In the

Supreme Court of the United States

DON BORDENKIRCHER, Superintendent, Kentucky State Penitentiary,

Petitioner,

vs

PAUL LEWIS HAYES,

Respondent.

No. 76-1334

Washington, D. C.
November 9, 1977

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v.	No. 76-1334
PAUL LEWIS HAYES, Respondent.	

Washington, D. C.,

Wednesday, November 9, 1977.

The above-entitled matter came on for argument at 10:31 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

A APPEARANCES:

ROBERT L. CHENOWETH, ESQ., Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601; on behalf of the Petitioner.

J. VINCENT APRILE II, ESQ., Assistant Deputy Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Bordenkircher against Hayes.

Mr. Chenoweth, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT L. CHENOWETH, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CHENOWETH: Mr. Chief Justice, and may it please the Court:

The question the Petitioner presents to Your Honors by this case is whether an indictment under an habitual criminal statute by the State is constitutionally prohibited when it is brought after an accused has rejected a plea inducement offer.

It is Petitioner's position, and submit it should be the position of this Court, that the prosecutive procedure used in this case does not violate any constitutional rights of a defendant.

The record in this case is a simple one, and the basic facts are not in dispute. Of importance, though, I believe, is that the Commonwealth of Kentucky had overwhelming proof of Mr. Hayes' guilt.

Mr. Hayes had been charged with a substantive offense of uttering a forged instrument which, under Kentucky law, carried a possible sentence of two to ten years in the

penitentiary. The prosecutor offered --

QUESTION: For forgery of an $88 check.

MR. CHENOWETH: This was not a forgery, Your Honor, this was uttering. There being a difference of --

QUESTION: Well, it was uttering an $88 check.

MR. CHENOWETH: Yes, Your Honor, it was an $88 check.

QUESTION: And you get how many years for that in Kentucky?

MR. CHENOWETH: The possible penalty range for that substantive offense is two to ten years. This is under the law as it existed prior to our Kentucky Penal Code. That law has been changed.

QUESTION: Good!

[Laughter.]

MR. CHENOWETH: The prosecutor offered a sentence recommendation to Mr. Hayes of five years on this uttering charge. This offer was rejected, although Mr. Hayes was advised, prior to the rejection, that an enhancement charge could be brought in view of Mr. Hayes' two prior felony convictions.

After the rejection, the prosecutor did go back to the grand jury, did re-indict so as to include in the indictment an enhancement charge and the original substantive offense of uttering a forged instrument.

The Petitioner believes that it is important in this case to consider the unique character of an enhancement statute as it relates to plea negotiation. This Court, in Oyler vs. Boles, indicated that an habitual criminal enhancement charge does not create a separate and distinct substantive offense.

QUESTION: Let me interrupt you just a second, if I may, General Chenoweth.

MR. CHENOWETH: Sure.

QUESTION: In the course of the plea bargaining, did the prosecutor offer to drop any of the charges, or simply to make a sentence recommendation?

MR. CHENOWETH: At the time that the plea negotiations were going on, at a pretrial conference -- really two pretrial conferences. At that time there was only the singular substantive offense of uttering a forged instrument. But there was not -- it was really a sentence recommendation possibility, in that there were no other charges to deal with at that time. The basic plea inducement capability at that time really was a sentence recommendation.

The enhancement statute doesn't constitute a substantive offense, and I think that's very critical, in view of the prosector's broad discretionary powers in deciding whether to charge and what to charge, and especially so as this relates to the natural interest, for a number of reasons, of a prosecutor

seeking to enter into plea negotiations with the criminally accused.

This case, then, involves the timing and the scope of a prosecutor exercising his charging discretion when the possibility of an habitual criminal charge exists, a non-substantive offense, and a plea negotiation is, neverthless, desirable.

Now, if the prosecutor is faced with facts that would support an indictment on the substantive offense, and a non-substantive enhancement charge, the prosecutor has to decide whether he wishes to indict the accused as an habitual offender. And, if so, he has further to decide whether to seek an indictment on that habitual criminal statute at the time the principal offense indictment is returned. He is faced with that kind of decision when he has the facts, initially before him.

Now, it may be that the prosecutor will decide that an indictment is proper under an habitual statute; but since the prosecutor, in looking at the facts of the case, has determined that he intends to offer some kind of plea inducement on the substantive charge, that he will decide that the plea negotiations can proceed more fairly and proceed more expeditiously if an indictment on the substantive offense only is sought at that time.

QUESTION: Well, let me interrupt you there. Why would

he reach that conclusion? Do you think that plea bargaining is more likely to ensue with an initial lighter charge than the enhancement aspect?

MR. CHENOWETH: Yes, very definitely, if I understand your question, Mr. Justice Blackmun. The very reason that a prosecutor will come to that kind of conclusion, when he has those facts before him, is that if he has a strong case, as there existed in this Hayes case, he has to realize that if he is going to enter into any kind of plea negotiations, that he cannot enter into plea negotiations if there is an habitual charge already on the books. He has --

QUESTION: Why not?

MR. CHENOWETH: Well, he has to be willing, if he has already gotten the case to the posture of having an habitual charge, he's going to have to be willing to remove that habitual charge before he can go to the prosecutor [sic] and say, "I am willing to enter into plea negotiations", because no defendant is ever going to plead guilty to a charge as long as that enhancement statute is still on the books. It would still continue to enhance whatever the plea arrangement that was arrived at.

So the prosecutor has to be willing, if that indictment on the habitual charge is brought in the beginning, --

QUESTION: Well, you're coming up from the other side of the case. Why doesn't the prosecutor bring everything in

the original indictment or information? Everything. And take it from there, with his plea bargaining, if that's what he wants.

MR. CHENOWETH: Because if he -- if he brings everything, he is going to have to -- and he desires to go forward with plea negotiations, he is bringing an element into the negotiations that he really need not bring. And that is the habitual criminal indictment.

QUESTION: But you're saying that he has to give away more --

MR. CHENOWETH: That's really so, --

QUESTION: -- in order to arrive at a deal.

MR. CHENOWETH: -- he does have to give away more. He has to say to that defendant: "Here is what I am giving to you. And the first thing that I have to give to you is that I will be willing to go to the court and move to dismiss the habitual criminal indictment."

QUESTION: Well, doesn't that sound like a better deal for the defendant, then?

MR. CHENOWETH: I don't know why that it should, in the --

QUESTION: It isn't anything that's strange to the defendant; he knows what his record is. And he knows this is hanging over him, like a sword, so to speak. I just don't -- I guess I have trouble following any explanation of why the

one charge is initially brought and the other used as dynamite in reserve.

MR. CHENOWETH: Well, it's really that -- it seems to me, the type of thing that, why should the prosecutor go forward on a charge, a non-substantive charge, as involved in this case, and indict on that habitual criminal element of the case, and then turn right around and be willing -- "I've got it, but now I'll be glad to give it away if you'll go forward on plea negotiations".

QUESTION: Well, I'll give you one reason that neight you nor your opposition suggest -- at least I think it's a reason. Isn't bail likely to be higher?

MR. CHENOWETH: Oh, yes, but we're talking at that point in time of, in fact, a procedure that you are indicating, of bringing everything in the first instance, that that's going to work to the detriment of the defendant, not the prosecution.

If the prosecution goes in and indicts on the initial --

QUESTION: I realize this, and I intend to ask your opponent that same question. But I think this is a consequance that perhaps is a reason for not bringing the initial one, the full charge initially.

But --

MR. CHENOWETH: Very definitely.

QUESTION: -- I don't think anybody is being fooled, everyone knows what the record is.

MR. CHENOWETH: Sure, they understand that there are prior felonies in existence. But I think that we are talking about -- we are talking about two ways to get to the same point: either bring them from the beginning and be willing to give up the enhancement if you're going to go forward on plea negotiations, or if you believe that there's a reasonable possibility of entering into plea negotiations and arriving at a plea arrangement, and especially you're going to feel that way if you have an overwhelming case, as you had here, of proof of guilt, that the -- that why get that indictment for the enhanced offense on the books and then be willing to turn right around and, in the statement of one writer, give the sleeves off your vest? You're not really giving the defendant anything. You have to get rid of that or you're never going to go further on any kind of plea inducement, whether it be sentence recommendations, charge dismissal, or having a lesser included offense type of plea inducement.

So we think here --

QUESTION: General Chenoweth, --

MR. CHENOWETH: Yes, Mr. Justice?

QUESTION: -- after -- in your Commonwealth of Kentucky, after a grand jury has indicted someone on an habitual criminal, under your habitual criminal statute, may

the prosecutor dismiss that indictment without consent of the court? Is he free to do whatever he wishes to?

MR. CHENOWETH: Yes, there is, to my knowledge, no guidance; the courts, on that type of charge, the prosecutor goes to the court and that charge would be dismissed, that there is not -- the court has to accept the motion.

QUESTION: Just on the prosecutor's say-so. The court --

MR. CHENOWETH: But as far as --

QUESTION: It doesn't require consent of court; or, if it does, it's a rubber-stamp operation, is that it?

MR. CHENOWETH: Well, consent of the court, to the extent you would have to make the motion and an order would have to be entered.

QUESTION: Then it would be pro forma granted.

MR. CHENOWETH: I think that would be very safe to say, Your Honor. That this is a matter within that discretionary power of the prosecutor, and the judge is not going to tell the prosecutor --

QUESTION: Well, it's the grand jury who has indicted, who has brought the indictment.

MR. CHENOWETH: This is so, upon request of the prosecutor.

QUESTION: Upon the showing of the prosecutor, yes.

MR. CHENOWETH: Yes.

QUESTION: But this can be dismissed in the -- in fact, in practical fact, in the unreviewable and untrammeled discretion of the prosecutor; is that it?

MR. CHENOWETH: I think it's safe to say that --

QUESTION: As a matter of practice in the Commonwealth.

MR. CHENOWETH: -- the judge is not going to say to the prosecutor that you go forward with that which you don't want to go forward with.

QUESTION: Right.

MR. CHENOWETH: So, to that extent, I think that it would be a very, very rare situation where that would be denied.

QUESTION: Yes.

QUESTION: Well, are you really saying that? As I understand your answer, you're saying there is no discretion on the part of the court, once the prosecutor takes the position the court has to go along.

MR. CHENOWETH: I would not go so strongly as to say that, no, I don't intend to say that.

QUESTION: Then there is some discretion on the part of the court.

MR. CHENOWETH: I think, sure, that there would exist discretion in the judge, to say to the prosecutor that "I want to have reason, I want to have some greater showing

than a mere"--

QUESTION: Well now, wait a minute. Now you've given two different answers.

I asked for information and you said it was a rubber-stamp pro forma operation, and now you're saying something quite different. Now, what is the answer?

MR. CHENOWETH: Okay, let me please try and explain that.

What I am saying, Mr. Justice Stewart, is that I think, in almost all situations that it would be plainly a pro forma type of --

QUESTION: Does your law require that despite -- that a grand jury indictment can be dismissed only with consent of the court, or doesn't it? First of all, just what the law provides.

MR. CHENOWETH: The judge does have to pass on it, yes.

QUESTION: Right.

MR. CHENOWETH: So, to that extent, it is with the consent of the court.

QUESTION: Right.

MR. CHENOWETH: But I cannot conclusively say that there could never be a possibility of the judge denying it. I cannot say that he has no choice but to grant it. But he is going to, and history would bear out that he has. I've

never known of a situation of a judge ever denying a motion to dismiss.

QUESTION: Right.

MR. CHENOWETH: But I think, under some circumstances, I cannot begin to say that a judge would --

QUESTION: But, in your experience or knowledge, you've never heard of it; --

MR. CHENOWETH: That is correct.

QUESTION: -- is that right? In the Commonwealth of Kentucky.

MR. CHENOWETH: I can very conscientiously say that, I've never seen a judge refuse a motion by a prosecutor --

QUESTION: Or never heard of it?

MR. CHENOWETH: No, Your Honor; I can say that I've never heard of it, either.

In this case, the prosecutor did make the decision to go on the substantive charge of uttering only, made the offer of a recommendation, sentence recommendation, and at the same time -- or at that time of plea negotiations, at the pretrial conference -- did inform Mr. Hayes, as of course Mr. Hayes knew, that he had two prior felonies, that he could go back, that it was an alternative to go back and get the enhancement statute.

Mr. Hayes, faced with that, with counsel present, chose to exercise his Fifth and Sixth Amendment rights, chose

to plead not guilty and rejected the proffered negotiated arrangement of the prosecutor.

Now, I think that the -- in this situation we have, from the United States Court of Appeals for the Sixth Circuit, we have a situation of the Court having said, recognizing that there are two ways to get to the same point, that if you do it one way, that that's vindictive, that that's in violation of constitutional rights. But if you do it the other way it is not.

By that we're saying that if you indict in the beginning on the substantive offense and the enhanced charge, and then go to the defendant and say, "I'm willing -- I got it a minute ago, now I am willing to move to dismiss it if we can enter into some kind of plea negotiation. If not, we'll go forward in the trial with the enhancement on the books, which could subject you to life if you had two prior felony convictions."

But that is an accepted plea negotiation, an accepted offer. But if you, in the face of, as in this case, overwhelming charges, if you believe that a plea arrangement can be entered into and you go only on the substantive offense, while informing that the alternative does exist, that if you then, after the plea is rejected, that you go forward and do that, which is legally permissible by the -- the prosecutor go back to the grand jury, that that's vindictive, that that's in

violation of --

QUESTION: Well, what would happen if the prosecutor said, "We've got overwhelming evidence of your uttering the $88 check; we also have -- and you're indicted for that -- we also have overwhelming evidence that you also embezzled $460. If you don't plead on the check, we'll indict you on the other one"?

MR. CHENOWETH: If I understand your question correctly, we're talking about completely unrelated offenses, not arising out of the same conduct.

QUESTION: Well, that's okay?

MR. CHENOWETH: No, I am not saying that is okay, I'm not saying that that's really an aspect of this case at all. I think it's a very different consideration.

QUESTION: I didn't say, I said it was -- I said it was entirely different. Would you find anything wrong with that?

MR. CHENOWETH: I think that here --

QUESTION: Would that be using some pressure?

MR. CHENOWETH: No, I do not find pressure as being in violation of due process at the plea bargaining stage. I think the very nature of the plea negotiation stage, or the pretrial stage, recognizing the adversary nature of the prosecutor --

QUESTION: Suppose he says, "We also have over-

whelming evidence that your wife also stole $180; if you don't plead, we'll indict her"?

MR. CHENOWETH: I think, and certainly we recognize, as this Court recognized, as Mr. Chief Justice Burger indicated in the Santobello case, that there are limits. It's not a carte blanche, and we don't begin to argue -- nor would we argue, if those were the facts before us, that a prosecutor has absolute carte blanche to do whatever he wishes, including physical pressure.

QUESTION: Well, go back to my original one. If he says, "We can indict you for another offense, you uttered two checks, one for $88 and one for $160, and we've got the best evidence in the world on both of them; now, we've got you on the $88 one, we've got you indicted on that one. If you plead guilty on that one, we won't indict you on the other one."

MR. CHENOWETH: I think that is very legitimate plea negotiations. What we're talking about, in the language of some commentators to this area, is what is called horizontal overcharging. And that's really what we're talking about when we have different substantive offenses that do not relate -- or maybe they do relate --that a prosecutor has that discretion to decide what to charge. And he really, in a strong case he is going to, in many instances, charge initially on those things that he feels he is -- that he will be able to best negotiate a plea of guilty for.

But at that point in time, before we've ever gone to the trial process, I think that those kinds of additional substantive offenses is legitimate coercion, if you will, if that's the term that has been used, I think that is legitimate coercion. Because the very nature of the proceedings at that point in time, with the prosecutor having really an overwhelming amount of discretion.

QUESTION: Of course, there's some people that won't agree that you can have "legitimate pressure" --

MR. CHENOWETH: Yes, I know there are --

QUESTION: That one means apples and the other means rocks.

MR. CHENOWETH: That there cannot be that --

QUESTION: There are people that say that.

MR. CHENOWETH: And there are people that would like to say that the plea negotiation process has no place in our criminal justice system.

QUESTION: They're not the same people!

MR. CHENOWETH: Yes, that may be so, but yet, still, clearly to say that there are people having different viewpoints on various aspects --

QUESTION: Well, even you say that there are limits that the prosecutor couldn't go to; even you say that.

MR. CHENOWETH: Sure.

QUESTION: I believe everybody agrees on that.

MR. CHENOWETH: We would be very, very foolish to say otherwise, of course.

QUESTION: Right.

MR. CHENOWETH: The United States Sixth Circuit Court of Appeals, in deciding that one way is violation of due process rights and the other is not, based its decision in great respect on the decisions of this Court in North Carolina vs. Pearce and the Blackledge vs. Perry cases.

It seems that by citing those cases and implying the rationale of those cases, that the Court, the Sixth Circuit, seemed to forget that the prosecutor is the natural adversary of the defendant, and that the prosecutor has to consider society's interest in handling criminal cases.

Now, this case, the Hayes case, is simply not one which should be controlled by the decisions of this Court in Pearce and Blackledge. Petitioner urges that there should be no extension of that prophylactic rule of the Pearce and Blackledge cases.

We think that the distinguishment is that in plea negotiation there is some burden constantly existing, there is some chilling of constitutional rights constantly going on. That is a very -- that is just part of the plea negotiations, the pretrial stage of a criminal proceeding.

QUESTION: Your point is that -- well, first, that this Court has explicitly approved the procedure of plea

bargaining; and, secondly, that the very concept of plea bargaining, like the very concept of any bargaining, involves the use of leverage or, if you will, of pressure --

MR. CHENOWETH: Very much so.

QUESTION: -- on both sides.

MR. CHENOWETH: Very much so. Except the prosecutor probably has an unequal amount of power in that, at that stage. He really has more probably at his disposal than a defendant, because a defendant basically only has this: he has the Fifth Amendment and he has the Sixth Amendment.

QUESTION: Well, he also --

MR. CHENOWETH: He can either exercise those or not.

QUESTION: Well, a defendant, what the defendant has to offer, first of all, is -- there's always a risk, from the prosecutor's point of view, of a jury finding him not guilty. And secondly, there's always the certainty, in a not guilty plea, of expending the time and resources of the prosecutor and of the court and of the judge, and that's what the defendant -- those are the tools in his hands, aren't they?

MR. CHENOWETH: Those are factors that enter into the very decision of the prosecutor to select, to go forward with some kind of plea negotiations, hoping to get a plea arrangement. As this Court has indicated, there certainly is no constitutional right to have plea negotiations entered into.

QUESTION: But that it's perfectly permissible, constitutionally. Plea bargaining, as such.

MR. CHENOWETH: Yes. That it's not, per se, unconstitutional, --

QUESTION: Right.

MR. CHENOWETH: -- while recognizing, in response to Mr. Justice Marshall, that --

QUESTION: That it can be abused.

MR. CHENOWETHER: -- there are limits, there are -- oh, sure, there can be an abuse of it.

But we're saying at this stage, at a plea negotiation stage, that the difference between what we're talking of and what the court is talking of, what you're speaking of, and the opinions in North Carolina vs. Pearce and the Blackledge v. Perry case, and the opinions for the Court, is that the aspects of the trial, of a right of appeal or exercising that nature of a right, that there should be no chilling affect on that stage. It should go forward, really almost in a vacuum. And if something does enter into it, a presumption would enter in, but there has maybe been a vindictive -- the mere fear of vindictiveness, because that should go forward. The prosecutor at that stage should be virtually an impartial officer of the court at that time, and not have an interest in that.

But at the plea negotiation stage, in the very nature of that process, you do have a chilling; it's already there.

Just the very nature, no matter what kind of plea inducement that may be given, that chilling effect is there; and whether the defendant wants to partake of that negotiated plea or not, he is going to -- and if he decides not to, irrespective of the plea negotiations, he is going to be faced with the fact that probably, if he rejects the recommendations of the prosecutor, that if he goes to trial, the likelihood is that he will get a greater sense for having gone to trial than what it would have been had he accepted some kind of arrangement.

QUESTION: Mr. Attorney General, may I ask a question? If we assume for a moment it really doesn't matter whether the man is indicted on all charges and some are dismissed, or he's just indicted on some and later the others are added on if he doesn't enter into a plea; isn't there, nevertheless, perhaps a different problem that this case indicates, and that is this: that if there is a gross disparity between the charge that the prosecutor is willing to abandon, whether in advance of negotiation or later, and the lesser charge that he really wants to get a conviction on, isn't there some risk that a quite remote danger of conviction on a charge that might bring life imprisonment or death or something like that, for the prosecutor to give up that possible result in exchange for a 30-day sentence, wouldn't it inherently make you wonder whether there wasn't sufficient in terrorem effect

that an innocent man might plead guilty to the lighter charge? Isn't that the problem, as the comparison between what one side is willing to give up in exchange for what he gets, rather than the timing of it?

MR. CHENOWETH: No, I believe not. Because this same possibility is going to exist if the prosecutor, in the very beginning, indicts on that substantive offense and the non-substantive enhancement and says, "I am willing to give that" --

QUESTION: Well, I agree. That does not go to the question that you've been arguing, as to whether the one has to come ahead of the other, in terms of the procedure. But isn't there a potential for prosecutorial abuse in the kind of situation I described? And then, to go further, what were the alternatives in this case? One was life sentence as opposed to what? Five years?

MR. CHENOWETH: Five years recommended; two to ten on the substantive charge if going to trial.

So there is that -- there is that difference. But what I'm saying is that the decision of the Sixth Circuit indicates that the point in time is the important critical factor, and I'm saying they were wrong.

QUESTION: I understand, and I understand your argument about that. But you did seem to suggest there are limits to what the prosecutor might do. And I'm really asking

you whether one of those limits is not having charges that are so disparate that an innocent man might be tempted to plead guilty to a very minor charge in order to avoid risk of conviction of a very major charge; is that a possible limit? If not, what limits are there?

MR. CHENOWETH: Well, I think there are limits, but I do not think that's one of them. Because if we're talking about that, which is not an aspect of this case, but certainly an aspect of plea negotiations, we're talking about that possibility of bringing multiple substantive offenses by their sheer number and offering to enter into a plea negotiation for a plea of guilty on only one of those; that that's a possibility the prosecutors have utilized also.

QUESTION: Well, in answer to Mr. Justice Marshall, I understood you to say it doesn't matter whether the charges are related or unrelated. That's not the touchstone. I mean, you could follow the same procedure here with two totally unrelated events.

MR. CHENOWETH: I think unrelated substantive offenses, or they may be related but separate elements of the substantive offense.

QUESTION: But what, if any, is the limit on the discretionary which should guide the prosecutor in this kind of negotiation? Should we not be concerned about the risk that an innocent man may be induced to plead guilty to a minor

charge in this kind of negotiation? Isn't that what we're really concerned about?

MR. CHENOWETH: But that is the concern of plea negotation period.

QUESTION: Yes, but is there any limit to the discretion that you --

MR. CHENOWETH: Well, sure.

QUESTION: So how do you -- where is it? Where do we look for it?

MR. CHENOWETH: Where do you draw the line? I can't say. In this case I can certainly say that you don't draw the line between point-in-times in which you make that.

QUESTION: Well, I understand that, but you don't offer any alternative?

MR. CHENOWETH: Well, it's very difficult. There are such a range of plea negotiation possibilities, that we could go down the line of those ranges and offer various, what might be considered limits. But I certainly am not prepared in this case to talk about the full ambit of plea negotiation possibilities, and the discretionary power of the --

QUESTION: Well, I understand. But you aren't going to suggest any limit, either. You just acknowledge there is some limit somewhere, but you have no idea of how to idenfity it.

MR. CHENOWETH: There is some limit, but there is not a limit in this case with the facts that we're talking about here.

QUESTION: And you never have a limit based on the disparity between the charge that he's asked to plead to and the charge he'll have to go to trial on if he doesn't plead?

MR. CHENOWETH: I will say that.

QUESTION: So far, in the cases in this Court, rather than limits, the Court has been concerned with a showing that the bargain is kept; isn't that correct?

MR. CHENOWETH: That's correct. Santobello is a very primary example of that.

QUESTION: Santobello and the case last term, and others --

MR. CHENOWETH: Blackledge vs. Allison, a case written by Your Honor.

QUESTION: Yes. And the Court, while it may have, and probably has, talked about the fact that there are some limits, it hasn't in any way tried to define the metes and bounds of those limits. Rather, it's been concerned with the showing that the promise be kept; isn't that correct?

MR. CHENOWETH: Well, as you indicated, Your Honor, in the Allison case, is that just getting this plea negotiation thing out on the table, so to speak, we're just starting to look at it, and Your Honor says "Bring it out and you do have

to consider it".

But at this point in time, our guidance from Your Honors on plea bargaining is that if you make promises, whether it's one attorney in the Attorney General's office or another one, it's to be brought out.

QUESTION: The bargain -- that if a bargain is struck, it must be kept.

MR. CHENOWETH: That's correct.

QUESTION: Then, I suppose, if there's actual coercion, then it's not bargaining any more; that is, if there's brutality, compelling a person to plead guilty, or trickery or deception, then it's no longer bargaining. We had a per curiam not so long ago involving that kind of a situation.

MR. CHENOWETH: Mr. Chief Justice very much indicated that those -- and I think we go back to Machibroda, which Your Honor also wrote, where you talk about that fact.

QUESTION: But it's fair bargaining, the Court so far hasn't defined any limits.

MR. CHENOWETH: Fair bargaining, that is exactly what we say clearly here is fair bargaining, it is within the nature of the plea negotiation process.

QUESTION: I suppose the concepts of the federal labor laws aren't very helpful, although they use the same words, or I did.

QUESTION: Mr. Chenoweth, isn't one of the consequences of a habitual offender statute the fact that the crime which finally brings the person within the terms of, say, a four-time offender statute itself may carry a fairly light sentence, whereas the habitual offender statute, simply by virtue of the number of crimes, may carry a very severe sentence?

MR. CHENOWETH: Very definitely so. And this -- while these are arguments, or that the disproportional argument type of argument that has been presented in some of the lower federal courts, Hart vs. Coyner?, that you have really minor felony convictions, if you will -- I don't know what "minor" is, but that is an argument that's been presented by defense counsel, that to have these minor felony convictions, and although you have, say, four of them, that then the prosecutor goes forward and indicts on multiple offenses, multiple felony offenses, irrespective of their weight, and then goes forward, and the possible punishment, if convicted on that last crime, last felony, is life in the penitentiary.

QUESTION: By virtue of an habitual offender statute?

MR. CHENOWETH: By virtue of a persistant felony offender, an habitual offender type law.

QUESTION: I suppose that any plea of guilty is subject to collateral attack or a direct appeal, on the grounds

that it wasn't voluntary.

MR. CHENOWETH: I think, Mr. Justice Blackmun, that's so.

QUESTION: And then I suppose another limit is that the defendant should have adequate counsel.

MR. CHENOWETH: Of course, always, and --

QUESTION: And that the negotiation is really with counsel, as much as anybody.

MR. CHENOWETH: Well, the American Bar Association standards very definitely say, yes, you have counsel there when you enter into plea negotiations. I think, yes, that that is one of the hallmarks of a prosecutor, that he does have the --

QUESTION: Is there a claim in this case that as a matter of fact the plea was coerced?

MR. CHENOWETH: Coerced from the standpoint of the procedure that was used.

QUESTION: Well, I know, but it's just a conclusion from a -- the real thing is, the real point, or the real argument is that there should be a per se rule that would -- that might prevent some actual coercion.

MR. CHENOWETH: Yes, and again I have a great deal of trouble with that word "coercion" from the standpoint of the types of procedure that we're dealing with here versus the type -- the way I see coercion, when we're talking about what

Mr. Justice Stewart is discussing, and which was discussed in Santobello, where you have physical coercion, or overbearing mental coercion.

QUESTION: Well, tell me again -- perhaps you've already -- tell me again why a prosecutor would not say "Bring a criminal charge in the first instance"?

MR. CHENOWETH: Because if he does that he's doing a vain act. He's really performing a charade. He's going to the grand jury and he says, "I'm going to get the habitual indictment in addition to the substantive offense" that he's there for in the first place. But yet, because of the nature of the case I have before me, I'm going to -- I find it advantageous for society's interest that I want to enter into a plea negotiation.

So he goes to the grand jury and he has to turn right around and move to dismiss that, if he's going to go forward on plea negotiations. Why should he do that? That's our very point.

QUESTION: Well, the habitual criminal statute represents a rather serious judgment, I suppose, as to what should happen to a person. And if you think society -- if a prosecutor -- if the Court of Appeals thought that if a prosecutor thinks society's interest demands prosecution for the more serious offense, they ought to put it in the indictment.

MR. CHENOWETH: But I think that that is an incorrect conclusion that you make the decision as a prosecutor when you are faced with an enhancement possibility in a substantive offense; that if you don't indict in the very beginning on the enhancement statute, that you have made the decision that the crime is not bad enough, or this is not someone that we have an obligation to society because of the prior felonies -- and here we had two prior felonies within a ten-year, ten or eleven-year period of time, with five of those years having been in the penitentiary, that that does preclude,the mere fact you don't bring it in the first instance doesn't preclude the fact that that prosecutor has on his mind that if he cannot enter into a plea negotiation, in view of the overwhelming evidence, that he should not, in the interest of society, then indict for the habitual felony offender, so that the punishment that the statutes authorize should be placed in the case for consideration by a jury.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Aprile.

ORAL ARGUMENT OF J. VINCENT APRILE II, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. APRILE: Mr. Chief Justice, may it please the Court:

I would like to initially point out that this case

retaliation from stopping or chilling anyone from exercising a constitutional right, such as --

QUESTION: Or a statutory right of appeal.

MR. APRILE: Or a statutory right or a procedural rule right, perhaps.

But the point there was that the man had the opportunity to do something that was legitimate.

In the next instance we have something legitimate done with actual vindictiveness, and I believe it was Mr. Justice Powell pointing out in Michigan vs. Payne, we've always recognized actual vindictiveness, even the doing of something that is permitted with actual vindictiveness would be a due process violation. In this case, the actual vindictiveness was to say, "If you will exercise your constitutional right to a trial before a jury, to plead not guilty, to have the right to confront witnesses against you, to be free from self-incrimination, I'm going to put a penalty on it, and that's the sole reason I'm doing it."

And the Sixth Circuit found this in the penultimate paragraph of their opinion, when they clearly said: We don't need to infer vindictiveness in this case, it has been admitted by the prosecutor.

QUESTION: Is not what you describe always the upshot of what happens when a plea bargaining -- when plea bargaining is unsuccessful? Only.

MR. APRILE: No, Your Honor, I don't believe --

QUESTION: Then if plea bargaining comes to an impasse, then the defendant pleads not guilty and he goes to trial under the risk of a greater -- of a conviction of a greater offense or of a longer sentence than he could have achieved in the plea bargain. That's the whole nature of the beast, isn't it?

MR. APRILE: I don't believe so, Your Honor.

I would harken back to this Court's analysis in Brady vs. United States, where you described plea bargaining as mutuality of advantage. And you said that: we could not hold the --

QUESTION: And that's when a bargain is reached. But when a bargain is not reached, what you describe is always the result, --

MR. APRILE: But it was the extension --

QUESTION: -- the defendant pleads not guilty and he goes to trial under the risk of getting a worse, a longer sentence and a more serious conviction than he would have pleaded guilty to if the bargain had been negotiated.

MR. APRILE: Well, Your Honor, --

QUESTION: That's always the result, isn't it?

MR. APRILE: I don't believe -- I don't believe that is always the result of the same magnitude. And that's the difference in this case.

Let me give you this example. In the case at bar, the initial bargaining position that the defendant was in, when he stood charged with the uttering of a forged instrument indictment, unenhanced, was that he faced, if he pled not guilty, he faced a maximum sentence of ten years. That was the ante for exercising his constitutional rights. Those were the --

QUESTION: But he was told in the process of the bargain what the result would be.

MR. APRILE: No, Your Honor. In the initial -- what I'm saying, when the indictment came down, this was what he faced if he exercised his constitutional rights. Then the prosecutor came to him and tendered to him the following offer: "Plead guilty. I will give you -- I will recommend to the judge a five-year sentence. No guarantee."

The defendant then said, --

QUESTION: And didn't the prosecutor further say, "And if you don't plead guilty" what's going to happen?

MR. APRILE: No, Your Honor, not at that point. When, from the record, we see that when the arrangement offered by the prosecutor was rejected, he then threatened that "If you don't accept my plea bargain and plead guilty, I am going to increase the stakes against you. I'm going to re-indict you as a habitual criminal with two prior felonies, and if we can convict you of that, there will be a mandatory life

sentence."

Now, I submit to you, the distinction is very different, because where he places the threat on him after he has attempted to exercise his constitutional rights, the only purpose for the threat is to deter the exercise of the constitutional rights.

In the situation that the Sixth Circuit posited was "Put your cards on the table, tell the man what the charges are, what's the maximum punishment he faces. If he refuses to negotiate with you, he still faces that maximum punishment."

I find that --

QUESTION: Well, if we uphold the Sixth Circuit here, every prosecutor, faced with the situation this one is, is going to indict for both the latest substantive offense and the habitual offense. And the defendants aren't going to be any better off.

MR. APRILE: Your Honor, I would say --

QUESTION: You say this is also my question. Aren't you in effect, if you prevail, forcing precautionary overcharging -- to use the phrase one of you used in your briefs -- and therefore if you prevail, aren't you actually winning nothing? Or, in other words, doesn't the case amount to very little?

MR. APRILE: Your Honor, the first point I would

make is to refer back to the footnote in Brady vs. United States, where I believe this Court gave at least implicit recognition that you would find guilty pleas coerced if the charging power of the prosecutor was abused by overcharging when evidence did not support it.

So I think that takes care --

QUESTION: Well, but here -- here --

MR. APRILE: Well, no, I understand that --

QUESTION: -- now just a minute. The habitual offender charge here certainly could not be rationally found to be overcharging.

MR. APRILE: Your Honor, that was not the response that I gave. The response was to the initial problem of overcharging that the Justice was pointing to. I agree. I'm not saying that this was overcharging.

But I think it begs reality to submit that the prosecutor cannot indict -- which is the normal practice in Kentucky, by the way -- to indict on both the substantive offense and the habitual offender offense; now we call it the --

QUESTION: I'm sure he can, but --

MR. APRILE: And to deal --

QUESTION: -- why should a constitutional principle turn on whether he chooses to indict on both offenses first and then give up the bigger one at the conclusion of a plea

bargain, or indict only on the substantive offense first and then,if the plea bargain fails, indict on the larger one?

MR. APRILE: Because, Your Honor, it is clear to people who are caught up in the criminal justice system that Paul Lewis Hayes and people in his situation, when they exercise their constitutional rights to plead not guilty and turn down a plea bargain offer, are punished for it. And it would not appear that way, Your Honor, if it was clear to people that this was the initial maximum punishment that the person faced.

And I believe this Court recognized that very real problem in North Carolina vs. Pearce and Blackledge vs. Perry when you said "apprehension of this kind of fear" --

QUESTION: Well, then it's strictly a question of appearances.

MR. APRILE: Well, it wasn't to Paul Lewis Hayes, but it would be to many people within the criminal justice system.

QUESTION: Well, do you think your -- do you think your client knew what he faced under the law from his attorney?

MR. APRILE: Your Honor, that's a very interesting point that you make. The actual record in this case reveals that Mr. Hayes' attorney, trial attorney -- I was not his trial attorney -- did not make this objection. But at the beginning of the criminal portion of the trial, Paul Lewis Hayes

personally approached the judge and said, "I object to the way that I have been indicted as an habitual offender, because it was done solely because I refused to plead guilty to the forgery charge."

QUESTION: Well, let's --

MR. APRILE: The prosecutor -- the defense attorney didn't even recognize the issue, apparently.

QUESTION: Well, then, some of our cases say that certainly the adequacy of counsel issue survives pleas of guilty. Are you suggesting that the counsel was inadequate in this case?

MR. APRILE: Your Honor, there's no plea of guilty in this case. Paul Lewis Hayes went ahead --

QUESTION: Do you think the -- do you think there was adequate counsel in this case or not?

MR. APRILE: Your Honor, since the issue was clearly preserved in the State courts, and raised on this particular issue, yes; I don't think that the adequacy of the counsel is the problem. I think that quite clearly the issue of vindictiveness was raised.

QUESTION: Well, if counsel is adequate, he can advise his client what kind of penalties he faces for his conduct. He probably knows more about it, or should know more about it than the prosecutor, he probably knows more about what the defendant did than the prosecutor.

MR. APRILE: Your Honor, I would submit that the Sixth Circuit was correct when they stated that when a prosecutor, with knowledge of the facts of the crime, seeks and obtains an indictment on a charge less severe than the facts warrant, he makes a discretionary determination that that's the appropriate charge. So he did this in this case.

QUESTION: Could I ask you if, in Kentucky, the plea bargaining goes on prior to indictment?

MR. APRILE: No, Your Honor, plea bargaining does not go on prior to indictment. Not to my knowledge.

QUESTION: Well, I'm quite sure it does in some places.

MR. APRILE: Well, I would say this, Your Honor. I'm a Public Defender, and the clients that I represent, it does not go on prior to indictment. There are some sort of white-collar crimes in Kentucky, possibly political type crimes, where that type of situation may occur. But having had ample opportunity to survey the criminal justice system in both urban and rural areas of our State, I would say no; plea bargaining does not occur prior to indictment in our State.

QUESTION: I would suppose that in those places where it does, if we affirmed the Sixth Circuit, no one could afford to plea bargain until after the grand jury met and the indictment came down.

MR. APRILE: Your Honor, I think that the reality in

this situation is that in Brady vs. United States you, writing -- as I recall, you, writing that opinion, pointed out that: it would be unconstitutional to hold that prosecutors couldn't extend as benefits concessions, dismissed counts, and to allow pleas to lower lesser-included offenses of the charged offense.

And I thought it was important that you emphasized "the charged offense".

In this case we're not talking about concessions relating to a charged offense. This man was told, "If you don't negotiate, we will up the ante against you."

QUESTION: Well now, that's important, Mr. Aprile. It seems to me it may be a subtle difference, but it strikes me that it might be a dispositive one.

You've stated this case so far as though there were plea bargaining within the original charge, as indeed there was; but that that was the extent of the plea bargaining, on the count of uttering the forged check. An offer by the prosecutor to recommend a five-year sentence.

And that after that plea bargaining failed, then, without any further opportunity to the defendant, the prosecutor went on his own hook and got the grand jury to indict on the habitual criminal statute, with no further opportunity for the defendant to bargain, and thereby the prosecutor penalized the defendant's constitutional right to plead not guilty.

Now, that would be one case, it seems to me. But if, on the other hand, the other case would be, if the chronology were that there was bargaining under the original charge and the defendant said, "No, I think I'm going to plead not guilty", then the prosecutor said, "Well, if you do that, I'm going to go to the grand jury and get them to indict under the habitual criminal statute, under which you could get life imprisonment."

Then if there were an opportunity for additional bargaining, that would be quite a different case, it seems to me. The difference may seem like a subtle one, but it might be -- because the second case is a different one from the one you've presented to us, it seems to me.

MR. APRILE: To a certain degree, I can understand that.

QUESTION: Well now, what did happen in this case?

MR. APRILE: In this case, the initial bargain did not involve any -- the initial bargain presented by the prosecutor related only to the charged offense, as best we can tell from the --

QUESTION: I understand that. That was the initial negotiation.

QUESTION: But that's not what the Court of Appeals opinion says.

MR. APRILE: Yes, Your Honor.

QUESTION: It says that "During this conference, the prosecutor offered to recommend a five-year sentence if Hayes would please guilty. Petitioner was warned that if he did not plead guilty, he would be charged under the habitual criminal statute."

QUESTION: Now, what did actually --

MR. APRILE: The actual statement of the prosecutor in the record is, "Isn't it a fact that I told you if you did not intend to 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?"

QUESTION: Now, does that imply --

MR. APRILE: Pages 49 and 50 of the Appendix, in context, reveals it was after the initial bargain was tendered to the individual.

QUESTION: Now, does that imply that there was still an opportunity for the defendant to plead guilty and get a recommendation of the prosecutor for five years, or was it too late?

MR. APRILE: Oh, I'm sorry, no, this was --

QUESTION: Or was this just vindictive punishment to him for turning down the original bargain?

MR. APRILE: I'm sure that --

QUESTION: All right, now those are two different

cases.

MR. APRILE: Right, Your Honor. And I say this, that I don't believe that can be dispositive in the case, I see that it --

QUESTION: Well, what happens in my question?

MR. APRILE: I'm telling the Court it's my understanding that the man was told -- was threatened after he turned down the original offer, would be re-indicted as an habitual criminal. And I'm sure that had Mr. Hayes wanted to plead not guilty, he would not have reindicted him.

QUESTION: You don't mean that --

MR. APRILE: But that was trying to make the threat work.

QUESTION: You mean if he wanted to plead not guilty.

MR. APRILE: I mean if he wanted to plead guilty; excuse me. He would have not --

QUESTION: And accept the bargain of a recommendation of a five-year sentence?

MR. APRILE: Certainly, because that's the threat, what he wanted to accomplish by the threat.

QUESTION: My question is: factually, was there still an opportunity, was that still a continuation of the bargaining; or was it a punishment of the defendant for his failure to reach an agreement? Which was it?

MR. APRILE: I would say that it was a punishment, a

threat of punishment that could have been ameliorated by accepting the original bargain.

QUESTION: That was still open to him?

MR. APRILE: Well, I can speculate to that: yes, Your Honor.

QUESTION: Well, we deal with -- up here we don't generally have a dispute of facts, we take the facts as they are and try to apply the law.

MR. APRILE: Well, because Paul Lewis Hayes did not say, "All right, let me plead guilty", the prosecutor never answered that question. But he said, "If you don't plead guilty", so I imagine that he was willing at that point to say, "Yes, I will let you go with the five years under the uttering a forged instrument charge." But I can't say for sure, because --

QUESTION: Well, that's a different case than the one you presented.

MR. APRILE: But I think the key point is that the intention was to make the threat work. And if the threat worked, by getting the man to plead guilty to the original charge, then he accomplished it, and it was a penalty if the man continued to exercise his constitutional rights. So I don't think the distinction is dispositive, in that case.

QUESTION: Well, what you've just stated is always -- just describing plea bargaining generally.

MR. APRILE: Well, Your Honor, if I would just use the criteria that this Court utilized in North Carolina vs. Pearce and some of the other cases dealing with vindictiveness, you've always looked at these four major factors: They are: knowledge by the participant in the system; the actor, does he have knowledge of the prior penalty? In this case the prosecutor clearly knew what the original maximum authorized punishment was in the case.

QUESTION: Mr. Aprile, may I interrupt there? If you focus on actual vindictiveness, as I guess this is the standard you would suggest, what if you had this situation: that a prosecutor presents to the grand jury a charge of uttering an $88 forged check and a second charge of -- second count of habitual criminal charge, which bears a life sentence; at the time he does so, he has no intention whatsoever of going to trial on the second charge. He presents the charge to the grand jury solely for the purpose of having a bargaining ticket which he can use to coerce the defendant into pleading guilty to the $88 charge.

Could one not call that actual vindictiveness?

MR. APRILE: Your Honor, as this Court has recognized on many occasions, that's a very difficult -- actual vindictiveness is normally very difficult to prove.

QUESTION: But would you not make the strong argument --

MR. APRILE: It would be difficult to prove that in --

QUESTION: -- for the proposition that that would be actual vindictiveness?

MR. APRILE: Yes, Your Honor, but again it would be very difficult to prove. I think that the point there is that if it was not overcharging, not --

QUESTION: Well, it's overcharging in the sense that the prosecutor has no interest whatsoever in getting a conviction on the second charge. He brings it purely for the purpose of enhancing his bargaining power on the $88 charge.

MR. APRILE: But he can't legitimately bring it, and therefore what he does is he gives away a valid concession for his goal to get a guilty plea.

In this case, what we're saying is he had already made an election that there was no interest of the State served by that habitual criminal statute indictment. And so --

QUESTION: Well, the same interest is served in both cases. The purpose of the second count is simply to induce a guilty plea on the first count. I don't know why it can be right in one context and wrong in the other. It seems to me it's either wrong in both or wrong in neither.

MR. APRILE: Because the timing and the nature of the threat in the case is aimed at one thing, and that's

chilling the exercise of the constitutional right to plead not guilty.

And I think that if we look at --

QUESTION: Well, my case shows the constitutional right, too. He says -- he has the same variables to work with. Because I don't think they -- say, instead of being habitual criminal, say it's murder, one is murder and the other is the $88 check. Because he says, "I really don't think they can convict me of murder, but, my gosh, if they do, it's pretty darn serious; I'd better plead guilty to the $88 charge, and I don't take any chances."

You say that's different depending on whether he's indicted ahead of time or merely told in the plea bargaining that this is a consequence that might ensue?

MR. APRILE: Well, you're getting inside the prosecutor's mind, Your Honor.

QUESTION: Well, I made the assumption it's always for the purpose of getting the plea of guilty to the lesser charge. That's why he does it, and he admits it.

MR. APRILE: Well, I understand that, but in one instance it was the original intention to prosecute the person under both charges, at least --

QUESTION: In both cases, the intention is: if he will plead guilty to the lesser charge, we won't prosecute on the other. If he doesn't plead guilty, we'll shoot the

works and get him for whatever we can.

MR. APRILE: But there has been no attempt at that point by the defendant to exercise any right, and therefore there is no retaliation that takes place for the exercise of the right to plead not guilty.

If plea bargaining is legitimate, and of course we don't challenge that, it is clear, under your opinion in Brady vs. United States, it's based on concessions being made under existing charges, and it's based on mutuality of advantage.

And I submit to you that that is a different situation from where a prosecutor initially makes a determination that this is a proper charge, and when he can't get the absolute agreement, word for word, that he wants from the defendant, then he turns around and says, "I will seek higher and greater charges against you." And this is what the Sixth Circuit was afraid of.

QUESTION: Well, what you're saying is that any inducement automatically becomes virtually a threat and a vindictive action?

MR. APRILE: No, Your Honor, I certainly would not say that, and I'm sorry if I misrepresented my position that way.

QUESTION: No, "misrepresentation" is not the word; that's the way I take your argument.

MR. APRILE: No, Your Honor. I recognize that --

QUESTION: The way I take it is that when inducements are offered, if they are rejected, they are converted into threats.

MR. APRILE: No, Your Honor. I think that it would not be realistic to look at what occurred in this case, outside of the situation, and say, Well, what if they had charged it originally? Because that is a different situation.

In this case the prosecutor, by his own admission, wanted to penalize Paul Lewis Hayes for not pleading guilty, for not saving the court time, for not saving his prosecutorial resources, for not giving the certainty of a guilty plea. It was not an attempt to bargain, to work something out; it was that "if he won't do it my way, then I insist, then I will punish you in another way."

QUESTION: Isn't that true of every plea bargaining that fails?

MR. APRILE: No, Your Honor, I think the example given by the prosecutor to a very -- excuse me, by the Petitioner in this case is a very good example. He says, what if there's an original felony charge and it's offered by the prosecutor to amend it to a misdemeanor, and the defendant turns it down; and then the prosecutor says, "Well, I'm going to go ahead and seek the maximum punishment under that felony count". Well, the defendant's bargaining position hasn't been changed by exercising his constitutional right. Before they

even had any negotiation, he faced the exact same maximum punishment. There's no upping the ante for exercising his right.

But in the real situation in the case at bar, Paul Lewis Hayes thought that when he rejected the prosecutor's plea bargain offer of five years, that the most he would face was ten years. And then the prosecutor said, "No," --

QUESTION: Well, then I come back to where I started.

MR. APRILE: Yes, Your Honor?

QUESTION: If you prevail, you're going to have every case with a full-fledged increment from here on in, so that you gain really nothing, you have a pecric victory in future cases.

MR. APRILE: I don't understand why it a peeric victory, Your Honor, the way that I --

QUESTION: Because every prosecutor is going to indict all of your defendants on an habitual criminal charge.

MR. APRILE: Well, Your Honor, as I understand the scenario that would follow, if this Court reversed and took the other position, then every prosecutor will not have to indict on a higher charger or an enhanced charge, he will still be able to threaten the same thing. So I don't see how my client or any other clients in the criminal justice system suffer under you affirming the decision of the Sixth Circuit. Because every prosecutor can threaten without even

having the indictment.

QUESTION: Well, they're not able to threatent, they're going to indict from here on in, that's the only way they can protect themselves.

MR. APRILE: But the position that this --

QUESTION: What do you gain?

MR. APRILE: But the position that you're taking in this case would be that it wouldn't make any difference whether he's indicted or not. That that possibility of the re-indictment will always exist and always be a valid type of leverage for the prosecutor to use.

So my client and other clients in the criminal justice system have lost nothing. They're still in a difficult position. But what I submit to you is that if you uphold the decision of the Sixth Circuit, what we do is we finalize, that here is an existing indictment, this is the maximum authorized punishment; if the prosecutor --

QUESTION: Well, therefore, why leave it as an initial indictment? Why not bring a broader one at the start?

MR. APRILE: No, Your Honor, I do wish --

QUESTION: That takes your case completely out from under you.

QUESTION: Mr. Aprile, you keep saying "reindictment".

MR. APRILE: Yes, Your Honor.

QUESTION: And my brother Blackmun is not talking

about re-indictment, he's talking about original indictment.

MR. APRILE: I understand that, Your Honor. I thought I was trying to make that distinction, because if --

QUESTION: Well, let me put it separately. In this particular county where this man was convicted, do you have any doubts that the prosecutor in that one is going to over-indict?

MR. APRILE: Well, it's been four years; he's not there any longer, so it's very difficult for me to say.

QUESTION: Well, I assume he will read the opinion of this Court.

QUESTION: Or his successor will.

MR. APRILE: Well, it's very obvious that they will charge, as most of them do in our State, they will go ahead and charge the habitual offender statute. And it will be legitimate in that situation to offer concessions under that.

My point, though, and I harken back to this time and time again, is that there's no doubt in this case that the prosecutor acted because he wanted to chill Paul Lewis Hayes from exercising his constitutional rights.

And I don't believe that that's what this Court was talking about in Brady vs. United States, when you said that a prosecutor can, at every step of the criminal justice stage, encourage pleas of guilty. This isn't encouraging a plea

of guilty, this is threatening to penalize someone for pleading not guilty.

And I think we must recognize that in this case the prosecutor, and in this type of situation the prosecutor has the ammunition, because he has that threat of re-indictment that he can always hold over the defendant's head.

Recently, in June of this year, the Supreme Court of Montana, not having to pay any allegiance to the Sixth Circuit Court of Appeals, in their Supreme Court, recognized the validity of this reasoning in their situation and said: Under both federal and State law, in State vs. Sather?, that they would follow this procedure, they thought it was a violation of due process to do otherwise.

And I submit that it is clear that prosecutors who will utilize leverage like this are doing it for only one purpose, and that is --

QUESTION: That case, is that Montana case --

MR. APRILE: It's not cited in the brief, Your Honor.

QUESTION: Do you have the citation?

MR. APRILE: Yes, I do. The citation is 564 Pac. 2d 1306.

QUESTION: Thank you.

MR. APRILE: 1977.

QUESTION: 1306?

MR. APRILE: Yes, Your Honor, 564 Pac. 2d.

QUESTION: Well, of course, some States have abolished plea bargaining altogether.

MR. APRILE: That's true, Your Honor. Of course, although the Petitioner stated at all levels that that's what we're trying to do, we're not challenging the constitutionality of plea bargaining. This Court has recognized, it seems to me, in your many cases dealing with plea bargaining, two things: fairness and proper administration.

Certainly there's no concept of ultimate fairness involved here. The prosecutor makes the determination that one charge is sufficient, but when he can't get his way -- in this case, there is no give-and-take. It was five years, "Are you willing to take five years", between two and ten, and that's only a sentence recommendation in Kentucky. There's no even a right in Kentucky to withdraw your plea.

If the defendant does not -- if the judge does not follow the prosecutor's recommendation. So he was asking Paul Lewis Hayes to give up all of his constitutional rights for the possibility of still gaining absolutely no sentence reduction, and then, when he didn't accomplish that, he said, "Well, I'll go higher, I'll raise the stakes against you until I put you in a position that you're going to plead guilty." Although he misunderstood Paul Lewis Hayes.

QUESTION: Would you still be here if, after the --

if the prosecutor says what he said here, then gets the broader indictment after the defendant does not plead, and then bargaining resumed?

MR. APRILE: Well, obviously, there is a question, a real question raised as to whether or not, in view of your trilogy, Brady, McMann and so on, if you inject the defense attorney's aid and assistance into that bargaining under that situation, then he enters a guilty plea, it may very well be that whatever coercion exists there could be cut off in a guilty plea.

QUESTION: Even though, originally, he had only a narrow indictment, --

MR. APRILE: Well, as I say, that --

QUESTION: -- and he said, "If you don't plead to this one, I'm going to get a broader one".

MR. APRILE: As I stated in my brief, I believe that there's a distinct possibility that under Machibroda vs. United States, where you noted that a cognizable claim would be generated by a threat of additional prosecution, that indeed it may very well be that in this circumstance you would have a coerced guilty plea.

QUESTION: Yes. Well, then, if this situation had resulted in a guilty plea, the claim of coercion would still have been open.

MR. APRILE: It would still have been open, Your

Honor, that's true. And counsel may or may not have been sufficient to cut that coercion off.

QUESTION: In one district recently, a study showed that there were a great many cases where additional crimes were committed while the defendant was released on his own recognizance, that six different charges ultimately had accumulated by the time they came to trial on the first one. Would all that you've been saying apply equally to subsequent crimes committed repeatedly after the defendant was released on bail?

MR. APRILE: No, Your Honor.

QUESTION: Well, why not?

MR. APRILE: Well, I think the Sixth Circuit --

QUESTION: The threat is still there.

MR. APRILE: I think the Sixth Circuit addressed this quite clearly, and perhaps it's been a mistake on my part to not point this out; but always the prosecutor is allowed, as under your decisions in Blackledge and North Carolina vs. Pearce, to demonstrate changes that account for why he didn't obtain the original indictment. And in this case he -- in the case you give me, the hypothetical, he wouldn't have been able to originally indict on those charges.

QUESTION: But he might have been able to get the indictments on the other charges before they reached the point

of plea negotiations.

MR. APRILE: That would be perfectly acceptable. Because the original indictment could not have anticipated the subsequent conduct, like your U.S. v. Diaz analogy in North Carolina vs. Pearce.

The one point I would make ultimately is that in Brady vs. United States, Mr. Justice White, you stated that we cannot --

QUESTION: No, the Court did.

MR. APRILE: I'm sorry. That's correct.

We cannot hold that it is unconstitutional -- I'm sorry, that's not the statement.

The statement was: In Brady we find no threats being made between the time the man initially pled not guilty and he changed his plea to guilty, no threats being made to him in a face-to-face confrontation with the authorities.

QUESTION: Well, could I ask you if you'd have a different position if there had never been any bargaining confrontations between the prosecutor and the defendant, simply initially there was a narrow indictment, no plea of guilty was forthcoming, the prosecutor added a count, he broadened the indictment, no plea of guilty was forthcoming; and he kept broadening it. Then he went to trial. Then they went to trial.

Would you be here then or not?

MR. APRILE: Yes, Your Honor, because of what we ask for in the way of the prophylactic rule which the Sixth Circuit recognized, that there would be an apprehension generated and that the prosecutor was --

QUESTION: Well, the face-to-face confrontation and the oral threat, as you call it, really isn't determinative in the case.

MR. APRILE: Yes, Your Honor, it's determinative in two ways. I say that if we did not have the face-to-face threat stated here, we would not have actual vindictiveness, and we would only be able to succeed on our relief under the prophylactic rule.

But I say we have actual vindictiveness, so, even without the prophylactic rule, we can succeed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:38 o'clock, a.m., the case in the above-entitled matter was submitted.]

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