent's claim was not merged in his guilty plea. Imposition of sentence in violation of *Pearce* is not an "antecedent constitutional violation," since sentence is customarily imposed after a plea of guilty, and is a separate legal event from the determination by the Court that the defendant is in fact guilty of the offense with which he is charged.

If respondent's claim is properly analyzed in terms of *Pearce,* I would think that a result quite different from that mandated in the Court's opinion would obtain. *Pearce* and the decisions following it have made it clear that the wrong lies in the increased sentence, not in the

Judgment of conviction, and that the remedy for a *Pearce* defect is a remand for sentencing consistent with due process. *North Carolina* v. *Rice*, 404 U. S. 244, 247–248 (1971). In *Rice* we concluded that the Court of Appeals had erred in ruling that *Pearce* authorized the expunging of Rice's conviction after his *de novo* retrial in North Carolina:

> "It could not be clearer . . . that *Pearce* does not invalidate the conviction that resulted from Rice's second trial . . . . *Pearce*, in short, requires only resentencing; the conviction is not *ipso facto* set aside and a new trial required. Even if the higher sentence imposed after Rice's trial de novo was vulnerable under *Pearce*, Rice was entitled neither to have his sentence erased nor to avoid the collateral consequences flowing from that conviction and a proper sentence." *Ibid.*

Since Rice had completely served his sentence, rather than reaching the merits of Rice's *Pearce* claim, we remanded for a determination whether any collateral consequences flowed from his service of the longer sentence imposed after retrial, or whether the case was moot.

Here, while respondent faced the prospect of a more severe sentence at the conclusion of his felony trial in the Superior Court of North Carolina, it was by no means self-evident that this would be the result. The maximum sentence which he could receive on the misdemeanor count was one and one-half years, but nothing in the record indicates that the Superior Court judge might not impose a lesser penalty than that, or even grant probation. Nor is there any indication in the habeas record, which contains only a fragment of the state court proceedings, that the Superior Court judge might not at the conclusion of the trial and after a verdict of guilty have before him for sentencing purposes information which

would support an augmented sentence under *Pearce*. In fact, the habeas court found that the sentence actually imposed was more severe than that which could have been imposed under the misdemeanor charge. But the remedy for that violation should be a direction to the state court to resentence in accordance with *Pearce*, rather than an order completely anulling the conviction. Respondent was originally convicted of assaulting a fellow inmate with a deadly weapon, and later pleaded guilty to a charge of assaulting the inmate with a deadly weapon with intent to kill him. But in spite of both a verdict of guilty on one charge and a plea of guilty to the other, the Court's decision may well, as a practical matter, assure that no penalty whatever will be imposed on him.

Judge__

I think this is all balled up. May I discuss it with you? I think the answer to this case is so clear (and so clearly not dealt with adequately here) that I wonder if I'm missing something. Jack

1st DRAFT

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

Circulated: 4/26/74

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 72-1660

Stanley Blackledge, Warden, et al., Petitioners, *v.* Jimmy Seth Perry. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[May —, 1974]

MR. JUSTICE REHNQUIST, dissenting.

I would find it more difficult than the Court apparently does in Part I in its opinion to conclude that the sentence imposed by the North Carolina courts violated Fourteenth Amendment due process as defined in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). I think the Court too readily equates the role of the prosecutor, who is a natural adversary of the defendant and who we observed in *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 27, "often request[s] more than [he] can reasonably expect to get," with that of the sentencing judge in *Pearce*. I also think the Court passes over too lightly the reasoning of *Colten* v. *Kentucky*, 407 U. S. 104 (1972), in which we held that Kentucky's two tier appellate system for *de novo* appeals from justice court convictions did not offend *Pearce*, even though the judge at retrial might impose a more severe sentence than had been imposed by the Justice Court after the original trial.

Query? Your Chaffin opinion is narrow & careful -- does it support this implication?

My principal difference with the Court arises over its conclusion, in Part II of the opinion, that "the very initiation of the proceedings against [respondent] in the Superior Court operated to deny him due process of law." The Court states initially that it is not reaching respondent's double jeopardy contention, but the quoted statement surely sounds in the language of double jeopardy, however, it may be dressed in due process garb.

Loosely mixed metaphor

The dissenting opinion in *Pearce*, 395 U. S. 711, 726, took the position that the imposition of a penalty after retrial which exceeded the penalty imposed after the first trial violated the guarantee against double jeopardy. But the opinion of the Court, relying on cases such as *United States* v. *Ball*, 163 U. S. 662 (1896), and *Stroud* v. *United States*, 251 U. S. 15 (1919), specifically rejected such an approach to the case. The Court went on to hold "that neither the double jeopardy provision nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction." 395 U. S., at 723. The Court concluded by holding that due process "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." 395 U. S., at 725. To make certain that those requirements of due proces were met, the Court laid down the rule that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." 395 U. S., at 726. Thus the whole thrust of *Pearce*, as written, was not to bar a subsequent prosecution of the defendant for the conduct which had resulted in his conviction in the first instance, but rather to assure that although the second proceeding might take place, no more severe sentence should be imposed as a result of judicial vindictiveness.

It is therefore puzzling indeed to find the Court now speaking in terms that implicate "the very power of the state to bring the defendant into court to answer the

charge brought against him." Slip opinion, p. 9. If the Court were correct in stating the consequences of upholding respondent's constitutional claim here, and indeed the state lacked "the very power to bring him to trial," I would think this case was governed by cases culminating in *Tollett* v. *Henderson*, 411 U. S. 258 (1973). In that case the state no doubt lacked "power" to bring Henderson to trial without a valid grand jury indictment; yet that constitutional disability was held by us to be merged in the guilty plea. I do not see why a constitutional claim the consequences of which make it the identical twin to double jeopardy may not, like double jeopardy, be waived by the person for whose benefit it is accorded. *Kepner* v. *United States*, 195 U. S. 100, 131 (1904); *Harris* v. *United States*, 237 F. 2d 274, 277 (CA8 1956); *Kistner* v. *United States*, 332 F. 2d 978, 980 (CA8 1964).

But if, as I believe, a proper analysis of respondent's constitutional claim produces at most a violation of the standards laid down in *North Carolina* v. *Pearce*, *supra*, I agree with the Court, though not for the reasons it gives, that respondent's claim was not merged in his guilty plea. Imposition of sentence in violation of *Pearce* is not an "antecedent constitutional violation," since sentence is customarily imposed after a plea of guilty, and is a separate legal event from the determination by the Court that the defendant is in fact guilty of the offense with which he is charged.

If respondent's claim is properly analyzed in terms of *Pearce*, I would think that a result quite different from that mandated in the Court's opinion would obtain. *Pearce* and the decisions following it have made it clear that the wrong lies in the increased sentence, not in the judgment of conviction, and that the remedy for a *Pearce* defect is a remand for sentencing consistent with due

process. *North Carolina* v. *Rice*, 404 U. S. 244, 247–248 (1971). In *Rice* we concluded that the Court of Appeals had erred in ruling that *Pearce* authorized the expunging of Rice's conviction after his *de novo* retrial in North Carolina:

> "It could not be clearer . . . that *Pearce* does not invalidate the conviction that resulted from Rice's second trial . . . . *Pearce*, in short, requires only resentencing; the conviction is not *ipso facto* set aside and a new trial required. Even if the higher sentence imposed after Rice's trial de novo was vulnerable under *Pearce*, Rice was entitled neither to have his sentence erased nor to avoid the collateral consequences flowing from that conviction and a proper sentence." *Ibid.*

Since Rice had completely served his sentence, rather than reaching the merits of Rice's *Pearce* claim, We remanded for a determination whether any collateral consequences flowed from ~~Rice's~~ his service of the longer sentence imposed after retrial, or whether the case was moot.

Here, while respondent faced the prospect of a more severe sentence at the conclusion of his felony trial in the Superior Court of North Carolina, it was by no means self-evident that this would be the result. The maximum sentence which he could receive on the misdemeanor count was one and one-half years, but nothing in the record indicates that the Superior Court judge might not impose a lesser penalty than that, or even grant probation. Nor is there any indication in the habeas record, which contains only a fragment of the state court proceedings, that the Superior Court judge might not at the conclusion of the trial and after a verdict of guilty have before him for sentencing purposes information which would support an augmented sentence under *Pearce*. In fact, the habeas court found that the sentence actually

lfp/ss 5/8/74

Kruple
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dissent
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I'll

No. 72-1660 BLACKLEDGE v. PERRY

MR. JUSTICE POWELL, dissenting.

I join Part II of Justice Rehnquist's dissent, but add this brief statement to emphasize my view that the Court's recent decision in Tollett v. Henderson, 411 U.S. 158 (1973) is controlling as to the effect of respondent's guilty plea.

In Henderson, we held that a guilty plea, otherwise valid, foreclosed a subsequent attack on the constitutional validity of the grand jury that had indicted the defendant. The Court today holds that this defendant [respondent] despite and otherwise valid guilty plea, may attack subsequently the prosecutorial decision to ehhance the charge on appeal de novo from a misdemeamor to a felony. In my view, these two holdings are analytically irreconcilable. If the possible vindictiveness of the prosecutor, burdening the right of appeal, goes to the "very power of the state to bring a defendant into court", one would have thought

If we are to overrule Henderson within a few months after deciding it, I would hope that the Court would do so expressly and with appropriate articulation of its rationale. I would adhere to Henderson for, as Mr. Justice Rehnquist points out, it is important in the interest of the administration of justice for guilty pleas, made voluntarily and knowingly with advice of counsel, to be respected as a definitive resolution of all issues that could have been raised prior to the guilty plea. An accused defendant has at least as great an interest in the finality of gu a guilty plea as does the state, as the entire structure of plea bargaining is based upon the assumption of finality.

May 10, 1974

No. 72-1660 Blackledge v. Perry

Dear Bill:

Please join me in Part II of your dissenting opinion.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

May 10, 1974

No. 72-1660 Blackledge v. Perry

Dear Bill:

I am happy to join Part IV of your dissent in the above case. As Parker seems controlling, it is unnecessary for me to address other issues.

I considered filing a separate dissenting opinion along the lines of the enclosed draft, but have decided not to do so. Do not hesitate to use any part of this draft, if it should appeal to you.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

No. 72-1660 BLACKLEDGE v. PERRY

MR. JUSTICE POWELL, dissenting.

I join Part II of Mr. Justice Rehnquist's dissent, but add this brief statement to emphasize my view that the Court's recent decision in Tollett v. Henderson, 411 U.S. 285 (1973) is controlling as to the effect of respondent's guilty plea.

The Court today allows a post-conviction challenge to a felony indictment, even though respondent had entered an otherwise valid guilty plea to the indictment. The basic for this belated challenge is that the indictment was handed up after respondent exercised his right under state law to a de novo trial following a misdemeanor conviction. In Tollett, we held that a voluntary guilty plea foreclosed a subsequent attack on the constitutional validity of the grand jury that had indicted the defendant.

In my view, the holdings in Tollett and in the instant case are irreconcilable. If the possible burden on the

of the state to bring a defendant into court", supra at ____, one would have thought that the possible constitutional infirmity of the grand jury in Tollett, resulting in an invalid indictment, also went to the "very power of the state" to try a defendant.

If we are to eviscerate Tollett so soon after deciding it, I would hope that the Court would do so expressly and with appropriate articulation of its rationale. I would adhere to Tollett, for, as MR. JUSTICE REHNQUIST points out, the efficacious administration of justice demands that guilty pleas, made voluntarily and with the advice of counsel, be respected as a definitive resolution of antecedent issues. Since the great majority of criminal cases are resolved by plea bargaining, defendants as a class have at least as great an interest in the finality of voluntary guilty pleas as do prosecutors. If that finality may be swept aside with the ease exhibited by the Court's approach today, prosecutors will have a reduced incentive to bargain, to the detriment of the many defendants for whom plea bargaining

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 14, 1974

Re: 73-1560 - Blackledge v. Perry

Dear Potter:

Please join me.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

			3/1/74	[redacted]				
joins P.S. 5-14-74	joins PS 4-12-74			joins PS 4-15-74	joins PS 4-16-74	Dillon Exhibit 4-16-74		
				joins PS 4-26-74		Jon Pabst 5/10/74		