Bordenkircher v. Hayes: Prosecutorial Discretion during Plea Bargaining

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BORDENKIRCHER v. HAYES: PROSECUTORIAL DISCRETION DURING PLEA BARGAINING

INTRODUCTION

Paul Lewis Hayes was indicted by a Fayette County, Kentucky grand jury on a charge of uttering a forged instrument, an offense punishable by a prison term of two to ten years. During plea negotiations, the prosecutor offered to recommend a sentence of five years in prison in return for Hayes' pleading guilty. He also told Hayes that if he did not plead guilty, he would be reindicted under the Kentucky Habitual Criminal Act, which would, upon conviction of this third felony offense, subject Hayes to a mandatory sentence of life imprisonment. Hayes refused to plead guilty and the prosecutor carried out his threat. Hayes was subsequently convicted and received a life sentence pursuant to the Habitual Criminal statute.

The Kentucky Court of Appeals rejected Hayes' constitutional objections to the mandatory life sentence. The United States District Court for the Eastern District of Kentucky dismissed Hayes' petition for a writ of habeas corpus. The Sixth Circuit reversed, holding that the "vindictive exercise of [the] prosecutor's discretion . . . [placed Hayes] in fear of retaliatory action for insisting upon his constitutional right to stand trial," thus violating the principles of North Carolina v. Pearce and Blackledge v. Perry. The United States Supreme Court reversed. The Court found that "no . . . element of punishment or retaliation," as prohibited by Pearce and Perry, existed in the "'give-and-take' of plea bargaining" involved here. Bordenkircher v. Hayes, 98 S. Ct. 663 (1978).

3. Hayes v. Cowan, No. 73-766 (Ky., filed March 1, 1974). Hayes appealed on three grounds: (1) that the evidence was insufficient to support a conviction, (2) that the trial court erred in failing to instruct the jury on the requirement of corroboration of the testimony of an accomplice, and (3) that he was denied due process of law because the mandatory life sentence constituted cruel and unusual punishment.
4. Hayes v. Cowan, No. 75-61 (E.D. Ky., filed June 11, 1975). In Hayes' petition, he asserted that selective application of the habitual criminal statute constituted cruel and unusual punishment and that the vindictive application of that statute was an unconstitutional implementation of plea bargaining which violated his right to due process of law.
I. Plea Bargaining and Discretionary Limitations on the Resentencing of Defendants

Plea bargaining has become an essential, although controversial, component of the criminal justice system, enabling prosecutors to obtain guilty pleas in return for promises of leniency in charging or recommending sentences. The decision to plead guilty is of grave importance to a criminal defendant, for in so doing he waives his fifth amendment right not to incriminate himself as well as his sixth amendment rights to a jury trial and confrontation of his accusers. For this reason, the courts accept only those guilty pleas which appear to be voluntarily and intelligently made. Surprisingly, considering the gravity of the rights involved, the Supreme Court did not fully address the issue of the validity of plea bargaining until recently. For decades it was a sub rosa process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges. The Supreme Court first indicated its acceptance of plea bargaining in Brady v. United States. In Brady, the defendant claimed that his guilty plea was involuntary because the Kidnapping Act provided for the death penalty only in jury trials, and thus coerced his plea. The Court held Brady's guilty plea to be valid, and


9. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 135 (1967) [hereinafter cited as CHALLENGE OF CRIME]. In some jurisdictions guilty pleas account for the disposition of as many as 95% of all criminal cases. ABA Project on Standards for Criminal Justice, Standards Relating to the Administration of Criminal Justice 299 (1974). See also CHALLENGE OF CRIME, supra at 134, citing a figure of 90%.

10. "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." Kercheval v. United States, 274 U.S. 220, 223 (1927).


12. Blackledge v. Allison, 431 U.S. 63, 76 (1977) (footnote omitted). The defendant in Blackledge was instructed to deny that any plea bargaining had taken place so that his guilty plea would be accepted by the judge. See also CHALLENGE OF CRIME, supra note 9, at 134; Fed. R. Crim. P. 11, Notes of Advisory Committee on Rules.


15. See text accompanying notes 76-80 infra.
in doing so equated it with guilty pleas obtained in a number of plea bargaining situations.\textsuperscript{16} Finally, in \textit{Santobello v. New York},\textsuperscript{17} the Court held plea bargaining to be constitutional, and acknowledged it as a necessary practice; without it, "the States and the Federal Government would need to multiply by many times the number of judges and court facilities."\textsuperscript{18} In \textit{Blackledge v. Allison},\textsuperscript{19} the Court praised the plea bargaining process, saying that it works to the benefit of all concerned:

The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.\textsuperscript{20}

In plea bargaining, as in other areas, courts and prosecutors are vested with enormous discretion,\textsuperscript{21} but a number of cases have made it clear that under no circumstances may the prosecutor or the court exercise its discretion in a vindictive manner that interferes with a defendant’s exercise of his constitutional rights.

In \textit{North Carolina v. Pearce},\textsuperscript{22} the Supreme Court held that a court may not impose a heavier sentence upon a defendant for having successfully appealed his first conviction. Such action, said the Court, constitutes a violation of the defendant’s procedural due process rights, since it imposes a penalty for the exercise of his right to appeal or to collaterally attack a conviction. The court still has the power, upon retrial, “to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction,”\textsuperscript{23} but vindictiveness against the defendant for successfully appealing his conviction must play no part in such resentencing;\textsuperscript{24} the very possibility of this retaliation serves to “chill

\begin{itemize}
\item \textsuperscript{16} 397 U.S. at 751.
\item \textsuperscript{17} 404 U.S. 257 (1971).
\item \textsuperscript{18} Id. at 260.
\item \textsuperscript{19} 431 U.S. 63 (1977).
\item \textsuperscript{20} Id. at 71 (footnote omitted).
\item \textsuperscript{21} See, e.g., K. Davis, \textit{Discretionary Justice: A Preliminary Inquiry} 224 (1969); \textit{Association of the Bar of the City of New York, Special Committee on Courtroom Conduct, Disorder in the Court} 170-78 (1973).
\item \textsuperscript{22} 395 U.S. 711 (1969).
\item \textsuperscript{23} Id. at 720 (footnote omitted).
\item \textsuperscript{24} Id. at 725. \textit{See also} Blackledge v. Perry, 417 U.S. 21, 27 (1974).
\end{itemize}
the exercise of [those] basic constitutional rights” by those still in prison.25 The Court formulated a rule to insure the absence of such vindictiveness: whenever a defendant receives a greater sentence upon retrial, the reasons for imposing the greater sentence must appear in the record, and imposition of the greater sentence must be based on “identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.”26 This in effect created a rebuttable presumption of vindictiveness which could be overcome by a showing of the requisite amount of “identifiable conduct.”27

Although Pearce addressed itself only to the sentencing decisions of the courts, a number of lower courts have applied the Pearce principle to prosecutorial discretion. In Sefcheck v. Brewer,28 the district court found the prosecutor’s reindictment of the defendant on a more serious charge, after the defendant had been granted a writ of habeas corpus, to be impermissible in the absence of a “legally justified, compelling reason . . . .”29 In United States v. Jamison,30 the court applied Pearce to a situation involving reindictment of the defendant on a more serious charge after the defendant had been granted a mistrial. To overcome the possibility of vindictiveness, it was held, the record must contain proof of “intervening events or . . . new evidence of which the government was excusably unaware at the time of the first indictment.”31 In United States v. Gerard,32 a case factually similar to Hayes, the Ninth Circuit held that the prosecutor’s conduct violated the Pearce principle when he reindicted a defendant on an extra count after the defendant withdrew a guilty plea.33

The Supreme Court finally applied the Pearce principle to prosecutorial conduct in Blackledge v. Perry.34 The prosecutor successfully sought to indict Perry for a felony after he had been granted a trial de novo for a misdemeanor conviction. The indictment covered the

25. 395 U.S. at 724 (quoting United States v. Jackson, 390 U.S. 570, 582 (1968)).
26. 395 U.S. at 726.
27. The Pearce court implied the existence of this rebuttable presumption when it required that “the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.” Id.
29. Id. at 795.
30. 505 F.2d 407 (D.C. Cir. 1974).
31. Id. at 417.
32. 491 F.2d 1300, 1304-07 (9th Cir. 1974).
same conduct for which the defendant had originally been tried and convicted. The Court stated:

[a] person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one. . . . Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process.

The Ninth Circuit extended *Perry* to a situation involving pretrial conduct in *United States v. Ruesga-Martinez*. There, the prosecutor obtained a felony indictment against the defendant under a habitual offender statute, after initially charging him with a misdemeanor, because the defendant refused to waive his right to be tried by a district judge and a jury. The court reversed and remanded, holding that "the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive." It would seem, then, that "prosecutorial vindictiveness can be

35. Id. at 23.
36. Id. at 28.
37. 534 F.2d 1367 (9th Cir. 1976). In a number of cases, however, courts have upheld reindictments on more serious charges pursuant to the standards set by *Pearce* and *Perry*. In *Diaz v. United States*, 223 U.S. 442 (1912), decided well before those cases, the defendant was originally indicted for assault, but the prosecutor was allowed to reindict him for homicide when the victim died subsequent to the original trial. In *United States ex rel. Williams v. McMann*, 436 F.2d 103 (2d Cir. 1970), *cert. denied*, 402 U.S. 914 (1971), the Second Circuit upheld the prosecutor's actions when he reindicted the defendant on more serious charges after the defendant withdrew his guilty plea. The court based its decision on the fact that the defendant had originally been indicted on the more serious charge, which had been dropped in return for his guilty plea. In *United States v. Butler*, 414 F. Supp. 394 (D. Conn. 1976), the court found it permissible to reindict the defendant on an extra charge for an act which occurred after those for which he was initially charged. The Ninth Circuit, in *United States v. Preciado-Gomez*, 529 F.2d 935 (9th Cir.), *cert. denied*, 425 U.S. 953 (1976), approved the prosecutor's reindictment of the defendant on two extra counts after the prosecutor learned of new facts during testimony at the initial trial which supported the extra charges, thus expanding *Perry* from "identifiable conduct" occurring after the original sentencing to cover the acquisition of new facts by the prosecutor relating to prior conduct. See also notes and text accompanying notes 31-32.

The impact of the *Perry* rule was diminished in the Eighth Circuit in *Percy v. South Dakota*, 443 F.2d 1232 (8th Cir.), *cert. denied*, 404 U.S. 886 (1971). *Percy* had been convicted of indecent molestation of a five year old child, for which he received a sentence of forty years in the state penitentiary. Upon the reversal of that conviction, he was reindicted for kidnapping, based on the same event as the reversed indecent molestation conviction. *Percy* was found guilty of kidnapping and sentenced to life imprisonment. The Eighth Circuit upheld this conviction and the greater sentence, stating "[w]e do not interpret the decision in *North Carolina v. Pearce*, supra, to apply to another offense arising out of the same transaction." 443 F.2d at 1237.

38. 534 F.2d at 1369 (footnote omitted).
no less an affront to those values we characterize as 'due process' than judicial vindictiveness."\(^{39}\)

The Supreme Court decisions in *Pearce* and *Perry* dealt with reindictment or resentencing after prior convictions had been overturned. Even those lower court decisions involving pretrial rights did not involve plea bargaining. Thus, it remained unclear, until Paul Hayes' reindictment under the Kentucky Habitual Criminal statute, how the *Pearce* rule would be applied to the process of plea bargaining.

II. **BORDENKIRCHER V. HAYES**

Justice Stewart, writing for the Court, stated that the decision was based on the unique characteristics of the plea bargaining process. The Court acknowledged the vital role of plea bargaining in the functioning of the criminal justice system, and equated Hayes' reindictment on the more serious charge with the situation in which the defendant had been indicted "as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargaining."\(^{40}\) The Court distinguished *Pearce* and *Perry* as cases dealing with the imposition of penalties on defendants' constitutional rights to appeal, which it considered "very different from the give-and-take negotiation common in plea bargaining between the prosecution and the defense, which arguably possess relatively equal bargaining power."\(^{41}\)

In making this distinction, the Court also cited "'the mutuality of advantage' to defendants and prosecutors" and the fact that the "accused is free to accept or reject the prosecution's offer."\(^{42}\) The Court said that the very acceptance of plea bargaining as a method of obtaining guilty pleas recognizes both that the prosecutor has an interest in inducing the defendant to plead guilty, and that the defendant must choose between accepting the prosecution's offer (thus waiving his procedural rights) or facing the risk of more severe punishment upon conviction. That a defendant is induced to plead guilty


\(^{40}\) Bordenkircher v. Hayes, 98 S. Ct. 663, 666 (1978). The Court of Appeals found the two situations to be distinguishable, holding that the first contained an impermissible possibility of prosecutorial vindictiveness. Hayes v. Cowan, 547 F.2d 42, 44-45 (6th Cir. 1976).

\(^{41}\) 98 S. Ct. at 667 (citing Parker v. North Carolina, 397 U.S. 790, 809 (1970)).

\(^{42}\) 98 S. Ct. at 668.
by the prosecutor's promises of leniency does not detract from the voluntariness of the plea. The Court held that while there are constitutional limits to the exercise of a prosecutor's discretion, the prosecutor's actions in the present case did not exceed those limits. The defendant was merely forced to make a choice regarding his exercise of constitutional rights within the acceptable bounds of the essential practice of plea bargaining.

Justice Blackmun, joined by Justices Brennan and Marshall, dissented. He saw the thrust of Perry to be the prohibition of prosecutorial vindictiveness, and felt that the Perry rule requiring the prosecution to rebut the possibility of vindictiveness should have been extended to the process of plea bargaining. Justice Blackmun found "little difference between vindictiveness after . . . the exercise of a 'legal right to attack his original conviction,' and vindictiveness in the 'give-and-take negotiation common to plea bargaining.'" Reindicting Hayes under the Habitual Criminal statute created a "'strong inference' of vindictiveness" which required the prosecution to "justify its action on some basis other than discouraging respondent [Hayes] from the exercise of his right to a trial." In this case, in fact, Blackmun found proof of such vindictiveness, citing the prosecutor's remarks at trial. Justice Blackmun realized that the application of the Pearce principle to plea bargaining might lead to prosecutors' bringing the greatest possible charge in every case so as to avoid scrutiny under Pearce, but, nonetheless, found it "far preferable to hold the prosecution to the charge it was originally content to bring and to justify in the eyes of its public."

Justice Powell, dissenting in a separate opinion, also felt that the prosecutor's actions denied Hayes due process, citing the prosecutor's remarks as evidence of his intent to discourage Hayes' exercise of his

43. Id. at 670 (Blackmun, J., dissenting).
44. Id.
45. Id.
46. Id. During cross-examination the prosecutor asked Hayes:
Isn't it a fact that I told you at [the initial bargaining session] that if you did not intend to plead guilty to five years for this charge and . . . save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?
Id. at 665 n.1. See also Hayes v. Cowan, 547 F.2d 42, 43 n.2 (6th Cir. 1976). Obviously, Justice Blackmun felt that the prosecutor was more concerned with "getting back" at Hayes for not pleading guilty rather than "saving the court the inconvenience and necessity of a trial."
47. 98 S. Ct. at 670 (footnote omitted).
His decision, however, was based not on the prosecutor's timing, but rather on the impropriety of the charge considering the conduct on which it was based. It would have been "unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment" in the first instance, for forging an $88.30 check, and Justice Powell found it equally unreasonable to escalate the charge after Hayes had refused to plead guilty.48

Justice Powell did state, however, that "a prosecutor would be fully justified in seeking a fresh indictment for a more serious offense [if] it would have been reasonable and in the public interest initially to have charged the defendant with the greater offense."50 Thus, his opinion may be read as supporting the majority's view except in cases where there is clear proof of improper motive on the part of the prosecutor, in this case the bringing of a charge not warranted by the facts.

III. VALIDITY OF GUILTY PLEAS AND METHODS OF OBTAINING GUILTY PLEAS IN LIGHT OF HAYES

Courts in the past have recognized the need to limit prosecutorial discretion and have made some attempts to check such abuse, both within the context of obtaining guilty pleas,51 as well as in other areas.52 For example, to insure adequate appellate review of the voluntariness and validity of a plea a record must be made of the judicial proceedings in which the guilty plea is offered.53 In Hayes, the

48. Id. at 671 (Powell, J., dissenting).
49. Id. at 672.
50. Id.
52. For example, a prosecutor may not use a criminal proceeding to forestall a civil suit by the defendant against a policeman. McDonald v. Musick, 425 F.2d 373 (9th Cir.), cert. denied, 400 U.S. 852 (1970). In general, a prosecutor may not exercise discrimination with regard to which individuals he chooses to prosecute. See generally Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 588 (1961); United States v. Falk, 479 F.2d 616 (7th Cir. 1973); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972); United States v. Crowthers, 456 F.2d 1074, 1080 (4th Cir. 1972); Washington v. United States, 401 F.2d 915, 924-25 (D.C. Cir. 1968); Moss v. Hornig, 314 F.2d 89, 92-93 (2d Cir. 1963), at least so far as such discrimination is based upon an unjustifiable standard such as race, religion, or other arbitrary classifications, see Oyler v. Boles, 368 U.S. 448, 456 (1962), though claims of such discriminatory prosecution have often proven difficult to sustain in the face of burdens put on the defendant. See, e.g., United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974); United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973).
Court had to decide whether to extend the prophylactic rule of *Pearce* and its progeny to prosecutorial conduct during plea bargaining and to require a showing of "identifiable conduct on the part of the defendant" occurring during the plea negotiations to justify a re-indictment of the defendant on a more serious charge.

More exactly, the question confronted by the Court was one of timing; whether the prosecutor's course of conduct was truly analogous to the typical plea bargaining situation in which a prosecutor initially brings the more severe charge and later offers to drop it in return for a guilty plea, or whether it differed from that situation to such an extent as to constitute constitutionally impermissible behavior. If the decision initially to indict Hayes without the Habitual Criminal charge and later threaten him with it upon his refusal to plead guilty were held not to be within the acceptable parameters of plea bargaining, then it might well be proper to invoke the *Pearce* rule and require a showing of "identifiable conduct" to justify the re-indictment on that charge.

Although the *Pearce* and *Perry* decisions place much emphasis on vindictiveness, there seem to be four main factors discussed in *Pearce* and *Perry*, as well as in *Hayes*, that must be considered in determining the validity of the prosecutor's actions in *Hayes*: (1) the extent to which such conduct constitutes punishment of the defendant's exercise of his constitutional right to plead not guilty, (2) the possible deterrent effect on other similarly situated defendants from exercising their constitutional rights to plead not guilty, (3) the voluntariness of a plea of guilty in this type of situation, and (4) the possibility of vindictiveness on the part of the prosecutor.

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55. The majority indicated that it would have been proper for the prosecutor to have initially indicted defendant Hayes under the Habitual Criminal Act. *98 S. Ct. at 666. Contra, id. at 672 (Powell, J., dissenting); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES § 350.3(3)(b) (1975); ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, The Prosecution Function § 2.5(b), suggesting that it is not always proper for a prosecutor to seek an indictment on the maximum charge possible based on the facts before him.


The first factor, punishment, was emphasized in *Pearce* when the Court stated that the State may not impose a penalty on those defendants who have successfully exercised their constitutional rights.

It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. Where . . . the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, "penalizing those who choose to exercise" constitutional rights, "would be patently unconstitutional." . . . But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal, or collateral remedy would be no less a violation of due process of law.\(^6\)

In *Hayes* the Court interpreted the thrust of *Pearce* and *Perry* as being against such punishment or retaliation,\(^62\) but found no such element in the "'give-and-take' of plea bargaining."\(^63\) The Court thus implicitly held the prosecutor's actions to be free of any element of punishment when it equated his actions with the normal plea bargaining scenario of initially indicting Hayes on the greater charge and offering to drop it in return for a guilty plea.\(^64\)

In either situation the defendant is faced with the choice between waiving procedural rights (right to trial, right to plead not guilty, right to be proven guilty beyond a reasonable doubt) and facing the greater punishment upon conviction. Nonetheless, the two types of plea bargaining situations do have important differences. The prosecutor's timing in *Hayes* (i.e., bringing the greater charge after the defendant has refused the plea offer) at least strongly resembles punishment for not pleading guilty to the lesser charge. If the prosecutor had originally set the stakes higher by charging Hayes under the Habitual Criminal statute in the first indictment, this could not have been punishment since the prosecutor would not yet have known whether Hayes would choose to exercise his procedural rights or accept the plea offer.\(^65\) Resetting the stakes after Hayes did in fact

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\(^62\) 98 S. Ct. at 667-68.

\(^63\) *Id.* at 668.

\(^64\) *Id.* at 666.

\(^65\) This statement, as well as the entire analysis of the case, is based upon the assumption that it would have been proper for Hayes to have been indicted under the
choose to exercise those rights can be nothing less than unacceptable punishment. The distinction between the two prosecutorial approaches may appear to be small, as it did to the majority, but it assumes greater importance if the rule prohibiting punishment of defendants' exercise of constitutional rights is viewed not only as a safeguard for defendants, but as a method of enhancing the public confidence in the criminal justice system and the officers entrusted with running that system. The courts must guard against the appearance of impropriety in prosecutorial behavior, as well as the actual abuse of defendants' rights. That Hayes had been warned during the plea negotiations of the possibility of indictment on the more serious charge justified the prosecutor's actions, according to the majority. This seems to be nothing more than a distinction between punishing, and threatening to punish and then carrying out that threat. If the first is unacceptable, the second should be considered no better.

The second factor, that of the possible deterrent effect on other similarly situated defendants, is not given much weight by the courts. Nevertheless, the courts do cite the possible deterrent effect of official behavior on defendants' exercise of their constitutional rights as at least one of the factors to take into account in protecting defendants' rights. In *Pearce*, the Court stated that "due process also

Habitual Criminal statute initially. See 98 S. Ct. at 670, n.2 (Blackmun, J., dissenting). See also note 55 supra. Contra, 98 S. Ct. at 672 (Powell, J., dissenting).

66. See 98 S. Ct. at 670 (Blackmun, J., dissenting): "[I]t is far preferable to hold the prosecution to the charge it was originally content to bring and to justify in the eyes of its public" even if this results in prosecutors bringing the greater charge initially in every case. In a footnote, Justice Blackmun continued:

[ID. at 670, n.2.

67. *Id.* See also Blackledge v. Perry, 417 U.S. at 27-29 (emphasizing the "realistic likelihood of 'vindictiveness'" and the "potential for vindictiveness"); United States v. Gerard, 491 F.2d 1300, 1304 (9th Cir. 1974) (holding the "appearance of vindictiveness" to be constitutionally impermissible). Though these cases dealt more with vindictiveness, the fourth factor to be discussed, than with punishment, the "public relations" aspects of Justice Blackmun’s dissent, note 66 supra, are mirrored in the courts' concern with "appearances" and "potentials."

68. 98 S. Ct. at 666.

69. Though deterrence does receive some mention, none of the plea bargaining or *Pearce* line of cases has been decided on deterrence alone. This may well be due to its highly speculative nature.
requires that a defendant be freed of apprehension of . . . a retaliatory motivation” on the part of the sentencing judge.70 The Pearce Court noted that the possible “chilling effect” of such apprehension on the exercise of constitutional rights by other defendants is violative of due process.71 Fear of retaliation by the state should not be allowed to deter a defendant’s exercise of the right to appeal or collaterally attack his first conviction,72 nor should it be allowed to deter the exercise of the right to plead not guilty. The majority in Hayes explicitly minimized the importance of the potential deterrent effect on defendants.73 Considering, however, the possible punitive and retaliatory nature of the prosecutor’s actions,74 it may well be that if such methods were to become widespread, defendants would accept harsh plea bargaining agreements out of fear that they would be reindicted on greater charges should they refuse—a fear justified by the Supreme Court’s endorsement of that procedure in Hayes.

The third factor, voluntariness, is perhaps the most important of the four in determining the validity of a plea. In a number of cases, courts have found the lack of voluntariness of a plea to be sufficient cause for invalidating a conviction. In Walker v. Johnston75 the Supreme Court held that a prosecutor could not deceive or coerce a defendant into pleading guilty. Courts have found coercion sufficient to reverse convictions in situations where defendants were threatened with physical violence,76 physically coerced,77 or threatened with the imposition of the maximum sentence possible.78 In Pearce, the Court stated that

A court is “without right to . . . put a price on an appeal. A defendant’s exercise of right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given the court to determine sentence to place a defendant in the dilemma of making an unfree choice.”79

70. 395 U.S. at 725.
71. Id. at 724.
72. See text accompanying note 39 supra.
73. “The Court has emphasized that the due process violation in cases such as Pearce and Perry lay not in the possibility that a defendant might be deterred from the exercise of a legal right . . .” 98 S. Ct. at 667 (citations omitted).
74. See text accompanying notes 65-68, supra.
75. 312 U.S. 275 (1941).
76. See Waley v. Johnston, 316 U.S. 101 (1942). In Chambers v. Florida, 309 U.S. 227, 239 (1940) the defendant was filled with “terror and frightful misgivings.”
79. 395 U.S. at 724 (citing Worcester v. Commissioner, 370 F.2d 713, 718 (1st Cir. 1966)).
The facts of *Hayes* precluded significant discussion of voluntariness because Hayes did not in fact plead guilty; thus he could not claim that his plea had been coerced by the prosecutor. Notwithstanding this factual setting, a discussion of voluntariness might still be appropriate if couched in terms of whether the prosecutor's actions imposed an "impermissible burden" on the defendant, a term formulated by the Court in *United States v. Jackson*.

The *Jackson* Court held section 1201(a) of the Kidnapping Act to be unconstitutional, finding that it imposed an "impermissible burden" upon the assertion of a constitutional right. The *Jackson* holding might theoretically be applied to a case such as *Hayes* where the defendant was not in fact coerced into giving up any constitutional rights, but was nevertheless faced with a choice arguably constituting an "impermissible burden." It would seem, however, that the prosecutor's timing in *Hayes* cannot be distinguished from the normal plea bargaining scenario on an "impermissible burden" theory. Whether the prosecutor indicted Hayes under the Habitual Criminal statute initially, later offering to drop that charge, or chose not to bring the charge initially, later threatening to bring it, Hayes would have been faced with the same choice: plead guilty and take the five year sentence, or plead not guilty and face the possibility of a life sentence.

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80. 390 U.S. 570, 583 (1968).
82. Section 1201(a) of the Kidnapping Act provided for the death penalty "if the verdict of the jury shall so recommend." There was no procedure for imposing the death penalty on a defendant who pleaded guilty or waived a jury trial. The defendant in *Jackson* claimed that the risk of death was the price he had to pay for asserting the right to a jury trial. The Court held that this discouraged the assertion of the fifth amendment right to plead not guilty and deterred the exercise of the sixth amendment right to demand a jury trial, which resulted in the imposition of an impermissible burden upon the assertion of a constitutional right. The evil in the statute was not that it "necessarily coerces ... but simply that it needlessly encourages [guilty pleas and jury waivers]." 390 U.S. at 583.
83. In *Hayes*, however, the majority indicated that voluntariness could never be brought into question in a plea bargaining situation. 98 S. Ct. at 668.
84. The application of the "impermissible burden" theory of *Jackson* was called into question by the Court's holding in *Brady v. United States*, 397 U.S. 742 (1970). In *Brady*, the Court refused to set aside the conviction of a defendant who had pleaded guilty under the same statute invalidated by the *Jackson* decision. The Court held that, although the death penalty provision tended to discourage a defendant from entering a plea of not guilty, a guilty plea entered under that statute was not necessarily involuntary:

Even if we assume that Brady would not have pleaded guilty except for the death penalty provision of § 1201(a), this assumption merely identifies the penalty provision as a "but for" cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act.
sible burden” theory were held to be applicable it would invalidate both types of plea bargaining. Clearly it does not invalidate the first, and therefore it cannot invalidate the second.

The fourth factor, vindictiveness, is a more subjective factor, and may be viewed as pervading the other three in its application to prosecutorial conduct. In Perry, the Court based much of its decision on the “realistic likelihood of ‘vindictiveness’” posed by the prosecutor’s behavior. In Colten v. Kentucky, the Supreme Court specifically cited vindictiveness as an important factor in determining the validity of a higher sentence imposed on a defendant after a trial de novo, although it denied the defendant relief by finding that “[t]he possibility of vindictiveness, found to exist in Pearce, is not inherent in the Kentucky two-tier system.”

The majority in Hayes made only brief mention of vindictiveness, and implied that it was not a factor in “the give-and-take negotiation common in plea bargaining . . . .” Thus, it refused to ex...

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Id. at 750. Thus, it would seem that a defendant faced with an unconstitutional choice would still have to prove that the choice actually made his actions involuntary, an impossible task for a defendant such as Hayes who had pleaded not guilty. The Supreme Court, in two other cases, also refused to invalidate guilty pleas which had been entered after allegedly coerced confessions. In Parker v. North Carolina, 397 U.S. 790 (1970), the Court stated that “an otherwise valid plea is not involuntary because induced by the defendant’s desire to limit the possible maximum penalty to less than that authorized if there is a jury trial.” Id. at 795. In McMann v. Richardson, 397 U.S. 759 (1970), the defendants were truly faced with a difficult choice of constitutional proportions. At the time of defendants’ trials, the New York procedure was for the jury to determine the voluntariness of the confession as well as the defendant’s guilt. Rather than face the possibility that allegedly involuntary confessions would be offered against them, the defendants chose to plead guilty. The Supreme Court upheld the convictions, reasoning that if the defendants’ confessions had really been involuntary, they would have gone to trial since the confessions would have been unusable. Id. at 768.

The “Brady trilogy” (Brady, Parker, and McMann) has been criticized as imposing a rule of absolute waiver of constitutional rights upon a plea of guilty. See Alschuler, The Supreme Court, the Defense Attorney, and the Guilty Plea, 47 U. Colo. L. Rev. 1, 55 (1975); Note, The Waivability by Guilty Plea of Retroactively Endowed Constitutional Rights, 41 Ala. L. Rev. 115 (1977). The Court retreated from this position (if indeed it had ever taken it) in Blackledge v. Perry holding a defendant’s guilty plea invalid when it was induced by the prosecutor’s having reindicted him on a more serious charge after obtaining a trial de novo. 417 U.S. at 24-29.

85. See text accompanying notes 8, 9, 17-20 supra.

86. See, e.g., Blackledge v. Perry, 417 U.S. at 27 (1974). There the Court stated that the “lesson that emerges from Pearce, Colten, and Chaffin is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of ‘vindictiveness.’”

87. 417 U.S. at 27, 29. See also North Carolina v. Pearce, 395 U.S. at 725.


89. Id. at 116.

90. 98 S. Ct. at 667 (quoting Parker v. North Carolina, 397 U.S. 790, 809 (1970)).
tend Pearce to require a showing of "identifiable conduct on the part of the defendant" occurring after the initial indictment to justify the reindictment. Conversely, the dissent emphasized the importance of the "realistic likelihood of vindictiveness" in the prosecutor's actions, finding that vindictiveness was "present to the same extent as it was thought to be in Pearce and in Perry . . . ." The dissent's analysis of vindictiveness is similar to that found in United States v. Gerard. There, the Ninth Circuit disallowed the reindictment, conviction, and sentencing of a defendant on an extra count after he had withdrawn his guilty plea from a lesser charge. The court interpreted Pearce as holding that "absent some proper reason affirmatively shown for imposing a longer sentence after the first had been vacated by reason of error committed at the trial, an increase of sentence was constitutionally impermissible as bearing the appearance of vindictiveness for taking the appeal . . . ."

The Supreme Court has acknowledged the potential for vindictive reactions by a court whose findings have been challenged, or on the part of a judge who has been reversed. Similarly, a prosecutor whose offer of leniency for a guilty plea has been rebuffed might be moved to retaliate with vindictive acts, such as reindicting the defendant on more serious charges. In Brady, after citing examples of acceptable plea bargaining scenarios, the Court stated: "We here make no reference to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty." In Gerard, the court specifically distinguished the situation in which the prosecutor reindicts the defendant on charges which have already been brought in the initial indictment (acceptable) from the situation in which the prosecutor adds new charges upon reindictment without any factual

92. 98 S. Ct. at 669 (quoting Blackledge v. Perry, 417 U.S. at 27).
93. Id. at 670.
94. 491 F.2d at 1304.
95. Id.
98. 397 U.S. at 751, n.8. The Court did not, however, explicitly declare that type of conduct to be impermissible. The footnote continued: "In Brady's case there is no claim that the prosecutor threatened prosecution on a charge not justified by the evidence or that the trial judge threatened Brady with a harsher sentence if convicted after trial in order to induce him to plead guilty." Id. Thus, the Court at least left open the question of whether it would be acceptable for the prosecutor to threaten a defendant with a charge justified by the evidence.
The fact that the defendant withdrew his guilty plea and the prosecutor was therefore allowed to "reset the stakes" did not make the latter situation any more acceptable. It seems that the Hayes majority should have followed the lead of the Ninth Circuit in Gerard in condemning such behavior.

CONCLUSION

Plea bargaining is an invaluable tool of the prosecutor, and, when properly used, benefits both defendants and society. The broad discretion vested in the prosecutor, however, creates a great potential for abuse of defendants' constitutional rights. Hayes opens the door to the possibility that prosecutorial discretion to charge will be used as a weapon of retaliation in plea negotiations. The case emphasizes the need for the formulation of guidelines to govern prosecutorial conduct during plea bargaining. Along these lines, it has been suggested that there is a need for judicial presence to inform the parties of the acceptability to the court of agreements reached by them and to ensure fairness in the negotiations, and a need for uniformity of decisions, so that similarly situated defendants are given similar choices during plea negotiations.

The Court in Hayes balked at a chance to apply the Pearce rule governing prosecutorial conduct to plea bargaining. The plea bargaining process would not have been substantially hampered if the Pearce rule had been adopted and prosecutors had been required to justify the reindictment of defendants on greater charges with a showing of "identifiable conduct on the part of the defendant" occurring after
the initial indictment, or that relevant facts had come to light after the initial indictment. Adoption of this rule would increase the public confidence in the plea bargaining system, insure the protection of defendants' pretrial rights, and still allow enough flexibility in plea negotiations to ease the heavy burden on the criminal justice system. Permitting a defendant to be threatened with reindictment on greater charges for no other reason than the defendant's rejection of prosecutors' plea offers has no place in the supposedly free-willed give-and-take nature of plea bargaining.

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reindictment on greater charges, which is essentially what the prosecutor in Hayes did. See also ABA Standards Relating to the Administration of Criminal Justice § 3.1(b); ALI Model Code of Pre-Arraignment Procedure § 350.3(1), (3) (1975). 105. See United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974).