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DUE PROCESS LIMITATIONS ON PROSECUTORIAL DISCRETION IN RE-CHARGING DEFENDANTS: *PEARCE* TO *BLACKLEDGE* TO *BORDENKIRCHER*

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Within the past decade, federal courts have begun to circumscribe the traditionally unfettered discretion of the prosecutor to bring an additional charge against a defendant, where it appears that the extra charge is brought in retaliation for the defendant's exercise of a procedural right.[1] A criminal defendant is entitled to pursue his constitutional and statutory rights free of prosecutorial threats and intimidation. A fear of prosecutorial retaliation or vindictiveness may chill a defendant's exercise of these rights, and may amount to a violation of due process of law.[2]

Two recent United States Supreme Court decisions have established that when the institution of an additional charge against a defendant upon retrial may be perceived by the defendant as retaliation for his assertion of a legal right, principles of due process are violated.[3] Thus, if the govern-

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[1] The charging power of the executive has been circumscribed in a variety of contexts which are beyond the scope of this article. *See, e.g.*, Oyler v. Boles, 368 U.S. 448, 456 (1962) (exercise of the prosecutor's charging power may not be "based upon an unjustifiable standard such as race, religion, or other arbitrary classification"); Two Guys v. McGinley, 366 U.S. 582, 588 (1961) (a defense to a criminal proceeding may be that ". . . any such proceeding . . . is actually prosecuted on the ground of unconstitutional discrimination . . . ."); Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) (impermissible discrimination against Chinese violated the equal protection clause); United States v. Falk, 479 F.2d 616, 624 (7th Cir. 1973) (prosecution of defendant for failure to carry draft card when Justice Department policy was not to prosecute for that offense amounted to denial of equal protection and infringement of the rights of speech and expression); United States v. Steele, 461 F.2d 1148, 1152 (9th Cir. 1972) (discrimination found in indicting defendant who refused to answer questions in a census report); United States v. Crowthers, 456 F.2d 1074, 1080-81 (4th Cir. 1972) (discrimination in indicting defendant on charge of disorderly conduct abridged defendant's freedom of speech and expression).

[2] The fifth amendment provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. V. The fourteenth amendment states in part:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. CONST. amend. XIV, sec. 1.

[3] Blackledge v. Perry, 417 U.S. 21 (1974); North Carolina v. Pearce, 395 U.S. 711 (1969).

ment has knowledge of multiple offenses or offenses of different severity at the time of the original indictment, it cannot "up the ante" after the assertion of rights by charging additional or more serious offenses than those originally brought.[4] In another recent decision, however, the Supreme Court has held that principles of due process are not violated when, during plea negotiations, a prosecutor legitimately threatens reindictment and trial on a more serious offense in order to induce the defendant to plead guilty to the offense with which he was first charged.[5]

In *North Carolina v. Pearce*,[6] and *Blackledge v. Perry*,[7] the Supreme Court established the constitutional principle that the due process clause of the fourteenth amendment requires that a defendant be allowed to pursue his rights free of any apprehension of retaliation by the substitution or addition of a more serious charge. Prosecutorial charging decisions are particularly closely scrutinized where an increase or substitution of charges is or appears to be motivated by a defendant's refusal to waive a procedural or constitutional right.[8] Thus, a finding that the additional or more serious charges are based upon conduct known by the government to have criminal ramifications when the initial charges were brought is the operative fact which condemns the new allegations.[9] Only where an event occurs between the first and second indictments, which on its face negates the appearance of retaliation, will a charge increase be condoned. After-the-fact rationalizations are insufficient to justify the additional charges when the government's action smacks of vindictiveness. It is the very *appearance* of vindictiveness, not simply express retaliation, which the courts proscribe.[10]

A major exception to the *Pearce/Blackledge* rule was carved out in the context of plea bargaining by the Supreme Court in *Bordenkircher v. Hayes*.[11] In *Bordenkircher*, the Court held that during plea negotiations a prosecutor may threaten a defendant with indictment for a more serious offense if the defendant refused to plead guilty to a lesser offense with which he was initially charged.[12] While somewhat of a retreat from *Pearce/Blackledge*, *Bordenkircher* applies only in the limited context of pretrial negotiations where the prosecutor has probable cause to file the more serious charges. The narrow scope of the *Bordenkircher* exception

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[4] *See* Blackledge v. Perry, 417 U.S. 21, 27-29 (1974); *see, e.g.*, United States v. Jamison, 505 F.2d 407, 413-17 (D.C. Cir. 1974).

[5] Bordenkircher v. Hayes, 434 U.S. 357 (1978).

[6] 395 U.S. 711 (1969).

[7] 417 U.S. 21 (1974).

[8] *See* Blackledge v. Perry, 417 U.S. 21 (1974); *cf.* Corbitt v. New Jersey, 99 S. Ct. 492, 499-500 (1978) (state statute making life imprisonment mandatory if defendant is convicted by a jury of first degree murder not an unconstitutional burden on a defendant's rights when a plea of non vult to the same offense may result in a lesser sentence).

[9] *E.g.*, United States v. Groves, 571 F.2d 450, 453 (9th Cir. 1978); *see* United States v. Johnson, 537 F.2d 1170, 1172-73 (4th Cir. 1976).

[10] *E.g.*, Blackledge v. Perry, 417 U.S. 21, 28 (1974); United States v. Groves, 571 F.2d 450, 453 (9th Cir. 1978); United States v. DeMarco, 550 F.2d 1224, 1226-27 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977).

[11] 434 U.S. 357 (1978).

[12] *Id.* at 365.

was entirely misconstrued, however, by the Fourth Circuit in *United States v. Litton Systems, Inc.*[13] Mechanically applying the result in *Bordenkircher*, the *Litton* court disregarded the district judge's finding of actual retaliation, the government's admitted lack of probable cause to indict, and the prophylactic principles of *Pearce/Blackledge.*[14] The court of appeals thus placed its stamp of approval on serious prosecutorial misconduct. Despite the *Litton* decision, the lower courts generally have given broad meaning to the constitutional principle of due process and the ethical obligations of the prosecutor in determining what charges to file against defendants.

I. DEVELOPMENT OF THE RIGHT TO BE FREE OF PROSECUTORIAL VINDICTIVENESS

A central maxim of American jurisprudence is that neither the prosecutor, nor the judge, nor the legislature may abrogate the constitutional rights guaranteed a defendant. Although the Constitution does not forbid requiring a defendant to choose from among the rights available to him,[15] if the "purpose or effect" of a statute or procedure is "to chill the assertion of constitutional rights by penalizing those who choose to exercise them," that result is "patently unconstitutional."[16]

The Supreme Court first dealt with the issue of vindictiveness in *North Carolina v. Pearce.*[17] *Pearce* involved the constitutionality of the imposition of a sentence by a judge[18] upon conviction after retrial where the

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[13] 573 F.2d 195 (4th Cir.), *cert. denied,* 99 S. Ct. 101 (1978).

[14] *See* text accompanying notes 126-62 *infra.*

[15] *See* McGautha v. California, 402 U.S. 183, 213 (1971); Brady v. United States, 397 U.S. 742, 756-57 (1970).

[16] United States v. Jackson, 390 U.S. 570, 581 (1968) (statute permitting imposition of death penalty only upon recommendation of jury had chilling effect on exercise of fifth and sixth amendment rights).

[17] 395 U.S. 711 (1969).

[18] In *Pearce,* the Supreme Court rejected equal protection and double jeopardy attacks, but set forth the requirement 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.

Sentencing by a judge, as in *Pearce,* is to be contrasted with jury sentencing which was present in Chaffin v. Stynchcombe, 412 U.S. 17 (1973). Distinguishing the potential for judicial vindictiveness, which explicitly underlay *Pearce,* 395 U.S. at 723-26, the *Chaffin* Court found that the likelihood of retaliatory or vindictive sentencing by a jury was "de minimis in a properly controlled retrial." 412 U.S. at 26. Where the jury is not aware of the sentence previously imposed, and not concerned with vindicating a sentence imposed in the first trial, there is no real threat of vindictiveness. Thus, the due process concerns of *Pearce* are not implicated. *Id.* at 25-28.

Although extended discussion of judicial retaliation or vindictiveness is beyond the scope of this article, *Pearce* demonstrates that the due process principles extend to bar the appearance of judicial vindictiveness. For example, in United States v. Stockwell, 472 F.2d 1186 (9th Cir.), *cert. denied,* 411 U.S. 948 (1973), the Ninth Circuit vacated a sentence imposed after trial where the district judge had told the defendant that a shorter sentence would be imposed if he would plead guilty and avoid a trial. Citing *Pearce,* the court held that the trial court's sentencing power may not be used as punishment for a defendant's refusal to plead guilty.

sentence was harsher than that imposed following the original conviction. The defendant was originally convicted of assault with intent to commit rape and received a prison term of 12 to 15 years. This conviction was reversed when the North Carolina Supreme Court found his confession to have been involuntary. Upon retrial he was again convicted, receiving a sentence of eight years imprisonment. This second sentence, when added to the time Pearce had already spent in prison, amounted to approximately three years more than the sentence originally imposed. In a habeas corpus proceeding, the federal district court found the sentence impermissible, and the Fourth Circuit affirmed. Mr. Justice Stewart, writing for a majority of the Supreme Court, identified the major issue in the case as being "what constitutional limitations there may be upon the general power of a judge to impose upon reconviction a longer prison sentence than the defendant originally received."[19]

Observing that it would be a flagrant violation of the fourteenth amendment if a state trial court had an announced policy of imposing more severe sentences upon defendants who successfully attack their convictions, the Court found that an unexplained increase in punishment in these circumstances violated the due process clause:

"[C]ourts must not use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice." *Id.* at 1187.

Two years later, in a case involving resentencing after a revocation of probation, the Ninth Circuit again vacated a sentence imposed because the record did not "affirmatively show that the court resentenced the defendant 'solely upon the facts of his case and his personal history' . . . and not to punish him for asserting his legal rights." United States v. Kenyon, 519 F.2d 1229, 1233 (9th Cir.), *cert. denied,* 423 U.S. 935 (1975). The court held that due process "requires that corrective resentencing be free of vindictiveness, pique, or the appearance thereof." *Id.*

The continuing nature of the problem of judicial retaliation is well illustrated by the California Supreme Court's recent decision In re Lewallen, 23 Cal.3d 274, 590 P.2d, 383, 152 Cal. Rptr. 528 (1979). *See also* Ramsey v. New York, 401 N.Y.S.2d 671 (App. Div. Sup. Ct.), *cert. dismissed as improvidentially granted,* 99 S. Ct. 1415 (1979).

Other cases which have utilized the rationale of *Pearce* include Midgett v. McClelland, 547 F.2d 1194, 1197 (4th Cir. 1977) (after retrial, second judge's imposition of a greatly increased sentence from that imposed by the first judge appeared retaliatory and was prohibited by *Pearce*); United States v. Floyd, 519 F.2d 1031, 1035 (5th Cir. 1975) (*Pearce* applied despite express showing by sentencing judge that no vindictiveness was involved); United States v. Gerard, 491 F.2d 1300, 1306 (9th Cir. 1974) (greater sentence impermissible on resentencing because court was not made aware of any new facts, even though defendant convicted on increased charges); Wood v. Ross, 434 F.2d 297, 300 (4th Cir. 1970), *vacated on other grounds,* 404 U.S. 244 (1971) ("[o]n the strength of *Pearce,* we again see the more drastic sentence on the second trial as a denial of Federal due process, in that by discouragement it impinges upon the State-given appeal"). *See also* Marano v. United States, 374 F.2d 583 (1st Cir. 1967) (prior to *Pearce*); Rice v. Simpson, 274 F.Supp. 116 (M.D. Ala. 1967), *aff'd,* 395 U.S. 711 (1969) (companion case to *Pearce*). *But see* United States v. Baer, 575 F.2d 1295, 1300-01 (10th Cir. 1978) (misdemeanor defendant held not victim of judicial retaliation for refusing to consent to trial before a magistrate despite district judge's critical comments). *Cf.* Williams v. McMann, 436 F.2d 103, 105 (2d Cir. 1970) (judge had no discretion to reimpose original sentence when defendant backed out of plea bargain and was reconvicted on more serious charges).

[19] 395 U.S. at 726.

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.[20]

While the Court held that it was permissible for a judge to impose a more severe sentence upon a defendant after a new trial,[21] the reasons for a harsher sentence must appear on the record.[22] Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time the original sentence is imposed. The factual basis for the increased sentence must be placed on the record so that the "constitutional legitimacy" of the judge's reasons may be reviewed.[23]

In *Pearce,* the limitation on increasing the defendant's punishment on retrial was directed at the trial judge. Five years later, in *Blackledge v. Perry,*[24] the Supreme Court extended the prophylactic rule of *Pearce* to the prosecutor. The Court held that the due process clause constituted a bar to a prosecutor's use of increased charges on retrial, where "upping the ante" gave the appearance of vindictiveness, and thus discouraged a defendant's exercise of his statutory appellate remedy.[25]

While incarcerated in the North Carolina penitentiary, Perry was involved in an altercation with another inmate and charged with the misdemeanor offense of assault with a deadly weapon. He was tried by the court, sitting without a jury, and given a six-month sentence to be served upon completion of the sentence he was then serving.[26]

North Carolina employs a two-tier criminal justice system for misdemeanors. A convicted misdemeanant, upon his request, is entitled to a trial de novo in a court of general jurisdiction. This de novo trial may be obtained by the defendant by filing a notice of appeal, and no allegation of

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[20] *Id.* at 725.

[21] *Id.* at 722-23.

[22] *Id.* at 723.

[23] *Id.* The Supreme Court declined to extend the *Pearce* rationale in Colten v. Kentucky, 407 U.S. 104 (1972). Kentucky had a two-tier system that permitted a misdemeanor defendant convicted in an inferior court to obtain a trial de novo in a court of general jurisdiction. In *Colton,* the defendant claimed that the rationale of *Pearce* prevented the court of general jurisdiction from imposing a sentence upon him on retrial greater than the sentence which was originally imposed in the lower court. *Id.* at 114-15. The Court held that the *Pearce* rationale was inapplicable to the *Colton* situation, because *Pearce* was directed at insuring the absence of "vindictiveness" against a defendant who attacked his initial conviction. Since the judge in the court of general jurisdiction was different from the one who imposed the original sentence, the rule of *Pearce* was not required. 407 U.S. at 114-19.

[24] 417 U.S. 21 (1974).

[25] *Id.* at 27-28.

[26] *Id.* at 22.

errors below is necessary.[27]

Following his conviction in the lower court, Perry requested a trial de novo. Prior to trial, the prosecutor superseded the misdemeanor charge with a felony indictment, charging Perry with assault with intent to kill on the basis of the same conduct as that alleged in the misdemeanor complaint.[28] Perry entered a plea of guilty and was sentenced to a term of five to seven years imprisonment, to be served concurrently with the prison sentence he was then serving. The effect of this sentence was to lengthen his potential incarceration by approxmiately seventeen months beyond what it would have been had he not appealed and requested a trial de novo.[29]

The Supreme Court identified the issue as "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."[30] The Court concluded that the new indictment was impermissible. "The lesson that emerges from *Pearce, Colten* [*v. Kentucky*],[31] and *Chaffin* [*v. Stynchcombe*][32] 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.' "[33]

The Court observed that the prosecutor had a strong interest in discouraging misdemeanants from appealing and requesting a trial de novo, since appeals necessitate increased expenditures of prosecutorial resources and pose the possibility that a defendant may go free. Since the prosecutor has the means to discourage such appeals by "upping the ante" to a felony indictment whenever a convicted misdemeanant pursues his statutory remedy, the state could discourage all but the most confident or most desperate defendants from facing the risks of a trial de novo.[34] Although the Court found no evidence that the prosecutor acted either in bad faith or maliciously in indicting Perry on the felony charge, the Court observed that actual retaliatory motivation was not required. As in *Pearce,* "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 . . . ."[35] Since North Carolina chose originally to

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[27] *Id.* at 22-23. In North Carolina, the District Court Division of the General Court of Justice has exclusive jurisdiction over the trial of misdemeanors. N.C. GEN. STAT. § 7A-272 (1969). Any person convicted of a misdemeanor in the District Court has an absolute right to a trial de novo in the Superior Court. N.C. GEN. STAT. §§ 7A-290, 15-177.1 (1969) (§ 7A-290 currently codified at 1977 Cum. Supp.; § 15-177.1 was repealed in 1973). For a discussion of two-tier systems found in other states, see Colten v. Kentucky, 407 U.S. 104, 112-14 & nn.4-11 (1972); note 23 *supra.*

[28] 417 U.S. at 23.

[29] *Id.* at 23 & n.2.

[30] *Id.* at 27.

[31] 407 U.S. 104 (1972); *see* note 23 *supra.*

[32] 412 U.S. 17 (1973); *see* note 18 *supra.*

[33] 417 U.S. at 27.

[34] *Id.* at 27-28.

[35] *Id.* at 28 (quoting North Carolina v. Pearce, 395 U.S. 711, 725 (1969)).

prosecute the misdemeanor charge, the Court held that the state was "precluded by the Due Process Clause from calling upon [Perry] to answer to the more serious charge in the Superior Court."[36]

The rule that emerges from the Supreme Court's decisions in *Pearce* and *Blackledge* is that the due process clause prohibits the state from retaliating against a defendant's exercise of constitutional or statutory rights. Because the mere appearance of vindictivenes may deter a defendant from challenging the lawfulness of his conviction, due process concepts prohibit the state from "upping the ante." The rule applies whenever the prosecution has knowledge of the facts essential to the more serious charge at the time of the original indictment. The good faith or bad faith of the prosecutor is irrelevant[37] and it is not necessary for the defendant to show actual vindictiveness. Absent an adequate justification for the superseding or additional charges, vindictiveness will be presumed.

II. APPLICATION OF THE *Pearce/Blackledge* RULE IN THE LOWER COURTS

Since the Supreme Court's decision in *Blackledge,* lower federal courts have applied the *Pearce/Blackledge* rule to a wide variety of situations to insure that defendants can pursue their rights free from any threat of prosecutorial retaliation. The rule has been applied to the assertion of constitutional rights such as effective assistance of counsel,[38] trial by jury,[39]

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[36] *Id.* at 30. Thus, unlike Pearce, whose due process rights could have been protected by resentencing, *see* 395 U.S. at 725-26, Perry's due process rights could only have been vindicated if the filing of the more serious charges had been banned altogether. 417 U.S. at 30-31.

In *Blackledge,* the Supreme Court clearly distinguished the situation where the prosecutor is unable to bring the more serious charge in the initial prosecution. *Id.* at 29 n.7. In so doing, it implicitly reaffirmed the analysis set forth in a number of lower federal court decisions. For example, in Colon v. Hendry, 408 F.2d 864 (5th Cir. 1969), a pre-*Pearce* case, the defendant had been convicted of various misdemeanor offenses in a Florida state court. This conviction had been voided by a federal district court in a prior habeas corpus action because Colon had been denied his right to counsel. After Colon's conviction was set aside, the state filed felony charges against him based on the same facts as those underlying the misdemeanor prosecution. Prior to the second trial, Colon again petitioned for a writ of habeas corpus, claiming that his right to seek federal habeas corpus was being infringed. Writing for the Fifth Circuit, then-Circuit Judge Griffin Bell remanded the case to the district court for an evidentiary hearing on why the felony charges had been filed. He noted that, absent some valid justification, the filing of the felony charges constituted "an impermissible inhibition on [Colon's] right to seek the federal writ." *Id.* at 866.

Similar results, focusing on whether there was a valid reason for the prosecution to institute additional charges, were reached in pre-*Blackledge* cases. *See* United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974) (additional charge filed after defendant was permitted to withdraw a guilty plea); Sefcheck v. Brewer, 301 F.Supp. 793 (S.D. Iowa 1969) (more serious felony charged after defendant's original plea of guilty found to be involuntary).

[37] *Cf.* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

[38] United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974).

[39] United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976).

and reasonable bail.[40] The rule has been extended to cover the assertion of statutory rights,[41] as well as situations where the assertion of rights was informal[42] or even unsuccessful.[43]

The decisions of the lower courts demonstrate, with one notable exception,[44] concern that the possible appearance of vindictiveness is sufficient to violate a defendant's due process rights. Also, the lower courts have focused on whether evidence supporting the increased charge was in the hands of the prosecutor at the time of the original indictment.

A. *Appearance of Vindictiveness*

Courts applying the *Pearce/Blackledge* rule have been sensitive to the reality that even when there is no evidence of actual vindictive purpose, the possible appearance of vindictiveness by the prosecutor will violate the defendants' right of due process. Thus, when a superseding indictment contains an additional or more severe charge, the prosecutor has been required to justify affirmatively the increased charge.[45] In the absence of

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[40] United States v. Andrews, 444 F. Supp. 1238 (E.D. Mich. 1978).

[41] *See* United States v. Groves, 571 F.2d 450, 453 (9th Cir. 1978) (assertion of rights under the Speedy Trial Act, 18 U.S.C. § 3161(b) (1976)); United States v. DeMarco, 550 F.2d 1224, 1226-27 (9th Cir. 1977) (assertion of venue rights for trial under 18 U.S.C. § 3237(b) (1976)); Sefcheck v. Brewer, 301 F. Supp. 793, 794-95 (S.D. Iowa 1969) (assertion of right to be personally present at plea and sentencing under IOWA CODE § 77.12 (1978)). The *Pearce/Blackledge* rule also has been applied to the exercise of a procedural right under the Federal Rules of Criminal Procedure. *See, e.g.*, United States v. Johnson, 537 F.2d 1170, 1174-75 (9th Cir. 1976) (noncompliance with FED. R. CRIM. P. 11 in accepting original guilty plea).

[42] United States v. Alvarado-Sandoval, 557 F.2d 645 (9th Cir. 1977). In *Alvarado-Sandoval,* the prosecutor sought a superseding felony indictment after he was advised by defendant's counsel that he wished to investigate the possibility of contesting the legality of a search. *Id.* The Ninth Circuit reversed the conviction on the felony charges, holding that the "failure to interpose a formal motion [challenging the search] before the magistrate does not effectively distinguish this case from *Ruesga-Martinez* . . . ." *Id.* at 646; *see* United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976); text accompanying notes 52-59 *infra.*

[43] Wynn v. United States, 386 A.2d 695 (D.C. 1978). In *Wynn,* the defendant moved to have charges against him dismissed due to the government's failure to grant him a speedy trial or, in the alternative, to have his trial date advanced. *Id.* at 696. The motion to dismiss was denied, but the trial was advanced. However, when the government was unable to locate one of its witnesses on such short notice, the trial court dismissed the information without prejudice. The government then refiled the charges, and added two misdemeanor counts to the second information. Wynn was convicted on the original charge and on one of the additional charges. *Id.* at 696-97. The District of Columbia Court of Appeals strongly condemned the additional charges in the second information where the "defendant has sought dismissal of an information or indictment for failure to obtain a speedy trial and soon thereafter does in fact obtain a dismissal under circumstances resembling failure to prosecute . . . ." *Id.* at 697. *See also* United States v. Groves, 571 F.2d 450 (9th Cir. 1978) (defendant asserted right to speedy trial).

[44] United States v. Litton Systems, Inc., 573 F.2d 195 (4th Cir.), *cert. denied,* 99 S. Ct. 101 (1978); *see* text accompanying notes 126-62 *infra.*

[45] *See, e.g.*, United States v. Johnson, 537 F.2d 1170, 1171-73 (4th Cir. 1976) (prosecutor may rebut appearance of vindictiveness by showing that evidence upon which increased charge was based was not available at time defendant asserted right); United States v.

such a justification, the appearance of vindictiveness cannot easily be dispelled.

The courts of appeals for the District of Columbia Circuit and the Ninth Circuit have rejected prosecution arguments that the absence of any indication of actual vindictiveness validates the prosecutor's conduct in recharging. In *United States v. Jamison,*[46] the defendants were charged originally with second-degree murder and a weapons offense. At the close of the government's case, the defendants moved for a mistrial because of ineffective assistance of counsel.[47] The defendants were subsequently re-indicted and convicted of first-degree murder. On appeal, the defendants contended that due process required that the fear of a vindictive charge increase following a successful motion for mistrial be dispelled by prohibiting the increase.[48] The court of appeals of the District of Columbia agreed.

In rejecting the government's argument that the impact of the increased charge was not as significant as in *Blackledge,*[49] the court stated:

> The fact that in a particular case the actual impact on the defendant of a charge increase is slight is, or course, not determinative, any more than the fact that a prosecutor may not in fact have acted out of vindictiveness, for the evil to which *Pearce* is directed is the *apprehension* on the defendant's part of receiving a vindictively-imposed penalty for the assertion of rights. Moreover, we would hesitate to distinguish *Pearce* even in a case where the only *possible* prejudicial effect of the charge increase was minimal. The difficulty of drawing the line between those charge increases which do and do not carry sufficient potential impact to require restrictions of the kind imposed in *Pearce* persuades us that all charge increases should in this respect be treated alike.[50]

The court concluded that since the record failed to illuminate any reasons why the first degree murder charge was brought, the re-indictment for first degree murder denied the defendant due process.[51]

The Ninth Circuit in *United States v. Ruesga-Martinez*[52] also applied the *Pearce/Blackledge* rule to a re-indictment in which there was a "significant possibility" that the increased charge may have resulted from a vindictive motive or purpose.[53] In *Ruesga-Martinez,* the defendant was

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Jamison, 505 F.2d 407, 416-17 (D.C. Cir. 1974) (government must discover new evidence justifying more severe charges or have been excusably unaware of such evidence to rebut appearance of vindictiveness); Wynn v. United States, 386 A.2d 695, 698 n.10 (D.C. 1978).

[46] 505 F.2d 407 (D.C. Cir. 1974).

[47] *See id.* at 409.

[48] *Id.* at 410.

[49] In *Blackledge,* the charge was increased from a misdemeanor to a felony and carried a possible sentence increase of seven years, Blackledge v. Perry, 417 U.S. 21, 23 n.2 (1974); *see* text accompanying notes 24-36 *supra.*

[50] 505 F.2d at 415 (emphasis in original).

[51] *Id.* at 417.

[52] 534 F.2d 1367 (9th Cir. 1976).

[53] *Id.* at 1369.

arraigned before a United States Magistrate on a misdemeanor complaint charging him with unlawful entry into the United States. At arraignment the defendant refused to sign a waiver of his right to be tried before a district judge.[54] Following the defendant's refusal to waive this right, the government filed a two-count felony indictment charging him as a multiple offender.[55]

Ruesga-Martinez moved unsuccessfully for dismissal of the second indictment, and was thereafter convicted on both counts and sentenced to three years imprisonment. The court of appeals reversed, finding absolutely no evidence in the record justifying the increased charge.[56]

The Ninth Circuit noted that the prosecutor bears a "heavy burden of proving that any increase in the severity of the charges was not the result of a vindictive motive."[57] Furthermore, the court emphasized that "the mere *appearance* of vindictiveness" is enough to require affirmative justification of the increased charge.[58] The absence from the record of any evidence of vindictiveness did not validate prosecutorial conduct which was otherwise "inherently suspect."[59] With perhaps one exception[60] none of

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[54] *Id.* at 1368. The statutory right to be tried by a district court judge, rather than by a magistrate, on a federal misdemeanor charge is conferred by 18 U.S.C. § 3401(b). *Id.* at 1370. A defendant's refusal to waive this right has led repeatedly to allegations of prosecutorial misconduct. *E.g.,* United States v. Sturgill, 563 F.2d 307 (6th Cir. 1977) (discussed at note 79 *infra*); United States v. Alvarado-Sandoval, 557 F.2d 645 (9th Cir. 1977). *See also* United States v. Baer, 575 F.2d 1295, 1300-01 (10th Cir. 1978) (judicial retaliation alleged).

The court of appeals in *Ruesga-Martinez* did not reach the issue whether a misdemeanor defendant has a constitutional right to a jury trial. *See* 534 F.2d at 1370 n.5.

[55] 534 F.2d at 1369. When the original complaint was filed, the prosecutor was aware that the defendant was a multiple offender who could have been charged with a felony. The prosecutor elected, however, to charge the defendant with a misdemeanor. *Id.*

[56] *Id.* at 1369. The court stated, "In the present case, the only new facts alleged in the felony indictment were appellant's previous arrest, conviction and deportation." *Id.* at 1370.

[57] *Id.* at 1370.

[58] *Id.* (emphasis in original); *accord,* United States v. Alvarado-Sandoval, 557 F.2d 645 (9th Cir. 1977). *But see* Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977).

In *Alvarado-Sandoval,* the Ninth Circuit found the possibility of the appearance of vindictiveness in the reindictment of a defendant who only informally asserted a constitutional right. *See* note 42 *supra.* This case is significant in light of the remarkably tentative nature of the defendant's assertion of rights.

By contrast, the Fifth Circuit in *Hardwick v. Doolittle* refused to adopt a standard consistent with the *Blackledge* Court's concern for the impact of the appearance of vindictiveness on a defendant. In *Hardwick,* the defendant was indicted on one count of bank robbery and one count of aggravated assault in connection with the robbery of a Georgia bank. *Id.* at 294. Subsequent to Hardwick's efforts to obtain removal of his case to federal district court and his special plea of insanity, the prosecutor obtained a superseding indictment charging Hardwick with two counts of armed robbery and two counts of aggravated assault arising out of the same incident which was the basis of the original indictment. *Id.* at 294, 302. The jury convicted him on all four counts and sentenced him to two life sentences and two ten-year terms. *Id.* at 294.

On appeal, the Fifth Circuit twisted badly the *Blackledge/Pearce* rule to protect the "broad ambit [of] prosecutorial discretion." *Id.* at 301. Although the court recognized that the trial record contained no indication why the two additional counts were brought after the defendant "had exercised various procedural rights," the court held that "the apprehension

the lower courts applying the *Pearce/Blackledge* rule expressly found that the prosecutor's action to have been motivated by malice. Rather, the appearance of vindictiveness or apprehension of vindictiveness created by the prosecutor's action in filing the increased charges violates the due process clause. Therefore, those courts which require proof of a prosecutor's vindictive intent in filing the increased charge miscomprehend due process concerns with underlie the Supreme Court's decision in *Pearce* and *Blackledge*.

B. *Prosecutor's Knowledge of Offenses at Time of Original Charge*

A crucial factor in many lower court decisions applying the *Pearce/Blackledge* rule has been that at the time of the original indictment the prosecutor knew of the basic facts or events supporting the additional charges brought on re-indictment.

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of vindictiveness which controlled the decision in *Blackledge*" had no application to Hardwick's situation. *Id.* at 302.

The court stressed that *Blackledge* involved the substitution of a more serious "variation" of the same offense *after* the initial decision to prosecute. *Id.* at 301. The court distinguished the additional counts in *Hardwick* as "different and distinct" activities even though the charges arose out of the same bank robbery. *Id.* at 302. The Fifth Circuit deemed the additional charges to be a "new prosecution" and held:

> [I]f we were to adopt apprehension of vindictiveness as opposed to vindictiveness in fact to be the standard by which we judge whether new prosecutions for different criminal activities may be initiated, we would render the prosecutor's discretion meaningless . . . . In such a situation, it is enough that a prosecutor, who decides to add charges to a prior indictment, prove that he did not in fact act vindictively. *The test is to be applied to the prosecutor's actions rather than the defendant's reactions.*

Id. (emphasis added). This purported application of *Blackledge* totally avoids the purpose of the *Pearce/Blackledge* rule. By creating an artificial and unrealistic label for superseding indictments and by focusing on the prosecutor's actual intentions, the Fifth Circuit has abandoned the defendant's due process right to pursue his procedural rights without fear of prosecutorial retaliation. This decision is contrary to the majority of lower court applications of the *Pearce/Blackledge* rule.

[59] 534 F.2d at 1369 & n.2. *But see* United States v. Sturgill, 563 F.2d 307 (6th Cir. 1977) (holding *Blackledge* inapplicable on facts similar to *Ruesga-Martinez*). In addition to the strong emphasis on the defendant's right to be free from the fear of retaliation, the *Ruesga-Martinez* decision is significant because of the court's sweeping language about the scope of the rights protected: "*Pearce* and *Blackledge* apply regardless of whether the accused asserts a constitutional right, a common law right, or a statutory right . . . ." 534 F.2d at 1370. *But cf.* United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir. 1977)(court spoke only in terms of rights with "due process overtones").

[60] The one exception is United States v. Groves, 571 F.2d 450, 453 (9th Cir. 1978):

> This coincidence of events prevents overwhelming circumstantial evidence that the indictment was returned and filed in retaliation for appellant's suggestion that the Speedy Trial Act barred prosecution on the cocaine complaint. With full knowledge of the appellant's violation of the marihuana laws and the extent of his cooperation in January, the government did not see fit to seek the indictment until shortly after the appellant had asserted his statutory rights.

In *United States v. Jamison,*[61] the District of Columbia Circuit noted that a prosecutor might justify increasing a charge on retrial under two circumstances: first, if at the time of the original indictment the prosecutor lacked evidence of essential elements of the more serious offense; and, second, if the government discovers new evidence of which it was "excusably unaware" at the time the original charge was brought.[62]

Two federal circuit courts have strictly applied the "new evidence" justification to reject government attempts to increase charges. In *United States v. DeMarco,*[63] the prosecution brought a three count indictment against the defendant DeMarco charging conspiracy to defraud the United States, making false statements to IRS agents in Washington, D.C., and willfully obstructing a congressional proceeding.[64] After the United States District Court for the District of Columbia granted motions for change of venue,[65] the prosecutor informed defense counsel that if DeMarco insisted on having the trial in Los Angeles, the government would "restructure" its case by bringing an additional charge against him for making false statements to an IRS agent in California.[66] DeMarco refused to forego trial in Los Angeles. Shortly after the three-count indictment was transferred, the prosecutor, true to his word, obtained an additional one-count indictment in the Central District of California.

In the district court the government attempted to distinguish *Pearce, Blackledge* and *Jamison* by arguing that in each of those cases the prosecutor charged a more serious offense on retrial based on the same facts which

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See also United States v. DeMarco, 550 F.2d 1224, 1226 (9th Cir. 1977); United States v. Johnson, 537 F.2d 1170, 1173 (4th Cir. 1976); United States v. Ruesga-Martinez, 534 F.2d 1367, 1370 (9th Cir. 1976). *But see* Hardwick v. Doolittle, 558 F.2d 292, 302 (5th Cir. 1977) (dismissed at note 58 *supra*).

[61] 505 F.2d 407 (D.C. Cir. 1974).

[62] *Id.* at 416-17.

[63] 401 F. Supp. 505 (C.D. Cal. 1975), *aff'd.,* 550 F.2d 1224 (9th Cir.), *cert. denied,* 434 U.S. 827 (1977).

[64] 401 F. Supp. at 507.

[65] *Id.* at 508. The right to a change of venue to the defendant's home district arises under 18 U.S.C. § 3237(b) (1976).

[66] 401 F. Supp. at 508. The government also advanced several legal arguments to avoid the impact of *Blackledge.* First, the prosecution contended that *Blackledge* only applied where interests protected by the constitutional right against double jeopardy were involved. Although the court found this distinction to be consistent with the facts of *Blackledge,* it also found the distinction to be inconsistent with the sweeping language of that decision. *Id.* at 510. Second, the government analogized its actions to plea bargaining and argued that if plea bargaining was constitutional, so was venue bargaining. The court rejected this analogy, observing that "while plea bargaining may be necessary for the effective administration of criminal justice, venue bargaining is hardly a necessary component of the prosecutor's arsenal." *Id.* at 511. Third, the government urged that because it had dismissed one of the counts of the District of Columbia indictment (the consiracy charge) on its own motion, prior to trial and during the court's consideration of the defendant's *Blackledge* motion, the defendant did not face the prospect of "increased charges." The court also rejected that contention, because the government's proposed substitution of charges came too late. Since the dismissal had not occurred until after the defendant had been threatened with the prospect of increased charges, the government had lost its right to bring the threatened charge. *Id.* at 511-12.

gave rise to the initial charges.[67] In *DeMarco,* the prosecutor argued that the California indictment for false statement made in California was derived from facts different from those upon which the District of Columbia indictment rested. The court expressly rejected the argument:

> All of the charges against DeMarco relate to the events surrounding the claim and defense of a tax deduction from an alleged 1969 gift by former President Nixon to the United States. Moreover, as the government conceded, the conspiracy count [Count 1] embraces the California facts.[68]

Moreover, the district court noted that even if the facts of the California indictment were wholly dissimilar to the District of Columbia indictment, "a different result need not obtain" since the threat of the new indictment was an effort to prevent the defendant from exercising his right to a change of venue.[69]

In affirming dismissal of the California indictment, the Ninth Circuit found that even though the facts supporting the two indictments were not identical, the charges arose from the same "factual nucleus."[70] This was a correct application of the *Pearce/Blackledge* rule and *Jamison.* The court narrowed the "new evidence" justification considerably when it stated:

> Even if the first and second indictments were not based on facts that were so similar that a trial on one would have prevented trial on the other upon double jeopardy grounds, that situation would not distinguish this case from *Blackledge* . . . . Apprehension of vindictiveness and "the appearance of vindictiveness" . . . are adequate to bring the case squarely within *Blackledge.*[71]

Thus, in the Ninth Circuit, the degree of similarity of the facts from which the first and subsequent indictments arise is only one factor bearing on the vindictiveness question.

In most cases in which the courts find that there was no new evidence to justify an increase of charges, the point of reference has usually been the prosecutor's knowledge at the time of the original indictment. In *United States v. Johnson,*[72] the Fourth Circuit offered a variation on the method of evaluating a prosecutor's awareness of essential facts.

In 1972, Johnson was charged in a four-count indictment with participation in a heroin distribution scheme. Pursuant to an agreement with the prosecutors, Johnson entered a guilty plea to counts 1 and 4, and the government dropped counts 2 and 3. In 1974, Johnson's plea was set aside by the Fourth Circuit for noncompliance with the requirements of Federal Rule of Criminal Procedure 11.[73] The government subsequently obtained

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[67] *Id.* at 511-12 n.2.

[68] *Id.*

[69] *Id.* at 508.

[70] 550 F.2d at 1226.

[71] *Id.* at 1226-27.

[72] 537 F.2d 1170 (4th Cir. 1976).

[73] *Id.* at 1171-72. FED. R. CRIM. P. 11 establishes specific procedures for insuring that

a superseding indictment charging Johnson with the original four counts plus 37 new charges. Johnson was tried on eight counts, of which only the first was among the original charges, and was convicted on all eight.[74]

The court of appeals held that the *Pearce/Blackledge* rule barred the government from proceeding on any of the 41 counts in the superseding indictment other than the four counts charged in the original indictment. The government argued that since the prosecutor did not know of the crimes charged in the second indictment at the time the first indictment was filed, there could have been no denial of due process.[75] The government did know, however, of the "essential facts" giving rise to the 37 additional counts at the time Johnson entered his original guilty plea, and was content to except the plea to two of the four original counts in light of those facts.[76] No new evidence was discovered during the year and a half between Johnson's plea and the new indictment.

In rejecting the government's argument that the absence of evidence at the time of the original indictment eliminated any appearance of vindictiveness, the Fourth Circuit stated:

> The reference to return of the indictment as the time for assessing the prosecutor's knowledge does not imply that some other date might not be equally critical, and the opinion does not attempt to catalog all tactics that may engender apprehension of prosecutorial vindictiveness. Rather, *Blackledge* unequivocally assures a prisoner of his right to appeal without fear that the prosecutor will retaliate with a more serious charge if the original conviction is reversed. Therefore, instead of simply assessing the prosecutor's knowledge at the time the original indictment was returned, as the government suggests, we must examine all circumstances of Johnson's situation.[77]

The *Johnson* decision stands for the proposition that a prosecutor's knowledge of the basis for additional charges is not to be mechanically tested as of the date the original charges are filed. The court in *Johnson* seemed to require that, in judging a rebuttal of the appearance of vindictiveness, courts should focus on the availability of evidence at the time the right is asserted by the defendant, and not solely at the time the initial accusatory pleading is filed.

C. *Justifications for Increased Charges*

In a handful of cases, the government has succeeded in convincing the court that intervening events rebutted the appearance of vindictiveness prohibited by the *Pearce/Blackledge* rule. Several federal courts of appeals

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pleas entered in criminal cases are voluntary and understood by the defendant.

[74] *Id.*

[75] *Id.* at 1172-73.

[76] *Id.* at 1173.

[77] *Id.*

have allowed increased charges after a defendant has withdrawn his bargained-for guilty plea or has collaterally attacked such a plea and the plea has been overturned on appeal.[78] The Eighth Circuit has accepted the need to protect the identity of an informer as a legitimate, strategic reason for withholding a charge in the original indictment.[79] Also, as has been discussed above, the discovery of new evidence of additional crimes has been an intervening factor which dispels the appearance of vindictiveness created by increased charges on retrial.[80] In several other cases, however, the courts misapplied the rule by ignoring the issue of whether the government's action created the appearance of vindictiveness.[81]

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[78] Moore v. Foti, 546 F.2d 67, 68 (5th Cir. 1977) (per curiam); United States v. Johnson, 537 F.2d 1170, 1174-75 (4th Cir. 1976); United States v. Williams, 534 F.2d 119, 121-22 n.2 (8th Cir.), *cert. denied*, 429 U.S. 894 (1976); United States v. Anderson, 514 F.2d 583, 588 (7th Cir. 1975); United States v. Rines, 453 F.2d 878, 880 (3d Cir. 1971) (per curiam); Williams v. McMann, 436 F.2d 103, 105-06 (2d Cir. 1970), *cert. denied*, 402 U.S. 914 (1971).

[79] United States v. Partyka, 561 F.2d 118, 123 (8th Cir. 1977), *cert. denied*, 434 U.S. 1037 (1978).

[80] *See, e.g.*, United States v. Preciado-Gomez, 529 F.2d 935 (9th Cir.), *cert. denied*, 425 U.S. 953 (1976). Although the proposition that later discovered evidence may rebut the appearance of vindictiveness is sound, the court in *Preciado-Gomez* may have misapplied it to the facts of the case. The defendant was originally tried on a two-count indictment alleging certain immigration offenses which had occured in June 1974. That trial resulted in a hung jury, and a mistrial was declared. The government then reindicted Preciado-Gomez, charging him with the two offenses which were the subject of the first trial, plus two additional immigration-related offenses which had occurred in April 1972. *Id.* at 937. With respect to the additional charges, the court stated:

> [Defendant's] conduct, occurring prior to the original charge of unlawful entry, was suspected, but only ascertained by the prosecution after the aborted trial at which no judgment was entered.
>
> Thus, it was proper in *Preciado* [*-Gomez*] to charge against him separate, different and earlier charges in a superseding indictment, not established to the satisfaction of the prosecution at the time of Preciado's arrest on June 13, 1974, or his indictment on June 25, 1974, or his mistrial on September 20, 1974.

Id. at 941. However, since evidence of the 1972 offense was available to the government, *see id.* at 940-41 & n.1, it seems unlikely that the government lacked the necessary evidence to have charged the defendant with the additional offense at the first trial. In U.S. v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976), a different panel of the 9th Circuit rejected the notion that *Preciado-Gomez* could be read as holding that absence from the record of any evidence of vindictiveness is sufficient to justify an increase in the severity of the charges. The Court limited *Preciado-Gomez* to the situation where the prosecution did not have all the facts at the time the original charge was made. *Id.* at 1369 n.2.

A separate issue which was not discussed by the *Preciado-Gomez* court is what right did the defendant assert for which the prosecution was retaliating? The hung jury situation in *Preciado-Gomez* is not entirely analogous to the mistrial declared in United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974), where the defense prematurely terminated a prosecution which was going well. It is more difficult to lay the "blame" for a hung jury mistrial at the feet of the defense, if the prosecutor wanted to discourage the defendant's exercise of some legal right. United States v. Arias, 575 F.2d 253, 255-56 (9th Cir.), *cert. denied*, 99 S. Ct. 196 (1978); *see* United States v. Jamison, 505 F.2d 407, 416 n.15 (D.C. Cir. 1974).

[81] *See* United States v. Stacey, 571 F.2d 440 (8th Cir. 1978); Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978); note 58 *supra*; United States v. Sturgill, 563 F.2d 307 (6th Cir. 1977). In *Sturgill*, the court of appeals focused not on the appearance of vindictiveness, but rather on whether the defendant would be "forced to stand

The Seventh Circuit case *United States v. Anderson*[82] is illustrative of those cases in which courts have permitted more serious charges after a bargained-for plea has been set aside. In *Anderson,* the defendant was originally charged with use of a dangerous weapon during a bank robbery. Pursuant to a plea bargain, a second information was filed, charging Anderson with larceny of 35 dollars from the bank. The defendant was sentenced to 10 years imprisonment on his guilty plea and the original charge was dismissed. Six months later, Anderson collaterally attacked his conviction to have the guilty plea set aside for noncompliance with Federal Rule of Criminal Procedure 11. The motion was granted when the government acknowledged that, at the time of sentencing, everyone involved (including the defendant) erroneously believed that the maximum punishment for larceny was ten years. The government then obtained an indictment which charged the same offense as the original information.[83]

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trial on more severe charges than were contained in the [original] complaint." *Id.* at 309. Sturgill was charged with four misdemeanors under the Kentucky law, brought in federal court under the Assimilative Crimes Act, 18 U.S.C. § 13, as having been committed on the premises of the Naval Ordnance Station in Louisville, Kentucky. At his initial appearance, Sturgill refused to waive his right to trial before a district judge, and thereafter the government brought two additional misdemeanor charges against him, which arose from the same facts as the initial charges.

The Sixth Circuit distinguished *Blackledge* and *Ruesga-Martinez* on the basis that the additional charges were punishable by fine only, and that prior to trial (but after the additional charges were brought) the government had filed a notice of intent to "nolle pros" the charge which carried the longest potential period of confinement. "Thus at trial Sturgill was subjected to charges carrying the same potential fine and a shorter potential period of incarceration [than those originally filed]." 563 F.2d at 309 n.2. By focusing exclusively on the possible maximum punishment which the defendant faced at the time of trial, the *Sturgill* court entirely ignored the question of the appearance of vindictiveness and erroneously held the *Blackledge* rule to be inapplicable. *Id.* at 309.

In United States v. Stacey, 571 F.2d 440 (8th Cir. 1978), the Eighth Circuit did not address the issue of vindictiveness, but focused on the admitted guilt of the defendant. In November, 1975, Stacey confessed to a charge of failing to report a sum of money in excess of $5,000 brought into the United States in furtherance of a conspiracy to export marijuana into Canada. In early 1977, Stacey sought return of the funds confiscated. Thereafter, in March 1977, the government obtained an indictment based on the 1975 confession. *Id.* at 441-42.

On appeal, the Eighth Circuit held that *Pearce* and *Blackledge* were inapplicable, despite the government's acknowledgment that one reason it had sought the indictment was Stacey's action to seek return of the money. The court held that the defendant's demand for the return of the impounded funds was not the assertion of "*a statutory right that has due process implications*" envisioned under the *Pearce/Blackledge* rule. *Id.* at 443 (emphasis in original) (quoting United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir. 1977)).

The Eighth Circuit erred in three specific respects. First, it ignored the appearance of vindictiveness issue, which is the heart of the *Pearce/Blackledge* rule. Second, the court erroneously placed the burden of *proving* vindictiveness on the defendant, rather than requiring the prosecution to prove its absence. Third, the court engrafted into *Pearce* and *Blackledge* the requirement that the vindictiveness be manifested in reaction to a right asserted in the criminal proceedings. None of these three criteria find any support in either *Pearce* or *Blackledge.*

[82] 514 F.2d 583 (7th Cir. 1975).

[83] *Id.* at 585.

The Seventh Circuit rejected Anderson's charge of prosecutorial vindictiveness. The court noted that at the time the defendant originally entered his guilty plea, there were two valid informations pending against him, and the government had not "elected on which charge they would try Anderson if the case went to trial."[84] The court held, therefore, that "the mere *reinstitution* of the [original] charges, under these circumstances, did not amount to a deprivation of Anderson's due process rights."[85]

It is important to recognize that the *Anderson* court was not approving more serious charges brought on retrial, nor charges not originally confronting the defendant at the time of his first plea. Rather, the prosecutor reinstituted the exact charges which the defendant faced originally when he entered into the plea bargain. In this respect, restoration of the status quo ante could not be considered as retaliatory, any more than could prosecution on the original charge had the plea bargain fallen through prior to entry of the guilty plea.[86]

In *United States v. Partyka,*[87] the government's unwillingness to disclose the identity of its informer led to reversal of a conviction for a misdemeanor offense for possession of PCP tablets.[88] The government then refiled the misdemeanor possession charge on which the defendant had originally been convicted and sought a felony indictment for distribution of the drug MDA. Partyka attacked the felony indictment on the ground that the charge was brought in retaliation of his exercise of the right to appeal.[89] In rejecting Partyka's claim of retaliation, the Eight Circuit held that if any appearance of vindictiveness existed, the government had successfully rebutted such appearance:

> In our view the indictment was procured not merely because the conviction had been reversed but because the collateral effect of the reversal was to disclose the identity of Faircloth as the government's informer and thus remove the government's valid reason for

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[84] *Id.* at 588.

[85] *Id.* (emphasis added).

[86] In this respect, *Anderson* is entirely consistent with United States v. Johnson, 537 F.2d 1170 (4th Cir. 1970); *see* text accompanying notes 72-77 *supra.*

Courts have been properly suspicious of a prosecutor's attempt to justify an increased charge on the basis of a defendant's noncompliance with the terms of a plea bargain. In United States v. Gogarty, 533 F.2d 93 (2d Cir. 1976), the Second Circuit held that noncompliance with the terms of a deferred prosecution agreement permitted reinstatement of original charges and indictment for later offenses. However, in the absence of a formal, written agreement such as in *Gogarty,* noncompliance or noncooperation by a defendant should not be accepted as an affirmative justification for increasing charges after a defendant has asserted a constitutional or statutory right. *See* United States v. Groves, 571 F.2d 450 (9th Cir. 1978) (court held that defendant's assertion of statutory right to speedy trial, rather than his alleged noncompliance with plea bargain, triggered superseding indictment on more serious charges).

[87] 561 F.2d 118 (8th Cir. 1977).

[88] *Id.* at 121-22.

[89] *Id.* at 123.

> not indicting the defendant on the distribution [of MDA] charge when it originally indicted him on the [PCP] possession charge.[90]

D. *Summary*

The lower court cases which condemn the prosecutor's conduct do so almost uniformly because of the existence of the appearance of vindictiveness and the lack of an intervening justification. These cases hew closely to the concerns expressed in *Pearce* and *Blackledge.* Cases which condone the government's conduct, however, are often less consistent with the teachings of *Pearce* and *Blackledge.* The Fifth and Eighth Circuits in particular have been reluctant to recognize the effect of the appearance of prosecutorial retaliation on the exercise of constitutional and statutory rights.[91]

The lower courts have properly identified three situations which do not fall directly within the *Pearce/Blackledge* rule: reinstatement of original charges after withdrawal of plea bargain, discovery of new evidence of additional crimes, and legitimate, strategic reasons for not charging separate offenses. However, these "exceptions" must be construed narrowly if the *Pearce/Blackledge* rule is to retain its full vitality. Thus, if a defendant withdraws from a plea bargain and new and more severe charges are introduced, or if the newly discovered evidence adds little to already known facts of additional offenses, and if the "strategic" reason is a sham or relates to charges arising from the same transaction, the prosecutor should not be permitted to defeat the application of the *Pearce/Blackledge* rule. Any purported justification of an increased charge on retrial should be clearly and affirmatively set forth by the prosecutor and carefully examined by the court. Any less rigorous scrutiny tends to vitiate the prophylactic principles of the rule.

III. The Plea Bargaining Exception to the *Pearce/Blackledge* Rule

A. Bordenkircher v. Hayes

The Supreme Court's 1978 decision in *Bordenkircher v. Hayes*[92] represents a distinct step backwards from the position announced in *Pearce* and *Blackledge.* In *Bordenkircher,* the Court ruled that it was permissible conduct, not proscribed by *Blackledge,*[93] for a prosecutor during plea negotiations to threaten a defendant with reindictment for a more serious offense if he did not plead guilty to the lesser offense with which he was initially charged.[94]

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[90] *Id.* at 124.

[91] *See* United States v. Stacey, 571 F.2d 440 (8th Cir. 1978) (discussed at note 81 *supra*); Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977) (discussed at note 58 *supra*).

[92] 434 U.S. 357 (1978).

[93] *Id.* at 362-63. The Sixth Circuit had held, however, that the same potential for impermissible vindictiveness existed in *Bordenkircher* as in *Blackledge.* Hayes v. Cowan, 547 F.2d 42, 44 (6th Cir. 1976), *rev'd sub nom.* Bordenkircher v. Hayes, 434 U.S. 357 (1978).

[94] 434 U.S. at 359.

The defendant Hayes was indicted by a Kentucky grand jury for uttering a forged instrument, an offense punishable by imprisonment for five to ten years. Thereafter, Hayes, his counsel and the prosecuting attorney met to discuss a possible plea agreement. The prosecutor offered to recommend a sentence of five years if Hayes would enter a plea of guilty, but stated that if Hayes did not plead guilty, he would seek an indictment from the grand jury charging Hayes under Kentucky's habitual criminal statute.[95] Under that statute, Hayes, a twice previously convicted felon, could have received a mandatory term of life imprisonment. Hayes refused to plead guilty and was subsequently indicted on the habitual criminal charge. He was convicted on both the forgery and habitual criminal counts and was sentenced to the mandatory term of life imprisonment.[96] Hayes petitioned unsuccessfully for a writ of habeas corpus in the federal district court. The Sixth Circuit reversed, holding that *Blackledge v. Perry* protected Hayes from the vindictive exercise of the prosecutor's discretion.[97] The Supreme Court granted certiorari and reversed the court of appeals in a 5-4 decision.

Justice Stewart,[98] writing for the majority, found that the recidivist charge was fully justified by the evidence existing at the time the original indictment was returned. Although the principles of *Pearce* and *Blackledge* were expressly reaffirmed, the basis for those decisions was reinterpreted:

> The Court has emphasized that the due process violation in cases such as *Pearce* and [*Blackledge*] lay not in the possibility that a defendant might be deterred from the exercise of a legal right . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction . . . .
>
> To punish a person because he had done what the law plainly allows him to do is a due process violation of the most basic sort . . . 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."[99]

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[95] *Id.* at 358-59; *see* KY. REV. STAT. § 431.190 (repealed 1975). This statute has been replaced by KY. REV. STAT. § 532.080 (1977 Supp.), which provides a much shorter term of incarceration under more limited circumstances.

[96] 434 U.S. at 359.

[97] Hayes v. Cowan, 547 F.2d 42, 44-45 (6th Cir. 1976).

[98] Justice Stewart also authored the opinions in North Carolina v. Pearce, 395 U.S. 711 (1969) and Blackledge v. Perry, 417 U.S. 21 (1974).

[99] 434 U.S. at 363. Justice Stewart distinguished plea bargaining from the facts presented in *Pearce* and *Blackledge*. *Id.* In *Blackledge*, Justice Stewart wrote:

> The rationale of our judgment in the *Pearce* case . . . 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 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." . . . We think it clear that the same considerations apply here. A person convicted of an offense

The Court acknowledged the dynamics of the plea bargaining process and the essential place it holds in our criminal justice system.[100] The Court differentiated, however, the "give and take" of plea bargaining from the *Pearce* and *Blackledge* situations: "[T]here is no such element of punishment or retaliation [in plea bargaining] so long as the accused is free to accept or reject the prosecution's offer."[101] Given the salutory purposes served by the plea bargaining process and the fact that defendants are represented by presumptively competent counsel, thus being capable of intelligent choices in response to prosecutorial persuasion, the majority found that defendants are "unlikely to be driven to false self-condemnation."[102]

The prosecutor's broad authority to determine what charges to bring was both acknowledged and circumscribed when the Court noted that "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."[103] The Court acknowledged, however, the existence of constitutional limitations on the prosecutor's broad discretion:

> There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. 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 not violate the Due Process Clause of the Fourteenth Amendment.[104]

By its language, *Bordenkircher* necessarily is limited to the plea bargaining process, and even then only when four criteria are met. First, the prosecutor must openly present the defendant with the charges he will face at trial if the defendant persists in a plea of not guilty.[105] Second, at the time he puts the choice to the defendant, the prosecutor must have probable cause to believe that the accused committed the offenses which

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> 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. . . .

417 U.S. at 28.

[100] 434 U.S. at 360-62.

[101] *Id.* at 363.

[102] *Id.*; *see* Corbitt v. New Jersey, 99 S. Ct. 492, 500 (1978).

[103] 434 U.S. at 364 (emphasis added).

[104] *Id.* at 365.

[105] *See id.* at 360. The Court noted that although "the prosecutor did not actually obtain the recidivist indictment after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations." *Id.*

the prosecutor threatens to charge.[106] Third, the offer must relate only to the defendant and must not involve either adverse or lenient treatment of a third person.[107] Finally, the selection of persons or offenses to charge may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[108] The absence of any one of these four criteria should render the *Bordenkircher* rationale inapplicable.

B. *Lower Court Decisions Applying* Bordenkircher *to Condone the Prosecutor's Conduct*

In the first year since *Bordenkircher* was decided, the lower federal courts have cited it in a number of cases. Some decisions have routinely and without extended discussion held *Bordenkircher* to be directly controlling.[109] Other cases have held *Bordenkircher* not to be applicable on the facts presented,[110] while still other decisions have alluded to *Bordenkircher* but have not purported to analyze it.[111] Two recent decisions are illustrative of the current application of *Bordenkircher* by the lower federal courts. In *United States v. Allsup*[112] and *Watkins v. Solem*,[113] the courts correctly applied the *Bordenkircher* rule while still conforming to the constitutional constraints of the *Pearce/Blackledge* rule.

In *United States v. Allsup*,[114] the defendant was arrested on a federal warrant for two bank robberies and a search of his car revealed a quantity of marijuana and a .45 caliber pistol.[115] Following his indictment for the robberies, Allsup entered into a plea agreement whereby the government

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[106] *See id.* at 364. The Court did not define the term "probable cause" in this context. The majority opinion refers to the ALI MODEL CODE OF PREARRAIGNMENT PROCEDURE § 350.3 (1975) and the Commentary thereto, and to the ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION §§ 2.5 & 3.9 (1971). 434 U.S. at 364-65 nn.8 & 9. *See also* ABA STANDARDS RELATING TO PLEAS OF GUILTY § 3.1 (1968).

[107] 434 U.S. at 364 n.8; *see* United States v. Tursi, 576 F.2d 396, 397-98 (1st Cir. 1978).

[108] 434 U.S. at 364 (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

[109] *E.g.*, Montgomery v. Estelle, 568 F.2d 457, 458 (5th Cir.), *cert. denied*, 99 S. Ct. 135 (1978) (defendants may not be charged under Texas habitual offender statute after they refused to plead guilty to lesser offenses).

[110] *E.g.*, United States v. Groves, 571 F.2d 540, 545 (9th Cir. 1978) (held *Bordenkircher* inapplicable where government and accused had reached a plea agreement and completed their obligations under the plea agreement before the government secured the indictment which was the basis of its prosecution); United States v. Andrews, 444 F. Supp. 1238, 1243-44 (E.D. Mich. 1978) (held that *Bordenkircher* plea bargaining exception did not permit the prosecution to obtain a superseding indictment after the defendants exercised their constitutional rights to be admitted to reasonable bail).

[111] *E.g.*, United States v. Bambulas, 571 F.2d 525, 526-27 (10th Cir. 1978) (guilty plea not invalid where at time of proceedings under FED. R. CRIM. P. 11 defendant denied any coercive effect arising from terms of plea bargain).

[112] 573 F.2d 1141 (9th Cir.), *cert. denied*, 98 S. Ct. 3081 (1978).

[113] 571 F.2d 435 (8th Cir. 1978).

[114] 573 F.2d 1141 (9th Cir. 1978).

[115] *Id.* Allsup's possession of the pistol was illegal under 18 U.S.C. §§ 922(g)(1), 924(a) & app. 1202(a)(1) (1976) because he was a convicted felon and the firearm had previously been transported in interstate commerce. 573 F.2d at 1142.

offered to dismiss one bank robbery charge and not prosecute the marijuana and firearms offenses in return for a plea of guilty to the other bank robbery charge.[116] Prior to the entry of his promised plea, however, Allsup repudiated the agreement. Following his conviction on both bank robbery charges, the government secured an additional, two-count indictment charging Allsup with the firearms offenses.[117]

In appealing his conviction on the firearms charges, the defendant alleged that prosecutorial vindictiveness for his refusal to plead guilty to bank robbery was the sole reason behind the firearms indictment.[118] The Ninth Circuit, relying on *Bordenkircher,* rejected that contention. The court affirmed Allsup's conviction, holding that the government had "exercised permissible prosecutorial discretion"[119] by using the firearm charges as a "latent bargaining tool" in this manner.

The case of *Watkins v. Solem,*[120] involved an appeal from the denial of a petition for habeus corpus. Watkins contended that his guilty plea in state court had been involuntary because it had been induced by the prosecutor's offer not to file habitual criminal charges in exchange for Watkins' guilty plea to two charges of third-degree burglary.[121] While the Eighth Circuit affirmed the denial of Watkins' petition on the authority of *Bordenkircher,* it observed that the Supreme Court's holding was "very narrow."[122] The court admonished prosecutors not to regard *Bordenkircher* "as giving them the right to abuse their prosecutorial powers."[123]

In both *Allsup* and *Watkins,* the four limiting conditions articulated in *Bordenkircher*[124] were present. The *Watkins* decision in particular emphasizes the narrow scope of the *Bordenkircher* exceptions.[125] This narrow construction, however, has not always been employed.

C. United States v. Litton Systems, Inc.

Recently, in *United States v. Litton Systems, Inc.,*[126] the Fourth Circuit was presented with the opportunity to apply the *Bordenkircher* rule and

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[116] 573 F.2d at 1142.

[117] *Id.*

[118] *Id.* at 1143. The Ninth Circuit noted that at trial the prosecutor did not deny that it was in possession of sufficient information concerning the firearm charges at the time of the robbery indictment. *Id.* at n.2. Nor did the prosecution deny that the defendant's refusal to plead guilty to bank robbery charges induced the firearm indictment. *Id.* at 1443.

[119] *Id.* at 1443. Although the Ninth Circuit did not discuss the appearance of vindictiveness issue, such an omission is not significant in a true *Bordenkircher* case where the prosecutor carefully lays out all the options in advance. Therefore, *Allsup* is only a modest extension of United States v. Anderson, 514 F.2d 583 (7th Cir. 1975); *see* text accompanying notes 82-86 *supra,* and is fully consistent with the narrow *Bordenkircher* exception.

[120] 571 F.2d 435 (8th Cir. 1978).

[121] *Id.* at 435-36.

[122] *Id.* at 436.

[123] *Id.* The court stated that "[*Bordenkircher*] cannot be read as a grant of *carte blanche* authority for a prosecutor to unduly threaten and coerce a criminal defendant into making a guilty plea." *Id.*

[124] *See* text accompanying notes 105-08 *supra.*

[125] *See also* Corbitt v. New Jersey, 99 S. Ct. 492, 501-02 (1978) (Stewart, J., concurring).

[126] 573 F.2d 195 (4th Cir.), *cert. denied,* 99 S. Ct. 101 (1978).

the principles of *Pearce* and *Blackledge*. *Litton* was before the Fourth Circuit on the government's appeal of the trial court's dismissal of a one-count indictment against Litton. The trial court had dismissed the indictment because of prosecutorial misconduct during pre-indictment negotiations.[127] The Fourth Circuit reversed the district court, purportedly relying on the Supreme Court's recent decision in *Bordenkircher v. Hayes*,[128] however, the court completely misconstrued the rule of *Bordenkircher* and perverted the language and logic of the Supreme Court.

1. *The Factual Setting and the District Court's Opinion*

In May 1972, Litton presented a claim to the government for cost overruns incurred during the construction of nuclear submarines for the United States Navy. Litton claimed that these costs, totalling approximately $30 million, were the result of government requirements above the specifications of the contracts.[129] The government contracting officers rejected the claims and the matter was submitted by Litton to the Armed Services Board of Contract Appeals (ASBCA).[130] The hearing before the ASBCA spanned six months, concluding in March 1974. In April 1976, approximately two years after the conclusion of the hearing, the ASBCA issued its decision, awarding Litton $16 million of its claim. The government and Litton jointly agreed not to file a motion for reconsideration before the ASBCA.[131]

During the two-year interval between the completion of the hearing and the decision of the ASBCA, the government began to present evidence relating to the propriety of Litton's claims to a specially convened grand jury. After hearing 25 days of testimony during its 18-month term, the grand jury was discharged without returning an indictment. A week before the grand jury's term was due to expire (in September 1976), the United States attorney proposed to Litton's counsel that the government would "terminate the investigation and not seek an indictment if Litton would agree to allow the proceedings before the ASBCA to be reopened and to permit evidence obtained by the grand jury to be presented to the

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[127] *See id.* at 198. The district court's memorandum opinion is unreported; however, it appears as Appendix A to the Petition for Certiorari, Litton Systems, Inc. v. United States, No. 77-1689, filed May 26, 1978 [hereinafter cited as Petition for Certiorari]. Reference will be made to that opinion by citing to the appropriate page of the Appendix, i.e., A-1, A-2, etc.

[128] *Id.* at 201.

[129] 573 F.2d at 196.

[130] The ASBCA operates as a trial level judicial tribunal to review contract disputes. ASBCA decisions are final against the government and are not subject to judicial review at the instance of the government except in a case of fraud. *See* S&E Contractors, Inc. v. United States, 406 U.S. 1, 8-15 (1972) (construing the Wunderlich Act, 41 U.S.C. §§ 321-322 (1976)). ASBCA decisions are binding against the government in subsequent litigation under the principles of res judicata and collateral estoppel. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-22 (1966).

[131] Petition for Certiorari, *supra* note 127, at A-2.

ASBCA."[132] The government conceded that while it had evidence that the claim was false, it had no evidence of intent.[133] At the meeting during which this proposal was made, the government counsel informed Litton's attorneys that termination of the matter in this fashion would only be discussed if Litton's counsel agreed that "the discussions would not be taken as a threat or treated as other than a good faith attempt to resolve the intent question."[134] Litton rejected the government's proposal for termination.

In early 1977, Litton reconsidered and offered to accept the government's proposal, but its offer was refused.[135] Thereafter, the government summarized to a different grand jury the evidence presented to the special grand jury,[136] and in April 1977 Litton was indicted on a single count of making a false claim against the government. During negotiations occurring after the indictment had been returned, the prosecutor told defense counsel that "Litton brought this indictment."[137]

Litton moved to dismiss the indictment because of prosecutorial vindictiveness. The United States District Court for the Eastern District of Virginia conducted a hearing and found:

> No matter how benign a view of the matter is urged by the government, the truth of it is that the government wanted a "second bite at the apple" in its controversy with Litton over the issue of reimbursement; that it used the implied threat of indictment in an effort to obtain reconsideration of what Litton, presumptively innocent, was otherwise entitled to; and that when

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[132] *Id.* at A-2 to A-3, A-5.

[133] *Id.* at A-3. The crime of submitting a false claim to the government requires proof of intent. *See* 18 U.S.C. § 287 (1976).

[134] Petition for Certiorari, *supra* note 127, at A-3.

[135] *Id.* at A-5.

[136] The summarization of 25 days of testimony before the special grand jury was made by two special agents of the FBI. The district court found that in their presentation to the second grand jury, the two FBI agents had not been required by government counsel:

> 1. To read and review all of the matters occurring before the eighteen-month investigating grand jury;
>
> 2. To restrict their summary presentations to those matters occurring before the eighteen-month grand jury;
>
> 3. To distinguish between hearsay and personal knowledge; and
>
> 4. To distinguish between matters occurring and not occurring before the eighteen-month investigating grand jury.

Id. at A-5. The significance of this procedure was noted in the following terms:

> The appearance and summation testimony before the grand jury of the two agents is relevant, however, to the issue of the misconduct of the United States Attorney's Office. One need not be a skeptic to question the impartiality of a presentation which persuaded a grand jury that neither had heard nor seen the previous witnesses or documents to do within ten days what the prior grand jury had not seen fit to do after twenty-five days of evidentiary hearing over an eighteen-month period. This is further evidence of the cynical view that has been taken of the grand jury in this case, namely, as a mere echo of the office of the United States Attorney.

Id. at A-8 to A-9.

[137] *Id.* at A-6.

> Litton, as was its right, refused to forego that entitlement, namely, the finality of the civil award, the government retaliated—made good its threat—by producing an indictment. This is a serious abuse of prosecutorial power.[138]

At the time of the original discussions the prosecution had no evidence that a criminal offense had been committed,[139] and the district court rejected the government's argument that its proposal to terminate the investigation was motivated by a desire to ensure that the ASBCA had considered all the facts.[140] Similarly, the court rejected the notion that Litton had waived its right to complain of this conduct because its attorneys had agreed to the government's condition that the proposed termination be considered a part of settlement negotiations. The district judge observed that Litton's counsel had little choice but to agree to that condition, and the stipulation did not lessen the coercive nature of the circumstances.[141]

The court found that the government had attempted to circumvent the established statutory and regulatory scheme for the resolution of civil disputes and that an "abridgement of [Litton's] substantive due process rights" had occurred. In its order dismissing the indictment, the district court concluded:

> Allowing the government to circumvent the finality otherwise accorded the administrative resolution of contract disputes by threatening criminal prosecution in substance abrogates the private party's right to hold the government to its own rules. At the very least the Court is warranted in exercising its supervisory power over federal prosecutors where there is present deliberate and disingenuous conduct.[142]

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[138] *Id.*

[139] The government lacked evidence demonstrating criminal intent to commit the offense. *Id.* at A-7 to A-8 & n.4.

[140] The district court elaborated as follows:

> Had the bargain been proposed *after* indictment it arguably could be justified, but what is reprehensible here is the *threat* to use, as *well* as the actual use of, the grand jury as a bargaining tool in an effort to upset the final civil award to which Litton was entitled.

Id. at A-6 to A-7 (emphasis in original).

[141] *Id.* at A-8. The district court also condemned the fact that at the time the government offered to "reopen" the matter before the ASBCA, it had subpoenaed two of the judges who participated in the ASBCA decision awarding Litton the original $16 million. Although the judges were not actually called to testify before the grand jury, they were interviewed by a Special Assistant to the United States Attorney and two FBI agents to determine the extent to which matters presented to the grand jury had also been considered by the ASBCA in its decision-making process. *Id.* at A-9. In addition to noting its concern that the secrecy requirements of grand jury proceedings contained in Federal Rule of Criminal Procedure 6(e) might have been violated, the court found that "[s]uch activity could only carry the potential for depreciation of the ASBCA's impartiality and vitiation of its decisions in any reopened claim or in future claims involving the defendant." *Id.*

[142] *Id.* at A-10.

2. *The Fourth Circuit's Decision*

On the government's appeal, the Fourth Circuit held that the case was governed by the principles of *Bordenkircher v. Hayes*,[143] but nonetheless held that the trial court improperly dismissed the indictment.[144] In its review of the case, the court analyzed the facts in the district court opinion and attached significance to two facts not discussed by the district court: first, that the Deputy United States Attorney General had reviewed Litton's contention that it was pressured to give up its civil award by threat of an indictment; second, that approval for the indictment had been issued by the Attorney General of the United States.[145] These findings were relied upon to support a third finding that neither the Deputy Attorney General's nor the Attorney General's action was vindictive.[146]

In an apparent conflict with the district court, the Fourth Circuit found that the government had not threatened to indict Litton if it rejected the proposal to reopen the ASBCA proceedings. Instead, it characterized the prosecutor's statement as a warning to Litton's counsel that "the fraud investigation would be continued to determine whether Litton should be indicted."[147]

The circuit court acknowledged that Litton had been asked to give up its right to bar the ASBCA's reconsideration of the award. The court disagreed, however, with the district court's conclusion that the prosecutor's conduct was unlawful. The Fourth Circuit interpreted *Bordenkircher* as allowing a prosecutor to use the implied threat of indictment to deter a defendant from exercising a legal right when the prosecutor is "bargaining with the potential defendant of a threatened indictment."[148]

Litton's counsel attempted to distinguish *Bordenkircher* on the basis that at the time of the plea negotiations in that case, the government had probable cause to indict on the threatened charge. In contrast, the government admittedly had no evidence of intent to defraud and hence no prob-

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[143] 434 U.S. 357 (1978).

[144] 573 F.2d 195, 200 (4th Cir. 1978).

[145] *Id.* at 197-98.

[146] *Id.* at 199.

[147] *Id.* No discussion exists in either opinion of the nature of any new evidence which the government might have presented to the second grand jury. Obviously unpersuaded, the district court noted only that the government "asserts" that new evidence of criminal intent was developed. Petition for Certiorari, *supra* note 125, at A-4. The Fourth Circuit simply mentioned in passing that "after new evidence of the defendant's wrongdoing has been uncovered," the government should not be bound by a previously rejected offer. 573 F.2d at 200. In fact, it appears that no new evidence was obtained and that the government simply submitted in summary fashion the evidence obtained in the first grand jury investigation to the second grand jury. Petition four certiorari, *supra* note 127, at A-10 to A-11.

[148] 573 F.2d at 199. The Fourth Circuit's interpretation of *Bordenkircher* seems at odds with the clear limitation imposed by the Supreme Court in *Bordenkircher*:

> 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, . . . 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."

434 U.S. at 363.

able cause to seek an indictment at the time of the discussions in *Litton*. The Fourth Circuit rejected that distinction as "insignificant," and stated: "We do not believe that the [Supreme] Court intended to confine plea bargaining to those situations where the prosecutor possesses irrefutable proof of the most serious crime for which a defendant is ultimately prosecuted."[149]

The Fourth Circuit also dismissed Litton's contention that the prosecutor's withdrawal of the offer demonstrated actual prosecutorial vindictiveness, thus rendering *Bordenkircher* inapplicable.[150] Finally, the court ruled that *Bordenkircher* was not distinguishable "because it dealt solely with criminal proceedings while this case presents a mixture of civil and criminal litigation."[151] In applying the principles expressed in *Bordenkircher*, the court concluded that "the government did not abridge Litton's right to substantive due process."[152]

The legerdemain of the Fourth Circuit in avoiding the limitations of the *Bordenkircher* holding is remarkable. The court both cited *Bordenkircher* as controlling authority and yet evaded its express requirement of probable cause, which was essential to legitimatize the plea bargaining process. Thus, the court in one breath relied on, and in the next ignored, *Bordenkircher's* constitutional underpinnings. Moreover, the Fourth Circuit improperly equated the government's lack of proof of all elements of the offense at the time of the negotiations with the situation posited in

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[149] 573 F.2d at 199. Once again, the Fourth Circuit's interpretation appears to conflict with the actual language of the Supreme Court in *Bordenkircher*:

> 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.

434 U.S. at 364 (emphasis added); *see* note 106 *supra*.

The Supreme Court impliedly prohibited the conduct by the Fourth Circuit when the Court in *Bordenkircher* explained that the probable cause requirement had been met: "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." 434 U.S. at 360-61. The obvious difference between *Litton* and *Bordenkircher* was that the grand jury could not have indicted the defendant on the falsification charge since the prosecution had no evidence of intent. Thus, there was no probable cause and the limited *Bordenkircher* exception had no application.

[150] The court ruled that *Bordenkircher* "does not require a prosecutor to keep an offer of a bargain open indefinitely after it has been rejected," suggesting that the discovery of new evidence of the defendant's guilt was a proper basis of proceeding. 573 F.2d at 200. The court did not state, however, that *Litton* presented an example of this rationale.

In addition, the court praised "[t]he prosecutor's candor in revealing the weakness of the government's case," and concluded that this disclosure "dispels any notion of vindictiveness." *Id.* The Fourth Circuit did not analyze why an acknowledgement of an insufficient case to take to the grand jury, coupled with the threat to indict if Litton did not forego its legal rights, would dispel the appearance of vindictiveness within the meaning of *Blackledge*.

[151] *Id.* Finding that the "material elements of both the civil and criminal proceedings were closely interwoven," the court characterized the government's proposal as "an effort to resolve all facets of an essentially single controversy." *Id.*

[152] *Id.*

Blackledge, in which the prosecutor at the outset was unable to proceed on a more serious charge because all the elements had not yet occurred.[153] The court proceeded from that erroneous premise to find that the government's acknowledged lack of proof of a necessary element demonstrated commendable candor dispelling "any notion of vindictiveness."[154]

While it is true that the Supreme Court in *Bordenkircher* did not hold that the prosecutor must have "irrefutable proof" to increase the charge, the majority did require that the prosecutor have probable cause.[155] Moreover, the ABA and ALI Standards alluded to in *Bordenkircher*[156] not only require a prosecutor to have probable cause, but also condemn a prosecutor's seeking to induce a plea of guilty where probable cause does not exist.[157]

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[153] Blackledge v. Perry, 417 U.S. 21, 29 n.7 (1974).

[154] 573 F.2d at 200. The Court discounted evidence of actual vindictiveness contained in the statement of an assistant United States attorney that "Litton brought this indictment." *Id.* at 199 n.2. The Court found that the attorney was not trying the case and that there was no evidence that he reflected the views of the Department of Justice. *Id.*

[155] *See* text accompanying note 103 *supra.*

[156] *See* 434 U.S. at 365 n.9.

[157] Section 3.9(a) the ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION (1971) provides that: "It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that the charges are not supported by probable cause."

Section 350.3(3) of the ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975) provides, in part, that:

> The prosecutor shall not seek to induce a plea of guilty or nolo contendere by exerting such undue pressures as: (a) charging or threatening to charge the defendant with a crime not supported by facts believed by the prosecutor to be provable
>
> . . . .

In addition, the Disciplinary Rules of the American Bar Association provide: "A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause." ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-103(A).

In reviewing the ABA standards relating to probable cause, one commentator has concluded:

> The standard of probable cause does not require exacting judgment from the prosecutor, for it does not entail great certainty concerning the underlying truth of the matter; "probable cause" may be predicated on hearsay, and, indeed, does not even import a substantial likelihood of guilt. Like probable cause, the prima facie standard [for taking the case to trial] takes little account of credibility questions, but it is a significantly more demanding criterion, satisified only by (1) "legal" (*i.e.,* admissible) evidence (2) sufficiently complete to establish every element of the crime in question, credence aside. So the standard countenances accusation on no greater certitude than the belief warranting arrest (probable cause), but the prosecutor should not "overcharge," that is, he should not accuse of more than he reasonably anticipates he will be able to support with legally sufficient evidence. Read together, then, the trio of provisions sounds like this: The prosecutor *must* abjure prosecution without probable cause, *should* refuse to charge without a durable prima facie case, and *may* decline to proceed if the evidence fails to satisfy him beyond a reasonable doubt.

Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA,* 71 MICH. L. REV. 1145, 1156 (1973).

In addition to the Fourth Circuit's confusion on the probable cause issue, the court erred in its discussion of constitutional due process. *Bordenkircher* expressly reaffirmed the principle that, other than in the plea bargaining context, punishment of a person who does what the law permits is a "due process violation of the most basic sort . . . 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.'"[158] The government's suggestion that Litton either permit the reopening of the civil side of the dispute or face the prospect of indictment was in fact an ultimatum: yield the right to the $16 million award or be indicted.[159] When Litton refused to yield to this demand, it became a victim of precisely the type of due process violation condemned in *Bordenkircher*.[160]

In addition to the due process issues, *Litton* presented a mixture of both civil and criminal litigation between the parties, while *Bordenkircher* had involved only criminal charges. The Fourth Circuit's conclusion that the two cases should not be distinguished on that basis led to yet another error. The court found that the prosecutor's proposal "was an effort to resolve all facets of an essentially single controversy."[161] In doing so, it plainly ignored the ethical prohibition against utilizing the criminal process to gain an advantage in a civil action.[162]

What credence or authority other courts will give to the Fourth Circuit's holding is, of course, unknown. As a practical matter, there is little likelihood that an analogous factual situation will arise again. However,

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[158] 434 U.S. at 363. Absent probable cause to indict, the Fourth Circuit's underlying premise, that this offer was, in essence, a plea bargain, is itself highly suspect.

[159] *See* text accompanying notes 132-34 *supra*.

[160] In United States v. Groves, 571 F.2d 450 (9th Cir. 1978), the Ninth Circuit held that where "the government sought unilaterally and vindictively to punish the appellant for assertion of his legal rights [other than the right to plead not guilty], *Bordenkircher* is a support rather than a bar" to condemnation of that action. *Id.* at 455.

The district court's decision in *Litton* properly pointed out that the normal "give and take" of plea bargaining and the concomitant "mutuality of advantage" which were central to the holding in *Bordenkircher*, 434 U.S. at 363, were absent in *Litton*. "The 'bargaining' . . . was hardly at arm's-length. With a grand jury investigation in the background the United States enjoyed substantial leverage in making its proposal." Petition for Certiorari, *supra* note 127, at A-6 n.2.

[161] 573 F.2d at 200.

[162] The ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-105(A), states: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." *Accord*, MacDonald v. Musick, 425 F.2d 373, 376 (9th Cir.), *cert. denied*, 400 U.S. 852 (1970); *see* Ganger v. Peyton, 379 F.2d 709, 711-14 (4th Cir. 1967).

In addition, Ethical Canon 7-21 provides:

> The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired . . . .

ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC-21.

since *Litton* is one of the few appellate decisions on prosecutorial vindictiveness where the losing party has petitioned for certiorari, and since the Supreme Court denied review, other courts may unfortunately regard *Litton* as something other than what it is: an aberration.

IV. CONCLUSION

Although the reported federal decisions are less than uniform in their application of the rationales of *Pearce, Blackledge,* and *Bordenkircher,* some general principles applicable to motions to dismiss based on prosecutorial misconduct may be derived. First, to punish a person because he has done what the law permits is a fundamental violation of due process.[163] Second, both actual vindictiveness and the appearance of vindictiveness by a prosecutor towards a defendant who has exercised his rights are prohibited by the due process clause.[164]

The due process violations in *Pearce* and *Blackledge* arose not from the possibility that the defendants might be deterred from asserting their rights, but from the possibility that the prosecutors might be retaliating against that assertion.[165] Due process prevents a prosecutor from increasing or threatening to increase, charges after a defendant exercises a constitutional, statutory or common law right. The prophylactic rule which bars the prosecutor from bringing the new or increased charge is designed not only to succor the defendant who may have asserted his rights, but also to prevent a chilling of the exercise of such rights by other defendants in similar circumstances.[166]

While reaffirming the holdings of *Pearce* and *Blackledge,* the Supreme Court in *Bordenkircher* carved out a relatively narrow exception to the *Pearce/Blackledge* rule. In good faith plea bargaining negotiations, where the defendant is represented by counsel, the prosecutor is permitted to offer the defendant the alternatives of pleading guilty to a lesser charge or going to trial on a greater charge which the prosecutor then has probable cause to file.[167] Outside of the plea bargaining situation, the due process clause guards against the danger that the prosecutor might retaliate against the accused for the exercise of his rights. When a prosecutor "ups the ante" after a defendant exercises his rights, proof of bad faith by the prosecutor is not required to sustain the defendant's claim of vindictiveness.[168]

The validity of the *Pearce/Blackledge* rule remains unimpaired in the aftermath of *Bordenkircher.* The focus remains on the *appearance* of vindictiveness, and the government bears the burden of affirmatively demonstrating that there was a proper basis for the institution of additional

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[163] Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

[164] Blackledge v. Perry, 417 U.S. 21, 27-28 (1974).

[165] 434 U.S. at 362. *But see* 417 U.S. at 28.

[166] *See* United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir. 1977).

[167] 434 U.S. 357 (1978).

[168] *See* Blackledge v. Perry, 417 U.S. 21, 28 (1974).

charges. Only in the narrow area of plea bargaining has an exception been created. Moreover, *Bordenkircher* conditions such an exception on four criteria: first, the prosecutor must openly present the defendant with the choice, accurately portrayed; second, the prosecutor must have probable cause at that time to seek the additional charge; third, the offer must relate only to the defendant and not involve a third party; and finally, the prosecutor cannot employ race, religion or other arbitrary classifications in selecting what charges to bring against a defendant.[169] Only when all four criteria are met does the *Bordenkircher* exception apply.

Any attempt by the government to invoke *Bordenkircher* must be carefully scrutinized, for it is often raised as an excuse when it is factually inappropriate.[170] The failure to apply the qualifying criteria of *Bordenkircher* led the Fourth Circuit into error in *United States v. Litton Systems, Inc.*,[171] and the fundamental nature of that error strongly necessitates a narrow construction of the *Bordenkircher* exception.

Even when a case appears to fall within the *Bordenkircher* exception, it is incumbent upon the courts to examine not simply the due process concerns relating to the defendant, but also whether the prosecutor has lived up to those ethical responsibilities which go with his extensive authority. The courts must exercise their supervisory powers to control prosecutorial overreaching which does not stretch far enough to transgress constitutional limits.[172] Only in this way can the due process concerns reflected in the *Pearce/Blackledge* rule be safeguarded.

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[169] 434 U.S. at 364; *see* text accompanying notes 105-08 *supra*.

[170] *See, e.g.*, United States v. Groves, 571 F.2d 450, 455 (9th Cir. 1978); United States v. Andrews, 444 F. Supp. 1238, 1243-44 (E.D.Mich. 1978).

[171] 573 F.2d 195 (4th Cir. 1978).

[172] *See* McNabb v. United States, 318 U.S. 332, 340-41 (1943).

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