10-1977

Bordenkircher v. Hayes

Lewis F. Powell Jr.

but the matter
to

State prosecutor, during plea bargaining, threatened to prosecute Resp on a more serious charge (life) unless he pled guilty to the lesser offense for which he then was charged.

When Resp. refused to plead guilty, the prosecutor carried out his threat — CA 6 said

PRELIMINARY MEMORANDUM then was coercive plea bargaining —

June 2, 1977 Conference
List 1, Sheet 2

Cert to CA 6
(Peck, McCree, Lively) reflecting

No. 76-1334 CFH

H/C prosecutorial vindictiveness

BORDENKIRCHER, Warden

v.

HAYES, Prisoner Federal/Habeas Timely

1. SUMMARY: Applying this Court's decisions in North Carolina v. Pearce, 395 U.S. 711 (1969) and Blackledge v. Perry, 417 U.S. 21 (1974), CA 6 held that the prosecutor violated due process when he secured an indictment under an habitual-offender statute after a state defendant refused to plead guilty to a less serious offense. The Warden seeks certiorari.

not ready in form.

2. FACTS: Resp was indicted in Kentucky state court on a forgery charge. During ensuing plea bargaining sessions,

Deny - No great harm in the decision ... prosecutors are ... to indict to all ... possible offenses. I don't think ... question is ... important enough ... take ...

the prosecutor warned resp that if he did not plead guilty, he would be charged under the habitual criminal statute, which carried a life sentence. Resp refused and insisted on going to trial on the forgery count. The prosecutor thereupon secured an indictment against resp under the habitual offender statute. Resp was convicted on both counts, and, pursuant to the trial judge's instructions, was sentenced by the jury to a mandatory life sentence. The Kentucky appellate courts affirmed the conviction over resp's due-process claim.

Resp then sought federal habeas relief. The District Court (E.D.Ky.)(Moynahan, J.) denied relief, concluding simply that resp assumed the risk of a life sentence:

> "[T]he petitioner chose to risk the maximum sentence of life imprisonment under the Kentucky habitual criminal statute by electing to proceed to trial, rather than accepting a sentence of 5 years in return for a plea of guilty to the forgery charge...." Petn, at 2f.

CA 6 reversed. The court, per Judge McCree, held that the plea-bargaining process had been impermissibly abused by the prosecutor's attempt "to coerce an unwilling defendant into foregoing his constitutional right to trial." Id., at 4a. The prosecutor's actions in this case, the court concluded, were plainly based on vindictiveness; */ accordingly,

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*/ During sentencing proceedings, the prosecutor inquired of resp: "...isn't it a fact that I told you that if you did not intend to save the court the...necessity of a trial...that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?" Id., at 3a n.2.

"we hold that due process has been offended by placing [resp] in fear of retaliatory action for insisting upon his constitutional right to stand trial." Id., at 7a.

3. CONTENTIONS: CA 6, in the Warden's view, has improperly hampered the plea-bargaining process. Admitting that the prosecutor attempted "to create natural coercive impact on the accused...", the Warden contends that the "vindictiveness" and "coercion" in this case were no greater than similar pressures operating on criminal defendants at other stages of the criminal process.

Resp replies that the decision below is consistent with Blackledge and Pearce, which hold that defendants who assert procedural rights must be treated in a manner that avoids any suggestion of vindictive or retaliatory motives.

4. DISCUSSION: Neither Pearce nor Blackledge is on all fours with this case. Those decisions govern instances where the prosecutor has occasion to reindict the accused because the latter has exercised some procedural right; those cases therefore presented the spectacle of judges or prosecutors upping the ante once a defendant had already been subjected to a full trial and eventually succeeded in avoiding the conviction by virtue of exercising a procedural right.

That is not the case here. Resp went through the system only once; thus, the prosecutor used his entire arsenal against resp the first time around. Moreover, the very same result could have been achieved, again with only a single trial, had the prosecutor simply procured the multiple-offender indictment

at the outset and then used the more serious offense as leverage to secure resp's plea to the lesser charge. Since that procedure would have been above reproach, CA 6's result is wedded to the entirely fortuitous circumstances of this case. Next time, the prosecutor can avoid the due-process holding, while maintaining his leverage in the plea-bargaining process, simply by securing both indictments at the same time. That is a very long-winded way of saying that, at bottom, CA 6 may simply be exalting form above substance.

Caveat: It is my understanding that due process is indeed concerned with "form" as well as with substance. Blackledge and Pearce, after all, were based on the "appearance", not the certainty, of vindictiveness on the part of prosecutors or judges. If, then, it violates due process for prosecutors to act in a way that can reasonably be viewed as a vindictive response to the exercise of a constitutional or statutory right, then the Kentucky prosecutor here violated due process.

There is a response and a motion to proceed ifp.

5/21/77 Starr Ops in petn

Court CA - 6 ..... Voted on ....., 19...

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

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

JUN 2 1977

No. 76-1334

DON BORDENKIRCHER, SUPERINTENDENT, KENTUCKY STATE PENITENTIARY, Petitioner

vs.

PAUL LEWIS HAYES

3/28/77 - Cert.

Byron thinks a prosecutor should have to do this. If prosecutor failed to state alternative, it would be unreasonable

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Stevens, J.		✓											
Rehnquist, J.		✓											
Powell, J.							Join 3						
Blackmun, J.							Join 3						
Marshall, J.			✓										
White, J.		✓											
Stewart, J.			✓										
Brennan, J.			✓										
Burger, Ch. J.		✓											

September 14, 1977

No. 76-1334 Bordenkircher v. Hayes

This memo will record my initial reaction (tentative at this stage) after reading the briefs and the opinion of CA6 (McCree).

Respondent was convicted of being an habitual criminal under Kentucky's recidivist statute that carried an automatic life sentence. He was indicted on the charge of uttering a forged check for about $88, an offense that carried a penalty of from two to ten years. Apparently, the evidence against respondent was overwhelming. During pretrial conferences with the prosecuting attorney at which respondent's counsel was present, the prosecutor offered to recommend a five-year sentence if respondent pled guilty. In these plea bargaining negotiations, the prosecutor advised respondent that if he elected not to plead guilty, he would be charged under the habitual criminal statute. Respondent chose not to plead guilty, and the prosecutor thereupon obtained a new indictment. The second indictment differed from the first in that Count 2 thereof charged respondent with being an "habitual criminal". Respondent previously had pled guilty

to a charge of "detaining a female against her will for the purpose of having carnal knowledge of her", and was sentenced to seven years; and also had been convicted of robbery (see App. 12).*

After exhausting state remedies in which the issue now before was duly raised, respondent sought federal habeas corpus relief. This was denied by the district court. That court also refused to issue a certificate of probable cause to permit an appeal because the Court thought the "appeal would be frivolous and not taken in good faith" (Pet for Cert 2a). CA6 reversed on the merits, holding that respondent had been denied due process by the plea bargaining tactics of the prosecutor:

> Although a prosecutor may in the course of plea negotiations offer a defendant concessions relating to prosecution under an existing indictment, see United States ex rel. William v. McMann, 436 F.2d 103 (2d Cir. 1970), cert denied, 402 U.S. 914 (1971), he may not threaten a defendant with the consequences that more severe charges may be brought if he insists on going to trial. When a prosecutor obtains an indictment less severe than the facts known to him at the time might permit, he makes a discretionary determination that the interests of the state are served by not seeking more serious charges. Cf. United States v. Johnson, 537 F.2d 1170 (4th Cir. 1976). Accordingly, if after plea negotiations fail, he then procures an indictment charging a more serious crime, a strong inference is created that the only reason for the more serious charge is vindictiveness. Under the circumstances, the

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* Respondent was convicted of robbery on January 18, 1971, sentenced to five years, but was placed on probation. He was charged with uttering a forged instrument on November 20, 1972, while he was on probation.

> prosecutor should be required to justify his action. In this case, a vindictive motive need not be inferred. The prosecutor has admitted it. Pet for Cert. 7a

The reference above to the prosecutor admitting a "vindictive motive" apparently refers only to the conceded fact that the prosecutor had specifically advised respondent and his counsel that unless the guilty plea was entered, the prosecutor would "return to the grand jury and ask them to indict you based upon these prior felony convictions".

CA6 relied primarily upon North Carolina v. Pierce, 395 U.S. 711 and Blackledge v. Perry, 417 U.S. 21. Although these cases are not irrelevant, I do not view them as being in any sense dispositive of the present issue. In both Pierce and Blackledge the prosecutor had reindicted an accused following conviction in a trial that was overturned by the exercise of a constitutional right. Here, there had been no prior trial, and the prosecutor merely "bargained" on the basis of the state's right to indict for a more serious offense.

I thought initially that the case was not too important, as it seemed to me that prosecutors could avoid its holding simply by indicting initially for the offense that carried the most severe penalty. I therefore voted at Conference merely to "join 3". Upon further reflection, I am inclined to view the case more seriously. As I read CA6's

opinion, it enunciates a per se rule that would substantially curtail the flexibility of a prosecutor in plea bargaining discussions. Moreover, as indicated in the amicus brief filed by the Attorney General of Texas, there is now a square conflict with the Fifth Circuit case of Montgomery v. Estelle, decided February 25, 1977, although the mandate in that case was vacated and the case set for future oral argument.

Petr's brief, after emphasizing the now recognized utility of plea bargaining, points out that prosecutors attempt to structure a case so that the defendant is encouraged to plead guilty rather than elect to go to trial. It is common knowledge that the already overloaded system could collapse if a significantly larger percentage of defendants elected jury trial. If prosecutors were compelled by the CA6 rule always to indict for the maximum possible penalty, the gap between the state's demand (in this case it would have been life) and a plea of not guilty presumably would have been more difficult to bridge than the difference between ten years and not guilty. Putting it differently, I would think it in the interest of defendants generally - as well as expediting the business of the courts - if prosecutors were encouraged to indict for lesser offenses.

In any event it seems to me that the per se rule of CA6 goes too far.

L.F.P, Jr.

ss

Reviewed 11/8

Nancy drew this as a clear affirmance. Here the prosecutor indicted Rash originally only for uttering a forged check (prescribed sentence 2 - 10 yrs). When Rash refused to plead guilty during plea bargaining, Prosecutor threatened to - & in fact did - obtain a fresh indictment under Habitual Offender Act that provided a mandatory life sentence.

CA 6 held that a prosecutor may not "threaten" to enhance the original charge as a means of inducing a guilty plea. But it would have been OK to charge both offenses originally & "trade one off (the greater) for a plea of guilty to the lesser.

BENCH MEMO

TO: Mr. Justice Powell DATE: Nov. 7, 1977

FROM: Nancy Bregstein

76-1334 Bordenkircher v. Hayes

This case should be captioned "The Case of the Vindictive Prosecutor, or, Are There Any Limits How Far a Prosecutor Can Go in Plea Bargaining?"

I do not mean to be overly sarcastic, but the prosecutor's actions and motives in this case affront even my relatively conservative sense of justice. If the Court meant what it said in Brady v. United States, 397 U.S. 742, to the effect that there are limits to what is permissible in plea bargaining, then this is the case in which to enforce a limit.

There may be plausibly form over substance

See ABA Standards (Pet's Brief 12,13)

I. Facts

The facts deserve some elaboration, because they are not treated adequately in the briefs. These additional facts are not critical to resp's claim, but they emphasize (if it needs any additional emphasis) that the prosecutor's decision to re-indict resp under the habitual criminal statute was not based on a legitimate exercise of prosecutorial discretion in evaluating society's interest, but rather was an attempt to get resp to relinquish his right to a trial and to punish resp for his assertion f constitutional rights after resp insisted on having a trial.

In the original indictment, resp was charged with one count of uttering a forged instrument. He had presented a forged check for $88.30 to the cashier at a grocery store. Uttering a forged instrument carries a penalty of 2-10 years imprisonment. The prosecutor offered resp a 5-year sentence if he would plea guilty. Resp insisted on his innocence ("Why do you want to put pressure on me to cop-out before a trial of something that I didn't do?" App. 43). The state may have had overwhelming evidence against him, but the Fifth Amendment guarantees resp's right to insist that he did not commit the crime and to put the state to its proof.

The prosecutor threatened resp that if he insisted on going to trial, and thereby refused to save the state inconvenience and time, resp would be reindicted as an

habitual offender. Conviction under the habitual offender statutes carries a mandatory life sentence. The two previous crimes of which resp had been convicted were (1) "detaining a female against her will for the purpose of having carnal knowledge of her" and (2) robbery.

The circumstances of the two prior crimes are revealed in resp's testimony in the state trial court. Resp was 17 years old when he participated in the commission of the first crime, detaining a female. He pleaded guilty and was sent to reformatory, not prison. Resp told the jury that at the time of the rape resp was involved with three other "guys", one of whom was sentenced to life. Resp testified, "I was seventeen years old and just passing through this place and they involved me in it, you know." App. 44. It is impossible to know what resp's role was, but the fact that he was sent to a reformatory while one of the other participants was given life suggests that his role was minor. For the second crime (robbery) resp was placed on probation; he served no time.

These facts are relevant to evaluating the prosecutor's initial decision not to charge under the habitual criminal statute. In this opinion below Judge McGree reasoned that

> "[w]hen a prosecutor obtains an indictment less severe than the facts known to him at the time might permit, he makes a discretionary determination that the interests of the state are served by not seeking more serious charges. [citation omitted] Accordingly, if after plea negotiations fail, he then procures an indictment charging a more serious crime, a strong inference is created that the only reason for the more serious charges is vindictiveness."

App. 89. It seems clear on the facts of this case that the prosecutor's initial decision not to proceed under the habitual criminal statute was a sound exercise of discretion, based on an assessment that resp really does not come within the category of criminals who should be locked up for life. Indeed, when the prosecutor cross-examined resp at trial about his knowledge of the meaning of "habitual criminal", resp insisted that he had no idea it could mean someone like him, because he had seen many convicts in the reformatory who had been "six-time losers" and had not been charged as habitual criminals. This is not to say that the prosecutor was not legally entitled to charge under the habitual criminal statute, which clearly was applicable, but that the prosecutor most likely recognized that the statute should not be applied to resp.

Indeed, the inappropriateness of treating resp as an habitual criminal and imposing a mandatory life sentence subsequently was recognized by the Kentucky legislature. The New statute - which regulates "persistent felony offender sentencing" - applies

> "only if, for each of two previous felony convictions, the sentence was at least one year; defendant was imprisoned under each such sentence before commission of the instant felony; and the offender was over eighteen years at the time he committed each offense. [Resp] would not have been subjected to enhanced sentencing under [the new statute] because none of these conditions were satisfied."

CA opinion, App. 84 n. 1.

II. The Decision Below

From reading your Aid-to-Memory, I gather that you believe the decision below goes too far, in that it establishes a "per se rule". I take it that that rule is that a prosecutor may not "bring an habitual offender indictment against a defendant who has refused to plead guilty to an indictment for the same unenhanced substantive offense", at least when "the prosecutor does not assert that any event occurred between the issuance of the first indictment and the issuance of the second to influence his decision except [the defendant's] insistence upon his right to trial." CA opinion, App. 88. I do not see anything unreasonable about such a rule. Of course, it must be justified by a holding that due process has been violated by the prosecutor's actions, which will be discussed below. But I view the holding of the court below as sufficiently narrow and tied to the facts of this case. It does not even prohibit all instances of "upping the ante"; it just applies to bringing an additional charge that carries a mandatory life sentence. Rather than the

incremental steps normally associated with bargaining, bringing such a charge injects a qualitative different coercive element into the plea bargaining situation.

III. Due Process

In Santobello v. New York, 404 U.S. 257, the Court recognized that although plea bargaining may afford advantages to both the prosecution and the accused, "all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor." Id. at 261. And in Brady v. United States, 397 U.S. 742, which upheld the validity of a guilty plea despite the fact that it might have been entered into out of fear of the death penalty that the Court later held unconstitutional because of its deterrence of Fifth and Sixth Amendment rights, the Court explicitly distinguished that case from "the 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." Id. at 751 n. 8. This case presents that very situation.

Much language in several distinct but related lines of cases supports - and perhaps compels - resp's position and the decision of the court below. Resp and the three California amici quote practically all of the relevant passages in their briefs, primarily from the guilty plea

cases[1] and from North Carolina v. Pearce and Blackledge v. Perry. The reasoning in these different lines of cases is concerned with different problems, but they coalesce in this case.

A. The Guilty Plea Cases

One would think that this line of cases would be the most helpful in analyzing the issue presented here, since they deal with the permissible limits of plea bargaining. Yet there is a critical difference between this case and the guilty plea cases: Resp did not plead guilty. He "unreasonably" (in the state's words) insisted on going to trial, despite the fact that by doing so he subjected himself to imposition of a mandatory life sentence. In the guilty plea cases, the defendant pleaded guilty and later attacked the validity of the plea on grounds of involuntariness or coercion. The argument, with several variations on the same theme, was that the plea was coerced and therefore involuntary because the defendant really had no choice.

Different from guilty plea cases

In United States v. Jackson, 390 U.S. 570, the Court held the capital punishment portion of the Federal

1. By the "guilty plea cases" I mean the Brady trilogy, Brady v. United States, 397 U.S. 742; McMann v. Richardson, 397 U.S. 759; Parker v. North Carolina, 397 U.S. 790; and North Carolina v. Alford, 400 U.S. 25. Also relevant is Santobello v. New York, 404 U.S. 257.

Kidnapping Act unconstitutional because it placed an "impermissible burden" on the defendant's right to a jury trial. Yet in Brady v. United States, 397 U.S. 742, decided after Jackson but involving a guilty plea entered before Jackson, the Court held that the defendant's election to plead guilty rather than face the possibility of the death penalty was not involuntary. The majority (per White, J.) stated: "That the statute caused the plea in [a 'but for'] sense does not necessarily prove that the plea was coerced and invalid as an involuntary act." 397 U.S. at 750. The Court reasoned that the decision to obtain leniency and avoid the death penalty was, in the absence of threats or mental coercion, rational.[2]

The Court rejected Brady's theory of involuntariness, which the Court described as follows:

> "Brady's claim is of a different sort: that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime charged if a conviction is obtained after the State is put to its proof."

Id. at 750-51. The Court rejected this theory because it would undermine much of the advantage, conferred on prosecutor and accused alike, of plea bargaining: "we

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2. Indeed, this is the corollary of the state's comment in the instant case that resp "unreasonably chose, in view of the overwhelming evidence against him, to stand trial before a jury." Petr's brief at 15-16.

cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system. . . ." 397 U.S. at 753 (emphasis added). The Court followed the Brady reasoning in Parker v. North Carolina, 397 U.S. 790, 795 ("we determined in [Brady] that an otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial.") (emphasis adeed), and in North Carolina v. Alford, 400 U.S. 25, 31.

> "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. [Citing Boykin v. Alabama, 397 U.S. 238, and Machibroda v. United States, 368 U.S. 487.] That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice. . . ."

I glean two points from the guilty plea cases. The first is the Court's repeated emphasis on the presumed fairness of the plea bargaining, meaning (a) that the prosecutor does not use his charging power to force or induce the defendant to plea guilty and (b) that if the plea bargaining process is legitimate, it is because there

are mutual benefits to the prosecutor and the accused. Of course the prosecutor always had the upper hand, but the Court's mention of the clearly guilty defendant's desire to avoid the agony of trial and to obtain a more lenient sentence, and the reference to mutual "exten[sions] of benefit" suggest that the defendant is supposed to get something out of the bargaining and be better off than he would be by going to trial on the indictment that is the subject of the bargaining. This is a very different matter from ending up worse off than under the original indictment because of an insistence on Fifth and Sixth Amendment rights. This point will be pursued below at p. ___.

As to point (a), the meaning of "force" or "induce" is not clear. A major difference between the majority and dissenting opinions in Brady focuses on what this concept means. The majority seems to limit it to "actual or threatened physical harm or . . . mental coercion overbearing the will of the defendant." 397 U.S. at 750. Mr. Justice Brennan, on the other hand, believed this to be too restrictive a definition of involuntariness.

> "[T]he legal concept of 'involuntariness' has not been narrowly confined but refers to a surrender of constitutional rights influenced by considerations that the government cannot properly introduce. The critical question that divides the Court is what constitutes an impermissible factor, or, more narrowly in the context of these cases, whether the threat of the imposition of an unconstitutional death penalty is such a factor."

Id. at 802.[3] The point is that although the majority and dissent disagreed as to what constitutes involuntariness, they agreed that a plea would be invalid if "induced" by the prosecutor.

Under the Court's holding in Brady, I would imagine that the inducement in the instant case would not have rendered resp's plea "involuntary", if he had pleaded guilty. That is, if the original indictment had charged both counts (forgery and habitual criminal), and resp had decided to plead guilty, an attack on the validity of that plea would not succeed under Brady because the desire to avoid a life sentence is not even as great as the desire to avoid the death penalty.

Guilty plea cases not relevant

But the second point I glean from the guilty plea cases is that they are not really relevant to the instant case for the simple reason that resp did not succumb to whatever pressure was exerted by the prosecutor. He did not plea guilty. Some Justices might regard this as waiver. This is not discussed in any of the briefs. It seems to be the implication of the prosecutor's questioning of resp about whether he was not warned that the prosecutor would seek a harsher indictment if resp would not plead guilty. But any notion that there was waiver here should

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3. Mr. Justice Brennan concurred in Brady because the record showed that Brady had pleaded guilty for various reasons unrelated to fear of the death penalty.

not prevail. Resp had two choices: he could plead guilty or he could insist on his right to trial. By doing the latter, he did not waive his right to claim either that the harsher indictment is invalid under Pearce and Blackledge v. Perry, or that a threat to indict under the habitual criminal statute placed an "impermissible burden" on Fifth and Sixth Amendment rights, under Jackson. The defendants in Blackledge and Pearce did not waive the right to challenge prosecutorial vindictiveness by pursuing their appeals instead of succumbing to the general fear of a higher sentence as retaliation for the exercise of constitutional rights. The very point of those cases was that even though the prosecutor did not explicitly threaten to seek a harsher sentence the defendant's apprehension of such action was sufficient to require a prophylactic rule. It should not matter in the instant case that the threat was explicit and that resp insisted on his right to trial despite the threat. Similarly, the defendant in Jackson did not waive his right to challenge the unconstitutionality of the capital punishment provision in the Kidnaping Act, on the ground that it unnecessarily deterred assertion of the right to a jury trial, even though he did not succumb and went to trial.

Mr. Justice Brennan noted the anomaly of this situation in his dissent in the Brady trilogy:

> "Since the death penalty provision of the Kidnaping Act remains void, those who resisted the pressures identified in Jackson and after a jury trial were sentenced to death receive relief, but those who succumbed to the same pressures and were induced to surrender their constitutional rights are left without any remedy at all. Where the penalty scheme failed to produce its unconstitutional effect, the intended victims obtain relief; where it succeeded, the real victims have none.

397 U.S. at 807-08. In my opinion, Justice Brennan's analysis of the anomaly cannot be faulted. In terms of consistency, either the Brady Court should have said that Jackson was wrongly decided, instead of limiting it in an assailable fashion, or Brady was wrongly decided. As Justice Brennan says, if fear of the death penalty was an impermissible factor in the decision to plead guilty, the plea should be open to attack.

But court did not agree

Since the guilty plea cases are not the most relevant, the instant case must be analyzed in terms similar to those employed in Jackson, in conjunction with the vindictiveness analysis of Pearce and Blackledge. See Chaffin v. Stynchcombe, 412 U.S. 17.

B. United States v. Jackson

In United States v. Jackson the Court struck down the capital punishment portion of the Federal Kidnaping Act because it imposed too great a burden on Fifth and Sixth Amendment rights. The statute, by requiring that a jury recommend imposition of the death penalty, deterred defendants from asserting the right to a jury trial. The Court's reasoning is worth stating at some length:

Jackson

> "The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional."

390 U.S. at 581. In Jackson the Court found that the statutory scheme did serve a legitimate objective, i.e., avoidance of the more drastic penalty of a mandatory death penalty. But this legitimate objective was not weighty enough to save the statute.

> "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. [Citing Robel, 389 U.S. 258; Shelton v. Tucker, 364 U.S. 479.] The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive. . . . The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial. . . . Congress cannot impose the death penalty in a manner that needlessly penalizes the assertion of a constitutional right."

adequate safeguard existed in the judge's responsibility to reject coerced or otherwise involuntary pleas.

> "For the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right."

The theory expressed in Jackson is an amalgam of the "least restrictive alternative" theory, as indicated by the Court's citation of Shelton v. Tucker, and the theory of unconstitutional conditions. See Note, The Unconstitutionality of Plea Bargaining, 83 Harv. L. Rev. 1387, 1398 (1970).[4]

Although the Court has rejected the idea that plea bargaining per se is unconstitutional, it has left open the possibility that beyond certain limits, plea bargaining practices would be unconstitutional. It seems to me that the unconstitutional condition analysis in the Harvard Note, together with the least restrictive alternative

Criminal ~~Good~~ justice system would collapse without it

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4 "The individual's assertion of his constitutional rights may be deterred if the state makes their exercise costly. When an individual foregoes the exercise of a constitutional right in order to obtain or retain a benefit from the state, established doctrine requires that the courts examine such an exchange to determine if it places an undue burden of the exercise of the right and hence is unconstitutional.

88 Harv. L. Rev. at 1398. The author goes on to distinguish between "unconstitutional pressures that render a plea involuntary" and "[u]nconstitutional conditions that induce waiver". The former focuses on the defendant's mental state; the latter involves "focuses simply on the presence and importance of the right and the justifications for penalizing its exercise."

analysis of Jackson, suggest very strongly that the prosecutor cannot use the complete extent of his charging power in order to attempt to induce or compel a guilty plea. The focus is on the permissibility of the prosecutor's actions and not on the subjective mental state of the defendant, unlike the situation in the guilty plea cases. The prosecutor may not place an "impermissible burden" on the exercise of a defendant's constitutional right to demand a trial. Chaffin, supra, 412 U.S. at 35 (quoting Jackson v. United States).

C. Pearce and Blackledge

You indicated in your Aid-to-Memory that Pearce and Blackledge are not really on point. That is true. But when Pearce and Blackledge are considered along with Jackson and much of the language in the guilty plea cases, the incontrovertible principle that emerges is that a prosecutor cannot attempt to obtain a guilty plea by taking action that is intended to force the defendant to give up his rights. The question of what is an "impermissible burden" can be answered by reference to the interdiction of vindictiveness in Pearce and Blackledge.

Much of the language in Chaffin lends support to the idea of reading the ideas expressed in Jackson together with the Pearce/Blackledge rationale. The Chaffin Court focused on Pearce's emphasis on vindictiveness and identified the problem as "the hazard of being penalized for seeking a new trial". 412 U.S. at 25-26 (emphasis by the Chaffin Court). This would be all the more true in a

case where the hazard faced by the defendant is of being penalized for seeking a trial. The personal motive of the prosecutor is also a strong one in the guilty plea situation. Unlike the situation in Chaffin, where "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 n. 13, the prosecutor seeking a guilty plea is motivated by a single concern: discouraging what he regards as a meritless trial.

The obvious objection to this theory is that this is what takes place in all plea bargaining. This is the tenor of the state's brief, which, contrary to this Court's emphasis on the presumed fairness of most plea negotiations, describes plea bargaining as an inherently "coercive" process whose aim, "[b]luntly put", is "to avoid utilizing the jury trial system established by the United States Constitution." Petr's brief at 22, 10. This may be true in practice, but the Court refused to make this callous assumption when it placed its imprimatur on plea bargaining. The tenor of the Court's decisions is that plea bargaining is permissible only so long as it is fair and furthers legitimate objectives, one of which is providing the defendant some benefit. As the Chaffin Court made plain, "Jackson and Pearce are clear and subsequent cases have not diluted their force: if the only objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional' . . . ." Chaffin, supra, 412 U.S. at 32 n. 20.

When the prosecutor returns to the grand jury to seek a harsher indictment after a defendant refuses to relinquish his Fifth and Sixth Amendment rights, it is plain that the objective is to discourage the assertion of constitutional rights. The threat is made to induce this defendant to plead guilty; and following through on the threat serves as a deterrent to the exercise of these constitutional rights by other defendants who know what will happen if they insist on being tried. This is the chilling effect that was condemned in Pearce, even though it was acknowledged there that there is no constitutional right to an appeal. The case for prohibiting vindictiveness because of its effect on the right to a trial is even greater than the case for prohibiting vindictiveness because of its effect on appeals.

It does not matter in principle that in the plea bargaining situation there has been no trial, and therefore that there is no first sentence with which to compare the allegedly vindictive action. This makes application of the constitutional standard more difficult, because it is not as easy to say what is vindictive in the normal plea bargaining situation as to identify that a higher sentence has been imposed. But on the facts of this case, application of the rule is easy because the prosecutor has conceded that he threatened and ultimately sought the higher charge because resp would not plead guilty. To the extent that the holding of CA 6 can be regarded as a per se rule, it is a justifiable and narrowly tailored rule. When a prosecutor does not charge under an enhancement statute,

for whatever reasons informed his decision that such a charge would be inappropriate, it can be presumed that vindictiveness is the only reason for his decision to return to the grand jury for such a charge when the only change in circumstances is the defendant's assertion of constitutional rights.

The reason I say the rule is narrowly tailored is that it does not affect "plea bargaining practices such as offering to amend a felony count to a misdemeanor, but upon rejection of the offer, seeking at trial the maximum penalty permitted for the felony offense." Petr's brief at 22. Although petr contends that what happened in the instant case "pales [by] comparison" to such a situation as the one just described, the California amici correctly note that the situation described by petr is permissible because the prosecutor has done no more than what he could have done if plea bargaining did not exist. The prosecutor has not penalized the defendant for asserting his constitutional rights.

This brings me to the fundamental distinction between constitutionally impermissible "upping the ante" and constitutionally permissible offering of concessions. Resp rebuts petr's example, stated above, as follows:

> "In petr's example, the maximum penalty the defendant braves when he pleads not guilty is the maximum penalty authorized by law for the felony offense. If the defendant and the prosecutor never discuss a plea bargain, the defendant by his plea of not guilty will risk, at most, the possibility that his conviction will result in the imposition of the maximum sentence authorized for the felony. If the defendant and the prosecutor

> negotiate but the defendant declines to plead guilty in return for the offered amendment of the felony charge to a misdemeanor, the defendant, even though he rejected the prosecutor's offer, will still risk only the maximum penalty authorized for the original felony charge."

It has been suggested that an affirmance in this case will not help defendants because prosecutors will be able to charge the enhancement offense from the outset and thereby evade the Court's decision. (Petr also notes that this would have an adverse collateral consequence for the defendant by making it harder for him to obtain bail.) The theory of the suggestion is that insofar as addition of the enhancement statute cannot be viewed as vindictive, because the defendant has not yet asserted any constitutional right, it will not be prohibited by Pearce. That is a correct assessment, as far as it goes. It will be an open question whether the prosecutor can charge under an enhancement, statute despite his view of its inappropriateness in the particular defendant's case, simply to gain leverage in order to obtain a guilty plea. My own opinion, based on all the cases discussed above, is that a prosecutor could not use his charging power in this manner, not because of Pearce but because of the impermissible burden on the assertion of constitutional rights, along the lines suggested by Jackson.

This question need not be addressed in order to decided this case. The Court would be justified in making the assumption that prosecutors act in good faith and would not attempt to evade a constitutional obligation by

bringing unwarranted charges simply to obtain bargaining leverage. Some leverage is necessary, of course, and is built into the system. But that leverage supposedly is the ability to make concessions to a defendant, not the ability to extort a guilty plea. At least under the Court's statements about the legitimacy of plea bargaining, there is a very real difference between a prosecutor's offer of concessions and his threats to "up the ante" if the defendant will not relinquish his constitutional rights.

IV. Remedy

The CA ordered the case remanded to the district court "with instructions to order petitioner's discharge except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument." I am not sure what this means. I assume it means that resp is required to serve the ten years to which he could have been sentenced on the forgery count. If so, and since resp has not cross-petitioned from the CA's judgment, it would not be open to him to request better relief.

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[5] See Note, Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas, 112 U. Pa. L. Rev. 865, 885-86 (1964):

> "The practices employed to induce guilty pleas should be channelled by prosecutors into those areas which create a minimal danger of coercion. . . . A prosecutor's discretion to charge multiple counts, where proper, should not be circumscribed. But a prosecutor should not include additional charges merely to bring pressure on a defendant to plead guilty."

The CA's language is ambiguous, however, and could be construed to mean that resp should be resentenced. At oral argument, it might be a good idea to ask resp's counsel what relief he thinks resp was granted.

V. Conclusion

The Court's decision in the instant case can be quite narrow. No general rule need be stated; the Court can hold simply that the prosecutor here engaged in conduct that violated the guarantee of due process of law by attempting to coerce a guilty plea by threatening to obtain an habitual offender indictment that the prosecutor initially thought was not justified. The only change in circumstances between the two indictments was the defendant's assertion of his Fifth and Sixth Amendment rights. Once resp refused to plead guilty, the decision to seek a much harsher indictment must be viewed as motivated by vindictiveness under Pearce. From the perspective of the plea negotiations before resp refused to plead guilty, the threat to seek the habitual offender indictment was an "unnecessary and therefore excessive" use of the charging power calculated "needlessly [to] penalize the assertion of a constitutional right", which amounted to "an impermissible burden upon the assertion of a constitutional right". Jackson v. United States, supra.

The Court need not address the question whether a prosecutor can bring stepped-up charges at the outset when the only reason for doing so is to obtain overwhelming

leverage[6] in order to induce a defendant to relinquish his constitutional rights. (Neither must the Court address the difficult question of what kind of proof a defendant would have to present to prevail on such an allegation.) The Court may assume that prosecutors will act in good faith in deciding what to charge.

N.B.

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6 I say "overwhelming" leverage because, at least in this case, the prosecutor had adequate leverage within the sentencing range of the forgery charge. Using the habitual offender charge was needless because (a) for someone like resp, who was determined to go to trial no matter what, the additional pressure was bound to be unavailing; and (b) for the more usual defendant, the potential of facing ten years instead of five would have been adequate to cause him to make a rational decision in favor of pleading guilty.

76-1334 SCHERNEKOW v. HAYES Argued 11/9/77

Please [illegible]

Chenowith (Cert to 6th Cir of Ky)

Case involves timing & scope of exercise of prosecutorial discretion

Blackmun asked why prosecutor did it include "every thing" (including habitual offender) in first indictment.

[redacted]

As evidence of guilt was "overwhelming" the prosecutor saw no reason to go thru trial. The refusal of D - with counsel present - to accept a bargained plea was unexpected.

As Santobello, Ky. recognizes there are limits to prosecutorial discretion.

(Blackmun noted that if "book" is thrown at D to begin with, higher bail

→ Stewart: The very concept of plea bargaining is "pressure"

Check Crim Comm. Report

" ABA Standards (Petro's Bk 12,13

Clause 14 (cont.)

Should either party wish to terminate this Agreement prior to the expiration of the Initial Term or any Renewal Term (as the case may be), such party must give written notice of such intention to the other party at least 6 months before the expiration of the Initial Term or any Renewal Term (as the case may be).

Appendix (from Rudy)

Reserved 6 - 3

Mr. Justice Brennan

Mr. Justice White *Reverse*

If Δ had pled guilty under what Δ thought was coercion, he could have raised validity of guilty plea on habeas.

Prosecutors sometimes threaten charges that ct. does not substantiate, but this possibility is virtually impossible to avoid. see w/out handicapping the plea bargaining system.

Mr. Justice Marshall *Affirm*

There is no defense to a "check uttering" charge if signature was forged. It was silly for Δ not to accept plea. But prosecutor did over-reach on these facts.

Mr. Justice Blackmun *Affirm*

If we affirm this case, prosecutors will simply throw book at the beginning - which won't help Δ's generally.

But can't say CA 6 was wrong on the facts here - we should write up. That doesn't leave validity of plea bargaining.

Mr. Justice Stevens

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

From: Mr. Justice Stewart

Circulated: DEC 21 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1334

Don Bordenkircher, Superintendent, Kentucky State Penitentiary, Petitioner, v. Paul Lewis Hayes. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1978]

MR. JUSTICE STEWART delivered the opinion of the Court.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged.

I

The respondent, Paul Lewis Hayes, was indicted by a Fayette County, Ky., grand jury on a charge of uttering a forged instrument in the amount of $88.30, an offense then punishable by a term of two to 10 years in prison. Ky. Rev. Stat. § 434.130 (repealed 1974). After arraignment, Hayes, his retained counsel, and the Commonwealth's attorney met in the presence of the clerk of the court to discuss a possible plea agreement. During these conferences the prosecutor offered to recommend a sentence of five years in prison if Hayes would plead guilty to the indictment. He also said that if Hayes did not plead guilty and "save the court the inconvenience and necessity of a trial," he would return to the grand jury to seek an indictment under the Kentucky Habitual

Received
12/27

Although my tentative vote was with P.S., I'll now await dissent

Criminal Act,[1] then Ky. Rev. Stat. § 431.190 (repealed 1975), which would subject Hayes to a mandatory sentence of life imprisonment by reason of his two prior felony convictions.[2] Hayes chose not to plead guilty, and the prosecutor did obtain an indictment charging him under the Habitual Criminal Act. It is not disputed that the recidivist charge was fully justified by the evidence, that the prosecutor was in possession of this evidence at the time of the original indictment, and that Hayes' refusal to plead guilty to the original charge was what led to his indictment under the habitual criminal statute.

A jury found Hayes guilty on the principal charge of uttering a forged instrument and, in a separate proceeding, further found that he had twice before been convicted of felonies. As required by the habitual offender statute, he was sentenced to a life term in the penitentiary. The Kentucky Court of Appeals rejected Hayes' constitutional objections to the enhanced sentence, holding in an unpublished opinion that imprisonment for life with the possibility of parole was constitutionally permissible in light of the previous felonies of which

[1] While cross-examining Hayes during the subsequent trial proceedings the prosecutor described the plea offer in the following language:

"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?"

[2] At the time of Hayes' trial the statute provided that "[a]ny person convicted a . . . third time of felony . . . shall be confined in the penitentiary during his life." Ky. Rev. Stat. § 431.090 (repealed 1975). That statute has been replaced by Ky. Rev. Stat. § 532.080 (1977 supp.) under which Hayes would have been sentenced to, at most, an indeterminate term of 10 to 20 years. § 532.808 (6)(b). In addition, under the new statute a previous conviction is a basis for enhanced sentencing only if a prison term of one year or more was imposed, the sentence or probation was completed within five years of the present offense, and the offender was over the age of 18 when the offense was committed. At least one of Hayes' prior convictions did not meet these conditions. See n. 3, *infra*.

Hayes had been convicted,[3] and that the prosecutor's decision to indict him as an habitual offender was a legitimate use of available leverage in the plea bargaining process.

On Hayes' petition for a federal writ of habeas corpus, the United States District Court for the Eastern District of Kentucky agreed that there had been no constitutional violation in the sentence or the indictment procedure, and denied the writ.[4] The Court of Appeals for the Sixth Circuit reversed the District Court's judgment. While recognizing "that plea bargaining now plays an important role in our criminal justice system," the appellate court thought that the prosecutor's conduct during the bargaining negotiations had violated the principles of *Blackledge* v. *Perry*, 417 U. S. 21, which "protect[ed] defendants from the vindictive exercise of a prosecutor's discretion." *Hayes* v. *Cowan*, 547 F. 2d 42, 44. Accordingly, the court ordered that Hayes be discharged "except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument." 547 F. 2d, at 45. We granted certiorari to consider a constitutional question of importance in the administration of criminal justice. — U. S. —.

II

It may be helpful to clarify at the outset the nature of the issue in this case. While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly put forth at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where

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[3] According to his own testimony, Hayes had pleaded guilty in 1961, when he was 17 years old, to a charge of detaining a female, a lesser included offense of rape, and as a result had served five years in the state reformatory. In 1970 he had been convicted of robbery and sentenced to five years imprisonment, but had been released on probation immediately.

[4] The opinion of the District Court is unreported.

the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty.[5] As a practical matter, in short, 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 part of the plea bargain.

The Court of Appeals nonetheless drew a distinction between "concessions relating to prosecution under an existing indictment," 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.[6] Quite apart from this chronological distinction, however, the Court of Appeals found that the prosecutor had acted vindictively in the present case since he had conceded that the indictment was influenced by his desire to induce a guilty plea.[7] The ultimate conclusion of the Court of Appeals thus seems to have been that a prosecutor acts vindictively and in violation of due process of law when-

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[5] Compare the present case and *United States ex rel. Williams* v. *McMann*, 436 F. 2d 103 (CA2), with *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367, 1370 (CA9).

[6] "Although a prosecutor may in the course of plea negotiations offer a defendant concessions relating to prosecution under an existing indictment . . . he may not threaten a defendant with the consequences that more severe charges may be brought if he insists on going to trial. When a prosecutor obtains an indictment less severe than the facts known to him at the time might permit, he makes a discretionary determination that the interests of the state are served by not seeking more serious charges. . . . Accordingly, if after plea negotiations fail, he then procures an indictment charging a more serious crime, a strong inference is created that the only reason for the more serious charges is vindictiveness. Under these circumstances, the prosecutor should be required to justify his action." 547 F. 2d, at 44–45.

[7] "In this case, a vindictive motive need not be inferred. The prosecutor has admitted it." 547 F. 2d, at 45.

ever his charging decision is influenced by what he hopes to gain in the course of plea bargaining negotiations.

III

We have recently had occasion to observe that "[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concommittant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." *Blackledge* v. *Allison*, 430 U. S. 63, 71. The open acknowledgment of this previously clandestine practice has led Court to recognize the importance of counsel during plea negotiations, *Brady* v. *United States*, 397 U. S. 742, 758, the need for a public record indicating that a plea was knowingly and voluntarily made, *Boykin* v. *Alabama*, 395 U. S. 238, 242, and the requirement that a prosecutor's plea bargaining promise must be kept. *Santobello* v. *New York*, 404 U. S. 257, 262. The decision of the Court of Appeals in the present case, however, did not deal with considerations such as these but held that the substance of the plea offer itself violated the limitations imposed by the Due Process Clause of the Fourteenth Amendment. Cf. *Brady* v. *United States*, *supra*, 397 U. S., at 751 n. 8. For the reasons that follow, we have concluded that the Court of Appeals was mistaken in so ruling.

IV

This Court held in *North Carolina* v. *Pearce*, 395 U. S. 711, 725, that the Due Process Clause of the Fourteenth Amendment "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." The same principle was later applied to prohibit a prosecutor from reindicting a convicted misdemeanant on a felony charge after the defendant had invoked an appellate remedy, since in this

situation there was also a "realistic likelihood of 'vindictiveness.'" *Blackledge* v. *Perry*, *supra*, 417 U. S., at 27.

In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—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." *Parker* v. *North Carolina*, 397 U. S. 790, 809 (opinion of BRENNAN, J.). The Court has emphasized that the due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a defendant might be deterred from the exercise of a legal right, see *Colten* v. *Kentucky*, 407 U. S. 104; *Chaffin* v. *Stynchcombe*, 412 U. S. 17, but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction. See *Blackledge* v. *Perry*, *supra*, 417 U. S., at 26–28.

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, see *North Carolina* v. *Pearce*, *supra*, 395 U. S., at 738 (opinion of Black, J.), and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." *Chaffin* v. *Stynchcombe*, *supra*, 412 U. S., at 32–33, n. 20. See *United States* v. *Jackson*, 390 U. S. 570. But in the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.

Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial. *Brady* v. *United States*, *supra*, 397 U. S., at 752. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation.

Id., at 758. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial. See ABA Standards Relating to Pleas of Guilty § 3.1 (1968); Note, Plea Bargaining and the Transformation of the Criminal Process, 90 Harv. L. Rev. 564 (1977). Cf. *Brady* v. *United States*, *supra*, 397 U. S., at 751; *North Carolina* v. *Alford*, 400 U. S. 25.

While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Chaffin* v. *Stynchcombe*, *supra*, 412 U. S., at 31. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty. See generally Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chi. L. Rev. 50 (1968).

It is not disputed here that Hayes was properly chargeable under the recidivist statute, since he had in fact been convicted of two previous felonies. In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.[8] Within

[8] This case does not involve the constitutional implications of a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused, see ALI Model Code of Pre-Arraignment

the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler* v. *Boles*, 368 U. S. 448, 456. To hold that the prosecutor's desire to induce a guilty plea is an "unjustifiable standard," which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself. Moreover, a rigid constitutional rule that would prohibit 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. See *Blackledge* v. *Allison*, *supra*, 431 U. S., at 76.

There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse.[9] And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did

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Procedure, Commentary to § 350.3, pp. 614–615 (1975), which might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider. *Cf. Brady* v. *United States*, 397 U. S. 742, 758.

[9] This potential has led to many recommendations that the prosecutor's discretion should be controlled by means of either internal or external guidelines. See ALI Model Code of Pre-Arraignment Procedure § 350.3 (2)–(3) (1975); ABA Standards Relating to the Prosecution Function §§ 2.5, 3.9 (1971); Abrahms, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 UCLA L. Rev. 1 (1971).

not violate the Due Process Clause of the Fourteenth Amendment.

Accordingly, the judgment of the Court of Appeals is

Reversed.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 21, 1977

Re: 76-1334 - Bordenkircher v. Hayes

Dear Potter:

Please join me.

Respectfully,

Mr. Justice Stewart
Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

December 27, 1977

Dear Potter:

No. 76-1334 Nonnenmacher, Supt., Ky. State Penitentiary v. Stone

I join.

Regards,

WEB

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 28, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1334 - Nordenskjold v. Davis

In due course I shall try my hand at a dissent in this case.

December 28, 1977

No. 76-1334 Nordenkirchen v. Hayes

Dear Potter:

As I indicated at Conference, this case has troubled me - perhaps primarily because the life sentence seems terribly unjust.

I nevertheless voted tentatively to reverse, and I remain in this posture. But before coming to rest, I will await circulation of the dissenting opinion.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

LFP/lab

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 5, 1978

Re: No. 76-1536 - Rockefeller v. Torres

Dear Potter:

I agree.

Sincerely,

Mr. Justice Stewart

Copies to Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 7, 1978

Re: No. 76-1334 - Rochenkircher v. Moore

Dear Potter:

Please join me.

Sincerely,

WOD

Mr. Justice Stewart

Copies to the Conference

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 5, 1978

RE: No. 76-1334 Bordenkircher v. Hayes

Dear Harry:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 5, 1978

Re: No. 76-1334, Bordenkircher v. Hayes

Dear Harry:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

PLEASE RETURN
TO FILE

Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

No. 76-1334 Bordenkircher v. Hayes

From: Mr. Justice Powell

Circulated: JAN 12 1978

Recirculated:

MR. JUSTICE POWELL, dissenting.

Although I agree with much of the Court's opinion, I am not satisfied that the result is just in this case or that the conduct of the plea bargaining satisfied the requirements of due process.

Respondent was charged with the uttering of a single forged check in the amount of $88.30. Under Kentucky law, this offense was punishable by a prison term of from two to ten years, apparently without regard to the amount of the forgery. During the course of plea bargaining, the prosecutor offered respondent a sentence of five years in consideration of a guilty plea. I observe, at this point, that five years in prison for the offense charged hardly could be characterized as an especially generous offer. Apparently respondent viewed the offer in this light and declined to accept it; he protested that he was innocent and insisted on going to trial. Respondent adhered to this position even when the prosecutor advised that he would seek a new indictment under the state's Habitual Criminal Act which would subject respondent, if convicted, to a mandatory life sentence because of two prior felony convictions.

The prosecutor's initial assessment of respondent's case led him to forego an indictment under the habitual criminal statute. The circumstances of

respondent's prior convictions are relevant to this assessment and to my view of the case. Respondent was 17 years old when he committed his first offense. He was charged with rape but pled guilty to the lesser included offense of "detaining a female". One of the other participants in the incident was sentenced to life imprisonment. Respondent was sent not to prison but to a reformatory where he served five years. Respondent's second offense was robbery. This time he was found guilty by a jury and was sentenced to five years in prison, but he was placed on probation and served no time. The end result of these two prior convictions, for which respondent was not imprisoned, and conviction on a charge involving $88.30, was a mandatory sentence of life imprisonment. Although respondent's prior convictions brought him within the terms of the Habitual Criminal Act, the offenses themselves apparently were not serious enough to result in imprisonment. But now, conviction on a charge involving $88.30 resulted in a mandatory sentence of imprisonment for life.[1] Persons convicted of rape and murder often are not punished so severely.

No explanation appears in the record for the prosecutor's decision to escalate the charge against respondent other than respondent's refusal to plead guilty. The prosecutor has conceded that his purpose was to discourage respondent's assertion of constitutional

rights, and the majority accepts this characterization of events. See ante, at 2 n. 1, 7.

It seems to me that the question to be asked under the circumstances is whether the prosecutor reasonably might have charged respondent under the Habitual Criminal Act in the first place. The deference that courts properly accord the exercise of a prosecutor's discretion perhaps would foreclose judicial criticism if the prosecutor originally had sought an indictment under that act, as unreasonable as it would have seemed.[2] But here 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 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.[3] 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.

There may be many situations in which a prosecutor would be fully justified in seeking a fresh indictment for a more serious offense. The most plausible justification might be that it would have been reasonable and in the public interest initially to have charged the defendant with the greater offense. In most cases a court could not know why the harsher indictment was sought, and

an inquiry into the prosecutor's motive would be as inappropriate as it likely would be unfruitful. In these cases, I would agree with the majority that the situation would not differ materially from one in which the higher charge was brought at the outset. See ante at 4.

But this is not such a case. Here, any inquiry into the prosecutor's purpose is made unnecessary by his candid acknowledgment that he "threatened" to procure and in fact procured the habital criminal indictment because of respondent's insistence on exercising his constitutional rights. We have stated in unequivocal terms, in discussing United States v. Jackson, 390 U.S. 570 (1968), and North Carolina v. Pearce, 395 U.S. 711 (1969), that "Jackson and Pearce are clear and subsequent cases have not diluted their force: if the only objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.'"" Chaffin v. Stynchcombe, 412 U.S. 17, 32 n. 20 (1973). And in Brady v. United States, 397 U.S. 742 (1970), we drew a distinction between the situation there approved and the "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." Id., at 751 n. 8.

I would affirm the opinion of the Court of Appeals on the facts of this case. The plea bargaining process, as recognized by this Court, is essential to the functioning of the criminal justice system. It normally

affords genuine benefits to defendants as well as to society. And if the system is to work effectively, prosecutors must be accorded the widest discretion, within constitutional limits, in conducting bargaining. Cf. note 2, supra. This is especially true when a defendant is represented by counsel and presumably is fully advised ofhis rights. Only in the most exceptional case should a court conclude that the scales of the bargaining are so unevenly balanced as to arouse suspicion. In this case, the prosecutor's actions denied respondent due process because their admitted purpose was to discourage and then to penalize with unique severity his exercise of constitutional rights. Implementation of a strategy calculated solely to deter the exercise of constitutional rights is not a constitutionally permissible exercise of discretion. I therefore dissent.

FOOTNOTES

1. It is suggested that respondent will be eligible for parole consideration after serving 15 years.

2. The majority suggests that this case cannot be distinguished from the case where the prosecutor initially obtains an indictment under an enhancement statute and later agrees to drop the enhancement charge in exchange for a guilty plea. I would agree that these two situations are alike only if it were assumed that the hypothetical prosecutor's decision to charge under the enhancement statute was occasioned not by consideration of the public interest but by a strategy to discourage the defendant from exercising his constitutional rights. In theory, I would condemn both practices. In practice, the hypothetical situation is largely unreviewable. The majority's view confuses the propriety of a particular exercise of prosecutorial discretion with its unreviewability. In the instant case, however, we have no problem of proof.

3. Indeed, the Kentucky legislature subsequently determined that the habitual criminal statute under which respondent was convicted swept too broadly and did not identify adequately the kind of prior convictions that should trigger its application. At least one of respondent's two prior convictions would not satisfy the criteria of the revised statute; and the impact of the

statute, when applied, has been reduced significantly in situations, like this one, where the third offense is relatively minor. See ante, at 2 n. 2.

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1334

Don Bordenkircher, Superintendent, Kentucky State Penitentiary, Petitioner, v. Paul Lewis Hayes. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1978]

MR. JUSTICE POWELL, dissenting.

Although I agree with much of the Court's opinion, I am not satisfied that the result in this case is just or that the conduct of the plea bargaining met the requirements of due process.

Respondent was charged with the uttering of a single forged check in the amount of $88.30. Under Kentucky law, this offense was punishable by a prison term of from two to 10 years, apparently without regard to the amount of the forgery. During the course of plea bargaining, the prosecutor offered respondent a sentence of five years in consideration of a guilty plea. I observe, at this point, that five years in prison for the offense charged hardly could be characterized as a generous offer. Apparently respondent viewed the offer in this light and declined to accept it; he protested that he was innocent and insisted on going to trial. Respondent adhered to this position even when the prosecutor advised that he would seek a new indictment under the State's Habitual Criminal Act which would subject respondent, if convicted, to a mandatory life sentence because of two prior felony convictions.

The prosecutor's initial assessment of respondent's case led him to forego an indictment under the habitual criminal statute. The circumstances of respondent's prior convictions are relevant to this assessment and to my view of the case.

Respondent was 17 years old when he committed his first offense. He was charged with rape but pled guilty to the lesser included offense of "detaining a female." One of the other participants in the incident was sentenced to life imprisonment. Respondent was sent not to prison but to a reformatory where he served five years. Respondent's second offense was robbery. This time he was found guilty by a jury and was sentenced to five years in prison, but he was placed on probation and served no time. Although respondent's prior convictions brought him within the terms of the Habitual Criminal Act, the offenses themselves did not result in imprisonment; yet the addition of a conviction on a charge involving $88.30 subjected respondent to a mandatory sentence of imprisonment for life.[1] Persons convicted of rape and murder often are not punished so severely.

No explanation appears in the record for the prosecutor's decision to escalate the charge against respondent other than respondent's refusal to plead guilty. The prosecutor has conceded that his purpose was to discourage respondent's assertion of constitutional rights, and the majority accepts this characterization of events. See *ante*, at 2 n. 1, 7.

It seems to me that the question to be asked under the circumstances is whether the prosecutor reasonably might have charged respondent under the Habitual Criminal Act in the first place. The deference that courts properly accord the exercise of a prosecutor's discretion perhaps would foreclose judicial criticism if the prosecutor originally had sought an indictment under that act, as unreasonable as it would have seemed.[2] But here the prosecutor evidently made a reason-

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[1] It is suggested that respondent will be eligible for parole consideration after serving 15 years.

[2] The majority suggests, *ante*, at 4, that this case cannot be distinguished from the case where the prosecutor initially obtains an indictment under an enhancement statute and later agrees to drop the enhancement charge in exchange for a guilty plea. I would agree that these two situations

able, 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.[a] 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.

There may be situations in which a prosecutor would be fully justified in seeking a fresh indictment for a more serious offense. The most plausible justification might be that it would have been reasonable and in the public interest initially to have charged the defendant with the greater offense. In most cases a court could not know why the harsher indictment was sought, and an inquiry into the prosecutor's motive would neither be indicated nor likely to be fruitful. In those case, I would agree with the majority that the situation would not differ materially from one in which the higher charge was brought at the outset. See *ante*, at 4.

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[a] Indeed, the Kentucky Legislature subsequently determined that the habitual criminal statute under which respondent was convicted swept too broadly and did not identify adequately the kind of prior convictions that should trigger its application. At least one of respondent's two prior convictions would not satisfy the criteria of the revised statute; and the impact of the statute, when applied, has been reduced significantly in situations, like this one, where the third offense is relatively minor. See *ante*, at 2 n. 2.

prosecutor's purpose is made unnecessary by his candid acknowledgement that he threatened to procure and in fact procured the habitual criminal indictment because of respondent's insistence on exercising his constitutional rights. We have stated in unequivocal terms, in discussing *United States* v. *Jackson*, 390 U. S. 570 (1968), and *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), that "*Jackson* and *Pearce* are clear and subsequent cases have not diluted their force: if the only objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.'" *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 32 n. 20 (1973). And in *Brady* v. *United States*, 397 U. S. 742 (1970), we drew a distinction between the situation there approved and the "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." *Id.*, at 751 n. 8.

The plea-bargaining process, as recognized by this Court, is essential to the functioning of the criminal-justice system. It normally affords genuine benefits to defendants as well as to society. And if the system is to work effectively, prosecutors must be accorded the widest discretion, within constitutional limits, in conducting bargaining. Cf. n. 2, *supra*. This is especially true when a defendant is represented by counsel and presumably is fully advised of his rights. Only in the most exceptional case should a court conclude that the scales of the bargaining are so unevenly balanced as to arouse suspicion. In this case, the prosecutor's actions denied respondent due process because their admitted purpose was to discourage and then to penalize with unique severity his exercise of constitutional rights. Implementation of a strategy calculated solely to deter the exercise of constitutional rights is not a constitutionally permissible exercise of discretion. I would affirm the opinion of the Court of Appeals on the facts of this case.

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J.
		11/12/77						
←	Join PS 12/27/77	2nd draft 1/3/78	join PS 1/3/78	join HAB 1/5/78	will dissent 1/6/77	await dissent 12/28/77	join PS 1/3/78	Join 12
	Join HAB 1/5/78				1st draft 1/5/78	dissent 1st draft 1/12/78		
					2nd draft 1/16/78	2nd draft 1/16/78		
				76-1334 Borden Kircher v. Hayes				