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Due Process Not Violated When Prosecutor Carries out Threat to Reindict Accused on More Serious Charges after Plea Bargain on Original Charge Is Refused.

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person of the opposite sex who is not their spouse and is under seventeen years of age.[84] Thus, the determination in *Groves* that the Texas Penal Code is gender-neutral relieved the court from having to decide what is the proper test to apply for statutes challenged on the ground of equal protection.

Nonetheless, while the First Circuit emphatically limited its holding to the particular statute involved, other jurisdictions should take heed of the decision. *Meloon* represents a logical application of the rule in *Craig* to a gender-based criminal law. While the decision may require revision of some states' criminal laws, such revisions can only further the cause of equal protection of the law.

Thomas E. Sisson

CRIMINAL LAW—Plea Bargaining—Due Process Not Violated When Prosecutor Carries Out Threat to Reindict Accused on More Serious Charges After Plea Bargain on Original Charge Is Refused

Bordenkircher v. Hayes,
___ U.S. ___, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

Paul Lewis Hayes was indicted under a Kentucky statute[1] for uttering a forged check. After arraignment, pretrial conferences were held with the prosecuting attorney who offered to recommend a five year sentence if Hayes would plead guilty. He also warned Hayes that if he did not plead guilty he would be reindicted under the Kentucky Habitual Criminal Act.[2] Hayes would, therefore, face a mandatory life sentence rather than a two to ten year sentence. After Hayes refused the offer and chose not to plead guilty, the prosecutor obtained an indictment under the recidivist statute. A jury found Hayes guilty and he was sentenced to life imprisonment as required under the statute.[3] The Kentucky Court of Appeals affirmed Hayes' conviction in an unpublished opinion.[4] The United States District

84. *See Ex parte* Groves, No. 58,945, slip op. at 8-9 (Tex. Crim. App. Oct. 4, 1978) (not yet reported).

1. KY. REV. STAT. § 434.130 (1970) (current version at KY. REV. STAT. § 516.020 (1975)).

2. *See* KY. REV. STAT. § 431.190 (1970) (current version at KY. REV. STAT. § 532.080 (Supp. 1976)). This statute provided for a mandatory life sentence if a person is convicted of a felony for the third time. *Id.*

3. Bordenkircher v. Hayes, ___ U.S. ___, ___, 98 S. Ct. 663, 666, 54 L. Ed. 2d 604, 608 (1978). In 1961 when Hayes was seventeen he plead guilty to a charge of detaining a female and served five years in the state reformatory. In 1970 he was convicted of robbery and sentenced to five years imprisonment, but was released on probation. *Id.* at ___, 98 S. Ct. at 666 n.3, 54 L. Ed. 2d at 608 n.3.

4. *Id.* at ___, 98 S. Ct. at 666, 54 L. Ed. 2d at 608.

Court for the Eastern District of Kentucky denied Hayes a writ of habeas corpus holding that neither the sentence nor the indictment violated the defendant's constitutional rights.[5] An appeal was taken to the Court of Appeals for the Sixth Circuit where the district court's judgment was reversed.[6] The United States Supreme Court granted certiorari.[7] Held—*Reversed.* A defendant's due process rights are not violated if, after an offered plea bargain he refuses to plead guilty, and the prosecutor carries out his threat to reindict for an offense carrying greater sanctions.[8]

Although plea bargaining has been in existence in this country since at least the early part of the twentieth century,[9] it has only recently been recognized by the courts as a legitimate practice.[10] When first developed, plea bargaining took the form of a silent agreement.[11] Today, however, if a plea agreement is reached in federal court, its disclosure in open court is required to be on the record.[12] Most criminal cases in this country are

5. *Id.* at ____, 98 S. Ct. at 666, 54 L. Ed. 2d at 608. The opinion of the district court is unreported. *Id.* at ____, 98 S. Ct. at 666 n.4, 54 L. Ed. 2d at 608 n.4.

6. Hayes v. Cowan, 547 F.2d 42, 45 (6th Cir. 1976), *rev'd sub nom.* Bordenkircher v. Hayes, ____ U.S. ____, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

7. Bordenkircher v. Hayes, ____ U.S. ____, 97 S. Ct. 2672, 53 L. Ed. 2d 269 (1978).

8. Bordenkircher v. Hayes, ____ U.S. ____, ____, 98 S. Ct. 663, 668-69, 54 L. Ed. 2d 604, 611-12 (1978).

9. *See* Note, *Plea Bargaining—Proposed Amendments to Federal Criminal Rule 11,* 56 MINN. L. REV. 718, 725-26 (1972). There is some support for the position that plea bargaining began early in the nineteenth century. *See* Case Comment, *People v. Seikoff, The Route to Rational Plea Bargaining,* 21 CATH. LAWYER 144, 145 n.6 (1975).

10. Beall, *Principles of Plea Bargaining,* 9 LOY. CHI. L.J. 175, 178-79 (1977); *see, e.g.,* Santobello v. New York, 404 U.S. 257, 260-61 (1971); Lassiter v. Turner, 423 F.2d 897, 900 (4th Cir.), *cert. denied,* 400 U.S. 852 (1970); United States *ex rel.* Rosa v. Follette, 395 F.2d 721, 724 (2d Cir.), *cert. denied,* 393 U.S. 892 (1968). *See generally* J. BOND, PLEA BARGAINING AND GUILTY PLEAS §§ 2.01, .02 (1978).

11. Beall, *Principles of Plea Bargaining,* 9 LOY. CHI. L.J. 175, 177 (1977). The defense counsel and the prosecutor informally agreed off the record that the defendant would plead guilty in return for a recommendation of leniency. The prosecutor never discussed the agreement with the defendant personally. The defendant was instructed to plead guilty and if asked whether any agreement or understanding had been made, he was told to give a negative response. *Id.* at 177-81.

12. FED. R. CRIM. P. 11(e)(2); *see, e.g.,* McCarthy v. United States, 394 U.S. 459, 465, 467 (1969) (strict compliance with Rule 11 required); Bryan v. United States, 492 F.2d 775, 781-82 (5th Cir.) (defendant and counsel have duty to disclose existence and details of any agreement), *cert. denied,* 419 U.S. 1079 (1974); Raines v. United States, 423 F.2d 526, 530 (4th Cir. 1970) (district judges should ask counsel whether plea bargaining has taken place). *See generally* J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 6.10 (1978). Disclosure on record has been made applicable to states. *See, e.g.,* People v. West, 477 P.2d 409, 417-18, 91 Cal. Rptr. 385, 393 (1970) (basis of bargain should be disclosed to the court); Gibson v. State, 532 S.W.2d 69, 75-76 (Tex. Crim. App. 1976) (bring "fruit of negotiation" into the record); State *ex rel* Clancy v. Coiner, 179 S.E.2d 726, 733 (W. Va. 1971) (subjects plea bargaining to "strong light of full disclosure"). *See generally* J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 6.10 (1978).

concluded without a trial.[13] In *Santobello v. New York*[14] the United States Supreme Court recognized that "plea bargaining is an essential component of the administration of justice."[15] Through the plea bargaining process, the defendant avoids extended pretrial imprisonment, the burdens and uncertainties of trial are eliminated, and the defendant is given a quick disposition of his case.[16] This latter feature protects the public from additional crimes by those on bail, and enables prosecutors and judges to conserve resources.[17] Thus, plea bargaining is not only an essential element of the judicial process, but also a highly desirable one.[18]

Despite these benefits to the criminal justice system, however, plea bargaining places certain burdens on the criminally accused. The plea bargaining process affects a criminal defendant's right against self incrimination, his right to a fair trial, and the right to confront his accusers as guaranteed by the fifth and sixth amendments.[19] In order to insure that

13. Approximately 90% of all criminal cases are resolved through guilty pleas. Brady v. United States, 397 U.S. 742, 752 n.10 (1970); *see* Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 564 n.1 (1977).

14. 404 U.S. 257 (1971).

15. *Id.* at 260. In *Santobello*, the petitioner had reached a plea agreement with the prosecutor. At a subsequent sentencing hearing, a different prosecutor failed to honor the commitment made by the original prosecutor. The Supreme Court held that when a defendant pleads guilty based upon agreements or promises made with a prosecutor, those promises must be kept no matter who argues the case before the court. *Id.* at 262. In enforcing the commitment, the Court emphasized that the plea must be voluntary. *Id.* at 261-62; *see, e.g.*, Lassiter v. Turner, 423 F.2d 897, 900 (4th Cir.), *cert. denied*, 400 U.S. 852 (1970); Commonwealth v. Marsh, 293 A.2d 57, 60 (Pa. 1972); People v. West, 477 P.2d 409, 417, 91 Cal. Rptr. 385, 393 (1970).

16. *See, e.g.*, Blackledge v. Allison, 431 U.S. 63, 71 (1977); Santobello v. New York, 404 U.S. 257, 261 (1971); Brady v. United States, 397 U.S. 742, 751-52 (1970).

17. *See, e.g.*, Blackledge v. Allison, 431 U.S. 63, 71 (1977); Santobello v. New York, 404 U.S. 257, 261 (1971); Brady v. United States, 397 U.S. 742, 751-52 (1970). *See generally* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52-58 (1968).

18. Santobello v. New York, 404 U.S. 257, 261 (1971); State v. Cato, 290 A.2d 901, 901 (Conn.Super. Ct. 1972). *But see* Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1411 (1970). Prosecutors, judges, and defense counsel should not be able to diminish constitutional protections without any supervision; such diminution should come only through public approval. *Id.* at 1411.

19. Boykin v. Alabama, 395 U.S. 238, 243 (1969); McCarthy v. United States, 394 U.S. 459, 466 (1969); Lassiter v. Turner, 423 F.2d 897, 900 (4th Cir.), *cert. denied*, 400 U.S. 852 (1970); *see* U.S. CONST. amends. V, VI. If the judge is satisfied that there is a factual basis for the defendant's plea, then the plea is itself a conviction; nothing more remains but to render the judgment and determine the punishment. Kercheval v. United States, 274 U.S. 220, 223-24 (1927); *see* United States *ex rel.* Rosa v. Follette, 395 F.2d 721, 724 (2d Cir.), *cert. denied*, 393 U.S. 892 (1968); J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 1.05[1] (1978). A defendant in a state prosecution enjoys these same rights through the due process clause of the fourteenth amendment. *See* Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968) (right to trial by jury); United States v. Jackson, 390 U.S. 570, 581 (1968) (right not to plead guilty); Pointer v. Texas, 380 U.S. 400, 403-06 (1965) (right to confront one's accusers); Malloy v. Hogan, 378 U.S. 1, 8 (1964) (right against self incrimination).

these rights are provided a defendant, the Supreme Court requires that confessions and waivers of constitutional rights be made voluntarily, knowingly, and with knowledge of the consequences.[20] The question of the voluntariness of a guilty plea has been the subject of much litigation.[21] The Supreme Court dealt with this question in a series of cases known as the *Brady* Trilogy.[22] Initially, the Court seemed reluctant to declare a guilty plea involuntary.[23] Today, however, specific guidelines are imposed. Before a guilty plea can be accepted in federal court the trial judge must ask the defendant if his plea is voluntary and if he understands the consequences of pleading guilty.[24]

Few cases have dealt directly with the issue of vindictiveness during the plea bargaining process. There are numerous cases, however, involving vindictiveness during various phases of criminal proceedings.[25] In *North*

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20. *See* FED. R. CRIM. P. 11(c), (d); Jackson v. Denno, 378 U.S. 368, 376-77 (1964). In *Brady v. United States* the Supreme Court quoted with approval the definition of an acceptable guilty plea formulated by the Fifth Circuit.

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual values of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by the threats (or promises to discontinue improper harassment), misrepresentation (including unfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes).

Brady v. United States, 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)).

21. *See, e.g.*, Streets v. Wainwright, 436 F.2d 962, 963 (5th Cir. 1970), *cert. denied*, 404 U.S. 910 (1971) (mother's appeal to son to plead guilty did not render guilty plea involuntary); Tarnabine v. Warden of Louisiana State Penitentiary, 331 F. Supp. 975, 977 (E.D. La. 1971) (lawyer's misrepresentation to defendant of terms of plea bargain invalidated plea); Morris v. United States, 315 F. Supp. 1016, 1018 (N.D. Ga. 1970) (mistaken belief that evidence admissible not enough to invalidate plea).

22. *See* Parker v. North Carolina, 397 U.S. 790, 794-96 (1970); McMann v. Richardson, 397 U.S. 759, 771-74 (1970); Brady v. United States, 397 U.S. 742, 749-55 (1970). *See generally* Note, *The Supreme Court's Changed View of the Guilty Plea*, 4 MEM. L. REV. 79, 82-85 (1973).

23. *See* Brady v. United States, 397 U.S. 742, 755 (1970). A guilty plea was not invalidated merely because it was entered to avoid the possibility of a death penalty. *Id.* at 755. *See also* Parker v. North Carolina, 397 U.S. 790 (1970). In *Parker*, the defendant was locked in a cell without food or water until he confessed to the crime. The court held that his plea of guilty was not involuntary since it was one month after the confession. *Id.* at 795-96. *See generally* Note, *The Supreme Court's Changed View of the Guilty Plea*, 4 MEM. L. REV. 79 (1973).

24. FED. R. CRIM. P. 11(d). In *Boykin v. Alabama* the Court indicated that the protection provided in the federal courts by rule 11 may be applicable to state criminal proceedings as a fundamental right governed by the due process clause. Boykin v. Alabama, 395 U.S. 238, 242-44 (1969).

25. *See* Blackledge v. Perry, 417 U.S. 21, 27-28 (1974); North Carolina v. Pearce, 395 U.S. 711, 723-24 (1969); United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.), *cert. denied*, 98 S. Ct. 105 (1977); United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976); United States v. Jamison, 505 F.2d 407, 413 (D.C. Cir. 1974); United States v. Lippi, 435 F. Supp. 808, 811-14 (D.N.J. 1977).

Carolina v. Pearce[26] the United States Supreme Court established a rule to protect defendants from retaliation for the exercise of their procedural rights.[27] The Court held that when a person is resentenced by the court after having successfully appealed his original conviction, retaliation can play no part in imposing the second sentence.[28] If a stricter sentence is to be imposed, the reasons for assessing that sentence must affirmatively appear on the record.[29] In *Blackledge v. Perry*[30] the Supreme Court applied the *Pearce* rule proscribing judicial vindictiveness to a case involving prosecutorial vindictiveness.[31] In response to Perry's exercise of his statutory right to trial de novo, the prosecutor obtained a new indictment charging a more serious crime.[32] The Court held that a defendant should be free from fear of prosecutorial retaliation.[33] Consequently, the potential for, or appearance of, prosecutorial vindictiveness is enough to require reversal of a conviction.[34]

Subsequent decisions have extended the rule established in *Pearce* and *Blackledge* so that it no longer applies only to situations involving retrial after an appeal.[35] It has been held that due process is violated when the charges against a defendant are increased after he has been granted a mistrial unless the prosecutor justifies the increase.[36] The *Pearce* and *Blackledge* rule has also been applied to pretrial situations. Defendants

26. 395 U.S. 711 (1969).

27. *Id.* at 725. Pearce was convicted of assault with the intent to commit rape and sentenced to twelve to fifteen years in the penitentiary. Several years later he was granted a new trial and was again found guilty. Punishment was assessed at eight years which, when added to the time already served, was longer than the original sentence. *Id.* at 713.

28. *Id.* at 725; *see* United States v. Jamison, 505 F.2d 407, 413 (D.C. Cir. 1974).

29. North Carolina v. Pearce, 395 U.S. 711, 726 (1969).

30. 417 U.S. 21 (1974).

31. *Id.* at 27-28. Perry was in the penitentiary when he became involved in a fight with another inmate. He was convicted of assault with a deadly weapon and given a six month sentence. Perry exercised his statutory right and requested a trial de novo in the superior court. *Id.* at 22.

32. *Id.* at 22-23.

33. *Id.* at 28.

34. *Id.* at 28; *see* United States v. Johnson, 537 F.2d 1170, 1173 (4th Cir. 1976); United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976); United States v. Lippi, 435 F. Supp. 808, 812 (D.N.J. 1977); United States v. Lee, 435 F. Supp. 974, 980 (E.D. Tenn. 1976).

35. *See, e.g.*, United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.) (reindictment after transfer of venue), *cert. denied*, 98 S. Ct. 105 (1977); United States v. Johnson, 537 F.2d 1170, 1173 (1976) (reindictment following successful challenge of original conviction); United States v. Ruesga-Martinez, 534 F.2d 1367, 1368 (1976) (increased charges when defendant refused to waive right to trial by district judge).

36. *See* United States v. Jamison, 505 F.2d 407, 409 (D.C. Cir. 1974). Defendant was originally charged with second degree murder and carrying a dangerous weapon. After a mistrial was declared the defendant was reindicted for first degree murder and carrying a dangerous weapon. *Id.* at 409.

cannot be punished for refusing to waive their right to a trial by a district judge or a magistrate,[37] nor can a prosecutor unjustifiably increase the charges against a defendant when the defendant successfullly obtains a transfer of venue.[38] In such situations, the prosecutor who subsequently pursues a more severe charge has the burden of dispelling the appearance of vindictiveness.[39] Following a defendant's exercise of rights or his refusal to waive certain rights, a heavier sentence is not absolutely prohibited,[40] nor is imposition of more severe charges against a defendant;[41] but due process requires that the reasons for imposing heavier sentences or more severe charges must affirmatively appear of record.[42]

In *Bordenkircher v. Hayes*[43] the United States Supreme Court considered whether a prosecutor violated the defendant's due process rights by carrying out his threat to reindict the defendant under a recidivist statute after the defendant refused to plead guilty.[44] Finding no due process violation, the Court held that the consequent increase in the defendant's sentence was the result of plea bargaining.[45] It determined that the recidivist charge was fully justified by the evidence, that the prosecutor had the evidence to charge Hayes under the recidivist statute when the original indictment was obtained, and that Hayes knew the terms of the offer when

37. *See* United States v. Ruesga-Martinez, 534 F.2d 1367, 1368 (9th Cir. 1976) (defendant recharged after refusing to waive right to trial by district judge); United States v. Lippi, 435 F. Supp. 808, 812 (D.N.J. 1977) (defendant reindicted after refusing to waive right to trial by magistrate).

38. *See* United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.) (defendant reindicted when case successfully transferred to California), *cert. denied*, 98 S. Ct. 105 (1977).

39. *Id.* at 1227; United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976); United States v. Lippi, 435 F. Supp. 808, 812 (D.N.J. 1977).

40. *See, e.g.*, Chaffin v. Stynchcombe, 412 U.S. 17, 25 (1973) (different jury with no knowledge of first sentence); Colten v. Kennedy, 407 U.S. 104, 117-18 (1972) (different court with no knowledge of prior sentence); Martinez v. Estelle, 527 F.2d 1330, 1332 (5th Cir.) (second indictment same as first but no plea agreement under second), *cert. denied*, 97 S.Ct. 325 (1976).

41. *See, e.g.*, United States v. Jamison, 505 F.2d 407, 416-17 (1974) (evidence of additional crimes obtained after first indictment or information filed); United States v. Mallah, 503 F.2d 971, 988 (2d Cir. 1974) (reindictment on different charges justified by newly discovered information); Culbertson v. Wainwright, 453 F.2d 1219, 1220 (5th Cir. 1972) (upon assault victim's death after first trial defendant was reindicted for murder).

42. *See* North Carolina v. Pearce, 395 U.S. 711, 725 (1969); United States v. Ruesga-Martinez, 534 F.2d 1367, 1368 (9th Cir. 1976); United States v. Jamison, 505 F.2d 407, 415 (D.C.Cir. 1974); United States v. Lippi, 435 F. Supp. 808, 811 (D.N.J. 1977); United States v. Lee, 435 F. Supp. 974, 977 (E.D. Tenn. 1976).

43. ___ U.S. ___, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

44. *Id.* at ___, 98 S. Ct. at 665, 54 L. Ed. 2d at 607.

45. *Id.* at ___, 98 S. Ct. at 669, 54 L. Ed. 2d at 612. While recognizing that plea bargaining plays an important role in the criminal justice system, the Sixth Circuit held that the prosecutor's conduct was vindictive, and was, therefore, in violation of the defendant's right to due process. Hayes v. Cowan, 547 F.2d 42, 45 (6th Cir. 1976), *rev'd sub nom.* Bordenkircher v. Hayes, ___ U.S. ___, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

he made the decision not to plead guilty.[46] Since the defendant was in a plea bargaining situation in which he could accept or reject the prosecutor's offer, the prosecutor's response was not punishment or retaliation.[47] One's right to due process is violated, the Court reasoned, when he is punished for exercising a legal right,[48] but facing the choice between demanding a trial or the possibility of a more severe sentence is a legitimate consequence of plea bargaining rather than a punishment.[49] In reaffirming the plea bargaining process, the Court acknowledged that the prosecutor's interest was to persuade the defendant to waive his right to a trial.[50] The majority noted that the situation would have been no different if Hayes had originally been charged as a recidivist and the prosecutor had offered to drop the recidivist charge in exchange for the guilty plea.[51]

A dissenting opinion, in which two justices joined, criticized the majority for limiting the principles established in *Pearce* and *Blackledge*.[52] It was argued that the element of vindictiveness which was proscribed in those decisions was present to the same extent in this case.[53] The dissenting justices reasoned that it is vindictiveness at any phase of prosecution that the due process clause prohibits.[54] Thus, no distinction should be made between vindictiveness occurring after the exercise of a legal right and vindictiveness occurring after the defendant asserts his right to plead not guilty.[55]

Throughout the development of the *Pearce* and *Blackledge* rule it has been emphasized that the defendant need not prove actual vindictiveness on the part of the prosecutor.[56] The rule was designed so that the defendant could be free from the fear of retaliation, whether judicial or prosecutorial, for insisting on his statutory or constitutional rights.[57] The holding in the

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46. Bordenkircher v. Hayes, ___ U.S. ___, ___, 98 S. Ct. 663, 666, 54 L. Ed. 2d 604, 609 (1978).

47. *Id.* at ___, 98 S. Ct. at 668, 54 L. Ed. 2d at 610-11.

48. *Id.* at ___, 98 S. Ct. at 668, 54 L. Ed. 2d at 610.

49. *Id.* at ___, 98 S. Ct. at 668, 54 L. Ed. 2d at 611.

50. *Id.* at ___, 98 S. Ct. at 668, 54 L. Ed. 2d at 611.

51. *Id.* at ___, 98 S. Ct. at 666, 54 L. Ed. 2d at 609.

52. *Id.* at ___, 98 S. Ct. at 669, 54 L. Ed. 2d at 612 (Blackmun, J., dissenting); *see* Blackledge v. Perry, 417 U.S. 21, 27 (1974) (defendant entitled to be free from fear of prosecutorial retaliation); North Carolina v. Pearce, 395 U.S. 711, 725 (1969) (defendant entitled to be free from fear of judicial retaliation).

53. Bordenkircher v. Hayes, ___ U.S. ___, ___, 98 S. Ct. 663, 669-70, 54 L. Ed. 2d 604, 613 (1978) (Blackmun, J., dissenting).

54. *Id.* at ___, 98 S. Ct. at 670, 54 L. Ed. 2d at 613-14 (Blackmun, J., dissenting).

55. *Id.* at ___, 98 S. Ct. at 670, 54 L. Ed. 2d at 613-14 (Blackmun, J., dissenting).

56. *See* Blackledge v. Perry, 417 U.S. 21, 28 (1974); North Carolina v. Pearce, 395 U.S. 711, 725 (1969); United States v. Johnson, 537 F.2d 1170, 1173 (4th Cir. 1976); United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976); United States v. Lippi, 435 F. Supp. 808, 812 (D.N.J. 1977).

57. Blackledge v. Perry, 417 U.S. 21, 27-29 (1974); North Carolina v. Pearce, 395 U.S.

Bordenkircher case is difficult to reconcile with these previous decisions. The prosecutor in *Bordenkircher* did not deny that his only reason for reindicting Hayes was because of his refusal to enter a plea agreement.[58] Hayes' refusal was an assertion of his right to plead not guilty. Although the rule is supposed to guard against prosecutorial vindictiveness after the assertion of legal rights, *Bordenkircher* appears to carve out an exception: in the plea bargaining arena, behavior that is otherwise questionable may be tolerated.[59]

The majority opinion limited its holding to cases in which the prosecutor openly confronts the defendant with the decision of going to trial under a habitual criminal charge or waiving his right to a trial and facing a more lenient charge.[60] Even in light of this limitation, the decision may place undue hardship on future defendants in similar circumstances. Plea bargaining has been upheld because of the mutuality of its advantages and its benefits to defendants and prosecutors.[61] When a defendant engages in plea bargaining he usually does so in hopes of receiving a more lenient sentence,[62] while a prosecutor hopes to persuade a defendant to forego his right to a trial.[63] Thus, each party expects to benefit from the bargaining process. If, however, the prosecutor is allowed to act vindictively, the mutuality of advantage disappears because only the prosecutor will receive a benefit. The defendant is merely given an opportunity to avoid being disadvantaged; Hayes was "offered" a life sentence rather than a two to ten year sentence. The majority describes plea bargaining as a "give-and-take" situation,[64] however, in the instant case the prosecutor took all and gave nothing.

The majority opinion notes that Hayes was in the same situation as if he had been originally charged under the recidivist statute and was offered a reduction of that charge.[65] When an offer by the prosecution to reduce charges is refused, the defendant will often be sentenced in accordance with the the original charge rather than with the offered charge. There is a difference, however, between cases where the disparity in sentences is the

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711, 725 (1969); *see, e.g.*, United States v. Johnson, 537 F.2d 1170, 1175 (4th Cir. 1976); United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976); United States v. Lippi, 435 F. Supp. 808, 812 (D.N.J. 1977).

58. Bordenkircher v. Hayes, ___ U.S. ___, ___, 98 S. Ct. 663, 665, 54 L. Ed. 2d 604, 607 (1978).

59. *Id.* at ___, 98 S. Ct. at 669, 54 L. Ed. 2d at 612.

60. *Id.* at ___, 98 S. Ct. at 669, 54 L. Ed. 2d at 612.

61. Santobello v. New York, 404 U.S. 257, 261 (1971); *see* Blackledge v. Allison, 431 U.S. 63, 71 (1977); Brady v. United States, 397 U.S. 742, 751-52 (1970).

62. *See* J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 1.07[3] (1978) (prosecutors offer defendant a charge reduction which reduces maximum sentence judge may impose).

63. *See* Bordenkircher v. Hayes, ___ U.S. ___, ___, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604, 611 (1978).

64. *Id.* at ___, 98 S. Ct. at 668, 54 L. Ed. 2d at 610-11.

65. *Id.* at ___, 98 S. Ct. at 666, 54 L. Ed. 2d at 609.

result of the defendant's own choice of strategy and cases where the greater sentence is a result of retaliation on the part of the prosecutor.[66] For example, in cases in which a defendant is originally charged under a felony indictment and is thereafter offered a reduction of the charge in exchange for a guilty plea, it has been consistently held that a subsequent higher sentence is a result of defendant's trial strategy.[67] As such, there is no escalation of the government's charge and no facts suggesting prosecutorial vindictiveness.[68] The defendant chooses whether to go to trial and face the charges against him or to waive his right to a trial and face reduced charges. Even though the defendant is discouraged from insisting on his trial rights, his waiver is voluntary.[69] In cases involving retaliation, however, the defendant is faced with a harsher sentence or a more serious charge because of his refusal to waive a statutory, constitutional, or common law right.[70] When a defendant waives one of his statutory or constitutional rights, such as his right to a trial, that waiver must be voluntary.[71] Coercion may exist in a variety of forms arising from the conduct of the prosecutor.[72] In the instant case, Hayes was indicted under the recidivist

66. *See, e.g.*, Arechiga v. Texas, 469 F.2d 646, 647 (5th Cir. 1972), *cert. denied*, 414 U.S. 932 (1973); Bouie v. State, 565 S.W.2d 543, 545 (Tex. Crim. App. 1978) (en banc); Alvarez v. State, 536 S.W.2d 357, 359 (Tex. Crim. App.), *cert. denied*, 97 S. Ct. 325 (1976).

67. *See, e.g.*, Martinez v. Estelle, 527 F.2d 1330, 1331-32 (5th Cir.), *cert. denied*, 97 S. Ct. 325 (1976); Arechiga v. Texas, 469 F.2d 646, 647 (5th Cir. 1972), *cert. denied*, 414 U.S. 932 (1973); Bouie v. State, 565 S.W.2d 543, 545 (Tex. Crim. App. 1978) (en banc).

68. Arechiga v. Texas, 469 F.2d 646, 647 (5th Cir. 1972), *cert. denied*, 414 U.S. 932 (1973); Alvarez v. State, 536 S.W.2d 357, 360 (Tex. Crim. App.), *cert. denied*, 97 S. Ct. 325 (1976).

69. *See* Arechiga v. Texas, 469 F.2d 646, 647 (5th Cir. 1972), *cert. denied*, 414 U.S. 932 (1973); Alvarez v. State, 536 S.W.2d 357, 360 (Tex. Crim. App.), *cert. denied*, 97 S. Ct. 325 (1976). A plea is not involuntary even though it is induced by the defendant's desire to limit the maximum possible sentence. *See* North Carolina v. Alford, 400 U.S. 25, 37 (1970) (thirty years rather than a life sentence); Parker v. North Carolina, 397 U.S. 790, 794-95 (1970) (life sentence rather than death).

70. *See, e.g.*, United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.) (reindictment after transfer of venue), *cert. denied*, 98 S. Ct. 105 (1977); United States v. Johnson, 537 F.2d 1170, 1173 (4th Cir. 1976) (reindictment following successful challenge of original conviction); United States v. Ruesga-Martinez, 534 F.2d 1367, 1368 (9th Cir. 1976) (increased charges when defendant refused to waive right to trial by district judge). The Supreme Court has emphasized that if the only reason for a state practice is to discourage a defendant from insisting on his constitutional rights, that practice is "patently unconstitutional." *See, e.g.*, Chaffin v. Stynchcombe, 412 U.S. 17, 32 n.20 (1973); Shapiro v. Thompson, 394 U.S. 618, 631 (1969); United States v. Jackson, 390 U.S. 570, 581 (1968).

71. *See* Brady v. United States, 397 U.S. 742, 751 (1970); Rohrer v. Montana, 237 F. Supp. 747, 749 (D. Mont. 1965); State v. Sather, 564 P.2d 1306, 1309 (Mont. 1977); FED. R. CRIM. P. 11(d).

72. *See, e.g.*, United States v. Johnson, 537 F.2d 1170, 1173 (4th Cir. 1976) (reindictment following successful challenge of original conviction); United States v. Ruesga-Martinez, 534 F.2d 1367, 1368 (9th Cir. 1976) (increased charges when defendant refused to waive right to trial by district judge); United States v. Jamison, 505 F.2d 407, 409 (D.C. Cir. 1974) (reindictment after mistrial).

statute because he would not plead guilty.[73] The prosecutor warned that if Hayes did not save the court the inconvenience of going to trial he would face the additional charge.[74] The prosecutor attempted to coerce Hayes into pleading guilty by threatening him with a life sentence instead of the two to ten year sentence which he originally faced.[75] Unlike the trial strategy cases[76] the escalation of the defendant's sentence in this case was due to prosecutorial vindictiveness.[77]

In some situations obtaining a new indictment may be a proper use of the prosecutor's power. In his dissenting opinion Justice Powell argued that if the defendant could reasonably have been charged under the habitual criminal act in the first instance, then the prosecutor's conduct would be acceptable.[78] Courts have held that it is a violation of the eighth amendment's provision against cruel and unusual punishment to prosecute a defendant under a recidivist statute if his previous convictions were minor felonies.[79] Hayes' prior convictions were for detaining a female and robbery. He did not serve any time in jail, but was sent to a reformatory for his first offense and given a probated sentence for the second.[80] Considering that at least one of Hayes' prior convictions could be considered a minor felony and that the only new charge against Hayes was forgery of an eighty-eight dollar check, the prosecutor would have faced the possibility of a constitutional attack had he initially charged Hayes under the recidivist statute. If initial charges under the recidivist statute would be unreasonable, it is doubly unfair to allow the prosecutor to reindict the defendant under the statute for purely retaliatory motives.

Erosion of the rule established in *Pearce* and *Blackledge* increases the

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73. Bordenkircher v. Hayes, ___ U.S. ___, ___, 98 S. Ct. 663, 666, 54 L. Ed. 2d 604, 608 (1978).

74. *Id.* at ___, 98 S. Ct. at 665, 54 L. Ed. 2d at 607.

75. *Id.* at ___, 98 S. Ct. at 669-70, 54 L. Ed. 2d at 613 (Blackmun, J., dissenting).

76. *See, e.g.*, Martinez v. Estelle, 527 F.2d 1330, 1331-32 (5th Cir.), *cert. denied*, 97 S. Ct. 325 (1976); Arechiga v. Texas, 469 F.2d 646, 647 (5th Cir. 1972), *cert. denied*, 414 U.S. 932 (1973); Alvarez v. State, 536 S.W.2d 357, 359 (Tex. Crim. App.), *cert. denied*, 97 S. Ct. 325 (1976).

77. *See* Bordenkircher v. Hayes, ___ U.S. ___, ___, 98 S. Ct. 663, 669-70, 54 L. Ed. 2d 604, 613-14 (1978) (Blackmun, J., dissenting).

78. *Id.* at ___, 98 S. Ct. at 671-72, 54 L. Ed. 2d at 615-16 (Powell, J., dissenting). As of 1975 Hayes would not be eligible for conviction under the recidivist statute. The Kentucky recidivist statute now provides that a previous conviction is a basis for enhanced sentencing only if a prison term of one year or more was imposed, the sentence or probation completed within five years of the present offense, and the offender eighteen years of age when the offense was committed. *See* KY. REV. STAT. §532.080 (2) (Supp. 1976).

79. *See, e.g.*, Browne v. Estelle, 544 F.2d 1244, 1244-45 (5th Cir. 1977); Hart v. Coiner, 483 F.2d 136, 140-43 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974); Rogers v. United States, 304 F.2d 520, 521-22 (5th Cir. 1962).

80. Bordenkircher v. Hayes, ___ U.S. ___, ___, 98 S. Ct. 663, 666 n.3, 54 L. Ed. 2d 604, 608 n.3 (1978).