Criminal Procedure -- Protection of Defendants Against Prosecutorial Vindictiveness

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The United States Supreme Court has repeatedly held that states may not place burdens on the assertion of a constitutional right that chill its exercise by criminal defendants.¹ In Blackledge v. Perry² the Court considered whether the power of the prosecutor to charge the defendant with a more serious crime at a trial de novo placed an unconstitutional burden on the right of appeal. The Court found that the situation presented an opportunity for prosecutorial "vindictiveness" and therefore held that the requirement of due process precluded a prosecutor from raising the charge.³

Jimmy Perry was charged with a misdemeanor and convicted in the North Carolina district court. He appealed to the superior court for a trial de novo.⁴ After defendant's notice of appeal was filed, the prosecutor obtained a felony indictment against Perry based on the same conduct as the misdemeanor charge. At the trial de novo defendant pleaded guilty⁵ to the felony charge and was sentenced to a prison term.

1. See text accompanying notes 12-27 infra.
3. Id. at 28-29. Justice Stewart wrote the opinion for the majority, with Justices Rehnquist and Powell dissenting. Justice Rehnquist wrote a dissenting opinion with Justice Powell joining in Part II of that opinion. Id.
4. The trial de novo is a part of a two-tiered court system. An inferior court—the district court in North Carolina—has limited jurisdiction over misdemeanors and provides only non-jury trials. A defendant convicted in district court has an absolute right to a new trial in superior court regardless of plea, judgment or sentence. The superior court has general criminal jurisdiction and jury trial is provided. In superior court the slate is wiped clean, and new findings of law and fact are made without regard to error in the lower court proceedings. N.C. GEN. STAT. § 7A-290 (Supp. 1B, 1974); see Colten v. Kentucky, 407 U.S. 104, 113-14 (1972); State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); State v. Bryant, 11 N.C. App. 423, 181 S.E.2d 211 (1971).
5. The Court's analysis of the defendant's guilty plea to the felony charge raised a second issue which is in itself noteworthy. Prior decisions of the Supreme Court have limited the review of convictions based on guilty pleas to the question of whether the guilty plea was voluntary. Tollett v. Henderson, 411 U.S. 258 (1973); Parker v. North Carolina, 397 U.S. 790 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970). Relief has been denied to defendants who pleaded guilty voluntarily even though there was a constitutional violation in the proceedings "antecedent" to the guilty plea. Tollett v. Henderson, supra at 265-66. In Blackledge, however, the Court granted the defendant relief without regard to the voluntariness of the plea because the due process violation went to the "power of the State to bring the defendant into court" on the felony charge. 417 U.S. at 30. The Court distinguished the prior cases on the ground that the constitutional defect in Blackledge could not be "cured." Id. at 30-31. The remedy for the due process violation was "to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct
On a petition for a writ of habeas corpus, defendant alleged that the practice of increasing the charge at a trial de novo violated the due process clause of the fourteenth amendment.6

The issue before the Court was whether the practice of raising the charge against a defendant at a trial de novo presented the "hazard of vindictiveness."7 The Court found that the prosecutor has a "considerable stake" in discouraging appeals since every appeal dissipates valuable prosecutorial resources.8 The prosecutor can "up the ante" by raising the charge and thus be assured that few defendants will "brave the hazards of a de novo trial."9 Because the defendant's apprehension of retaliation will deter him from exercising his statutory right of appeal, the Court concluded that the situation "pose[d] a realistic likelihood of 'vindictiveness'"10 and held that raising the charge at a trial de novo violated the due process clause of the fourteenth amendment.11

The rationale of Blackledge v. Perry is derived from previous Supreme Court decisions that preclude states from "chilling" the exercise of constitutional rights.12 The Court has carefully scrutinized actions by states that deter defendants from exercising their rights by penalizing those who assert them,13 finding some of these burdens unconstitutional.14 Three situations in which the states have placed burdens on the exercise of constitutional rights have been considered.

In the first situation, a burden is placed on the assertion of a single constitutional right. The Court has held that in this situation a state may compel defendants to choose between asserting or waiving a constitu-

6. 417 U.S. at 25. The defendant also argued that raising the charge at a trial de novo violated the double jeopardy provision of the Constitution, but the Court did not reach this issue.
7. See id. at 27; note 31 infra.
8. 417 U.S. at 27.
9. Id. at 27-28.
10. Id. at 27.
11. Id. at 28-29.
tional right so long as "compelling the election [does not impair] to an appreciable extent any of the policies behind the rights involved." In *Griffin v. California* the Court held that a prosecutor may not comment to the jury on the fact that the defendant did not testify at trial. The Court stated that the fifth amendment privilege against self-incrimination outlawed the "inquisitorial system of criminal justice" and that to allow the prosecutor to draw negative inferences from the defendant's exercise of the privilege would severely undercut its meaning. In *Crampton v. Ohio,* however, the Court found that the policies behind the fifth amendment privilege did not necessitate separate trials on the issues of guilt and punishment when the decision on each is left to the jury. The Court recognized that at a single trial the defendant may be deterred from exercising his fifth amendment privilege in order to testify on the issue of punishment. The defendant might, therefore, elect to testify, thus possibly damaging his case on the issue of guilt. Nevertheless, since the policies behind the privilege do not preclude cross-examination and impeachment of a defendant who takes the stand, even though his case on guilt may thus be damaged, the Court found that the burden placed on the defendant's right in *Crampton* was not unconstitutional.

In the second situation, a single burden inhibits the exercise of more than one constitutional right. In this situation the Supreme Court has looked solely to the effect of the burden on the exercise of the constitutional rights involved. In *Simmons v. United States* the Court held that a burden that compels a defendant to choose between asserting one constitutional right or another is unconstitutional. Likewise, in *United States v. Jackson* the Court declared unconstitutional a portion

17. Id. at 614-15.
19. Id. at 214-15.
20. Id. at 216-17.
21. 390 U.S. 377 (1968). In *Simmons* the defendant testified at a hearing on a motion to suppress evidence from an allegedly illegal search and seizure. His testimony was admitted at trial against him on the issue of guilt. The Court reversed the conviction holding that a state may not require a defendant to surrender his fifth amendment privilege against self-incrimination in order to assert a fourth amendment right; to compel an election between rights is unconstitutional. *Id.* at 394.
22. 390 U.S. 570 (1968). In *Jackson* the defendant claimed he was compelled to plead guilty to a charge under the Federal Kidnapping Act, 18 U.S.C. § 1201(a) (1970), since the death penalty could be imposed only by the jury. The Court found that the punishment provision in the statute not only deterred the defendant from asserting his sixth amendment right to jury trial but also his fifth amendment privilege not to plead guilty. 390 U.S. at 581.
of a statute that inhibited the exercise of the defendant's sixth amendment right to jury trial and fifth amendment privilege against self-incrimination. Even though the Court found that there was a valid purpose behind the statute, its effect on the exercise of basic rights made the statute unconstitutional.\textsuperscript{23}

The third situation the Court has considered is that in which a state places a burden on the right of appeal. The Constitution does not require the states to grant appeals from criminal convictions.\textsuperscript{24} Once avenues of review are established, however, the due process clause of the fourteenth amendment protects the defendant's free exercise of his statutory right.\textsuperscript{25} When the right of appeal is concerned, the Court has developed a unique standard for determining whether a burden is unconstitutional. Instead of looking solely to the effect the burden has on exercising the right to appeal, the Court examines the State's purpose for imposing the burden. If the State's purpose is to deter appeals, the actions are "vindictive" and the burden is unconstitutional.\textsuperscript{26}

The "vindictiveness" standard was first articulated by the Court in \textit{North Carolina v. Pearce}.\textsuperscript{27} In \textit{Pearce} the Supreme Court invalidated a higher sentence received by the defendant from the same court following a successful appeal and reconviction. Since there was a likelihood that the sentence was imposed in retaliation against the defendant for pursuing an appeal,\textsuperscript{28} the Court found that the increased sentence operated as a penalty. The Court recognized that apprehension of such retaliation would deter other defendants from seeking appellate review and therefore held that due process limited judicial discretion in determining sentences.\textsuperscript{29} The decision, however, was not based on the actual motives or apprehensions of the persons involved. The Court instead drew its conclusions from an analysis of the objective circumstances.\textsuperscript{30}

The factors presenting what the Court has termed the "hazards of vindictiveness" were explored more fully in two subsequent cases.\textsuperscript{31} In

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\item \textsuperscript{23} 390 U.S. at 591.
\item \textsuperscript{24} Ross v. Moffitt, 417 U.S. 600, 606 (1974); McKane v. Durston, 153 U.S. 684, 687 (1894).
\item \textsuperscript{26} See 417 U.S. at 25-26; North Carolina v. Pearce, 395 U.S. 711, 725 (1969).
\item \textsuperscript{27} 395 U.S. 711 (1969).
\item \textsuperscript{28} Id. at 724-25.
\item \textsuperscript{29} Id. at 724.
\item \textsuperscript{30} Blackledge v. Perry, 417 U.S. at 28. The Court specifically stated that in \textit{Blackledge} there was no evidence of actual maliciousness on the part of the prosecutor.
\item \textsuperscript{31} Chaffin v. Stynchcombe, 412 U.S. 17, 25 (1973).
\end{itemize}
Colten v. Kentucky\textsuperscript{32} defendant was convicted in district court and appealed to the superior court for a trial \textit{de novo}. Following his conviction in the superior court defendant received a longer sentence than he had received in the district court. The defendant in Chaffin v. Stynchcombe\textsuperscript{38} was initially tried and sentenced by a jury and successfully appealed his conviction. He was retried by a different jury which imposed a longer sentence. In both of these cases the Supreme Court found that the increased sentence did not constitute an unconstitutional burden on appeal.\textsuperscript{34} According to the Court, the key element of "vindictiveness," a motive for retaliation, was absent.

Colten turned on the fact that the court which imposed the second sentence was different from the court imposing the first sentence.\textsuperscript{35} Unlike in Pearce, the judge at the trial \textit{de novo} is not asked to do again what he thought he had done properly the first time.\textsuperscript{36} In Chaffin, not only were the two juries different, but the Supreme Court found that, in general, juries do not have an institutional interest in discouraging appeals.\textsuperscript{37} Although in both contexts a burden is placed on appeal since a longer sentence can result, the increase is permissible because it is not designed to deter appeals.\textsuperscript{38}

The decision in Blackledge v. Perry is a logical extension of these cases. The Court focused for the first time on the actions of the prosecutor to determine if an unconstitutional burden was placed on appeal. In order to discern whether the purpose of raising the charge was to deter appeals, the Court examined the situation to see if it "pose[d] a realistic likelihood of 'vindictiveness'."\textsuperscript{39} The elements of vindictiveness were satisfied: 1) a penalty or burden—the increased

\begin{itemize}
\item 32. 407 U.S. 104 (1972).
\item 33. 412 U.S. 17 (1973).
\item 34. \textit{Id.} at 26; 407 U.S. at 116.
\item 35. 407 U.S. at 116.
\item 36. \textit{Id.} The Court may be right in concluding that one type of retaliatory motive stems from the fact that the court imposing sentence has been corrected on appeal and this factor is absent at the trial \textit{de novo}. The Court, however, failed to take into account the institutional interest in discouraging appeals that all courts have in common. The pressure of the backlog of criminal cases could easily provide a strong motivation for judges to discourage appeals. Even though a trial \textit{de novo} is a new trial on the merits, it is certain that the judge knows that the case is an appeal filling up his docket. See Alpin, \textit{Sentence Increases on Retrial After North Carolina v. Pearce}, 39 U. CIN. L. REV. 427, 432-33 (1970) [hereinafter cited as Alpin].
\item 37. 412 U.S. at 27.
\item 38. \textit{Id.} at 29; 407 U.S. at 116. In both Chaffin and Colten the Court found that the jury and judge possess the power to determine punishment on the basis of a fresh evaluation of the evidence and demeanor of the defendant. Flexibility in this process was seen to serve a legitimate purpose. 412 U.S. at 32; 407 U.S. at 117.
\item 39. 417 U.S. at 27.
\end{itemize}
charge—resulted from the defendant's exercise of his right of appeal; 40
2) a motive for retaliation was present since the prosecutor has a desire
to conserve state resources; 41 and 3) the same state representative, the
prosecutor, was involved throughout the appellate procedure. 42

The Court concluded that since fear of prosecutorial vindictiveness
would deter defendants from exercising their right of appeal, the due
process clause of the fourteenth amendment precluded the prosecutor
from raising the charge at a trial de novo. 43 This absolute prohibition
against increasing the charge is a more drastic remedy than the one
fashioned by the Court in North Carolina v. Pearce. 44 In Pearce the
Court permitted the judge to increase the sentence following an appeal if
the increase was supported by objective evidence of the defendant's
conduct ascertained subsequent to the first hearing. 45 This remedy was
purportedly designed to eliminate the motivation for retaliation. 46 The
remedy may more accurately be viewed as designed to dispell the
defendant's fear of retaliation by removing the court's ability to penalize
him. 47 The motivation to deter appeals may still be present, but the
method of implementing it is eliminated. Realization by the defendant
that a penalty cannot be imposed for appealing relieves the burden on
appeal.

The remedies for vindictiveness, however, do not reflect solely the
perspective of the defendant. Rather, the apprehensions of the defendant
are balanced against policy considerations that favor retaining discretion
by the party imposing the burden. 48 In Pearce, for example, the Court
allowed the judge to retain some discretion in sentencing. Flexibility in
the sentencing process is balanced against the deterrent effect an in-

40. Id. at 27-28.
41. Id. at 27. The necessity of the presence of this factor is seen by the Court's
decisions in Chaffin and Colten, see text accompanying notes 32-38 supra.
42. 417 U.S. at 27.
43. Id. at 28-29.
44. 395 U.S. 711 (1969). Justice Rehnquist, in his dissent, argued that the remedy
fashioned by the majority went beyond the identified wrong. 417 U.S. at 34. He felt the
appropriate remedy would be to resentence the defendant in accordance with Pearce and
let the felony conviction stand. 417 U.S. at 39. Although the sentence a defendant
receives is the greatest deterrent to appeal, Justice Rehnquist did not take into account
the collateral consequences flowing from a felony conviction such as loss of voting rights
in some states. Resentencing the defendant would not remove these further penalties on
the defendant. See generally Special Project, The Collateral Consequences of a Criminal
Conviction, 23 Vand. L. Rev. 929, 955-60 (1970); text accompanying notes 46-53 infra.
45. 395 U.S. at 726.
46. Id. at 725-26.
47. See 417 U.S. at 28.
creased sentence has on appeal. By limiting the increase to those situations in which the defendant's conduct warrants increased punishment, the judge can "[fit the punishment to] the offender and not merely the crime"\textsuperscript{49} while assuring the defendant that the increase will not be imposed vindictively.

The balance between the state's interest and the defendant's interest is resolved differently when the prosecutor is involved. The policies favoring judicial discretion and flexibility in sentencing are not applicable to prosecutorial discretion in determining charges. The defendant's apprehension of retaliation is greater in the \textit{Blackledge} situation because the prosecutor is his adversary.\textsuperscript{50} There is no way to make the power to raise the charge conditional on a showing of a permissible purpose and at the same time remove the penalty on the defendant that deters appeals. While there may be permissible reasons for raising the charge in some cases, such as the discovery of new evidence, the defendant's apprehension of retaliation would not be dispelled. The defendant in the \textit{Pearce} situation maintains a degree of control over an increase in sentence by his conduct.\textsuperscript{51} After the initial charge in the \textit{Blackledge} situation, however, the prosecutor and not the defendant has control over increasing the charge.\textsuperscript{52} The fact that the prosecutor could later justify his actions to a court and show that there was no actual vindic-


\textsuperscript{50} Justice Rehnquist noted that the prosecutor is a "natural adversary" of the defendant but did not think that this fact would contribute to the possibility of vindictiveness. It is rather peculiar that a judge, as in \textit{Pearce}, who is presumably impartial to the issue of defendant's guilt would necessitate greater scrutiny than a prosecutor whose job is to obtain convictions. 417 U.S. at 32-34; see Alpin, \textit{supra} note 36, at 452.

\textsuperscript{51} It is uncertain exactly what type of objective evidence is permissible to support an increase in sentence. The Court stated that it must be "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726 (emphasis added). Although this language strongly indicates that evidence of prior conduct of the defendant coming to the judge's attention for the first time at the second sentencing hearing would be excluded, the Supreme Court will have to clarify this point. See Alpin, \textit{supra} note 36, at 444-45.

\textsuperscript{52} The factors which would cause a prosecutor to raise the charge bear no relationship to anything the defendant does, but depend upon external events. The discovery of new evidence, for instance, supporting a higher charge depends upon the thoroughness of the prosecutor's investigation. Justice Rehnquist notes that a prosecutor may seek a lower court determination because it is expeditious even though he has the evidence to obtain a conviction on a higher charge. 417 U.S. at 34. In each case, the opportunity for raising the charge is not tied to any action by the defendant other than appeal. Because the prosecutor has a great deal to gain from deterring appeals the defendant will always view the actions as vindictive. Whereas in \textit{Pearce} the defendant could control the length of sentence by ordering his conduct accordingly, in \textit{Blackledge} the only way the defendant can be assured the charge will not be raised is to refrain from appealing.
tiveness does not remove the defendant's fear of retaliation. The defendant will still view the power to raise the charge as an opportunity for retaliation and will thus be deterred from appealing.

Although society has an interest in convicting the defendant for the highest offense his conduct warrants, the prosecutor serves this interest by bringing the initial charge. Once the charge has been brought, the defendant's interest in a fair trial must be served. If a defendant is deterred from appealing he has lost his only opportunity for a review of the fairness of his conviction. The power of the prosecutor to raise the charge on appeal has too grave an effect on the rights of the defendant to give the prosecutor a second chance to promote society's interest.

The rationale of Blackledge may be applied to curtail the power of the prosecutor to raise the charge following appeal in three contexts outside the trial de novo:53 1) when the prosecutor reindicts the defendant for a higher charge based on the same conduct following normal channels of appeal;54 2) when the prosecutor reindicts the defendant under a recidivist statute calling for increased punishment on conviction;55 and 3) when the defendant is tried on the original indictment after successfully challenging a guilty plea conviction on a lesser included offense.56

The first two situations present the same elements of vindictiveness found in Blackledge. The same retaliatory motive recognized in Blackledge is present in both. Reindicting the defendant on a higher charge or under a recidivist statute operates as a penalty for pursuing an appeal and the state's representative, the prosecutor, is involved throughout the proceedings. Since the defendant's apprehension of prosecutorial vindictiveness would deter him from appealing, the remedy fashioned in Blackledge may be appropriately extended to limit the charge on retrial of the defendant to that originally brought.57

57. In Ewell v. United States, 383 U.S. 116 (1965), the Supreme Court earlier rejected a double jeopardy challenge to the retrying of a defendant on additional charges
The situation in which a defendant is retried on the original charge after successfully challenging a guilty plea to a lesser included offense presents a different question. A plea bargain consists of a guilty plea by the defendant in return for a moderate sentence or a conviction on a lesser included offense. An appeal from a plea bargain is generally limited to a consideration of the voluntariness of the guilty plea.\(^8\)

Although the likelihood of retrial on the original charge contained in the indictment may deter a defendant from exercising his right of appeal, it is doubtful that the state has placed any burden on the right of appeal at all. In a sense, the plea bargain falls outside the normal channels of the criminal process. The defendant who participates in a plea bargain has been relieved of trial on the greater charge by pleading guilty to a lesser offense. A successful appeal places him in the same position that he was in prior to the guilty plea. The charge on retrial is the same charge that initiated the proceedings against the defendant; the prosecutor has not "upped the ante." The defendant is deterred from appeal not because the state has imposed a burden, but because the defendant has received a benefit that he does not want to relinquish.\(^5\)

By holding that prosecutorial vindictiveness can place an unconstitutional burden on the right of appeal, the Supreme Court has liberated the concept of vindictiveness from the sentencing context. The reasoning in *Blackledge v. Perry* indicates that the holding may extend beyond the limited situation of the trial *de novo* to curtail the power of the prosecutor to raise the charge following normal channels of appeal. *Blackledge* arising from the same conduct that formed the basis for the original indictment. The precedential effect of the *Ewell* decision, however, is questionable. *Ewell* arose prior to the Court's articulation of the "vindictiveness" standard in *North Carolina v. Pearce*. In addition, *Ewell* was decided on double jeopardy grounds. The Court made a distinction in *Pearce* between the two claims. Even in *Pearce*, the Court rejected the defendant's argument that the increase in sentence violated the double jeopardy clause. 395 U.S. at 719-21. The Court, however, went on to rule in favor of the defendant on due process grounds. *Id.* at 725-26. If a case similar to *Ewell* were presented to the Court today, the Court could easily find a due process violation without overruling *Ewell*.\(^3\)

58. See note 5 supra.

59. But see Note, 62 CALIF. L. REV., supra note 56. Plea bargaining presents special problems in criminal procedure that the Court has not squarely faced. Retrial on the original charge is a deterrent to appeal even though it does not fit into the vindictiveness analysis. Although the defendant may be retried on the original charge because of the actual desire of the prosecutor to secure the finality of convictions, society has a greater interest in securing a conviction on the highest charge the evidence supports. Unlike in *Blackledge*, society's interest was never fully served because of the plea bargain. The defendant's interest is not protected since he may be deterred from appeal. The only true benefit of plea bargaining is the fast and final disposition of cases. Because plea bargaining is so widespread, it should be thoroughly examined by the Supreme Court and constitutional standards should be determined.
and other cases applying the vindictiveness standard indicate that some burdens may be placed on the defendant's right of appeal, but that acts of the state designed to deter appeals are unconstitutional.

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The Statute of Frauds—Application of the Main Purpose Rule: Eliminating a Short Cut Through the "Corporate Veil"

The statute of frauds makes unenforceable the promise of one person to assume the debt or to guarantee the credit of another unless the promise or guarantee is supported by a writing signed by the promisor.\(^1\) The chief limitation on this application of the statute is the so-called "main purpose" or "leading object" rule, which defeats the operation of the statute when the promisor has a personal pecuniary interest in the transaction concerned.\(^2\) In *Burlington Industries v. Foil*\(^3\) the North Carolina Supreme Court attempted to clarify what had become a haphazard application of the main purpose rule to oral representations made by corporate officers, directors, or shareholders concerning corporate debt. The opinion adhered to the classical standard for application of the main purpose rule, rejecting any per se application of the rule in the context of the close corporation.

The two individual defendants in *Burlington*, Martin B. Foil, Jr., and William H. Taylor, both were officers, directors, and shareholders in the bankrupt, Colonial Fabrics, Inc., a North Carolina corporation.\(^4\) Colonial, a close corporation,\(^5\) was organized in 1970 and achieved a

\(^1\) This provision has remained essentially unchanged since the passage of the original statute of frauds in 1676. The act was originally titled "An Act for the Prevention of Frauds and Perjuries." 29 Car. II, c. 3 (1676).

\(^2\) A clear statement of the main purpose rule is found in *Emerson v. Slater*, 63 U.S. (22 How.) 28, 43 (1859):

> Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.

This portion of the *Emerson* opinion is quoted verbatim by the North Carolina Supreme Court in *Burlington Indus. v. Foil*, 284 N.C. 740, 748, 202 S.E.2d 591, 597 (1974).

\(^3\) 284 N.C. 740, 202 S.E.2d 591 (1974).

\(^4\) *Id.* at 741, 202 S.E.2d at 593.

\(^5\) Colonial's president, E. B. Fowler, owned one-half of the stock. Defendants