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Prosecutorial Vindictiveness

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Dr. Bruce Wheeler
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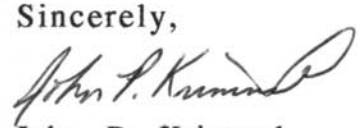
Dear Dr. Wheeler:

As you requested, here is the report on prosecutorial vindictiveness. This report provides important information about the role of prosecutors in our criminal justice system and amount of discretion which they are afforded. However, its primary focus is on the interesting, and somewhat confusing problem of prosecutorial vindictiveness. The legal world is still searching for a definitive answer on just what exactly constitutes vindictive behavior. I feel like this should be a help in clearing up that issue.

This report contains an opening section defining and describing a prosecutor and his role. It pays special attention to pressures that are unique to a prosecutor's job, and exhibits the need for the speedy and inexpensive disposition of a large number of cases. It then explains the basic premise of prosecutorial vindictiveness, an abuse of the prosecutor's discretionary power. What follows is a case history of the development of the prosecutorial vindictiveness doctrine, and finally an analysis of what comprises vindictive behavior by a prosecutor today. The references are done according to the Uniform System of Citation, volume 15. At the end I added an extra references consulted page, even though my reference system doesn't require this, because I also gained understanding of my topic through sources I did not cite.

The information found in this report should be useful to anyone who wants to be well informed about the role of a prosecutor and the limits of his power. Thank you for your help in planning this project. If you have any question regarding this report, please call me at 584-3217.

Sincerely,



John P. Krimmel

INFORMATIVE ABSTRACT

Prosecutors are granted a large amount of discretionary power in the performance of their duties. Because of this large amount of discretion, and because of the many pressures inherent in the job of a prosecutor, this discretionary power is sometimes abused. One such abuse is prosecutorial vindictiveness, "the forbidden practice of penalizing a defendant's exercise of a right." The Supreme Court uses two standards in adjudicating claims of vindictiveness: the in-fact standard and the appearance standard. The Court determines which standard to apply in each case depending upon whether or not the prosecution has a motive to be vindictive. In addition, the Court has ruled that there is no such thing as vindictive behavior during plea bargaining.

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Introduction

Lately there has been disagreement among federal circuit courts about what kind of behavior comprises prosecutorial vindictiveness. This confusion has led to lengthy debate about how these claims should be adjudicated, but little has been accomplished to clarify the issue. It seems as if many prosecutors and even some judges lack an understanding of what comprises legitimate and effective use of a prosecutor's power and what comprises vindictive behavior, which is banned by our system of law. There have been several landmark decisions in this area, and their confusing and seemingly contradictory nature has only added to the confusion about the issue. However, a close look at the case law of prosecutorial vindictiveness will reveal that this problem can be understood and therefore avoided.

This report will provide all of the information you will need to know in order to become informed about the problem of prosecutorial vindictiveness. After defining the role a prosecutor plays in our criminal justice system, with special reference to the many pressures that might lead a prosecutor to abuse his discretionary power, the report will focus on prosecutorial vindictiveness itself. This focus will be accomplished by explaining the evolution of the prosecutorial vindictiveness doctrine through an extensive case study, which will be followed by an analysis of the doctrine as it stands today. Finally, I will propose an interpretation that should help clarify how to adjudicate new claims of prosecutorial vindictiveness as they surface. By the time this report

is finished, you will have a better understanding of our criminal justice system in general, and a crystal-clear view of the limits of a prosecutor's discretionary power.

Definition of a Prosecutor

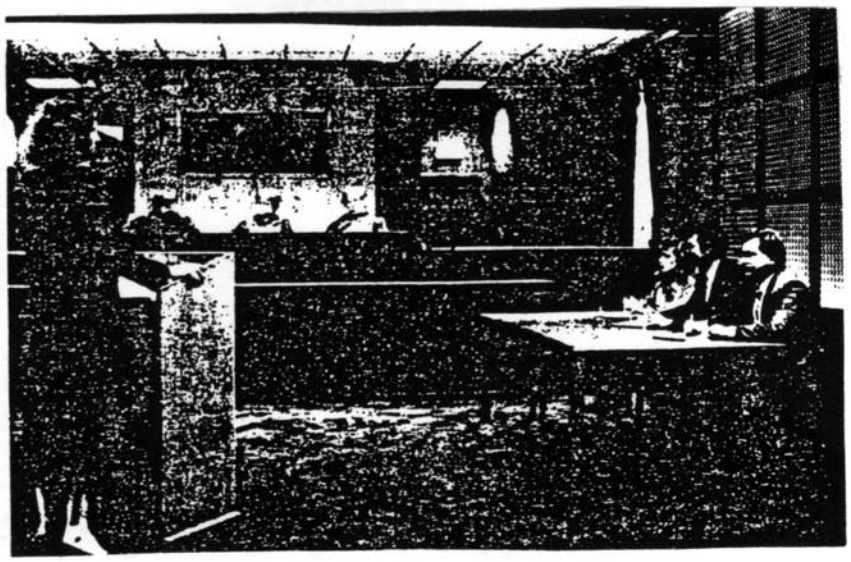
The prosecuting attorney is one of the most valuable and powerful public officials in today's society. He is the person who is responsible for making sure that justice is achieved swiftly and accurately, and is granted a large amount of discretion in order to balance the many demands of his job. But since a prosecutor is granted so much discretion over the discharge of his power, it is important to take a look at just what a prosecutor is and what he does. A prosecutor, as defined in *The New World Dictionary of the American Language*, is a public official who is an attorney and who conducts criminal prosecutions on behalf of the State or the people. However, this definition, while it is accurate, does not give us a real sense of who an attorney is or what he does. It gives us no sense of the extensive education it takes to become an attorney, the duties of a prosecutor, the conditions a prosecutor works under, or the pressures that come with being a prosecutor. Because it is important that we understand all of these things before we can grasp special problems that plague the legal system, such as prosecutorial vindictiveness (which will be studied in depth later in this report), this definition is not adequate. However, it does provide a good base to build on in order to come up with a definition that is adequate.

The first term that we must explore in the *New World* definition is the phrase, "who is an attorney." An obvious question that comes to mind is, "How does one become an attorney?" To become an attorney today, a person must be both trained in legal matters and licensed by the State.

The first step towards practicing law in most states is receiving a law degree from a law school. In order to be accepted into law school, an applicant must go through a lengthy and highly competitive process. He must obtain a four year undergraduate degree from a college or university, and score well on a standardized test called the Law School Admissions Test. Upon fulfilling these requirements, and submitting various other things such as recommendations of his academic ability and character to the school of his choice, he may be considered for enrollment into an A.B.A. (American Bar Association) accredited law school. Upon acceptance into such a school, a student will begin extensive study of the law. Most law school programs take three years of study to complete. Courses are taken in all major branches of both public and private law. Special emphasis is given to such subjects as torts, contracts, taxes, and the constitution. These and other subjects are taught according to the case method, which was developed at Harvard Law School. This method trains students in legal methods through the reading, analysis, and discussion of actual court cases. In addition to regular coursework, a law student participates in several other activities. These activities may include clerkships, writing for a student publication called a Law Review, or conducting mock trials in a competition called a moot court (see figure 1). Upon completion of three years of law school, a student receives a J.D. (Doctor of Jurisprudence) degree.

Upon receiving a J.D. degree, a lawyer seeks to earn his license to practice law. This license is granted by the bar, the body of lawyers who already have a license to practice in the state.

Figure 1 Students at the John Marshall Law School in Chicago participate in a moot court competition.



SOURCE: World Book Encyclopedia, Vol L, p. 138, 1993.

Normally, this license is received after successful completion of the state bar examination. However, a few states automatically license graduates of approved law schools in the state without an examination.

Upon receiving a law degree and a license to practice, a prosecutor will take a position as a public prosecutor, usually in a district attorney's office. His job will then be to act on behalf of the government to prosecute a party (usually an individual) for the alleged commission of a crime. At this point his duties will include any or all of the following: gathering evidence, filing petitions, advising others in legal matters, negotiating with the other attorney, selecting juries, applying law to specific cases, and filing briefs. Once

a case goes to trial, he prepares opening and closing arguments, introduces evidences, interrogates witnesses, and argues questions of law and fact.

However, most cases never go to trial. This is because there is a large backlog of cases in criminal courts at all times, and the courts simply do not have the resources to fully prosecute alleged criminals in every case. Therefore, there is tremendous pressure on prosecutors to negotiate with the criminals. In this negotiation, called plea bargaining, the prosecutor offers a defendant a lesser sentence in return for a guilty plea. In this way, the prosecutor can dismiss a large number of cases relatively quickly without having to go to all of the trouble of taking a case to court. A prosecutor may be tempted to enter into plea bargaining if the evidence against the defendant is not overly compelling, if the defendant has retained a highly skilled and successful defense attorney, if the prosecutor does not have the resources (money, witnesses) to prosecute successfully, or simply if there is a large backlog of cases that must be disposed of. It is estimated that between 80 and 95 percent of all cases are plea bargained.[1]

For prosecutors, another advantage to plea bargaining is that it often leads to an impressive conviction rate for the prosecutor. This is important, because a high conviction rate is essential if the prosecutor would like to be promoted or take a job in the more lucrative private sector. Unfortunately, this incentive to win provides a strong temptation for prosecutors to forego justice and convict even innocent defendants. This does not happen often, but

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[1] *See* J. Scheb & O. Stephens, American Constitutional Law at 836 (1993).

abuses of the system do exist. In the famous case *Adams vs. Texas*, defendant Randall Adams was convicted of a murder and sentenced to death for a crime he did not commit (See figure 2). Afterward, Dallas County District Attorney Henry Wade allegedly bragged, "Any prosecutor can convict a guilty man. But it takes someone really good to convict an innocent one."[2] Fortunately, Adams' conviction was overturned after the actual murderer admitted that he had committed the crime. Even though such practices are extremely rare, it is scary to think that the competitiveness of a court room is sufficient enough to drive some prosecutors to sentence an innocent man to death.

A prosecutor is a special kind of person. He must be smart enough and motivated enough to make it through law school and become licensed to practice law. He must be able to perform duties in almost every aspect of the law, and dispose of a monumental number of cases. He must also be able to resist the temptations of the spoils that accompany high conviction rates, and remember that justice is utmost in all circumstances. Perhaps most incredibly, he must be willing to do all of this for the pay of a public official.

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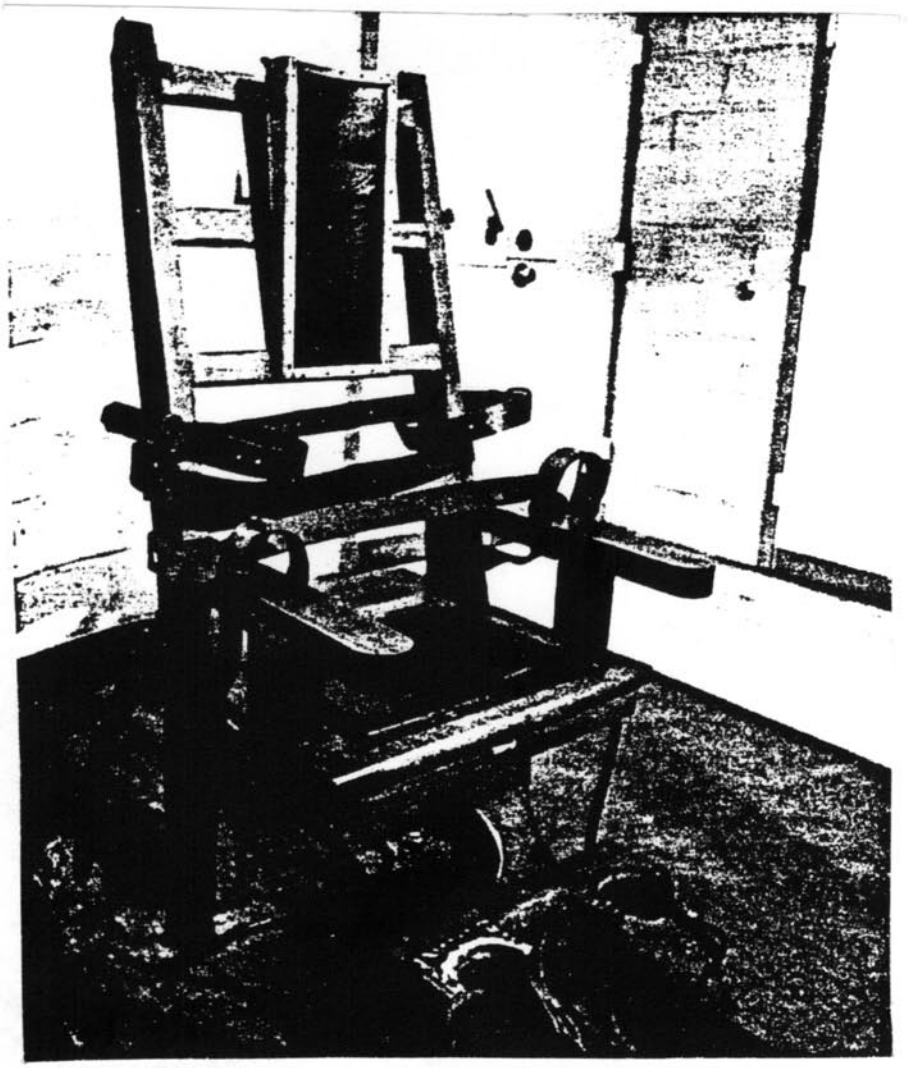
[2] *See* R. Adams, *Adams v. Texas* at 301.

Figure 2 Because Dallas County, Texas, District Attorney Henry Wade became overly concerned with his 100% conviction rate, innocent Randall Adams faced the electric chair.



SOURCE: American Constitutional Law, Stephens and Scheb, p.843.

Abuse of Prosecutorial Discretion

As we have already found, a prosecutor in the United States enjoys a degree of discretion that is unparalleled in the legal systems of the Western World.[3] And, as James Madison told us, "a governmental body wielding unbridled discretionary power is certain to abuse that power."[4] Just as a governmental body can take advantage of its discretionary power, so may a prosecutor. We like to think that abuses of this power are rare; still we know that they do occur at least occasionally. As we have seen, there are many reasons why a prosecutor would like to enter into plea negotiations and avoid a full-blown trial: if the evidence obtained against the defendant of is not overly compelling, if the defendant has retained a highly skilled and successful defense attorney, if the prosecutor does not have the resources (money, witness) to prosecute successfully, or simply if there is a large backlog of cases that must be disposed of. If a defendant refuses to submit a plea of guilty (or if he does any other thing which might complicate a case for a prosecutor) under these circumstances, the prosecutor has a legitimate interest in denying a defendant the exercise of his constitutional or statutory rights to a trial, which may delay the outcome of the case and require the prosecutor to use valuable time and money. Therefore, it is not beyond the realm of possibility that a prosecutor, facing these dilemmas, might threaten and punish a defendant choosing to

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[3] *See* M. Garnick, *Two Models of Prosecutorial Vindictiveness*, in The Georgia Law Review at 467 (Winter '83).

[4] *Id.* at 474.

exercise his rights by forcing him to risk suffering a greater penalty. "This type of retaliation clearly constitutes a more serious abuse of discretionary authority, for it punishes a person under color of law for doing what the law plainly allows."[5] The Supreme Court has ruled that vindictiveness of this sort is "a due process violation of the most basic sort" and a "flagrant violation of the fourteenth amendment" due process clause.[6] Even though the Supreme Court has clearly ruled that prosecutorial vindictiveness is an abuse of the prosecutor's power, there has been much debate about what kind of behavior actually is considered vindictive by a prosecutor. In order to understand the present law regarding prosecutorial vindictiveness, we must have an understanding of how the present doctrine of prosecutorial vindictiveness came about. What follows then, is a case study of the issue of prosecutorial vindictiveness.

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[5] *Id.* at 475.

[6] *See* R. Castro, *Prosecutorial Vindictiveness in the Fifth Circuit*, in The Thurgood Marshall Law Review at 179 (Fall '85).

The Doctrine of Prosecutorial Vindictiveness

A. Judicial Vindictiveness is Defined and Outlawed

1. *North Carolina v. Pearce*

The first decision in the area of vindictiveness addressed the issue of judicial vindictiveness. This question came to the courts in the form of *North Carolina v. Pearce.* In this case, the defendant had originally been convicted of assault with intent to commit rape and had been given a sentence of 12-15 years. Some years later the conviction was set aside due to a successful appeal that the defendant's confession had been obtained unconstitutionally. At this time, Pearce was retried, reconvicted, and resentenced before the same judge that had done so in his initial trial. This time, however, the judge gave him a sentence that was three years longer than his first sentence. Because of the increased sentence, Pearce once again appealed, claiming that he had been a victim of double jeopardy and had been denied his rights to equal protection and due process.

The Supreme Court first dispelled the notion that Pearce had been the victim of double jeopardy or had been denied his rights to equal protection. The Court went on to say that if the longer sentence was handed down "for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside [it would constitute] a flagrant violation of the Fourteenth

Amendment."[7] In an important addition to this ruling, the Court declared that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motive on the part of the sentencing judge."[8] Also, the Court required that in cases in which a judge hands down a stricter sentence upon retrial the reasons for doing so must "affirmatively appear," and those reasons must be made a part of the record. As a result of this decision, judicial vindictiveness was effectively outlawed. "In essence, the *Pearce* decision established that judicial vindictiveness must play no role in resentencing a defendant upon retrial after successful appeal of his original conviction."[9] This decision declared that vindictiveness was outlawed not only in fact, but also in appearance, since the appearance of vindictiveness might cause enough apprehension in defendants to suppress them from exercising their constitutional rights to due process through appeals of convictions, and to provide extra assurance to defendants that a heavier sentence upon reconviction was not an inherent risk of appeals. The reasoning of this decision set up two distinguishing models of thought about vindictiveness. One such model of thought, often called the in-fact model, states that the primary purpose of the rule against prosecutorial vindictiveness is to prevent prosecutors from acting vindictively. The second model, often called the apprehension or appearance model, states that the primary purpose of the rule is to

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[7] 395 U.S. 723.

[8] *Id.*

[9] *See supra* note 6.

protect defendants from being deterred from exercising their constitutional rights.

2. *Colten v. Kentucky*

There was little controversy surrounding the first part of the Court's decision in *Pearce.* However, many were surprised that the Court outlawed tougher sentences in those cases almost completely, including cases were there was no evidence of actual vindictive behavior, since it allowed for the *appearance* of vindictiveness. In *Colten v. Kentucky* the defendant had been convicted of a misdemeanor in a lower court and had exercised his right to a trial de novo in a higher court. He was then tried under the same facts for a felony, and was convicted and sentenced more harshly. Upon appeal the Court made an exception to the appearance part of the *Pearce* decision, and instead applied only the in-fact standard of vindictiveness for this case (and subsequently others) because the defendant was retried and resentenced before a different judge. In stating that when a defendant exercised a right to a trial de novo he was risking an increased punishment if convicted, the Court asserted that the trial was a "fresh determination of guilt or innocence."[10] This reasoning was supported in that the first record was not a part of the second trial and that the judge was probably unaware of the original sentence and therefore could not deliberately increase the severity of the sentence.

3. *Chaffin v. Stynchcombe*

In this case, the Court extended the reasoning that excluded the apprehension model from cases in which a different judge presided

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[10] 407 U.S. 117 (1972).

to cases in which a different jury presided. The Court found that there was no danger of vindictiveness upon resentencing by a new jury for two reasons. First, the new jury would obviously be made up of different members. Second, the new jury should be unaware not only of the result but also the existence of the first trial. Therefore, it was unreasonable to apply the appearance standard of vindictiveness in this situation, and the defendant would have to prove not only that there was an opportunity for vindictiveness to occur, but that vindictiveness actually did occur.

In both *Colten* and *Chaffin* the Supreme Court focused more on whether or not actual vindictiveness was a possibility (the in-fact standard) and less on whether these decisions would cause apprehension among defendants and deter them from exercising their rights. The Court found that in Colten and *Chaffin* there was no real possibility of vindictiveness and applied the in-fact standard to deciding claims of vindictiveness. These cases differed from *Pearce* (which applied the appearance standard) because "vindictiveness is only a predictable threat in situations where the second sentencing party has a stake in the prior conviction and, thus, has a motive to be vindictive."[11]

B. The Idea of Vindictiveness is Extended to Prosecutors

1. *Blackledge v. Perry*

In 1974 the Supreme Court extended the standard of vindictiveness for judges to prosecutors in *Blackledge v. Perry.* In

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[11] 412 U.S. 18. (1972).

Blackledge the defendant, who was already serving a prison term, exercised his right to a trial de novo. Before the trial convened, the prosecutor returned to the grand jury and obtained an indictment which increased the charge against Perry from a misdemeanor to a felony. Upon pleading guilty, Perry was sentenced to a term that was seventeen months longer than his initial sentence for the same offense. Perry then petitioned the Supreme Court on the grounds that he had been a victim of double jeopardy and had been denied his rights to due process. Upon appeal, the Supreme Court declared that the prosecutor's power to seek a greater sentence was comparable to a judge's power to give a greater sentence.[12] They further noted that, like a judge, a prosecutor has comparable or even greater reasons to be vindictive: "appeal of the case increases the demand on scarce prosecutorial resources, a successful appeal increases the chances that a previously convicted defendant will be set free, and a high conviction rate has potential political importance."[13] Thus, the Court emphasized in *Blackledge* that the opportunity for vindictiveness was present, even though there was no evidence that the prosecutor had indeed acted vindictively. Since the prosecutor had a stake in the prior conviction, or at least a stake in preventing the use of resources in order to reconvict, this case was able to be determined according to the appearance standard. The Court found that the opportunity for vindictiveness was present, even though there was no actual evidence, and declared the stricter

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[12] *See* N. Whitehead, *Evaluating Prosecutorial Vindictiveness Claims in Non-plea-bargained Cases*, in The Southern California Law Review at 1138-39 (May '82).

[13] 417 U.S. 27.

sentence unconstitutional. In so doing the Court relied on the purpose of preventing the defendant's apprehension that he will be subject to an increased sentence as punishment for pursuing his rights.

2. *Bordenkircher v. Hayes*

Shortly after the Court reached its decision in *Blackledge* another question of prosecutorial vindictiveness arose in the form of *Bordenkircher v. Hayes.* In this case Hayes, the defendant, had been arrested and charged with the felony of forging a check in the amount of $88.30. This was punishable by a term of two to ten years. Although Hayes technically qualified as a habitual offender under the Kentucky Habitual Criminal Act, the prosecutor charged him based solely on his third arrest. During plea bargaining, the prosecutor offered to recommend a sentence of five years for Hayes in return for a guilty plea. At this time, Hayes was also informed that if he did not accept this agreement and plead guilty, the prosecutor would return to the grand jury and seek an indictment as an habitual offender. Hayes was informed that if he was convicted under the Habitual Criminal Act he would be subject to a mandatory life sentence because of his two prior felony convictions. In the subsequent trial proceedings the prosecutor described his plea offer in the following way: "Isn't it a fact that I told you at that time if you did not intend to plead guilty to five years for this charge and . . . save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?"[14] However,

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[14] 434 U.S. 357.

even after receiving this threat, Hayes chose not to plead guilty and insisted upon receiving his right to a trial. A jury then found Hayes guilty of the charge and of being convicted twice before of felonies, and subsequently handed down the mandatory life sentence. Hayes then filed an appeal based on the questionable constitutionality of the enhanced sentence.

The Supreme Court upheld Hayes' conviction with the increased sentence as constitutional. As Supreme Court Justice Stewart noticed in his majority opinion, "It is not disputed that the recidivist charge was fully justified by the evidence, that the prosecutor was in possession of this evidence at the time of the original indictment, and that Hayes' refusal to plead guilty to the original charge was what led to his indictment under the habitual criminal statute."[15] However, the opinion went on to note that all of this was immaterial "since the prosecutor's conduct did no more than openly present the defendant with the alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution."[16] Since the Court had decided that the "value of open plea bargaining outweighs the need to protect defendants from the possibility of prosecutorial vindictiveness,"[17] the effect of the decision in ***Bordenkircher*** was that it exempted prosecutorial behavior from the limitations imposed on it by prosecutorial vindictiveness during plea bargaining.

Unfortunately, however, the effects of ***Bordenkircher*** did not stop with plea bargaining. If it had, the issue of prosecutorial vindictiveness would be much simpler. However, in its majority

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[15] *Id* at 362.
[16] *Id* at 365.
[17] *Id.*

opinion the Court seemingly contradicted the stance it took in *North Carolina v. Pearce* and *Blackledge v. Perry* when it said, "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."[18] In other words, the Court was not only making an exception for plea bargaining, but was discarding the appearance standard for judging vindictiveness and applying the in-fact model. This portion of the Court's stance caused considerable confusion about the purpose of the ban against prosecutorial vindictiveness. Lower courts were left to wonder the whether the purpose is to protect defendants from being deterred from exercising their rights, as had been assumed by the *Pearce* and *Perry* precedents, or if it is to prevent prosecutors from acting vindictively, as the majority opinion of *Bordenkircher* had claimed.

3. *United States v. Goodwin*

Only a few years after the *Bordenkircher* decision, the Court once again had to answer a claim about prosecutorial vindictiveness. In *United States v. Goodwin*, a defendant was charged with a variety of misdemeanors. After a plea bargaining session in which the defendant declined to plead guilty and exercised his right to request that the trial be held before a jury instead of a judge, the prosecutor obtained a felony indictment based on the same facts as the original misdemeanors. The main difference in this case from *Bordenkircher* was that the prosecutor did not mention during the plea bargaining

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[18] 434 U.S. at 363.

agreement the possibility that he would seek to increase the charges if the defendant insisted upon his right to a jury trial. In addition, the prosecutor in this case produced an affidavit, to be included in the record, that listed the reasons for his increasing the charges and denied that the defendant's request for a jury trial or refusal to plead guilty was one of those reasons. Upon Goodwin's appeal that he had been a victim of prosecutorial vindictiveness, a panel of Fourth Circuit judges reversed the conviction and, citing *Pearce* and *Blackledge*, affirmed that the defendant should be free to exercise his right to a jury trial without "the apprehension of retaliation."[19] In addition, the Fourth Circuit somewhat surprisingly cited *Bordenkircher*, because it had condemned situations which led to the "unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right."[20]

Upon the Fourth Circuit's overturning of this case, the United States filed an appeal to the Supreme Court. In an interesting majority opinion by Justice Stevens, the Court upheld the original conviction, and remanded it to the lower court for sentencing. First the Court admitted that punishment "is the very purpose" of a criminal proceeding, and that "motives are complex and difficult to prove,"[21] and that "this reality had compelled the Court to establish a doctrine that requires the government to show that certain of its actions are not retaliatory."[22] However, the opinion went on to describe that this presumption of vindictiveness may only arise

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[19] *Goodwin*, 637 F. 2d at 253.
[20] *Id.*
[21] 457 U.S. at 372-73.
[22] *Id* at 373.

when there is a "reasonable likelihood that vindictiveness exists."[23] Furthermore, the opinion asserted that Goodwin's conviction could only be reversed if a presumption of vindictiveness was warranted."[24] Therefore, in order for the claim of prosecutorial vindictiveness to be decided by the appearance standard, the Court would have to determine through judging the situation that a "reasonable likelihood" of vindictiveness did indeed exist. Next, the opinion distinguished between pre-trial and trial or post-trial evaluations of vindictiveness. It stated that pre-trial claims of prosecutorial vindictiveness must adhere to a more difficult test, because there were several reasons why prosecutorial behavior that might be questionable during or after the trial would be more likely to be legitimate in a pre-trial setting. These reasons include the possibility of the discovery of additional evidence and the realization of the full significance of the evidence the prosecutor had already accumulated. The line of thought that produced this statement concluded by saying that evidence during the trial or after the trial was "more likely to have been discovered and assessed," and therefore changes in the charging decisions at that point were "more likely to be improperly motivated."[25] In addition, the opinion stated that defendants were "expected to raise procedural challenges before trial."[26] Finally, the opinion talked about the very nature of the right, insistence upon trial by jury instead of judge, that was being asserted. The Court concluded that this right, although it did require

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[23] *Id.*
[24] *Id* at 381.
[25] *Id.*
[26] *Id.*

somewhat more work by the prosecutor than trial by a judge, was not enough of a trouble either to the prosecutor or his resources to elicit a vindictive response. The majority opinion read, "the burdens of a jury trial are less significant than those imposed either by a general refusal to plead guilty, as in *Bordenkircher*, or a trial of any sort, as in *Blackledge.* Unlike the judge in Pearce or the prosecutor in Perry, a prosecutor has no stake in conducting a bench trial as opposed to a jury trial and is not being asked to do again that which he thought he had done correctly."[27]

According to all of this analysis (that the change in charging took place pre-trial, that the defense did not challenge the change at that point, and the fact that the defendant's insistence upon a jury trial did not cause the prosecutor a great deal of trouble), the opinion stated that it was not probable that the change was due to vindictiveness. Therefore, the Court discarded the appearance standard of vindictiveness and required that the case be judged by the in-fact standard. It is important to note however, that the Court did recognize the need and usefulness of the appearance standard for judging certain claims of prosecutorial vindictiveness. Instead of trying to ignore or change the earlier opinions of *Pearce* and *Blackledge*, as the *Bordenkircher* decision did, it openly asserted those decisions as both wise and valid, but logically outlined the situations which made the appearance standard inappropriate for this case. In *Goodwin*, the Court not only preserved but reiterated the appearance standard, although in so doing the Court limited its scope of application.

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[27] *Id* at 383.

C. The Present Doctrine of Prosecutorial Vindictiveness

The cases that have been outlined above are what make up the doctrine of prosecutorial vindictiveness today. From this synopsis the case law seems fairly complicated, but reasonable and even quite predictable. What it amounts to is this: there are two standards by which claims of prosecutorial vindictiveness may be tried (see figure 3). One is the in-fact standard. This standard has the sole purpose of preventing prosecutors from acting vindictively. This standard places the burden of proof upon the defendant to prove that the prosecutor acted vindictively towards him. It is used in situations upon which the prosecutor would have little or no motive for acting vindictively. Those situations would be ones in which the prosecutor had no stake in the previous conviction, would not be asked to "do again that which he thought he had done correctly," or would not be put to a measurable inconvenience or suffer a measurable loss of prosecutorial resources by allowing the defendant to exercise his full rights.

The other standard is the appearance standard. This standard has two primary purposes. One is to protect defendants from being deterred from exercising their rights by freeing them of the apprehension that a more severe sentence is an inherent risk of appeal or refusal to plead guilty. The other is to prevent prosecutors from acting vindictively. Sometimes the in-fact standard is inadequate to achieve this purpose because oftentimes "motives are complex and difficult to prove." The appearance standard places the burden of proof upon the prosecutor to prove that his behavior was

Figure 3

Two Standards for Evaluating Claims of Vindictiveness

CLAIMS ADJUDICATED BY THE APPEARANCE STANDARD

All of those cases in which the state has a motive to be vindictive, such as:

North Carolina v. Pearce

case retried before same judge as in first trial.

Blackledge v. Perry

case in which same prosecutor enhances charges after a successful appeal

CLAIMS ADJUDICATED BY THE IN-FACT STANDARD

All of those cases in which the state does not have a motive to be vindictive, such as:

Colten v. Kentucky

Case retried before a new judge.

Chaffin v. Stynchecombe

Case retried before a new jury.

United States v. Goodwin

case in which defendant insisted upon a trial by jury.

not vindictive. This standard is applied when the prosecutor has a motive to be vindictive. Situations that would provide this motive include those in which a prosecutor has had a stake in the previous trial, those in which a prosecutor is asked to "do again that which he thought he had done correctly," and those in which the right being exercised by the defendant would cost the prosecutor a measurable amount of his scarce resources.

Additionally, we should remember that there can be no claims of prosecutorial vindictiveness stemming from a prosecutor's behavior during plea bargaining. *Bordenkircher v. Hayes* served to carve out this important exception to the doctrine of vindictiveness in order to protect a prosecutor's power during plea bargaining. The Court eliminated all claims of vindictiveness within the plea bargaining context by observing that vindictiveness is "very different from the give and take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power,"[28] and "the importance of open plea bargaining outweighs the need to protect defendants from the possibility of prosecutorial vindictiveness."[29]

Still, many lower courts appear to be confused and unsure about how to judge cases of prosecutorial vindictiveness. Most of this confusion comes from a lack of knowing which standard should be used to determine prosecutorial vindictiveness in individual cases. For instance, the Sixth Circuit favors the in-fact standard ("the mere appearance of vindictiveness is not enough to trigger the *Pearce-*

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[28] 434 U.S. at 361.

[29] *See supra* note 17.

Blackledge sanctions."[30]) while the Ninth Circuit more closely applies the appearance standard. The biggest reason for this confusion is that these courts focus too much on the precedential effect of single cases rather than analyzing the line of reasoning displayed throughout the entire case law. The other reason for this confusion can be found buried in the portion of the *Bordenkircher* decision not dealing with plea bargaining that distorted the reasoning of the *Pearce* and *Blackledge* decisions. To alleviate this problem, lower courts should simply ignore that part of the decision and restrict *Bordenkircher* to its plea bargaining context. This is because the attempt it made to contradict the reasoning of earlier cases, in their own context, must be looked upon as being on rather shaky ground. In addition, it is important to note that *Bordenkircher* was an in-fact case (one in which the presence of vindictiveness was openly present and even admitted to) and thus should have little relevance to the pre-existing appearance of vindictiveness doctrine.[31]

Thus, while present application of prosecutorial vindictiveness claims seem to be somewhat confused, there is no real need for them to be. Claims of vindictive behavior stemming from plea negotiations are to be dismissed. The appearance standard for determining claims of vindictiveness is used under circumstances in which a prosecutor has a motive to be vindictive. In circumstances where there is no motive for vindictive behavior, courts should apply the in-fact standard.

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[30] 633 F.2d at 455.

[31] *See supra* note 19 at 253.

Conclusion

The prosecuting attorney is one of the most valuable and powerful public officials in today's society. He is the person who is charged with achieving justice swiftly and accurately, while burdened with only a scarcity of resources. In order to achieve this nearly impossible task the prosecutor is granted a large degree of discretion over the use of his power. In order to ensure that the prosecutor is qualified to handle all of the many tasks his job requires, he must go through a lengthy and difficult educational process.

However, upon receiving a position as a public prosecutor, the prosecutor will find that he not only needs a complete understanding of the law, but also needs to deal with the many pressures that are an inherent part of his job. A plethora of duties, a large backlog of cases, a scarcity of resources, and the spoils of an impressive conviction rate all entice the prosecutor to take any shortcuts he can in order to successfully dispense with as many cases as possible. These pressures are what often lead the prosecutor to abuse his discretionary power.

One such abuse of a prosecutor's discretionary power is prosecutorial vindictiveness. This is defined by the courts as "the forbidden practice of penalizing a defendant's exercise of a right,"[32] hence it applies to any retaliatory conduct of a prosecutor's charging power. This retaliatory conduct usually occurs after a defendant

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[32] *See supra* note 6.

rejects a plea negotiation offered by a prosecutor or after a successful appeal of a conviction by a defendant.

The Supreme Court has set forth two standards for judging claims of prosecutorial vindictiveness: the in-fact standard and the appearance standard. The in-fact standard has the purpose of preventing the prosecutor from engaging in vindictive behavior and leaves the burden of proof upon the defendant to show that the prosecutor's actions were, in fact, vindictive. This standard is used to decide claims in which the prosecutor has no motive for engaging in vindictive behavior. The appearance standard has the purpose of protecting defendants from being deterred from exercising their constitutional rights by freeing them from the apprehension that a more severe sentence is an inherent risk of appeal or refusal to plead guilty. This standard places the burden of proof upon the prosecutor to show that his actions were not, in fact, vindictive. This standard is used in deciding claims in which the prosecutor has a motive to act vindictively. Because motives are nearly impossible to prove, the determination of which standard is to be used almost always determines the outcome of the claim.

One important exception to this rule arose in *Bordenkircher v. Hayes.* The decision in this case effectively disallowed claims of prosecutorial vindictiveness in plea bargaining contexts. This was a result of the Supreme Court's decision that "the value of open plea bargaining outweighs the need to protect defendants from prosecutorial vindictiveness."

The lower courts still seem to be confused about how to judge claims of prosecutorial vindictiveness. This seems to be a result of

traditional legal thinking, which stresses the importance of individual precedents. Unfortunately, these precedents have often been extended beyond their original scope of meaning. Courts need to understand that when a new situation in this issue arises, the outcome of the case based on that situation applies only to that situation. They should not attempt to extend the new precedent to cover situations which have already been provided for. By analyzing the logic displayed throughout the entirety of cases that make up the case law, instead of dwelling solely on particular decisions, these courts would find that the present doctrine of prosecutorial vindictiveness is fairly easy to understand and can even be quite predictable.

Selected Glossary

ADJUDICATE: To hear and decide a case of law.

CASE LAW: Law based on previous judicial decisions, or precedents; distinguished from statute law.

PROSECUTORIAL VINDICTIVENESS: The forbidden practice of penalizing a defendant's exercise of a right.

TRIAL DE NOVO: A completely new retrial; no records of the past trial are allowed, no testimony of the past trial is allowed, and the outcome of the past trial has no bearing upon the new retrial.

Works Consulted

Castro, Roy. "Prosecutorial Vindictiveness in the Fifth Circuit." v11 Thurgood Marshall Law Review (Fall 1985): 177-200.

Erlinder, Peter, and David Thomas. "Prohibiting Prosecutorial Vindictiveness While Protecting Prosecutorial Discretion: Towards a Principled Resolution of a Due Process Dilemma." v 76 The Journal of Criminal Law and Criminology (Spring 1985): 341-343.

547 Federal Reporter, 2d Series. *"Hayes v. Cowan."* 42-45.

Garnick, Murray. "Two Models of Prosecutorial Vindictiveness." v 17 Georgia Law Review. (Winter 1983): 467-507.

Glenn, John. "Supreme Court's Views as to Plea Bargaining and Its Effects." United States Supreme Courts Reports 876-882.

McGoey, Christine. "Prosecutorial Vindictiveness and the Plea Bargaining Exception: *Bordenkircher v. Hayes* Four Years Later." v13 Loyola University Law Journal (Summer 1982): 1011-1031.

Nemerson, Steven. "Coercive Sentencing." v64 Minnesota Law Review (April 1980): 669-750.

Rubin, Richard. "The Resurrection of the Right Privilege Distinction?" v7 Hastings Constitutional Law Quarterly (Fall 1980): 165-215.

Scheb, John M. II, and Otis H. Stephens. American Constitutional Law. St. Paul: West 1993.

Schwartz, Barbara. "The Limits of Prosecutorial Vindictiveness." v69 Iowa Law Review (Oct. 1983): 127-208.

434 United States Reports. 357; 54 L. Ed.2d 604 (1978).

98 United States Supreme Court Reports. 663; 54 L. Ed2d 604 (1978).