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# Fifth Amendment--Prosecutor Not Presumed Vindictive in Pretrial Charge Increases after Defendant's Request for Jury Trial

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# FIFTH AMENDMENT—PROSECUTOR NOT PRESUMED VINDICTIVE IN PRETRIAL CHARGE INCREASES AFTER DEFENDANT'S REQUEST FOR JURY TRIAL

## United States v. Goodwin, 102 S. Ct. 2485 (1982).

### I. INTRODUCTION

In *United States v. Goodwin*,[1] the Supreme Court held that the due process clause of the fifth amendment[2] is not violated when a federal prosecutor obtains a felony indictment after the defendant has exercised his right to have the original misdemeanor charges tried before a jury.[3] The defendant in *Goodwin* chose a jury trial in district court over a bench trial in magistrate's court.[4] The Court declined to presume that the prosecutor was vindictive when he did not threaten the defendant with the felony indictment but simply obtained it after the case was transferred to district court. The *Goodwin* Court has reaffirmed a prosecutor's freedom to institute more serious charges before trial without special justification.[5]

The majority bases its decision on a disturbing extension of the premises underlying plea bargaining to pretrial situations in which the protections of negotiation may not exist. The Supreme Court's legitimation of plea bargaining has reinforced the judicial view that defendants accept the risks arising from their strategic choices. In *Goodwin*, the majority took this view, but applied plea bargaining precedents when Goodwin's risk of increased charges was unknown.

Instead, the Court in *Goodwin* should have adopted an easily rebut-

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1 102 S. Ct. 2485 (1982).

2 "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

3 102 S. Ct. at 2494-95.

4 *Id.* at 2487-88.

5 The Court required no special explanation why the increased charges could not have been brought originally. *See infra* notes 145-47 and accompanying text. The usual justification for making charges, i.e., probable cause to believe that the defendant has committed the charged crimes, sufficient to convince a grand jury or magistrate, was present in *Goodwin*, since a grand jury issued an indictment for the increased charges. 102 S. Ct. at 2488.

table presumption of prosecutorial vindictiveness when charges are increased after a defendant exercises a constitutional or statutory right. Such a presumption would both protect a defendant's constitutional rights and preserve a prosecutor's flexibility. Had it applied the presumption, the Court could have reached the same result in *Goodwin* but avoided the logical inconsistencies now confronting defendants under the majority's reasoning.

## II. FACTS OF *GOODWIN*

On February 3, 1976, a federal officer filed a complaint in federal district court charging Learley Reed Goodwin with six counts of misdemeanors and petty offenses, including speeding, reckless driving, fleeing from a police officer, and assault.[6] The court issued a warrant[7] and Goodwin was arrested and arraigned before a United States magistrate in Hyattsville, Maryland.[8] At the preliminary hearing, the magistrate set a date for trial and released Goodwin on his own recognizance. Goodwin fled the jurisdiction.[9]

Three years later, Virginia authorities returned Goodwin to Mary-

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[6] Brief for United States at 2-3, United States v. Goodwin, 102 S. Ct. 2485 (1982).

On February 2, 1976, Goodwin was stopped for speeding on the Baltimore-Washington Parkway by United States Park Policeman Morrissette. Goodwin left his car to talk to Morrissette. After obtaining information from Goodwin's license and registration, Morrissette shined his flashlight into the car and noticed a clear plastic bag under an armrest. Morrissette asked Goodwin to raise the armrest. Goodwin reentered his car and raised the armrest but then grabbed the bag, threw it on the floor, placed the car into gear, and accelerated. The car "fishtailed" and struck Morrissette, knocking him first onto the back of the car and then onto the highway. Morrissette returned to his car and pursued Goodwin with lights and siren on, at speeds reaching 95 miles per hour, but Goodwin eluded him. United States v. Goodwin, 637 F.2d 250, 251-52 (4th Cir. 1981), *rev'd*, 102 S. Ct. 2485 (1982).

Goodwin was charged with: two counts of speeding, in violation of 36 C.F.R. § 50.31 (1981); one count of reckless driving, in violation of 36 C.F.R. § 50.32 (1981); one count of leaving and failing to give aid at the scene of an accident, in violation of MD. TRANSP. CODE ANN. §§ 20-102, 20-104 (1977); one count of fleeing from a police officer, in violation of MD. TRANSP. CODE ANN. § 21-904(b) (1977) (amended 1981), 18 U.S.C. § 7 (1976) (amended 1981), and 18 U.S.C. § 13 (1976); and one count of assault by striking, in violation of 18 U.S.C. § 113(d) (1976). The first three counts were each punishable by a fine of up to $500 and up to 6 months imprisonment, in accordance with 36 C.F.R. § 50.5(a) (1981). The remaining charges were punishable, respectively, by a fine of up to $1000 and up to four months imprisonment, as provided by MD. TRANSP. CODE ANN. § 27-101(c)(12),(14) (1977)(current version at MD. TRANSP. CODE ANN. § 27-101(c)(13), (15) (Supp. 1982)), up to $1000 and one year as provided by MD. TRANSP. CODE ANN. § 27-101(g)(1) (1977) (current version at MD. TRANSP. CODE ANN. § 27-101(i)(1) (Supp. 1982)), and up to $500 and six months, in accordance with 18 U.S.C. § 113(d) (1976). 102 S. Ct. at 2496 n.1.

[7] 637 F.2d at 252.

[8] Brief for Respondent at 3, United States v. Goodwin, 102 S. Ct. 2485 (1982). At the preliminary hearing, Goodwin testified that he was in Georgia when the incident occurred. Brief for United States, at 3, *Goodwin*.

[9] Brief for United States, at 3, *Goodwin*.

land.[10] An attorney from the Antitrust Division of the Department of Justice handled Goodwin's prosecution. The attorney, whose two-week assignment was to try petty crime and misdemeanor cases before magistrates, did not have authority to try felony cases, seek indictments or file informations.[11] Goodwin's attorney began plea negotiations but Goodwin did not plead guilty and requested a trial by jury.[12] The government's attorney did not mention the possibility of a felony indictment during the course of the plea negotiations.[13]

An assistant United States attorney assumed Goodwin's case after its transfer to the district court in Baltimore.[14] This attorney reviewed the case, consulted the complaining officer, and investigated Goodwin's background.[15] Six weeks after receiving the case, he obtained Goodwin's indictment on four counts arising from the incident, including two felonies.[16]

A jury convicted Goodwin of one felony—forcibly assaulting a federal officer—and of one misdemeanor—fleeing from a police officer. Goodwin was sentenced to five years for the felony and one year for the misdemeanor, to be served consecutively.[17]

Goodwin moved to set aside the felony verdict on the ground of

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[10] Goodwin was in custody in Virginia awaiting sentencing on convictions of attempting to shoot a police officer and possessing heroin. Brief for Respondent, at 3, *Goodwin*.

[11] Brief for United States, at 3-4, *Goodwin*.

[12] *Id.* at 4.

[13] 637 F.2d at 252.

[14] Brief for Respondent, at 4 & n.4, *Goodwin*. At that time, trials by jury before a magistrate were not allowed, so a request for a jury trial required the removal of the case to district court. 18 U.S.C. § 3401(b) (1980) now provides for trial by jury before a magistrate. Brief for Respondent, at 4 n.4, *Goodwin*.

[15] Brief for United States, at 4, *Goodwin*. The attorney learned that Goodwin had recently been tried and convicted in Virginia for attempting to shoot a police officer and for possession of over $10,000 worth of heroin. He also learned that Goodwin was known to the Drug Enforcement Administration and the Washington, D.C. police as a major heroin dealer. *Id.* at 5.

[16] 102 S. Ct. at 2488. The first count of the four-count indictment charged Goodwin with forcibly assaulting, resisting, or impeding a federal officer with a deadly weapon in violation of 18 U.S.C. § 111 (1976), punishable by a fine of up to $10,000 and up to 10 years in prison. The second count charged Goodwin with assault with a dangerous weapon in violation of 18 U.S.C. § 113(c) (1976), punishable by a fine of up to $1000 and up to five years. The third count charged Goodwin with fleeing from a police officer in violation of MD. TRANSP. CODE ANN. § 21-904(b) (1977) (amended 1981), 18 U.S.C. § 7 (1976) (amended 1981), and 18 U.S.C. § 13 (1976), punishable by a fine up to $1000 and one year, as provided by MD. TRANSP. CODE ANN. § 27-101(g)(1) (1977) (current version at MD. TRANSP. CODE ANN. § 27-101(i)(1) (Supp. 1982)). The final count was for failure to appear in violation of 18 U.S.C. § 3150 (1976). The charge of failure to appear was severed and later dismissed. Brief for Respondent, at 4-5, *Goodwin*.

[17] Brief for Respondent, at 1, *Goodwin*.

apparent prosecutorial vindictiveness.[18] The United States attorney then filed an affidavit setting forth his reasons for seeking the felony indictment, denying that he was motivated by Goodwin's request for a jury trial.[19] The district court denied Goodwin's motion.[20] The court found that the prosecutor had adequately dispelled any appearance of retaliation[21] and noted that the prosecutor was not aware of Goodwin's record until after Goodwin had requested a jury trial.[22]

On appeal, the United States Court of Appeals for the Fourth Circuit reversed Goodwin's felony conviction.[23] The court found no actual vindictiveness in the decision to seek the felony indictment[24] but found that a real danger of retaliation by the prosecutor existed.[25] Relying on the Supreme Court's decisions in *North Carolina v. Pearce*[26] and *Blackledge v. Perry*,[27] the court adopted a rebuttable presumption of vindictiveness where the circumstances suggest a genuine risk of retaliation[28] and held:

> Lest exercise of the right to a jury trial be chilled, the due process clause requires that defendant be freed of the apprehension of retaliation by prohibiting the bringing of more serious charges, once the right was exercised, at least where there is no showing that the charges could not have been brought before defendant made his election for a jury trial.[29]

The Supreme Court granted certiorari[30] because the case presented an important question concerning the scope of the Court's holdings in *Pearce* and *Perry*.[31]

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18 102 S. Ct. at 2488. Goodwin did not allege or prove that the prosecutor was actually vindictive in seeking the felony indictment. *Id.* at 2494-95.

19 *Id.* at 2488 n.2. The attorney claimed he sought the indictment because he believed Goodwin's conduct on February 2, 1976, to be a serious violation of the law and related to major narcotics transactions. The attorney believed that Goodwin had perjured himself at the preliminary hearing. Furthermore, Goodwin failed to appear for the original trial and had a lengthy history of violent crimes. *Id.*

20 *Id.* at 2488.

21 *Id.*

22 Brief for United States, at 7, *Goodwin*. The district court considered the motion on its merits although it was not filed in accordance with FED. R. CRIM. P. 12(b)(1); the court found sufficient cause for the failure to file. The higher courts did not consider the propriety of this ruling. 102 S. Ct. at 2488 n.3.

23 637 F.2d at 251. Goodwin also appealed his misdemeanor conviction on other grounds but the court of appeals affirmed the conviction. *Id.* at 255.

24 *Id.* at 252.

25 *Id.* at 254. The court stated that "the conclusion is inescapable that, 'but for' his election of a jury trial, defendant would have been tried before the magistrate solely on the lesser charges." *Id.* at 255.

26 395 U.S. 711 (1969).

27 417 U.S. 21 (1974).

28 637 F.2d at 253. A rebuttable presumption spares courts the "unseemly task of probing the actual motives of the prosecutor." *Id.* at 255.

29 *Id.* at 253.

30 United States v. Goodwin, 102 S. Ct. 632 (1981).

31 102 S. Ct. at 2487.

## III. SUPREME COURT OPINIONS IN *GOODWIN*

In a seven to two decision, the Supreme Court reversed the judgment of the court of appeals and remanded the case.[32] Writing for the majority, Justice Stevens declined to presume that the prosecutor vindictively sought the felony indictment. Since there was no allegation of actual prosecutorial vindictiveness, the Court held that the defendant had not established a due process violation.[33] The Court concluded that it has presumed an improper vindictive motive[34] only where a reasonable likelihood of vindictiveness existed.[35] A presumption about motivation, rather than inquiry into actual motivation, is appropriate in cases where vindictiveness is likely because motives are "complex and difficult to prove."[36] The Court acknowledged that the situation in *Goodwin* provided an opportunity for vindictiveness.[37] Yet, it found unlikely the possibility that a prosecutor would bring charges not in the public interest for the sole purpose of punishing a defendant for exercising the right to a jury trial. Hence, a presumption of vindictiveness for all cases similar to Goodwin's was not warranted.[38]

To support its conclusion, the Court emphasized both the need for pretrial prosecutorial flexibility and the tentative nature of initial charges,[39] relying on its rationale in *Bordenkircher v. Hayes*,[40] another case involving allegations of pretrial prosecutorial vindictiveness:

> A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. As we

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[32] *Id.* at 2495.

[33] *Id.* at 2494-95.

[34] A punitive motive is not itself improper. *Id.* at 2488-89.

[35] *Id.*

[36] *Id.* at 2489.

[37] *Id.* at 2494.

[38] *Id.* The Court advanced four reasons why vindictiveness was not likely in this case. First, forcing the prosecutor to go through a jury trial, as opposed to a bench trial, was not a significant burden. The difference between a jury trial and a bench trial was less significant than the difference between an initial trial and no trial, which the Court, in Bordenkircher v. Hayes, 434 U.S. 357 (1978), had already held to be an insufficient burden to warrant the presumption. 102 S. Ct. at 2494. Second, no institutional bias against the retrial of decided questions existed. Such a bias, applicable when a defendant exercises the right to appeal, for example, would make vindictiveness more likely. *Id.* Third, the criminal defendant constantly exercises rights which burden the prosecution. *Id.* at 2493. Finally, until the trial begins, the prosecutor is constantly discovering new information and reassessing the proper level of prosecution. "Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision." *Id.*

The Court left open the possibility that a defendant might be able to prove objectively that a prosecutor's charging decision was "motivated by a desire to punish him for doing something that the law plainly allowed him to do." *Id.* at 2494.

[39] 102 S. Ct. at 2491-93.

[40] 434 U.S. at 357.

> made clear in . . . [Hayes], the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.[41]

Because of plea bargaining, additional charges are not necessarily punitive:[42]

> [C]hanges in the charging decision that occur in the context of plea negotiation are an inaccurate measure of improper prosecutorial "vindictiveness." An initial indictment—from which the prosecutor embarks on a course of plea negotiation—does not necessarily define the extent of the legitimate interest in prosecution.[43]

Therefore, the Court refused to disturb the presumptive validity of a prosecutor's motives for pretrial charging decisions even outside the context of plea negotiation.

Justice Blackmun concurred in the result. He indicated that a presumption of vindictiveness should apply in this case, since there was a realistic likelihood of vindictiveness against Goodwin.[44] Justice Blackmun found, however, that the presumption was rebutted because the second prosecutor, in seeking the increased charges, acted on objective information not reasonably available to either prosecutor at the time of the original charge.[45]

In dissent, Justice Brennan, joined by Justice Marshall, also disagreed with the majority's finding that a jury trial rather than a bench trial imposes such a small burden on prosecutors that vindictiveness is unlikely.[46] The dissent argued that the majority's application of plea bargaining precedents was inappropriate, since in this case there were no plea negotiations. Instead, the prosecutor unilaterally punished Goodwin for exercising a legal right.[47] Justice Brennan did not address the question of whether the presumption of vindictiveness had been rebutted.

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41 102 S. Ct. at 2493.

42 *Id.* at 2491-92.

43 *Id.* at 2492.

44 The Assistant United States Attorney responsible for increasing the charges against respondent was aware of the initial charging decision; he had the means available to discourage respondent from electing a jury trial in District Court; he had a substantial stake in dissuading respondent from exercising that option; and he was familiar with, and sensitive to, the institutional interests that favored a trial before the Magistrate. *Id.* at 2495 (Blackmun, J., concurring).

45 *Id.* at 2495-96.

46 *Id.* at 2497 (Brennan, J., dissenting).

47 *Id.* at 2498. The concurrence agreed that *Hayes* was irrelevant to *Goodwin* since the prosecutor in *Goodwin* was unilaterally imposing a penalty. *Id.* at 2495 (Blackmun, J., concurring).

## IV. Overview of the Scope of Prosecutorial Discretion

The prosecutor in *Goodwin* exercised discretion in substituting more serious charges for those originally brought. The wide range of discretion vested in the prosecutor[48] in the American criminal justice system supports the presumptive validity, reaffirmed in *Goodwin*, of a prosecutor's decision to change charges. Limited judical review of prosecutorial decisions stems from the separation of powers doctrine.[49] The prosecutor's discretion must be exercised in the public interest,[50] but a wide range of factors can legitimately influence a prosecutor's determination of the public interest in each case.[51]

A prosecutor's decision to drop charges or not to institute charges is normally within the permissible range of discretion.[52] The prosecution

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[48] "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." *Bordenkircher*, 434 U.S. at 364.

[49] *E.g.*, Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 393 (1976).

> Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

[50] *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE, Standard 3-3.9 (1980) [hereinafter cited as STANDARDS].

The Court in *Goodwin* recognized that the prosecutor's duty is to select charges in the public interest. *See supra* notes 38-43 and accompanying text.

[51] "The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, in order to determine whether prosecution would be in the public interest." United States v. Lovasco, 431 U.S. 783, 794 (1977).

> Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:
> (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
> (ii) the extent of the harm caused by the offense;
> (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
> (iv) possible improper motives of a complainant;
> (v) reluctance of the victim to testify;
> (vi) cooperation of the accused in the apprehension or conviction of others; and
> (vii) availability and likelihood of prosecution by another jurisdiction.

STANDARDS, *supra* note 50, Standard 3-3.9.

[52] Lower federal courts have refused to compel United States attorneys to bring charges when requested to do so by individuals or grand juries, citing the executive branch's discretion with which the judiciary cannot interfere. *E.g.*, Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 379-82 (2d Cir. 1973); Powell v. Katzenbach, 359 F.2d 234, 235 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966); *Cox*, 342 F.2d at 171-72.

Leave of court is required before prosecution may be discontinued in federal court. FED. R. CRIM. P. 48(a). This rule does not appear to allow much exertion of judicial influence over prosecutorial discretion. In United States v. Cowan, 524 F.2d 504 (5th Cir. 1975), *cert.*

of some but not all persons who commit the same crime does not violate equal protection; the only constitutional limitation is that differential enforcement of the law may not be based on some suspect classification.[53] Proof of an impermissible standard for selection of those to be prosecuted is difficult.[54]

Prosecutors may also choose which charges to initiate. If a defendant's conduct violates several criminal statutes, as did Goodwin's, a prosecutor may choose under which statutes to proceed.[55] A prosecutor may also decide whether to invoke habitual criminal statutes.[56] This discretion is enhanced by overlapping criminal statutes. Overlapping statutes, which permit the same incident or transaction to be punishable as several crimes, do not generally violate the fifth amendment prohibition of double jeopardy.[57]

The judiciary does review prosecutors' decisions in the charging process. An individual must be charged with crimes either by a grand jury indictment or by an information which survives the test of a preliminary hearing.[58] Some scholars, however, question the extent to which

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*denied*, 425 U.S. 971 (1976), the district court refused to dismiss an indictment when the prosecutor sought the dismissal in exchange for the defendant's testimony in another case. The court of appeals overruled the district court, holding that Rule 48(a) means that the executive's decision whether to terminate prosecution should not be judicially disturbed unless such termination is clearly contrary to the manifest public interest.

53 [T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged.

Oyler v. Boles, 368 U.S. 448, 456 (1962).

*See* United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc) (lower court conviction for failing to possess draft card reversed; allegation that defendant was singled out for prosecution for purpose of chilling exercise of first amendment rights was supported by facts sufficient to raise reasonable doubt about prosecutor's purpose; burden of proving nondiscriminatory enforcement shifted to government).

54 Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision-Making*, 13 AM. CRIM. L. REV. 473, 503 (1976); Cox, *supra* note 49, at 403-08.

55 Cox, *supra* note 49, at 418.

56 Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1529 (1981).

57 The Supreme Court has articulated a test for whether two offenses defined by different statutes are sufficiently distinguishable to permit imposition of punishment for both offenses. The test is that actions may be punished under both statutory provisions if each statutory provision requires proof of a fact which the other does not. Albernaz v. United States, 450 U.S. 333, 337 (1981); Simpson v. United States, 435 U.S. 6, 11 (1978). If this test is not met, both crimes constitute one offense and consecutive punishment for both crimes would constitute double jeopardy, either as multiple punishments for the same offense or as a second prosecution for the same offense. Brown v. Ohio, 432 U.S. 161, 165-66 (1977).

58 For example, a finding of probable cause by a magistrate at the preliminary hearing is required in order for the prosecution to proceed, although the government may institute a subsequent prosecution for the same offense if no probable cause is found initially. FED. R. CRIM. P. 5.1. Probable cause is also required before a warrant will issue on a complaint. FED. R. CRIM. P. 4(a).

preliminary hearings and grand juries check prosecutorial discretion.[59] Furthermore, these institutions assure only that a prosecutor brings justified charges; they do not assure that the charges represent the full societal interest in prosecuting a defendant.[60]

Prosecutorial discretion has aroused much commentary.[61] Scholars have suggested numerous limitations on the scope of prosecutorial discretion,[62] including review of charging decisions within the prosecutor's office,[63] internal standards outlining conditions under which certain crimes will and will not be charged,[64] and administrative and judicial review of prosecutorial decisions similar to that imposed for administrative agencies.[65]

Discretion is justified by the realities of criminal justice administration.[66] Prosecutorial discretion makes plea bargaining possible. Without the authority to drop charges, to promise not to bring additional justified charges or to recommend lenient sentencing, a prosecutor would have nothing to offer a defendant in exchange for a guilty plea.[67] The Supreme Court condoned explicit plea bargaining in *Brady v. United*

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[59] *E.g.*, Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 474, 497, 539 (1980); Bubany & Skillern, *supra* note 54, at 483-84; Cox, *supra* note 49, at 421-22; Vorenberg, *supra* note 56, at 1537.

[60] *See* Cox *supra* note 49, at 422.

[61] *E.g.*, K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); P. DOW, DISCRETIONARY JUSTICE: A CRITICAL INQUIRY (1981); F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969); Cox, *supra* note 49; Vorenberg, *supra* note 56.

[62] *E.g.*, Bubany & Skillern, *supra* note 54, at 490-505; Cox, *supra* note 49, at 392-93, 397-403; Vorenberg, *supra* note 56, at 1560-72.

[63] Miller, *supra* note 61, at 16-19, 344; Cox, *supra* note 49, at 393.

[64] Bubany & Skillern, *supra* note 54, at 496-99; Cox, *supra* note 49, at 393; Vorenberg, *supra* note 56, at 1562-65.

While internal standards may be salutary, their effect on judicial review of prosecution decisions has yet to be seen. According to one author, no published federal court decision as of 1980 had granted relief to a defendant solely on the basis of the prosecutor's breach of advisory standards for prosecution or of standards for federal prosecution conduct contained in the Code of Federal Regulations. Holderman, *Preindictment Prosecutorial Conduct in the Federal System*, 71 J. CRIM. L. & CRIMINOLOGY 1, 2 (1980). In one recent Supreme Court case involving the exclusion of evidence obtained in violation of Internal Revenue Service guidelines for agent conduct, the Court refused to give relief to persons adversely affected by violation of federal agency internal guidelines if the Constitution or statutes did not require adoption of the guidelines. United States v. Caceres, 440 U.S. 741 (1979).

[65] Bubany & Skillern, *supra* note 54, at 490-96, 503-05; Cox, *supra* note 49, at 397-403.

[66] One of the universally recognized reasons for the exercise of the prosecutor's discretion is the fact that both prosecutor and court have limited resources. If the prosecutor charged all the cases which the police brought to him, he would not have the manpower to investigate and prosecute the cases; nor would the courts have space or manpower to try them.

Cox, *supra* note 49, at 413. *See* Halberstam, *Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMINOLOGY 1, 35-45 (1982).

[67] *See* Halberstam, *supra* note 66, at 15.

*States*[68] and *Santobello v. New York*,[69] recognizing its practical necessity given limited law enforcement and judicial resources. Approximately ninety percent of all criminal convictions result from guilty pleas.[70] The Court has recognized that without a prosecutor's flexibility to make an attractive deal, criminal courts would be overloaded.[71]

Since 1974, the Court has been limiting prosecutorial discretion through the use of a rebuttable presumption of vindictiveness.[72] In *Goodwin*, the Court refused to broaden this limitation. The Court declined to hold that prosecutors must have proper, documented motives to increase charges after defendants exercise protected rights. While the result is consistent with the Court's previous decisions delineating the exception to prosecutorial discretion, the Court incorrectly drew an analogy to plea bargaining.

## V. SUPREME COURT DEVELOPMENT OF ASSUMPTION OF VINDICTIVENESS

The Court's first decisions analyzing a presumption of retaliatory motives focused upon judicial, not prosecutorial, vindictiveness. In *North Carolina v. Pearce*,[73] the convictions of two defendants were overturned on appeal but the defendants were convicted on retrial and received higher sentences.[74] The Court held that under these circumstances, the due process clause of the fourteenth amendment prohibited the unjustified imposition of more severe penalties upon reconviction.[75] A defendant's apprehension of a heavier second sentence would have an unconstitutional chilling effect on the filing of appeals:

> Due process of law. . . 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 . . . 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.[76]

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68 397 U.S. 742 (1970).

69 404 U.S. 257 (1971).

70 397 U.S. at 752 n.10. Seventy to 85% of felony convictions are by guilty plea. *Id.*

71 404 U.S. at 264-65 (Douglas, J., concurring); 397 U.S. at 753.

72 *See infra* notes 73-104 and accompanying text.

73 395 U.S. at 711.

74 Pearce was originally sentenced to 12 to 15 years. Upon the second conviction, he was sentenced to eight years, which, when added to the time he had already served under his first conviction, amounted to a longer sentence than the one originally imposed. The other defendant, Rice, was originally sentenced to 10 years and subsequently to 25 years. *Id.* at 713, 714.

75 *Id.* at 725.

76 *Id.*

The judge could show the absence of such a motivation by affirmatively stating in the record the reasons for the increased sentence. The reasons must be related to conduct of the defendant following the original sentencing.[77] The Court justified its application of a presumption of vindictiveness by noting both the difficulty of proving a judge's retaliatory motivation and the appearance of vindictiveness presented by frequent increased sentences on reconviction.[78]

After *Pearce*, the Court considered and denied requests for relief from higher sentences on retrial in *Colten v. Kentucky*[79] and in *Chaffin v. Stynchcombe*.[80] The Court found no violation of due process in these cases because, unlike *Pearce*, there was no realistic likelihood of vindictiveness in the imposition of the second sentence.

In *Colten*, the defendant had been tried twice for a misdemeanor in Kentucky's two-tier court system.[81] The Court, distinguishing *Pearce*, decided that the possibility of vindictiveness was not inherent in the Kentucky system. In *Pearce*, the second trials were at the same level as the first, and the court was "asked to do over what it thought it had already done correctly."[82] In *Colten*, a higher court imposed the second sentence. A defendant might demonstrate that the higher court was retaliating for the appeal by showing that the higher court dealt more severely with those who were there for a second trial than with those who were there for a first trial, but no such evidence was present in *Colten*.[83] Since the second trial was "a completely fresh determination of guilt or innocence," a higher sentence on retrial was not necessarily vindictive but simply a result of the different finding of facts.[84]

In *Chaffin*, the defendant's conviction was reversed on appeal; a jury convicted him on retrial and sentenced him to a term longer than the

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77 *Id.* at 726. The Court noted in *Pearce* that the state did not at any time justify the increased sentences, referring presumably both to the judges and to the prosecutors involved. *Id.*

78 "The existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case. But data have been collected to show that increased sentences on reconviction are far from rare." *Id.* at 725 n.20.

The Court later held that *Pearce* did not apply retroactively since it dealt with the propriety of the judicial process and not with the determination of guilt. Michigan v. Payne, 412 U.S. 47, 52 (1973).

79 407 U.S. 104 (1972).

80 412 U.S. 17 (1973).

81 If convicted on a guilty plea or after a trial in the inferior court, the defendant had an absolute right to a new trial in a court of general jurisdiction, with the higher court not bound by the lower court's judgment. Colten, after being found guilty in the lower court, received a higher fine after the new trial in the higher court. 407 U.S. at 112-13.

82 *Id.* at 117.

83 *Id.*

84 *Id.*

first jury had imposed.[85] The Court declined to extend *Pearce* to this situation, finding that, if the judge properly controlled the retrial, the possibility that a second jury could abuse the sentencing process by being vindictive was *de minimis*. The Court pointed out that the jury would have no personal stake in the prior conviction and no institutional interest in discouraging appeals.[86]

In *Blackledge v. Perry*,[87] the Court extended the rationale of *Pearce* to the exercise of prosecutorial, rather than judicial, discretion. Convicted of a misdemeanor, Perry requested a trial *de novo* in the superior court.[88] Before the new trial, the prosecutor obtained a felony indictment for the same conduct. Perry pleaded guilty to the felony charge and was sentenced to five to seven years in prison; the original sentence for the misdemeanor had been six months.[89] The Court held that the felony indictment violated due process.[90] Relying on *Pearce*, *Colten*, and *Chaffin*, the Court stated 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.' "[91] Although there was no evidence in *Blackledge v. Perry* that the prosecutor was actually vindictive,[92] the Court recognized that the interest of the prosecutor in discouraging convicted defendants from obtaining a *de novo* trial made vindictiveness likely.[93]

The Court declined to extend the rationale of *Pearce* to the pretrial plea-bargaining setting in *Bordenkircher v. Hayes*.[94] Hayes was indicted on a charge carrying a penalty of two to ten years' imprisonment. The prosecutor stated that he would recommend a five-year sentence if Hayes pleaded guilty but otherwise would seek an additional indictment under the habitual offender statute, which carried a mandatory life sentence. Hayes pleaded not guilty and was convicted and sentenced to life

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85 412 U.S. at 18-20.

86 *Id.* at 27.

87 417 U.S. at 21.

88 North Carolina, where Perry was tried, has provisions for trials *de novo* similar to Kentucky's. *See id.* at 22. *See also supra* note 81 and accompanying text.

89 417 U.S. at 22-23.

90 *Id.* at 28-29. The Court affirmed the lower court's grant of a writ of habeas corpus. *Id.* at 24, 32. The state was then free to initiate a trial *de novo* on the original misdemeanor charge. *Id.* at 31 n.8.

91 *Id.* at 27.

92 *Id.* at 28.

93 "A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing . . . since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free." *Id.* at 27.

The Court distinguished the situation where the state could not bring the more serious charge at the beginning of prosecution. *Id.* at 29 n.7.

94 434 U.S at 357 (5-4 decision).

imprisonment on the added charge.[95] The Court affirmed his conviction.[96]

The Court's legitimation of plea bargaining necessitated the result in *Hayes*.[97] The Court pointed out that the situation was in practice no different from that in which all possible charges had been brought originally and the prosecutor had offered to drop the habitual criminal charge.[98] Although the prosecutor sought the second indictment to induce a guilty plea,[99] the Court reasoned that, "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."[100] The Court distinguished plea negotiation, during which a defendant may be deterred from exercising a right, from the unilateral imposition of punishment for exercising a right.[101] While the lower court found the prosecutor actually had a vindictive motive, because of his explicit threat to seek the habitual criminal indictment,[102] the Supreme Court construed this threat as part of the prosecutor's offer. Hayes knew the terms of the prosecutor's offer, including the possibility of the additional indictment, when he decided to plead not guilty.[103] Therefore, the prosecutor's behavior, which "no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution," was consistent with due process.[104]

## VI. THE *GOODWIN* COURT'S INAPPROPRIATE RELIANCE ON *HAYES*

In *Goodwin*, the Court extended the liabilities, but not the benefits, of plea bargaining to defendants in Goodwin's position. The Court

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95 *Id.* at 358-59.

96 *Id.* at 365.

97 The Court recognized this in *Goodwin*, 102 S. Ct. at 2491.

98 434 U.S. at 360-61.

99 *Id.* at 361.

100 *Id.* at 364.

101 *Id.* at 362. "[T]he 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.* at 363. "[I]n the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecutor's offer." *Id.*

102 "In this case, a vindictive motive need not be inferred. The prosecutor has admitted it." Hayes v. Cowan, 547 F.2d 42, 45 (6th Cir. 1976), *rev'd sub nom.* Bordenkircher v. Hayes, 434 U.S. 357 (1978).

103 "This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty." 434 U.S. at 360.

104 *Id.* at 365.

could have upheld Goodwin's conviction without drawing an analogy to *Hayes*. Instead, it relied on the distinction drawn in *Hayes* between deterrence and punishment to bring *Goodwin* within the plea bargaining analogy.

In the *Pearce* line of cases, the Court made an increasingly clear distinction between deterring a defendant from exercising a right, which is permissible, and punishing a defendant for exercising a right, which violates due process. The Court in *Pearce*[105] and *Perry*[106] condemned actions giving the appearance of vindictiveness, since fear of retaliation might deter defendants from exercising the right to appeal. In *Colten* and *Chaffin*, the Court found that, because of the different institutions involved, defendants' higher sentences were not likely to have been imposed as penalties; instead, "[t]he possibility of a higher sentence was recognized and accepted as a legitimate concomitant of the retrial process."[107] The Court found the distinction determinative in *Hayes*. There, the Court stated that it was the possibility of vindictiveness in *Pearce* and *Perry*, not the deterrence of appeals caused by fear of such vindictiveness, that violated due process.[108]

The Court has also made its acceptance of institutional deterrents to the exercise of rights increasingly explicit in cases which consider convictions under statutes with punishments varying by plea. In *United States v. Jackson*,[109] the Court held that statutory provisions allowing the jury to recommend the death penalty but providing, in effect, for a maximum penalty of life imprisonment in a bench trial or upon a guilty plea unconstitutionally deterred exercise of the sixth amendment right to a jury trial.[110] Needless chilling of constitutional rights, whether intentional or incidental, impermissibly burdened such rights.[111]

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105 395 U.S. at 725.

106 417 U.S. at 28.

107 412 U.S. at 25.

108 434 U.S. at 363. *See supra* notes 101-04 and accompanying text.

109 390 U.S. 570 (1968).

110 *Id.* at 572.

111 *Id.* at 582-83. The Court noted that there were governmental objectives to be achieved by the provision, aside from deterring the exercise of rights, but stated:

> [W]hatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . . The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive.

*Id.* at 582 (citations omitted). "A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right." *Id.* at 583. Because the government had alternative means of achieving its objective, the statute was invalidated.

The Court did not apply this language or mention *Jackson* in a later examination of burdens on the fourteenth amendment right to a jury trial. In Ludwig v. Massachusetts, 427 U.S. 618 (1976), the Court held that the state's two-tier court system did not impermissibly burden the right to jury trial. The defendant was required either to be convicted or to plead

With the acceptance of open plea bargaining, the Court encountered defendants' arguments that their guilty pleas were coerced by the system of punishment and therefore involuntary. In *Brady v. United States*,[112] the Court held that an otherwise valid guilty plea is not involuntary if made to limit a defendant's exposure to punishment.[113] The Court recognized that the state encourages guilty pleas throughout the criminal process and reasoned that it is not unconstitutional for the state to extend a benefit to a defendant who in turn extends a substantial benefit to the state.[114] Only coercion which overcomes the will of the defendant is unacceptable.[115] In *Brady*, the defendant was able to "rationally weigh the advantages of going to trial against the advantages of pleading guilty."[116]

In *Corbitt v. New Jersey*,[117] the Court stated that "[t]he cases in this Court since *Jackson* have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid."[118] The state may encourage guilty pleas by offering leniency, but withholding leniency from those who insist on a trial is not impermissible punishment.[119]

This line of cases,[120] which held that statutory punishment schemes may encourage waiver of rights, echoes the conclusion of *Hayes*.[121] Due process is not violated when a prosecutor presents a defendant with unpleasant alternatives and forces the defendant to make a choice.[122] Although the prosecutor created one of the alternatives—the threat of increased charges—that action is not punishment but the absence of leniency.[123] The Court has reasoned that the defendant must gamble and

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guilty in a lower court non-jury proceeding before a jury trial was available, and the defendant ran the risk of receiving a harsher sentence in the *de novo* trial. The Court recognized that this procedure could be burdensome but not that it was unconstitutional. *Id.* at 628-31.

112 397 U.S. at 742.

113 *Id.* at 751.

114 *Id.* at 752-53.

115 *See id.* at 748-51.

116 *Id.* at 750. The concurrence argued vigorously that the majority's decision undermined the rationale of *Jackson* but concurred in the result because Brady pleaded guilty for reasons other than the statutory punishment scheme. *Jackson* and *Brady* dealt with the same federal statute. *Id.* at 808, 814-17 (Brennan, J., concurring).

117 439 U.S. 212 (1978). Again, statutory punishments differed with the plea, but the Court held that the sentencing scheme did not unconstitutionally burden the defendant's rights. *Id.* at 214-18.

118 *Id.* at 218.

119 *Id.* at 223.

120 *See supra* notes 109-16 and accompanying text.

121 434 U.S. at 365.

122 *See Hayes*, 434 U.S. at 364-65.

123 *See, e.g.*, Abrams, *Systemic Coercion: Unconstitutional Conditions in the Criminal Law*, 72 J. CRIM. L. & CRIMINOLOGY 128, 133-34 (1981).

accept the risks inherent in or incidental to a choice of actions.[124]

This reasoning may be appropriate in the plea bargaining setting, but the Court inappropriately extended it to the *Goodwin* situation. In *Goodwin*, the prosecutor did have a basis for the felony charges but did not present Goodwin with the alternatives of giving up a jury trial or facing felony charges; explicit plea bargaining with the prosecutor bringing the felony charges did not occur. The prosecutor imposed the charges unilaterally and not as part of a bargain, as both the concurrence[125] and the dissent[126] pointed out. Goodwin was not free to accept or reject the "offer" since he did not know precisely what the terms were. Freedom to accept or reject distinguished deterrence from punishment for the exercise of sixth and fourteenth amendment rights in *Hayes*.[127] The Court recognized that the prosecutor did not directly threaten felony charges, but it interpreted the lack of a threat to deny causation.[128] Since the prosecutor made no threat, Goodwin could not prove that the increased charges came in response to his request for a jury trial except by the chronological sequence.[129]

Goodwin did arguably accept the risk of higher charges, or at least have constructive notice of their possibility, when he opted for a jury trial and the resulting move to district court. The mutual benefit to prosecutor and defendant of staying in magistrate's court was lost; in this sense, the facts of *Goodwin* are akin to plea bargaining.[130] But defendants could exercise other rights which would not result in a known increase of exposure to punishment, for example, the right to counsel. By characterizing pretrial exercise of rights as a choice involving risk, and by failing to tie its decision to the facts in *Goodwin* indicating a

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124 *See, e.g., Corbitt*, 439 U.S. at 217-26.

125 102 S. Ct. at 2495 (Blackmun, J., concurring).

126 *Id.* at 2498 (Brennan, J., dissenting).

127 *See supra* note 101 and accompanying text.

128 102 S. Ct. at 2493 n.15.

129 *Id.*

130 Justice Rehnquist's dissent in *Perry* supports this point. Rehnquist argued that while bringing more serious charges after a successful appeal might violate due process, bringing more serious charges in anticipation of a trial *de novo* did not. Both the defendant and the prosecutor gain from having the initial trial in the lower court; the prosecutor benefits from simplified procedure, and the defendant benefits from the limited penalties available. When there is a trial *de novo* in the superior court, the prosecutor's reasons for pursuing only misdemeanor charges disappear and "a prosecutor need not be vindictive to seek to indict and convict a defendant of the more serious of the two crimes of which he believes him guilty." 417 U.S. at 34 (Rehnquist, J., dissenting).

Indeed, such behavior in Goodwin's case would seem to fulfill a stated aim of prosecutorial discretion, which is to maximize the use of limited resources. If a prosecutor who is authorized to try felonies must take a case, then that prosecutor should make the case a felony.

possible acceptance of risk, the Court generalized its plea bargaining assumptions to the exercise of constitutional rights.

If the Court is to extend the liabilities of plea bargaining to defendants in all pretrial situations, the prosecutorial and judicial obligations of plea bargaining should be extended as well. The Court will enforce plea bargains,[131] and a guilty plea resulting from plea negotiations must be informed and voluntary.[132] A defendant is constrained by some pretrial notice requirements.[133] It seems fair to require a prosecutor to give a defendant notice of the charges against which a defense must be mounted.[134]

The Court in *Goodwin* also strengthened its analogy to plea bargaining by linking to *Hayes* its analysis of the burden necessary to raise the presumption of vindictiveness. In *Goodwin*, the Court read *Hayes* as finding that the burden of forcing the prosecutor to prove a case against the defendant was not adequate to justify a presumption that the prosecutor was improperly motivated.[135] The Court therefore reasoned in *Goodwin* that since a trial itself is an insufficient burden under *Hayes*, the differential in prosecutorial effort required for a jury trial rather than a bench trial was not sufficiently burdensome to justify a presumption of vindictiveness.[136]

In *Hayes*, however, the Court did not reach the question of how much of a burden on the prosecutor is necessary to show that vindictiveness is likely. The Court decided that negotiation, not unilateral punishment, occurred in *Hayes*.[137] Because the Court has treated negotiation and retaliation or punishment as mutually exclusive,[138] there was by definition no punishment in *Hayes* and therefore no reason to examine whether the prosecutor's action was likely to be vindictively

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131 *E.g.*, *Santobello*, 404 U.S. at 262.

132 *E.g.*, Henderson v. Morgan, 426 U.S. 637 (1976).

133 For example, a defendant is required to raise certain defenses or objections before trial or lose the right to make them except by leave of court. FED. R. CRIM. P. 12, 12.2.

134 Goodwin did not claim any prejudice in defending his case resulting from the substituted charges, but it is not clear that the Court would have been sympathetic to such claims. For example, in United States v. Lovasco, 431 U.S. at 795-96, the Court held that a prosecutor's delay of 18 months in seeking an indictment was apparently a good-faith investigative delay and did not deprive the defendant of due process even if the defense was prejudiced by the delay.

135 102 S. Ct. at 2494.

136 *Id.* The concurring opinion disagreed on this point. *Id.* at 2495 (Blackmun, J., concurring), and so did the dissent: "[I]t is simply inconceivable that a criminal defendant's election to be tried by jury would be a matter of indifference to his prosecutor." *Id.* at 2497 (Brennan, J., dissenting).

137 *See supra* notes 101-04 and accompanying text.

138 *See Hayes*, 434 U.S. at 362-63; Abrams, *supra* note 123, at 133-34; Note, *A "Realistic Likelihood of Vindictiveness": Due Process Limitations on Prosecutorial Charging Discretion*, 1981 U. ILL. L. REV. 693, 701.

motivated. Consequently, the impact of Hayes' not guilty plea on the prosecutor is irrelevant to *Goodwin*.

The Court in *Goodwin* also noted that institutional pressure from the judiciary against retrial increases the likelihood of vindictiveness when a defendant's exercise of rights causes a retrial.[139] Therefore, vindictiveness in response to the exercise of pretrial rights is less likely. In making this analytical division between pretrial and post-trial rights, the Court revealed its own bias against retrials of decided questions.[140] Retrials occurred in *Pearce* and *Perry* but not in *Hayes* or *Goodwin*. In *Goodwin* and *Hayes*, juries had judged the defendants guilty and neither defendant had been able to challenge the factfinding successfully.[141] By contrast, the original factfinding in *Pearce* was constitutionally flawed[142] and the two-tier system in *Perry* provided for a trial *de novo*.[143] With its reasoning in *Goodwin* and *Hayes*, the Court has adopted the position that if the facts are properly found, there is no reason to question the prosecutor's actions preceding the finding of guilt.[144] This analysis strengthened its assumption that all pretrial prosecutorial actions are not punishment but negotiation.

The Court could have reached the same result in *Goodwin* without reasoning that the situation was analogous to *Hayes*. The *Goodwin* Court was considering whether to presume vindictiveness, not whether proof of actual vindictiveness would invalidate the prosecutor's actions. The presumption of judicial vindictiveness originally adopted in *Pearce* could be rebutted by objective evidence of the defendant's behavior after the first sentence which would justify increased punishment.[145] In the pretrial context of *Goodwin*, a standard for the rebuttal of presumed vindictiveness after increased charges lower than the standard articulated in *Pearce* could have been adopted. In addition to evidence of the defend-

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139 102 S. Ct. at 2490-91, 2494.

140 The Court's analysis also raises the question of whether the Court, in deciding *Pearce* and *Perry*, was influenced by double jeopardy considerations in spite of explicit denial of double jeopardy claims in those cases. 417 U.S. at 25; 395 U.S. at 719-21. *See* United States v. Andrews, 633 F.2d 449, 458 (6th Cir. 1980) (en banc) (Merritt, J., dissenting), *cert. denied*, 450 U.S. 927 (1981).

141 The court of appeals did not reach Goodwin's contention that the evidence against him on the felony charge was insufficient as a matter of law. 637 F.2d at 255. Hayes was unsuccessful in his claim that the enhanced sentence itself was unconstitutional. 434 U.S. at 359-60.

142 395 U.S. at 713-14.

143 *See supra* note 88 and accompanying text.

144 The Court's position, combined with its decision in United States v. Hollywood Motor Car Co., 102 S. Ct. 3081 (1982) (per curiam), which was delivered after *Goodwin*, further limits the possibility that the Court will investigate pretrial actions of the prosecutor. In *Hollywood*, the Court disallowed interlocutory appeals of decisions on motions based on prosecutorial vindictiveness. *Id.* at 3083-84. The Court will now hear only cases involving prosecutorial vindictiveness when a trial has been completed and guilt adjudicated.

145 *See supra* note 77 and accompanying text.

ant's behavior after the filing of initial charges, evidence of the prosecutor's actions, state of knowledge, and institutional circumstances, e.g., availability of a grand jury, should be allowed to rebut the presumption of vindictiveness. Several lower courts have suggested these and other factors, including mistake or change in prosecutors, which would negate a presumption of vindictiveness stemming from increased charges.[146] In his concurrence in *Goodwin*, Justice Blackmun stated his belief that a prosecutor "adequately explains an increased charge by pointing to objective information that he could not reasonably have been aware of at the time charges were initially filed."[147]

A presumption of vindictiveness in appropriate circumstances could accommodate the systemic need for plea bargaining without unduly interfering with a prosecutor's discretion to act in the public interest.[148] A defendant's due process interest in protection against abuse of discretion outweighs the added inconvenience to a prosecutor caused by rebutting claims of apparent vindictiveness. A prosecutor would need to rebut allegations of actual vindictiveness if made.[149] Since *Goodwin* diminishes the possibility that prosecutorial vindictiveness will be presumed, it seems likely that defendants will now allege actual retaliation. The Court originally adopted a presumption of judicial vindictiveness in *Pearce* to avoid interfering with the process by which judges decided sentences.[150] If actual, rather than presumed, prosecutorial vindictiveness must be found, a court must investigate the good faith of the prosecutor. This can be an unseemly proceeding which may bring about confrontations between the court and the prosecutor.[151] Motions alleging presumed prosecutorial vindictiveness would not delay trials substantially since there is no interlocutory appeal of such motions.[152]

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146 633 F.2d at 456 (prosecutor inexperienced and grand jury unavailable); United States v. Burt, 619 F.2d 831, 837 (9th Cir. 1980) (increased charges filed by independent federal prosecutor); United States v. Griffin, 617 F.2d 1342, 1347-48 (9th Cir.), *cert. denied*, 449 U.S. 863 (1980) (reasonable delay in filing indictment, ongoing investigations being conducted by unrelated government agencies); Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978) (evidence obtained after first indictment; mistake or oversight; different approach by later prosecutor; public demand for prosecution).

147 102 S. Ct. at 2495-96 (Blackmun, J., concurring).

148 *See supra* notes 66-71 and accompanying text. A presumption of prosecutorial vindictiveness would not apply to threats of increased charges during formal plea negotiations, since in *Hayes* the Court approved increased charges in this situation. *See supra* notes 94-104 and accompanying text. Therefore, plea bargaining would not be affected by the adoption of such a presumption.

149 The prosecutor in *Goodwin* presented reasons for the change in charges before it was decided whether the presumption would apply. *See supra* notes 19, 147 and accompanying text.

150 *Chaffin*, 412 U.S. at 39 (Marshall, J., dissenting). *See also* 395 U.S. at 723.

151 633 F.2d at 455.

152 102 S. Ct. at 3083-84.

The appellate court has two remedies available if the prosecutor fails to rebut this proposed presumption. If charges are substituted, the court can order a new trial on the original charges, as the Supreme Court noted in *Perry*.[153] If charges are added, the court can uphold convictions on the original charges, as the court of appeals did in *Goodwin*.[154]

## VII. RAMIFICATIONS

Under the reasoning adopted by the Court in *Goodwin*, a presumption of pretrial prosecutorial vindictiveness will be difficult to establish, and actual vindictiveness will be difficult to prove. The burden on the prosecutor necessary to trigger a presumption of vindictiveness apparently remains equal to the demands placed on the prosecutor by a second trial. The burden of a jury trial was not sufficient in *Goodwin*. When a course of action mutually benefits a prosecutor and a defendant, and the defendant does not accept that course, the prosecutor can cease lenient behavior without raising a presumption of vindictiveness. The tacit bargain struck in *Goodwin*—a bench trial in magistrate's court on only misdemeanor charges—was broken by Goodwin's request for a jury trial, and the prosecutor was free to stop the leniency of charging only misdemeanors.

The Court will be more likely to presume vindictiveness if a defendant is in fact deterred in the exercise of rights, as Perry was but as Hayes and Goodwin were not. There will have to be a direct chain of causation between a defendant's action and a prosecutor's reaction outside the plea bargaining context; "but-for" causation was not sufficient in *Goodwin*.[155] However, if a prosecutor makes causation direct by explicitly threatening increased charges, the Court is likely to regard the explicit statement of consequences as bringing the transaction inside the plea bargaining context.[156] Finally, if a prosecutor has put forth any justification for the increased charges at any point, the Court is less likely to presume vindictiveness.[157]

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153 417 U.S. at 31 n.8.

154 637 F.2d at 251.

155 *See supra* notes 128-29; United States v. Goodwin, 637 F.2d 250, 255 (4th Cir. 1981), *rev'd*, 102 S. Ct. 2485 (1982).

156 *See supra* notes 102-03, 128.

157 In *Goodwin*, where no vindictiveness was presumed, the prosecutor's reasons for seeking the increased charges were included in the record before the Court. *See supra* note 19 and accompanying text. In *Perry*, where the Court applied a presumption of prosecutorial vindictiveness, *see supra* notes 87-93 and accompanying text, the Court did not mention any justification put forth by the prosecutor for the increased charges but noted that "[t]his would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset. . . ." 417 U.S. at 29 n.7.

Lower courts may be confused in their interpretation of *Goodwin*, as they were with the *Hayes* decision.[158] *Goodwin* reasserts broad protection for prosecutorial discretion. It decides only that a jury trial rather than a bench trial does not place a burden on prosecutors sufficient to raise the presumption of prosecutorial vindictiveness. It does not clarify when a prosecutor's action is a punishment for the exercise of constitutional rights and when a deterrent to their exercise. Therefore, *Goodwin* is unlikely to guide lower courts in facing the variety of situations in which allegations of vindictiveness arise[159] or to quell the confusion which has arisen.

## VIII. CONCLUSION

In *United States v. Goodwin*, the Supreme Court refused to further restrict the scope of prosecutorial discretion and did not choose to apply a presumption of prosecutorial vindictiveness. A successor prosecutor filed felony charges after Goodwin, originally charged with misdemeanors, exercised his right to a jury trial and caused his case to be transferred to district court. Goodwin did not allege that the prosecutor was actually motivated to file the felony charges by an improper desire for retaliation. Hence, since it declined to presume improper motivation, the Court found no due process violation and upheld the felony conviction.

On the surface, the majority's reasoning was consistent with the Court's previous development of the presumption of prosecutorial vindictiveness. The majority, however, blurred the distinction the Court has previously made between imposing punishment for exercising a constitutional right and withholding leniency in order to deter exercise of the right. By inaccurately analogizing Goodwin's situation to a plea

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[158] Note, *supra* note 138, at 701-16. *Compare* 633 F.2d at 456 (*Hayes* confined to plea bargaining context); United States v. Allsup, 573 F.2d 1141, 1143 (9th Cir.), *cert. denied*, 436 U.S. 961 (1978); United States v. Litton Sys., 573 F.2d 195, 198-99 (4th Cir.), *cert. denied*, 439 U.S. 828 (1978) (*Hayes* extended to allow additional charges as latent bargaining tools outside formal plea bargaining).

[159] Courts of appeals have adopted a presumption of prosecutorial vindictiveness after the exercise of a variety of pretrial rights. *E.g.*, United States v. Shaw, 655 F.2d 168, 171-72 (9th Cir. 1981) (motion for arrest of judgment); *Andrews* 633 F.2d at 452-57 (appeal of order denying bail); United States v. Shaw, 615 F.2d 251, 252 (5th Cir. 1980) (request to transfer to different magistrate); United States v. Groves, 571 F.2d 450, 453-55 (9th Cir. 1978) (dismissal motion under Speedy Trial Act); *Hardwick*, 558 F.2d at 294, 302-03 (removal to federal court and insanity defense).

Courts have also rejected the presumption in other cases. *E.g.*, *Burt*, 619 F.2d at 836-37 (motion to suppress evidence); *Griffin*, 617 F.2d at 1346-48 (motion to dismiss indictment); United States v. Stacey, 571 F.2d 440, 443-44 (8th Cir. 1978) (demand for return of lawfully seized funds).

bargaining situation, the Court required defendants to assume unknown risks when making defense choices.

The Court could have reached the same result by adopting an easily rebuttable presumption of vindictiveness when charges are increased outside the bargaining arena of plea negotiation. The practical effect on prosecutors of such a presumption would be the same as the effect of the actual vindictiveness claims which will now be brought, since claims of actual vindictiveness must be rebutted. The rules already established by the Court for formal plea bargaining would not be disturbed. This approach, suggested by the concurring opinion in *Goodwin*, would guide lower courts in deciding claims of pretrial prosecutorial vindictiveness and would balance the administrative interests served by prosecutorial discretion with the interest of the defendant in fairness. The majority's reasoning does neither.

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