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Constitutional Law - Due Process Clause - Where New Prosecution Is Initiated for Additional Criminal Activity Not Specified in an Original Indictment, Actual Vindictiveness Is the Proper Standard to Determine Whether Such Prosecutorial Conduct Is Constitutionally Permissible

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Recent Developments

CONSTITUTIONAL LAW—DUE PROCESS CLAUSE—WHERE NEW PROSECUTION IS INITIATED FOR ADDITIONAL CRIMINAL ACTIVITY NOT SPECIFIED IN AN ORIGINAL INDICTMENT, ACTUAL VINDICTIVENESS IS THE PROPER STANDARD TO DETERMINE WHETHER SUCH PROSECUTORIAL CONDUCT IS CONSTITUTIONALLY PERMISSIBLE.

United States v. Andrews (6th Cir. 1979)

On November 16, 1975, Tallice Andrews, Thurston Brooks, and Fannie Braswell were stopped and arrested for alleged narcotics and firearms offenses.[1] A two-count indictment was returned on November 8, 1976,[2] charging the three defendants with possession of heroin with intent to distribute,[3] and with unlawfully carrying a firearm during the commission of a felony.[4] On December 29, 1976, defendants Andrews and Brooks appeared before a United States magistrate to be arraigned and, pursuant to the government's request, were remanded without bail.[5] These defendants successfully appealed the magistrate's ruling and both were admitted to bail on January 11, 1977.[6] Two days later, a grand jury returned a superseding indictment charging all three individuals with offenses identical to the November, 1976 indictment except that a conspiracy count was added.[7] De-

1. United States v. Andrews, No. 78-5166, slip op. at 1-2 (6th Cir. Dec. 14, 1979) *rehearing granted en banc*, No. 78-5166 (6th Cir. Feb. 21, 1980). The United States Court of Appeals for the Sixth Circuit had upheld the validity of that stop in a prior decision. United States v. Andrews, 600 F.2d 563 (6th Cir. 1979).

2. United States v. Andrews, No. 78-5166, slip op. at 2 (6th Cir. Dec. 14, 1979). A complaint had been issued against all the defendants two days after the arrest but was dismissed in January, 1976, for lack of progress. United States v. Andrews, 444 F. Supp. 1238, 1239 (E.D. Mich. 1978), *rev'd and remanded*, United States v. Andrews, No. 78-5166 (6th Cir. Dec. 14, 1979). Subsequently, in August 1976, Fannie Braswell was indicted for violations of the narcotics laws. 444 F. Supp. at 1239. That indictment was superseded by the new charges brought on November 8, 1976, in which all three individuals were jointly indicted. *Id.* *See* text accompanying note 7 *infra*.

3. United States v. Andrews, No. 78-5166, slip op. at 2 (6th Cir. Dec. 14, 1979). *See* 21 U.S.C. § 841(a)(1) (1976). This section provides that "it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ." *Id.*

4. United States v. Andrews, No. 78-5166, slip op. at 2 (6th Cir. Dec. 14, 1979). *See* U.S.C. § 924(b) (Supp. 1977). Section 924(b) states:

> Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

Id.

5. United States v. Andrews, No. 78-5166, slip op. at 2 (6th Cir. Dec. 14, 1979). The reasons underlying the government's request that no bail be set were that "Fannie Braswell had turned state's evidence, had been threatened, and had been placed in the federal witness protection program." *Id.* slip op. at 2 n.2.

6. *Id.* slip op. at 2.

7. *Id.* *See* 21 U.S.C. § 846 (1976). Section 846 states that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the

fendants Andrews and Brooks then filed a pretrial motion to dismiss the added charge, contending that it was obtained in retaliation for their exercise of the constitutional and statutory right[8] to reasonable bail, and was, therefore, the product of unconstitutional prosecutorial conduct.[9] The United States District Court for the Eastern District of Michigan granted the defendants' motion to dismiss the conspiracy count.[10]

On appeal, the United States Court of Appeals for the Sixth Circuit reversed and remanded, *holding* that when *additional* charges are brought against a defendant subsequent to his assertion of some procedural right, such prosecutorial conduct violates due process[11] only if the defendant can

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commission of which was the object of the attempt or conspiracy." *Id.* The substantive offense involved in the indictment for conspiracy was found in 21 U.S.C. § 841(a)(1). United States v. Andrews, No. 78-5166, slip op. at 2 (6th Cir. Dec. 14, 1979). For the text of § 841(a)(1), *see* note 3 *supra*.

8. United States v. Andrews, No. 78-5166, slip op. at 2 (6th Cir. Dec. 14, 1979). The eighth amendment proscribes the imposition of "[e]xcessive bail." U.S. CONST. amend. VIII. As a corollary to this constitutional right, Congress has set forth the conditions upon which a judicial officer may impose bail in order to reasonably assure the appearance of a defendant for trial, as well as the factors that should influence the exercise of that discretion. See 18 U.S.C. § 3146(a), (b) (1976). Furthermore, rule 46 of the Federal Rules of Criminal Procedure expressly requires that "eligibility for release prior to trial shall be in accordance with 18 U.S.C. § 3146." FED. R. CRIM. P. 46(a).

9. United States v. Andrews, No. 78-5166, slip op. at 2 (6th Cir. Dec. 14, 1979). The thrust of the defendant's claim was that the additional charge should be stricken because it was the result of prosecutorial vindictiveness as prohibited by the Supreme Court in Blackledge v. Perry, 417 U.S. 21 (1974), and North Carolina v. Pearce, 395 U.S. 711 (1969). United States v. Andrews, No. 78-5166, slip op. at 2 (6th Cir. Dec. 14, 1979). Under the rule of *Pearce* and *Blackledge*, due process of law is violated when the prosecutorial decision to procure a superseding indictment is motivated, or appears to be motivated, by a desire to punish a defendant for exercising his legal rights. *See* Blackledge v. Perry, 417 U.S. at 28; North Carolina v. Pearce, 395 U.S. at 725. For a detailed discussion of these two cases and the concept of prosecutorial vindictiveness, *see* notes 12-21 & 27-34 and accompanying text *infra*.

10. United States v. Andrews, 444 F. Supp. 1238, 1244 (E.D. Mich. 1978) *rev'd and remanded*, United States v. Andrews, No. 78-5166 (6th Cir. Dec. 14, 1979). Although the government was aware of all the facts necessary to obtain the conspiracy charge at the time of the November, 1976 indictment, it sought to justify the new charge as a combined result of the prosecutor's inexperience, a moratorium on the work of the grand jury, and vacation scheduling difficulties in the prosecutor's office. *Id.* at 1241. The government argued that but for these circumstances, it "would have presented the conspiracy evidence to the Grand Jury in mid-December prior to the time defendants filed their bond motion." *Id.* (footnote omitted). The district court determined that the prosecutor's failure to add the conspiracy count prior to the defendant's assertion of the right to bail was not malicious. *Id.* at 1243. Nevertheless, the district court reasoned that even the mere appearance of retaliatory vindictiveness violates due process of law since the apprehension of such conduct may deter a defendant from exercising his constitutional or statutory rights. *Id.* at 1240, *citing* Blackledge v. Perry, 417 U.S. 21 (1974); North Carolina v. Pearce, 395 U.S. 711 (1969). The district court indicated that only two exceptions can prevent the application of this prophylactic rule by dispelling the appearance of vindictiveness: 1) where the essential elements of the increased offense did not exist at the time of the original indictment; and 2) where the government discovers new evidence of which it was excusably unaware at the time of the original charge. *Id.* at 1241. Since neither of these circumstances was present in the instant case, the district court concluded that the increase in charges did not satisfy the demands of the due process clause "in preserving unblemished the integrity of our criminal justice system." *Id.* at 1244.

11. The due process clause of the fifth amendment to the United States Constitution provides that no person shall "be deprived of life, liberty, or property without due process of law."

prove actual vindictiveness in the bringing of the added charges.[12] *United States v. Andrews*, No. 78-5166 (6th Cir. Dec. 14, 1979), *rehearing granted en banc*, No. 78-5166 (6th Cir. Feb. 21, 1980).[13]

The United States Supreme Court first examined the due process limitations on governmental retaliation for a defendant's exercise of his legal rights in *North Carolina v. Pearce*.[14] In *Pearce*, defendant was convicted in a North Carolina court for assault with intent to commit rape, and was sentenced by the trial judge to a twelve to fifteen year prison term.[15] The defendant subsequently initiated a state post-conviction appeal which resulted in a reversal of his conviction.[16] After being convicted again upon retrial, he was sentenced by the same judge to a harsher term than had originally been imposed.[17] In a habeas corpus proceeding, the Supreme Court observed that it was repugnant to fundamental notions of fairness to penalize those who choose to exercise protected rights.[18] Thus, the Court held:

U.S. CONST. amend. V. Similarly, the fourteenth amendment states, "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

12. United States v. Andrews, No. 78-5166, slip op. at 17-18 (6th Cir. Dec. 14, 1979). This holding comprises only part of Judge Green's elaborately articulated standard for determining when prosecutorial conduct is unconstitutionally vindictive. *Id.* Judge Green distinguished the situation in which the prosecution adds new charges arising out of "criminal conduct relatively distinct from that underlying the original charge" from the situation where the prosecution adds new charges "for a different and distinct offense which was a different and distinct consequence of the same basic conduct underlying the original charge." *Id.* Although in both instances the defendant must show actual vindictiveness, Judge Green concluded that in the first situation the prosecutor could rebut the defendant's case by offering a plausible explanation for his conduct, whereas, in the second, he must offer facts which reasonably negate any inference of vindictive intent. *Id.* slip op. at 17-18. Judge Green also held that when the prosecution *substitutes* charges, thereby increasing the potential severity of the punishment to which the defendant is exposed, a prima facie case of prosecutorial vindictiveness is created which can be overcome only by a showing that intervening circumstances created a fact situation which did not exist at the time of the original indictment. *Id.* slip op. at 17. For a discussion of Judge Green's development of this tripartite standard against which prosecutorial conduct is to be measured, *see* notes 57-71 and accompanying text *infra*.

13. For a discussion of the precedential value of the decision in *Andrews*, *see* note 55 *infra*.

14. 395 U.S. 711 (1969). In a companion case to *Pearce*, *Simpson v. Rice*, the defendant pleaded guilty to four separate counts of second-degree burglary and was sentenced to serve a 10-year prison term. *Id.* at 714. After successfully attacking this conviction on the basis that he had been denied his constitutional right to counsel, the defendant was retried and convicted for three of the original counts, but received a 25-year sentence. *Id.*

15. *Id.* at 713.

16. *Id.*

17. *Id.* Although the second sentence was only an eight-year prison term, the parties stipulated that it amounted to a greater sentence when considered with the time Pearce had already served for his original sentence. *Id.*

18. *Id.* at 724, *citing* United States v. Jackson, 390 U.S. 570, 581 (1968). The *Pearce* Court noted that the Supreme Court "has never held that the States are required to establish avenues of appellate review." 395 U.S. at 724, *quoting* Rinaldi v. Yeager, 484 U.S. 305 (1966). The Court also stated, however, that it is patently unconstitutional to "put a price on appeal" or to "impede open and equal access" once these avenues have been established. *Id.*, *quoting* Worchester v. Commissioner of Internal Rev., 370 F.2d 713, 714 (1st Cir. 1966) *and* Rinaldi v. Yeager, 384 U.S. 305, 310-11 (1966).

> Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction *must play no part* in the sentences 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.[19]

As a prophylaxis against vindictiveness in the resentencing process, the Court required that, upon a showing by the defendant of the imposition of a harsher sentence, the government must show articulable reasons for any increase in punishment.[20] The Court specifically stated that "[t]hose reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing."[21]

The Supreme Court subsequently determined that not "all possibilities of increased punishment upon retrial after appeal" violate due process.[22] For example, in *Colten v. Kentucky*,[23] the Court held that an increased penalty imposed by a different judge after a trial de novo is not unconstitutional since such a two-tiered trial arrangement does not feature the same potential for judicial vindictiveness as was present in *Pearce*.[24] Similarly, in *Chaffin*

The defendant in *Pearce* also advanced the argument that imposition of a harsher sentence upon retrial is proscribed by the double jeopardy clause of the fifth amendment. 395 U.S. at 719. In rejecting this claim, the Court conceded that the constitutional guarantees against double jeopardy essentially protect against: 1) a second prosecution for the same offense after acquittal; 2) a second prosecution for the same offense after conviction; or 3) multiple punishments for the same offense. *Id.* at 717 & nn. 8-11, 721. Nonetheless, Justice Stewart's majority opinion regarded as applicable the exception that the double jeopardy clause "imposes no limitations whatever upon the power to *retry* a defendant who had succeeded in getting his first conviction set aside." *Id.* at 720 (footnote omitted) (emphasis in original).

19. 395 U.S. at 725 (footnote omitted) (emphasis added). The Court further explained the nexus between the first part of this standard (actual vindictiveness) and the second part (apprehension of vindictiveness) as follows: "[T]he very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to 'chill the exercise of basic constitutional rights.' " *Id.* at 724, *quoting* United States v. Jackson, 390 U.S. 570, 582 (1968). It is important to note that the standard enunciated in *Pearce* applies whether the first conviction is overturned for constitutional or nonconstitutional error. 395 U.S. at 724. In *Pearce*, the defendant's first conviction was set aside on the ground that an involuntary confession had been unconstitutionally admitted into evidence. *Id.* at 713. *See* State v. Pearce, 266 N.C. 234, 237, 145 S.E.2d 918, 921 (1966). The companion case to *Pearce*, *Simpson v. Rice*, was also reversed on the basis of constitutional rights. 395 U.S. at 714. *See* note 14 *supra*. The Court expressly held, however, that its due process standard against judicial vindictiveness could be asserted when a defendant pursued "a statutory right of appeal or collateral remedy." 395 U.S. at 724.

20. 395 U.S. at 726.

21. *Id.* The Court also mandated that such factual information be made part of the record, in order that the justification for any increased sentence may be carefully examined on appeal. *Id.*

22. Blackledge v. Perry, 417 U.S. 21, 27 (1974). *See* Chaffin v. Stynchcombe, 412 U.S. 17 (1973); Colten v. Kentucky, 407 U.S. 104 (1972); notes 23-26 and accompanying text *infra*. For a discussion of *Blackledge*, *see* notes 27-34 and accompanying text *infra*.

23. 407 U.S. 104 (1972).

24. *Id.* at 116. In *Colten*, the defendant was convicted in an inferior state court for disorderly conduct and was fined $10. *Id.* at 108. Dissatisfied with the outcome, he exercised his

v. Stynchcombe,[25] the Supreme Court reasoned that under the circumstances of the case due process does not bar the imposition of a higher sentence by a different jury on retrial following reversal of a prior conviction.[26]

The development of the concept of vindictiveness in judicial sentencing prompted inquiry into the possibility of similar impropriety in the exercise of a prosecutor's charging authority. The Supreme Court in *Blackledge v. Perry*[27] interpreted the due process clause as extending protection to an accused against prosecutorial vindictiveness.[28] In *Blackledge*, a North

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statutory right to a trial de novo under Kentucky's two-tiered system for adjudicating certain criminal cases. *Id.* The new trial in a court of general criminal jurisdiction resulted in Colten's reconviction and an enhanced fine of $50. *Id.* On appeal to the United States Supreme Court, Colten argued that Kentucky's two-tiered trial de novo system was substantially comparable to the appellate remedy pursued in *Pearce* in that both "involve reconviction and resentencing, [and] provide the convicted defendant with the right to 'appeal.' " *Id.* at 115. Relying upon the fact that no evidence was shown which indicated why a de novo court would treat vindictively those who request a trial before it, the Supreme Court concluded that a trial de novo represents a "completely fresh determination" by a different court. *Id.* at 116-17.

25. 412 U.S. 17 (1973).

26. *Id.* at 26. The petitioner in *Chaffin* was convicted on a charge of robbing by open force or violence and was sentenced by the jury to serve a 15-year prison term. *Id.* at 18. After obtaining a reversal of his conviction on the basis that an erroneous jury instruction was given by the trial judge, the petitioner was retried before a different judge and a new jury for the same offense. *Id.* at 19. After finding him guilty for a second time, the jury returned a life sentence. *Id.* Thereafter, the petitioner filed for habeas corpus relief, arguing that due process of law required that *Pearce* be extended to jury sentencing. *Id.* at 20. The Supreme Court observed that "the jury was not aware of the length of the sentence meted out by the former jury" nor was it "told that petitioner had been convicted and that his conviction had been overturned on collateral attack." *Id.* (footnote omitted). Under these circumstances, the Court concluded that *Pearce* was not controlling because there is no potential for abuse by a resentencing jury. *Id.* at 26, 28.

27. 417 U.S. 21 (1974).

28. *Id.* at 28-29. Restraints on a prosecutor's charging power are a matter of special concern because the interface between prosecutorial vindictiveness and prosecutorial discretion is delicately drawn. *See* United States v. Andrews, No. 78-5166, slip op. at 21-22 (6th Cir. Dec. 14, 1979) (Merritt, J., concurring). It is when a prosecutor's freedom to decide unilaterally whether to prosecute a suspect becomes contaminated with an element of punishment that legitimate discretionary power turns into impermissibly vindictive conduct. *See* Bordenkircher v. Hayes, 434 U.S. 357, 362-65 (1978).

One commentator has stated that there are two elements which generally influence a prosecutor's decision whether or not to prosecute: "practical factors" and "considerations specifically linked to particular offense categories." Abrams, *Internal Policy: Griding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1, 11 (1971). The practical factors include: "the prosecutor's belief in the guilt of a suspect, the likelihood of a conviction, the possibility of obtaining the suspect's cooperation in other matters, the prosecutor's concern about his record for obtaining convictions, the influence of the law enforcement agents involved, and the general character of the offender." *Id., citing* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1970); Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174 (1965). The considerations linked to particular offense categories which might influence prosecutorial discretion are: the community's opinion of a statute, the constitutional legitimacy of applying it to certain conduct, and the availability of alternative means of enforcement. *Id.* at 11, 15, 16.

Courts have generally refrained from interfering with the exercise of a prosecutor's charging discretion. *See, e.g.*, United States v. Cowan, 524 F.2d 504, 513 (5th Cir.), *cert. denied*, 425 U.S. 971 (1975); Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); Sweepston v. United

Carolina prison inmate was charged and convicted for the misdemeanor of assault with a deadly weapon.[29] After the defendant filed an appeal for a trial de novo, the prosecutor obtained a superseding indictment charging him with felonious assault with intent to kill and inflict serious bodily harm.[30] In a habeas corpus proceeding, the defendant argued that the felony indictment was invalid under *Pearce*.[31] Recognizing that the prosecution has a significant stake in deterring criminal defendants from appealing their convictions, and that it "has the means readily at hand to discourage such appeals by 'upping the ante,' " the Supreme Court found that the exercise of a prosecutor's charging authority poses a realistic opportunity for vindictiveness.[32] The Court therefore concluded that due process of law requires application of the restrictions first articulated in *Pearce* to prosecutorial decisions.[33] Although it found no evidence of actual vindictive-

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States, 289 F.2d 166, 170 (8th Cir.), *cert. denied*, 369 U.S. 812 (1961); United States v. Bryson, 434 F. Supp. 986, 988 (W.D. Okla. 1971); Pugach v. Klein, 193 F. Supp. 630, 635 (S.D.N.Y. 1961), *cert. denied*, 374 U.S. 838 (1963). Indeed, the Supreme Court has approved of such deference to the prosecutor's powers:

> 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. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."

Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978), *quoting* Oyler v. Boles, 368 U.S. 448, 456 (1962) (footnote omitted). Underlying this unwillingness to interfere with the free exercise of a prosecutor's decision to bring charges is the separation of powers doctrine. *See, e.g.*, United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965). *But see* K. DAVIS, DISCRETIONARY JUSTICE 209-11 (1969) (reluctance to interfere is less a function of reason, than settled judicial tradition); Noll, *Controlling a Prosecutor's Screening Discretion Through Fuller Enforcement*, 29 SYRACUSE L. REV. 697, 730-37 (1978) (indirectly, courts do, in fact, "review" a prosecutor's decision to prosecute by such judicial procedures as judgments n.o.v. and probable cause hearings).

29. 417 U.S. at 23. *See* N.C. GEN. STAT. § 14-33(b)(1) (1969).

30. 417 U.S. at 23. *See* N.C. GEN. STAT. § 14-32(a) (1969). The defendant pleaded guilty to the second indictment and was sentenced to serve a five to seven year prison term. 417 U.S. at 23.

31. 417 U.S. at 24. The defendant also claimed that the reindictment on the felony charge constituted a violation of the double jeopardy clause. *Id.* The Court, however, found it unnecessary to address this contention since the defendant's due process attack under *Pearce* was dispositive. *Id.* at 25. For a discussion of the double jeopardy clause, *see* note 18 *supra*.

32. 417 U.S. at 27-28. The Supreme Court maintained that prosecutors have a twofold interest in discouraging appeals because 1) any appeal would require increased expenditures of limited prosecutorial resources; and 2) a formerly convicted defendant may be allowed to go free on appeal. *Id.* at 27.

33. *Id.* at 28-29. To prevent vindictiveness in the resentencing process, *Pearce* set forth a two-pronged test: 1) there must be no actual vindictiveness; and 2) the defendant must be free of apprehension of any vindictiveness. *See* 395 U.S. at 725; note 19 and accompanying text *supra*. *See also* Hardwick v. Doolittle, 558 F.2d 292, 249 (5th Cir. 1977). Therefore, in describing *Blackledge*'s holding, courts have stated that both actual vindictiveness and the apprehension of vindictiveness is the proper standard against which prosecutorial conduct is to be measured in determining whether it is unconstitutionally vindictive. For example, the Fourth Circuit stated in accordance with *Blackledge*, that "[t]he harm which the constitution prohibits is *both* the likelihood of vindictiveness *and* the apprehension of retaliation by either judge or

ness, the *Blackledge* Court held that the prosecutor's conduct was unconstitutional since *Pearce*'s requirement that a defendant must be freed of any apprehension of vindictiveness remained unsatisfied.[34]

Lower courts have liberally applied *Blackledge*'s rule against prosecutorial vindictiveness to encompass circumstances not envisioned in that case. In *United States v. Jamison*,[35] for instance, the District of Columbia Circuit concluded that *Blackledge* was not restricted to the situation where a superseding indictment is obtained after a defendant pursues his post-conviction appellate remedies.[36] Rather, the court held that *Blackledge* also required "restrictions on increased charges after mistrials."[37] In *United States v.*

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prosecutor which may deter a defendant from appealing his conviction because his punishment may be enlarged on retrial." United States v. Johnson, 537 F.2d 1170, 1175 (4th Cir. 1976) (emphasis added), *citing* Blackledge v. Perry, 417 U.S. 21, 27-28 (1974). *Cf.* United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir. 1977) (*Pearce* with its dual requirements, was the progenitor of *Blackledge*).

34. 417 U.S. at 29. The Supreme Court thus determined that a defendant's mere showing of an apprehension of vindictiveness, without proof of actual vindictiveness, is sufficient to violate due process of law. *Id. See* Jackson v. Walker, 585 F.2d 139, 144 (5th Cir. 1978). The *Blackledge* Court stated:

> 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 . . . ."

417 U.S. at 28, *quoting* North Carolina v. Pearce, 395 U.S. at 725. The *Blackledge* Court indicated, however, that there were countervailing circumstances which the state might have shown to negate the defendant's apprehension of vindictiveness. *Id.* at 29 n.7. The Court thought that if it was impossible to proceed on a more serious charge at the time of the original indictment (as where an assault victim subsequently dies), then there would be sufficient justification to sustain the prosecution's second charge. *Id.*, *citing* Diaz v. United States, 233 U.S. 442 (1912). *Cf.* United States v. Jamison, 505 F.2d 407, 416-17 (D.C. Cir. 1974) (intervening events or new evidence of which the prosecution was excusably unaware at the time of the original indictment might also justify an increase in charges). The *Blackledge* Court's exception is analogous to the one adopted in *Pearce*, where the Supreme Court held that there could be no finding of *judicial* vindictiveness if the sentencing judge could show sufficient justification for imposing a heavier sentence. 395 U.S. at 726. *See* note 20 and accompanying text *supra*.

It is interesting to note that the first application of *Pearce*-type restrictions to prosecutorial vindictiveness occurred just three weeks after the *Pearce* Court's decision. *See* Sefcheck v. Brewer, 301 F. Supp. 793 (S.D. Iowa 1969). As in *Blackledge*, the defendant in *Sefcheck* was reprosecuted on a harsher charge for the same conduct after he successfully appealed his first conviction. *Id.* at 794. The district court stated that the *Pearce* principle applies equally to all state officials because fear that a prosecutor might vindictively increase a charge would unconstitutionally deter the exercise of a defendant's rights as "effectively as fear of a vindictive increase in sentence by [a] court." *Id.* at 795.

35. 505 F.2d 407 (D.C. Cir. 1974). In *Jamison*, the defendants were indicted for *second degree* murder and for carrying a dangerous weapon. *Id.* at 409. At their first trial, they moved for a mistrial on grounds of "ineffective assistance of counsel." *Id.* The trial judge declared a mistrial and the defendants were subsequently reindicted for *first degree* murder and for carrying a dangerous weapon. *Id.* At the second trial, the defendants were convicted on these increased charges. *Id.* at 410. Thereafter, the defendants appealed the validity of the second indictment, charging that *Blackledge*'s due process rule against fear of vindictiveness prohibits a charge increase following a successful defense request for a mistrial. *Id.*

36. *Id.* at 415.

37. *Id.* at 416. The court perceived no persuasive distinction "between attacks which defendants make on the fairness of criminal proceedings before and after they are complete." *Id.*

DeMarco,[38] the Ninth Circuit determined that even in a pretrial situation, if charges are added following a defendant's motion for change of venue, due process "is controlled by the teaching of *Blackledge*."[39]

In *Bordenkircher v. Hayes*,[40] however, the Supreme Court excluded from the scope of *Blackledge* prosecutorial conduct occurring during the course of plea negotiations.[41] In *Bordenkircher*, a defendant with two prior felony convictions was indicted on a felony charge for issuing a forged instrument.[42] During plea negotiations, the prosecutor threatened that he would obtain a recidivist indictment with a mandatory sentence of life imprisonment if the defendant did not plead guilty.[43] After the defendant rejected the prosecution's plea offer, he was reindicted on the more serious charge.[44] The Supreme Court reversed the court of appeals' ruling "that the prosecutor's conduct during the bargaining negotiations had violated the principles of *Blackledge v. Perry*."[45] The *Bordenkircher* Court's decision

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Furthermore, the court stated that the administration of our criminal justice system would be seriously hampered if it permitted subsequent indictments after mistrials, but not after reversals, reasoning that such a distinction "would discourage defendants from seeking mistrials when error prejudicial to them has occurred, whereas mistrials in such cases may represent a significant saving of judicial resources." *Id.*

38. 550 F.2d 1224 (9th Cir. 1977).

39. *Id.* at 1227. The prosecution in *DeMarco* appealed the district court's dismissal of an indictment charging two individuals with making false statements to an IRS agent in California. *Id.* at 1225 n.1, *citing* United States v. DeMarco, 401 F. Supp. 505 (C.D. Cal. 1975). This indictment was procured after the defendants, who had previously been indicted in the District of Columbia for making false statements to an IRS agent, insisted on changing venue to the districts of their residence, Chicago and Los Angeles. 550 F.2d at 1226. The prosecution had been aware of facts upon which the second indictment was based before the first indictment was brought. *Id.* The Ninth Circuit held that it could perceive no substantial difference between the defendants' statutory right to change venue and Perry's right to a trial de novo in *Blackledge*. *Id.* at 1227. The court thus concluded that there was no basis upon which to prevent the application of *Blackledge* when, as here, the situation poses a realistic likelihood of vindictiveness. *Id.*

The Ninth Circuit, in United States v. Alvarado-Sandoval, 557 F.2d 645 (9th Cir. 1977), also held that the absence of a formal, pretrial motion does not prevent assertion of a *Blackledge* claim. 557 F.2d at 645. There, an alien misdemeanant, who was initially charged with unlawful entry, was subsequently indicted on a felony charge covering the same act. *Id.* The second indictment was brought after the defendant's counsel indicated before a United States magistrate that no plea would be entered because of the later possibility of raising a suppression motion. *Id.* at 645-46. The court of appeals expressly stated that the failure to interpose a formal motion would not distinguish this case from *Blackledge*. *Id.* at 645.

40. 434 U.S. 357 (1978).

41. *Id.* at 362.

42. *Id.* at 358.

43. *Id.*

44. *Id.* at 359.

45. *Id.* at 360. The Sixth Circuit had held that "if after plea negotiations fail, [a prosecutor] . . . procures an indictment charging a more serious crime, a strong inference is created that the only reason for the more serious charges is vindictiveness." Hayes v. Cowan, 547 F.2d 42, 44-45 (6th Cir. 1976), *rev'd sub nom.* Bordenkircher v. Hayes, 434 U.S. 357 (1978), *noted in* 7 MEM. ST. U.L. REV. 703 (1977). The court reasoned that prosecutorial policy is *already made* when a defendant is indicted for less than all the possible offenses surrounding his criminal spree since "a discretionary determination [has been made] that the interests of the state are served by not seeking more serious charges." 547 F.2d at 44.

was based upon its express determination that plea bargaining is necessary to the administration of our criminal justice system,[46] and that such bargaining is devoid of any "element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."[47] The Court thus concluded that the prosecutor's decision to indict after unsuccessful negotiations represented "a legitimate use of available leverage in the plea bargaining process" and not a vindictive exercise of his discretionary power to initiate prosecution.[48]

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46. 434 U.S. at 361-62. The Supreme Court has dispelled any doubt as to the legitimacy of the plea bargaining process. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 262 (1961). The Court, however, has conditioned its approval on the requirement that a plea be voluntarily made with an "awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970). The underlying assumption which makes the negotiation of pleas constitutionally permissible is that properly advised defendants who are protected by certain procedural guarantees are "unlikely to be driven to false self-condemnation." Bordenkircher v. Hayes, 434 U.S. at 363, *citing* Brady v. United States, 397 U.S. 742, 758 (1970).

The importance of plea bargaining has been recently explained by the Supreme Court:

> The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.

Blackledge v. Allison, 431 U.S. 63, 71 (1977) (footnote omitted). For a discussion of plea bargaining as a questionable practice, *see* Berger, *The Case Against Plea Bargaining*, 62 A.B.A. J. 621 (1976); Note, *The Unconscionability of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

47. 434 U.S. at 363. The Court posited several reasons why the "give-and-take" of plea bargaining lacks any element of punishment. *Id.* at 362-63. First, the prosecution and the defense in plea negotiations "arguably possess relatively equal bargaining power." *Id.* at 362, *quoting* Parker v. North Carolina, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting). Second, "[p]lea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors each with his own reasons for wanting to avoid trial." *Id.* at 363, *quoting* Brady v. United States, 397 U.S. 742, 752 (1970). *See* note 46 *supra*.

48. 434 U.S. at 359. It is important to note that the Supreme Court in *Bordenkircher* did not foreclose the possibility of finding a *Blackledge* taint in the context of plea negotiations. *Id.* at 365. In the instant case, Hayes had been advised at the outset that if he did not accept the prosecution's plea agreement, a harsher charge would be brought. *Id.* at 358. Emphasizing this fact, the Supreme Court stated that its holding did not encompass the "situation where the prosecutor *without notice* [brings] an additional charge after plea negotiations relating only to the original indictment [have] ended with the defendant's insistence on pleading not guilty." *Id.* at 360. (footnote omitted) (emphasis added). For a discussion of the Supreme Court's decision in *Bordenkircher*, *see* Note, 33 ARK. L. REV. 211 (1979); Note, 24 VILL. L. REV. 142 (1978).

It is also important to note that *Blackledge* has been deemed inapplicable where, after a guilty plea has been vacated on appeal, a defendant is reindicted on all charges originally waived pursuant to a plea agreement. *See, e.g.*, United States v. Johnson, 537 F.2d 1170 (4th Cir. 1976); United States v. Anderson, 514 F.2d 583 (7th Cir. 1975). Courts have considered this situation distinguishable from *Blackledge* "in terms of [the] crucial element of vindictiveness." *Id.* at 588. *See also* United States v. Johnson, 537 F.2d at 1175. In *Anderson*, for example, an information was filed against the defendant charging him with armed robbery. 514 F.2d at 585 n.1. After plea negotiations, the prosecution dropped the original charge in return for Anderson's guilty plea to a lesser charge. *Id.* at 585 n.2. The defendant subsequently attacked the validity of his guilty plea for its failure to comply with rule 11 of the Federal Rules of Criminal Procedure. *Id.* at 585. *See* FED. R. CRIM. P. 11. Following vacation of the defendant's guilty plea by the court of appeals, the prosecution obtained a new indictment for the original armed robbery charge. 514 F.2d at 585. The majority reasoned that when an indictment is revived after a defendant's guilty plea is vacated, it is merely because the situation has "re-

Even prior to the Supreme Court's decision in *Bordenkircher*, lower courts had attempted to give ample latitude to the prosecutor's discretion to control the decision to prosecute. In *Hardwick v. Doolittle*,[49] for example, the defendant was indicted for armed robbery and aggravated assault.[50] After he entered a special plea of insanity and filed a petition for removal to the federal district court, the prosecution brought additional indictments on separate charges arising out of the same incident.[51] In rejecting *Blackledge's* vindictiveness analysis, the Fifth Circuit observed that *Blackledge* involved "the substitution of a more serious charge and not the making of a decision to initiate prosecution for [different] criminal activity."[52] The court reasoned that if it were to adopt *Blackledge's* two-pronged test in this context, the requirement against apprehension of vindictiveness "would render the prosecutor's discretion meaningless in every case in which a defendant is initially indicted for less than all the violations his alleged spree of activity would permit."[53] The Fifth Circuit therefore held

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verted to the pre-plea stage," and the prosecution is returning to its pre-plea bargaining position. *Id.* at 588. The court thus held that the mere reinstitution of all original charges under these circumstances is not within *Blackledge's* teachings since there is "no appearance of retaliation when a defendant is placed in the *same position* as he was in before he accepted the plea bargain." *Id.* (emphasis added). *Cf.* Martinez v. Estelle, 527 F.2d 1330, 1332 (5th Cir.), *cert. denied*, 429 U.S. 924 (1976) (court reversed defendant's conviction which was obtained pursuant to plea agreement, and where defendant on retrial rejected identical plea offer, reindictment and conviction on harsher pre-plea charge was not precluded by *Blackledge*).

49. 558 F.2d 292 (5th Cir. 1977).

50. *Id.* at 294.

51. *Id.* The original armed robbery and aggravated assault counts were based upon the defendant's theft of $43,000 from a bank in Augusta, Georgia, and a subsequent chase and gunfight with three policemen. *Id.* The superseding indictment charged the defendant with two additional counts of armed robbery and aggravated assault. *Id.* The added robbery count charged the defendant with taking approximately $300 from a bank customer during the course of the bank robbery, while "the added assault count accused him of assaulting a probation officer whom he had bodaciously seized and used as a shield during the gun battle." *Id.* at 298.

52. *Id.* at 301. *See* notes 29-30 and accompanying text *supra*. In determining whether prosecution has been initiated for added or substituted charges, it is useful to apply the "same evidence" test—a standard which was devised to decide if a state is in violation of the double jeopardy clause's prohibition against punishing a defendant twice for the same offense. *See, e.g.*, Hardwick v. Doolittle, 558 F.2d at 297-98, 302. The formulary expression for this test was stated by the Supreme Court in Blackburger v. United States, 284 U.S. 299 (1932): "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." *Id.* at 304.

53. 558 F.2d at 302. The Fifth Circuit intimated that the right accorded to the defendant in *Blackledge* to be free of any *apprehension* of vindictiveness would continually bar a prosecutor from *adding* charges after a defendant was initially indicted. *Id.* Thus, the court found that application of this aspect of *Blackledge* would dangerously limit a "prosecutor's broad discretion to control the decision to prosecute." *Id.* at 301. In comparison, the court stated that *Blackledge* involved a reindictment on *substituted* charges which does not bring into sharp conflict the defendant's right to be free of apprehension and the prosecutor's charging discretion. *Id.* In the *Blackledge*-type situation, where a prosecutor obtains an original indictment less severe than the facts might warrant, the license a prosecutor has in deciding what charges to bring is already exercised. *Id. See also* note 45 *supra*. The court concluded that any superseding indictment really represents a "harsher variation of the same *original* decision to prosecute." 558 F.2d at 302 (emphasis added).

that a defendant must establish actual vindictiveness on the part of the prosecutor to satisfy a claim of unconstitutional conduct when a superseding indictment consists of added, rather than substituted, charges.[54]

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54. 558 F.2d at 302. The court specifically stated that, although the defendant's mere showing of added charges made out a prima facie case for finding prosecutorial vindictiveness, "the cause should be remanded to the district court to afford the prosecutor the opportunity to come forward with countervailing evidence." *Id.* The court listed some of the explanations which might rebut a claim of actual vindictiveness, including "mistake or oversight in the initial action, a different approach to prosecutorial duty by a successor prosecutor, [and] public demand for prosecution on the additional crimes allegedly committed." *Id.* at 301. It is important to distinguish these explanations from those which would be required to negate the mere apprehension of vindictiveness. *See* note 34 *supra*. The objective explanations just listed, which will offset an inference of actual vindictiveness, are insufficient to dispel the mere appearance of vindictiveness. *See* United States v. Andrews, 449 F. Supp. at 1241, 1244.

The following year the Fifth Circuit restated *Hardwick*'s underlying principle that "due process policy must be reconciled with the countervailing policy of allowing the prosecutor broad discretion to control the decision to prosecute." Jackson v. Walker, 585 F.2d 139, 143 (5th Cir. 1978). Jackson, a domestic worker for the Magee family, was arrested for her participation in an unsuccessful plan to kidnap the Magees' 10-month old baby. *Id.* at 141. During the course of the kidnapping, Mrs. Magee was tied up and robbed. *Id.* On August 21, 1973, Jackson was indicted for aggravated kidnapping, armed robbery, and conspiracy to kidnap. *Id.* Five months after Jackson's conviction for aggravated kidnapping was overturned, she was reindicted on charges of aggravated kidnapping, armed robbery, and aggravated burglary. *Id.*

While the Fifth Circuit noted that *Jackson* was factually distinguishable from *Hardwick*, *id.* at 145, it nevertheless concluded that, as in *Hardwick*, only a determination of actual vindictiveness would justify an interference with the prosecutor's exercise of discretion under *Blackledge*. *Id.* at 148. The court emphasized that the test "[i]n deciding whether to require a showing of actual vindictiveness or merely a showing of reasonable apprehension of vindictiveness" should be the same threshold balancing test utilized in *Hardwick*. *Id.* at 145. *See* Hardwick v. Doolittle, 558 F.2d at 301. Specifically, "the court must weigh the need to give defendants freedom to decide whether to appeal against the need to give the prosecutors freedom to decide whether to prosecute." 585 F.2d at 145. *Cf.* Lovett v. Butterworth, 610 F.2d 1002, 1007 (1st Cir. 1979) (apprehension of vindictiveness was sufficient to establish a due process violation since, under the circumstances of the case, a significant due process interest outwieghed a minor prosecutorial interest). Applying its balancing test, the *Jackson* court held that a "moderately weighty" prosecutorial interest prevailed against a "very limited" due process interest. 585 F.2d at 145-48. Thus, it remanded the action to the district court to examine the evidence in light of the actual vindictiveness standard. *Id.* at 148.

Under the actual vindictiveness standard, a defendant establishes a prima facie case for a finding of vindictiveness by showing the imposition of increased charges. *Id.* The prosecution may then rebut this prima facie evidence by proffering a neutral explanation to show that it did not, in fact, act vindictively. *Id.* In distinction to this approach, if the balancing test required application of an appearance of vindictiveness standard, a defendant's showing of increased charges would be prima facie sufficient to establish a due process violation which could only be rebutted if the prosecution demonstrates the discovery of previously unavailable evidence. *Id.* at 142-43, *citing* Blackledge v. Perry, 417 U.S. 21 (1974).

Other courts, however, have expressed different views where a superseding indictment consists of added charges. The Ninth Circuit, for instance, dismissed a felony indictment for possession of marijuana filed shortly after a defendant moved for discharge of a cocaine complaint under the Speedy Trial Act. United States v. Groves, 571 F.2d 450 (9th Cir. 1978). In *Groves*, the prosecutor argued that *Blackledge* should be distinguished because that case did not involve "different crimes relating to completely separate fact situations." *Id.* at 454. Rejecting this contention, the court stated that it did not "regard the factual similarity/dissimilarity of the two charges dispositive on the question of vindictiveness." *Id.* at 454. *Accord*, United States v. DeMarco, 550 F.2d 1224 (9th Cir. 1977); United States v. Alvarado-Sandoval, 557 F.2d 645 (9th Cir. 1977).

It was against this background that Judge Green[55] began his analysis in *Andrews* by considering the proper standard for determining the constitutionality of conduct alleged to be vindictive.[56] Judge Green turned first to the district court's holding that since the prosecutor's action in filing the superseding indictment *appeared* vindictive, *Blackledge* required dismissal of the conspiracy count despite the absence of any actual retaliatory motivation.[57] After examining the district judge's "overall approach,"[58] Judge Green stated that the trial court erred in finding that the concept of "appearance of vindictiveness" was the standard to be applied in the instant case.[59] According to Judge Green, the Supreme Court's "references in *Colten* and *Chaffin* to due process violations by *purposeful punishment or penalization* of a defendant in retaliation for the exercise of constitutional rights" militated against applying a rule turning on the mere appearance of vindictiveness in this case.[60]

Judge Green contended that the decision in *Bordenkircher* buttressed his view that apparent vindictiveness was an inappropriate standard for gauging prosecutorial conduct in the present factual context.[61] While Judge Green conceded that *Bordenkircher* was distinguishable from the case *sub*

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55. Senior District Judge Green, sitting by designation, delivered the opinion of the court in which Circuit Judge Merritt joined and filed a separate opinion. Circuit Judge Keith dissented. Although Judge Merritt would severly limit the approach set forth by Judge Green, he would not disagree that, even in the pretrial and trial process, actual vindictiveness is patently unconstitutional whether old charges are increased or new charges added. *See* United States v. Andrews, No. 78-5166, slip op. at 19 (6th Cir. Dec. 14, 1979); text accompanying note 72 *infra*. Therefore, Judge Merritt felt constrained to remand to the district court for redetermination in accordance with Judge Green's opinion since 1) he disagreed with Judge Keith's conclusion that the prosecutor's conduct in the instant case was unconstitutional, United States v. Andrews, No. 78-5166, slip op. at 23 (6th Cir. Dec. 14, 1979) (Merritt, J., concurring), and 2) his double jeopardy-type analysis did not recognize the concept of appearance of vindictiveness which underlay Judge Keith's conclusion. *Id.* slip op. at 19 (Merritt, J., concurring) (by implication). *See id.* slip op. at 34 (Keith, J., dissenting). As a result, Judge Green's opinion for the court technically embodies a majority standard for subsequent cases despite its inconsistency with Judge Merritt's suggested view. *See* note 106 and accompanying text *infra*.

56. United States v. Andrews, No. 78-5166, slip op. at 5 (6th Cir. Dec. 14, 1979).

57. *Id.* slip op. at 3-4 (6th Cir. Dec. 14, 1979), *citing* United States v. Andrews, 444 F. Supp. at 1239-40, 1244. For a discussion of the district court's opinion, *see* note 10 and accompanying text *supra*.

58. United States v. Andrews, No. 78-5166, slip op. at 4 (6th Cir. Dec. 14, 1979).

59. *Id.* slip op. at 5.

60. *Id.* slip op. at 7. Judge Green believed that the language used in those cases was not supportive of the *Pearce-Blackledge* rule which protects a defendant from the mere apprehension of vindictive behavior. *Id.* Judge Green explained that "in *Colten* the Supreme Court had spoken of due process being violated if an increased sentence was imposed *'as purposeful punishment'*, while in *Chaffin* the concept that a jury was highly unlikely to *penalize* a defendant for exercising a right of appeal was emphasized." *Id.* slip op. at 6-7 (citations omitted) (emphasis in original). Judge Green concluded that, notwithstanding the deterrent effect which a higher sentence on reconviction may have, the Supreme Court in both *Colten* and *Chaffin* was primarily concerned with whether or not vindictiveness actually played a discernible role in the resentencing process. *Id.* For a discussion of *Colten* and *Chaffin*, *see* notes 23-26 and accompanying text *supra*.

61. United States v. Andrews, No. 78-5166, slip op. at 7 (6th Cir. Dec. 14, 1979).

judice since the "pivotal point" in the former case was that an increase in charges as part of the "give-and-take" of plea bargaining could not be considered vindictive,[62] he nevertheless found that *Bordenkircher*'s treatment of *Pearce* and *Blackledge* was relevant.[63] Looking to *Bordenkircher*, Judge Green observed that "in its references to and quotation from *Pearce* and *Blackledge* the majority . . . did not refer to the broader aspects of those earlier rulings regarding the defendant's perception of the conduct in question—'apprehension of vindictiveness.' "[64] Rather, Judge Green determined that the Supreme Court alluded to the holdings in *Pearce* and *Blackledge as* "representing the 'imposition of penalty' upon a defendant."[65] Judge Green considered *Bordenkircher*'s interpretation of *Pearce* and *Blackledge* to be "a clear indication to the trial courts that the doctrine developed in those rulings is to be confined to its intended scope."[66] With respect to the "intended scope" of the principles established in *Pearce* and *Blackledge*, Judge Green stated that in both cases "there was a *substitution* of charges—the *same conduct* on the part of the defendant was the basis for the diverse sentences imposed in *Pearce* and underly both the misdemeanor and felony charges in *Blackledge*."[67]

Upon this foundation, Judge Green examined the facts of the instant case and concluded that the same conduct was *not* the basis for both the original indictment and the superseding indictment charging the conspiracy count.[68] Judge Green noted that because the district court had failed to observe this critical distinction between substituting charges and adding

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62. *Id.* slip op. at 8. For a discussion of *Bordenkircher*, *see* notes 40-48 and accompanying text *supra*.

63. United States v. Andrews, No. 78-5166, slip op. at 8 (6th Cir. Dec. 14, 1979).

64. *Id.* slip op. at 9. In support of this assertion, Judge Green quoted the following passage from the *Bordenkircher* opinion:

> This Court held in North Carolina v. Pearce that the Due Process Clause of the Fourteenth Amendment "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." The same principle was later applied [in *Blackledge*] to prohibit a prosecutor from reindicting a convicted misdemeanant on a felony charge after the defendant had invoked an appellate remedy, since in this situation there was also a "realistic likelihood of 'vindictiveness.' "

Id. slip op. at 8 (citations omitted), *quoting* Bordenkircher v. Hayes, 434 U.S. at 362.

65. United States v. Andrews, No. 78-5166, slip op. at 8 (6th Cir. Dec. 14, 1979). The portion of the *Bordenkircher* opinion to which Judge Green was referring stated:

> The Court has emphasized that the due process violation in cases such as Pearce and Perry lay not in the possibility that a defendant might be deterred from the exercise of a legal right, but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction.

Id. slip op. at 8-9, (citations omitted), *quoting* Bordenkircher v. Hayes, 434 U.S. at 363.

66. United States v. Andrews, No. 78-5166, slip op. at 9 (6th Cir. Dec. 14, 1979).

67. *Id.* (emphasis added).

68. *Id.* Judge Green acknowledged that the conspiracy count arose from the same total factual pattern as did the original narcotics and firearms offenses. *Id.* He nevertheless believed that the conspiracy charge was "a separate and distinct offense with elements different" from those offenses. *Id.* slip op. at 9. *See* notes 3-4 & 7 and accompanying text *supra*.

charges, it erroneously applied *Blackledge*'s prophylactic rule.[69] Relying primarily on decisions of other circuits,[70] Judge Green held that only a showing of actual retaliatory motivation would justify invalidating added charges on the basis of prosecutorial vindictiveness.[71]

In a separate concurring opinion, Judge Merritt stated that although he concurred "in the result and much of the reasoning of Judge Green's opinion," he would limit the concept of appearance of vindictiveness to posttrial prosecutorial conduct.[72] Judge Merritt justified this limitation on claims of prosecutorial vindictiveness upon two grounds: 1) that the principles announced in *Pearce* and *Blackledge* were simply attempts to prevent the undermining of double jeopardy values—values not implicated in this case;[73]

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69. United States v. Andrews, No. 78-5166, slip op. at 10 (6th Cir. Dec. 14, 1979).

70. *See* United States v. Partyka, 561 F.2d 118 (8th Cir. 1977); United States v. Ricard, 563 F.2d 45 (2d Cir. 1977). For a discussion of *Hardwick*, *see* notes 50-54 and accompanying text *supra*. For a discussion of *Jackson*, *see* note 54 *supra*.

71. United States v. Andrews, No. 78-5166, slip op. at 16-18 (6th Cir. Dec. 14, 1979). Like the Fifth Circuit, Judge Green felt that where charges are added, the full extent of prosecutorial discretion has not been exercised. *Id.* slip op. at 11. For a discussion of the Fifth Circuit's approach regarding the addition of charges, *see* note 53 and accompanying text *supra*.

The following tripartite formulation constituted Judge Green's precise holding:

> [I]f the prosecution *substitutes* charges increasing the potential severity of the punishment to which the defendant is exposed, such substitution of charges creates a *prima facie* case of prosecutorial vindictiveness which can be overcome only by showing that intervening circumstances, of which the prosecution could not reasonably have been aware created a fact situation which did not exist at the time of the original indictment. Such a standard places primary emphasis on the apprehension of retaliatory motivation—the perception of the defendant.
>
> If the prosecution *adds* new charges arising from criminal conduct relatively distinct from that underlying the original charge the *defendant must show actual vindictiveness* in the bringing of the added charges, although a *prima facie* case may be made out by the mere fact of the added charges if no plausible explanation is offered by the prosecution. This standard focuses on the intent of the prosecutor.
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> . . . [T]he *addition of a new charge for a different and distinct offense which was a different and distinct consequence of the same basic conduct underlying the original charge* would make out a *prima facie* case of prosecutorial vindictiveness, but such *prima facie* case would be subject to rebuttal by the *prosecution offering evidence* of facts which *reasonably* explain or justify the action taken and negate *any* inference of *vindictiveness in fact*. This standard takes into recognition both the perception of the defendant and the intent of the prosecutor, and if the trial court is not satisfied as to the plausibility or substantiality of the government's explanation the reasonable apprehension of vindictive motivation may be given controlling weight.

United States v. Andrews, No. 78-5166, slip op. at 17-18 (6th Cir. Dec. 14, 1979) (emphasis added) (footnotes omitted).

72. United States v. Andrews, No. 78-5166, slip op. at 19 (6th Cir. Dec. 14, 1979) (Merritt, J., concurring).

73. *Id.* slip op. at 19-21 (Merritt, J., concurring). Judge Merritt believed that since the Court in *Pearce* and *Blackledge* was unwilling to decide the problem of prosecutorial retaliation on double jeopardy grounds, it was "forced to conceptualize the problem more broadly under the due process clause" in order to remedy the wrongs involved. *Id.* slip op. at 20 (Merritt, J., concurring). *See* notes 18-31 *supra*. Judge Merritt concluded, however, that "the two cases fit much better the double jeopardy mold." United States v. Andrews, No. 78-5166, slip op. at 21 (6th Cir. Dec.14, 1979) (Merritt, J., concurring).

and 2) that the notion of prosecutorial vindictiveness is not only "inconsistent with the competitive, adversary nature of the pre-trial and trial process,"[74] but it is also unmanageable in this context.[75]

Judge Keith dissented, criticizing Judges Green and Merritt for severely limiting *Blackledge*'s "needed and vital control on prosecutorial discretion."[76] Insisting that his colleagues' finding that *Bordenkircher* limited *Blackledge* was untenable,[77] Judge Keith expressly rejected their abandonment of *Blackledge*'s underlying concern with the appearance of prosecutorial vindictiveness.[78] Nevertheless, Judge Keith recognized that a total bar against added charges on reindictment could "intrude deeply into prosecutorial discretion."[79] To resolve this difficulty, Judge Keith espoused "an overall balancing test" in which the need for prosecutorial discretion is weighed against the interest of a defendant in being free to assert his rights without the fear of retribution.[80]

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74. United States v. Andrews, No. 78-5166, slip op. at 21-22 (6th Cir. Dec. 14, 1979) (Merritt, J., concurring). Judge Merritt explained that criminal adjudication by necessity demands the public prosecutor to assume an aggressive stance "contrary to the liberty interests of the accused." *Id.* slip op. at 22 (Merritt, J., concurring).

75. *Id.* slip op. at 21-22 (Merritt, J., concurring). To illustrate the unmanageability of the vindictiveness concept in the pretrial and trial process, Judge Merritt asked several troublesome questions:

> Once a defendant has successfully asserted a particular legal right in the course of the criminal process, is a prosecutor guilty of unconstitutional vindictive conduct, which "chills" the exercise of the legal right asserted, each time the prosecutor thereafter takes a position contrary to the interests of the defendant? If not, why not, and what is the standard of measurement? What difference does it make that the prosecutor's conduct took place *after* rather than *before* the defendant asserted the right?

Id. slip op. at 22 (Merritt, J., concurring) (emphasis supplied by Judge Merritt).

76. *Id.* slip op. at 25 (Keith, J., dissenting).

77. *Id.* slip op. at 36-38 (Keith, J., dissenting). Judge Keith considered *Bordenkircher*'s discussion of prosecutorial vindictiveness to be a product of the special factual situation present in that case. *Id.* (Keith, J., dissenting). For a discussion of *Bordenkircher*, *see* notes 40-48 and accompanying text *supra*. Instead of seizing upon the language of *Bordenkircher* to limit the principles stated in *Pearce* and *Blackledge*, Judge Keith would restrict *Bordenkircher*'s holding to prosecutorial conduct during the plea bargaining process. United States v. Andrews, No. 78-5166, slip op. at 37 (6th Cir. Dec. 14, 1979) (Keith, J., dissenting).

78. United States v. Andrews, No. 78-5166, slip op. at 39 (6th Cir. Dec. 14, 1979) (Keith, J., dissenting). According to Judge Keith, his colleagues ignored the apprehension concept described in *Pearce* and *Blackledge* since their approach breaks down vindictiveness issues into three factual situations: 1) substitution of charges; 2) addition of charges in a crime spree situation; and 3) addition of charges for the same basic criminal acts. *Id.* slip op. at 38 (Keith, J., dissenting). Judge Keith explained that the latter two situations would occasion the mechanical application of a vindictiveness-in-fact test, and thus, completely forsake the efforts of *Pearce* and *Blackledge* to thwart any chill on the exercise of a defendant's rights. *Id.* slip op. at 38-39 (Keith, J., dissenting). *See* notes 12 & 71 and accompanying text *supra*.

79. United States v. Andrews, No. 78-5166, slip op. at 32 (6th Cir. Dec. 14, 1979) (Keith, J., dissenting).

80. *Id.* slip op. at 32-36 (Keith, J., dissenting). The balancing test proposed by Judge Keith would require a court to decide as a threshold matter whether a prosecutor's bringing of a heavier second indictment appears vindictive. *Id.* slip op. at 32 (Keith, J., dissenting). *See also* Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978); note 54 *supra*. If the appearance of vindictiveness was present, the court would then balance in light of all the facts "the extent to which allowing the second indictment will chill defendant's exercise of the right in question with the extent to which forbidding the second indictment infringes on the prosecutor's charging author-

It is suggested that Judge Green's finding that, under the facts of this case, the court was not compelled to apply *Blackledge*'s rule protecting defendants from the mere apprehension of vindictiveness is supported by precedent and backed by logic. As Judge Green insisted, *Bordenkircher*'s recent interpretation of *Pearce* and *Blackledge* circumscribes the concept of appearance of vindictiveness.[81] Furthermore, the *Bordenkircher* Court's refusal to establish a rule against vindictive prosecutorial behavior in the face of a new indictment admittedly obtained to deter the exercise of a defendant's right to trial[82] implicated a balancing rationale not unlike Judge Green's approach in *Andrews*.[83] It is therefore submitted that the Sixth Circuit's decision requiring the government merely to rebut a showing of actual vindictiveness, rather than to refute an allegation of apprehension of vindictiveness, is in consonance with the *Bordenkircher* Court's concern for the effective administration of criminal justice which demands broad prosecutorial discretion.[84]

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ity." United States v. Andrews, No. 78-5166, slip op. at 32 (6th Cir. Dec. 14, 1979) (Keith, J., dissenting). If the scales tip in favor of the defendant, then appearance of vindictiveness would be the controlling standard in determining whether the prosecution's action was unconstitutional. *Id.* slip op. at 33 (Keith, J., dissenting). On the other hand, if the scales tip in favor of the prosecution, actual vindictiveness would be the relevant standard. *Id.* In the instant case, Judge Keith determined that the prosecutor's independent discretion interest was outweighed by the chilling effect on the defendant's freedom to seek release on bail. *Id.* slip op. at 35 (Keith, J., dissenting).

81. *See* notes 61-67 and accompanying text *supra*.

82. Bordenkircher v. Hayes, 434 U.S. at 361 & n.7. The prosecutor in *Bordenkircher* "conceded that the indictment was influenced by his desire to induce a guilty plea." *Id.* at 361 (citation omitted).

83. *Id.* at 364. The Supreme Court in *Bordenkircher* emphasized that although "confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates . . . the negotiation of pleas.' " *Id.*, *quoting* Chaffin v. Stynchcombe, 412 U.S. at 31. Judge Green's opinion did not expressly adopt an overall balancing test like that of the Fifth Circuit in Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978). United States v. Andrews, No. 78-5166, slip op. at 16-17 (6th Cir. Dec. 14, 1979). For a discussion of the *Jackson v. Walker*'s balancing approach, *see* note 54 *supra*. However, the basic premise for his requiring a defendant to show actual vindictiveness in the bringing of added charges was a threshold determination that prosecutorial discretion in this situation deserves greater leeway than when charges are substituted. *Id.* slip op. at 17 n.13. *See* note 71 *supra*. *See generally* note 54 *supra*.

84. *See* 434 U.S. at 361-62, 365. This analysis is inconsistent with the view that *Bordenkircher*'s holding limits its application to the particular facts of that case. *See* United States v. Andrews, No. 78-5166, slip op. at 37-38 (6th Cir. Dec. 14, 1979) (Keith, J., dissenting). Clearly, *Bordenkircher* did hold that under the circumstances of that case there was no due process violation since the give-and-take of plea negotiation lacks any element of punishment. *See* notes 40-48 and accompanying text *supra*. Any view which would so narrowly interpret *Bordenkircher*, however, is fraught with difficulty; not only does it discount the Court's treatment of the competing interests of defendants and of the state in the sensitive area of executive prosecutorial power, but it also interprets vindictiveness issues as admitting to sterile categorization. *See* note 28 *supra*. In addition, three members of the *Bordenkircher* minority argued that the Court's opinion, "although purporting to rule narrowly (that is, on 'the course of conduct engaged in by the prosecutor in *this* case,'. . .) is departing from, or at least restricting, the principles established in *North Carolina v. Pearce*." 434 U.S. at 365-66 (Blackmun, J., dissenting) (emphasis added) (citations omitted).

It is further suggested that Judge Green's decision to limit *Blackledge* by applying only its actual vindictiveness standard in the situation of added charges is supported by logic.[85] It is contended that Judge Green reasonably concluded that if *Blackledge*'s prophylactic rule were applied in cases involving *added* charges, the prosecutor's prerogative to initiate prosecution for different criminal activities would be seriously undermined.[86] Although a superseding indictment which contains added charges might appear vindictive, it is submitted that "a prosecutor should have greater latitude to augment charges when dealing with multiple criminal acts."[87] It is suggested that various characteristics of modern prosecutors' offices indicate that such an increase in the number of charges after the first indictment may often be reasonably attributable to sheer inadvertence or mistake.[88] If *Blackledge*'s prophylactic rule were applied in such situations, it would require that the additional charges be summarily dismissed due to their mere appearance of vindictiveness, unless the prosecution could show the discovery of previously

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85. United States v. Andrews, No. 78-5166, slip op. at 17 (6th Cir. Dec. 14, 1979). For a discussion of the court's interpretation of *Blackledge*, *see* notes 52-53 & 67 and accompanying text *supra*.

86. *See* note 71 and accompanying text *supra*. For a discussion of this rationale as set forth in *Hardwick* and Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978), *see* notes 49-54 and accompanying text *supra*.

87. United States v. Andrews, No. 78-5166, slip op. at 33 (6th Cir. Dec. 14, 1979) (Keith, J., dissenting). *See also id.* slip op. at 11.

88. *See* Abrams, *supra* note 28, at 2; Noll, *supra* note 28, at 702. The kinds of circumstances which may prevent a defendant's initial indictment on charges for which he is plainly subject to prosecution are: 1) the lack of any central internal review of screening decisions; 2) high staff turnover; or 3) various prosecutors controlling different aspects of the same case. *Id.* One commentator has aptly described the background against which modern prosecutorial decisionmaking must be considered:

> The modern prosecutor in a predominantly urban environment is no longer the individual district attorney who handles all aspects of a case himself. Rather, it is a large bureaucratic institution comprised of tens or sometimes hundreds of lawyers with an even larger supporting staff. In such offices, the individual lawyer is more like an assembly line worker, doing only specific tasks in relation to the product, *i.e.*, the completed prosecution, than like the old fashioned shoemaker who made the whole shoe . . . .
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> . . . .
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> . . . At each [stage], a number of prosecutors may contemporaneously be performing the same function in different cases. These separate decision-makers may not be in direct communication with each other, and their decisions may not be subject to a central internal review.

Abrams, *supra*, at 1-2 (footnote omitted).

It should be noted that the prosecution in *Andrews* explained that several nonvindictive factors coalesced to cause the additional conspiracy count to be sought two days after the defendants' bond motion was decided. *See* United States v. Andrews, No. 78-5166, slip op. at 34 (6th Cir. Dec. 14, 1979), *quoting* United States v. Andrews, 444 F. Supp. at 1241. The government argued that except for challenges to the validity of the composition of the grand jury which caused delays in its work, and except for scheduling difficulties in arranging vacations in the prosecutor's office, it would have brought the additional conspiracy count prior to the time defendants were first arraigned and remanded without bail. United States v. Andrews, No. 78-5166, slip op. at 34 (6th Cir. Dec. 14, 1979). The government also pointed out that its Assistant United States Attorney in this case was inexperienced and was not aware "that she should or could have sought a conspiracy indictment." *Id.* slip op. at 3. *See* note 10 *supra*.

unavailable evidence.[89] It is suggested that such a limitation on prosecutorial discretion would be a high price for society to pay if an accused, whose guilt was clear, could escape punishment merely because "fragmented" prosecutorial procedure caused him to be initially indicted for less than all the violations his criminal spree would permit.[90]

Conversely, it is submitted that Judge Green appropriately decided to apply *Blackledge*'s apparent vindictiveness standard to situations involving the substitution of charges.[91] Although broad prosecutorial discretion is essential to the functioning of the criminal justice system,[92] this policy must be reconciled with the due process limitation first established in *North Carolina v. Pearce*—namely, that defendants be free of any apprehension of retaliatory motivation on the part of the government.[93] It is suggested that

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89. For a discussion of those circumstances which will dispel the *appearance* of retaliatory vindictiveness, *see* note 34 *supra*. For a discussion of those explanations which will offset defendant's proof of *actual* vindictiveness, *see* note 54 *supra*. The burden of dispelling apparent vindictiveness is much heavier than the burden of offsetting actual vindictiveness since the explanations which will rebut the latter are insufficient to rebut the former. *See* note 54 *supra*.

90. By contrast, a number of Ninth Circuit decisions have applied *Blackledge*'s prophylactic rule regardless of whether the superseding indictment contained additional charges for different and distinct criminal activities. *See* United States v. Groves, 571 F.2d 450, 454 (9th Cir. 1978); United States v. DeMarco, 550 F.2d 1224, 1226-27 (9th Cir. 1977); United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 n.2 (9th Cir. 1976). Although the broad ambit of prosecutorial discretion arguably protects society's interest in punishing criminals, the Ninth Circuit felt that a situation involving added charges was squarely within *Blackledge*. *See* cases cited *supra*. *See also* note 54 *supra*. The operative fact in *Blackledge*, and the one which the Ninth Circuit considered crucial in applying its rule protecting defendants from the appearance of vindictiveness, was that "the prosecution [had] knowledge of . . . facts essential to the more serious charge at the time of the original indictment." Smaltz, *Due Process Limitations on Prosecutorial Discretion in Recharging Defendants*: Pearce *to* Blackledge *to* Bordenkircher, 36 WASH. & LEE L. REV. 347, 353, 357 (1979). *See also* United States v. DeMarco, 550 F.2d at 1226. Therefore, even though the second indictment may have involved different crimes relating to a completely separate fact situation, the Ninth Circuit would not disturb *Blackledge*'s rule as long as the facts upon which the second indictment was brought were known before the first. *Id.*

If courts refuse to interpret *Blackledge* narrowly by limiting it to the substitution of more serious charges, it has been contended that overindicting could result. United States v. Andrews, No. 78-5166, slip op. at 11 n.7 (6th Cir. Dec. 14, 1979). In *Andrews*, Judge Green stated that

> prosecutors [might obtain] initial indictments containing every count the facts could conceivably sustain, for fear that a defendant's assertion of some protected right which the government would be required to oppose would create a virtually insurmountable obstacle to the obtaining of a superseding indictment adding counts to those initially set forth in an original indictment of reasonable scope.

Id. But see id. slip op. at 41 n.23 (Keith, J., dissenting). Of course, instead of being subject to the possible dilemma of overindictment, vindictiveness issues might be eliminated altogether if a "regime of full enforcement" of all laws was implemented. Noll, *supra* note 28, at 706. However, as one commentator has stated, "[s]uch a system would be enormously expensive, wasteful, cruel, and probably unworkable. There are now so many laws that it is impractical to try to enforce them all. If prosecutors could not drop or plead most cases, the criminal justice system would be overwhelmed." *Id.* (footnotes omitted).

91. *See* notes 12 & 71 *supra*.

92. *See* notes 85-90 and accompanying text *supra*.

93. *See* notes 14-21 and accompanying text *supra*.

because this concept is most forceful,[94] and its limitation on prosecutorial discretion only minor,[95] where there are substituted charges in question, it is appropriate to fashion a rule requiring the government to bear the heavy burden of offsetting a defendant's reasonable apprehension of vindictiveness in this context.

Although Judge Green's unwillingness to follow *Blackledge*'s rule protecting defendants from the mere apprehension of vindictiveness is supported by precedent and backed by logic, it is suggested that the standard he set forth defers excessively to the discretionary interest of the prosecutor in adding new charges.[96] While Judge Green's systemization of vindictiveness issues represents a meaningful attempt to articulate guidelines that will "maintain 'tolerable consistency' in discretionary prosecutorial decisionmaking,"[97] it is submitted that such consistency should not be attained by a total sacrifice of *Blackledge*'s basic proscription against abusive prosecutorial conduct which may chill the exercise of a defendant's rights.[98] In all fact situations involving the addition of charges, Judge Green would require a determination of actual vindictiveness to establish a due process violation, and would thus allow a prosecutor's explanations for the delay, such as inadvertence or mistake, to rebut the alleged vindictive intent in bringing the second indictment.[99] As suggested by the dissent, this mechanical willingness to apply an actual vindictiveness test and to accept "glib prosecutorial

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94. United States v. Andrews, No. 78-5166, slip op. at 10-11 (6th Cir. Dec. 14, 1979). Judge Green explained that a defendant's apprehension of vindictiveness is strongest where charges are substituted since

> [o]nce the judgment is made as to which penal statute is to be invoked the full extent of prosecutorial discretion has been exercised.
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> Under [these] circumstances, absent an explanation encompassing factors unknown or nonexistent at the time the original decision was made it could fairly be assumed that the sole factor intervening between such decision and the shift to a more punitive position—the defendant's exercise of a protected right—played a part in the determination. . . .
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> The same cannot be said as regards addition of charges.

Id. slip op. at 11. *Cf. id.* slip op. at 33 (Keith, J., dissenting) (if a prosecutor augments charges, as in *Blackledge*, the apprehension of retaliatory motivation is so great that almost no explanation justifies it).

95. *See* Jackson v. Walker, 585 F.2d 139, 144 (5th Cir. 1978). *See* notes 49-54 and accompanying text *supra*.

96. *See* United States v. Andrews, No. 78-5166, slip op. at 39 (6th Cir. Dec. 14, 1979) (Keith, J., dissenting).

97. Abrams, *supra* note 28, at 7. The concept of protecting defendants from the mere "appearance of vindictiveness" is not only elusive, but it is also capable of arising in an endless variety of circumstances. *See* United States v. Andrews, No. 78-5166, slip op. at 19-23 (6th Cir. Dec. 14, 1979) (Merritt, J., concurring). *See also* notes 35-39 and accompanying text *supra*. Thus, it is important that "each prosecutor . . . have some notion of the criteria that he and his fellows are applying" to distinguish permissible from impermissible conduct in order to coordinate decisionmaking in the prosecutorial system. *See* Abrams, *supra* note 28, at 7. In essence, Judge Green's approach weighed the government's interest in having freedom to add charges against a defendant's interest in being free of the apprehension of vindictiveness, and then firmly fixed any balance struck. *See* United States v. Andrews, No. 78-5166, slip op. at 16-17 (6th Cir. Dec. 14, 1979). *See also* note 83 and accompanying text *supra*.

98. For a discussion of the "chilling effect" which may result from prosecutorial misconduct, *see* notes 18-20 and accompanying text *supra*.

99. *See* notes 12 & 71 and accompanying text *supra*. *See also* note 89 *supra*.

explanations for the seeking of heavier charges could make a mockery of *Blackledge*."[100] Under Judge Green's approach, it is of no importance whether the subtleties of a specific factual context indicate that a prosecutor, who had knowledge of all the essential facts at the time of the first indictment, was retaliating by seeking a heavier second indictment.[101] This approach needlessly relaxes the judiciary's vigilance against governmental retaliation by preventing a court from reconsidering equities where the circumstances of a particular case prove exceptional.[102] Therefore, as the dissent insisted, it is submitted that a balancing test weighing all the circumstances would present a more appropriate standard to determine when there is a need to eliminate the appearance of vindictiveness. Not only is such a test consistent with Supreme Court precedent,[103] but it is also submitted that the benefits to defendants[104] as well as society[105] militate in its favor.

In the wake of the Sixth Circuit's decision in *Andrews*, a defendant must show actual vindictiveness in order to bar additional counts in a superseding indictment on the basis of unconstitutional prosecutorial conduct.[106] Thus, a claim of prosecutorial vindictiveness will succeed only if, after defendant shows actual vindictiveness, the prosecution fails to offer either a plausible explanation for the actions it took or facts which negate any inference of actual retaliatory motivation.[107] The differences in the opinions of

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100. United States v. Andrews, No. 78-5166, slip op. at 32 (6th Cir. Dec. 14, 1979) (Keith, J., dissenting).

101. *Id.* slip op. at 39-40 (Keith, J., dissenting).

102. *Id.* In the case *sub judice*, the dissent maintained that there were several facts which militated against applying the more lenient standard of actual vindictiveness. *Id.* slip op. at 35-36 (Keith, J., dissenting). Specifically, Judge Keith considered how vigorously the prosecution opposed the defendant's release on bail. *Id.* slip op. at 35 (Keith, J., dissenting). *See also id.* slip op. at 2 n.2. In addition, he cited the timing of the addition of charges as a factor which made the prosecutor's conduct so apparently vindictive. *Id.* slip op. at 40 (Keith, J., dissenting).

103. *See* notes 81-84 and accompanying text *supra*.

104. *See* notes 100-02 and accompanying text *supra*.

105. United States v. Andrews, No. 78-5166, slip op. at 32-34 (6th Cir. Dec. 14, 1979) (Keith, J., dissenting). *See* text accompanying note 79 *supra*. While Judge Keith felt that the equities in the instant case warranted imposition of the stricter standard of apparent vindictiveness, he conceded that a prosecutor's discretionary interest in bringing added charges ordinarily outweighs a defendant's due process interest in being free of the apprehension of retaliatory conduct. United States v. Andrews, No. 78-5166, slip op. at 42 (6th Cir. Dec. 14, 1979) (Keith, J., dissenting). Judge Keith stated:

> The peculiar facts of this case are unique in that it is a rare instance where the balancing test results in the barring of additional charges brought before trial. In most such situations, the prosecutorial interest will be so strong and the appearance of vindictiveness so slight that the prosecutor would not be barred from bringing additional charges.

Id. Judge Keith also observed that the balancing test in cases of substituted charges would result in application of the stricter standard of apparent vindictiveness since a due process interest is strong in such a context while the government's independent-discretion interest is slight. *Id.* slip op. at 38 n.19 (Keith, J., dissenting). *See generally* note 53 *supra*.

106. *See* notes 12 & 71 and accompanying text *supra*.

107. *See* notes 12 & 71 and accompanying text *supra*. In accordance with Judge Green's formulation, the standard which will apply in a given case depends on whether the added charges are relatively distinct or similar to the conduct underlying the original charge. United States v. Andrews, No. 78-5166, slip op. at 17-18 (6th Cir. Dec. 14, 1979).

Judges Green and Merritt, however, will doubtless preclude all hope of predictability and consistency in vindictiveness cases within the Sixth Circuit.[108] Fortunately, the uncertainty currently surrounding the standard to be applied in such cases can be dispelled since the Sixth Circuit has granted the government's motion for rehearing en banc.[109]

Until the Supreme Court provides definitive guidance, the circuits will continue to be divided concerning the proper standard to be applied in the case of added charges. It is submitted that if a balancing approach similar to that advanced by Judge Keith[110] is adopted by the Sixth Circuit, it could have a significant effect in influencing other circuits to establish reasonable limits for the concept of apparent vindictiveness. It is further submitted that the decision in *Andrews* has already set such a precedent for, notwithstanding the differences of the views in that case, each judge determined that the effective administration of criminal justice demands that prosecutors have ample latitude to control the decision to prosecute.[111]

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108. *See* note 55 *supra*.

109. United States v. Andrews, No. 78-5166 (6th Cir. Dec. 14, 1979), *rehearing granted en banc*, No. 78-5166 (6th Cir. Feb. 21, 1980).

110. *See* note 80 and accompanying text *supra*. *See also* Lovett v. Butterworth, 610 F.2d 1002 (1st Cir. 1979); Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978); note 54 *supra*.

111. United States v. Andrews, No. 78-5166, slip op. at 11 (6th Cir. Dec. 14, 1979); *id.* slip op. at 23 (Merritt, J., concurring); *id.* slip op. at 32, 43 (Keith, J., dissenting).