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PROHIBITING PROSECUTORIAL VINDICTIVENESS WHILE PROTECTING PROSECUTORIAL DISCRETION: TOWARD A PRINCIPLED RESOLUTION OF A DUE PROCESS DILEMMA*

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I. INTRODUCTION

The Supreme Court has consistently recognized that the use of governmental power to punish criminal defendants for exercising statutory or constitutional rights, or to deter them from exercising their rights, is an abuse of power that strikes at the very heart of due process.[1] Despite this sentiment, the application of the due process doctrine prohibiting the abuse of prosecutorial power to the realities of criminal prosecutions has proven difficult indeed.[2] In less

[1] Every case that has addressed the issue has condemned the use of governmental power to punish criminal defendants for exercising constitutional or statutory rights. *See* Blackledge v. Perry, 417 U.S. 21, 25 (1974) (citing North Carolina v. Pearce, 395 U.S. 711, 724 (1969)); North Carolina v. Pearce, 395 U.S. 711, 724 (1969) (citing United States v. Jackson, 390 U.S. 570 (1968)). *Cf.* United States v. Goodwin, 457 U.S. 368, 372-73 (1982); Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978); Chaffin v. Stynchcombe, 412 U.S. 17, 32-33 (1973); Colten v. Kentucky, 407 U.S. 104 (1972).

[2] *See infra* text accompanying notes 14-271. The doctrine has proved elusive in both the substantive and procedural context. The substantive doctrinal difficulties stem, in the first instance, from the contradiction between the general punitive purpose of criminal prosecutions and the recognition that retribution for the exercise of rights is an intolerable diminution of due process. Thus, the doctrine, by its nature, attempts to reconcile apparently contrary policy objectives and, as a result, necessarily reflects in its application a balancing of interests that are likely to be perceived differently by particular judges in particular circumstances. Much confusion has also arisen from the failure of the Court to clearly differentiate between the two branches of the doctrine: (a) the

than eight years, the Supreme Court has enunciated a due process "prosecutorial vindictiveness" doctrine[3] designed to sort out the proper use of prosecutorial discretion to punish crime from the improper use of power to punish the exercise of rights,[4] has created a major exception to that doctrine,[5] and has substantially limited the application of the doctrine to prosecutorial acts that occur prior to trial.[6]

This Article traces the rise and fall of the doctrine prohibiting prosecutorial vindictiveness from its inception in 1974 to the present. As a necessary introduction to a discussion of the most recent expressions of the doctrine,[7] Section II presents a detailed analysis of *North Carolina v. Pearce*,[8] *Colten v. Kentucky*,[9] *Chaffin v. Stynchcomb*,[10]

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prohibition against actual vindictiveness and (b) the prohibition of a "chilling effect" on the exercise of rights arising from defendants' fear of retaliation for the exercise of protected rights. *See infra* text accompanying notes 14-126.

Procedural difficulties have arisen because the Supreme Court has never clearly articulated either the procedures or the standard of proof required in vindictiveness analysis. While *Pearce*, 395 U.S. 711 (1969), set forth the procedures and standards to be applied by judges in resentencing, neither *Blackledge*, 417 U.S. 21 (1974), nor *Goodwin*, 457 U.S. 368 (1982), describe in much detail the procedures that apply to prosecutorial vindictiveness claims in either the "actual vindictiveness" or "apprehension of vindictiveness" context.

3 *Blackledge*, 417 U.S. 21 (1974).

4 The scope of prosecutorial discretion in American jurisprudence has been the subject of continuing attention by scholars. *See generally* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1978); Halberstam, *Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMINOLOGY 1 (1982); Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981). More particularly, the doctrine prohibiting prosecutorial vindictiveness has recently received increased attention. *See* Schwartz, *The Limits of Prosecutorial Vindictiveness*, 69 IOWA L. REV. 127 (1983); Note, *Unleashing the Prosecutor's Discretion*, United States v. Goodwin, 20 AM. CRIM. L. REV. 507 (1983); Note, *Two Models of Prosecutorial Vindictiveness*, 17 GA. L. REV. 467 (1983) [hereinafter cited as *Two Models*]; Note, *Prosecutorial Vindictiveness: Expanding the Scope of Protections to Increased Sentence Recommendations*, 70 GEO. L. REV. 1051 (1982); Note, *Prosecutorial Vindictiveness: Divergent Lower Court Applications of the Due Process Prohibition*, 50 GEO. WASH. L. REV. 324 (1982); Note, *Prosecutor Not Presumed Vindictive in Pre-Trial Charge Increases After Defendant's Request for a Jury Trial*, 73 J. CRIM. L. & CRIMINOLOGY 1452 (1982); Note, *Prosecutorial Vindictiveness in The Criminal Appellate Process: Due Process Protection After* United States v. Goodwin, 81 MICH. L. REV. 194 (1982) [hereinafter cited as *Prosecutorial Vindictiveness in the Criminal Appellate Process*]; Note, United States v. Goodwin*:* *Enhanced Prosecutorial Discretion in the Pretrial Setting*, 10 OHIO N.U. L. REV. 415 (1983); Note, *Evaluating Prosecutorial Vindictiveness Claims in Non-Plea Bargained Cases*, 55 S. CAL. L. REV. 1133 (1982).

5 *Bordenkircher*, 434 U.S. 357.

6 *Goodwin*, 457 U.S. 368.

7 Texas v. McCullough, 106 S. Ct. 876 (1986); Wasman v. United States, 468 U.S. 559 (1984); Thigpen v. Roberts, 468 U.S. 27 (1984); United States v. Goodwin, 457 U.S. 368 (1982).

8 *Pearce*, 395 U.S. 711 (1969).

9 *Colten*, 407 U.S. 104 (1972).

Blackledge v. Perry,[11] and *Bordenkircher v. Hayes*,[12] the major cases that have discussed the development of both the judicial vindictiveness doctrine and the prosecutorial vindictiveness doctrine. This section then focuses on the Supreme Court's application of the vindictiveness analysis to prosecutors in *United States v. Goodwin*.[13] Section III of the Article closely examines the reasoning in *Goodwin* and observes that the *Goodwin* opinion apparently misconstrues both *North Carolina v. Pearce* and *Blackledge v. Perry* and contradicts the reasoning in *Bordenkircher v. Hayes*. Section IV of the Article examines the impact of the *Goodwin* opinion on the vindictiveness doctrine and suggests that *Goodwin* may actually require procedures that are more costly and, at the same time, less effective in accomplishing the stated purpose of the doctrine than those that existed prior to the *Goodwin* opinion. The Article observes that, in spite of expressions of concern for maintaining the prohibition against vindictiveness, the current state of the doctrine severely restricts due process limitations on pre-trial use of prosecutorial power to punish defendants who exercise procedural rights. The most recent expressions of the doctrine establish an analytical framework that may eviscerate the branch of the doctrine that addresses the "chilling effect" on the exercise of rights caused by the fear of retaliation by prosecutors. Section V of the Article illustrates the development of the prosecutorial vindictiveness doctrine in the lower courts following *Goodwin* and pinpoints the aspects of the doctrine that are likely to remain in controversy.

II. Genesis of the Doctrine

A. Judicial Vindictiveness

1. North Carolina v. Pearce

The doctrine prohibiting both "actual vindictiveness"[14] and the "appearance of vindictiveness"[15] in the exercise of governmental

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10 *Chaffin*, 412 U.S. 17 (1973).

11 *Blackledge*, 417 U.S. 21 (1974).

12 *Bordenkircher*, 434 U.S. 357 (1978).

13 After this article was written, the Supreme Court decided another judicial vindictiveness case, Wasman v. United States, 468 U.S. 559 (1984). *See infra* discussion of this case in Addendum at notes 558-59.

14 Actual vindictiveness refers to the use of discretion by either judges or prosecutors to increase or enhance a defendant's exposure to penalty in retaliation for an exercise of a constitutionally protected right.

15 The "appearance of vindictiveness" arises when, irrespective of the actual motives of a judge or prosecutor, a sequence of events occurs that gives rise to a reasonable inference that a judge or prosecutor acted with retaliatory intent. The "appearance of vindictiveness" is violative of due process because of the "chilling effect" it may have on

power in criminal prosecutions was originally discussed by the United States Supreme Court in *North Carolina v. Pearce* and *Simpson v. Rice*, two companion cases decided in the same opinion.[16] In rejecting each defendant's claims that the double jeopardy provision and the equal protection clause prohibited increased sentences following reconviction on the same charges,[17] the Court first clearly identified the due process implications of such increased penalties following the exercise of constitutional or statutory rights.[18]

In *North Carolina v. Pearce*, the defendant had been granted a new trial by the state supreme court on constitutional grounds that the defendant first raised in a habeas-type, post-trial petition.[19] In a second trial, Pearce was again convicted, but he received a greater sentence than that imposed in the first trial.[20] The conviction and increased sentence were both upheld at the state level, and Pearce filed a habeas corpus petition in federal court.[21] In an unpublished opinion, the United States District Court for the Eastern District of North Carolina found the increased sentence unconstitutional and ordered the state to resentence Pearce within sixty days.[22] Upon the state's failure to resentence, the District Court ordered Pearce's release.[23] The Fourth Circuit affirmed the order of the lower court.[24] From this affirmance the Supreme Court granted a writ of certiorari.[25]

In the companion case, *Simpson v. Rice*, the defendant pleaded guilty to several burglary counts and was given a sentence of ten years.[26] These judgments were set aside several years later in a state

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the exercise of the right in question. It arises independently of the subjective intent of the judge or prosecutor.

16 *Pearce*, 395 U.S. 711 (1969).

17 The Court stated, "A new trial may result in an acquittal. But if it does result in a conviction, we cannot say that the constitutional guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offense in question." *Id.* at 721.

18 *Id.* at 723-26.

19 *Id.* at 713. The North Carolina Supreme Court held that a two-month delay in appointment of counsel for the defendant was a denial of statutory and constitutional rights. *Id.*

20 *Id.* The earliest date of release under the original sentence was November 3, 1969, while the earliest possible date of release under the new sentence was October 10, 1972. *Id.* at 713 n.1.

21 *Id.* at 713-14.

22 *Id.* at 714.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.* Rice was sentenced to four years on one count and to two years for each of three other offenses. These sentences were to be served consecutively. *Id.* at 714 n.3.

coram nobis proceeding on a constitutional right to counsel claim.[27] The defendant was subsequently tried on three of the four charges to which he initially pled, and he received a sentence of twenty-five years.[28] The defendant Rice brought a habeas corpus proceeding in the Federal District Court for the Middle District of Alabama challenging the increased sentence. District Judge Frank M. Johnson, Jr., agreed with Rice's due process claim, although he did not believe that increased sentences upon retrial would be unconstitutional "if there is recorded in the Court record some legal justification for it."[29] According to Judge Johnson, the failure of the State of Alabama to explain or justify the increased sentences led to the "inescapable [conclusion] that the State of Alabama is punishing petitioner for having exercised his post-conviction right of review and for having his original sentence declared unconstitutional."[30] Because the state failed to make "some showing of necessity or justification" for the increased second sentence,[31] Judge Johnson ordered Rice released.[32] The Court of Appeals for the Fifth Circuit affirmed,[33] and the Supreme Court granted a writ of certiorari.[34]

The majority opinion in *Pearce* made it clear that an increased penalty alone was not sufficient to trigger the protection of either equal protection or double jeopardy.[35] Neither constitutional provision precluded a judge from imposing a greater or a lesser sentence based upon events subsequent to the first trial.[36] The Court, however, took pains to explain the limitations that the due process clause imposes upon judicial discretion in re-sentencing.[37] Justice Stewart, writing for the majority, observed that a rule that imposed greater sentences upon retrial "for the explicit purpose of punishing the defendant for having succeeded in getting his original conviction set aside" would violate the fifth and fourteenth

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27 *Id.* at 714.

28 *Id.* The defendant Rice was sentenced to ten years on the first and second counts, and to five years on the fourth count, all sentences to be served consecutively. *Id.* at 714 n.4. No credit was given for the time Rice had already served on the original sentences. *Id.* at 714.

29 *Id.* at 715 (citing Rice v. Simpson, 274 F. Supp. 116, 121-22 (M.D. Ala. 1967), *aff'd*, 396 F.2d 499 (5th Cir. 1968)).

30 *Pearce*, 395 U.S. at 715.

31 Rice v. Simpson, 274 F. Supp. 116, 122 (M.D. Ala. 1967).

32 *Id.* at 123.

33 Simpson v. Rice, 396 F.2d 499 (5th Cir. 1968).

34 *Pearce*, 395 U.S. at 715.

35 *Id.* at 723.

36 United States v. Wasman, 700 F.2d 663 (11th Cir. 1983), *aff'd.*, 468 U.S. 559 (1984).

37 *Pearce*, 395 U.S. at 723-26.

amendments.[38] He noted that this would particularly be true in cases such as *Pearce* and *Rice*, in which constitutional errors resulted in retrial, and that " 'penalizing those who choose to exercise constitutional rights would be patently unconstitutional.' "[39]

In support of the majority's rejection of the use of governmental power to punish the exercise of constitutional rights, Justice Stewart explicitly referred to the due process analysis in *United States v. Jackson*.[40] In that case, the Supreme Court invalidated a portion of the federal kidnapping statute that had made the death penalty applicable only in jury trials.[41] According to the Court in *Jackson*, the possibility of receiving the death penalty *only* if the right to a jury trial was exercised violated due process and created an unconstitutional burden on the right to a jury trial.[42] According to the Court in *Jackson*, "if the provision had no other *purpose* or *effect* than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional."[43]

Thus, in addition to the impact of increased punishment on those who exercise their constitutional rights, Justice Stewart's opinion in *Pearce* recognized that government acts which have the effect of deterring the exercise of such rights by others are also violative of due process.[44] The Court sought to prevent the implicit threat of punishment and the resulting "chill . . . of basic constitutional rights"[45] previously condemned in *Griffin v. California*[46] and *Johnson v. Avery*.[47] After establishing that the doctrine in *Pearce* arose from due process considerations that had already been applied to unnecessary burdens placed upon constitutional rights such as the right to a jury trial, the right of a defendant not to testify at trial and the right of prisoners to habeas corpus relief,[48] Justice Stewart made

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38 *Id.* at 723-24.

39 *Id.* at 724 (quoting United States v. Jackson, 390 U.S. 570, 581 (1968)).

40 390 U.S. 570 (1968).

41 *Id.* at 572.

42 *Id.* at 581.

43 *Id.* (emphasis added). This statement indicates that both the intention to punish or deter the exercise of a right and governmental acts that have the *effect* of deterring the exercise of rights are an anathema. Thus, *Jackson* seems to indicate that acts which have the *effect* of chilling the right to a jury trial would be improper, irrespective of the actual intention of the government.

44 *See Pearce*, 395 U.S. at 724. "[T]he very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to 'chill the exercise of basic constitutional rights.'" *Id.* at 724 (quoting United States v. Jackson, 390 U.S. 570, 582 (1968)).

45 *See id.*

46 Griffin v. California, 380 U.S. 609 (1965).

47 Johnson v. Avery, 393 U.S. 483 (1969).

48 *Pearce*, 395 U.S. at 724.

clear that burdens placed upon the exercise of statutory rights of appeal would also be violative of due process.[49]

The Court then applied these due process considerations[50] to *Pearce* and *Rice*.[51] The Court clearly stated for the first time that "vindictiveness" must play *no part* in sentencing on retrial following either appeal or collateral attack, and also that "a defendant must be free of the *apprehension* of such retaliatory motivation on the part of a sentencing judge."[52]

Since the Court recognized that "such motivations are extremely difficult to prove in any individual case,"[53] the Court in *Pearce* required that (1) reasons for an increased sentence affirmatively appear on the record "so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal"; and (2) the reasons for the increase must be "factual data" or "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."[54]

After enunciating the standards that would be applied to test the propriety of increased sentences after retrial, the Court examined the applicability of those standards to the cases before the Court.[55] Justice Stewart pointed out that in *Rice*, Judge Johnson had noted a complete absence of justification for the increased sentence and had made a finding that Alabama had failed to explain or justify the increase in sentence and was "punishing" Rice for exercising his right of review.[56] In *Pearce*, Justice Stewart noted that the state had failed to advance a legitimate justification for the increased sentence either at sentencing or at any time during the habeas proceeding, even though the District Court had given the state the opportunity to resentence the defendant.[57] Because the state in each case had failed to offer "any reason or justification for the [increased] sentence beyond the naked power to impose it," the Supreme Court affirmed outright the District Court orders in both *Pearce* and *Rice*.[58]

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49 *Id.* Justice Stewart stated that if a defendant was penalized for successfully seeking a statutory right of appeal or a collateral remedy, then the defendant's due process guarantees would be no less violated. *Id.*

50 *See supra* notes 38-48 and accompanying text.

51 *Pearce*, 395 U.S. at 725.

52 *Id.* at 725 (emphasis added).

53 *Id.* at 725 n.20.

54 *Id.* at 726.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

2. *Colten v. Kentucky*

Colten v. Kentucky[59] and *Chaffin v. Stynchcombe*[60] are cases decided after substantial alterations in the makeup of the Court.[61] *Colten* and *Chaffin* were the only cases that applied the judicial vindictiveness doctrine of *Pearce* prior to the Court's enunciation of the analogous "prosecutorial vindictiveness" doctrine in *Blackledge v. Perry* in 1974. In *Colten*, the Court found that in a statutorily granted *de novo* procedure, increased penalties levied by a judge who had no role in the original trial did not offend the considerations of *Pearce*.[62]

In distinguishing *Colten* from *Pearce*, Justice White observed that the evil in *Pearce* was not an increased sentence on retrial *per se*,[63] but rather the *possibility* that the increased sentences on retrial resulted from "purposeful punishment" for having successfully appealed.[64] For Justice White, the central issue in *Pearce* was the frequency of increased sentences after retrials. He stated that "the Court [in *Pearce*] concluded that such untoward sentences occur with sufficient frequency to warrant the imposition of a prophylactic rule" to ensure that neither vindictiveness nor the apprehension of vindictiveness deter the exercise of the defendant's right to appeal.[65]

Justice White recognized that a judge in a court of general jurisdiction who was forced to hear a second trial following a trial in an inferior court in a trial *de novo* system might feel that a "defendant who had a due process trial should be satisfied with it" and, thus, might also have a punitive motive in sentencing.[66] Justice White, however, concluded that the existence of such a motive is not sufficiently likely in a trial *de novo* system to require the *Pearce* procedure.[67]

According to Justice White, the features of the trial *de novo* sys-

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59 407 U.S. 104 (1972).

60 412 U.S. 17 (1973). *See infra* text accompanying notes 77-126.

61 When *Colten* was decided in 1972, three years after *Pearce*, Chief Justice Burger had replaced former Chief Justice Earl Warren, and Justices Powell, Blackmun, and Rehnquist had replaced Justices Black, Fortas and Harlan. E. L. BARRETT & W. COHEN, CONSTITUTIONAL LAW 1576-77 (1981).

62 *Colten*, 407 U.S. at 116-17.

63 *Id.* The trial *de novo* represents a completely fresh determination of guilt or innocence. It is not an appeal on the record. "In all likelihood, the trial *de novo* court is not even informed of the sentence imposed in the inferior court and can hardly be said to have 'enhanced' the sentence." *Id.* at 117-18.

64 *Id.* at 116.

65 *Id.* For a discussion of the relationship between the vindictiveness doctrine and state court attempts to frustrate the holding in *Gideon v. Wainwright* see, Schwartz, *The Limits of Prosecutorial Vindictiveness*, 69 IOWA L. REV. 127, 130 (1983) [hereinafter cited as Schwartz].

66 *Id.* at 117.

67 *Id.*

tem that distinguish it from an appeal include: (a) the second proceeding occurs in a different court and before a different judge than the original trial;[68] (b) the trial *de novo* procedure does not require the second court to "do again what it thought it had done correctly";[69] (c) the judge in the second proceeding is not asked to find error in another court's work;[70] (d) the second proceeding in a trial *de novo* system is no different than that which would have occurred had the case originated in the second court;[71] (e) it is possible that the judge in the second proceeding may not even be informed of the sentence in the inferior court.[72] In addition, Justice White observed that defendants charged in the inferior court may plead or demand trial and still retain the option of an entirely new determination of guilt or innocence, an option that the state does not retain when it charges in the inferior court.[73] These factors led Justice White to conclude that the initial proceeding is in the nature of "an offer in settlement" that the defendant is free to reject.[74] Further, *Pearce*-type restraints, according to Justice White, might well reduce the imposition of lenient sentences to settle minor cases since the effect of the application of *Pearce* would be to limit sentencing options on retrial.[75]

In deciding *Colten*, Justice White did not fully discuss the "chilling effect" on the exercise of constitutional and statutory rights that the apprehension of vindictiveness mentioned in *Pearce* might create. Apparently, Justice White concluded that any apprehension of judicial vindictiveness on the part of a defendant in a trial *de novo* procedure was too subjective to require *Pearce*-type protections. Implicit in this analysis is approval of an analytical methodology that examines (a) the *additional* burdens imposed upon the sentencing judge as a *result* of the defendant's exercise of a right, and (b) the likelihood that those additional burdens might be sufficiently substantial to cause the judge to respond punitively. Thus, *Colten* introduces a subjective judicial weighing of the probability of the existence of actual vindictiveness as a method of testing the validity of a defendant's fear of reprisal.[76]

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68 *Id.* at 116.
69 *Id.* at 117.
70 *Id.*
71 *Id.*
72 *Id.* at 118.
73 *Id.* at 119. It is important to note, in light of the *Goodwin* opinion, that the trial *de novo* procedure in *Colten* provided for a jury trial in both proceedings. Thus, burdens upon the right to a jury trial were not implicated in *Colten*.
74 *Id.*
75 *Id.*
76 *Id.* In addition to the factors mentioned by Justice White, a *Pearce*-type standard

3. *Chaffin v. Stynchcombe*

In *Chaffin v. Stynchcombe*, the Court ruled that increased sentences meted out by juries on a retrial after appeal do not offend the due process clause "so long as the jury is not informed of the original sentence and the second sentence is not otherwise shown to be a product of vindictiveness."[77] *Chaffin* is important because it introduced the additional concept that some "choice of rights" was acceptable in due process vindictiveness analysis if the exercise of the right was sufficiently attenuated from any punitive result.[78] The Court in *Chaffin* equated the risk associated with an increased jury-imposed sentence with the earlier acceptance of "a choice of rights" in the plea bargaining context approved by the Court in *Brady v. United States*.[79] The defendant in *Chaffin* had originally been convicted in a Georgia state court of the capital offense of "robbery by open force" and had been given a jury-recommended sentence of fifteen years in prison.[80] The conviction and sentence were affirmed on appeal,[81] but a retrial was ordered by the federal district court pursuant to defendant's habeas corpus petition.[82] A second trial before a different judge and jury resulted in a second conviction.[83] The prosecution argued for imposition of the death penalty in the second trial.[84] The jury returned a sentence of life imprisonment.[85]

Although the parties agreed that the jury was unaware of the

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would have required a record of the original proceeding so that an increased sentence in the second proceeding could be subjected to constitutional review. Thus, application of the *Pearce* rule to the facts of *Colten* would have required restructuring the informal, inferior court system and replacing it with a system more closely analogous to the second level court in Kentucky's two-tier system. Thus, the advantage of disposing of minor cases quickly and inexpensively would be lost. *Id.* at 117.

Although the Court did not specifically address this issue in *Pearce*, the Court seems to have considered the probability that actual vindictiveness was present, given the references to the number of appeals that resulted in increased sentences. *See Pearce*, 395 U.S. at 724-25 nn.19-20. One commentator has noted that *Pearce* may be seen as the Supreme Court's response to the reluctance of lower courts to give full effect to *Gideon v. Wainwright*. Viewed this way *Pearce*, too, is based upon a "realistic likelihood" of vindictiveness analysis. *See* Schwartz, *supra* note 65, at 130.

77 *Chaffin*, 412 U.S. at 35.

78 *Id.* at 30-31.

79 *Id.* at 30-31 (citing Brady v. United States, 397 U.S. 742 (1970)).

80 *Chaffin*, 412 U.S. at 18.

81 *Id.* at 19.

82 *Id.* at 18-19.

83 *Id.* The two trials were similar in most respects. "The case was prosecuted on both occasions by the same State's attorney and the same prosecution witnesses testified to the facts surrounding the alleged robbery. Petitioner, however, was represented by new counsel and, in addition to repeating his alibi defense, he interposed an insanity defense not offered at the former trial. New witnesses were called to testify for both sides on this issue." *Id.* at 19.

84 *Id.* at 19 n.3. Although the closing arguments from the first trial were not tran-

original sentence, the jury was certainly aware of the original trial.[86] The defendant's attorney at the first trial even testified in the second proceeding to explain why an insanity defense was not offered in the first trial and to give his opinion that the defendant suffered from a mental defect.[87] The lower court conceded that the jury could only have speculated whether the retrial was caused by mistrial or reversal on appeal.[88]

After state appeals of the higher sentence were rejected, the defendant applied for habeas relief arguing that *Pearce* prohibited the increase in sentence from fifteen years to life. The District Court and United States Court of Appeals affirmed the higher sentence.[89] The Supreme Court granted certiorari to resolve a division in the courts of appeal on the applicability of the *Pearce* vindictiveness doctrine to jury resentencing.[90]

Justice Powell wrote the opinion for the majority in *Chaffin*; Justices Douglas, Brennan, Marshall and Stewart dissented. The majority rejected the defendant's double jeopardy claim[91] and the claim that *Pearce* required jury sentences on retrial not to exceed the first sentence.[92] In addressing the petitioner's claim that the *Pearce* analysis regarding vindictiveness applied with equal force to both jury and judicial resentencing, the majority found that the concerns regarding the *possibility* of vindictiveness expressed in *Pearce* did not arise in jury resentencing.[93] Although *Pearce* stated that vindictiveness can have no place in the resentencing process,[94] thus implying that even a remote possibility of vindictiveness requires *Pearce*-type protection, the majority cited *Colten* for the proposition that the "chilling of rights" vindictiveness analysis was not appropriate where the "possibility of vindictiveness" did not "inhere in the . . . system."[95] The majority concluded that "potential for such abuse in the sentencing by the jury is *de minimus* in a properly controlled retrial."[96]

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scribed, affidavits of counsel asserted that the state argued for the death penalty at both trials. The court assumed that this was a correct reconstruction of the facts.

85 *Id.* at 19-20.

86 *See id.* at 20 n.4.

87 *Id.*

88 *See id.* at 20 n.5.

89 *Id.* at 21.

90 *Id.*

91 *Id.* at 24.

92 *Id.* at 28.

93 *Id.* at 25-26.

94 *Pearce*, 395 U.S. at 725.

95 *Chaffin*, 412 U.S. at 26 (quoting Colten v. Kentucky, 407 U.S. 104, 116 (1972)).

96 *Id.* at 26.

According to Justice Powell, the jury resentencing in *Chaffin* did not carry the same dangers that "inhere" in judicial sentencing for several reasons: (a) the jury was not informed of the previous sentence and, in other settings, may not even be aware of the earlier trial[97], (b) the second jury sentence is not meted out by the same "judicial authority", and the jury has no "personal stake in the outcome and no motivation to engage in self-vindication;"[98] and (c) the jury is unlikely to have the "institutional interests" that may cause judges to seek to discourage appeals.[99]

Apparently recognizing that vindictiveness, or at least the appearance of vindictiveness, may arise even in jury sentencing because of the motivations of the judge and prosecutor, Justice Powell observed that it may be desirable for judges to give the same instructions to each jury and for prosecutors to make the same arguments regarding sentence.[100] Thus, *Chaffin* carries the implication that even jury resentencing may be subject to the *Pearce* rationale as a result of either *judicial* or *prosecutorial* acts that increase the defendant's risk of a heightened penalty.[101]

In a comment that more clearly foreshadows *Goodwin* and the prosecutorial vindictiveness analysis of *Blackledge v. Perry*, Justice Powell addressed his concern that higher sentences after retrial may result from prosecutorial vindictiveness.[102] According to Justice Powell, the record in *Chaffin* did not indicate that the prosecutor argued for a higher sentence or argued more strenuously on retrial.[103] Thus, he concluded, where a jury is unaware of the previous sentence, "there is no basis for holding that jury resentencing poses any *real* threat of vindictiveness."[104] Because the threat of vindictiveness was found to be *de minimis* before untainted juries in *Chaffin*,[105] the Court declined to apply the *Pearce* prophylactic rule.[106] The majority conceded in a footnote that some remedies may be necessary in cases involving tainted juries, but observed that the

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97 *Id.*

98 *Id.* at 27.

99 *Id.*

100 *Id.* at 27 n.13.

101 *See id.*

102 He went beyond the facts to note that a recommendation of an increased sentence *might* arise from other motives and that the prohibition against informing the sentencing jury of the previous sentence made "the possibility that a harsher sentence [would] be obtained through prosecutorial malice . . . remote." *Id.* at 27 n.13.

103 *Id.*

104 *Id.* at 28.

105 *Id.* at 26.

106 *Id.* at 28 n.15.

Pearce rule would be difficult to apply.[107]

After rejecting a *Pearce*-type vindictiveness analysis in jury resentencing when jurors are unaware of the previous sentence, the majority addressed the "chilling effect" that any jury-imposed increase in sentence might have on appeal rights, irrespective of the existence of actual vindictiveness.[108] This analysis of the chilling effect in the exercise of rights did not rely upon *Pearce*, but rather was premised upon the doctrine enunciated in *United States v. Jackson*,[109] the case from which the *Pearce* rationale was drawn.[110] In *Jackson*, the Court struck down a federal statute that gave death-penalty sentencing power to the jury but not to the judge.[111] According to the *Chaffin* majority, although *Jackson* struck down the offending statute because it needlessly chilled the exercise of constitutional rights, *Jackson* did not prohibit every "government-imposed *choice* . . . that has the effect of discouraging the exercise of constitutional rights."[112]

As an example of a constitutionally acceptable choice, the majority referred to the choice in *Brady v. United States* between the "certainty or probability" of a higher sentence if a defendant exercises the right to stand trial rather than accept a plea bargain.[113] The majority candidly noted that such choices were "upheld as an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas."[114] As applied to *Chaffin*, the majority found that the right to appeal can constitutionally carry with it some risk of an increased sentence for two major reasons: (1) the court finds "nothing in the right to appeal or collateral attack . . . which *elevates those rights* above the right to jury trial or to remain silent;" (2) unlike plea bargaining, or the choice whether to testify,

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107 *Id.* The Court also noted that a due process doctrine that would limit sentences on retrial to those originally imposed would accomplish the same result that the Court had already rejected under the double jeopardy analysis. *Id.* at 28-29 n.15.

108 *Id.* at 29.

109 390 U.S. 570 (1968).

110 *Chaffin*, 412 U.S. at 29.

111 *Id.* at 29-30.

112 *Id.* at 30. As examples, the Court cited the choice to plead guilty to avoid the potential imposition of the death penalty and the choice to testify at trial or to remain silent, thus foregoing either the fifth amendment right to remain silent or to present mitigating sentencing information. *Id.* at 30-31. According to the majority, the distinguishing feature in these "choice of rights" cases between permissible and impermissible choices is "whether compelling the election [of rights] impairs to an appreciable extent any of the policies behind the rights involved." *Id.* at 32 (quoting Crampton v. Ohio, 402 U.S. 183 (1971) (companion case to McGautha v. California, 402 U.S. 183 (1971)).

113 *Id.* at 30-31.

114 *Id.* at 31.

the likelihood of receiving a higher sentence is remote when the right to appeal is exercised.[115]

According to the majority, several eventualities must occur before a defendant can receive an increased penalty after exercising the right to appeal: the appeal must succeed; the case must be remanded rather than dismissed; the prosecutor must decide to go forward with the retrial; the defendant must *choose* a jury trial; the jury must convict; and the "jury or the judge must arrive at a harsher sentence" in circumstances *genuinely* devoid of actual vindictiveness."[116] The majority concluded that the prospect of an increased sentence that might prevent free choice under such circumstances is too speculative at the point at which the decision is made to be likely to "chill" the exercise of the right to appeal.[117]

Justice Douglas, in dissent, would have found that applying *Pearce* to increased sentences imposed by judges on retrial but not to juries unconstitutionally burdened the right to be tried by a jury.[118] In another dissenting opinion, Justice Stewart stated that *Pearce* should apply, even in jury resentencing, to assure that "vindictiveness . . . play no part. . . ."[119] For Justice Stewart, the danger, even in jury resentencing, comes from both the prosecutor and the judge.[120] The possibility that one or both of these instruments of the state might influence the second jury is sufficient to require application of the *Pearce* doctrine. He read the prosecutor's request for the death penalty in the second trial in *Chaffin* to be an indication of just such vindictive potential.[121] He maintained that the possibility of such motivation is exactly what made a *Pearce*-type procedure necessary.[122]

Justice Stewart would require the judge to reduce an increased

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115 *Id.* at 33 (emphasis added).

116 *Id.* at 33-34 (emphasis added). This is somewhat misleading, because after *Pearce*, judges must also sentence in circumstances devoid of the *appearance* of vindictiveness.

117 *Id.* at 34-35.

118 *Id.* at 35 (Douglas, J., dissenting) (citing United States v. Jackson, 390 U.S. 570 (1968)).

119 *Id.* at 35 (Stewart, J., dissenting).

120 *Id.* at 36. Justice Stewart stated the following:

> Either or both might have personal and institutional reasons for desiring to punish a defendant who has successfully challenged his conviction. Out of vindictiveness the prosecutor might well ask for a sentence more severe than that meted out after the first trial, and a judge by the manner in which he charges the jury might influence the jury to impose a higher sentence at the second trial.

Id.

121 *Id.* Justice Stewart explained that he felt that the prosecutor and the judge gave the jury the option to impose the death penalty as a tactical move to assure that the petitioner would receive at least another 15-year sentence. *Id.*

122 *Id.* at 37.

jury sentence to the original sentence or to make a *Pearce*-type record of the reasons for the increase. Thus, he would avoid the double jeopardy/due process problem alluded to by the majority and, under the proper circumstances, sentences could be increased after appeal, but *only* for assuredly non-punitive reasons.[123] Justice Stewart also agreed with the dissenting opinion by Justice Marshall which concluded that allowing a more severe sentence in a jury trial after appeal impermissibly burdens the right to a jury trial.[124]

The *Chaffin* majority opinion is important primarily because it builds upon *Colten* and clarifies the test for the imposition of the *Pearce* prophylactic rule by making clear that the *possibility* of actual vindictive motive is insufficient to trigger application of the rule. Rather, the test requires a *realistic likelihood* of actual vindictiveness.[125] In addition, *Chaffin* introduced the notion that the chilling effect addressed in *Pearce* and *Jackson* does not arise simply because a defendant is presented with the possibility of an increased penalty as a result of a choice of rights. Rather, if the exercise of the right is insulated from any increased penalty by intervening variables that sufficiently reduce the ability of the government to *impose* a greater penalty, possibility of increased punishment is viewed as "speculative" and, thus, unlikely to be a deterrent to the exercise of the right in question.[126]

B. PROSECUTORIAL VINDICTIVENESS

1. Blackledge v. Perry

The due process doctrine prohibiting prosecutorial vindictiveness was first enunciated by the Supreme Court in *Blackledge v. Perry* in 1974.[127] The defendant in *Blackledge*, like the defendant in *Colten v. Kentucky*,[128] was originally convicted of a misdemeanor in the

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123 *Id.*

124 *Id.* Justice Marshall took issue with the majority's treatment of United States v. Jackson, 390 U.S. 570 (1968). *Id.* at 38 (Marshall, J., dissenting). According to Marshall, the inquiry should not be whether the burden imposed on a right is incidental. Rather, the correct inquiry should be whether the chilling effect is unnecessary, and therefore excessive. *Id.* at 44. He would ask then, whether the burden on the right to appeal was necessary to accomplish a legitimate state purpose. His conclusion is that legitimate state interests are not advanced by permitting increased jury sentences following retrial. *Id.*

125 For Justice Stewart, the author of *Pearce*, the possibility of such motivation and the difficulty of proving it remain enough to require a prophylactic rule. *Id.* at 37 (Stewart, J., dissenting).

126 *Id.* at 35.

127 *Blackledge*, 417 U.S. 21.

128 *Colten*, 407 U.S. 104. *See supra* notes 59-77 and accompanying text.

lower court of North Carolina's two-tier trial court system.[129] After the defendant exercised his statutory right to a trial *de novo* on appeal,[130] the prosecutor sought a felony indictment on the same facts that gave rise to the original misdemeanor conviction. The defendant pled guilty to the increased charge and received a sentence substantially greater than that in the original trial.[131] The defendant then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. In an unreported opinion, the petition was dismissed for failure to exhaust state remedies.[132] The United States Court of Appeals for the Fourth Circuit reversed, holding that requiring exhaustion of remedies would be futile.[133] The case was remanded to the district court.[134]

The district court granted the writ, holding, in an unpublished opinion, that the increased sentence violated the double jeopardy clause and the defendant's right to a jury trial.[135] The court of appeals affirmed the district court without publishing a written opinion.[136] Thus, the Supreme Court granted certiorari without the benefit of a published opinion from either of the courts below. The Supreme Court noted, however, that the district court had the benefit of the Supreme Court opinion in *Colten v. Kentucky* prior to granting the habeas petition.[137] Justice Stewart, writing for an eight to one majority, rejected the defendant's claim that the increased charges and punishment violated the constitutional prohibition

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129 *Blackledge*, 417 U.S. at 22. Perry, an inmate in a North Carolina prison, was charged and convicted of assault with a deadly weapon after a fight with another prisoner. *Id.*

130 *Id.* Unlike the system in *Colten*, the lower court proceeding did not provide for the election of a jury trial.

131 *Id.* at 23. Perry was given a six-month sentence for this misdemeanor charge, to be served after completing the sentence he was already serving. *Id.* at 22. On appeal to the Superior Court, Perry was sentenced to a term of five to seven years for the felony indictment, to be served concurrently with the time he was already serving. *Id.* at 23. The effect was to increase his potential period of incarceration by 17 months, as compared to the possible six-month increase from the misdemeanor charge. *Id.* at 23 n.2.

132 *Id.* at 23.

133 *Id.* at 23-24. The United States Court of Appeals believed that the North Carolina state courts would not be helpful to Perry because the Supreme Court of North Carolina had "consistently rejected the constitutional claims presented by Perry in his petition." *Id.* at 24.

134 *Id.* at 24.

135 Perry v. Blackledge (No. 2800 filed Aug. 24, 1972) (unpublished opinion of J. Larkin). *See infra* text accompanying notes 325-39.

136 *Id.*

137 *Blackledge*, 417 U.S. at 24 n.3. This reference may be significant since the trial court opinion distinguished *Blackledge* from *Colten* because of the difference in jury trial provisions in each system. It seems to imply approval of the trial court's treatment of that distinction.

against double jeopardy.[138] Concerning the defendant's second claim based on vindictiveness on the part of the prosecutor, the Court looked to *North Carolina v. Pearce*[139] and its progeny for a due process analysis that applied to the actions of the prosecutor.[140]

The majority opinion reaffirmed that *Pearce* required that "vindictiveness against the defendant . . . must play no part" in resentencing following an appeal and that an increased sentence could not be imposed unless the judge placed "certain specified findings" on the record.[141] The majority noted that *Colten v. Kentucky* permitted increased sentences in a trial *de novo* system because the danger of vindictiveness addressed in *Pearce* was *de minimus*.[142] The Court also mentioned *Chaffin v. Stynchcombe* as the most recent application of *Pearce* that found the danger of vindictiveness *de minimus* in jury sentencing.[143]

According to the Court in *Blackledge*, "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 those that pose a realistic likelihood of 'vindictiveness'."[144] The Court concluded that the "opportunities for vindictiveness" on the part of a prosecutor who could "up the ante" by increasing charges required an "analagous" rule to that enunciated in *Pearce*.[145] The Court reached this conclusion even though the trial *de novo* procedure in *Blackledge* was virtually identical to the procedure which was found to insulate judges from the *Pearce* rule in *Colten v. Kentucky*. The major distinction between the two systems was that jury trials were only available in North Carolina following an appeal from the inferior court.[146]

Applying the analysis suggested in earlier cases, the majority

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138 *Id.* at 25.

139 395 U.S. 711 (1969).

140 417 U.S. at 25-29. In *Pearce*, the Court considered the constitutional problems presented when, following a successful appeal and reconviction, a criminal defendant was subjected to a greater punishment than that imposed at the first trial. "While we concluded that such a harsher sentence was not absolutely precluded by either the Double Jeopardy or Due Process Clause, we emphasized that 'imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law.' " *Id.* at 25 (quoting North Carolina v. Pearce, 395 U.S. 711, 724 (1969)).

141 *Id.* at 25-26 (citing North Carolina v. Pearce, 395 U.S. 711, 725 (1969)).

142 *Id.* at 26 (citing Colten v. Kentucky, 407 U.S. 104 (1972)).

143 *Id.* at 26-27 (citing Chaffin v. Stynchcombe, 412 U.S. 17 (1973)).

144 Blackledge v. Perry, 417 U.S. 21, 27 (1974). The Court distinguished *Blackledge* from *Pearce*, *Colten* and *Chaffin* by pointing out that in *Blackledge*, the central figure was the prosecutor, not the judge or jury. *Id.*

145 *Id.*

146 *See infra* text accompanying notes 325-39.

concluded that even in a trial *de novo* setting, a prosecutor, unlike a judge as in *Colten*, has a *stake* in discouraging appeals since "an appeal will clearly require increased expenditures of prosecutorial resources before defendant's conviction becomes final, and may even result in a formerly convicted defendant going free."[147] The Court observed that few defendants will brave the hazards of the *de novo* trial.[148] Thus, the majority in *Blackledge* concluded that a "realistic likelihood" of vindictiveness[149] arose because incentives for prosecutors to prevent the exercise of rights[150] existed simultaneously with the unfettered power to "up the ante"[151] to deter the exercise of those rights.[152] Unlike *Chaffin*, there were no intervening, independent occurences between the incentive to punish and the exercise of discretion that made the defendant's fear of retaliation "speculative".

After finding that the potential for prosecutorial vindictiveness was sufficient to require the application of *Pearce*, the Court pointed out that there was no evidence of actual vindictiveness on the part of the prosecutor in *Blackledge*.[153] According to the majority, however, *Pearce* did not necessarily require an inquiry into the existence of *actual* vindictive motive.[154] If it had, any inquiry into the "realistic likelihood of vindictiveness" would obviously have been unnecessary. The due process violation arose in *Pearce* because a person is entitled to pursue a new trial "without apprehension that the State will retaliate by substituting a more serious charge."[155] Although *Pearce, Colten, Chaffin* and *Blackledge* all addressed sentencing following a retrial, there is no indication that any of the opinions were limited to a post-trial exercise of rights. Thus, after *Blackledge v. Perry*, the doctrine prohibiting use of the prosecutor's power to punish the exercise of procedural rights by a defendant at any time was apparently firmly established.

Like the "prophylactic rule" developed for judicial vindictiveness in *Pearce, Blackledge* required that an increase in potential liability following a defendant's exercise of a statutory or constitutional

147 *Blackledge*, 417 U.S. at 27.
148 *Id.* at 27-28.
149 *Id.* at 27.
150 *Id.*
151 *Id.* at 28.
152 *Id.*
153 *Id.*
154 *Id.*
155 *Id.* The Court stated that a due process violation arose if the defendant were subjected to the possibility of increased incarceration. *Id.* Additionally, the conviction for a felony usually resulted in longer prison sentences compared to sentences imposed for misdemeanor convictions. *Id.* at 28 n.6.

right be accompanied by objective reasons for the increased liability which did not exist or which were not known to the prosecution prior to the defendant's exercise of the rights.[156] Thus, the courts would be spared the "unseemly task" of divining the subjective motives of the prosecutor, and presumably, if legitimate reasons were presented, prosecution on the increased charges would be allowed to go forward. If, on the other hand, the government were unable to present such objective reasons, nothing in *Blackledge* would prevent prosecution on the original charges.[157]

2. *Bordenkircher v. Hayes*

In 1978, the Court again addressed the issue of prosecutorial vindictiveness in a case that contrasted the Court's earlier acceptance of the practice of plea bargaining with *actual* vindictiveness on the part of a prosecutor. In *Bordenkircher v. Hayes*, the Court held that a threat to seek additional charges and a mandatory life term if a defendant insisted upon going to trial was constitutionally acceptable *in the context of plea bargaining*.[158]

The defendant in *Bordenkircher* had previously been convicted of two felonies. He had been committed to a juvenile facility for assault and had received probation for a theft-related charge.[159] In pretrial conferences, the prosecutor offered to recommend a five-year sentence if Hayes would plead guilty to the charge of uttering an $88.30 forged check.[160] The prosecutor also told Hayes that he

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156 The nature of the showing required of the state to establish a valid increase in penalty is not specifically addressed in *Blackledge*. In one footnote, however, the Court states that an increase in charges from assault to murder was acceptable when the alleged victim died subsequent to the original trial. *Id.* at 29 n.7 (citing Diaz v. United States, 223 U.S. 442 (1912)). This implies that a change in objective circumstances would be enough to allow an increased charge. There is nothing in *Blackledge*, however, that would necessarily limit the showing to such a change in the objective circumstances. This ambiguity has led to continuing controversy regarding what that showing required.

The "objective-evidence-only" position has been criticized as not allowing a change in position based upon newly discovered facts that existed at the time of the original proceeding. Justice Blackmun, in *Goodwin*, suggests that a more flexible standard would solve this problem. *See infra* notes 251-55 and accompanying text.

157 The federal district court allowed the original misdemeanor conviction to stand pending an appeal by the defendant. Perry v. Blackledge, No. 2800 (Dist. N. C., J. Larkins, Aug. 23, 1972). The appellate opinions do not disclose whether the defendant filed a subsequent appeal.

158 *Bordenkircher*, 434 U.S. 357. The Court stated, that "[p]lea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Id.* at 363 (quoting Brady v. United States, 397 U.S. 742, 758 (1970)).

159 *Id.* at 359.

160 *Id.* at 358. The applicable statute at the time called for a term of incarceration of two to ten years. KY. REV. STAT. § 484.130 (1973) (repealed 1975).

would indict him as a habitual criminal, which carried a mandatory life sentence, if Hayes did not plead guilty.[161] Hayes decided to go to trial, was convicted of the increased charges, and was sentenced to life.[162] The Sixth Circuit Court of Appeals reversed the conviction, finding that the prosecutor's conduct violated the doctrine enunciated in *Blackledge v. Perry*, which "protect[s] defendants from the vindictive exercise of a prosecutor's discretion."[163] The Supreme Court took the case on certiorari "to consider a constitutional question of importance in the administration of criminal justice."[164] Justice Stewart wrote for the majority; Justices Blackmun, Brennan, Marshall and Powell all filed dissents.

The majority opinion was careful to "clarify the nature of the issue" before the Court in *Bordenkircher*.[165] Justice Stewart pointed out that (1) the indictment on the Habitual Criminal statute was obtained *after* the plea bargain discussions had ended;[166] and (2) Hayes was informed of the terms of his choice before he decided to exercise his right to go to trial.[167] "This is not a situation, therefore, *where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty.*"[168] Thus, the majority specifically rejected the filing of more serious charges after the conclusion of plea bargaining if such an increase was not a part of the plea bargaining discussions. The Court in *Bordenkircher* did not make a distinction between a pre-trial and post-trial exercise of rights by a defendant, but rather focused on the particular requirements of plea bargaining and the need for flexibility in that neces-

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161 *Bordenkircher*, 434 U.S. at 358. At the time of Hayes' trial, a Kentucky statute (the Kentucky Habitual Criminal Act) provided that if a person was convicted of a felony for the third time, then a life sentence would result. KY. REV. STAT. § 431.190 (1973) (repealed in 1975). The Court noted that under the new statute, the sentence, at most, would have been for a term of 10 to 20 years. *Bordenkircher*, 434 U.S. at 359 n.2. (citing KY. REV. STAT. § 532.080 (5)(b) (Supp. 1977)). In addition, this sentence could only be imposed if the previous convictions carried sentences of one year or more, if the sentence "was completed within five years of the present offense," and the defendant was of age at the time the offense was committed. *Id.*

162 *Id.* at 359.

163 *Id.* at 360 (quoting Hayes v. Cowan, 547 F.2d 42, 44 (6th Cir. 1976)).

164 *Id.* at 360.

165 *Id.*

166 *Id.* While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of plea negotiations. *Id.*

167 *Id.*

168 *Id.* (emphasis added). The Court stated, "[A]s a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain." *Id.* at 360-61.

sary, but controversial, process.[169]

The *Bordenkircher* opinion rests its reasoning entirely upon what the Court viewed as the necessary requirements of the plea bargaining process, and the Court specifically limited the opinion to "the give-and-take of plea bargaining" in which ". . . the accused is *free to accept or reject* the prosecution's offer."[170] The majority opinion carefully limited the reach of *Bordenkircher* to "the course of conduct engaged in by the prosecutor in this case."[171]

Two dissenting opinions were filed in *Bordenkircher*. Justice Blackmun, joined by Justices Brennan and Marshall, stated that the majority was "departing from, or at least restricting, the principles established in *North Carolina v. Pearce* . . . and in *Blackledge v. Perry*."[172] In his dissent, Justice Blackmun took issue with the entire notion that retaliation does not exist "so long as the accused is free

169 *See id.* at 361-62. Further, the majority opinion pointed out that the prosecutor *admitted* that he made the threat and filed the indictment to influence the defendant to give up his right to trial. *Id.* at 361. In the face of the prosecutor's admission of retaliatory motive, the majority concluded that the Court of Appeals "seems" to have concluded that "a prosecutor acts vindictively . . . whenever his charging decision is influenced by what he hopes to gain in the course of plea bargaining negotiations." *Id.* This reasoning is important because it makes clear that the *Bordenkircher* opinion is an *actual* vindictiveness case that speaks *specifically* to plea bargaining situations, not to situations in which the state increases charges in response to the exercise of the right to trial.

By reading into the Sixth Circuit opinion the idea that it rejected *any* motive of inducement in the bargaining situation, the majority opinion directly counterposed the due process doctrine of vindictiveness with the all-too-necessary practice of plea bargaining. *Id.* This contra-position, the existence of *any* or some prosecutorial motive to induce a defendant to forego constitutional rights in plea bargaining with the due process doctrine prohibiting vindictiveness or the appearance of vindictiveness, was not necessary in *Bordenkircher* since "in this case a vindictive nature need not be inferred. The prosecutor had admitted it." *Id.* at 361 n.7.

Thus, *Bordenkircher* was not a case in which the decision to increase charges was *influenced* by the prosecutor's desire to induce a plea as the majority stated; it was the *only reason* for the increase based upon the facts before the Court. The result of this casting of the issues by the majority required it to choose between accepting *complete* discretion in plea bargaining or applying *Blackledge* to the facts in *Bordenkircher*. The result was that the majority upheld Hayes' life term in the interest of maintaining the plea bargaining process. *Id.* at 364-65. "To hold that the prosecutor's desire to induce a guilty plea is an 'unjustifiable standard,' which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself." *Id.*

It is unfortunate that the Supreme Court chose this either/or analysis of prosecutorial decision-making which is generally applied to "suspect class" analysis in equal protection cases. Rather, some middle ground may have been preferable. For example, the Court could have properly found that *some* motivation to induce a plea is always present in plea bargaining, but that it cannot be the *only* motivation. Such an analysis may have been more in keeping with previous vindictiveness analysis and suspect class doctrine.

170 *Id.* at 363 (emphasis added).

171 *Id.* at 365.

172 *Id.* at 365-66.

to accept or reject the prosecution's offer."[173] Justice Blackmun pointed out that the prosecutor in this case admitted that the *sole* reason for the increase in charges was to discourage the defendant from going to trial.[174] According to Justice Blackmun, the situation in *Bordenkircher* is precisely that "against which the Due Process Clause ought to protect."[175] He would have affirmed the Sixth Circuit's judgment since "prosecutorial vindictiveness in any context is still prosecutorial vindictiveness."[176]

Justice Powell, in an equally strong dissent, focused on the prosecutor's original decision to forego prosecution under the Habitual Criminal Statute.[177] Justice Powell inferred "that the prosecutor himself deemed it unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment."[178] Further, Powell pointed out that none of the cases cited by the majority support the conclusion that prosecutors or judges may use their power to induce a defendant to plead guilty.[179] For Justice Powell, this would have been an easy case, since the prosecutor had *admitted* using his power to indict to retaliate for defendant's insistence on exercising his constitutional rights.[180] Justice Powell, too, would have upheld the Sixth Circuit since "implementation of a strategy calculated solely to deter the exercise of constitutional rights is not a constitutionally permissible exercise of discretion."[181]

Following *Bordenkircher v. Hayes*, several of the circuits had the opportunity to address the issue of prosecutorial vindictiveness in settings outside the "give-and-take" of plea bargaining discussed by the majority in *Bordenkircher*.[182] Although the United States Supreme Court apparently had granted complete discretion to pros-

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173 *Id.* at 367.

174 *Id.* While cross-examining Hayes during subsequent proceedings, the prosecutor described the plea offer in the following language: "Isn't it a fact that I told you at that time [the initial bargaining session] 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 358 n.1.

175 *Id.* at 367.

176 *Id.* at 368.

177 *Id.* at 370.

178 *Id.* at 371.

179 *Id.* at 372.

180 *Id.* at 372-73.

181 *Id.* at 373.

182 *See, e.g.*, United States v. Taylor, 749 F.2d 1511 (11th Cir. 1985); United States v. Heidt, 745 F.2d 1275 (9th Cir. 1984); United States v. Eddy, 737 F.2d 564 (6th Cir. 1984); United States v. Andrews, 633 F.2d 449 (6th Cir. 1980), *cert. denied*, 450 U.S. 927 (1981); United States v. Burt, 619 F.2d 831, 836 (9th Cir. 1980); United States v. Griffin, 617 F.2d 1342 (9th Cir.), *cert. denied*, 449 U.S. 863 (1980); Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978); United States v. Groves, 571 F.2d 450 (9th Cir. 1978).

ecutors to threaten retaliation in plea bargaining, and to carry through on those threats, the circuits consistently applied the *Pearce/Blackledge* analysis to vindictiveness claims outside the limited facts of *Bordenkircher*.[183] Given the care taken by the majority to limit the reach of *Bordenkircher*, this reliance on *Pearce* and *Blackledge* can hardly be said to have been misplaced.[184] As a result, prior to the Supreme Court's opinion in *United States v. Goodwin*, every circuit that had addressed the issue applied the "appearance of vindictiveness" prophylactic rule expressed in *Pearce* and *Blackledge* to both pre-trial and post-trial settings.[185] The "likelihood of vindictiveness" standard, which removed the taint from jury resentencing and judicial resentencing in a two-tier process, was applied, if at all, to determine whether the prosecutor had *some interest* in deterring the exercise of a defendant's rights.[186]

3. United States v. Goodwin

It was within this context that the Supreme Court accepted the government's petition for certiorari in *United States v. Goodwin*.[187] The Fourth Circuit had reversed Goodwin's felony conviction after concluding that " 'but for' his election to exercise his right to a jury trial, defendant would have been tried before the magistrate solely on the lesser charges."[188] According to the Fourth Circuit, the resulting felony conviction violated Goodwin's right to due process under the dictates of *Blackledge v. Perry*.[189]

a. Factual Background

The defendant in *Goodwin* had been arrested and arraigned on several state and federal misdemeanors and petty offenses in 1976.[190] A trial date was set, but Goodwin failed to appear. After three years, the police found Goodwin and returned him to federal district court in Maryland to stand trial on the outstanding

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183 *See supra* note 182.

184 *See supra* text accompanying notes 165-69.

185 *See supra* note 181.

186 *See, e.g., Burt*, 619 F.2d 831; *Griffin*, 617 F.2d 1342, *cert. denied*, 449 U.S. 863 (1980). *See also supra* note 182.

187 454 U.S. 1079 (1982).

188 United States v. Goodwin, 637 F.2d 250, 255 (4th Cir. 1981). The Fourth Circuit's use of the "but for" test may have invited Supreme Court review. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963).

189 *Goodwin*, 457 U.S. at 372.

190 *Id.* at 370. Goodwin was arrested for assault after he had been stopped for speeding. When the police officer noticed a plastic bag in the car, the defendant fled in his car, striking the officer as he pulled away. *Id.*

charges.[191]

Goodwin's attorney entered into plea negotiations with the trial attorney from the Department of Justice who was assigned to prosecute petty offenses and misdemeanors before the magistrate.[192] Unlike *Bordenkircher v. Hayes*, during plea negotiations the prosecutor did not mention the possibility that the United States would seek to increase the charges if the defendant did not plead guilty.[193] The defendant declined to plead guilty and requested a jury trial, requiring a transfer of the case to the federal district court.[194] Thus, discussion of the potential for increased charges or penalties was never part of the bargaining process as it was in *Bordenkircher*.

After the defendant exercised his right to a jury trial outside the "give-and-take of plea bargaining," the United States Attorney unilaterally obtained an indictment for a felony based upon the same facts as the original misdemeanors.[195] Later, the United States Attorney set forth in an affidavit the reasons for his action.[196] The government attorney denied that Goodwin's request for a jury trial was a factor in his decision to increase the charge.[197]

The trial court denied Goodwin's motion to dismiss on grounds of prosecutorial vindictiveness.[198] A panel of the Fourth Circuit, however, reversed the conviction after deciding that *Pearce* and *Blackledge* were controlling.[199] According to the Fourth Circuit in *Goodwin*, it was not necessary to determine whether retaliation actu-

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191 *Id.*

192 *Id.* at 370-71. This prosecuting attorney had neither the authority to litigate felony cases nor the authority to seek grand jury indictments. *Id.* at 371.

193 *Goodwin*, 637 F.2d at 255. "During the discussions, the prosecutor did not mention the possibility that the United States would seek to have defendant indicted for the felony of forcible assault on a federal officer." *Id.*

194 *Id.*

195 *Id.* The district court stated that "[a]s a result of defendant's election to be tried by a jury, his case was transferred to the district court for trial, [and that] [t]he United States Attorney then sought and obtained the indictment charging defendant with a violation of 18 U.S.C. § 111." *Id.*

196 *Id.* The reasons listed in the affidavit were as follows: the defendant's actions were serious violations of the law, the defendant had a past record of violent crime, the defendant's conduct on the day of arrest was considered to be related to major narcotics transactions, the defendant was believed to have committed perjury at his preliminary hearing, and the defendant had failed to appear for trial. *Id.* It is not clear from the opinion when the United States Attorney filed this affidavit.

197 *Goodwin*, 457 U.S. at 371 & n.2. Not surprisingly, there is nothing in the record to indicate that Goodwin offered evidence to dispute the prosecutor's description of his own state of mind.

198 *Id.* at 371.

199 *Id.* at 372. The Fourth Circuit also relied upon United States v. Johnson, 537 F.2d 1170 (4th Cir. 1976).

ally occurred.[200] Rather, due process required that the defendant be free to exercise his right to a jury trial without "the apprehension of retaliation."[201] The Fourth Circuit was careful to note that remedies for apparent prosecutorial retaliation would attach *only* if the apprehension of vindictiveness went unrebutted by the government.[202] Thus, under the Fourth Circuit's reading of *Pearce* and *Blackledge* the government would remain free to provide legitimate reasons for the increased charges, if those reasons existed.

In the Fourth Circuit's opinion, the government's failure to demonstrate that the new charges could not have been brought prior to the exercise of the defendant's rights required a conclusion that the defendant's apprehension of vindictiveness was based on a "genuine risk" that such motivation played a role in the charging decision.[203] The panel concluded that both *Pearce* and *Blackledge* required a dismissal of the increased charges to cure the "apprehension of retaliatory motivation . . . at least where there is no showing that the charges could not have been brought before defendant made his election for a jury trial."[204]

The Fourth Circuit rejected the government's reliance on *Bordenkircher v. Hayes*, pointing out that the Supreme Court opinion in that case was limited to plea bargaining situations in which the possibility of the increased penalty had been made clear to the defendant.[205] Further, even *Bordenkircher* had *favorably* referred to *Blackledge v. Perry* in condemning practices resulting in "unilateral imposition of a penalty upon a defendant who had chosen to exercise a *legal right* . . . ."[206]

The Fourth Circuit also pointed out that the cases cited by the government, *Colten* and *Chaffin*, did not address the issue of prosecutorial abuse.[207] Since both *Chaffin* and *Colten* arose from challenges to increased penalties assessed by juries or judges other

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200 *Goodwin*, 637 F.2d at 253. The Court stressed:

> [T]he rationale of *Pearce* and *Blackledge* was that, since the *fear* of prosecutorial vindictiveness, as well as *actual* vindictiveness, had a chilling effect on a defendant's right to appeal, to attack his conviction collaterally, or to be tried *de novo*, the due process clause required that a defendant be freed of the apprehension of such a retaliatory motivation as well as actual retaliation.

Id.

201 *Id.*

202 *Id.*

203 *Id.* at 255.

204 *Id.* at 253.

205 *Id.* It is important to note that *Bordenkircher* was also an *actual* vindictiveness case and thus had little relevance to the pre-existing "appearance of vindictiveness" doctrine.

206 *Id.* at 254 (citing Bordenkircher v. Hayes, 434 U.S. 357, 362 (1978)) (emphasis added).

207 *Id.* at 254.

than those who imposed the original sentences, there had been little or no incentive to retaliate. Therefore, a realistic likelihood that the increased penalty was related to the exercise of the defendant's right did not exist.[208] The Court of Appeals distinguished *Colten* and *Chaffin* from cases such as *Goodwin*, where the prosecutor "had an incentive to deter misdemeanor defendants from exercising a right that would 'require increased expenditures' of his own time."[209] Thus, the Fourth Circuit concluded, " '[T]he danger that the [government] might be retaliating is real.' "[210]

b. The Supreme Court Opinion: *United States v. Goodwin*

i. The Majority

The majority opinion by Justice Stevens[211] set the tone for the analysis by casting the issue before the Court in terms of "presumptions,"[212] a concept not previously mentioned in prosecutorial vindictiveness analysis. According to Justice Stevens, the issue in *Goodwin* was whether the "presumptions" used to test post-trial judicial or prosecutorial actions should also be used to examine a prosecutor's response to a defendant's exercise of pre-trial rights, such as the request for a jury trial.[213] As stated by the majority, the case was governed by an analytical distinction between due process rights before and after trial and a distinction between the right to a jury trial and other rights.[214]

The Court's analysis began with a review of the policy underlying the doctrine prohibiting vindictiveness in the criminal prosecu-

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208 *Id.*

209 *Id.*

210 *Id.* (citing Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)). Finally, the Fourth Circuit also rejected the argument that even if a genuine risk existed, the Court should balance the chilling effect on the exercise of a defendant's rights against the limitations imposed upon the prosecutor's discretion. *Id.* *See also* United States v. Andrews, 633 F.2d 449 (6th Cir. 1980); Jackson v. Walker, 585 F.2d 139, 145 (5th Cir. 1978); Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978). The Court held that "Blackledge [v. Perry] suggests no balancing test" precisely to eliminate the "unseemly task" of examining, in retrospect, the motives of an individual prosecutor. *Goodwin*, 637 F.2d at 255.

211 *Goodwin*, 457 U.S. 368 (1982). The opinion was joined by Chief Justice Burger, and Justices White, Powell, Rehnquist, and O'Connor. Justice Blackmun filed an opinion that rejected the reasoning of the majority but concurred with the judgment. Justices Brennan and Marshall filed a dissenting opinion. *Id.* at 369.

212 *Id.* at 373.

213 *Id.* at 369-70. *See infra* text accompanying notes 358-68.

214 *Id.* at 381-82. *See infra* text accompanying notes 282-408. The doctrinal source of these distinctions was not described in the opinion, nor was it made clear that any "presumptions" which may have been implicit in earlier cases such as *Pearce* or *Blackledge* were presumptions of a rebuttable nature.

tion system.[215] The majority opinion clearly stated that punishment for the exercise of a legal right is a "due process violation of the most basic sort" and that such punishment must be distinguished from punishment for violation of law.[216]

The Court then observed that punishment is the "very purpose" of a criminal proceeding, that "motives are complex and difficult to prove"[217] and that this reality had compelled the Court to establish a doctrine that requires the government to show that certain of its actions are *not* retaliatory.[218] The Stevens opinion characterized this process as a "sever[e] . . . presumption [of vindictiveness]" that arises only in cases where a "reasonable likelihood of vindictiveness exists."[219]

The opinion then illustrated this doctrine by referring to *North Carolina v. Pearce*, which required an increased sentence to be justified by the presence on the record of "objective information" not originally available to the sentencing court.[220] The Court cited *Blackledge v. Perry* as an example of the application of this doctrine to prosecutorial conduct.[221] According to the majority opinion, *Blackledge* stood for several major principles. First, due process is not offended by any possibility of increased penalty, but only those that pose a realistic likelihood of vindictiveness.[222] Second, prosecutors have a "considerable stake" in deterring misdemeanants from seeking a new trial.[223] Third, defendants should be free from the "apprehension of such a retaliatory motivation on the part of the prosecutor."[224]

The opinion then asserted that *Pearce* and *Blackledge* reflected "a recognition by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided."[225] Without citing any specific language in either *Pearce* or *Blackledge* that supports this conclusion, Justice Stevens found that this "bias" was at the heart of both cases.[226]

Justice Stevens next looked to *Bordenkircher v. Hayes*,[227] the plea

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215 *Id.* at 372.
216 *Id.* (citing Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)).
217 *Id.* at 372-73.
218 *Id.* at 373.
219 *Id.*
220 *Id.* at 373-74.
221 *Id.* at 375-76.
222 *Id.* at 375.
223 *Id.* at 375-76
224 *Id.* at 376.
225 *Id.*
226 *See id.* at 376-77.
227 *Bordenkircher*, 434 U.S. 357.

bargaining exception case, as an example of the Court's treatment of vindictiveness at pre-trial stages.[228] He noted that an *express threat* to increase charges during plea bargaining was upheld in *Bordenkircher*, and he cited Justice Brennan's opinion in *Parker v. North Carolina* which distinguished the "give-and-take of plea bargaining" from other aspects of the prosecutorial process.[229]

Justice Stevens then pointed out that *Bordenkircher* was bottomed upon the Court's acceptance of "plea-bargaining as a legitimate process."[230] He also noted that *Bordenkircher* was limited to "the course of conduct engaged in by the prosecutor . . . which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution."[231] Justice Stevens then directed his attention to the application of this doctrine to the facts in *Goodwin*.[232]

According to Justice Stevens, *Goodwin*, like *Bordenkircher*, arose from the pretrial decision to increase charges but, unlike *Bordenkircher*, the prosecutor in *Goodwin* did not *admit* to a punitive motive.[233] In spite of his previous treatment of *Bordenkircher*, Justice Stevens failed to make clear that it was the plea bargaining process in *Bordenkircher* that distinguished it from earlier cases and caused the Court to accept the admittedly coercive purpose and the punitive result. He asserted that the conviction in *Goodwin* may be reversed "only if a presumption of vindictiveness . . . is *warranted*."[234]

Justice Stevens made the point that caution should guide the examination of pre-trial vindictiveness.[235] He listed several reasons for this restraint, including the possibility of the discovery of additional evidence before trial and the realization of the significance of evidence in the state's possession. These consideration are not present in a trial or post-trial posture.[236] He concluded that evidence during or after trial is "more likely" to have been "discovered and assessed", and therefore, post-trial changes in the charging decision are "more likely to be improperly motivated."[237]

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228 *Goodwin*, 457 U.S. at 377.
229 *Id.* at 377-78 (citing Parker v. North Carolina, 397 U.S. 790, 809 (1970)).
230 *Id.* at 378.
231 *Id.* (citing Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978)).
232 *Id.* at 380-85.
233 *Id.* at 380-81.
234 *Id.* at 381 (emphasis added). The source of this test was not explained by Justice Stevens but it was apparently a reference to the "realistic likelihood of vindictiveness" concept introduced in *Colten*, *Chaffin* and *Blackledge*.
235 *Id.*
236 *Id.*
237 *Id.*

Further, he pointed out that defendants, and presumably their counsel, are *expected* to raise procedural challenges before trial.[238] Thus, he concluded, "[I]t is unrealistic to assume that a prosecutor's *probable* response to such motions is to seek to penalize and to deter."[239] He did not discuss whether such a response is *possible*, whether that possibility might deter the exercise of a defendant's rights, or why a prosecutor would not seek to punish the exercise of procedural rights, which, though expected, make the prosecution more difficult and time consuming.

Justice Stevens then turned to an examination of the facts in *Goodwin*. He concluded that the *timing* of the prosecutorial acts suggested that requiring the government to demonstrate that the basis for the increased charges existed before the jury trial demand is not warranted because initial charges may not reflect the ultimate extent of liability.[240] In addition, he concluded that the *nature* of the right asserted in this case, trial by jury, did not warrant an examination of government motives.[241] Justice Stevens pointed out that *Bordenkircher* did not require the government to justify its actions in carrying out a threat made in plea bargaining to penalize the defendant's request for any type of trial.[242] He next focused on the distinction between the burdens of a bench trial and a jury trial and concluded that the added burdens imposed by a jury trial are not so great so as to require the government to justify its actions when increased charges follow a request for a jury.[243] Although Justice Stevens recognized that a jury trial is "more burdensome than a bench trial,"[244] he concluded that the burdens are "less significant" than those imposed either by a general refusal to plead guilty, as in *Bordenkircher*, or a trial of any sort as in *Blackledge*.[245] He reached this conclusion without citing doctrinal or empirical support.

Justice Stevens stated that, unlike the judge in *Pearce* or the prosecutor in *Blackledge*, a prosecutor has no "stake" in conducting a bench trial as opposed to a jury trial and is not being asked to do again that which he thought he had done correctly.[246] Perhaps most importantly for Justice Stevens, "the institutional bias against the

238 *Id.*
239 *Id.* (emphasis added).
240 *Id.* at 381-82.
241 *Id.* at 382.
242 *Id.* at 382-83.
243 *Id.* at 383. The *nature* of the right asserted by the defendant, the right to a jury trial, "confirms" that the showing of "objective criteria" required by the Fourth Circuit was unwarranted. *Id.*
244 *Id.*
245 *Id.*
246 *Id.*

retrial of a decided question that supported . . . *Pearce* and *Blackledge* simply has no counterpart in this case."[247]

According to the majority opinion, the opportunity for vindictiveness may exist prior to trial, but it is so *unrealistic* to assume that vindictive motives may influence a prosecutor's actions that even a rebuttable "presumption of vindictiveness" is not warranted.[248] The opinion, however, specifically leaves open the opportunity for the defendant to prove that vindictiveness *actually* played a role.[249] Having disposed of the requirement that the government comply with the prophylactic rule, the majority opinion also stated in dicta that an actual vindictiveness violation did not exist in this case and that the judgment of the circuit court of appeals should be reversed.[250] The case was remanded for further proceedings.[251]

ii. The Concurrence

Justice Blackmun filed an opinion concurring in the result in *Goodwin* but criticizing the reasoning of the majority.[252] Justice Blackmun pointed to several major analytical flaws. First, the prosecutor who increased the charges was aware of the original charges and had at least *some interest* in dissuading the defendant from exercising the right to a jury trial in the district court.[253] Second, the pre-trial/post-trial distinction made by the majority was not derived from previous cases, and *Bordenkircher* specifically rejected the unilateral imposition of an increased penalty which took place in *Goodwin*.[254] He also took issue with concerns that proper pre-trial charging decisions would be fettered under the *Pearce/Blackledge* rule, because increased charges brought for legitimate reasons would remain unaffected.[255] Accordingly, Justice Blackmun concluded that a "realistic likelihood" of vindictiveness was present in *Goodwin*, but that the reasons given for the increased charges satisfied the "objective" justification test required by *Blackledge v. Perry* and *North Carolina v. Pearce*.[256]

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247 *Id.*

248 *Id.* at 384.

249 *Id.* The actual vindictiveness issue was never raised in *Goodwin*. *See supra* text accompanying notes 232-39.

250 *Goodwin*, 457 U.S. at 384.

251 *Id.* at 384-85.

252 *Id.* at 385.

253 *Id.*

254 *Id.*

255 *Id.* at 386.

256 *Id.*

iii. The Dissent

Justice Brennan filed a rather lengthy dissent, in which Justice Marshall joined. The dissent maintained that the doctrine enunciated in *Blackledge v. Perry* required affirmance of the Court of Appeals in *Goodwin* and that the attempt of the majority to distinguish the cases was misplaced.[257] According to Justice Brennan, the increase in potential maximum penalties from fines of $3,500 and twenty-eight months in prison to fines of $11,500 and fifteen years in prison following Goodwin's request for a jury trial raised a realistic apprehension of vindictiveness.[258] Further, he took issue with the majority's reference to a "presumption" as an attempt to "denigrate" the defendant's claim by making it appear "unreal or technical."[259] Justice Brennan proposed an analysis drawn from *Blackledge* and *Pearce*: first, does the increase in charges pose a realistic likelihood of the existence of a vindictive motive?;[260] and second, is it possible that "the fear of such vindictiveness may unconstitutionally deter" the exercise of a legal right?[261] In *Goodwin*, Justice Brennan would answer both inquiries in the affirmative.[262]

In response to the assertion of the majority that the distinction between a bench trial before a magistrate and a jury trial in district court is too insignificant for a prosecutor to have a "stake" in the defendant's demand for a jury trial,[263] Justice Brennan stated that it is "inconceivable that a criminal defendant's election to be tried by jury would be a matter of indifference to [a] prosecutor, [because] jury trials entail far more prosecutorial work than a bench trial."[264] He listed juror challenges, *voir dire* procedures, hearings on motions to supress, increased witness preparation, preparation of jury instructions, care to avoid mistrials or reversible error, and the possibility of an "irrational" unreviewable acquittal as some of the "troublesome" features of jury trials which may cause prosecutors to prefer bench trials.[265] As applied to the *Goodwin* case, Justice Brennan pointed out that, in addition to the burden generally imposed on the prosecution by the defendant's election of a jury trial, the government:

(a) was compelled to transfer the case from the magistrate in Hyatts-

257 *Id.* at 386-92.
258 *Id.* at 387-88.
259 *Id.* at 389.
260 *Id.*
261 *Id.* at 389-90 (citing North Carolina v. Pearce, 395 U.S. 711, 725 (1969)).
262 *Id.* at 390.
263 *Id.* at 383.
264 *Id.* at 390.
265 *Id.*

> ville, Maryland to the district court in Baltimore, (b) was forced to assign a second prosecutor to the case, (c) lost the value of the preparation of the first prosecutor, and (d) incurred administrative inconveniences as well.[266]

Justice Brennan then paraphased *Blackledge v. Perry*: "[I]f the prosecutor has the means readily at hand to discourage such [elections] by 'upping the ante' through a felony indictment . . . the State can insure that only the most hardy defendants will brave the hazards of a [jury] trial."[267]

Finally, the dissent differed with the majority's reliance on an analogy to *Bordenkircher v. Hayes*.[268] For Justice Brennan the analogy was inappropriate for two major reasons. First, *Bordenkircher* expressly dealt only with plea-bargaining and specifically with a situation in which a defendant had been presented with the alternatives.[269] Second, *Bordenkircher* by its own terms distinguished the plea-bargaining situation from cases such as *Blackledge* or *Pearce*, which involved "the unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right."[270] Justice Brennan concluded that there was no give-and-take in *Goodwin* and that there *was* the unilateral "imposition of a penalty" in response to the defendant's request for a jury trial[271] which had been condemned by *Bordenkircher*.

III. Analysis of the Court's Reasoning In *Goodwin*

The line of vindictiveness cases left intact the underlying principle of *Pearce* that the two-fold evils to be prevented were: (a) vindictive governmental acts and (b) the deterrence of free exercise of rights resulting from a "realistic" fear of governmental retaliation.[272] It is worth mentioning that, even in *Goodwin*, the majority was compelled to note that "punishment for the exercise of a right is 'a violation of due process of the most basic sort.'"[273] It seems fair to say, therefore, that whatever *Goodwin*'s impact is on the appearance of vindictiveness doctrine, the constitutional prohibition against *actual* retaliation, outside of plea bargaining, on the part of

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266. *Id.*

267 *Id.* at 391. It should be noted that this is the same reasoning used by the trial court in *Blackledge*, 417 U.S. at 27-28.

268 *Goodwin*, 457 U.S. at 391.

269 *Id.* Justice Brennan also failed to differentiate clearly between the appearance of vindictiveness doctrine of earlier cases and the actual vindictiveness at issue in *Bordenkircher*.

270 *Id.*

271 *Id.* at 391-92.

272 *See supra* notes 16-58 and accompanying text.

273 *Goodwin*, 457 U.S. at 372.

the prosecutor remains undiminished.[274] Thus, the following discussion will focus upon the second portion of the doctrine, the appearance of vindictiveness.

The opinion of Justice Stevens in *Goodwin* is based upon two questionable analytical premises which are analyzed separately in the following section. The first premise is that earlier opinions in this area were based upon a previously unmentioned reverence for *stare decisis*[275] and an "institutional bias" against new trials,[276] rather than the Court's announced purpose of prohibiting the use of governmental power to punish or deter the exercise of legal rights.[277] The second premise is that prior to trial prosecutors have so little "stake" in punishing or deterring the exercise of rights, particularly a demand for a jury trial, that there is no reason to require the government to demonstrate legitimate reasons for filing increased charges following such a demand.[278]

A. THE CREATION OF THE PRE-TRIAL/POST-TRIAL DISTINCTION

The first questionable premise is that previous cases were based upon considerations of *stare decisis* and an "institutional bias" against new trials, which provided the major justification for the *Goodwin* pre-trial/post-trial distinction. Only after the *Goodwin* opinion created that distinction was it possible to avoid the application of the *Pearce/Blackledge* doctrine and to uphold Goodwin's conviction on the increased charges without overruling the entire prosecutorial vindictiveness doctrine. In order to create this distinction where none had existed previously, however, the majority was forced to look beyond the language of the major cases decided prior to *Goodwin*. A review of the majority's reasoning in light of the cases previously discussed may help illustrate the analytical inconsistencies upon which the *Goodwin* result is based.

After the Court established in *Pearce* the due process principle prohibiting judicial vindictiveness or the appearance of vindictiveness, the Court clarified its scope in *Colten* and *Chaffin*.[279] None of the cases, however, differentiated between post-trial and pre-trial actions in determining whether a "realistic possibility" of vindictive-

274 *See infra* text accompanying notes 427-74. The difficulty lower courts have had in sorting out and applying vindictiveness analysis may even make this protection less than certain. *See infra* text accompanying notes 441-45.

275 *Goodwin*, 457 U.S. at 376.

276 *Id.*

277 *Id.* at 372.

278 *Id.* at 383.

279 *See supra* notes 14-126 and accompanying text.

ness might exist to give substance to a defendant's apprehension.[280] There is no suggestion in any of these cases that they were limited exclusively to deterring the "appearance of vindictiveness" *only* in the post-trial setting.

The one prior "appearance of [prosecutorial] vindictiveness" case also provides little apparent support for the pre-trial/post-trial distinction created by the majority in *Goodwin*. *Blackledge v. Perry* did not distinguish between pre-trial and post-trial decision making.[281] Like *Pearce*, *Blackledge v. Perry* was clearly directed toward eliminating the appearance of vindictive motivation on the part of the prosecution from situations in which fear of vindictiveness might deter the exercise of rights by defendants. The assertion of the Court in *Goodwin* that *Blackledge* was limited to post-trial prosecutorial decisions finds no support in the language of the *Blackledge* opinion.[282]

As mentioned earlier, the teaching of *Blackledge v. Perry* had found wide acceptance in the circuits.[283] Although the circuits applied various standards to determine the legitimacy of a prosecutor's reasons for increased charges,[284] most of the courts conceded that *Blackledge* required that prosecutors adhere to a similar procedure as that imposed upon the judiciary in *Pearce*.[285] Since no explicit pre-trial/post-trial distinction existed before the Supreme Court decided *Goodwin*, it seemed self-evident that increased charges brought after a request for a constitutionally enumerated right, such as a jury trial, gave rise to the spectre of vindictive motivation and required the government to demonstrate a proper basis for the increase.[286]

The Spreme Court looked also to *Bordenkircher v. Hayes*, the actual vindictiveness case, to lend credence to the pre-trial/post-trial distinction that it adopted in *Goodwin*.[287] Because *Bordenkircher* is the only case that involved a pre-trial factual setting, one might reasonably have expected a reference in that case to the pre-trial/post-trial

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280 *See id.*

281 *See supra* notes 127-57 and accompanying text.

282 *Id.*

283 *See supra* notes 183-86 and accompanying text.

284 *See, e.g.*, United States v. Ruesqa-Martinez, 534 F.2d 1367 (9th Cir. 1976) (defendant entitled to exercise right to be tried by district judge without fear or apprehension of prosecutorial vindictiveness by substituting a more serious charge for misdemeanor charged in original complaint); United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974) (reindictment for first-degree murder after trial on charge of second-degree murder ended in mistrial on motion of defendant held invalid absent any showing of justification for increase in charge). *See also supra* note 182.

285 *See, e.g., supra* notes 183-86.

286 *See, e.g., Goodwin*, 637 F.2d 250.

287 *Goodwin*, 457 U.S. at 377.

dichotomy set forth in *Goodwin*. Such a doctrine, however, did not appear in *Bordenkircher*.[288]

Thus, none of the previous cases mention a pre-trial/post-trial distinction that the *Goodwin* court found in those cases.[289] They also make no mention of *stare decisis, res judicata* or double jeopardy as a basis for their holdings.[290] Nor do they lend direct support for the Court's assertion in *Goodwin* that the heart of these cases is an "institutional bias" against retrials.[291]

The creation of the pre-trial/post-trial distinction arising from an "institutional bias against retrials" first announced in *Goodwin* was abetted by the Court's failure in earlier cases to clearly identify the factors that led it to strike down increased penalties in *Pearce* and *Blackledge* but not in *Colten* or *Chaffin*. Because the Court has not clearly explained the unifying principles in these early vindictiveness cases, a conceptual review of the development of the doctrine may shed some light on the *Goodwin* reasoning.

Pearce clearly established that due process violations occurred when the government actually punished defendants for exercising rights that were legally protected.[292] Drawing from cases that held that the unnecessary "chilling" of the exercise of rights also constitutes a due process violation,[293] *Pearce* also extended due process to protect against the fear of judicial retaliation on retrial and required a "prophylactic rule" as a cure.[294] The rule imposed an obligation upon judges to put on record "identifiable conduct on the part of the defendant occurring after the time of the original sentencing" as reasons for increased sentences on retrial.[295]

In *Colten* and *Chaffin*, the Supreme Court began to clarify the limitations in the due process analysis.[296] These limitations focused upon the *reasonableness* of the defendant's fear of retaliation.[297] Without disturbing *Pearce*, the Court found that increased sentences were permissible in retrials before new judges in a trial *de novo* setting[298] and before juries who were unaware of the original sentence.[299]

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288 *See supra* notes 158-86 and accompanying text.
289 *See supra* notes 14-186 and accompanying text.
290 *Id.*
291 *Id.*
292 *Pearce*, 395 U.S. at 725. *See supra* notes 14-58 and accompanying text.
293 *Pearce*, 395 U.S. at 725.
294 *Id.*
295 *Id.* at 726.
296 *See supra* text accompanying notes 59-126.
297 *Id.*
298 *Id.*
299 *Id.*

Blackledge v. Perry established that an increase in charges in a trial *de novo* setting, very similar to that in *Colten*, required a rule analogous to that of *Pearce*.[300] Thus, increased charges filed by a prosecutor in a trial *de novo* were found to create a realistic apprehension of vindictiveness,[301] while an increased sentence, levied by a judge in the same sort of proceeding, did not.[302] The touchstone for sorting out these apparently contradictory results is the Court's imposition of a reasonableness requirement as a limitation on the defendant's fear of retaliation.[303] Thus, *Colten* made clear that an abstract fear on the part of a defendant was insufficient to trigger the *Pearce* protections[304] and that different standards might be imposed upon different government agents in the same proceeding.

This analytical framework resulted in the Court finding that, for judges, a trial *de novo* was sufficiently different from a retrial after appeal to obviate the application of the "prophylactic rule."[305] The heart of the *Colten* analysis was that increased penalties in trials *de novo* carry with them a minimal likelihood of actual vindictiveness on the part of judges because:

1. The increase, if any, would be imposed by a different judge than that who heard the original trial[306] *and,*

2. The trial *de novo* proceeding would not directly burden the judge responsible for the increased penalty, thus greatly reducing any underlying motivation to punish the defendant for demanding the trial *de novo*.[307]

As applied to jury resentencing,[308] the Court in *Chaffin* developed more fully the reasoning that rejected increased penalties in *Blackledge* and *Pearce*, but upheld increased penalties in *Chaffin* and *Colten*.[309] According to the Court, the choice of rights in *Chaffin* was distinguishable from *Pearce*. Not only was the jury in *Chaffin* a separate entity that had not been burdened by the second proceeding,[310] but any increase in penalty depended upon several factors beyond the control of the government or the jury.[311] Thus, a realistic ap-

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300 *Blackledge*, 417 U.S. at 27.
301 *Id.* at 28.
302 *Colten*, 407 U.S. at 115.
303 *Id.* at 119.
304 *Id.* at 116.
305 *Id.*
306 *Id.* at 117.
307 *Id.* at 117. It is also significant that in *Colten* the defendant had a right to a jury trial in both proceedings. Thus, a chilling of that right was not implicated.
308 *Chaffin*, 412 U.S. 17.
309 *See supra* text accompanying notes 59-126.
310 *Chaffin*, 412 U.S. at 26.
311 *See supra* text accompanying notes 59-126.

prehension of vindictiveness could only arise when:

(a) a motivation to punish on the part of a government agent was accompanied by

(b) the power to exercise discretion in penalizing a defendant[312]

(c) without intervening factors that would attenuate the impact of any exercise of that discretion.[313]

Applying this three part analysis to determine the reasonableness of a defendant's fear of retaliation at the time a right is exercised helps to clarify the rationale underlying the vindictiveness cases. The defendant's fear of retaliation in *Chaffin* was not based upon the three factors that would make it "realistic" because: (a) a second jury would not be forced to accept additional burdens because of the appeal and would have little motivation to retaliate, (b) the power to increase a penalty exists but (c) it is attenuated by intervening independent occurrences before the exercise of that power is possible. In *Pearce, Colten* and *Blackledge*, however, the power to punish was not diminished by any attenuating factors. Thus, any distinction between those cases must reside in the first factor, the motivations of the governmental agent in each of the cases. The question becomes, whether the "bias against retrials" rationale from *Goodwin* can explain the outcome of these cases?

While a generalized "bias against retrials" and resistance to "doing again what has been done before" may explain the distinctions between the role of the judge following an appeal in *Pearce* and the judge in the trial *de novo* proceeding in *Colten*, it is apparent that this rationale cannot explain the contrasting results in *Colten* and *Blackledge*. Both *Colten* and *Blackledge* involve a trial *de novo* procedure, but one involves application of the doctrine to judges and the other to prosecutors in the same setting, and the cases reach different conclusions.[314] It is logically insufficient, therefore, to suggest, as does the Court in *Goodwin*, that a "bias against retrials" lies at the heart of the vindictiveness doctrine in prior cases. Were one to apply the "bias against retrials" reasoning to both *Colten* and *Blackledge*, the unavoidable conclusion is that the outcome in *Blackledge* would have been different had a second prosecutor "upped the ante." Since, like the judge in *Colten*, the second prosecutor would not have been "doing again what had been done before," the prophylactic

312 *See supra* text accompanying notes 59-75.

313 *See supra* text accompanying notes 77-126.

314 *See supra* text accompanying notes 59-75 and 127-57.

rule would not have come into play. Such a reading of *Blackledge* would make its holding virtually meaningless and almost irrational.

The "bias against retrials" rationale also is insufficient to explain the similarity in the outcome of *Pearce* and *Blackledge*. If "bias against retrials" were the organizing principle, the distinctions between an appeal and a trial *de novo*, which figured so prominently in distinguishing *Pearce* from *Colten*,[315] should also apply to a prosecutor in a trial *de novo*, as in *Blackledge*. Thus, the "bias against retrials" analysis would seem to counsel that *Blackledge* was improperly decided because, like *Colten*, the trial *de novo* is a new determination of guilt or innocence and, particularly after an initial plea, the prosecutor would not be required to "do again what had previously been done."

Contrasting results in *Colten* and *Blackledge* and the similarity in outcome in *Pearce* and *Blackledge* indicate that the "bias against retrials" could not logically have been the source for the distinctions between those cases. Rather, these cases contain a different standard for the application of the prophylactic rule to judges as compared to prosecutors.[316] While a "bias against retrials" fails to explain the Court's treatment of these cases, a distinction based upon a functional analysis of the actors is consistent with the previous cases.

If one views *Pearce* and *Colten* as involving the application of the prophylactic rule to a judicial official who is *presumably* indifferent to the outcome of cases, application of a prophylactic rule only in circumstances like *Pearce*,[317] in which additional burdens that may be viewed as an affront to the original judgment or propriety of an earlier decision, seems entirely justifiable. The additional burden of retrial and an institutional or personal bias against retrials, however, do not explain the application of the doctrine to the prosecutor in *Blackledge*, since that case did not involve any appeal or retrial or challenge to an earlier decision.

This suggests that *Blackledge* endorsed an application of the prophylactic rule because prosecutors have an incentive to retaliate that exceeds, or at least differs from, that of judicial officials. *Blackledge* is apparently grounded in the simple recognition that prosecutors, unlike judges, are presumed to be adversaries and, as such, have an

315 *See supra* text accompanying notes 14-75.

316 This analysis is buttressed by the language of *Blackledge v. Perry*, which requires a prophylactic rule for prosecutors "analogous" to that required for judges in *Pearce*. *See supra* text accompanying footnote 145.

317 *Pearce*, 395 U.S. 711.

increased incentive to act in a vindictive fashion by virtue of their function in the system.

In addition to the "bias against retrials" reasoning, the *Goodwin* majority relies heavily upon *Bordenkircher v. Hayes* to support the pre-trial/post-trial distinction.[318] The Court's reliance on this case is misplaced for two major reasons. First, *Bordenkircher*, both on its face and as interpreted by commentators and the circuits, was limited exclusively to plea bargaining, and a "bias against retrials" could not be relevant because a trial never occurred. But, perhaps more importantly from a doctrinal viewpoint, *Bordenkircher v. Hayes* was not an "appearance of vindictiveness" case at all.

The question in *Bordenkircher*, unlike the question in the "appearance of vindictiveness cases," was not whether a "realistic apprehension of vindictiveness" arose from an increased penalty following the exercise of a right. Rather, the question was whether actual vindictiveness, retaliation for the exercise of the right to a jury trial, was appropriate in plea bargaining.[319] Thus, by relying upon *Bordenkircher*, *Goodwin* relied upon a case that set out principles which defined the scope of permissible actual retaliation. The Court in *Goodwin* applied this actual vindictiveness case to a factual setting in which actual retaliation is admittedly impermissible and the "appearance of vindictiveness" the only issue. The result is an analytical merging to two doctrines that address completely different evils: (1) actual vindictiveness on the part of a prosecutor and (2) the deterrent effect upon the exercise of constitutional rights caused by a defendant's reasonable fear of vindictiveness, *whether actual vindictiveness is present or not.*

The irony of using *Bordenkircher* to support the Court's rejection of *Pearce/Blackledge* due process analysis in a pre-trial setting is that even a cursory reading of *Bordenkircher* makes clear that Justice Stewart's slim five-to-four majority opinion in that case was *expressly limited* to *plea bargaining* situations and did not apply to all pre-trial

318 *See supra* text accompanying notes 228-34.

319 *See supra* text accompanying notes 158-86. While one might question whether such coercion is appropriate even in plea bargaining, a critique of the plea bargaining process is beyond the scope of this article. It is worth noting, however, that the acceptance of plea bargaining in Brady v. United States, 397 U.S. 742 (1970), substantially undercut the concept from United States v. Jackson, 390 U.S. 570 (1968), that placing a burden upon the exercise of rights was improper. Similarly, the acceptance of coercion as appropriate in plea bargaining in *Bordenkircher*, 434 U.S. 357, has made punitive measures beyond the plea bargaining setting more difficult to detect and prevent. One might well question whether the benefits of the plea bargaining system, as presently defined, are worth the costs created by the analytical inconsistencies and contradictions with the free exercise of rights which seem an inevitable consequence of the practice as it presently operates.

situations.[320] Further, it should be noted that the dissent in that case would have imposed the *Pearce/Blackledge* rule even in plea bargaining.[321] Rather than providing precedent for a broad pretrial/post-trial distinction in the "appearance of vindictiveness" doctrine, *Bordenkircher* was an "actual vindictiveness" case based solely upon a specific, narrow exception to the *Pearce/Blackledge* doctrine that the Court deemed necessary because of its earlier acceptance of plea bargaining.[322] The reasoning in *Bordenkircher* was grounded entirely upon support for the plea bargaining process and was specifically limited only to that situation.[323]

The Court in *Bordenkircher* actually anticipated, and criticized, precisely the situation that arose in *Goodwin*. The Court was clear in rejecting "the State's unilateral imposition of a penalty in response to the exercise of a legal right to attack his original conviction"—a situation very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense.[324] The conclusion that *Bordenkircher* allowed an exception to the *Pearce/Blackledge* rule only for plea bargaining, and only when a defendant is clearly informed as to the alternatives legitimately presented by the state, is unavoidable. The notion that *Bordenkircher* sanctioned the lessening of the vindictiveness standard for all prosecutorial acts prior to trial, outside the plea bargaining context, is not supported by any language in *Bordenkircher*.

The Supreme Court's reliance upon *Bordenkircher*, an "actual vindictiveness" case, rather than *Blackledge v. Perry*,[325] a doctrinally similar "appearance of vindictiveness" case, is all the more curious in light of the jury trial issues raised by the trial court in *Blackledge*.[326] The trial court opinion noted that the North Carolina trial *de novo* system, unlike the Kentucky system in *Colten*, did not provide for jury trials at the initial trial stage.[327] Thus, like *Goodwin*, the defendant in *Blackledge v. Perry* could only have received a jury trial in the second proceeding. The trial court reasoned:

> Where a jury trial is only allowed in the Superior Court, it is apparent that a defendant's right to a jury trial is chilled by permitting a trial on a felony charge in the Superior Court, after a trial in a misdemeanor

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320 *Bordenkircher*, 434 U.S. at 365.

321 *See supra* text accompanying notes 172-81.

322 For a discussion of the rationale for limiting prosecutorial discretion in plea bargaining, see Schwartz, *supra* note 65, at 16-77.

323 *See supra* text accompanying notes 158-86.

324 *Bordenkircher*, 434 U.S. at 362.

325 *Blackledge*, No. 2800 (E.D. N.C. filed Aug. 24, 1972) (Larkins J., opinion).

326 *Id.*

327 *Id.*

> court. It is one thing to say that the possibility of imposition of a harsher sentence would not chill a defendant's right to a jury trial, but it is quite another to say that the possibility of being tried for a felony upon appeal of a misdemeanor conviction would not have such an effect.[328]

The trial court found that this distinction between the effect of a greater sentence versus the effect of an increased charge made *Colten* inapplicable.[329] Although the trial court incorrectly characterized the constitutional violation as double jeopardy, the underlying principles in *Blackledge* would seem to be virtually indistinguishable from the those in *Goodwin*, that is, the increase in liability from a misdemeanor to a felony following a jury demand. It would appear, therefore, that the *Blackledge* opinion would govern the factual circumstances that gave rise to *Goodwin* and would compel a similar outcome.

The foregoing analysis of the reasoning in *Goodwin* points out that the pre-trial/post-trial distinction, used in *Goodwin* to limit the application of the prophylactic rule, is neither logically consistent with the outcome of previous cases nor analytically consistent with the two-part vindictiveness doctrine. The method of analysis relied upon by the Court has the unfortunate effect of merging the analysis applied to "actual vindictiveness" in plea bargaining with the principles to be applied in an "appearance of vindictiveness" context. The result is both additional confusion in the relationship between "actual vindictiveness" and the "appearance of vindictiveness" and an overall reduction in judicial scrutiny of pre-trial prosecutorial acts.

B. DIVINING THE PRE-TRIAL MOTIVATIONS OF PROSECUTORS

It seems fair to conclude that the cases cited by the Court in *Goodwin* provide, at best, tangential support for the pre-trial/post-trial distinction. Even if one were to assume that such a distinction was implicit in those cases, however, the second questionable premise comes into bold relief. After creating the pre-trial/post-trial distinction, Justice Stevens justified a lower level of judicial scrutiny in the pre-trial stage by concluding that prosecutors have virtually no institutional or personal "stake" in the outcome of pre-trial proceedings.[330] The *Pearce/Blackledge* rule is, therefore, "not warranted" prior to trial.[331]

As noted earlier, Justice Stevens begins his analysis in *Goodwin*

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328 *Id.*
329 *Id.*
330 *Goodwin*, 457 U.S. at 383.
331 *Id.*

by pointing out that punishment for the exercise of a defendant's rights, as opposed to punishment for a violation of law, has no place in American jurisprudence.[332] He also quite correctly points out that punishment is *always* a motivation in criminal prosecutions and that subjective motives are exceedingly difficult to determine.[333]

Prior to *Goodwin*, this reasoning was used to support the need for a mechanism to remove the appearance of abuse, which did not require a defendant to prove the prosecutor's subjective motivation.[334] This led the Court to conclude, in *Pearce* and *Blackledge*, that it was necessary for the state to make a record of proper justifications for increased penalties to dispel the appearance of improper motive.[335] In phrasing the issue in terms of a "presumption,"[336] however, the *Goodwin* majority introduced a new concept into vindictiveness analysis that created an analytical "straw-man." As mentioned in the dissent, the use of the "presumption" language had the effect of making the application of the prophylactic rule seem "unreal" or "technical",[337] but it also did something more.

First, it gives the Court a convenient way to mischaracterize the previously enunciated doctrine. None of the cases prior to *Goodwin* refer to the *Pearce/Blackledge* prophylactic rule as a "presumption."[338] Second, use of the word "presumption" blurred the actual procedure that the *Pearce/Blackledge* doctrine required. Justice Stevens failed to make clear that, even before *Goodwin*, the prosecutor's actions were presumptively valid. This presumption of validity could only be brought into question if the defendant could prove a sequence of events which resulted in exposure to an additional penalty following the exercise of a right.[339] Only after the defendant met this burden would the prosecution be required to justify its actions.[340] Whether one considered the defendant's burden of alleging and proving such a sequence of events "raising a presumption," "an inference" or making "a prima facie showing," it was absolutely clear that the government could completely rebut any implication of improper motive at any time.[341] The Court in *Goodwin* failed to make clear that the primary effect of the *Pearce/Blackledge* doctrine,

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332 *See supra* text accompanying notes 211-51.
333 *Id.*
334 *See supra* text accompanying notes 127-57.
335 *See supra* text accompanying notes 14-58 and 127-57.
336 *Goodwin*, 457 U.S. at 369.
337 *Id.* at 389 (Brennan J., dissenting).
338 *See supra* text accompanying notes 14-186.
339 *See supra* text accompanying notes 126-57.
340 *Perry*, 417 U.S. at 28.
341 *Id.* at 27.

whether characterized as a presumption or not, was merely to put the burden of coming forward with evidence of proper motive on the only party who was in a position to do so.

The *Goodwin* Court also failed to address the nature of the showing that is required of a prosecutor to rebut an inference of vindictiveness. Further, by accepting uncritically the standard for rebuttal required by the Fourth Circuit, the majority unnecessarily applied the *Pearce* standards for rebutting judicial vindictiveness in sentencing to the actions of a prosecutor in filing additional charges. The Court then concluded that the *Pearce* standards are too high for a proper pre-trial balance when applied to prosecutors.[342] Nothing in *Pearce* or *Blackledge*, however, required the *Goodwin* Court to adhere to the same standard required of judges in resentencing following retrial set forth in *Pearce*.[343] As pointed out by Justice Blackmun in his concurrence in *Goodwin*, it was entirely possible to apply another rebuttal standard to prosecutors under the existing doctrine.[344]

According to Justice Stevens, the likelihood of a prosecutor acting to punish a defendant for exercising the right to a jury trial, and possibly any other pre-trial right, is so remote as to obviate the need for even a rebuttable "presumption of vindictiveness."[345] In support of his view, Justice Stevens asserts that prosecutors have little, if any, personal stake in the defendant's decision to elect a jury trial in federal district court over a bench trial before a magistrate.[346]

In the final analysis, the majority relies heavily on this assertion to justify the conclusion that the *Pearce/Blackledge* scrutiny was "not warranted" in *Goodwin*.[347] Justice Stevens cites no authority to support his hypothesis that pre-trial prosecutorial vindictiveness is so unlikely that creating a record to make judicial scrutiny possible is not necessary.[348] Rather than relying upon empirical data or case law that would tend to bolster his assertion, he merely relates a series of personal observations to justify his conclusion.[349]

According to the majority opinion, the "nature of the right as-

342 *Goodwin*, 457 U.S. at 372.

343 See supra text accompanying notes 315-18.

344 *Goodwin*, 457 U.S. at 386. Whether one agrees with Justice Blackmun's conclusion that the prosecution in *Goodwin* had met its burden, the possibility of applying a standard other than the *Pearce* "objective evidence" standard certainly exists in the language of *Blackledge*, requiring only an "analogous" doctrine for prosecutors. *See supra* text accompanying notes 315-22.

345 *Goodwin*, 457 U.S. at 382-83.

346 *Id.* at 383.

347 *Id.* at 384. *See also supra* text accompanying notes 211-51.

348 *Goodwin*, 457 U.S. at 384.

349 *Id.*

serted" may also be evaluated to determine whether its exercise is likely to result in a vindictive response.[350] Although there is no justification in previous Supreme Court opinions for linking the nature of the right asserted to the likelihood of improper governmental motive in preventing its exercise,[351] Justice Stevens concludes that the assertion of the right to a jury trial, with its challenges to the venire, impaneling of the jury, and potential for mistrial, did not create the sort of impediments that would be likely to cause a prosecutor to punish a defendant.[352]

Justice Stevens set forth five major assertions to support the conclusion that prosecutors should not be required to explain their reasons when charges are increased after a defendant has exercised the right to a jury trial:

> 1) Prosecutors may uncover new evidence or re-evaluate old evidence prior to trial. Thus, a change in the charging decision is more likely to be vindictive after trial.[353]
>
> 2) Prosecutors expect defendants to exercise pre-trial procedural rights that will burden the prosecution. Therefore, prosecutors are unlikely to react in a punitive fashion.[354]
>
> 3) Timing of the prosecutor's action is important because prosecutors should be able to exercise broad discretion prior to trial and increase charges if appropriate.[355]
>
> 4) The institutional bias against retrials does not exist in the pre-trial setting.[356]
>
> 5) The nature of the right asserted in this case, the right to a jury trial, does not impose a burden or require the expenditure of resources great enough to give rise to the "personal stake" or "self vindication" that may lead to vindictiveness in retrials.[357]

First, even if one were to agree that increased charges following a trial are *more likely* to be influenced by vindictiveness than before trial, this assertion alone does not completely negate the *existence* of vindictiveness during pre-trial stages.[358] For this very reason, actual vindictiveness in pre-trial charging decisions may be more difficult to recognize and prove. Second, the expectation that defendants will exercise pre-trial procedural rights is no less a reason to require prosecutors to justify actions giving rise to an appearance of vindic-

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350 *Id.* at 382.

351 *See supra* text accompanying notes 14-186.

352 *Goodwin*, 457 U.S. at 383.

353 *Id.* at 381.

354 *Id.*

355 *Id.* at 381-82.

356 *Id.* at 383.

357 *Id.* at 382-83.

358 *See infra* text accompanying note 535. Also, should new evidence be discovered, the "objective" reason for the increase would be clear.

tiveness. After all, the right of appeal is also commonly exercised. A logical extension of this reasoning would make frequently exercised post-trial rights less subject to the "prophylactic rule" than others. Third, the exercise of appropriate discretion is certainly an important prosecutorial function. This discretion remains unaffected by the *Pearce/Blackledge* prophylactic rule since all proper discretionary acts would be allowed under that test. Fourth, it is correct that a bias against retrials does not arise from the facts in *Goodwin*, but this "bias" was not part of the earlier vindictiveness analysis, and, as the dissent noted, other biases against jury trials and other pre-trial requests certainly do exist. Finally, the assertion that the "nature" of the right asserted and the burden imposed upon the prosecutor are not sufficient to require the application of the prophylactic rule is, as the dissent pointed out, purely a value judgment that is little supported by experience or logic.

It is important to note that none of these assertions was supported by empirical data or case law. Instead, they were used collectively to provide cumulative support for the conclusion that the "possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained *only* as a penalty imposed on a defendant[359] is so *unlikely* that a presumption of vindictiveness certainly is not warranted."[360]

Justice Stevens was correct in pointing out that previous cases required that there must be more than an "opportunity for vindictiveness." There must be a "realistic likelihood of vindictiveness" for the prophylactic rule to apply.[361] He failed to describe, however, any guiding principles from previous cases to help determine when such a "realistic likelihood" might be found to exist. As mentioned earlier, in previous cases, a "realistic likelihood of vindictiveness" arose when three factors were present:

> 1) a motivation to deter the exercise of a right arising from increased burdens imposed upon the judge or prosecutor,
>
> 2) discretionary power to increase penalties,

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359 This phrasing of the question, whether vindictiveness was the *only* motivation for increased charges, is a completely different inquiry than that addressed in the earlier cases. Previously the issue was framed in terms of whether vindictiveness may have played *some* role in the decision to increase charges. This phrase from *Goodwin* has the effect of re-forming the entire doctrine in that it accepts vindictiveness as long as it is not the *sole* motivation for the governmental actions. Of course, if this is truly to be the standard, it is unlikely that the any prosecutorial acts will run afoul of the vindictiveness doctrine.

360 *Goodwin*, 457 U.S. at 384 (emphasis added on "only").

361 *See supra* text accompanying notes 211-51.

> 3) a direct link between the exercise of discretion and a potential penalty suffered by a defendant that is not attenuated by intervening factors beyond government control.[362]

There can be little dispute that the facts in *Goodwin* fit the second and third criteria found in earlier vindictiveness cases. Thus, Justice Stevens' focus upon the motivations of the prosecutor in *Goodwin* as being determinative is consistent with the analytical methodology used in previous cases.[363] In this respect, *Goodwin* may be most closely analogous to the earlier "judicial motivation" case, *Colten v. Kentucky*.[364] In *Colten*, the Court found that judges in a trial *de novo* procedure, like the prosecutor in *Goodwin*, were unlikely to develop vindictive motivation;[365] thus any "appearance of vindictiveness" would be abstract and would not require the *Pearce* prophylactic remedies.[366]

The factors cited by Justice White in *Colten* in examining judicial motivation revolved around three general themes: first, judges in a trial *de novo* were not directly burdened by the exercise of a defendant's rights prior to the trial *de novo*;[367] second, unlike formal appeals there was no need to examine earlier decisions and, therefore, no institutional need to vindicate an earlier judicial decision;[368] and third, the sentencing entity was not the same in both proceedings and the second judge may not even be aware of the first proceeding.[369] Thus, the second judge would presumably feel less of a personal interest in the exercise of a defendant's rights even if some need for vindication or burden were created in the trial *de novo*.[370]

The most obvious distinction between *Colten* and *Goodwin* is that, in relationship to the defendant, the function of judges differs greatly from the function of prosecutors.[371] Unlike the judicial function, the very purpose of the prosecutorial function is punitive in nature.[372] The *Goodwin* opinion itself makes clear that prosecutors are expected and required to act with punitive intent.[373] The issue in the prosecutorial vindictiveness doctrine is differentiating between punitive motives that are improper under the law and those

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362 *See supra* text accompanying notes 305-14.
363 *See supra* text accompanying notes 300-14.
364 *Colten*, 407 U.S. 104.
365 *See supra* text accompanying notes 59-75.
366 *Id.*
367 *Colten*, 407 U.S. at 116-17.
368 *Id.* at 117-118.
369 *Id.* at 118.
370 *See id.* at 116-18.
371 *See supra* text accompanying notes 315-18.
372 *Id.*
373 *Goodwin*, 457 U.S. at 372-73.

that are not.[374] This fundamental difference in roles between judges and prosecutors makes direct comparison with *Colten* difficult. However, an examination of the reasoning of *Colten*, while recognizing the differences in roles, is helpful in evaluating the *Goodwin* rationale.

An obvious similarity between *Colten* and *Goodwin* is that the judge in *Colten* was not the same judge who had imposed the original sentence.[375] The same is true of the prosecutors in *Goodwin*. Although one may question whether the second judge would have some "personal stake" in encouraging defendants to accept the decision of the judge in the initial proceeding, thereby giving deference to a colleague and keeping one's own docket clear, not even the possibility of such a division of interests exists between the actors in *Goodwin*.[376] Both prosecutors shared the same institutionally required punitive purpose. The demand for a jury trial caused substantial expenditure of additional prosecutorial resources and required the same governmental entity, the prosecutors' office, to prepare the case a second time.[377] In *Goodwin*, like *Pearce* and *Blackledge*, the exercise of the right by the defendant created additional burdens on the very governmental agency with the power to increase the penalty upon conviction.[378]

The entire prosecutorial vindictivenss doctrine was premised upon the recognition that vindictiveness must play *no part* in a system that imposes criminal sanctions if due process is to have any meaning.[379] *Goodwin* clearly expresses the same sentiment. The effect of a rule that upholds prosecutorial discretion *unless* retaliation is the *sole motivation*, as suggested by language in *Goodwin*,[380] however, is that punishment for exercise of rights inevitably will be a permissible prosecutorial tactic.[381] Were this language of the Court taken as the foundation for a recasting of the doctrine, one might well ask whether *any* retaliatory prosecutorial acts would violate due process.

Another disturbing by-product of the analysis employed by the Court, which contrasted the right to a jury trial with that of appeal,[382] is the denegration of the importance of the right to a trial by

374 *Id.* at 373.
375 *Id.* at 374 n.5.
376 *Id.* at 390 (Brennan, J., dissenting).
377 *Id.*
378 *Id.*
379 *See supra* text accompanying notes 354-57.
380 *See supra* text accompanying notes 59-75.
381 *See infra* text accompanying note 535.
382 *See supra* text accompanying notes 211-51.

one's peers and the presumption of innocence. The Court's analysis balanced the importance of the right in question against the burdens imposed upon the state by its exercise.[383] The curious result of this method of analysis is to put procedural rights on a "sliding scale" that raises the right to appeal, a statutory right that applies only after the presumption of innocence has been removed, above constitutionally-mandated rights exercised by a defendant who is presumed innocent *prior* to a conviction. This result is certainly anomalous given the teaching of *Chaffin*, in which the Court, seeking to justify the elimination of the *Pearce* rule from jury resentencing, stated that there is "nothing in the right to appeal or the right to attack collaterally a conviction . . . which elevates those rights above the rights to jury trial."[384] This was particularly so, according to the majority in *Chaffin*, because unlike the right to a jury trial, any fear of vindictiveness arising from increased penalty on appeal was remote at the time a defendant exercises the right.[385] In addition, as noted, the only other appearance of prosecutorial vindictiveness case decided by the Court, *Blackledge v. Perry*, was based upon a lower court ruling concerned with impediments placed upon the right to a jury trial.[386] Thus, *Chaffin* and *Blackledge* both would seem to counsel an outcome contrary to that reached by the *Goodwin* majority.

The outcome in *Goodwin* had the effect of creating another doctrinal anomaly. As was noted earlier, *Pearce*, the seminal appearance-of-vindictiveness case, relied directly upon *United States v. Jackson* for the due process doctrine that addressed the "chilling effects" of governmental action upon the exercise of rights.[387] *Jackson*, which, like *Goodwin*, involved the pre-trial constitutional right to a jury trial, provided the basis for the expansion of the "chilling effect" doctrine to encompass the exercise of both constitutional rights and post-trial statutory rights.[388] It was the chilling of a *pre-trial right* to request a jury trial in *Jackson* that gave rise to *Pearce*, *Blackledge* and even *Goodwin*.[389] In *Goodwin*, however, the Court

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383 *See supra* text accompanying notes 240-43. This methodology, as noted in the Fourth Circuit opinion, is not endorsed by previous Supreme Court cases, although it has been employed by at least two circuits. *See* United States v. Andrews, 633 F.2d 449, 453 (6th Cir. 1980), *cert. denied*, 450 U.S. 927 (1981); United States v. Thomas, 617 F.2d 436, 438 n.1 (5th Cir. 1980) (noting that balancing test may be "substantially undermined" by *Bordenkircher*); Jackson v. Walker, 585 F.2d 139, 145 (5th Cir. 1978); Hardwick v. Doolittle, 558 F.2d 292, 301-02 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978).

384 *Chaffin*, 412 U.S. at 33. *See also supra* text accompanying notes 77-126.

385 *Chaffin*, 412 U.S. at 33.

386 *See supra* text accompanying notes 324-28.

387 *See supra* text accompanying notes 14-58.

388 *Pearce*, 395 U.S. 711, 723 (1969).

389 *Id.*

came full circle in its reasoning by creating a pre-trial/post-trial distinction, relying upon value judgments about the motivations of prosecutors and weighing the relative importance of certain constitutional rights. The result of the Court's analysis in *Goodwin* was that the constitutional right that spawned the entire "appearance of vindictiveness" doctrine, the right to a jury trial, was found not deserving of the same procedural protection and was granted less protection than the statutory right of appeal, a right which only those convicted of crimes may exercise.

IV. PROSECUTORIAL VINDICTIVENESS AFTER *GOODWIN*

Any analysis of the impact of *Goodwin* upon the due process doctrine prohibiting prosecutorial vindictiveness requires establishing a clear analytical distinction between the two major branches of the doctrine: the prohibition against actual vindictiveness[390] and the "chilling effect" upon the exercise of rights arising from an "apprehension of vindictiveness" on the part of a defendant.[391] With regard to the first branch, actual vindictiveness, the cases have been unanimous in their condemnation, outside the context of plea bargaining, of increasing penalties for the purpose of punishing a defendant for doing "what the law plainly allows."[392] Thus, even after *Goodwin*, a due process violation "of the most basic sort" would arise when a prosecutor *actually* "up[s] the ante" for the purpose of punishing a defendant for exercising *either* a pre-trial or post-trial right.[393]

A. THE REBIRTH OF THE ACTUAL VINDICTIVENESS DOCTRINE

The apparent thrust of *Goodwin* recasts the second branch of the doctrine, the branch that addresses the "chilling effect" created by defendants' fear of retaliation in the exercise of prosecutorial discretion.[394] Prior to *Goodwin*, a combination of (a) the problem of proving a prosecutor's subjective state of mind,[395] (b) a concern for the "unseemly task of examining motives" of a prosecutor in a particular case,[396] and (c) a recognition that the "appearance of vindictiveness" undermines the integrity of the system by deterring the exercise of rights by defendants and raising the spectre of arbitrary

390 *See supra* text accompanying notes 14-58 and 211-51.
391 *See supra* text accompanying notes 14-58 and 127-57.
392 *See supra* note 1.
393 *See Goodwin*, 457 U.S. 368.
394 *See supra* text accompanying notes 211-51.
395 *See supra* text accompanying notes 14-58 and 127-57.
396 *Id.*

punishment,[397] caused the Court to adopt a "prophylactic" rule. Although *Goodwin* clearly is directed toward modifying the appearance-of-vindictiveness doctrine and the use of the prophylactic rule, an effect of *Goodwin* will be an increased reliance upon the actual vindictiveness branch of the doctrine.

The result of the application of the "prophylactic rule" prior to *Goodwin* was that "actual vindictiveness" was more or less swallowed by the "apprehension of vindictiveness" doctrine.[398] Proof of actual

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397 *See supra* text accompanying notes 14-58. The appearance of unfairness has been recognized by the Supreme Court, scholarly commentators, and the ABA as having a corrosive effect on public acceptance of a system of punishment. *See* Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971); Turner v. Louisiana, 379 U.S. 466 (1965); Offutt v. United States 348 U.S. 11, 14 (1954); Nesson, *Rationality, Presumption and Judicial Comment: A Response to Professor Allen*, 94 HARV. L. REV. 1574 (1981). 1 ABA STANDARDS FOR CRIMINAL JUSTICE ch. 3, 3.9(b) (2d ed. 1980), provides that prosecutors are "not obligated to present all charges which the evidence may support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute. . . ."

398 Following the imposition of the prophylactic rule in *Pearce*, *Bordenkircher* was the only case in which any evidence of the actual motivations of the government agent were presented to the Court. *Bordenkircher*, 434 U.S. 357 (1978).

Prior to *Goodwin*, the only consideration of actual vindictiveness other than *Bordenkircher* came immediately on the heels of *Pearce* in Moon v. Maryland, 398 U.S. 319 (1970), a case largely ignored by commentators to date. The Court granted certiorari in *Moon* on the same day it decided *Pearce*, and counsel were instructed to brief and argue the question of the retroactivity of *Pearce* in addition to the other questions set forth in the petition for the writ, which was filed, of course, before *Pearce* was decided. *Pearce*, 395 U.S. at 975.

Moon is puzzling in several respects. In a *per curiam* opinion representing the views of four members of the court, following oral argument, the facts are stated as follows:

> [P]etitioner was found guilty of armed robbery by a Maryland jury and sentenced by the trial judge to 12 years' imprisonment. The conviction was set aside on appeal by the Maryland Court of Appeals. At a second trial *for the same offense* in 1966 the petitioner was again convicted, and this time the trial judge imposed a sentence of 20 years' imprisonment . . . . (emphasis supplied)

398 U.S. at 320. The italicized portion is incorrect, as indicated in the opinion of the Maryland Court of Appeals affirming the second conviction: "On retrial he was again found guilty of armed robbery and also of larceny and assault with intent to murder *for which he had not been tried the first time*. Judge Pugh, of the Circuit Court for Montgomery County, sentenced him to twenty years for armed robbery. With credit for the time he had served, and suspended ten-year sentences on each of the other counts (sic)." *Moon v. State*, 243 A.2d at 565 (emphasis supplied). Thus, *Moon* appears to be a case of prosecutorial, in addition to judicial vindictiveness because two additional counts were added to Moon's charges after reversal of his first conviction. Yet, the Supreme Court took no note of this fact, perhaps because it was unaware of the true facts.

Equally curious is the disposition of *Moon* and the reason given. The Supreme Court's opinion fails to note that the twenty year sentence Moon received the second time around was the maximum for armed robbery. *Moon v. State*, 243 A.2d at 567. In spite of this, or again perhaps because the court was not aware of it, the writ was dismissed as improvidently granted because:

> [T]he dispositive development is that counsel for the petitioner has now made clear that there is no claim in this case that the due process standard of *Pearce* was vio-

state of mind of the prosecutor at the time of an increase in penalties became largely irrelevant if the prosecutor was unable to advance legitimate reasons for the increase.[399] Conversely, establishing a legitimate basis for increased charges would, in the absence of hard evidence to the contrary, put an end to the inquiry.[400] To the extent that courts required prosecutors to advance objective reasons for the increase, the veracity of the prosecutor's assertions of proper motive never even came into issue.[401]

A good example of this phenomenon is *Goodwin* itself. When the case reached the Supreme Court, no allegations of actual vindictiveness had ever been made, and no record had been made on that issue.[402] The Fourth Circuit opinion found a due process violation in the "appearance of vindictiveness" while at the same time observing in dicta that "[o]n this record we readily conclude that the prosecutor did not act with actual vindictiveness."[403] Thus, the Supreme Court was presented with a case in which the issue of the actual intention of the prosecutor was entirely unexplored.

Although the prophylactic rule remains in effect after the creation of the pre-trial/post-trial distinction in *Goodwin*, it will apply routinely only in settings following a determination of guilt or inno-

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lated. As counsel forthrightly stated in the course of oral argument, "I have never contended that Judge Pugh was vindictive."

398 U.S. at 320.

Moon raises several significant points concerning actual vindictiveness. First, counsel's concession seems incredible in light of the undisputed facts of the case: it would appear to be an excellent illustration of the fact that it is very difficult to recognize in concrete terms when vindictiveness in fact exists. Second, in light of *Pearce* and the prophylactic rule it fashioned, of what relevance is an assumed absence of actual vindictiveness? In spite of the languge to the contrary in *Moon*, *Pearce* clearly identified two due process violations: the operation of actual vindictiveness and the deterrent or "chilling effect" upon the exercise of rights arising from an appearance of vindictiveness. As to the latter, the presence or absence of actual vindictiveness is irrelevant because if the appearance is present, the result will continue to be to deter or chill the exercise of rights.

Moon indicates that the Supreme Court itself perhaps did not appreciate the full significance of the distinction between the due process violations identified in *Pearce*. The failure of the lower federal courts and commentators to date to appreciate the significance of *Moon* illustrates the prevalence of the confusion and failure to distinguish between the presence of actual vindictiveness and the appearance of vindictiveness, which triggers application of the prophylactic rule.

399 The *Pearce/Blackledge* prophylactic rule was designed to avoid this very issue. *See supra* text accompanying notes 14-58 and 126-56.

400 Of course, it is possible for actual vindictiveness to exist, even though the "appearance of vindictiveness" has been rebutted.

401 By asserting objective factors that provide a proper basis for increased charges, the prosecutor need not even testify. *See Goodwin*, 457 U.S. 368; *Blackledge*, 417 U.S. 21.

402 *See supra* text accompanying notes 211-51.

403 *Goodwin*, 637 F.2d at 252.

cence.[404] After *Goodwin*, it is clear that the "apprehension of vindictiveness" doctrine will not apply in all settings prior to trial.[405] It is equally clear that the "actual vindictiveness" doctrine remains in full force at *all* times.[406] What is exceedingly unclear, however, is how either the "actual vindictiveness" or "appearance of vindictiveness" doctrines are to be applied in practice.

If one takes *Goodwin* at its word, the use of discretionary prosecutorial power to retaliate for the exercise of rights remains a serious due process violation whenever it occurs.[407] Thus, the elimination of the *Pearce/Blackledge* prophylactic rule in some pre-trial settings will necessarily require the development of the previously unused "actual vindictiveness" branch of the prosecutorial vindictiveness doctrine.[408]

As described earlier, the actual vindictiveness doctrine probably requires the defendant to carry the burden of proof regarding the prosecutor's subjective motives.[409] Since the actual vindictiveness doctrine has only been addressed in *Bordenkircher*, there is virtually no guidance in previous cases for the procedures that will be required following the Court's narrowing of the operation of the "prophylactic rule" in *Goodwin*.[410] In the absence of guidance from the Court, one can only speculate as to the approaches the Court will take in implementing the "actual vindictiveness" doctrine.[411]

A successful motion grounded upon this "actual vindictiveness" branch of the doctrine would presumably require proof of four necessary elements. First, a defendant must have properly exercised a right granted by statute or constitution.[412] Second, subsequent to the exercise of that right, the prosecutor must have increased the potential penalty confronting the defendant.[413] Third, possibility of the increase must not have been made known to the defendant during plea bargaining.[414] Fourth, the prosecutor must have increased the penalty for the purpose of punishing the

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404 *See infra* text accompanying notes 391-406.

405 *Id.*

406 *See also supra* discussion accompanying notes 211-51.

407 *See Goodwin*, 457 U.S. at 372.

408 Some lower courts also have recognized that the actual vindictiveness doctrine remains as a deterrent to misuse of prosecutorial authority. It is equally clear, however, that the failure of the Supreme Court to carefully delineate the doctrine has left courts unprepared to apply the doctrine in a coherent fashion. *See infra* text and notes 450-95.

409 *See supra* text accompanying note 395.

410 *See supra* text accompanying notes 158-86.

411 *See infra* text accompanying notes 439-83.

412 *See Pearce*, 395 U.S. 711.

413 *See Blackledge*, 417 U.S. 21.

414 *See Bordenkircher*, 434 U.S. 357.

exercise of the right.[415]

Obviously, the first three elements require proof of objective events that are highly amenable to proof by a defendant. The fourth element, however, may present an enormous practical problem for a defendant who is perfectly able to prove the other three. After all, short of an admission of improper motive by the prosecutor, a defendant would be hard pressed to prove the state of mind of the prosecutor.[416] Although *Goodwin* does not specifically address this inherent difficulty in the actual vindictiveness doctrine, the case makes absolutely clear that such a use of prosecutorial power remains an anathema.

In light of the obvious difficulty faced by defendants in proving improper prosecutorial motives, the vitality of the actual vindictiveness doctrine will revolve around two major procedural issues that the Supreme Court has not directly addressed in its vindictiveness analyses.[417] First, what facts must be alleged by a defendant in an "actual vindictiveness" motion to make out a prima facie case and avoid a motion to dismiss? Second, what procedures will be available to permit defendants to prove the motivation of the prosecutor? If a defendant must now carry the already heavy burden of proving an improper motivation on the part of the prosecutor, denying the procedural means to carry that burden will create an illusory doctrine, which pays lip service to "prohibiting" actual vindictiveness but which, in reality, makes enforcement of that prohibition impossible.

For example, if the prima facie case required in a challenge to vindictive prosecutorial acts is more than a recitation of the objective factual predicates mentioned earlier, together with a general assertion of improper motive, only a defendant who can allege the existence of an admission in a "smoking gun" memo will be able to survive a motion to dismiss. Under this construction, courts would be prevented from reviewing *any* prosecutorial impropriety that was not open and notorious. Thus, prosecutors would be quite free to take actions that were vindictive in fact without the possibility of judicial oversight unless they openly admitted their improper

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415 *See Blackledge*, 417 U.S. 21. The *Pearce* rationale was, of course, that (actual) vindictiveness must play no part in sentencing. *See also Pearce*, 395 U.S. at 724. The *Goodwin* opinion, however, contains a hint that this is no longer the case. Justice Stevens seems to indicate that only increases based *solely* on vindictiveness motive are impermissible. Should this become the test, actual vindictiveness will virtually never prove the basis for limiting discretion since some mixed motive can certainly be found in almost any case.

416 *Goodwin* hints that even the subjective state of mind of the prosecutor must be proved by objective evidence. *Goodwin*, 457 U.S. at 381 n.12, 384 n.19.

417 *See infra* text accompanying notes 439-49.

motive.[418]

Even if a defendant were able to survive a motion to dismiss, he still has the problem of proving the allegations of improper punitive actions by the prosecution. A defendant who can make out a colorable claim of actual vindictiveness must be permitted to examine the prosecution's decision-making process in detail to have any realistic opportunity of prevailing on a vindictiveness motion. It seems, therefore, that courts must permit a rather thorough discovery process.[419] Such a process certainly would have to include the power to subpoena both prosecutors and their files and could logically extend to depositions of prosecutors and their staff as well as full evidentiary hearings regarding the justifications for increased penalties following the exercise of rights by defendants.[420]

These procedures will be, of course, extremely burdensome to the prosecution and time-consuming for the courts. It is difficult, however, to imagine a meaningful doctrine preventing prosecutors from *actually* punishing defendants for the exercise of rights without similar procedures. Thus, one outcome of *Goodwin* is likely to be the need to undertake the "unseemly task" of examining individual motivations. Should the Court underwrite procedures that do not provide for full discovery, actual vindictiveness will be implicitly accepted as a legitimate prosecutorial tool.[421]

B. DISPELLING THE "APPEARANCE OF VINDICTIVENESS" AFTER *GOODWIN*

The "appearance of vindictiveness" doctrine is also in a state of some confusion after *Goodwin* but for very different reasons.[422] This

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418 *See infra* text accompanying notes 450-95.

419 *See infra* text accompanying notes 476-82.

420 *Id.*

421 This possible acceptance of vindictive motivations is all the more troubling in light of the Court's references to *Bordenkircher*-type situations as being non-vindictive. *Goodwin*, 457 U.S. at 380 n.12.

422 In a lengthy dissent from the denial of a petition for a writ of certiorari in Longval v. Meachum, 651 F.2d 818 (lst Cir.), *cert. denied*, 460 U.S. 1098 (1983), Justices Rehnquist and O'Connor provided some insights into the continuing controversy over the vindictiveness doctrine. *See infra* text accompanying notes 442, 493. The circuit court had held that due process was violated by a judge telling the defendant's lawyer that the defendant should reconsider his plea of not guilty "because if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. . . ." *Longval*, 651 F.2d at 819.

Following a remand for reconsideration in light of *Goodwin*, the First Circuit adhered to its original opinion that the judge's comments raised a "reasonable apprehension of vindictiveness" that required resentencing before another judge. Longval v. Meachum, 693 F.2d 236 (lst Cir. 1982). Justice Rehnquist characterized the ruling as establishing a *per se* rule that requires resentencing "whenever a judge makes any state-

rule required the defendant to carry the burden of alleging and proving the same three "objective" elements mentioned earlier.[423] Once these three elements were alleged and proved, however, the prosecutor was required to come forward with proper reasons for the increase.[424] Although some differences existed in the circuits regarding the factors upon which increased penalties could be justified,[425] this procedure largely accomplished the goal of allowing a limited review of prosecutorial decision-making, without the "unseemly task" of examining subjective motivations of individual prosecutors in a contested evidentiary hearing preceded by full discovery of the prosecutor's decision-making process.

Although one commentator read the pre-trial/post-trial distinc-

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ment that is susceptible of appearing from the defendant's perspective to be an attempt to coerce him to plead." *Longval*, 460 U.S. at 1099. This, of course, ignores the requirement in the doctrine that the defendant's apprehension of vindictiveness be "reasonable." *See supra* text and accompanying notes 59-126.

Justice Rehnquist apparently felt that the judge's statement was not an implicit threat, but rather was "simply to inform Longval of the facts of life in his courtroom." *Longval*, 460 U.S. at 1099. In criticizing the First Circuit's treatment of vindictiveness, Rehnquist refers to *Goodwin* as a case in which the presumption did not apply: "where a prosecutor presses more serious charges in a plea bargaining situation." *Id.* at 1100. He suggests that the *Goodwin* rationale should prohibit application of a "presumption" regarding judicial actions because of the "impartial position of a judge." *Id.*

The Rehnquist opinion is revealing in that it avoids any discussion of the "appearance of vindictiveness" rationale of *Pearce* and *Blackledge*. *See supra* text and accompanying notes 279-86. The opinion suggests that because "there is a fully credible alternative explanation (other than vindictiveness) for the trial judge's behavior" a due process violation does not lie. *Longval*, 460 U.S. at 1099. Implicit in Justice Rehnquist's analysis is an apparent rejection of two fundamental principles underlying the doctrine: first, that vindictiveness must play no role in decision-making and, second, that the court has no obligation to dispel any "reasonable apprehension" of vindictiveness. *See supra* text and accompanying notes 49-58. The possible existence of a non-vindictive motive simply does not address either problem. The exercise of rights may be chilled and actual vindictiveness may exist whenever the existence of a vindictive motive is not affirmatively eliminated. *See supra* text and accompanying notes 207, 390-403. This is all the more important when the governmental officer charged with impartiality and vested with the power to impose the increased penalty, and not merely request it, plays a role in encouraging the relinquishing of trial rights. *See supra* text accompanying note 371.

Goodwin is a case which held that the *Pearce-Blackledge* presumption does not apply in a plea bargaining situation. *See supra* text accompanying notes 158-86. The case which held that prosecutors may threaten increased penalties in plea bargaining was *Bordenkircher*, 434 U.S. 357. *See supra* text accompanying notes 158-86. That case, of course, was premised upon the "need for give and take" in plea bargaining negotiations, a process in which, at least to this point, the judiciary has not been encouraged to engage. The Rehnquist opinion seems to endorse the concept of judges actively engaged in the same process by which prosecutors are allowed to encourage defendants to give up trial rights. This hardly seems consistent with maintaining the impartial position of judges upon which Justice Rehnquist relies to justify his conclusion.

423 *See supra* text accompanying notes 412-14.

424 *See supra* text accompanying notes 127-57.

425 *See* Schwartz, *supra* note 65.

tion as limiting the application of the *Pearce/Blackledge* prophylactic rule exclusively to the post-trial setting,[426] this reading is not absolutely accurate. In *Goodwin*, Justice Stevens apparently leaves the door open for the application of the *Pearce/Blackledge* rule in some pre-trial settings. The opinion seems to confirm that the *Pearce/Blackledge* rule is applicable to *all* cases following trial[427] but does not apply to *all* cases in the pre-trial stage.[428] By not clearly stating that the *Pearce/Blackledge* rule is inapplicable in *any* pre-trial setting, the Court implies that some pre-trial circumstances still exist in which the courts may find the prophylactic rule applicable.[429] Thus, defendants will find it necessary to test the continuing validity of the prophylactic rule in the exercise of rights both pre-trial and post-trial.

Another source of confusion stems from the lack of clarity regarding the issue of whether *all* post-trial increases in penalties will raise a "realistic likelihood" of vindictiveness or whether some may be subject to the same sort of "balancing of interests" analysis applied in *Goodwin*.[430] In addition, the nature of the showing required by the prosecution to overcome the "appearance of vindictiveness" remains the subject of great confusion.[431] The Court has not addressed the content of the "objective criteria" needed to rebut the presumption of vindictiveness. Thus, it is not clear whether the Fourth Circuit criteria from *Goodwin* or other more subjective bases for prosecutorial decision-making, such as those approved by Justice Blackmun in his *Goodwin* dissent, will be sufficient to dispel the appearance of vindictiveness in the pre-trial context.[432] Since *Goodwin* concluded that a realistic apprehension of vindictiveness did not arise in that case, the sufficiency of the prosecution's attempts to comply with the prophylactic rule was never discussed by the majority. As a result, the substance of the prophylactic rule as applied to prosecutors remains an open question. When viewed in conjunction with earlier cases, however, *Goodwin* may provide a foundation for more clearly articulated standards for evaluating prosecutorial decisionmaking under the prophylactic rule.

From *Pearce* it is clear that increased sentences on retrial following appeal require judges to make a record of objective data regard-

426 *See Prosecutorial Vindictiveness in the Criminal Appellate Process*, *supra* note 4.
427 *Goodwin*, 457 U.S. at 381.
428 *See id.* at 380-81.
429 *See* United States v. Gervasi, 562 F. Supp. 632 (N.D. Ill. 1983); *see also infra* text accompanying notes 450-95.
430 *See supra* text accompanying notes 358-62.
431 *See infra* text accompanying notes 441-45.
432 *See infra* discussion accompanying notes 450-83.

ing a defendant's conduct occurring after the original sentencing. *Blackledge* also makes clear that an "analogous" rule applies to prosecutors. The Court, however, has not disclosed the precise nature of that analogous rule. The following is a proposal for a prophylactic rule that builds upon *Goodwin* and that takes into consideration existing case law and the concern for appropriate prosecutorial discretion expressed in *Goodwin*.

Given the teaching of *Colten* and *Perry*, the actions of prosecutors and judges taken in the same functional setting may be evaluated by different standards. Moreover, *Goodwin* establishes that varying standards can be applied to prosecutors before and after trial. Thus, the theoretical foundation exists for creating a flexible prophylactic rule that addresses many of the concerns for prosecutorial discretion expressed in *Goodwin*. Rather than eliminating meaningful judicial oversite from any stage of a criminal proceeding, a flexible standard for rebutting a realistic appearance of vindictiveness would allow an appropriate level of discretion for prosecutors, while allowing courts to protect the exercise of rights by defendants at all stages of litigation.

1. The Post-Trial Setting

The showing required of prosecutors in the post-trial context, as *Goodwin* concedes, should be closely analogous to that set forth in *Pearce*. Once a trial has been completed, the reasons for a valid exercise of discretion that would justify an increased penalty, whether an increased sentence or increased charges, are relatively few. In the case of sentencing, *Pearce* makes clear that only conduct by the defendant subsequent to the original sentence or changes in other objective circumstances provide a valid basis for an increased sentence. The effect of this standard is to "freeze" the judge's original decision irrespective of mistake, reconsideration, or even new evidence regarding the *original offense*.[433] Implicit in this standard is the notion that, by the time the first trial has been completed, the prosecution has had an adequate opportunity to investigate and present all relevant facts regarding the case. Further, it assumes that the court has had an opportunity to make appropriate decisions regarding those facts, whether that is actually the case or not. *Pearce*, therefore, incorporates the concept that reasonable limits may be placed upon the introduction of new evidence that may alter the original exercise of discretion.[434]

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[433] United States v. Carrasquillo, 732 F.2d 1160 (3d Cir. 1984).

[434] In *Wasman*, 700 F.2d 666 (11th Cir. 1983) *aff'd*, 468 U.S. 559 (1984), the Eleventh Circuit upheld an increased sentence following retrial based upon convictions for other

Since prosecutorial vindictiveness is ordinarily reflected by the addition of charges, rather than an increase in the sentence a defendant actually receives,[435] the *Pearce* standard obviously cannot apply directly to prosecutors because a defendant's conduct following the original trial could have no relevance to a charging decision involving the original offense. New evidence regarding the original offense itself, however, presents a more complicated problem.

As applied to prosecutors in the post-trial context, *Pearce* would indicate that changes in the factual basis for the original charge occurring *after* the original trial, such as the death of a previously injured victim, would provide a valid basis for increased charges. Such a standard would be closely analogous to *Pearce* and has already been mentioned by the Court in *Blackledge* as a proper basis for increased charges in a second trial. Use of undiscovered or unappreciated facts to increase charges, however, would introduce the same opportunities for vindictiveness in the post-trial context that the *Pearce* standard prohibited. Thus, at least in the post-trial context, a rule for prosecutors at least as strict as *Pearce* would seem appropriate, and only a change in facts which *occurred* after the original trial should provide a basis for increased charges on retrial.

2. *The Pre-Trial Setting*

Assuming that *Goodwin* is correct in observing that prior to trial prosecutors must be accorded greater latitude to increase charges, a different standard should be applied in this context. First, it is axiomatic that purely subjective reasons for increased charges either before or after trial, i.e., change in policy, mistake, inadvertance, and new insights can never achieve the goal of removing the appearance of vindictiveness.[436] Although in some cases there may be some dispute as to what constitutes "objective" evidence, it seems

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crimes which occurred after the original sentencing. The defendant argued that the convictions were not "identifiable conduct" following the original sentence as required to justify an increased penalty in *Pearce*.

The Eleventh Circuit reasoned that *Pearce* was designed to prevent the "appearance of vindictiveness" and that it did not prevent the use of "what had been considered a legal nullity for sentencing purposes, i.e. a mere accusation, a fact fully relevant to sentencing, i.e. that defendant had committed an additional crime." *Id.* at 668.

The Eleventh Circuit opinion differs from at least two other circuits. *See* United States v. Markus, 603 F.2d 409 (2d Cir. 1979), and United States v. Williams, 651 F.2d 644 (9th Cir. 1981), regarding the use of intervening convictions.

435 Although most of the prosecutorial vindictiveness cases involve increased sentences, the discussion of the conduct of the prosecution in resentencing in *Chaffin*, 412 U.S. 17, indicates that the vindictiveness analysis may also apply to an argument for an increased penalty following retrial. *See supra* text accompanying notes 100-03.

436 *See* Schwartz, *supra* note 65.

clear that such evidence must be both relevant to the *original* offense and based upon events *beyond the control* of the prosecutor. The more difficult problem concerns (a) whether the objective evidence must have arisen after the original charging decision or after the exercise of the right, and (b) by when must the prosecutor learn of its existence.

If a major objective of the doctrine is to limit the appearance of vindictiveness, allowing the use of evidence that existed prior to the exercise of the right, but which had not been used to increase charges before the right was exercised, will inevitably lead to suspicion that any justification for an increased charge based upon previously existing evidence is pretextual. Conversely, it is quite plausible that not all relevant facts may be known to a prosecutor prior to a defendant's exercise of rights. Thus, it seems that the standard must incorporate the ability to increase charges based upon evidence that is known to the prosecutor both before and after the exercise of rights. The standard, however, must not allow a prosecutor to merely claim ignorance of the evidence as a proper basis for increased charges. Any vindictive taint hardly could be dispelled by allowing a prosecutor simply to plead failure to prepare a case properly as a valid justification for a later increase in charges.

Given all these considerations, it seems that the pre-trial standard must require objective evidence and rest upon an objective assessment of reasonableness. If the prosecutor could show through objective evidence that (a) the factual basis for the increase in charges did not exist prior to the exercise of rights, or (b) if it existed prior to the exercise of rights, it could not have reasonably been known through the exercise of due diligence by the prosecutor, an increase in charges would be justified. Such a reasonableness requirement could also be applied to the significance of evidence existing prior to the exercise of rights. If the evidence is such that a competent prosecutor could not have reasonably understood its significance, it seems that the appearance of vindictiveness could be removed by making a record on that issue that the court could evaluate.

As discussed earlier, the all-or-nothing approach used by the Court in *Goodwin* results in elimination of judicial scrutiny of important discretionary functions that the court is well equipped to evaluate.[437] The standards for rebuttal suggested here meet the most

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[437] In *Goodwin*, the prosecutor's affidavit stated:

> My reasons for seeking an indictment follow.
>
> First, I considered Mr. Goodwin's conduct on February 2, 1976 to be a serious violation of law. He had intentionally resisted a United States Park police officer in

important concerns expressed by the Court in *Goodwin* without relinquishing judicial review. Such a flexible standard would seem to have much to commend it and few of the flaws inherent in the Court's approach in *Goodwin*.

Following *Goodwin*, the Court will have to clarify the standard to be applied in evaluating the possible motivations for governmental acts which give rise to the "realistic apprehension of vindictiveness." Prior to *Goodwin*, the absolute prohibition against actual vindictiveness caused the Court to apply the "prophylactic rule" if there existed the realistic possibility of *some* retaliatory motive.[438] The language in *Goodwin* that suggests that the application of the prophylactic rule was unwarranted because it was unlikely that a

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the performance of his duties, striking the officer with an automobile, leaving him perhaps seriously injured on the highway, and fleeing through traffic at a high rate of speed, thus endangering the lives of other drivers.

Second, among the documents I received in the Court file from Magistrate Burgess was a copy of Goodwin's F.B.I. record. That record showed Mr. Goodwin's lengthy history of violent crime.

Third, based on my conversations with Officer Morrisette and Assistant Commonwealth's Attorney Jones, I judged Goodwin's conduct on February 2, 1976 to be related to major narcotics transactions.

Fourth, I believe Mr. Goodwin had committed perjury in his testimony under oath at the preliminary hearing before Magistrate Burgess on March 30, 1976.

Fifth, subsequent to the filing of the initial complaint on February 3, 1976, Mr. Goodwin had failed to appear for a trial scheduled for April 29, 1976.

In summary, my decision to seek an indictment charging Mr. Goodwin with two felonies, [18 U.S.C. § 111 and 18 U.S.C. § 1331(c)], was based upon the totality of the circumstances set forth above and upon my judgment that his conduct on February 2, 1976 involved not merely a traffic incident on the Baltimore-Washington Parkway but also serious violations of federal law committed by a dangerous individual. My decision to seek a grand jury indictment was not motivated in any way by, nor did I ever consider Goodwin's request for trial by jury in the United States District Court.

/s/ Edward M. Norton, Jr. EDWARD M. NORTON, JR. Assistant United States Attorney. Brief for the United States at 30a, 31a app. E, 102 S. Ct. 2485 (1982) (affidavit of Edward M. Norton, Jr.).

Under the standard suggested here, the reasons for the increased charges in *Goodwin* would probably not have passed muster. The first three reasons for seeking an increase in charges were based upon evidence that was either known to the prosecution prior to the defendant's request for a jury trial or which was readily available to the prosecution. The fourth and fifth reasons may have been the basis for additional criminal charges but had no proper bearing on the severity of the underlying charge. Penalties for perjury or for violating conditions of bail are available as remedies for the conduct complained of. Were reasons four and five to be acceptable for increased charges, the Court would endorse a rule that either makes such penalties redundant or endorses charging based upon acts following the original charging decision that are legally unrelated to the underlying charge.

More importantly, perhaps, is the fact that *all* of the reasons for the increase were known or should have been known to the prosecution long before the request for a jury trial. Even if the reasons asserted were acceptable, the government should be required to justify the timing of the increased charge. The affidavit fails to set forth any objective reasons that prevented filing of increased charges prior to the request for a jury trial.

438 *See supra* discussion accompanying notes 333-37.

prosecutor would be acting *solely out of a retaliatory motive* in increasing charges carries with it disturbing implications for the applicability of the prophylactic rule where mixed motives may be at work. If the "sole motive" standard is adopted, the prophylactic rule will apply, even hypothetically, only to a very narrow universe of prosecutorial acts either before or after trial.

V. *GOODWIN* IN THE FEDERAL COURTS

Given the relative infancy of the prosecutorial vindictiveness doctrine, with only three United States Supreme Court decisions to provide guidance, it is not surprising that the law in the circuits is "chaotic."[439] *Blackledge* unleashed a "veritable blizzard" of federal court decisions involving a myriad assortment of claims of prosecutorial vindictiveness.[440] The *Goodwin* decision has done little to abate the volume of litigation or clarify the chaos regarding the doctrine of prosecutorial vindictiveness.[441]

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439 United States v. Andrews, 612 F.2d 235, 257 (6th Cir. 1979).

440 Before *Goodwin*, the doctrine was invoked to challenge prosecutorial decisions made before, during, and after trial. *See* McEachern, *"A Realistic Likelihood of Vindictiveness:" Due Process Limitations on Prosecutorial Charging Discretion*, 1981 U. ILL. L.F. 693, 701 (440). The claims of vindictiveness included prosecutorial acts in response to the exercise of constitutional procedural, statutory, and even informally asserted rights. *Id.* at 702.

441 Reported decisions in the circuits through Spring, 1985, involving claims of prosecutorial vindictiveness following *Goodwin* are set forth below:

1. Meachum v. Longval, 651 F.2d 818 (lst Cir.), *cert. granted*, 458 U.S. 1102 (1982); Meachum v. Longval, 693 F.2d 236, *cert. denied*, 460 U.S. 1098 (1983): Where the trial judge allegedly retaliated in sentencing defendant who refused to follow judge's advice during jury trial to plead guilty, the First Circuit applied the prophylactic rule and required resentencing because trial judge's statement was "susceptible of appearing from the defendant's perspective to be an attempt to coerce him to plead." *Longval*, 693 F.2d at 237. After the United States Supreme Court vacated judgment and remanded for further consideration in light of *Goodwin*, the First Circuit reaffirmed its previous decision, distinguishing *Goodwin* primarily because the threat of judicial vindictiveness was "more serious" than prosecutorial coercion because a judge is expected to be impartial. Dissenting from the denial of certiorari, Justice Rehnquist, joined by the Chief Justice and Justice O'Connor, characterized *Goodwin* as a "plea-bargaining situation" and stated: "I believe the *Goodwin* rationale is fully applicable in this case. If anything, the impartial position of the judge suggests that we should be more reluctant to apply a presumption of vindictiveness to judges than to prosecutors." *Cf. Blackledge*, 417 U.S. at 23-33 (Rehnquist, J., dissenting) (arguing that Court should be more reluctant to apply *Pearce* prophylactic rule to a prosecutor because latter "is a natural adversary of the defendant").

2. United States v. Russotti, 717 F.2d 27 (2d Cir.), *cert. denied*, 465 U.S. 1022 (1984): In a dual sovereignty setting, the Second Circuit upheld a federal indictment against the defendant that included a homicide charge, after the state conviction for the same homicide was vacated on appeal. The court rejected the claim of actual prosecutorial vindictiveness based upon the fact that a federal indictment was a permissible exercise of discretion by an independent sovereign.

3. United States v. Ng, 699 F.2d 63 (2d Cir. 1983): In a dual sovereignty setting,

The primary cause of the confusion is the continuing failure of

federal charges for firearms violations were brought after a plea on state charges for the same acts. The defendant claimed that the federal charges were in retaliation for a "successful" plea and sentencing. The court held the federal indictment to be a permissible exercise of discretion by the independent sovereign.

4. United States v. Hinton, 703 F.2d 672, 678 (2d Cir.), *cert. denied*, 462 U.S. 1121 (1983): The defendant claimed that there was a realistic likelihood of prosecutorial vindictiveness when the prosecutor added a second charge after defense counsel revealed a weakness in the original charge during plea bargaining. The defendant was only convicted on the second charge. Applying *Goodwin*, the Second Circuit held that a presumption of vindictiveness does not exist in a pretrial setting.

5. United States v. Silvestri, 719 F.2d 577 (2d Cir. 1983): The court held that no presumption of vindictiveness exists in pretrial setting where substantive charges were added to conspiracy charge after defendant's motion to sever trial was granted. Defendant alleged retaliation for refusal to plead and for unsuccessful motion to dismiss; the court held that the allegation was without any merit.

6. United States v. Shakur, 560 F. Supp. 366 (S.D. N.Y. 1983): The defendant was indicted for civil contempt after refusing to testify before a grand jury even though immunity was granted. The defendant alleged actual vindictiveness in that the indictment was returned as a penalty for exercising her legal right to challenge the subpoena. The court ruled that the "opportunity for vindictiveness" is not enough to constitute a due process violation; rather, what is needed is a realistic possibility that the increased punishment is a result of vindictiveness.

7. Fardella v. Garrison, 698 F.2d 208 (4th Cir. 1982): The defendant alleged that the United States Parole Commission's decision to reopen parole determination gave the appearance of retaliation for the filing of a writ of habeas corpus and thus a presumption of vindictiveness arose. The Fourth Circuit found decreased due process protection in parole proceedings. Further, the court deferred to the power of the commission to modify or revoke and order regarding parole.

8. United States v. Whitley, 759 F.2d 327 (4th Cir. 1985) (en banc): The defendant was charged with a four-count indictment for bank robbery. The defendant pled guilty to one count and was sentenced to 20 years. The defendant filed a motion to vacate conviction and sentence. The defendant was tried and convicted on all four counts. The court held, "[B]ecause Whitley's original plea was to a lesser-included offense and subsequently he was convicted of a greater offense, [North Carolina v.] Pearce does not apply. The likelihood of either actual vindictiveness or apprehension of vindictiveness, the object of *Pearce's* prophylactic rule, is minimal when the second sentence is imposed for an offense greater than that which was the basis of the original conviction. The complete explanation for the harsher penalty is obvious on the face of a judgment convicting the defendant of the greater crime." 759 F.2d at 332.

9. United States v. Bryant, 770 F.2d 1283 (5th Cir. 1985): The court held that the decision to seek a superseding indictment, when precipitated by the discovery of new evidence, was not motivated by vindictiveness, but rather was the product of a legitimate law enforcement decision to bring the defendant to trial.

10. United States v. Ward, 757 F.2d 616 (5th Cir. 1985): No unconstitutional prosecutorial vindictiveness was shown by calling defendant before grand jury to answer questions relating to drug transactions even though he had previously adamantly refused to cooperate as to those matters when his own case was pending.

11. United States v. Ruppel, 724 F.2d 507 (5th Cir. 1984): Absent actual retaliation, mere reindictment after a mistral due to a hung jury is insufficient to demonstrate the realistic likelihood of prosecutorial vindictiveness.

12. Byrd v. McKaskle, 733 F.2d 1133 (5th Cir. 1984): "Due process is violated by possibility of increased punishment, on retrial, that poses realistic likeihood of prosecutorial vindictiveness; actual vindictiveness need not be shown, since fear alone or

the Supreme Court to distinguish clearly between the due process prohibition against actual vindictiveness and the protection afforded

vindictiveness may deter defendant's exercise of appeal or collateral attack." 733 F.2d at 1136.

13. United States v. Krezdorn, 639 F.2d 1327 (5th Cir. 1981), *appeal after remand*, 693 F.2d 1221 (1982), *reh'g en banc*, 718 F.2d 1360 (1983), *cert. denied*, 465 U.S. 1066 (1984) (*see infra* text accompanying notes 482-514).

14. Delaney v. Estelle, 713 F.2d 1080 (5th Cir. 1983): The defendant was originally charged with burglary, which was enhanced by a habitual offender statute and forgery. The habitual offender charge was dismissed pursuant to a plea bargain. The defendant received fifteen years for burglary and forgery. The defendant's motion for retrial was granted, whereupon he was reindicted for the same crimes except that this time the forgery charge was also enhanced. The defendant claimed that the reindictment on the former forgery charge, supplemented by two enhancement provisions, constituted prosecutorial vindictiveness. The Fifth Circuit held that the increase in the charge must extend beyond the limits of the original indictment; there was no vindictiveness here since the charges facing defendant were the same in the second indictment as in the first.

15. United States v. Henry, 709 F.2d 298 (5th Cir. 1983). A challenge to an increased sentence was decided upon statutory grounds, but both the majority and the dissent discussed *Goodwin* extensively.

16. Lowery v. Estelle, 696 F.2d 333 (5th Cir. 1983): The prosecution originally charged the defendant with robbery by assault; on retrial the prosecution enhanced the charge to robbery by firearms, of which defendant was eventually convicted. No prosecutorial vindictiveness was found because the new penal code of Texas mandated a sentence upon conviction that was less than the sentence for the lesser charge.

17. United States v. Maurcio, 685 F.2d 143 (5th Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982): The prosecution filed felony charges after the defendant refused to plead guilty to misdemeanor charges. The court held that no actual vindictiveness had been established because defense counsel was notified of the consequences of refusal and the defendant was free to accept or reject offer (as in *Bordenkircher*).

18. United States v. Gervasi, 562 F. Supp. 632 (N.D. Ill. 1983) (*see infra* text accompanying notes 438-82).

19. United States v. Suquet, 551 F. Supp. 1194 (N.D. Ill. 1982): The defendant alleged that a second federal case was brought against him to force him to plead guilty in a pending case. After the defendant had prevailed on "some motions" indicating a "clear intention" of the defendant's refusal to plead guilty, the government was forced to prove its case. The court stated that subsequent changes in the charging decision are not *per se* unjustified. Thus the court found no presumption of vindictiveness.

20. United States v. Vega, No. 83 CR-511, slip op. (N.D. Ill. Nov. 29, 1983): The defendant alleged that the government filed felony charges in violation of an agreement to prosecute only on misdemeanor charges if he cooperated. The court held that the kind of conduct alleged by the defendant was not conduct that gives rise to a valid claim of prosecutorial vindictiveness.

21. Hack v. Broglin, 566 F. Supp. 1505 (N.D. Ind. 1983): The defendant originally entered a plea of guilty and was sentenced to 3½ years in prison. The defendant had understood the bargain to be 3½ years to be served on work release. At trial the defendant was sentenced by the same judge to five years in prison, without setting forth any aggravating circumstances. The court granted habeas corpus because of actual judicial vindictiveness.

22. United States v. Jefferson, 760 F.2d 821, 827 (7th Cir. 1985), *vacated on other grounds*, 106 S. Ct. 41 (1985): "Where trial judge must either lower sentence drastically or raise sentence imposed on another count, it does not offend rule against increasing sentence following successful appeal for district court to impose lowest of possible

by the prophylactic rule applicable where a deterrent effect upon the exercise of a right would result from a realistic apprehension of vin-

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sentences which was consistent with giving defendant full sentence district court intended to impose on her in first instance."

23. United States v. Grabinski, 727 F.2d 681 (8th Cir. 1984): The defendant was prosecuted for failure to file tax return while resident in State of Missouri; the case was dismissed upon proof of residency in Minnesota. The defendant was reindicted for failure to make two tax returns while a resident in Minnesota. The court held that the added charge did not raise a presumption of vindictiveness because it was based upon new information (that is, the court's determination of residency).

24. Luna v. Black, 772 F.2d 448 (8th Cir. 1985): The court held that the filing of an amended information without more does not constitute prosecutorial vindictiveness.

25. United States v. McGiffen, 578 F. Supp. 899 (1983), *aff'd sub nom.*, United States v. Ballester, 763 F.2d 368 (9th Cir. 1985): The court held that there has to be a threat or evidence of hostility to give rise to prosecutorial vindictiveness. The district attorney's statement that he would refer the matter to federal authorities if appellants persisted in their efforts to gain dismissal of the state indictment did not constitute a threat or an expression of hostility. Also, the statement was not converted into a threat or expression of hostility when the district attorney stated that the penalty carried by the federal charge was more severe than that carried by the parallel state charge.

26. United States v. McWilliams, 730 F.2d 1218, 1219 (9th Cir. 1984): "Allegation that United States Attorney was biased against defendant and interested in seeing him punished did not support claim of vindictive prosecution in filing second indictment charging defendant with obstruction of justice after he had engaged in altercation with his brother who had been on his way to United States attorney to offer testimony against defendant on charges of making false statement in acquisition of firearm and receipt of firearm by convicted felon."

27. United States v. Allen, 699 F.2d 453 (9th Cir. 1982): The defendant was indicted by federal prosecutors only because he received "favorable treatment" at sentencing in an unrelated state case. It was not clear what right the defendant exercised, if any. The court held that there is no presumption of vindictiveness in the sentencing setting and no "actual" vindictiveness was alleged.

28. United States v. Gallegos-Curiel, 681 F.2d 1164 (9th Cir. 1982): A routinely filed misdemeanor for illegal entry in the United States was changed to felony charges after defendant entered a not guilty plea. No appearance of vindictive prosecution because the decision to increase charges was based upon review of defendant's record as a whole, some of which was not available to prosecutors until after defendant had entered his plea.

29. United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983): A second indictment was brought after the first indictment was dismissed due to a motion by the defendant. There was no vindictiveness because the second indictment included fewer charges and lighter penalties than the first indictment. The court held that no reasonable likelihood of vindictiveness arises when the prosecutor increases charges prior to trial because the government may reevaluate the societal interest in prosecution prior to trial.

30. United States v. Banks, 682 F.2d 841 (9th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983) (*see infra* text accompanying notes 529-38).

31. United States v. Barker, 681 F.2d 589 (9th Cir. 1982): The court held that reinstatement of original charges after plea to lesser charge was vacated is not vindictiveness.

32. United States v. Frederick, 551 F. Supp. 1035 (D. Kan. 1982): The defendant agreed to cooperate with government prior to indictment. After the cooperation, the government filed charges in addition to those on which the defendant agreed to cooperate, allegedly in violation of agreement. The court held that there was no presumption

dictiveness. A related issue is a lack of understanding of what is meant by "actual vindictiveness." These problems stem from the fact that, largely because of the advantages of the prophylactic rule, which were stated in *Pearce*[442] and reiterated in *Blackledge*,[443] the prohibition against actual vindictiveness has been overshadowed by a nearly universal reliance upon the prophylactic rule.

With the sole exception of *Bordenkircher*,[444] every Supreme Court decision concerning a claim either of prosecutorial or judicial vindictiveness has been based upon an analysis involving the prophylactic rule. Even *Bordenkircher* fails to provide guidance in defining the meaning of actual vindictiveness. Thus, the meaning of actual vindictiveness and the analytical and procedural distinction which might differentiate judicial treatment of actual vindictiveness from the operation of the prophylactic rule has not been defined beyond the abstract proposition that a prosecutor has a clear duty to punish a defendant for violating the law but may not punish a de-

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of vindictiveness where the charging decision in this pretrial setting was treated like that in *Bordenkircher* because the defendant was aware of the possibility of additional charges.

33. United States v. Vigil, 743 F.2d 751 (10th Cir.), *cert. denied*, 105 S. Ct. 600 (1984): The court held that preindictment delay is not a violation of the due process clause of the fifth amendment absent a showing of actual prejudice or a showing that the delay was purposefully caused by the government to gain tactical advantage or to harass.

34. United States v. Taylor, 749 F.2d 1511, 1514 (11th Cir. 1985): "Prosecutor's indictment of defendant on felony counts, after initial conviction based on charge of cocaine possession only had been reversed, did not constitute improper prosecutorial vindictiveness for defendant's exercise of his appeal rights, where prosecutor originally charged cocaine offense only because he thought potential 15-year sentence for such offense would be adequate, and his decision to subsequently charge other felonies was based primarily on his view of equitable and appropriate sentence for defendant's criminal conduct, rather than to penalize defendant for taking appeal." 749 F.2d at 1514.

35. United States v. Cole, 755 F.2d 748 (11th Cir. 1985): After refusing to plea bargain, the defendants were charged with additional counts. The court held that these facts alone will not give rise to a presumption of prosecutorial vindictiveness.

36. United States v. Darby, 744 F.2d 1508 (11th Cir. 1984): The defendant was fully informed of government's intention to seek sentence enhancement and prosecute him as a dangerous special drug offender if defendant did not plead guilty as charged. The court held that the defendant simply declined to accept the offer and there was no basis for arguing prosecutorial vindictiveness.

37. United States v. Spence, 719 F.2d 358 (11th Cir. 1983): The defendant was indicted for tax evasion and false statements after a successful appeal and acquittal on retrial of drug possession and sale charges. The court held that there was no presumption of vindictiveness because the subsequent indictment was for separate and distinct original conduct, and there was no proof of actual vindictiveness.

38. United States v. Wasman, 700 F.2d 663 (11th Cir. 1983), *aff'd*, 468 U.S. 559 (1984): The Supreme Court granted certiorari to consider whether a judge may base increased sentence after retrial upon convictions of charges which were pending at initial sentencing. *See infra* discussion of *Wasman* accompanying notes 561-96.

442 *Pearce*, 395 U.S. at 725-26.

443 *Blackledge*, 417 U.S. at 28.

444 *See supra* discussion at 20-23.

fendant for exercising a right.[445] As the lower courts' attempts to apply *Goodwin* illustrate, it is far easier to state this abstract concept than it is to apply it properly to the facts of a particular case. Unlike Justice Stewart's famous observation about obscenity, vindictiveness is very easy to define but very difficult to "know it when [we] see it."[446]

After *Goodwin*, the due process focus in the pre-trial context necessarily shifts from the issue of a "realistic apprehension of vindictiveness" to that of actual vindictiveness. This major change in focus results from *Goodwin*'s holding that while the "presumption" does not apply to a defendant's pre-trial demand for a jury trial, the defendant may still prove through objective evidence that the prosecutor's conduct was motivated by actual vindictiveness.[447] The Court, however, does not pay sufficient attention to the change in focus it has just created and thereby presents the lower courts with significant analytical and procedural issues. The *Goodwin* opinion continues to blur the analytical distinction between actual and a realistic apprehension of vindictiveness by its description of the *Pearce/Blackledge* rule as a "presumption" and by requiring the defendant to prove only through the use of "objective evidence" that actual vindictiveness was the "sole" motivation for the prosecutor's conduct.[448] In addition, *Goodwin* provides no guidance regarding important procedural issues involved in an actual vindictiveness hearing, such as the showing the defendant must make to receive an evidentiary hearing and the parameters of discovery and the hearing itself. Three recent lower court cases illustrate the continuing analytical inconsistencies that continue to plague the vindictiveness doctrine following *Goodwin*.[449]

A. THE LOWER FEDERAL COURTS STRUGGLE WITH *GOODWIN*

1. United States v. Gervasi

In *United States v. Gervasi*, a defendant in an auto theft case, Soteras, was originally charged with car theft in state court.[450] Attorney Gervasi, representing Soteras, allegedly approached the arresting officer to discuss a bribe.[451] The officer contacted the state

445 *Goodwin*, 457 U.S. at 372.

446 Jacobellis v. Ohio, 378 U.S. 184, 197 (1963) (Stewart, J., concurring).

447 *Goodwin*, 457 U.S. at 380 n.12, 384.

448 *Id.* at 380 n. 12.

449 *Krezdorn*, 693 F.2d 1221 (1982), *rev.'d on rehearing en banc*, 718 F.2d 1360 (5th Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984); *Banks*, 682 F.2d 841 (9th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983); *Gervasi*, 562 F. Supp. 632 (N.D. Ill. 1983).

450 *Gervasi*, 562 F. Supp. at 634.

451 *Id.*

prosecutor's office, which then wiretapped telephone conversations and electronically eavesdropped on meetings between the officer and the attorneys for Soteras. The state did not secure a court order because it believed the particular method used did not violate Illinois law. Also, because Gervasi was then a candidate for judge, the state feared a "leak" if it sought judicial authorization.[452]

This decision proved to be a miscalculation by the state because after the attorneys for Soteras had been indicted in state court with eleven counts of bribery and conspiracy, the trial judge suppressed evidence of the overheard conversations based upon a violation of Illinois law.[453] The Illinois Supreme Court affirmed the ruling.[454] The effect of the ruling was to make inadmissible the bulk of the state's evidence and, thus, prevent it from proving its case against Gervasi and the other defendants. The state prosecutors then contacted federal prosecutors, who reviewed the state's file and indicted Soteras and his attorneys for conspiracy, mail fraud, and racketeering.[455]

The defendants in *Gervasi* moved to dismiss on the basis of prosecutorial vindictiveness, without specifying whether they were alleging actual vindictiveness, the appearance of vindictiveness or both.[456] The motion alleged two principle reasons for seeking dismissal of the federal indictment: (1) the federal indictment was in retaliation for defendants' success in suppressing the incriminating conversations under state law, particularly since all parties agreed the conversations were admissible in federal court; and (2) the federal indictment was retaliatory because it stripped the defendants of their more liberal rights under state law, including the defendants' absolute right to a bench trial in state court.[457] The state prosecutor had maintained that the case was before a "defendant's judge" in state court.[458] In federal court, defendants enjoy only the right to a jury trial; a bench trial can occur if only there is the consent of the judge, the prosecutor, and the defendant.[459]

The government's response to the defendant's motion also

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452 *Id.* at 635.

453 *Id.*

454 People v. Gervasi, 89 Ill. 2d 522, 434 N.E.2d 1112 (1982).

455 *Gervasi*, 562 F. Supp. at 643. *See* 18 U.S.C. §§ 371, 1434 and 1952. The federal charges carried less potential incarceration than the state charges on which defendants initially were indicted. The federal prosecution arguably still "upped the ante," however, if the prosecution could not prove its case in state court.

456 Defendants' Motion to Dismiss for Prosecutorial Vindictiveness, *Gervasi*, 562 F. Supp. 632 (N.D. Ill. 1983).

457 *Id.* at 636.

458 *Id.*

459 FED. R. CRIM. P. 23(a). *See also* Singer v. United States, 380 U.S. 24 (1965).

made no distinction between actual vindictiveness or an apprehension of vindictiveness. It relied primarily on the position that there can be no vindictiveness where the prosecutions are brought by separate prosecutorial offices, each representing a different sovereign.[460] The government cited *Goodwin* for the proposition that defendants were not entitled to an evidentiary hearing because "there is no evidence indicating that the state prosecutors did anything more than realize that the case had been brought in the wrong forum as the evidence that was inadmissable in state court is admissable in a federal proceeding."[461]

Faced with these competing claims, the district judge held, in an order granting defendants' motion for an evidentiary hearing, that "there can be no presumption in this case of vindictive prosecution" because "it is generally the right of each sovereign to make prosecutorial decisions in relation to the same defendant without regard to the decision of the other governmental body."[462] Therefore, according to the court, the facts did not establish the "realistic likelihood" of vindictiveness necessary to trigger the application of the *Pearce/Blackledge* prophylactic rule.[463]

Having determined that defendants were not entitled to invoke the prophylactic rule, and thus would have to prove actual vindictiveness in order to prevail on their motion for a hearing on that issue, the trial court concluded, without citation, that a hearing is necessary because "the Court regards the claim pressed here as one that is not frivolous."[464]

The judge then defined the scope of the hearing in light of his interpretation of *Goodwin*, placing the burden of proof on defendants which must be satisfied by "objective evidence." The defendants would not be permitted to probe the "subjective" motives of the federal or state prosecutors because that subject is "irrelevant"

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460 Government's Reply to Defendants' Motion to Dismiss for Prosecutorial Vindictiveness, *Gervasi*, 562 F. Supp. 632 .

461 *Id.*

462 Unpublished Order and Memorandum Opinion, United States v. Gervasi, 82 CR 635, p.2 (Hart, J., January 26, 1983) (citing Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959) [hereinafter cited as Unpublished Order].

463 Unpublished Order, *supra* note 462, at 2. Judge Hart did not interpret *Goodwin* as imposing a blanket prohibition on the "presumption" in the pre-trial context, but rather only where the facts do not indicate a "realistic likelihood of vindictiveness," a proposition that seems true to *Pearce* and *Blackledge*. *See also Andrews*, 633 F.2d at 454, 464.

464 Unpublished Order, *supra* note 462, at 3. This test for determining the necessity of an evidentiary hearing was apparently transplanted from cases dealing with claims of selective prosecution. *See, e.g.*, United States v. Oaks, 508 F.2d 1403, 1404 (9th Cir. 1974), *appeal after remand*, 527 F.2d 937 (1975), *cert. denied*, 426 U.S. 952 (1976).

to the determination of the motion.[465]

By defining the scope of an actual vindictiveness hearing in this manner, the district court in *Gervasi* both echoes and amplifies the confusion in *Goodwin* regarding the nature of actual vindictiveness claims. When *Pearce* and *Blackledge* emphasized the necessity for objective evidence, it was in the context of: (a) establishing the factors that give rise to the realistic apprehension of vindictiveness necessary to trigger the operation of the prophylactic rule[466] and (b) the nature of the showing required to dispel the appearance of vindictiveness in the post-trial setting.

The oft-repeated premise that "motives are complex and difficult to prove," however, leads to the opposite conclusion when discussing the admissibility of evidence to prove actual vindictiveness. It is difficult to conceive of an issue more subjective than "actual vindictiveness."[467] In fact, actual vindictiveness, being totally subjective in nature, can rarely, if ever, be proven solely by "objective evidence."[468]

The reasons underlying this fundamental error in *Goodwin*, and *Gervasi*'s interpretation of *Goodwin*, appear more clearly in a later published opinion. That opinion states that the limitation to objective evidence "after Goodwin comports with the *basis for the prophylactic rule* set out in *Blackledge* and re-echoed in *Goodwin* itself: 'Motives are complex and difficult to prove'."[469] Here, the *Gervasi* court expressly equates the type of evidence applicable to trigger the prophylactic rule with that required to prove actual vindictiveness, two entirely different propositions.[470]

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465 "The [*Goodwin*] court also held that if a presumption should not lie, then the defendant would have to come forward with objective evidence in order to prevail on the motion .... That is, the defendant must tender evidence which is objective in nature to sustain their motion. The subjective motives of the prosecutors—whether those representing the State of Illinois or those acting on behalf of the United States— are irrelevant to the determination of the motion. At the hearing to be held in this matter, the parties will not be permitted to probe the subjective motives of those instigating the instant prosecution." Unpublished Order, *supra* note 462, at 3.

466 *Pearce*, 395 U.S. at 726; *Blackledge*, 417 U.S. at 27, 29 n.7.

467 Some courts have gone so far as to hold, albeit erroneously, that a defendant must show that the prosecutorial conduct "would not have occurred but for hostility or punitive animus towards the defendant . . . ." *Gallegos-Curiel*, 681 F.2d at 1169.

468 *But see* State v. Halling, 66 Or. App. 180, 672 P.2d 1386 (1983).

469 *Gervasi*, 562 F. Supp. at 638 n.3 (emphasis supplied).

470 "Whether the presumption is with the defendant or the government, at a hearing on a motion to dismiss for vindictive prosecution, the court cannot allow a prosecutor to come to the witness stand and testify as to subjective motivation, whether that testimony is voluntary or drawn out through cross-examination. The Fourth Circuit recognized this in *Goodwin* and established a presumption to make certain that these questions are decided on the basis of objective evidence. The Supreme Court reversed in *Goodwin* based on where the Fourth Circuit thought the presumption line should be drawn. The

Equating the type of evidence admissible to prove actual vindictiveness with that necessary to trigger application of the prophylactic rule illustrates one aspect of the previous discussion. In *Goodwin*, the Supreme Court confused the concept of actual vindictiveness with a "realistic apprehension" of vindictiveness and erred in referring to the *Pearce/Blackledge* "prophylactic rule" as a "presumption."[471] The prophylactic rule of *Pearce* and *Blackledge* was crafted as a device to prevent the "chilling effect" resulting from a "realistic apprehension of vindictiveness": it was never applied nor was it intended to apply to actual vindictiveness. When "apprehension" is the issue, the defendant must allege objective facts to establish that the apprehension is "realistic." The subjective motivation of the individual prosecutor is irrelevant to the issue of the existence of a "realistic apprehension of vindictiveness."[472]

The situation is just the opposite, however, when the issue is actual vindictiveness, as in *Gervasi*. The doctrine simply cannot operate in the fashion described in *Gervasi*. The defendant cannot be required to prove very subjective facts involving the prosecutor's state of mind, while at the same time be restricted to "objective" evidence. If the due process protection against actual vindictiveness is not a *chimera*, the defendant must be permitted full discovery and presentation of evidence regarding the subjective motivations of the prosecution, for that is the heart of actual vindictiveness. Requiring the defendant to prove this subjective fact only through objective evidence strips the due process prohibition against actual vindictiveness of any real meaning by rendering it incapable of proof.

Goodwin's use of the term "presumption" contributes to the problem.[473] This confusion illustrated by the statement in *Gervasi* that only objective evidence is proper "[w]hether the presumption is with the defendant or the government."[474] This statement lumps together, and thus treats identically, two radically different concepts of the term "presumption": 1) whether it is appropriate to apply the prophylactic rule, which *Goodwin* mischaracterized as a "presumption", or 2) whether governmental actions, such as the fil-

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reversal did not undercut the Fourth Circuit's conclusion as to the necessity for presumptions and limitations to objective evidence in such matters." *Id.*

471 *See supra* discussion at notes 211-329.

472 *See infra* note 503.

473 "This case involves presumptions. The question presented is whether a presumption that has been used to evaluate a judicial or prosecutorial response to a criminal defendant's exercise of a right to be retried after he has been convicted should also be applied to evaluate a prosecutor's pre-trial response to a defendant's demand for a jury trial." *Goodwin*, 457 U.S. at 369-370.

474 *Gervasi*, 562 F. Supp. at 638 n.3. *See also* Unpublished Order, *supra* note 462, at 3.

ing of federal charges in *Gervasi*, will be presumed to have been done in good faith. To equate these "presumptions" is incorrect because they stand for two completely different propositions which may be related in *Gervasi* but which require completely different inquiries.[475]

At the hearing in *Gervasi*, the defendant's evidence consisted primarily of state court records, demonstrating that in numerous recent instances the state's attorney had dropped state prosecutions before the same state trial judge in favor of federal prosecutions.[476] The defendants were also allowed to introduce the deposition of an attorney who said that he had a conversation in a bar near the criminal courts building with one of the assistant state's attorneys involved in the case. The latter allegedly said, "[T]he reason the *Gervasi* case was sent over to federal court was that the state 'couldn't get a fair shake . . . from [the state trial judge]', and that we can try our case over there better than we can in front of [the state trial judge]."[477]

The government maintained that the deposition testimony was irrelevant.[478] The government's position is technically correct in light of the court's previous ruling regarding the scope of the hearing: "objective" elements, such as when the conversation took place, are relevant only if the *substance* of the conversation is relevant.[479] Here the substance involved subjective motives of state

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475 The burden of proving actual vindictiveness has never been articulated by the United States Supreme Court, nor does *Gervasi* suggest what the burden is. It would appear to be a "preponderance of the evidence" standard. Nix v. Williams, 105 S. Ct. 2681 (1985) (citing United States v. Matlock, 415 U.S. 164, 178 n.14 (1974)). It is erroneous to state that the party who does not bear the burden of persuasion thereby enjoys a presumption in its favor. *See infra* note 552. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Smith, 65 F.R.D. 464 (N.D. Ga. 1974).

476 *Gervasi*, 562 F. Supp. at 636. This seems strange evidence for defense counsel to offer since he must prove actual vindictiveness against his client, while establishing identical governmental conduct in "numerous other cases" can be viewed as demonstrating just the opposite. If the defendants' theory were to prove that theirs was but part of a series of vindictive prosecutions, the short answer is that this is both more difficult and unnecessary for defendants to prove under any recognized test for demonstrating actual vindictiveness. Perhaps defendants were simply attempting to comply with the "objective evidence" limitation.

477 *Id.* at 635-36. For reasons unstated, neither party to the alleged conversation was ever tendered as a witness. Indeed, it does not appear the government presented any evidence at all.

478 *Id.* at 636 n.2. The district court overruled the government's objection with the cryptic comment that "for purposes of deciding the important issues presented here the Court has admitted the exhibit." *Id.*

479 The district court later expanded on its view of the alleged conversation between the attorney and one of the assistant state's attorneys prosecuting the case in state court:

> The federal prosecutors certainly could have called [the assistant state's attorney] as a witness in the hearing held before this Court. This testimony would not

prosecutors, which would be inadmissible in a hearing limited to "objective" evidence. Unless "objective" is defined to include what the judge later referred to as a "barroom conversation,"[480] the purely subjective motivations of the state in offering to transfer, and *the federal prosecutors in agreeing to accept* prosecution of the case, would be irrelevant at a hearing limited to objective evidence. It is precisely this sort of evidence of the subjective motivations of the prosecutor, however, that will often be the only evidence a defendant can introduce to prove a claim of actual vindictiveness.

At the hearing, defendants argued both actual and a realistic appearance of vindictiveness on the following grounds:

> 1. The federal prosecution was designed and motivated to penalize these defendants for their state court success in exercising their statutory and constitutional rights.
> 2. The *institution* of a federal prosecution under such circumstances will deter other defendants from exercising their rights.
> 3. The prosecution is an attempt to avoid and make meaningless these defendants' rights to the greater procedural and substantive protections afforded by Illinois law, including the right to a trial by the court without a jury, and the protection of the more stringent state standards as to the admissibility of overheard conversations.[481]

The district court ultimately denied the defendants' motion to dismiss the indictment because the evidence they presented was "legally irrelevant" to proof of actual vindictiveness on the part of the federal prosecutors. "[D]efendants have admitted that they do not seek to prove actual vindictiveness on the part of the federal prosecutors, but instead ask this Court to find such vindictiveness by the state's attorney."[482] Since the fifth amendment due process clause limits only the federal government in federal prosecutions, proof of vindictiveness on the part of the state's attorneys was meaningless.

In the final analysis, the district court decided the motion in light of its previous rulings regarding the scope of the hearing, based upon the absence of "objective proof" of improper motivations of the prosecution. In effect, the court decided the motion based upon the dual sovereignty theory originally urged by the government.[483] The defendants apparently waived their right to the

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have been out-of-bounds based on the Court's January 26 Order. *It would not have required probing the subjective motives of [the assistant state's attorney], but would have addressed objective evidence: whether the conversation took place and the content of the conversation.* The government has taken the position, however, that [the] testimony is irrelevant.

Id. at 641 n.7 (emphasis supplied).

480 *Id.* at 641.

481 *Id.* at 636.

482 *Id.* at 641.

483 The court stated:

extensive discovery necessary to prove actual vindictiveness, including depositions and production of internal memos and other documents by the United States Attorney's Office, by failing to make such a request. The judge was correct in holding an evidentiary hearing, but, following *Goodwin*'s false path, incorrect in limiting it to "objective" evidence. By limiting the nature of the inquiry, he in effect made it impossible for defendants to sustain their burden. Given the state of the record, the validity of the holding is problematical. *Gervasi*, however, is an excellent illustration of the result of the absence of guidance provided by *Goodwin* in raising and deciding claims of vindictiveness in the pre-trial context.

2. *Commentary*

Gervasi is an excellent example of the pitfalls facing defendants and lower courts after *Goodwin* if the lower court has not read *Goodwin* with a critical appraisal of the roots of the vindictiveness doctrine established in *Blackledge* and *Pearce*.

It is now apparent that: (a) if defense counsel in good faith believes that prosecutorial actions toward the defendant have been motivated by vindictiveness, and/or (b) objective facts present a realistic apprehension of vindictiveness, particularly in the pre-trial context, the motion to dismiss[484] should allege separate actual vin-

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In any case, all the evidence presented by the defendants, both direct and circumstantial, is legally irrelevant to the vindictive prosecution claim. They have not proven that the *federal* prosecutors acted with *actual vindictiveness* in seeking the federal indictment. And the defendants have admitted that they do not seek to prove actual vindictiveness on the part of the federal prosecutors, but instead ask this Court to find such vindictiveness by the state's attorney. Vindictive prosecution is a defense brought under the due process clause of the Fifth Amendment. The guarantee . . . is a limitation placed upon the federal government. Except in certain limited circumstances, a federal district court is without power to review the prosecutorial activities of state authorities. Furthermore, the remedy for a proven case of vindictive prosecution is a dismissal of the indictment. The judiciary has the power to dismiss an indictment on grounds of prosecutorial misconduct or abuse, but this power is narrowly circumscribed. (Citations omitted).

In the case at bar the defendants ask this Court to dismiss an indictment, voted by a federal grand jury at the behest of the prosecutorial arm of the executive branch, not for the acts of the federal prosecutors but for the acts and motives attributable to the state prosecutors. This would be punishing the federal prosecutor who has acted fairly and above-board.

Id. at 641-42 (emphasis in original).

484 When *Gervasi* mischaracterizes the vindictiveness doctrine as a "defense" to charges, it is not alone in this error. *See also* United States v. Krezdorn, 718 F.2d 1360, 1365 (5th Cir. 1983) [hereinafter cited as *Krezdorn III*]; *Two Models, supra* note 4 (1983). The issue of vindictiveness normally will arise, as indeed it did in *Gervasi*, in the procedural context of a motion to dismiss under FED. R. CRIM. P. 12(b). A motion to dismiss based upon prosecutorial vindictiveness meets all the requirements of Rule 12; the issue is capable of determination without trial of the general issue. Moreover, it is erroneous to term it a "defense" because the merits of the vindictiveness claim are determined without regard to the guilt or innocence of the accused.

dictiveness and realistic apprehension of vindictiveness claims. The two separate allegations should be clearly distinguished in order to emphasize and clarify to the court the distinction between the two.

Many courts and commentators have incorrectly assumed *Goodwin* drew a "bright line" by adopting a *per se* stance that the prophylactic rule never applies in the pre-trial stage since there is not a "realistic apprehension" in that factual context.[485] This assumption is incorrect because the language in *Goodwin* implies the opposite conclusion: a change in the charging decision before trial is much less likely to be improperly motivated than is such a change made during or after a trial.[486] This is different than saying the prophylactic rule *never* applies prior to trial. Some courts and commentators have joined *Gervasi* in noting that there remains after *Goodwin* the opportunity for the defendant to establish a realistic likelihood of vindictiveness even prior to trial.[487] Just as there exists the possibility of proving actual vindictiveness at any stage of the case, so might the facts at any stage demonstrate the realistic likelihood necessary to trigger the prophylactic rule.

Although *Gervasi* is correct in concluding that the presumption *can* apply at the pre-trial stage, it is less clear that the court was correct in deciding that it did not apply in that case simply because two different prosecutorial offices were involved. The court never explains why this single fact was sufficient to conclude that the likelihood of vindictiveness was not realistic. Practically speaking, the prophylactic rule simply puts the burden on the party that is in the best position to rebut the appearance of vindictiveness which otherwise exists. In this situation, that party is the prosecutor's office, which generally does (and certainly should) maintain extensive records of all events and considerations involved in making the charging decision.

In cases involving the United States Attorney's office, the required prosecutorial memorandum is generally a thorough synopsis of all relevant factors involved in the charging decisions, including documentation of "objective" events, if any exist.[488] The prosecutor is privy to, and therefore in the best position to demonstrate, the basis of a particular charging decision. The prosecutor should be required to explain the basis of a charging decision if the question of a realistic apprehension of vindictiveness is at all a close one. *Gervasi* falls within the latter category because, as the court noted, the

485 *Goodwin*, 457 U.S. at 380.
486 *Id.* at 381.
487 *See, e.g.*, Schwartz, *supra* note 65, at 197.
488 DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL TITLE 9 (1985).

claim in that case was clearly not "frivolous."[489] Indeed, if the lack of a "frivolous" claim is all that is necessary to require an evidentiary hearing involving the "unseemly" task of determining the question of actual vindictiveness, this standard simply reinforces the conclusion that the burden should generally be placed on the prosecutor, rather than forcing the defendant to drag the facts out of the prosecutor through extensive discovery. As noted above, this is exactly what *Pearce* and *Blackledge* sought to avoid by adopting the rule in the first instance.[490]

Gervasi illustrates a major practical problem created by *Goodwin*. The natural adversarial position of the prosecutor vis-a-vis the defendant and counsel in the fiercely competitive criminal justice system[491] would be only exacerbated by arguments over document production, depositions and the evidentiary hearing itself.[492] If actual vindictiveness is not present prior to this process, it may well be present afterward as an unnecessary, and costly, residue. Certainly, if a prosecutor is tempted to engage in "self-vindication" when he has been told by an appellate court to "do over again what he thought he had already correctly done," a great temptation will also be present when he is accused of wrongdoing by the defendant and counsel.

An evidentiary hearing into actual vindictiveness seems guaranteed to produce animosity; such a hearing simply cannot be limited to "objective" evidence. The hearing in *Gervasi* was not limited to objective evidence, but instead was a curious hybrid of objective and subjective evidence.[493] It is difficult to see how a "hearing" of the type conducted in *Gervasi*, where no witnesses actually testified, helped the court in any way decide the issues involved, particularly since the court ended up denying the motion on the basis of dual sovereignty.[494] The type of hearing conducted in *Gervasi* contributes nothing to determine the existence of actual vindictiveness.

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489 *See infra* note 501.

490 *Id.*

491 The Supreme Court has repeatedly emphasized the extreme difficulty, complexity, and unseemly task of proving the existence of actual vindictiveness in any particular case. *Pearce*, 395 U.S. at 725 n.20; *Goodwin*, 457 U.S. at 372-373.

492 *See, e.g., Blackledge*, 417 U.S. at 32-33 (Rehnquist, J., dissenting) ("I think the Court too readily equates the role of the prosecutor, who is a natural adversary of the defendant . . . with that of the sentencing judge in *Pearce*."). *See also Bordenkircher*, 434 U.S. at 364-65; *Andrews*, 633 F.2d at 455.

493 *See infra* notes 502-510 and 513-518 and accompanying text.

494 *Gervasi*, 562 F. Supp. at 642. It should be noted that the dual sovereignty theory is the same reason put forward by the court in support of its refusal to apply the prophylactic rule and by the government in arguing that defendants were not even entitled to an evidentiary hearing.

By refusing to apply the prophylactic rule to a demand for a jury trial and generally discouraging its application in the pre-trial context, *Goodwin* opens wide the Pandora's box that *Pearce* and *Blackledge* sought to keep closed. By shifting the focus to actual vindictiveness, and thus requiring proof of subjective motivation, one result of *Goodwin* is to force the courts into the "unseemly" task of probing the subjective motives of members of the executive branch of government. Such confrontations between two separate branches of the government are generally considered "undesirable," particularly given the difficult nature of determining subjective motivation.[495] Thus, if one of *Goodwin*'s objectives, in refusing to apply the prophylactic rule in the pre-trial context, was to discourage judicial inquiry into the charging decisions made by the executive prior to trial, it may have achieved exactly the *opposite* result by shifting the focus to actual vindictiveness.

B. *GOODWIN*'S IMPACT UPON THE OPERATION OF THE PROPHYLACTIC RULE

1. United States v. Krezdorn

Ultimately, the most restrictive impact of *Goodwin* on the vindictiveness doctrine will be felt in diminishing the effectiveness of the previously healthy prophylactic rule, which addresses the "chilling effect" resulting from a realistic appearance of vindictiveness. This threat stems from the implication in *Goodwin* that the prohibition against the appearance of vindictiveness will prevent an increase in charges if a prosecutor's conduct can be explained *only* as having arisen from a vindictive motive.[496]

The concept that in order to violate due process vindictiveness must be the prosecutor's sole motivation, is antithetical to the command of *Pearce, Blackledge* and *Goodwin* that actual vindictiveness must play "no part" in the prosecution.[497] If actual vindictiveness must play "no part" in any prosecution, it follows that vindictiveness as *part* of the prosecutor's motivation, rather than the *sole* reason for the prosecutor's conduct, is violative of due process. To require a defendant to establish that vindictiveness is, or appears to be, the sole motivation, imposes another almost impossible burden. Given

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495 In fact, in this situation the court may be forced to brand the prosecutor a "liar," or at least find that the prosecutor acted in bad faith. *Andrews*, 633 F.2d at 455.

496 *Goodwin*, 457 U.S. at 384. The corollary to this proposition, at least in some circuits, is that it must appear that the prosecutorial conduct could not have been motivated by any purpose other than vindictive desire to deter or punish. *See, e.g., Krezdorn III*, 718 F.2d at 1365.

497 *Goodwin*, 457 U.S. at 373; *Blackledge*, 417 U.S. at 25; *Pearce*, 395 U.S. at 725.

the existence of a grand jury indictment or conviction which has been reversed, or a variety of other possible justifications, the prosecutor can almost always make a plausible claim that the defendant is merely being punished for violating the law, not for exercising a legal right. Moreover, given the fiercely adversarial nature of the criminal justice process, the prosecutor may be able to argue that the conduct is simply part of the "give-and-take" of the system, pointing to *Bordenkircher* as support for this proposition.[498]

The dilemma presented by the presence of dual motives for prosecutorial action is illustrated by *United States v. Krezdorn*.[499] The defendant was initially indicted on five, and convicted of four, counts of forging immigration documents. The district court permitted the prosecution to introduce evidence of thirty-two additional forgeries not charged in the original indictment, reasoning that the uncharged evidence was relevant because it showed the existence of a common plan or scheme. On appeal the Fifth Circuit reversed, holding the additional forgeries inadmissible under Federal Rule of Evidence 404(b),[500] because the existence of a "plan" was not an element of the offense with which defendant was charged. Therefore, the additional forgeries did not fall within the "plan or scheme" exception to the rule that evidence of a defendant's "other crimes" is inadmissible.[501] However, the Court of Appeals did observe in dicta that "[t]he existence of a plan would be directly at issue in, for instance, a conspiracy charge."[502]

On remand, the defendant was reindicted on the four forgery counts on which he was originally convicted, but the superseding indictment also charged a conspiracy.[503] The conspiracy charge added five years imprisonment and a ten thousand dollar fine to the potential punishment faced by the defendant, over and above the penalties for the four counts of forgery. The thirty-two inadmissible forgeries "were alleged to be overt acts in furtherance of the conspiracy charged in the superseding indictment."[504] The defendant

498 *Bordenkircher*, 343 U.S. at 362.

499 United States v. Krezdorn, 639 F.2d 1327 (5th Cir. 1981) [hereinafter cited as *Krezdorn I*].

500 *Id.* at 1381. In order for the uncharged forgeries to be admissible, they must satisfy the two-pronged test which is set forth in Rule 404(b) of the Federal Rules of Evidence. FED. R. EVID. 404(b). The district court found that the evidence "was relevant to the existence of a plan or scheme and its probative value outweighed its possible prejudice." *Krezdorn I*, 639 F.2d at 1381.

501 *Id.* at 1331-32.

502 *Id.* at 1331 n.7.

503 United States v. Krezdorn, 693 F.2d 1221, 1224 (5th Cir. 1982) [hereinafter cited as *Krezdorn II*].

504 *Id.* at 1223-24. The conspiracy count was brought pursuant to 18 U.S.C. § 371.

moved to dismiss the conspiracy count, arguing that the objective facts set forth above created a "reasonable appearance" of vindictiveness. The prosecutor simply denied any vindictive motive for the superseding indictment.[505]

An evidentiary hearing was held. Although in this setting, unlike *Gervasi*, the hearing could have been more properly limited to objective evidence for the increased charge to rebut the realistic apprehension of vindictiveness, in fact it was not. The Assistant United States Attorney responsible for the case testified that he was aware of all the facts giving rise to the conspiracy charge at the time the government brought the indictment and that no new evidence had come to light since the first trial.[506] He testified that the conspiracy charge was not contained in the original indictment because it would have "involved some administrative inconvenience."[507] The prosecutor also testified, without explanation, that "he was of the impression that even if Krezdorn was convicted of the conspiracy charge, he would not receive any punishment in addition to that meted out after his first conviction."[508] Although the district court noted that "[the] prosecutor did not gain this impression by any communication from this court," it apparently accepted this testimony at face value because it found that the government was not concerned with increasing the amount of punishment to which the defendant would be exposed.[509]

The district court, however, properly concluded that the facts presented a "reasonable apprehension" of vindictiveness. The court also found the government had failed to explain the increased severity of the superseding indictment in terms sufficient to dispel the reasonable apprehension of retaliatory motive created by the addition of charges following appeal.[510] The district court concluded that the conspiracy charge was added for the "primary, if not sole purpose of" transforming the thirty-two additional forgeries from inadmissible extraneous evidence "into evidence admissible as overt acts in a conspiracy."[511] Accordingly, the conspiracy count was dismissed, giving rise to *Krezdorn II*.[512]

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505 *Id.* at 1224.

506 *Id.*

507 *Id.* The prosecutor's apparent reference was to the fact that defendant's alleged co-conspirator was a Mexican citizen; consequently, the government "knew" he could never be extradited and "would simply clutter up the court records as a fugitive." *Id.* at 1224 n.5.

508 *Id.* at 1224 n.6.

509 *Id.*; *Krezdorn III*, 718 F.2d at 1363.

510 *Krezdorn III*, 718 F.2d at 1363.

511 *Id.*

512 *See infra* note 541. Additionally, the dismissal of the conspiracy count in *Krezdorn*

Since there was an increase in charges and potential penalties after a trial and reversal, *Krezdorn II* begins by stating that, even after *Goodwin*, "this case falls squarely within the category of cases as to which the Supreme Court has stated that a presumption of prosecutorial vindictiveness is justified by the high probability that the charging decision was improperly motivated."[513] The court then addresses the nature of the burden the prosecutor bears in order to dispel an otherwise reasonable apprehension of vindictiveness. It properly finds, albeit somewhat by accident, that, in light of the purposes of the prophylactic rule fashioned in *Pearce* and *Blackledge*, the appearance of vindictiveness can only be overcome by showing that "intervening circumstances, of which the prosecutor could not reasonably have been aware, created a fact situation which did not exist at the time of the original indictment."[514] Focusing on

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should be contrasted to the statement in *Gervasi* that "the remedy for a proven case of vindictive prosecution is a dismissal of the indictment." *Gervasi*, 562 F. Supp. at 642. This statement is accurate as it pertains to the facts in *Gervasi* because the defendant claimed that securing the indictment itself was vindictive. It also accurately describes the facts and relief in *Blackledge v. Perry*. In situations involving the addition of charges, such as *Krezdorn*, however, the accepted remedy is dismissal of the count. *See, e.g., Andrews*, 633 F.2d at 451. *But cf.* United States v. Banks, 682 F.2d 841, 843 (9th Cir. 1982). In *Banks*, the district court dismissed the entire indictment as to one defendant, based upon her motion that one new count had been added to a superseding indictment as a result of prosecutorial vindictiveness following a successful appeal. Since the Ninth Circuit determined that the additional count was not prohibited by the vindictiveness doctrine, however, it never reached the issue of the propriety of the district court's dismissal of the entire indictment in this situation.

513 *Krezdorn II*, 693 F.2d at 1227.

514 *Id.* at 1230. *Blackledge* "requires a rule analogous to that of the *Pearce* case" in the area of prosecutorial vindictiveness. 417 U.S. at 27. The subject of the nature of the prosecutor's burden to rebut a "presumption" of vindictiveness needs further examination. The Fifth Circuit engages in a rather complicated "balancing test" in which the nature of the burden of rebuttal depends "on whether the prosecutor added a new charge for relatively distinct criminal conduct occurring within the same 'spree' of activity; or whether the prosecutor simply substituted a more serious charge for the same criminal activity, as in *Blackledge*." *Krezdorn II*, 693 F.2d at 1228. If the new charge is for "relatively distinct conduct occurring within the same 'spree' of activity," because this is "a relatively serious infringement" upon traditionally broad prosecutorial discretion, literally "any reasonable explanation for the added charges [is sufficient], so long as the explanation tends to negate an inference of retaliatory motivation." *Id.* at 1228-29. If, however, the prosecutor simply substitutes a more serious charge for the "same criminal activity," then "rebuttal explanations focusing on the prosecutor's lack of subjective retaliatory motivation are irrelevant." *Id.* at 1229. Thus, the appearance of vindictiveness "can be overcome only by a showing that intervening circumstances, of which the prosecutor could not reasonably have been aware, created a fact situation which did not exist at the time of the original indictment." *Id.* Since the court in *Krezdorn II* decided that the case fit in the second category of adding more serious charges for the same activity, it applied the more stringent test recited above. *Id.* at 1230, 1231. This more stringent test seems to hew more closely to the line set by *Pearce*'s requirements of "objective information concerning identifiable conduct" of defendant and that "the factual data upon which the increased sentence is based must be made part of the record." *Pearce*,

a defendant's "realistic apprehension" of vindictiveness, the court notes that "the very right vindicated on appeal is the basis of the prosecutor's decision to add a new count to the superceding indictment,"[515] rendering the defendant's successful appeal a "pyrrhic victory."

Given these findings, *Krezdorn II* affirmed the decision of the district court because:

1. The objective facts created a realistic apprehension of vindictiveness, triggering the application of the *Pearce/Blackledge* prophylactic rule;
2. The prosecutor's decision to increase the charges for the purpose of admitting extrinsic evidence previously ruled inadmissible had "an especially chilling effect" on the right of appeal; and
3. The prosecutor failed to dispel the realistic appearance because he was unable to explain the increased charges by reference to newly discovered facts or evidence.[516]

The prosecutorial response to *Krezdorn I*, given the validity of *Pearce*'s warning that motives are complex and difficult to prove, does in fact create a realistic apprehension of two motives, one proper and one improper. On the one hand, it appears to be an attempt to render the evidence of the additional forgeries admissible in response to the Fifth Circuit's dicta in *Krezdorn I*: due process does not prohibit this so long as the defendant is not exposed to a more severe penalty in the process.[517] However, it also realistically appears to the defendant to be an attempt to punish him for successfully exercising the right to appeal by adding an additional charge exposing him to a more severe penalty. The government's action did indeed render the defendant's success a pyrrhic victory by basing the additional charge upon the same evidence that resulted in the original reversal. If vindictiveness or a reasonable apprehension of it must play "no part" in the case, *Krezdorn II* was correctly decided. If vindictiveness must appear to be the "sole" motivation, then the decision was erroneous. It was essentially this dispute over whether vindictiveness must be the "sole motivation" for the prosecutor's action that led the Fifth Circuit to grant rehearing *en banc*,

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395 U.S. at 726. It also comports with the citation in *Blackledge* of Diaz v. United States, 223 U.S. 442 (1912), where the defendant was originally tried and convicted for assault and battery. Subsequent to the original trial, the assault victim died, and defendant was then tried and convicted for homicide. Basically, the Fifth Circuit adopted the correct test for rebuttal in *Krezdorn II*, or at least faced in the right direction, but not necessarily for the right reasons.

515 *Krezdorn II*, 693 F.2d at 1231.

516 *Id.*

517 *Cf.* United States v. Motley, 655 F.2d 186, 189 (9th Cir. 1981), *cited in Krezdorn II*, 693 F.2d at 1231 n.30.

which produced *United States v. Krezdorn*.[518]

Krezdorn III reversed the previous panel's decision, holding this to be the type of case in which *any* explanation offered to rebut the "presumption" will suffice if it demonstrates either a lack of actual vindictiveness or "that events occurring since the time of the original charge decision altered that initial exercise of the prosecutor's discretion."[519] The court confirmed its previous "illustrative list" of such "events altering" the initial exercise of the prosecutor's discretion by citing *Hardwick v. Doolittle*.[520] In *Hardwick*, the court stated that "proof of mistake or oversight" in the initial decision, a "different approach" by a successor prosecutor, or "public demand for prosecution on additional crimes" would be sufficient to rebut the appearance of vindictiveness.[521]

Krezdorn III cited the district court's finding that the superseding indictment was obtained for the primary, if not the sole, reason of conforming to the dicta in *Krezdorn I*, but then concluded that "a reasonable minded defendant would appreciate that the prosecutor's actions were taken to pursue a course indicated by the appellate opinion rather than to impose a penalty on Krezdorn for having exercised his right of appeal."[522] The Fifth Circuit *en banc* reversed *Krezdorn II*, holding that the prosecution successfully rebutted any appearance of vindictiveness and finding that vindictiveness did not appear to be the sole motivation for the prosecutor's action in adding a conspiracy count to the superseding indictment.

2. *Commentary*

Krezdorn III is illustrative of the vindictiveness doctrine's potential demise in several respects. Although it correctly stated that in the district court hearing the defendant did not establish actual vindictiveness, that was not the issue. It is also incorrect to state as

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518 *Krezdorn III*, 718 F.2d 1360 (5th Cir. 1983).

519 *Id.* at 1365. In essence, *Krezdorn III* disagrees with *Krezdorn II* regarding whether the conspiracy count was simply a substitution of a more serious charge for the same criminal activity or was for relatively distinct conduct occurring within the same "spree" of criminal activity. *See infra* note 551. *Krezdorn III* accuses the panel in *Krezdorn II* of assuming erroneously that the original indictment charged the defendant with conspiracy. *Krezdorn III*, 718 F.2d at 1363. Although *Krezdorn II* does appear to make this error, it does not seem to be the basis of the panel's conclusion that the prosecutor was simply substituting a more serious charge for the same criminal activity. Rather, *Krezdorn II* was based upon the fact that the conspiracy count in the superseding indictment was "for the same basic criminal behavior of selling forged border-crossing applications." *Krezdorn II*, 693 F.2d at 1230. This conclusion remains valid, regardless of whether Krezdorn was charged with conspiracy in the original indictment.

520 *Hardwick*, 558 F.2d 292.

521 *Id.* at 301.

522 *Krezdorn III*, 718 F.2d at 1365.

does the Fifth Circuit that the district judge reached "a legal conclusion to the contrary."[523] Once again, the Fifth Circuit confuses actual vindictiveness with a reasonable appearance of vindictiveness. The district judge, however, understood the distinction between the two because the "legal conclusion" he reached was that although defendant had not proved actual vindictiveness, this was a case where a realistic likelihood of vindictiveness existed.[524] Therefore, the *Pearce/Blackledge* prophylactic rule applied, and the prosecution failed to rebut it through objective evidence. The district judge's conclusion which was affirmed in *Krezdorn II* conforms to the teaching of *Pearce* and *Blackledge*, and *Krezdorn III* does not.

Krezdorn III can be seen as a result of a misapplication of the teachings of *Goodwin* and the limitations *Goodwin* places on the prophylactic rule in the post-trial setting. *Krezdorn III* achieved this result by refusing to apply properly the prophylactic rule in a post-trial setting. It misinterpreted the nature and function of the prophylactic rule by allowing the prosecutor to assert virtually any explanation to rebut it. *Goodwin* did not address the operation of the rule in the post-trial setting. In fact, it justified the limitations it applied to the operation of the rule before trial, by *contrasting* that setting to the different set of facts existing post-trial.[525] Nor does *Goodwin* supply any authority for the idea that the rule may be rebutted by virtually any explanation, including a showing of an absence of actual vindictiveness that may consist of no more than a bare assertion of proper motive.[526] There is nothing in *Goodwin* that modifies or limits the teaching of the *Pearce/Blackledge* doctrine in the

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523 *Id.*

524 *Krezdorn* also serves to underscore the artificiality of *Goodwin*'s general pre/post trial distinction in terms of the applicability of the prophylactic rule. Assume the *Krezdorn* setting with the following alteration: after the original indictment but before trial, the defendant is notified that the government intends to introduce the same evidence of thirty-two additional uncharged forgeries for the same reason. Defendant makes a motion *in limine* prior to trial under Federal Rule of Evidence 404(b) to prohibit introduction of the extrinsic evidence, which the district court grants but with the same dicta regarding the relevance to a conspiracy charge as was contained in *Krezdorn I*. The government then secures a superseding indictment adding the conspiracy count. Since the timing of the addition of the conspiracy count in this hypothetical is pre-trial, the same action, which the Fifth Circuit in *Krezdorn II* found to give rise to a realistic likelihood of vindictiveness, suddenly would be "far less likely" to have the same appearance under *Goodwin* simply because it is taken pre-trial. Yet the actual motives for the action, as well as the appearance to the defendant, would be absolutely the same. Only the timing and the nature of the right (appeal v. motion *in limine*) would change; yet, these are the very factors which *Goodwin* makes determinative. *See Goodwin*, 457 U.S. 368. But neither in fact is determinative of the presence, or appearance, of vindictiveness.

525 *See supra* text accompanying notes 252-56.

526 In fact *Goodwin* notes with approval that the "Court emphasized in *Blackledge* that it did not matter that no evidence was present that the prosecutor had acted in bad faith or

post-trial settings: the prophylactic rule applies and an appearance of vindictiveness may be rebutted only by objective evidence justifying the prosecutorial conduct with reference to newly discovered facts or evidence.

Krezdorn III would reduce the prophylactic rule to the status of a mere evidentiary presumption.[527] This may be due in part to *Goodwin*'s use of the misnomer "presumption." As the dissent makes clear, the rule is much more than an evidentiary presumption.[528] It is not directly concerned with the presence or absence of actual vindictiveness; if it were, there would be no point in limiting rebuttal evidence to objective evidence because "subjective evidence is perfectly acceptable to establish subjective motive." Instead, the prophylactic rule is designed to eliminate the "chilling effect" on the exercise of rights which would otherwise arise from the realistic appearance of vindictiveness and to provide a record for judicial review. This oversight function is the reason evidence to rebut the application of the prophylactic rule is limited in the post-trial setting

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with malice." *Goodwin*, 457 U.S. at 376. Additionally, "the presumption again could be overcome by objective evidence justifying the prosecutor's action." *Id.*

527 The court stated:

> The district court also concluded that the government's purpose in seeking the superseding indictment was 'getting around' an evidentiary obstacle created by the appeal. As the panel expressed it, '[T]he prosecutor is attempting to turn a successful appeal into a pyrrhic victory.' 693 F.2d at 1231. This is wrong. In Krezdorn's original appeal we were presented with a claim of evidentiary error. In responding to that claim, we ruled that Krezdorn's four convictions must be reversed. Although we observed that the proof admitted in error might have been proper if Krezdorn were charged with conspiracy, we did not rule whether the prosecutor could exercise his discretion to add such a charge. Krezdorn's appellate victory vindicated his right not to be convicted of the substantive counts based on improper evidence. He now stands an innocent man. However, his assertedly felonious conduct is still subject to another trial—a process that certainly contemplates the proper exercise of prosecutorial discretion. It confuses the evidentiary principle vindicated by the appeal and the independence of the prosecutorial function—a matter not before the prior panel—to reason that the subsequent addition of the suggested conspiracy charge deprived him of his prior appellate success.

718 F.2d at 1365.

528 The dissent argued:

> The 'presumption' is no more an evidentiary presumption than the parol evidence rule is an evidence rule. . . . In a deterrence scheme, the prosecutor's actual motive is irrelevant [because] [a]pprehension of a retaliatory motive can certainly exist in the factual absence of such a motive. . . . Thus, even in the face of a factual finding, supported by the record, of no actual vindictiveness, a 'presumption of vindictiveness' would still establish a due process violation. No mere evidentiary presumption concerned with the presence or absence of actual vindictiveness would function in that manner.
>
> If the presumption of vindictiveness were intended to be a mere evidentiary presumption of actual vindictiveness, it would relate to that very subjective, 'complex and difficult to prove,' question of motive. In that case, there would be no point in restricting rebuttal evidence to objective evidence—subjective evidence is perfectly acceptable to establish subjective motive.

Id. at 1371.

to the objective showing discussed above. In spite of *Krezdorn III's* language regarding what a "reasonable minded defendant" should "appreciate," given the facts of the case there remains a realistic appearance of vindictiveness which a reasonable minded defendant would appreciate and which the prosecution failed to rebut. Under these circumstances, the due process doctrine set forth in *Pearce* and *Blackledge* requires that the court dismiss the conspiracy charge, *Goodwin* notwithstanding.

C. *GOODWIN* IN THE CONTEXT OF AN INTERLOCUTORY APPEAL

1. United States v. Banks

It is instructive to compare *Krezdorn III* with a previous decision of the Ninth Circuit in *United States v. Banks*.[529] *Banks* involves a similar issue in terms of the presence of dual motivations for prosecutorial conduct, but presents the issue in the context of an interlocutory appeal, chronologically halfway between the pre-trial context of *Goodwin* and the post-trial posture of *Pearce* and *Blackledge*.

KaMook Banks and her co-defendants, including her husband, American Indian leader Dennis Banks, were arrested on a fugitive warrant by Oregon state police after notification by the FBI of their presence in the state. The police impounded and searched defendants' vehicles pursuant to a warrant, resulting in the seizure of various items including explosive material. Oregon authorities later destroyed the explosive material in the presence of an FBI agent, who photographed the process. After a five count indictment was filed against them, defendants filed a motion to suppress evidence relating to the materials that had been destroyed. This motion was granted, and the government initiated an interlocutory appeal, which ultimately proved successful.[530]

Upon remand, the district court ruled, for reasons not stated in the opinion of the Court of Appeals, that certain counts of the initial five count indictment "could not simply be reinstated."[531] The government thereupon obtained a "new" indictment against Ms. Banks, containing the initial five counts plus a sixth count charging a firearms violation. It was this new indictment that prompted the motion to dismiss on the basis of prosectorial vindictiveness. The district court granted the motion, finding that the government had failed to dispel the appearance of vindictiveness created by the addi-

529 *Banks*, 682 F.2d 841 (9th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983).
530 *Id.* at 843.
531 *Id.* at 844.

tion of the firearms count against her.[532]

The Ninth Circuit reversed again, in the second interlocutory appeal in the case. Citing *Goodwin* for the proposition that a "prosecutor should remain free *before trial* to exercise the broad discretion entrusted to him to determine the societal interest in prosecution," the court held the prophylactic rule did not apply because there is no realistic likelihood of vindictiveness when the prosecutor is required by court order to obtain a new indictment.[533] The likelihood of vindictiveness is not realistic, according to the Ninth Circuit, because the prosecutor will necessarily have to review the evidence and reconsider what charges to present to the grand jury.[534] The Ninth Circuit held that the prophylactic rule should not be applied, at least in part because the district court found there was "no evidence that the government's action was vindictive in *fact*," in spite of the fact "there have been many hotly contested disagreements between the parties during the lengthy proceedings."[535]

2. *Commentary*

Banks is another example of the confusion that exists between actual vindictiveness and the appearance of vindictiveness. It also represents a blind application of *Goodwin*, one which is belied by the facts of the case. Banks also illustrates the mechanistic nature of *Goodwin*'s pre-trial/post-trial distinction regarding the operation of the prophylactic rule.

While it is true that *Banks* involved a pre-trial setting, it is equally true that many of the factors mentioned in *Goodwin* as integral to establishing a realistic likelihood of vindictiveness are present. Having to present the case to the grand jury a second time

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532 *Id.*

533 The court stated:

> If, as in *Goodwin*, and *Gallegos-Curiel*, there is not a reasonable likelihood of vindictiveness when the prosecutor decides to increase charges based on his review of the evidence prior to trial because he has 'simply come to realize that information possessed by the State has a broader significance,' there is even less likelihood of vindictiveness when the prosecutor is required by court order to obtain a new indictment.

Id. at 845.

534 The court continued:

> In this case the prosecutor clearly had a legitimate reason to reconsider the scope and content of the new pretrial indictment. Long after the original indictment was obtained, but before any trial had been held, the Government was compelled by court order to obtain a new indictment and to present witnesses and evidence to a new grand jury. Under these circumstances, we cannot say that there is a 'realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or punitive *animus* towards the defendant.'

Id. at 845-46 (emphasis in original).

535 *Id.* at 846 (emphasis in original).

forces the prosecution to do over again what it thought it had done correctly.[536] Given the defendants' success on the motion to suppress, there certainly existed the strong temptation for the prosecution to engage in "self-vindication."[537] In a case marked by "hotly contested disagreements" and where the government was forced to take two interlocutory appeals resulting from defendant's successful exercise of her rights, it is simply ignoring reality to conclude there is not a realistic likelihood that the additional charge was motivated at least in part by vindictiveness.

Viewing the facts in a light most favorable to the prosecution, *Banks* presents a situation, like *Krezdorn*, where dual motives, one proper (a response to a court order) and the other improper (vindictiveness), resulted in the additional charge. Under these circumstances, a realistic likelihood of vindictiveness exists, and the prophylactic rule should apply.[538] Therefore, the prosecuting attorney should be required to demonstrate *why* and/or *how* a review of the evidence led him/her to "up the ante." In other words, the prosecutor must explain why the initial charges did "not reflect" the extent to which the defendant was legitimately subject to prosecution. What objective facts led the prosecutor to realize after the trial began that the information possessed by the government had a "broader significance," and what was that significance? As *Pearce* and *Blackledge* held, unless the record demonstrates at least some objective reasons for the increase, the appearance of vindictiveness, which otherwise exists, is not dispelled.

VI. CONCLUSION

In retrospect, the genesis of the "appearance of vindictiveness" doctrine seems to have been an attempt by the Court to avoid the application of double jeopardy principles to judicial discretion in sentencing. Rather than adopting Justice Douglas' viewpoint, expressed in the dissenting opinion in *Pearce*, that judges should be prohibited from increasing penalties following re-trials in all circumstances, the Court created an "appearance of vindictiveness" doctrine that would prevent abuses that might arise, while attempting to maximize judicial discretion in that small number of cases in which increased sentences would be justifiable based upon occurrences *after* the original sentence.

The effort to maintain that discretion in the relatively small

536 *Goodwin*, 457 U.S. at 383.

537 *Id.*

538 *See supra* note 535 and accompanying text.

number of cases in which it might apply has been extremely costly, not only in terms of both judicial and prosecutorial resources, but also in terms of the uncertainty the rule has created for defendants. Had the Court originally taken the position that all increased sentences on retrial following appeal were improper, it is possible that some small number of defendants, who might receive increased sentences on retrial after *Pearce*, would escape additional punishment. Absent some showing that original sentences do not, in a systemic fashion, reflect the legitimate societal interests involved, however, it is difficult to see any substantial benefit in increased sentences on retrial, except the maximization of judicial discretion in a very small number of cases.

As the vindictiveness doctrine has come to be applied to prosecutors, the central issue addressed in *Blackledge v. Perry* and subsequent cases, the need for an effective mechanism to sort out proper prosecutorial acts of discretion from improper punitive use of prosecutorial power, is yet to be resolved.[539] Even the *Goodwin* opinion indicated that prosecutorial reprisals for the exercise of rights have no place in decision-making.[540] Justice Stevens succinctly stated the continuing problem:[541] "If punishment is a central purpose of criminal prosecutions, how are we to distinguish between permissible and impermissible state motives?"[542]

Goodwin may be read as an attempt to limit spurious challenges to the proper exercise of pre-trial prosecutorial discretion. But in so doing, it may result in significantly reducing legitimate challenges to the misuse of prosecutorial power prior to trial.[543] Whether this is good or bad policy depends largely upon whether the reduction of potentially spurious challenges to increased penalties following the exercise of rights outweighs the dangers inherent in weakening constitutional safeguards on the power of prosecutors to punish the exercise of pre-trial rights.

In assessing this aspect of the policy flowing from *Goodwin* it is important to recall that under the *Pearce/Blackledge* rule, *only* those increased charges which did not, or could not, be supported with legitimate justifications were subject to dismissal.[544] Thus, the doctrine had no direct effect on the original charging decision. Moreover, the "presumption" against increased charges following the

539 *Goodwin*, 457 U.S. at 373.

540 *Id.* at 372.

541 *See supra* text accompanying notes 272-432.

542 *Goodwin*, 457 U.S. at 372.

543 *See supra* text accompanying notes 390-432.

544 *See supra* text accompanying notes 14-52 and 127-57.

exercise of a right, if one existed, was always rebuttable.[545] Thus, the likelihood of unfounded claims of vindictiveness seriously impeding criminal prosecutions appears to have been rather remote.

On the other hand, elimination of the requirement of a governmental showing of non-vindictive motivation in the pre-trial context, when charges are increased following the exercise of a jury demand, has some potentially serious consequences. First, there would no longer be a meaningful incentive for prosecutors to refrain from intentionally using their power in a vindictive fashion.[546] As long as vindictive motivations were not overtly made known to a defendant, and perhaps even if they were,[547] vindictiveness and reprisals could take place virtually free from challenge.[548] In plea bargaining, it is already clear that such motivations are permissible and may be openly expressed.[549]

Goodwin is a reflection of the inherent contradiction between the stated goals of the due process doctrine which prohibits vindictiveness,[550] namely, separating punishment for crime from punishment for the exercise of rights,[551] and the goals of plea bargaining approved by the Court in earlier cases; that is, inducing defendants to give up rights by pleading guilty.[552] Viewed in this context, *Goodwin* is an expression of the conflict of imperatives faced by prosecutors in virtually every criminal prosecution.[553] The response of *Goodwin*, however, does little to help prosecutors or judges sort out those conflicting imperatives or ensure the discovery of actual vindictiveness where it does exist.[554] In fact, rather than setting out standards that would aid prosecutors in effectively fulfilling their obligations, *Goodwin* is an indication that the Court may be willing to "solve" the problem by reducing judicial oversight of the prosecutorial function.[555]

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545 *See supra* text accompanying notes 127-57.

546 *See supra* text accompanying notes 439-49.

547 Two very disturbing footnotes in *Goodwin* seem to indicate that even the open threats of the prosecutor in *Bordenkircher* may not amount to the sort of "objective evidence" of actual vindictiveness that *Goodwin* continues to condemn. *Goodwin*, 457 U.S. at 381 n.12, 384 n.19. If these footnotes and the reference in the opinion to objective evidence is taken seriously, the exception created in *Bordenkircher* will have swallowed the doctrine.

548 *See supra* text accompanying notes 390-432.

549 *Bordenkircher*, 434 U.S. 357.

550 *Goodwin*, 457 U.S. at 372-73.

551 *Id.* at 372.

552 *Bordenkircher*, 434 U.S. 357; *Brady*, 397 U.S. 742.

553 *See supra* text accompanying notes 450-95.

554 *See supra* text accompanying notes 390-432.

555 *See supra* text accompanying notes 390-432. This tendency to view the functions of the executive branch as sacrosanct has been reflected in earlier opinions by Chief Justice

This reverence for the discretion of the executive also may explain both the current Supreme Court's reluctance in *Goodwin* to admit to the "likelihood" of pre-trial punitive motivation on the part of prosecutors and the reluctance of courts to review prosecutorial decisions generally.[556] Although *Goodwin* may continue to allow a distinction to be made between open threats in plea bargaining, which are acceptable, and open threats outside of plea bargaining, which are not acceptable, the case carries with it the disturbing implication that: (a) the Court may be willing to accept some vindictiveness as an element of prosecutorial strategy,[557] and (b) the Court is extending an invitation to an increase in the Court's own words of "due process violation[s] of the most basic sort."

Even if one assumes that increased flexibility in increasing charges has greater justification in the pre-trial setting, absent some indication that under-charging is a serious, systemic problem, one might fairly ask what societal purpose is served by maximizing that flexibility. The cost to judicial and prosecutorial resources created by this attempt to maximize their discretion can be seen by the numerous cases that have attempted to apply and refine the doctrine. The cost to the system also includes far more than the costs to individual defendants who must risk increased penalities from judges and prosecutors. The greatest cost may be that the perception of "fundamental fairness," upon which the system must be based to maintain its authority, is diminished by a rule which appears to be applied to varying circumstances in an inconsistent, arbitrary and highly technical fashion.

In assessing the impact of *Goodwin* and the other cases that elaborate upon the *Pearce/Blackledge* doctrine, one might well question

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Burger who, long before he was appointed to the Supreme Court, indicated that the courts have no power to review prosecutorial decisions. *Two Models, supra* note 4, at 472 n.24 (1983). While this is an obvious misstatement of the law that cannot be taken literally, it may more properly reflect the rationale underlying much of *Goodwin* than the reasoning of the opinion itself. *Id.* at 471. As has been noted elsewhere, this reverence for a "separation of powers" defeats the very purpose of that doctrine by insulating all sorts of improper government acts from review. *Id.* at 470. Professor Kenneth Culp Davis, a noted commentator, has addressed the use of the separation of powers doctrine as a reason to limit judicial review of the executive:

> If separation of powers prevents review of discretion of executive officers, then more than a hundred Supreme Court decisions spread over a century and three-quarters will have to be found contrary to the constitution! If courts could not interfere with abuse of discretion by executive officers, fundamental institutions would be altogether different from what they are.

Id. at 471 n.25.

556 *Id.* at 471 n.24.

557 *See supra* text accompanying note 358 and the discussion of *Gervasi, supra* notes 450-95.

whether defendants can more freely exercise rights without fear of retaliation because those cases have been decided; a fair answer, it seems, is that they cannot. Perhaps it is time to rethink the doctrine and for the Court to clarify the doctrine in a straight-forward manner that will reverse the trend toward a vindictiveness doctrine without substance which no longer accomplishes its major task: protecting due process by allowing defendants to exercise their procedural and constitutional rights free from governmental retaliation and the fear of such retaliation.

VII. ADDENDUM

After this article was written, the Supreme Court decided *Wasman v. United States*,[558] a judicial vindictiveness case, and *Thigpen v. Roberts*,[559] a prosecutorial vindictiveness case. A review of each case reveals that the analysis presented in this article regarding the confusion in the doctrine between "actual vindictiveness" and "appearance of vindictiveness," which was exacerbated by *Goodwin*, is apparently correct and that the need remains to define more precisely the showing necessary to dispel the appearance of vindictiveness when it arises.[560]

In *Wasman v. United States*, a defendant received a higher sentence on retrial following an appeal, based upon a conviction that occured after the first trial for an offense that had been committed prior to the first trial.[561] The case turns on an interpretation of conflicting language in *Pearce*, which at one point stated that "conduct on the part of the defendant" between trials was the proper standard, not the fact of the intervening conviction.[562]

A unanimous Court agreed that the second conviction was based on the sort of "factual data upon which the increased sentence [may properly be] based."[563] Five Justices who concurred in the judgment, however, dissented from the reasoning in the opinion of the Court written by the Chief Justice precisely because it failed to properly describe the appearance of vindictiveness/actual vindictiveness distinction.[564]

Chief Justice Burger's opinion recognizes the obligation to re-

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558 *Wasman*, 104 S. Ct. 3217 (1984).

559 Thigpen v. Roberts, 104 S. Ct. 2916 (1984).

560 *See Prosecutorial Vindictiveness in the Criminal Appellate Process, supra* note 4, and text accompanying notes 390-449.

561 *Wasman*, 104 S. Ct. at 3219.

562 *Id.* at 3221.

563 *Id.* at 3224.

564 *Id.* at 3225-26.

but the "presumption that an increased sentence or charge resulted from vindictiveness."[565] Further, he makes clear that the defendant must "affirmatively prove actual vindictiveness"[566] when the presumption does not apply. While this formulation helps to confirm the continued vitality of both branches of the doctrine, the rest of the opinion serves to undermine the rationale for the distinction.[567]

Throughout his opinion, the Chief Justice applies the presumption language from *Goodwin* in a manner which obscures the rationale for establishing the rule prohibiting both actual vindictiveness and the "reasonable apprehension of vindictiveness."[568] The Burger opinion suggests that due process forbids "only enhancement motivated by vindictiveness toward the defendant for having exercised guaranteed rights."[569] He asserts that *Pearce* and *Blackledge* "presumed" vindictiveness because "there was no evidence introduced to rebut the presumption of actual vindictiveness behind the increases; in other words, by operation of law, the increases were deemed motivated by vindictiveness."[570] Thus, one of the predictions of the article, that the use of the presumption analysis would blur the true issues underlying the doctrine seems to be accurate.[571] Moreover, the entire opinion fails to credit the "reasonable apprehension of vindictiveness" as having any bearing upon the doctrine whatsoever.[572]

By failing even to consider whether an apprehension of vindictiveness exists which might chill the exercise of protected rights, the Chief Justice is free to suggest that *Pearce* would have been differently decided if the state had "advanced a legitimate justification for the increased charge."[573] Thus, as predicted in this article, a post-*Goodwin* opinion suggests that assertion of *any* legitimate motive for an increased penalty, even if it is intertwined with improper motives, will suffice, irrespective of the reasonableness of the defendant's apprehension of vindictiveness.[574]

Justice Powell, joined by Justices Blackmun, Brennan, and Marshall, wrote an opinion concurring in the judgment and in those parts of the opinion that did not discuss the "presumption of vindic-

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565 *Id.* at 3223.
566 *Id.* at 3222.
567 *Id.* at 3222-25.
568 *Id.* at 3221. *See supra* text accompanying notes 338-44.
569 *Wasman*, 104 S. Ct. 3223.
570 *Id.*
571 *See supra* text accompanying notes 390-411.
572 *Wasman*, 104 S. Ct. 3217.
573 *Id.* at 3225.
574 *See supra* text accompanying notes 398-409, 379-81, 438 and 477.

tiveness."[575] The Powell opinion briefly points out that *Pearce* was intended to protect against the appearance of vindictiveness which would deter the exercise of rights.[576]

Justice Stevens, the author of the opinion in *Goodwin*, concurred in the judgment but firmly rejected most of the reasoning in the majority opinion.[577] He also rejected the notion that *Pearce* was concerned only with actual vindictiveness.[578] Without referring to his opinion in *Goodwin*, Justice Stevens cited both *Pearce* and *Blackledge* to confirm that the reasonable apprehension of vindictiveness remains as a cornerstone of vindictiveness analysis.[579]

In *Thigpen v. Roberts*, the first post-*Goodwin* prosecutorial vindictiveness case,[580] the defendant was convicted of four misdemeanors arising from a traffic accident in which a fatality occurred.[581] He was fined a total of $1,300 and was sentenced to eleven months in jail on one offense, six months on another, and ten days on a third.[582] He appealed the convictions, and the case was transferred for a trial *de novo*.[583] While the appeal was pending, he was indicted for manslaughter.[584] The state elected not to proceed on the misdemeanors; he was convicted of manslaughter and was sentenced to twenty years in prison.[585]

The Mississippi courts denied Thigpen's appeals.[586] A federal magistrate recommended that a writ of habeas corpus issue based upon both double jeopardy and prosecutional vindictiveness.[587] The district court adopted the magistrate's ruling, and the Fifth Circuit affirmed solely on double jeopardy grounds.[588] A majority of the Supreme Court, however, concluded that the case was controlled by *Blackledge v. Perry* and affirmed the granting of the habeas corpus petition.[589]

Justice White's majority opinion suggests that this case is identi-

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575 *Wasman*, 104 S. Ct. at 3225.
576 *Id.*
577 *Id.* at 3226.
578 *Id.*
579 *Id.* For a discussion of the importance of maintaining this analytical distinction, see *supra* text accompanying notes 390-438.
580 *Thigpen*, 104 S. Ct. 2916 (1984).
581 *Id.* at 2918.
582 *Id.* at n.1.
583 *Id.* at 2918.
584 *Id.*
585 *Id.*
586 *Id.*
587 *Id.*
588 *Id.*
589 *Id.* at 2919.

cal to *Blackledge* in all important respects.[590] A convicted misdemeanant who exercised a right to a trial *de novo* was faced with felony charges on retrial in both cases.[591] The only possible factual distinction, according to the majority, is that in *Blackledge* the same attorney was responsible for the entire prosecution.[592] The majority opinion confirms the analysis in this article that such a distinction is meaningless because the vindictive motivation "does not hinge on the continued involvement of a single individual"[593] and observes that *Blackledge v. Perry* referred to "the State" rather than "the prosecutor."[594] Despite this language, the majority declined to determine what rule would apply when two independent prosecutors are involved.[595] In *Thigpen*, the same prosecutor played a role at every stage following the intial trial.[596] Justices Rehnquist, O'Connor and Powell dissented, at least in part, on the ground that the case should be remanded to the Fifth Circuit in light of *Blackledge v. Perry*.[597]

The impact of *Thigpen* is that it demonstrates that *Blackledge*, at least in the post-trial setting, remains unaffected by *Goodwin*.[598] In a footnote, the majority opinion summarily rejected the state's argument that *Goodwin* has overruled or modified *Blackledge*.[599] In addition, the majority made clear that a vindictiveness analysis is appropriate even when the subsequent charges do not share all of the same elements as the previous charges.[600] According to the majority, the critical aspect of *Blackledge* was not "the congruence or lack thereof of the offenses charged."[601] Rather, it was a subsequent indictment for the "same conduct."[602]

There is nothing in *Thigpen*, however, to clarify the apprehension of vindictiveness/actual vindictiveness distinction or the showing required necessarily to dispel an appearance of vindictiveness.[603] In fact, the continuing confusion in the doctrine is illustrated by a footnote in which the Court cites the actual vindictiveness case, *Bordenkircher v. Hayes*, to describe the evil to which

590 *Id.* at 2917.
591 *Id.*
592 *Id.*
593 *Id. See supra* discussion accompanying notes 371-78.
594 *Thigpen*, 104 S. Ct. 2917.
595 *Id.*
596 *Id.*
597 *Id.* at 2920-24.
598 *See supra* text accompanying notes 390-421.
599 *Thigpen*, 104 S. Ct. at 2919 n.4.
600 *Id.* at 2919 n.5.
601 *Id.*
602 *Id.*
603 *Id.* at 2916-20.

Blackledge was directed as "the danger that the State might be retaliating against the accused for lawfully attacking his conviction."[604] As discussed above, this formulation misconstrues the *Blackledge* rationale and ignores important distinctions between the *Bordenkircher* rationale and the "reasonable-apprehension-of-vindictiveness" portion of the doctrine.[605] Furthermore, in *Thigpen*, the majority decided the case without a remand because the state failed to advance a legitimate basis for the increased charges and a remand would therefore be futile.[606] The showing required to justify an increased charge was never litigated.

On February 26, 1986, the Supreme Court decided *Texas v. McCullough*,[607] a judicial vindictiveness case. Chief Justice Burger's opinion recites certain facts found to be dispositive by the majority. The jury sentenced McCullough to twenty years at his first murder trial. The trial judge granted the motion for a new trial based upon prosecutorial misconduct. At the second trial "the State presented testimony from two witnesses who had not testified at the first trial that McCullough rather than his accomplices had slashed the throat of the victim."[608] A second jury convicted McCullough. He elected to be sentenced by the trial judge, who imposed a sentence of fifty years. In response to McCullough's motion, the judge stated that she imposed the harsher sentence because of the testimony of the two new witnesses, the fact that she had learned for the first time on retrial that McCullough had been released from prison only four months before the offense for which he was convicted, and the fact that "had she fixed the first sentence, she would have imposed more than twenty years."[609]

Based upon these facts, the Supreme Court reversed the Texas Court of Appeals which had resentenced McCullough to twenty years, finding that the harsher sentence violated *Pearce* because it was not based upon events occurring after the first trial. The Supreme Court finds that "[t]he facts of this case provide no basis for a presumption of vindictiveness."[610] The opinion emphasizes facts which, in the view of the Court, demonstrate an absence of actual vindictiveness. The fact that the sentencing judge granted the motion for a new trial based on prosecutorial misconduct, "hardly suggests any vindictiveness on the part of the judge towards

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604 *Id.* at 2919 n.5.
605 *See supra* discussion accompanying notes 321-329.
606 *Thigpen*, 104 S. Ct. at 2920.
607 106 S. Ct. 976 (1986).
608 106 S. Ct. at 978.
609 *Id.*
610 *Id.* at 979.

[McCullough]" and provides no temptation for the judge to engage in self-vindication at the time of sentencing.[611] The majority also contends that McCullough cannot argue a realistic apprehension of vindictiveness because he chose to be sentenced by the judge rather than the jury, suggesting that he did not perceive the judge to be vindictive. Finally, the opinion, citing *Colten*, emphasizes that different sentencers were involved. It concludes that where "the second sentencer provides an on-the-record, wholly logical, nonvindictive reason for the sentence," *Pearce* requires no more.[612]

For many of the same reasons, the majority goes on to state in dicta that "[e]ven if the *Pearce* presumption were to apply here, we hold that the findings of the trial judge overcome that presumption."[613] Recognizing that a defendant may be reluctant to move for a new trial and/or appeal if a harsher sentence may be imposed based upon new evidence revealed on retrial, the Court nevertheless regards this as an incidental chilling effect, an insufficient basis for limiting a court's broad discretion in sentencing.

In his dissent, Justice Marshall, with whom Justices Blackmun and Stevens join, stresses facts not mentioned by the majority. After the first trial, the district attorney publicly declared his dissatisfaction with the jury's sentence. He joined in McCullough's motion for a new trial because he wanted the opportunity to secure a harsher sentence upon a retrial. It was after the close of jury selection at the second trial that McCullough chose to be sentenced by the judge if convicted; many prospective jurors had been excused after indicating that their knowledge of the results of the first trial would affect their ability to give McCullough a fair trial.[614]

Addressing the applicability of the prophylactic rule, Justice Marshall initially rejects the argument that *Pearce* does not apply because different sentencers were involved: the "message of *Pearce* is not that a defendant should be given a chance to choose the sentencing agency least likely to increase his sentence," but rather that vindictiveness play "no part" in the sentence after retrial.[615] The dissenters argue that the same personal and institutional prejudices identified in *Pearce* may infect sentencing following a retrial ordered by the judge because the judge "may still resent being given a choice between publicly conceding [trial] errors and waiting for her judgment to be put to the test on appeal," particularly where the

611 *Id.*
612 *Id.* at 980.
613 *Id.*
614 *Id.* at 984 (Marshall, J., dissenting).
615 *Id.* at 984-85.

errors do not cast doubt on the defendant's guilt.[616] The dissenters would apply the prophylactic rule to this case because "[i]t is far from clear that [the trial judge's] decision to grant a new trial was made out of either solicitude for McCullough or recognition of the merits of his claim."[617]

Nor would the dissent agree with the majority's dicta that the reasons stated for the increased sentence were sufficient to rebut a presumption of vindictiveness. Emphasizing that the justifications deemed adequate by *Pearce* were limited to occurrences taking place after the first trial, Justice Marshall stresses that some new information will inevitably become available to a sentencing judge "in the course of any retrial, or merely by virtue of the passage of time."[618] This leads the dissent to conclude that the chilling effect of the majority's decision places a defendant in the same position he occupied before *Pearce*.

McCullough does not involve a claim of prosecutorial vindictiveness. It is a judicial vindictiveness case where the majority, based upon the facts stated in the opinion written by the Chief Justice, refused to apply the *Pearce* prophylactic rule to a judge who imposed the harsher sentence, but had not imposed the first sentence and had granted the motion for a new trial. This limits *McCullough*'s reach to a relatively narrow universe of cases, a conclusion buttressed by Justice Brennan's concurrence.

McCullough limits the post-trial application of the prophylactic rule in judicial vindictiveness cases, but only where there are a number of intervening factors between the defendant's exercise of a right and the imposition of the increased penalty. In terms of the analysis employed earlier in this article, *McCullough* does not call for application of the prophylactic rule because between the granting of the post-trial motion and the second sentencing, the district attorney decided to retry the case and McCullough chose to be sentenced by the judge rather than the jury. Although the first factor never seems to be in doubt, there was no way to predict the second and, most important, it was completely beyond the control of the judge.

In terms of *McCullough*'s potential application to prosecutorial vindictiveness, it is particularly significant that the majority relies upon the fact that a jury imposed the first sentence and the judge the second, citing *Colten* in support of the importance of this fact. In prosecutorial vindictiveness cases this distinction never exists because the governmental agency, the prosecutor's office, is always the

616 *Id.* at 985.
617 *Id.* at 986.
618 *Id.* at 987.

same. As *Colten, Blackledge* and *Thigpen* all make clear, the fact that a different person may represent the office at different stages of the prosecution is irrelevant. Thus, *McCullough* arguably has no application to the prosecutorial vindictiveness doctrine because of the functional distinctions between judges and prosecutors.

Finally, addressing the majority's dicta regarding the adequacy of the reasons stated for the harsher sentence, the new testimony at the retrial does not satisfy the "objective evidence" requirement of either *Pearce* or *Wasman*. The "chilling effect" is not incidental because there will always be some new testimony at a retrial that the judge can cite to justify a harsher sentence. Nor does the fact that the judge grants a motion for a new trial, in which the district attorney joins, serve to dispel an otherwise reasonable apprehension of vindictiveness.