Prosecutorial Vindictiveness and the Plea Bargaining Exception: *Bordenkircher v. Hayes* Four Years Later

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**INTRODUCTION**

During the late 1960's and the early 1970's, the Supreme Court began to develop two separate and inherently conflicting lines of case law. The first, dealing with prosecutorial and judicial vindictiveness, recognized the need to protect and promote the free exercise of defendants' constitutional and statutory rights.\(^1\) The second, involving the plea bargaining process, sanctioned states' attempts to deter defendants from exercising these rights.\(^2\)

In 1978, these two conflicting lines of cases collided in *Bordenkircher v. Hayes*.\(^3\) In *Bordenkircher*, a prosecutor threatened to reindict a defendant on a charge carrying a potentially longer sentence if the defendant refused to accept the prosecutor's offer to plead guilty to a lesser charge.\(^4\) When the defendant rejected this offer and exercised his right to trial, the prosecutor retaliated by securing the indictment.\(^5\) The Supreme Court upheld the defendant's conviction on the more serious charges. In so doing, the Court effectively exempted prosecutorial behavior during plea bargaining from the limitations it had previously imposed on prosecutorial vindictiveness.

Four years after the *Bordenkircher* decision, lower courts remain uncertain as to how the decision should be interpreted. Some courts have suggested that *Bordenkircher's* wide grant of prosecutorial discretion precludes vindictiveness claims within or

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4. *Id.* at 358-59.
5. *Id.* at 359.
without the context of plea bargaining. Other courts have limited their application of Bordenkircher to the plea bargaining setting itself, denying only those vindictiveness claims which arise in the plea bargaining context. Still other courts, perhaps responding to the extensive academic criticism brought against Bordenkircher, have restricted Bordenkircher's applicability even within the plea bargaining situation.

This article will address the present controversy among the lower courts over Bordenkircher's application to prosecutorial and judicial vindictiveness. First, it will develop the conflicting lines of case law leading to Bordenkircher. Next, it will examine the accommodations reached by the Fifth, Sixth, and Fourth Circuits between the Bordenkircher decision and previously imposed limitations on prosecutorial and judicial vindictiveness. Finally, this article will suggest that the Fourth Circuit's approach best achieves the Supreme Court's dual objectives of deterring prosecutorial and judicial vindictiveness and facilitating meaning-


ful plea bargaining.

**BACKGROUND**

**Due Process and Judicial Vindictiveness**

The principle of due process which demands that a defendant be free from fear of reprisal when exercising a constitutional or procedural right was first established by the United States Supreme Court in *North Carolina v. Pearce*. In *Pearce*, the defendant was convicted initially of assault with intent to commit rape and sentenced to twelve to fifteen years in prison. In a state post-conviction proceeding brought several years later, Pearce alleged that the conviction was unconstitutional because it was based on an involuntary confession. The Supreme Court of North Carolina agreed and reversed the conviction. Pearce was then retried, convicted, and sentenced to a prison term of eight years by the same judge who had presided at the first trial. Added to the time he had already served, this eight year term created a longer sentence than had been imposed originally.

The Supreme Court reviewed the constitutional issues raised in *Pearce* together with those raised by the Fifth Circuit's decision in *Simpson v. Rice*. In *Simpson*, the defendant had been sentenced to prison terms totalling ten years upon pleading guilty to four separate charges of second degree burglary. After the judgments were set aside in a state *coram nobis* proceeding, Rice was retried on three of the counts and sentenced to a total of twenty-five years in prison.

In considering the sentences imposed by the lower courts in both cases, the United States Supreme Court, with Justice Stewart wr-

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11. 395 U.S. 711 (1969). *North Carolina v. Pearce* was a natural outgrowth of the Court's decision in *United States v. Jackson*, 390 U.S. 570 (1968), which found a provision of the Federal Kidnapping Act, ch. 645 § 1, 62 Stat. 760 (1948) (current version at 18 U.S.C. § 1201(a) (1976 & Supp. IV 1980) (authorizing the death penalty if the defendant was found guilty by a jury, but authorizing any term up to life imprisonment if the defendant pleaded guilty, or had a bench trial), unconstitutional. The *Jackson* court held that since the provision needlessly discouraged assertion of the defendant's fifth amendment right not to plead guilty and sixth amendment right to a jury trial, it was patently unconstitutional.
12. 395 U.S. at 713.
14. 395 U.S. at 713.
15. *Id.* at 714.
16. *Id.*
ing for the majority, held that the judicially enhanced sentences deprived Pearce and Rice of their rights to due process, because the sentences appeared to penalize them for exercising constitutional and statutory rights.\textsuperscript{17} The Court held that due process of law requires that vindictiveness against a defendant for having successfully attacked his prior conviction must play no part in the sentence imposed after a new trial.\textsuperscript{18} The Court added that, since fear of vindictiveness might deter a defendant's exercise of his rights to appeal or collaterally attack his first conviction, due process also requires that a defendant be free of apprehension of such retaliatory motivation on the part of the sentencing judge.\textsuperscript{19}

In the Court's view, it was the mere appearance of the judge's retaliatory motivation, and not the judge's actual motivation, that violated the defendants' due process rights.\textsuperscript{20} The Court held that this appearance of vindictiveness was a per se violation of due process, because it unduly burdened the free exercise of rights by the defendants.\textsuperscript{21} Therefore, the Court created a set of prophylactic rules to remove the appearance of vindictiveness from sentencing after retrial.\textsuperscript{22}

On the other hand, if the sentencing decision does not inherently give rise to an appearance of vindictiveness, a due process violation is not established. For this reason, vindictiveness claims failed in two subsequent Supreme Court cases. In Colten v. Kentucky,\textsuperscript{23} the defendant had been convicted of a misdemeanor offense in a Kentucky inferior court and fined ten dollars.\textsuperscript{24} After exercising his right to a trial \textit{de novo} in a court of general jurisdiction, the defendant was convicted of the same offense and fined fifty dollars.\textsuperscript{25} The Court of Appeals of Kentucky affirmed,\textsuperscript{26} rejecting Colten's ar-

\begin{itemize}
    \item 17. Id. at 724-26.
    \item 18. Id. at 725.
    \item 19. Id.
    \item 20. Id. at 724.
    \item 21. Id. at 724-26.
    \item 22. Id. at 726, where the Court said that whenever a judge imposes a more severe sentence upon a defendant after a new trial, his reason for doing so must affirmatively appear in the record. Moreover, those reasons must be based on objective information concerning identifiable conduct on the part of the defendant, occurring after the time of the original sentencing procedure. Finally, the Court required that the factual data upon which the increased sentence was based be made a part of the record, so that the "constitutional legitimacy" of the increased sentence could be fully reviewed on appeal.
    \item 23. 407 U.S. 104 (1972).
    \item 24. Id. at 107-08.
    \item 25. Id. at 108.
\end{itemize}
argument that the higher sentence violated the prohibitions set out in *Pearce*. The Supreme Court held that *Pearce* only applies to sentences increased due to an appearance of retaliatory motivation. In *Colten*, the Court found that the increased sentence could not possibly have been a product of retaliatory motivation, because the *de novo* court was uninformed of the first sentence and had no stake in the earlier conviction. Therefore, the Court ruled that the actions of the circuit court judge did not give rise to the per se appearance of vindictiveness prohibited by *Pearce*.

Similarly, in *Chaffin v. Stynchcombe*, the Court declined to apply *Pearce* because retaliatory motivation was not inherent in the sentencing decision. After having obtained a reversal of his original fifteen year sentence, Chaffin was retried and given a life sentence by a jury. The Supreme Court found that since the jury was uninformed of the first sentence, and was not in a position to possess retaliatory motivation against the defendant, the higher sentence (which was within the limits set by law) was not a product of an inherently retaliatory situation. Thus, Chaffin's sentence, like Colten's, failed to give rise to the per se appearance of vindictiveness precluded by *Pearce*.

**Due Process and Prosecutorial Vindictiveness**

In *Blackledge v. Perry*, the Court extended *Pearce*’s prohibition against judicial vindictiveness to the context of inherently retaliatory actions of prosecutors. Perry had been involved in an altercation with another inmate while serving a prison term. He was convicted of a misdemeanor in a North Carolina state district court and sentenced to six months additional imprisonment. The sentence was to be served at the completion of his original sentence. Perry then filed a notice of appeal under a North Carolina statute giving persons convicted in the district courts an absolute

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27. 407 U.S. at 116.
28. *Id.* at 116-17. See also *Ludwig v. Massachusetts*, 427 U.S. 618 (1976) (the Court, relying on *Colten*, held that the possibility of a higher sentence in Massachusetts' two-tier court system did not impermissibly burden the accused's right to a jury trial).
29. 407 U.S. at 116-17.
31. *Id.* at 19-20.
32. *Id.* at 26-27. "Georgia is one of a small number of states that entrusts the sentencing function in felony cases to the jury rather than to the judge." *Id.* at 21 n.7.
34. *Id.* at 22.
35. *Id.*
right to a trial *de novo* in the superior court.36

After Perry filed the appeal, but before he was required to appear for trial *de novo*, the prosecutor reindicted him on a felony charge based upon the same conduct which had resulted in the misdemeanor charge.37 Perry pleaded guilty and was sentenced to five to seven years, which were to be served concurrently with his original sentence. This sentence increased Perry's potential period of incarceration by seventeen months.38

The Supreme Court, in another opinion authored by Justice Stewart, held that Perry's felony indictment violated due process because it appeared to penalize the exercise of statutory rights of appeal.39 The Court stated that the due process clause was not offended by all possibilities of increased punishment upon retrial, but only by those possibilities that posed a realistic likelihood of vindictive motivation.40 The Court found such a realistic likelihood inherent in the prosecutor's actions against Perry.41

The Court noted that the prosecutor had a considerable stake in discouraging Perry from appealing, since an appeal would have required increased effort to secure Perry's conviction and might even have resulted in a reversal.42 The Court also noted that if the prosecutor had the means "readily at hand to discourage...appeals by 'upping the ante' through a felony indictment whenever a convicted misdemeanant pursue[d] his statutory appellate remedy—the State [could] insure that only the most hardy defendants [would] brave the hazards of a *de novo* trial."43 In order to prevent any appearance of vindictiveness, the Court again adopted prophylactic rules.44 The rule, which was developed in *Pearce* and expanded in *Perry*, prohibits even the appearance of judicial or prosecutorial retaliation against a defendant who exercises any

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37. 417 U.S. at 23.
38. The five to seven year sentence did not begin to run until the date of the guilty plea. By that time, Perry had already served seventeen months of his original sentence. Therefore, the concurrent sentence increased his potential incarceration period by seventeen months, rather than the six month increase which would have resulted from the district court's consecutive sentence. *Id.* at 23 n.2.
39. *Id.* at 27-29.
40. *Id.* at 27.
41. *Id.* at 27-28.
42. *Id.* at 27.
43. *Id.* at 27-28.
44. *Id.* at 27.
constitutional or statutory right.  

**Prosecutorial Discretion and Plea Bargaining**

At the same time as the Supreme Court was developing rules to prohibit judicial and prosecutorial vindictiveness, it was also developing rules with respect to plea bargaining. But whereas in the vindictiveness cases the Court had protected a defendant’s free exercise of rights, in the plea bargaining cases the Court sanctioned states’ attempts to deter defendants from exercising their fifth and sixth amendment rights. In *Brady v. United States*, the Court, for the first time, implicitly approved the plea bargaining process by recognizing circumstances where a defendant could be induced to forgo both his right to plead not guilty and his right to request a trial.

In *Brady*, the defendant alleged that his guilty plea was unconstitutionally coerced by the sentencing provisions of the Federal Kidnapping Act. *Brady* relied on *United States v. Jackson*, which had earlier held the same statutory provisions unconstitutionally coercive. The kidnapping statute imposed a death sen-

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45. Although the rule prohibiting judicial and prosecutorial vindictiveness was originally applied only as a means of protecting a defendant’s right to appeal, other courts interpreted and broadened the rule to bar retaliation against the exercise of any constitutional or statutory right. See *United States v. Goodwin*, 637 F.2d 250 (4th Cir. 1981) (retaliation for exercise of right to jury trial); *United States v. Andrews*, 633 F.2d 449 (6th Cir. 1980) (en banc) (retaliation for successfully pressing bail appeal); *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979) (retaliation for exercise of first amendment rights); *United States v. Groves*, 571 F.2d 450 (9th Cir. 1978) (retaliation for exercise of a statutory right to dismissal under the Speedy Trial Act).

46. For a discussion of prosecutorial discretion, see, e.g., Schulhofer, *supra* note 10, at 778-821; *Note, Discretion and Vindictiveness, supra* note 8, at 212-16; *Note, Limits on Vindictiveness, supra* note 8, at 1246-47. For a discussion of plea bargaining, see Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50 (1969), and *infra* notes 48, 54-55.


48. *Id.* at 751. The Supreme Court cited four circumstances in which a defendant could be induced to forgo his fifth and sixth amendment rights and plead guilty. Those circumstances were: (1) where a defendant pleads guilty because in his jurisdiction both the judge and jury have sentencing power and he knows the judge is usually more lenient; (2) where only the judge has sentencing power but a defendant pleads guilty because the judge gives more lenient sentences to those who plead than to those who go to trial; (3) where a defendant pleads guilty because the prosecutor and judge have allowed him to plead to a lesser offense; and (4) where a defendant pleads guilty to certain counts with the understanding that the others will be dropped. *Id.*


tence on defendants found guilty by a jury, and a prison sentence on defendants pleading guilty or found guilty by a judge.

The Supreme Court rejected Brady's claim that the statute deterred him from invoking his right to trial. The Court affirmed his sentence, finding that his plea was both voluntary and informed. 51 Jackson, according to the Court, neither ruled that all guilty pleas "encouraged by the fear of a possible death sentence were involuntary pleas, nor that such encouraged pleas were invalid whether voluntary or not." 53 In so holding, the Court recognized the government's power to coerce or "encourage" guilty pleas. 53

The Supreme Court went on to note in Brady that guilty pleas were mutually advantageous to both the defendant and the state. 54 Moreover, pleas had become an important component of the American criminal justice system. 54 A defendant had a legitimate interest in consenting to the imposition of a lesser penalty by pleading guilty, rather than facing a trial with an unpredictable outcome. 56 Because of these features of guilty pleas, the Court refused to hold that guilty pleas were in themselves unconstitutionally coercive or invalid. 57

51. 397 U.S. at 758. Brady was charged with violating the Federal Kidnapping Act and entered a plea of not guilty. After learning that his co-defendant had confessed and had agreed to testify against him, Brady changed his plea to guilty. His plea was accepted after the trial judge questioned him twice as to its voluntariness. Brady was sentenced to fifty years in prison, which was later reduced to thirty years. He appealed his sentence on the grounds that his plea was coerced by the statute, which imposed death if found guilty by a jury and any term up to life if found guilty by a judge or through a plea. Ch. 645, § 1, 62 Stat. 760 (1948) (current version at 18 U.S.C. § 1201(a) (1976 & Supp. IV 1980)). This same statute was held unconstitutional in United States v. Jackson, 390 U.S. 581 (1968), because it coerced defendants to enter pleas of guilty and unduly burdened the exercise of their fifth and sixth amendment rights. Nevertheless, the Supreme Court rejected Brady's argument and affirmed his sentence, finding that his plea was voluntary and informed. The Court found that it was Brady's fear of his co-defendant's testimony — and not the statute — that had motivated his guilty plea.

52. 397 U.S. at 747.

53. Id.

54. Advantages to the guilty defendant included limitation of the probable sentence, reduced exposure to the criminal justice system, immediate service of sentence, and the forgoing of "the practical burdens of a trial." The state, on the other hand, would benefit by avoiding trial and its associated burden of proof by promptly inflicting punishment and by conserving prosecutorial and judicial resources for those cases where there is a substantial issue of guilt. Id. at 752.

55. The court noted that well over 75% of the criminal convictions in this country come from guilty pleas. In fact, 90% to 95% of all criminal convictions and 70% to 85% of all felony convictions were obtained through guilty pleas at the time of Brady. Id. at 752 n.10.

56. Id. at 752.

57. Id. at 750. The Supreme Court had established the legitimacy of plea bargaining in two other decisions, Parker v. North Carolina, 397 U.S. 790 (1970), and McMann v. Rich-
In only a five year span, the Supreme Court established the following recognized principles: due process requires that a defendant be free from coercion in exercising his constitutional and statutory right to a trial; a state may induce a defendant to forgo these rights during the mutually advantageous process of plea bargaining; and prosecutorial vindictiveness may unconstitutionally taint the relationship between prosecutor and defendant. In effect, then, the Court’s decisions had both secured the free exercise of defendants’ rights and sanctioned prosecutorial attempts to prevent defendants from exercising those rights. It was against this background of conflicting precedents that Bordenkircher v. Hayes came before the Court.

BORDENKIRCHER v. HAYES

Factual Background

Defendant Hayes had been indicted for uttering a forged instrument in the amount of $88.30. After arraignment on the charge, Hayes’ counsel and the Commonwealth’s Attorney met in the presence of the clerk of the court to negotiate a plea. The prosecutor offered to recommend a sentence of five years imprisonment in return for Hayes’ guilty plea. He threatened that if Hayes did not accept the agreement and “save the Court the inconvenience and necessity of trial,” he would reindict Hayes under Kentucky’s Habitual Criminal Act. Conviction under Kentucky’s Habitual Criminal Act would have subjected Hayes to a mandatory life
sentence. Hayes refused to plead guilty and insisted on a full trial. The prosecutor obtained the indictment and Hayes was convicted on the forgery charge. In a separate proceeding, he was convicted of being a habitual criminal and given the mandatory life sentence.

The Sixth Circuit Opinion

Hayes appealed to the Sixth Circuit following an unsuccessful appeal to the Kentucky Court of Appeals and a denial of his writ of habeas corpus in the federal district court. The Sixth Circuit first considered Hayes' due process rights as delineated in the Supreme Court's vindictiveness decisions. Then, the court weighed these rights against the need for prosecutorial discretion in inducing a defendant to plead guilty, as had been previously outlined in the Court's plea bargaining cases. The Sixth Circuit found that the habitual offender indictment gave rise to an appearance of prosecutorial vindictiveness and thus a per se due process violation. Based on this finding, the Court ordered Hayes discharged after completing the sentence "imposed solely for the crime of uttering a forged instrument." The Supreme Court

Any person convicted of a third time of a felony shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state.

66. 434 U.S. at 359.
67. Id.
68. Id.
70. Id. at 44.
71. Id.
72. The Sixth Circuit found that the defendant's due process rights carried more weight than the state's contention that the entire concept of plea bargaining would be destroyed if prosecutors were not allowed to seek convictions on more serious charges after defendants refused to plead guilty. Id. Although a prosecutor could offer a defendant concessions in the course of plea bargaining, the Court found that Pearce and Perry precluded the prosecutor from threatening a defendant with the consequence that more severe charges would be brought if he insisted on going to trial. Id. Therefore, the Court determined that if after plea negotiations failed the prosecutor procured an indictment charging a more serious crime, the new charges would establish an appearance of vindictiveness which would violate due process, per se, unless the prosecutor could justify his actions by coming forth with objective reasons for the charges as required by Perry's prophylactic rules. Id. at 44-45. Here, however, the prosecutor could not meet this burden and had admitted to actual retaliatory motivation. Id. at 45.
73. Id. at 45. Other circuits are in accord with the approach taken by the Sixth Circuit in Hayes v. Cowan. See, e.g., United States v. De Marco, 550 F.2d 1224 (9th Cir. 1977) (where
granted certiorari.74

The Supreme Court Opinion

In another opinion authored by Justice Stewart,75 the Supreme Court acknowledged the judicial and prosecutorial vindictiveness cases and agreed with the Sixth Circuit that it would be patently unconstitutional for an agent of the state "to pursue a course of action whose objective [was] to penalize a person's reliance on his legal rights."76 Contrary to its characterization of the prosecutor's role in Blackledge v. Perry,77 however, the Court refused to characterize the prosecutor's actions in Bordenkircher as an attempt to penalize Hayes for exercising his right to trial.78 Unlike the Sixth Circuit, the Supreme Court believed that since the prosecutor initially had the power to indict Hayes under the habitual offender statute, and since he had informed Hayes of that power, the two indictments only evidenced the prosecutor's attempt to extend one of the benefits of plea bargaining—a reduced sentence—to the defendant.79 The Supreme Court's plea bargaining cases had established that in 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 prosecution's offer."80 Therefore, the prosecutor's actions fell within the legitimate

the government obtained a second felony indictment after the defendant exercised venue and trial rights, the action violated vindictiveness law); United States v. Ruegsa-Martinez, 534 F.2d 1367 (9th Cir. 1976) (where the court held that in view of vindictiveness law, a prosecutor's suggestion that the power of the prosecutor to adjust the charges against an accused at will inheres in his power to engage in plea bargaining was without merit).

75. Bordenkircher v. Hayes, 434 U.S. 357 (1978), was a five to four decision, with Chief Justice Burger and Justices White, Rehnquist and Stevens joining Justice Stewart in the majority opinion. Justices Brennan and Marshall joined in a dissent by Justice Blackmun. Justice Powell dissented separately, stating that he was not "satisfied that the result in this case [was] just or that the conduct of the plea bargaining met the requirements of due process." Id. at 368-69 (Powell, J., dissenting).
76. Id. at 363.
78. 434 U.S. at 364-65.
79. Id.
80. Id. at 363. Some lower federal courts have found instances in which a defendant's free choice was unduly burdened. In United States v. Harris, 635 F.2d 526 (6th Cir. 1980), a probation officer's recommendation was employed to persuade the defendant to plead guilty. The Sixth Circuit, determining that the probation officer was an arm of the court, ruled the judiciary was unnecessarily introduced into the plea bargaining process. In United States v. Velsicol Chem. Corp., 498 F. Supp. 1255 (D.D.C. 1980), the court ruled the defendant did not have a free and unencumbered choice because the prosecution had made an unspecified threat. In Schaffner v. Greco, 458 F. Supp. 202 (S.D.N.Y. 1978), the court found that the
exercise of prosecutorial discretion.81

By defining plea bargaining as a situation uninfluenced by retaliatory motivation, the Court distinguished it from those inherently retaliatory situations it had found in vindictiveness cases.82 Thus, the Court could easily “accept 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,”83 and thereby exempt prosecutorial behavior during plea bargaining from the limitations it had previously imposed in its vindictiveness cases.

CONFUSION IN THE CIRCUITS

The Supreme Court’s failure to distinguish accurately between the actions of the prosecutors in Perry and Bordenkircher has resulted in a confused application of the Bordenkircher decision. In each case, the prosecutor retaliated against the defendant in order to advance the same goals: the prompt imposition of punishment, the certainty of conviction, the avoidance of trial, and the conservation of judicial and prosecutorial resources.84 Despite the identical motivation of the prosecutors in Perry and Bordenkircher, however, the Court found that the actions of the one prosecutor were inherently retaliatory, while the actions of the other were not.85 Because the Supreme Court has failed to explain sufficiently how the plea bargaining situation neutralizes the prosecutor’s role, lower federal courts have been uncertain when to apply the limitations against judicial and prosecutorial vindictiveness to the plea bargaining context.

The Fifth, Sixth and Fourth Circuits recently have confronted the issue of Bordenkircher's application to plea bargaining situations where vindictiveness is arguably present. The Fifth Circuit

judge's participation in plea bargaining unduly burdened the defendant's free choice. See cases cited infra note 97.

81. 434 U.S. at 363.

82. See supra notes 10-22 and accompanying text.

83. 434 U.S. at 364.

84. These goals were approved in Brady v. United States, 397 U.S. 742, 752 (1970), where the Court noted them as the advantages the state was pursuing in participating in plea bargaining.

85. In Bordenkircher v. Hayes, 434 U.S. 357 (1978), the Court defined the defendant-prosecutor plea bargaining relationship as one which flows from “mutuality of advantage.” Id. at 363 (quoting Brady v. United States, 397 U.S. 742, 752 (1970)). But in Blackledge v. Perry, 417 U.S. 21, 27 (1974), the Court presented the prosecutor as an adversary, with a considerable “stake” in the proceedings.
read *Bordenkircher* expansively, the Sixth Circuit limited *Bordenkircher* to the traditional plea bargaining context, and the Fourth Circuit constrained *Bordenkircher*'s applicability to its facts. Since these three different approaches to *Bordenkircher* represent the three basic approaches used currently by the other circuit courts, an examination of these decisions will present an overview of *Bordenkircher*'s applicability to prosecutorial vindictiveness.

**Frank v. Blackburn: The Fifth Circuit Approach**

Prior to *Bordenkircher*, the Fifth Circuit had employed two separate balancing tests to determine whether a prosecutor had acted vindictively. The case of *Frank v. Blackburn*, however, demonstrates that the Fifth Circuit no longer employs these tests. In the Fifth Circuit, *Bordenkircher* and its grant of prosecutorial discretion has been read to control cases even involving judicial

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86. Frank v. Blackburn, 646 F.2d 873 (5th Cir. 1980) (en banc). On October 1, 1981, the United States Court of Appeals for the Fifth Circuit was reorganized and split into two circuits, the Eleventh and the "new Fifth." The Eleventh Circuit has expressly adopted as precedent the case law of the "former Fifth" Circuit as the latter court existed on September 30, 1981. Bonner v. City of Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). It might also be noted that over one-half of the judges on the Eleventh Circuit took part in the *Frank* decision.


89. In Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978), the court announced the first test, which established that where a prosecutor adds a new charge for relatively distinct conduct which has occurred in the same "spree of activity," the defendant's due process rights are offended only if the defendant proves actual vindictiveness. Merely showing an appearance of vindictiveness does not suffice under these circumstances. This vindictiveness test has also been adopted by a district court in the Second Circuit. United States v. Rodriguez, 429 F. Supp. 520, 524 (S.D.N.Y. 1977). The Second Circuit also adheres to a policy favoring wide grants of prosecutorial discretion in plea bargaining. Foxman v. Renison, 625 F.2d 429 (2d Cir. 1980); Miller v. Superintendent, 480 F. Supp. 858 (S.D.N.Y. 1979); United States v. Butler, 414 F. Supp. 394, (Conn. 1976).

90. The second test employed in the Fifth Circuit was announced in Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978). This approach uses a balancing test to determine whether to require a showing of actual vindictiveness or only the appearance of vindictiveness. The effect that allowing the second indictment will have, with respect to chilling the exercise of the defendant's rights, is weighed against the effect that forbidding the second indictment will have on prosecutorial discretion. If the second factor outweighs the first, then a showing of actual vindictiveness is needed to establish the claim. For cases applying the *Jackson v. Walker* test, see United States v. Thomas, 593 F.2d 615, 624 (5th Cir. 1979), *appeal after remand*, 617 F.2d 436 (5th Cir. 1980); Miracle v. Estelle, 592 F.2d 1269 (5th Cir. 1979).

91. Other courts have also read *Bordenkircher* as granting wide prosecutorial discretion. *See, e.g.*, Martinez v. Romero, 626 F.2d 807 (10th Cir. 1980); United States v. Adkins, 464 F. Supp. 419 (D. Tenn. 1978); Miller v. State, 269 Ark. 341, 605 S.W.2d 430 (Ark. 1980); State
The Decision

The issue in Frank v. Blackburn was whether a defendant, who received a thirty-three year sentence for armed robbery after his rejection of a twenty year sentence offered by a state court judge in return for a guilty plea, had established that the increased sentence was a product of vindictiveness.93 A panel of the Fifth Circuit had previously granted federal habeas corpus relief, finding that Frank had been penalized by the state judge for exercising his constitutional right to trial.94 In the opening paragraph of the en banc opinion, however, Judge Fay explained the reason for rehearing the case. Judge Fay wrote that the circuit "decided to rehear the case en banc because of its potentially devastating impact upon the plea bargaining process."94 The court then rejected the defendant's allegations of vindictiveness by a majority of sixteen to seven.

In order to find against Frank and honor "the outer limits of permissible plea bargaining practices"96 delineated in Bordenkircher, the Fifth Circuit had to find that the case was controlled by Bordenkircher rather than by the vindictiveness cases. There were, however, two major obstacles to overcome before the Court could apply Bordenkircher. First, Bordenkircher had characterized "plea bargaining" as a negotiation between the prosecutor and defendant. Second, other courts, relying on rule 11 of the Federal Rules of Criminal Procedure,97 had prohibited judicial par-

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v. Kailua Auto Wreckers, Inc., 62 Hawaii 222, 615 P.2d 730 (Hawaii 1980); State v. O'Brien, 272 N.W.2d 69 (S.D. 1978). For the proposition that the prosecutor can also use selectivity in deciding in which defendants to plea bargain, see United States v. Rosales-Lopez, 617 F.2d 1349 (9th Cir. 1980); McMillian v. United States, 582 F.2d 1061 (8th Cir. 1978); People v. Ruiz, 78 Ill. App. 3d 326, 396 N.E.2d 1314 (1979). See also United States v. Batchelder, 442 U.S. 114, 124 (1979) (citing Bordenkircher for the proposition that a prosecutor can use selectivity in deciding which charges to bring against which defendants, as long as the selectivity is not based upon race or religion).
92. 646 F.2d at 883. Other courts have found no vindictiveness in similar situations. United States v. Herrera, 640 F.2d 958 (9th Cir. 1981) (holding that a prosecutor was not bound by a plea bargain after the defendant initially refused it); McMillian v. United States, 583 F.2d 1061 (8th Cir. 1978) and New York v. Pena, 50 N.Y.2d 400, 406 N.E.2d 1347 (1980) (both holding that a judge was not bound to sentence in accordance with a rejected plea bargain).
93. Frank v. Blackburn, 602 F.2d 910 (5th Cir. 1979).
94. Frank v. Blackburn, 646 F.2d 873, 875 (5th Cir. 1980) (en banc).
95. Id. at 878.
96. Fed. R. Crim. P. 11(e)(1) provides in relevant part that "[t]he attorney for the government and the attorney for the defendant or the defendant when acting pro se may en-
participation in plea bargaining, finding that such participation violated the "mutuality" of the situation and was unduly coercive to defendants.97

The Fifth Circuit avoided the first obstacle by redefining plea bargaining to include judicial participation. Plea bargaining, as described in Judge Fay's opinion, is a "process of negotiation in which the prosecutor, trial judge, or some official in the criminal justice system, offers the defendant certain concessions in exchange for an admission of guilt."98 The court was also able to skirt the second obstacle. Although it had "previously expressed . . . agreement with Rule 11's prohibition of judicial involvement in plea bargains,"99 the court explained that it had also recognized that rule 11 "states a standard for Federal Courts, not necessarily a constitutional inhibition."100 Thus, the majority concluded that rule 11 was not binding on state courts.101

The majority relied on *Bordenkircher* for the proposition that during plea bargaining, defendants are free to accept or reject bargains offered by the state.102 Once a defendant has freely chosen to reject such an offer, he or she cannot complain that the sentence imposed after that trial exceeds the reduced sentence originally offered in return for the plea.103 Because Frank had freely chosen to reject the judge's offer during plea bargaining, the majority ruled

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98. 646 F.2d at 875.

99. Id. at 880.

100. Id. Generally, in order to avoid the appearance of impropriety due to the possibility of coercion during plea bargaining discussions, state courts have joined federal courts in disapproving judicial participation in plea bargaining. See comment and cases cited infra note 97.

101. 646 F.2d at 882.

102. Id. at 883.

103. See cases cited supra note 97.
that he could not argue that later imposition of a higher sentence constituted vindictive punishment.\textsuperscript{104}

The effort the Fifth Circuit employed to remove two formidable obstacles in order to apply \textit{Bordenkircher} demonstrates the circuit’s adherence to \textit{Bordenkircher} outside of the limited plea bargaining context in which the case arose. Two additional factors, the court’s rehearing of the \textit{Frank} case so as to prevent a “devastating impact” on plea bargaining, and the circuit’s decision to apply \textit{Bordenkircher} instead of its formerly announced tests,\textsuperscript{105} point to the circuit’s narrow application of due process limitations on judicial and prosecutorial vindictiveness in the plea bargaining context.

\textbf{Analysis}

There are two basic problems with the Fifth Circuit’s expansive reading of \textit{Bordenkircher}. First, \textit{Bordenkircher} was intended to create an exception to the vindictiveness cases, not to create a replacement for them. As long as the Supreme Court’s earlier decisions continue to be good law, the circuits should continue to apply their vindictiveness standards only to cases that arise outside of the prosecutor-defendant plea bargaining context.\textsuperscript{106}

Second, by extending \textit{Bordenkircher} to cases of judicial involvement in plea bargaining, the Fifth Circuit creates the potential for even greater harm to the plea bargaining process. The federal prohibitions against judicial participation in plea bargaining were created to keep the “give and take” and mutuality of benefit between the state and defendant free from judicial pressure.\textsuperscript{107} By redefining plea bargaining as a process in which the judge is free to participate, the Fifth Circuit sanctions judicial plea bargaining and invites other courts to circumvent the careful balance between the state and the defendant upon which plea bargaining rests. Therefore, because the Fifth Circuit fails to limit \textit{Bordenkircher} and to preserve the authority of the vindictiveness cases outside of the traditional plea bargaining context, its approach threatens the ex-
istence of both the due process rights protected in the vindictiveness cases and the validity of the plea bargaining process itself.

**United States v. Andrews: the Sixth Circuit’s Approach**

The Decision

In *United States v. Andrews*,\(^{108}\) the Sixth Circuit, sitting en banc, held seven to four that a prosecutor’s action in obtaining a second indictment charging defendants with an additional conspiracy count after they had successfully pressed their bail appeal, could give rise to a “realistic likelihood of vindictiveness,” which would establish a due process violation.\(^{109}\) In sharp contrast to the Fifth Circuit’s stated purpose in *Frank* for rehearing the case en banc,\(^{110}\) the Sixth Circuit reheard *Andrews* en banc to resolve “questions regarding the limits of prosecutorial discretion,” in order to arrive at a standard for applying the “doctrine of ‘prosecutorial vindictiveness.’”\(^{111}\) A panel of the court had considered the question earlier, producing three separate opinions and no consensus.\(^{112}\)

The Sixth Circuit began its inquiry by noting that two conflicting strands of law required reconciliation. One strand recognized the need for broad prosecutorial discretion,\(^{113}\) while the other strand stressed the need to protect defendants’ due process rights from prosecutorial vindictiveness.\(^{114}\) After reviewing the vindictiveness cases, the Sixth Circuit found that they “pointed the way” to an objective standard to be used in prosecutorial vindictiveness situations.\(^{115}\) The standard was whether or not the factual situation generated a “realistic likelihood of vindictiveness.”\(^{116}\)

According to the Sixth Circuit, if consideration of the prosecutor’s conduct and his stake in augmenting the charges reveals a realistic likelihood of vindictive motivation, a prima facie showing of vindictiveness violative of due process is established.\(^{117}\) The burden then shifts to the government to rebut the vindictiveness

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108. 633 F.2d 449 (6th Cir. 1980) (en banc).
109. Id. at 457.
110. See supra text accompanying note 94.
111. Id. at 450.
115. 633 F.2d at 453.
116. Id.
117. Id. at 456.
presumption through objective information.\textsuperscript{118} In \textit{Andrews}, because the prosecutor obtained the second indictment immediately after losing the bail appeal, and since he had a stake in keeping the defendants in jail, a realistic likelihood of vindictive motivation and a prima facie vindictiveness claim were established.\textsuperscript{119}

Unlike the Fifth Circuit, the Sixth Circuit rejected the contention that \textit{Bordenkircher} had effectively overruled the vindictiveness cases or at least controlled the pretrial prosecutor—defendant relationship.\textsuperscript{120} The court said that since \textit{Bordenkircher} allowed prosecutorial vindictiveness to exist in the plea bargaining context, an expansive reading of \textit{Bordenkircher} would be irreconcilable with the vindictiveness cases, which were "alive and well" outside of plea bargaining.\textsuperscript{121} Therefore, according to the Sixth Circuit, \textit{Bordenkircher} had to be read narrowly and had to be confined to the plea bargaining context in which it arose.\textsuperscript{122}

\textbf{Analysis}

When contrasted with the \textit{Bordenkircher} standard employed by the Fifth Circuit, the \textit{Andrews} "realistic likelihood" standard provides a greater possibility that a defendant abused by prosecutorial vindictiveness, at least outside of the plea bargaining situation, will obtain a remedy.\textsuperscript{123} The major failing of the \textit{Andrews} test, however, is that it clouds the clarity of the vindictiveness cases by creating a standard that rests, in part, upon a consideration of \textit{Bordenkircher}. The "realistic likelihood" test was created by weighing prosecutorial discretion, as advanced by \textit{Bordenkircher}, against due process, as promoted by the vindictiveness cases. In establishing the "realistic" test, the court replaced the "appearance of vindictiveness" test previously set forth in the vindictiveness cases.\textsuperscript{124} The Sixth Circuit commented that the "appearance of

\textsuperscript{118} Id.
\textsuperscript{119} The court remanded for an evidentiary hearing on the government’s evidence. Id. at 457.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} The Sixth Circuit rejected the rule used by the Ninth Circuit. Id. at 453 n.4. In the Ninth Circuit, a \textit{prima facie} case for vindictiveness is established once the defendant makes a showing of a per se "appearance of vindictiveness." The burden then shifts to the prosecution to prove that the increase in the severity of the charges did not result from a vindictive motivation. See United States v. Burt, 619 F.2d 831 (9th Cir. 1980); United States v. Griffin, 617 F.2d 1342 (9th Cir. 1980); United States v. Groves, 571 F.2d 450 (9th Cir. 1978).
\textsuperscript{124} See supra note 1.
"vindictiveness" test was "too harsh and operate[d] to unduly limit prosecutorial discretion."\textsuperscript{125}

Yet the Supreme Court's two major vindictiveness decisions did not hesitate to limit judicial or prosecutorial discretion outside the plea bargaining context.\textsuperscript{126} Both decisions advanced prophylactic rules to limit and protect against abuse, and both employed tests resting on the appearance of vindictiveness.\textsuperscript{127} By changing the appearance of vindictiveness standard in order to accommodate prosecutorial discretion, the \textit{Andrews} Court inadvertently and unnecessarily broadened \textit{Bordenkircher}'s influence and application, instead of limiting \textit{Bordenkircher} to plea bargaining situations.

\textbf{The Fourth Circuit and United States v. Goodwin: Rejection of the Fifth and Sixth Circuit Tests}

\textbf{The Decision}

In \textit{United States v. Goodwin},\textsuperscript{128} the Fourth Circuit explicitly rejected the Fifth and Sixth Circuits' application of \textit{Bordenkircher} to instances of vindictiveness arising outside the plea bargaining situation. In \textit{Goodwin}, the Fourth Circuit found that the defendant's right to due process had been violated when he was indicted and tried on a second offense, only after he had exercised his right to a jury trial on the misdemeanor and petty offense charges originally lodged against him.\textsuperscript{129} The government argued that \textit{Bordenkircher} controlled or that, in any event, the vindictiveness test used by the Fourth Circuit was faulty and should be replaced by one modeled after the Fifth or Sixth Circuit tests.\textsuperscript{130} The court rejected both arguments.

The court distinguished \textit{Bordenkircher} by pointing out that the prosecutor in \textit{Bordenkircher} had threatened to raise charges during plea bargaining and merely carried out the threat after plea negotiations had broken down.\textsuperscript{131} On the other hand, the \textit{Goodwin} prosecutor brought new charges without making a clear threat during plea negotiations.\textsuperscript{132} For the Fourth Circuit, the omission of

\textsuperscript{125} 633 F.2d at 457.
\textsuperscript{127} \textit{Id}.
\textsuperscript{128} 637 F.2d 250 (4th Cir. 1981).
\textsuperscript{129} \textit{Id}. at 255.
\textsuperscript{130} \textit{Id}. at 254.
\textsuperscript{131} \textit{Id}. at 257.
\textsuperscript{132} \textit{Id}.
this single fact sufficiently distinguished *Bordenkircher* from the case before it.

Once *Bordenkircher* was distinguished, the court was free to apply a traditionally based vindictiveness test.\(^{133}\) That test provides that once circumstances give rise to a genuine risk of vindictiveness, as evidenced in *Goodwin* by a second indictment following the exercise of a procedural right, a per se due process violation is established which can only be rebutted by showing that the government could not have brought the increased charges in the first instance.\(^{134}\) Since the government failed to show objective evidence establishing that the second indictment could not have been filed with the first,\(^{135}\) Goodwin's due process claim withstood the government's challenge.

**Analysis**

The simplicity with which the Fourth Circuit's test adheres to and advances vindictiveness law makes it superior to those tests employed by other circuits. The Fifth and Sixth Circuits, confused by the Supreme Court's characterization of the *Bordenkircher* prosecutor's motivations and actions, fail to apply *Bordenkircher* as an exception, and thereby distort vindictiveness case law. The Fourth Circuit, however, succeeds in recognizing the *Bordenkircher* exception, while employing a per se standard which accurately reflects the "appearance of vindictiveness" standard enunciated by the Supreme Court in its earlier vindictiveness decisions. In keeping with those decisions, the Fourth Circuit's per se test precludes the possibility, inherent in the methods employed by the Fifth and Sixth Circuits, that *Bordenkircher*'s plea bargaining exception could erode vindictiveness law by being applied outside of the plea bargaining context. Further, by placing the burden on the prosecutor to show why increased charges were not filed initially, the per se test protects defendants by discouraging prosecutors from initially withholding charges to use later in pressuring defendants to plead guilty.

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133. The test was based on the appearance of vindictiveness relied on in Blackledge v. Perry, 417 U.S. 21 (1974).

134. This per se vindictiveness test is also employed by the District of Columbia Circuit. See United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974); United States v. Velsicol Chem. Corp., 490 F. Supp. 1255 (D.D.C. 1980). This test differs from the Ninth Circuit test, which allows the government to rebut the vindictiveness claim with any objective evidence. See supra note 123.

135. 637 F.2d at 255.
If the Fourth Circuit continues to constrain *Bordenkircher* to its particular facts, however, then like the Fifth and Sixth Circuits, it will distort one area of case law in order to promote another. Although both the academic criticism levied against *Bordenkircher* and the uncertainty with which lower federal courts have applied the decision suggest the need for a careful approach, *Bordenkircher* must be applied in pre-conviction prosecutorial plea bargaining situations if the dual goals of promoting vindictiveness and plea bargaining case law are to be met. *Bordenkircher* must be applied as a necessary but limited exception to the vindictiveness cases, allowing prosecutorial discretion during plea bargaining, while preserving the protections created by the vindictiveness cases.

**Conclusion**

Four years after *Bordenkircher v. Hayes*, lower federal courts still struggle to reconcile *Bordenkircher* with the vindictiveness cases that preceded it. The problem with this approach, however, is that *Bordenkircher* cannot, strictly speaking, be reconciled with the vindictiveness cases. Whereas the vindictiveness cases dictate that defendants should be free from fear of retaliatory motivation on the part of a prosecutor or judge when exercising constitutional or statutory rights, *Bordenkircher* holds that the admittedly retaliatory actions of a prosecutor intending to coerce a defendant to forgo his or her right to trial do not constitute vindictiveness, because such actions take place during plea negotiations. Thus, it seems that contrary to the Supreme Court's justification of *Bordenkircher*, the nature of plea negotiations and the importance of plea bargaining to the American criminal justice system have removed prosecutorial discretion during plea bargaining from the constraints of the vindictiveness cases.

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