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Prosecutorial Vindictiveness in a Pretrial Setting: Determining the Proper Standard

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PROSECUTORIAL VINDICTIVENESS IN A PRETRIAL SETTING: DETERMINING THE PROPER STANDARD

State v. Stevens[1]

The concept of prosecutorial vindictiveness as a due process claim is relatively new.[2] Traditionally, a prosecutor's actions or motives were rarely questioned;[3] his broad discretionary powers precluded such inquiry.[4] Recently, however, defense attorneys have used the prosecutorial vindictiveness theory to quash indictments that originated in a prosecutor's displeasure with a defendant's assertion of his rights. Despite the growing popularity of this trend, the United States Supreme Court has not applied the vindictiveness theory in a pretrial setting.[5] The New Mexico Supreme

1. 96 N.M. 627, 633 P.2d 1225 (1981).

2. Note, *Prosecutorial Vindictiveness: An Examination of Divergent Lower Court Standards and a Proposed Framework for Analysis*, 34 VAND. L. REV. 431, 432 (1981). It should be noted that the United States Supreme Court has never enunciated an actual definition of vindictiveness. *See Plea Bargaining: Limits on Prosecutorial Discretion*, 1979 ANN. SURV. AM. L. 27, 42.

3. *See* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the Successful Criminal Appellant*, 74 YALE L.J. 606 (1965).

4. Missouri has consistently given great deference to the powers of prosecuting attorneys. In State *ex rel.* Schultz v. Harper, 573 S.W.2d 427 (Mo. App., K.C. 1978), the court refused to require the prosecuting attorney to file certain affidavits, stating that "the prosecutor-appellant was vested with the absolute discretion as to whether or not he would file informations . . . subject only to his obligation to investigate the facts and the law applicable and reach his own conclusion thereon." *Id.* at 431. *See generally* Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981) (prosecutors have unjustifiably broad power which needs to be restrained); Note, *Prosecutorial Misconduct: The Limitations upon the Prosecutor's Role as an Advocate*, 14 SUFFOLK U.L. REV. 1095 (1980) (conflict between role of prosecutor as officer of the court and as advocate); *Plea Bargaining: Limits on Prosecutorial Discretion*, *supra* note 2 (survey of prosecutor's role in criminal justice system). *But see* Mellon, Jacoby & Brewer, *The Prosecutor Constrained by his Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 128 (1981) (prosecutors unnecessarily restrained by environment, prosecutorial abuse rare); Silbert, *The Role of the Prosecutor in the Process of Criminal Justice*, 63 A.B.A. J. 1717 (1977) (prosecutors should be more active in criminal justice system, possible abuse of discretion curable).

5. In Bordenkircher v. Hayes, 434 U.S. 357 (1978), the Court declined to apply the prosecutorial vindictiveness theory to pretrial plea bargaining. *See* notes 29-32 and accompanying text *infra*. Lower federal courts have applied vindictiveness to pretrial actions. In United States v. DeMarco, 550 F.2d 1224 (9th Cir. 1977), the

Court was confronted with this situation in *State v. Stevens*.[6]

Willie James Stevens was indicted originally for voluntary manslaughter and aggravated assault with a firearm enhancement.[7] He moved to suppress evidence upon which his indictment was based.[8] Before a ruling on the motion to suppress, a second indictment was filed on the same transaction, charging the defendant with second degree murder with a firearm enhancement. Four days later, the prosecutor filed a nolle prosequi[9] with respect to the first indictment. Notwithstanding the prosecutor's filing, the trial court granted the motion to suppress. The defendant's subsequent motion to quash the second indictment was granted because that indictment was filed while the first was still pending. The prosecutor then filed a third indictment containing an open charge of murder. The third indictment was quashed because it was based on evidence that had been suppressed.[10]

When the State appealed the quashing of the third indictment, the New Mexico Court of Appeals reinstated it on the ground that the trial court had exceeded its authority.[11] A second motion to quash the indictment was denied by the trial court.[12] Prior to trial, however, the defendant again moved for dismissal on the ground that the successive indictments on more serious charges evidenced prosecutorial vindictiveness and denied him due process of law. The trial court denied the motion, finding no

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defendant exercised his right to a change of venue, and a second indictment containing more severe charges was filed. Applying the appearance of vindictiveness test, the court dismissed the indictment. *Id.* at 1225.

6. 96 N.M. 627, 633 P.2d 1225 (1981).

7. The State also sued in the alternative for involuntary manslaughter with a firearm enhancement. *Id.* The defendant had shot and killed his girlfriend during an argument.

8. The evidence consisted of an oral statement made by the defendant to a detective after arrest. State v. Stevens, 93 N.M. 434, 435, 601 P.2d 67, 68 (Ct. App. 1979).

9. Nolle prosequi is "a formal entry upon the record . . . by the prosecuting officer in a criminal action, by which he declares that he 'will not further prosecute' the case, either as to some of the defendants, or altogether." BLACK'S LAW DICTIONARY 945 (rev. 5th ed. 1979).

10. The prosecutor, in attempting to obtain the second indictment, had presented evidence to the grand jury that the trial court had suppressed. 93 N.M. at 435, 601 P.2d at 68.

11. *Id.* The trial court exceeded its authority by reviewing the grand jury proceeding and holding that the evidence presented to the grand jury must be legally admissible. The appellate court, basing its decision on State v. Chance, 29 N.M. 34, 221 P. 183 (1923), held that a grand jury "is a judicial tribunal with inquisitorial powers, and, unless there is some clear statutory authority to do so, we think the courts are without power to review its action to determine whether or not it had sufficient or insufficient, legal or illegal, competent or incompetent evidence upon which to return an indictment." 93 N.M. at 435, 601 P.2d at 68.

12. 96 N.M. at 627, 633 P.2d at 1225.

vindictiveness.[13]

The court of appeals reversed the trial court's denial of the motion to dismiss, finding that a presumption of vindictiveness arose following the prosecutor's actions.[14] The case was remanded to the trial court to give the prosecutor the opportunity to present rebuttal evidence.[15] If the evidence failed to rebut the presumption, vindictiveness would be established and the indictment quashed. The State appealed, however, and the Supreme Court of New Mexico reversed the appellate court's decision, holding that no presumption arose in the case. The defendant was required to prove actual vindictiveness in order to have his case dismissed.[16]

The three most important cases involving vindictiveness have been handed down by the United States Supreme Court. In *North Carolina v. Pearce*,[17] the Court applied a presumption of vindictiveness to judicial behavior. After successful appeal of his conviction, the defendant was convicted at a second trial. The same judge imposed a heavier sentence the second time around.[18] The Court required the record to reflect the reasons for the heavier sentence to rebut the presumption of judicial vindictiveness.[19] The holding was based on two concurrent due process considerations.[20] First, "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives

13. *Id.*

14. The rule of law creating the presumption was new in New Mexico, created by the court of appeals in this case. State v. Stevens, 96 N.M. 753, 757, 635 P.2d 308, 311 (Ct. App. 1981), *rev'd*, 96 N.M. 627, 633 P.2d 1225 (1981).

15. In *Stevens*, the State argued that different prosecutors handled the case and so no vindictiveness was present. The New Mexico Court of Appeals rejected the argument, charging one prosecutor with the knowledge of the other. 96 N.M. at 756-57, 635 P.2d at 310-11. *See also* United States v. Alvarado-Sandoval, 557 F.2d 645, 646 (9th Cir. 1977) (irrelevant that prosecutor appearing was not personally aware of record).

16. 96 N.M. at 630-31, 633 P.2d at 1228-29. *See* text accompanying notes 41-43 *infra*.

17. 395 U.S. 711 (1969).

18. *Id.* at 713-15. In *Pearce*, the defendant was originally convicted for assault with intent to commit rape. The trial judge sentenced him to twelve to fifteen years in prison. Several years later, the defendant initiated a proceeding which culminated in the reversal of his conviction. He was retried, convicted, and sentenced by the same trial judge to a prison term which, including the years which he had already served, was longer than the first sentence. *Id.*

19. *Id.* at 726. The Court further required that the reasons be "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.*

20. Some judges also feel that underlying these decisions is the notion that vindictive behavior is morally wrong. *See* United States v. Andrews, 612 F.2d 235, 249 & n.4 (6th Cir. 1979), *rev'd*, 633 F.2d 449 (6th Cir. 1980), *cert. denied*, 450 U.S. 927 (1981).

after a new trial."[21] Second, "due process requires that a defendant be freed of apprehension of such retaliatory motivation on the part of the sentencing judge"[22] which could deter the exercise of procedural rights. The Court recognized that "it is unfair to use the great power given to the court to determine sentence to place the defendant in the dilemma of making an unfree choice."[23] Judges therefore have an affirmative duty to clearly set out in the record the reasons for imposing more severe sentences on criminal defendants.[24]

In the second case, *Blackledge v. Perry*,[25] the Court extended the vindictiveness notion to prosecutorial action and held that the re-indictment of the defendant on a more serious charge after he had exercised a statutory right to a trial de novo violated due process. A defendant's fear of retaliation would otherwise deter him from fully exercising his rights.[26] The Court emphasized that actual retaliatory motivation was not essential, as the test protects against the defendant's *apprehension* of vindictiveness, not its existence.[27] Due process is therefore offended by all situations that pose a realistic likelihood of vindictiveness since they may chill a defendant's exercise of his rights.[28]

The Supreme Court departed from the *Pearce-Perry* trend in *Bordenkircher v. Hayes*,[29] ruling that a defendant's due process rights were not

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21. 395 U.S. at 725.

22. *Id.* This due process argument was developed from the unconstitutional conditions doctrine. *See* Abrams, *Systematic Coercion: Unconstitutional Conditions in the Criminal Law*, 72 J. CRIM. L. & CRIMINOLOGY 128 (1981); Smaltz, *Due Process Limitations on Prosecutorial Discretion in Re-Charging Defendants:* Pearce *to* Blackledge *to* Bordenkircher, 36 WASH. & LEE L. REV. 347, 349-353 (1979); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Note, *supra* note 2, at 434-37.

23. 395 U.S. at 724 (quoting Worcester v. Commissioner, 370 F.2d 713, 718 (1st Cir. 1966)).

24. This rule does not apply where a more severe sentence is imposed pursuant to a trial de novo before a different judge, Colten v. Kentucky, 407 U.S. 104, 116 (1972), or where the resentencing is performed by a different jury, Chaffin v. Stynchcombe, 412 U.S. 17, 28 (1973). In both cases the Court found the danger of retaliation to be minimal as the sentencing judge and jury had no personal stake in the outcome of the defendant's case.

25. 417 U.S. 21 (1974).

26. *Id.* at 28.

27. *Id.* In *Perry*, the Court admitted that there was no evidence of prosecutorial bad faith or maliciousness. The Court also noted that this would be a different case if it had been impossible for the State to bring more serious charges at the beginning. *Id.* at 29 n.7. *See* Diaz v. United States, 223 U.S. 442 (1912), where the defendant was originally tried and convicted of assault and battery. Subsequent to the original trial, the victim died. The defendant was tried a second time and convicted of homicide. No due process violation was found.

28. 417 U.S. at 21.

29. 434 U.S. 357 (1978), *noted in* 6 AM. J. CRIM. L. 201 (1978); 33 ARK. L. REV. 211 (1979); 66 CALIF. L. REV. 875 (1978); 27 DE PAUL L. REV. 1241 (1978); 3

impaired when prosecutorial vindictiveness occurred in the context of plea bargaining.[30] The prosecutor admitted that he had acted vindictively because the defendant had refused to plead guilty, but the Court found that an increase of charges as a part of the give and take of plea bargaining contained no element of punishment or retaliation as long as the accused was free to accept or reject the prosecution's offer.[31] While difficult to reconcile with *Pearce* and *Perry*, *Bordenkircher* has been limited to the context of plea bargaining.[32]

The vindictiveness which the constitution prohibits is "the imposition of punishment . . . against a defendant for the purpose of retaliating against him because he has exercised his legal rights rather than for the purpose of imposing a sanction upon him for the crimes he has committed."[33] To ferret out retaliatory conduct, courts have responded to *Pearce* and *Perry* by developing standards that a criminal defendant must meet in order to establish prosecutorial vindictiveness.[34] These standards focus on prosecutorial intent and can be divided into three distinct tests: (1) the appearance of vindictiveness, (2) a realistic likelihood of vindictiveness, and (3) actual vindictiveness. The first and second tests raise a presumption of vindictiveness against the prosecutor. The third test requires the defendant to prove actual retaliatory motivation, a very difficult standard to meet.

The United States Court of Appeals for the Eighth Circuit has adopted the appearance of vindictiveness standard.[35] Under this test, the defendant

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GLENDALE L. REV. 207 (1978); 19 SANTA CLARA L. REV. 249 (1979). *See generally* Comment, *Bordenkircher v. Hayes: Prosecutorial Discretion During Plea Bargaining*, 27 BUFFALO L. REV. 563 (1978); Comment, *Prosecutorial Discretion, Plea Bargaining and the Supreme Court's Opinion in* Bordenkircher v. Hayes, 6 HASTINGS CONST. L.Q. 269 (1978); Comment, *Constitutional Law: Due Process and the Bargained Plea*, 18 WASHBURN L.J. 144 (1978).

30. 434 U.S. at 365. For the ethical considerations involved in prosecutorial action, see Adlerstein, *Ethics, Federal Prosecutors, and Federal Courts: Some Recent Problems*, 6 HOFSTRA L. REV. 755 (1978); Note, *supra* note 2, at 458-59.

31. 434 U.S. at 363.

32. 96 N.M. at 629, 633 P.2d at 1227. *See also* United States v. Andrews, 633 F.2d 449 (6th Cir. 1980), *cert. denied*, 450 U.S. 927 (1981); United States v. Allsup, 573 F.2d 1141 (9th Cir.), *cert. denied*, 436 U.S. 961 (1978); Watkins v. Solem, 571 F.2d 435 (8th Cir. 1978). *But see* United States v. Thomas, 617 F.2d 436, 438 n.1 (5th Cir. 1980) (re-indictment with enhanced penalties not prosecutorial vindictiveness). It should be noted that courts do not automatically uphold increased sentences that result from unsuccessful plea bargaining. *See, e.g.*, United States v. Andrews, 612 F.2d 235, 249 & n.4 (6th Cir. 1979), *rev'd*, 633 F.2d 449 (6th Cir. 1980), *cert. denied*, 450 U.S. 927 (1981).

33. United States v. Walker, 514 F. Supp. 294, 312 (E.D. La. 1981).

34. Note, *supra* note 2, at 443.

35. United States v. Stacey, 571 F.2d 440, 444 (8th Cir. 1978). For other circuits using this approach, see Note, *supra* note 2, at 443 n.17. Missouri also follows this approach. *See, e.g.*, State *ex rel.* Westfall v. Mason, 594 S.W.2d 908 (Mo. En Banc 1980).

need only show that there is a possibility of vindictiveness, that an inference of vindictiveness may be drawn from the facts of the case. The prosecutor must negate this inference in order to proceed with the complaint. This cautious approach recognizes the "tremendous harm to both the individual and society which would attend a prosecutor's abuse of his discretionary authority."[36] Although this approach renders maximum protection to a defendant's rights, society's interests are not well served by a standard that is so easily met.[37] Prosecutors would be required to refute the presumption of vindictiveness in the majority of cases and, in so doing, an unnecessary burden would be placed on the criminal justice system.

A preferable approach is that enunciated in *Perry*: a realistic likelihood of vindictiveness. This requires the defendant to show a substantial probability of vindictiveness rather than the mere appearance of it.[38] The desirability of this approach stems from its balancing of two conflicting rules of law: "1) prosecutors have and need broad discretion to file charges where there is probable cause that someone broke the law; 2) vindictive conduct by persons with the awesome power of prosecutors (and judges) is unacceptable and requires control."[39] The striking of this balance gives this standard two advantages. First, defendants need not fear prosecutorial retaliation for assertion of a constitutional or statutory right. Second, it is a

36. 571 F.2d at 444. The amount and type of evidence the State must produce will vary depending on the court and the right asserted by the defendant. *See* Smaltz, *supra* note 22, at 360-64; Note, *supra* note 2, at 448-450. Most courts have not "specifically articulated the requirements for dispelling the appearance of vindictiveness but have dealt with the issue on an ad hoc basis." United States v. Andrews, 612 F.2d 235, 250 (6th Cir. 1979), *rev'd*, 633 F.2d 449 (6th Cir. 1980), *cert. denied*, 450 U.S. 927 (1981).

37. In United States v. Alvarado-Sandoval, 557 F.2d 645 (9th Cir. 1977), the court, applying an appearance of vindictiveness standard, dismissed a more severe second indictment which was procured after defendant's counsel indicated that no plea would be entered because defendant might file a motion to suppress. *Id.* This is very similar to *Stevens*, although the defendant did not actually exercise his constitutional rights. In United States v. DeMarco, 550 F.2d 1224 (9th Cir. 1977), the court found prosecutorial vindictiveness from the prosecutor's statements that he might consider extra counts against the defendant. *Id.* at 1226. These cases show the extremes to which the appearance of vindictiveness test can be extended.

38. Note, *supra* note 2, at 446.

39. United States v. Andrews, 633 F.2d 449, 453 (6th Cir. 1980), *cert. denied*, 450 U.S. 927 (1981). In *Andrews*, the prosecutor added charges to the original indictment two days after the defendants successfully appealed a denial of bail. The defendants moved to dismiss the indictment, alleging prosecutorial vindictiveness. The district court found for the defendants, using the appearance of vindictiveness standard. The Sixth Circuit reversed, stating that although a prima facie case of vindictiveness was established by the prosecutor's conduct, that case was rebuttable. The case was then remanded to the district court to examine the credibility of the prosecutor's explanation of the extra charges. *See generally* 49 U. CIN. L. REV. 540 (1980); 7 OHIO N.U.L. REV. 821 (1980); 25 VILL. L. REV. 365 (1979).

realistic method to police vindictiveness without imposing undue burdens on either the defendant or the state.[40]

The benefits of the *Perry* test are lost when the defendant must show actual vindictiveness as the *Stevens* court demands. Actual vindictiveness requires the defendant to establish a prima facie case of vindictiveness without benefit of a presumption. To meet this burden, the defendant must prove retaliatory intent, which is often difficult to do. It is easy for the prosecutor to rebut the defendant's accusations,[41] as the state need only show nonvindictive reasons for the increased charge[42] whether these were the motivating factors or not.[43]

The actual vindictiveness standard itself is based on a misinterpretation of the law. The Fifth Circuit, in adopting this standard, reasoned that *Bordenkircher* signalled a retreat from the principles of *Perry* and therefore imposed a more stringent test.[44] The court failed to limit *Bordenkircher* to plea bargaining, as most other courts have properly done because of the unique nature of plea bargaining.[45] The court extended *Bordenkircher* to sit-

40. United States v. Andrews, 633 F.2d 449, 454 (6th Cir. 1980), *cert. denied*, 450 U.S. 927 (1981).

41. North Carolina v. Pearce, 395 U.S. 711, 724 n.20 (1969). *See also* United States v. Andrews, 612 F.2d 235, 251-52 (6th Cir. 1979) ("Rare is the prosecutor who will openly admit that he added on charges in retaliation against defendant."), *rev'd*, 633 F.2d 449 (6th Cir. 1980), *cert. denied*, 450 U.S. 927 (1981).

42. United States v. Walker, 514 F. Supp. 294, 314 (E.D. La. 1981).

43. This standard will also place the judiciary and the prosecution in an unnecessary confrontation. The judge will be required either to allow the extra charge or to make an explicit finding of prosecutorial bad faith rather than relying on the presumption as the other standards allow. United States v. Andrews, 633 F.2d 449, 455 (6th Cir. 1980), *cert. denied*, 450 U.S. 927 (1981). The court noted that judges are reluctant to find bad faith when required to do so under this standard. *Id.* at 455 n.8. *See also* United States v. Andrews, 612 F.2d 235, 249 n.3 (6th Cir. 1979) (Keith, J., dissenting), *rev'd*, 633 F.2d 449 (6th Cir. 1980), *cert. denied*, 450 U.S. 927 (1981).

44. United States v. Thomas, 617 F.2d 436, 438 n.1 (5th Cir. 1980). In *Thomas*, the defendants, originally indicted on 71 counts, succeeded in having all counts dismissed. Two years later, they were re-indicted on 92 counts which included charges not found in the first indictment. The defendants' attempt to quash the indictment on the basis of prosecutorial vindictiveness was unsuccessful. *Id.* at 438. *See also* Miracle v. Estelle, 592 F.2d 1269 (5th Cir. 1979); Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978). In Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978), the court applied a balancing test, weighing the extent to which the second indictment would chill the defendant's exercise of his rights against the extent to which precluding the second indictment would infringe the prosecutor's discretion in order to determine which standard to apply. *Id.* at 145. This may no longer be valid in light of *Thomas*.

45. *See* note 32 *supra*. *But see* United States v. Walker, 514 F. Supp. 294, 315-25 (E.D. La. 1981) (institution of more severe charges following successful challenge of first conviction prima facie case of prosecutorial vindictiveness).

uations it was never meant to govern and effectively ignored the principles established in *Perry*, which only required a showing of a reasonable likelihood of vindictiveness.

The *Stevens* court also failed to apply the *Perry* principles. The court attempted to justify its application of an actual vindictiveness standard to pretrial prosecutorial activity in various ways. It was first claimed that a distinction should be drawn between pretrial activity and activity after trial.[46] The crux of this argument is that the prosecutor will not have sufficient motive to act vindictively before trial. The court, however, neglected to observe that there is ample opportunity for a prosecutor to develop retaliatory motivation before trial—as is clear from the facts of this case.[47] Further, the court failed to note that the Supreme Court in *Bordenkircher* could have dismissed the vindictiveness charge on the ground that the alleged violation occurred before trial but did not do so. The Court instead found justification for its holding in the specific characteristics of plea bargaining.[48]

The *Stevens* court also argued that the imposition of a pretrial presumption would interfere with proper prosecutorial discretion.[49] A majority of courts, however, have recognized that the *Perry* principles, properly administered, do not inhibit the prosecutor's discretion, since he is still able to raise charges for legitimate reasons.[50]

As the *Stevens* court deviates from the current trend in refusing to apply a pretrial presumption of vindictiveness, its reasoning is unsound. Courts should afford more protection to the due process rights of criminal defendants who are faced with a vindictive prosecutor.

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46. 96 N.M. at 630, 633 P.2d at 1228.

47. *See also* United States v. Andrews, 612 F.2d 235, 248 n.2 (6th Cir. 1979) (Keith, J., dissenting), *rev'd*, 633 F.2d 449 (6th Cir. 1980), *cert. denied*, 450 U.S. 927 (1981); Sefcheck v. Brewer, 301 F. Supp. 793, 795 (S.D. Iowa 1969).

48. *See* text accompanying notes 29-31 *supra*. *See also* U. CIN. L. REV., *supra* note 39, at 548.

49. 96 N.M. at 630, 633 P.2d at 1228.

50. *See, e.g.*, United States v. Partyka, 561 F.2d 118, 124 (8th Cir. 1977). The *Stevens* court also argued that even if no presumption is imposed, the defendant will still have the protection of a jury trial. 96 N.M. at 630, 633 P.2d at 1228. This argument is without merit as it misconstrues the nature of prosecutorial vindictiveness.