In the ORIGINAL

Supreme Court of the United States

UNITED STATES,	)	
	)	
Petitioner	)	
	)	
v.	)	NO. 80-2195
	)	
LEARLEY REED GOODWIN	)	

Washington, D. C.

April 21, 1982

Pages 1 thru 56

ALDERSON REPORTING

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Petitioner :

v. : No. 80-2195

LEARLEY REED GOODWIN :

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Washington, D. C.

Wednesday, April 21, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:07 o'clock a.m.

APPEARANCES:

ANDREW L. FREY, ESQ., Washington, D.C.; on behalf of the Petitioner.

PAUL W. SPENCE, ESQ., Baltimore, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in United States against Goodwin.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Thank you. Mr. Chief Justice and may it please the Court:

I'm sure I can't improve on the arguments that were given in Finley against Murray, so I will stick to the Goodwin case.

This is a case that is here on writ of certiorari to the United States --

QUESTION: Move the microphone closer to you. I can't hear.

MR. FREY: Oh, yes. Are the microphones there?

QUESTION: Those little tiny microphones, you can pull them just closer to you.

MR. FREY: I was asked by the Marshall not to move the microphones.

QUESTION: Well, if we can't hear you, though, we'll have to have the reality take over. Try moving them about two inches nearer to you, gently.

MR. FREY: All right.

QUESTION: Be careful.

MR. FREY: Thank you. Is that any better?

QUESTION: Yes.

MR. FREY: This case began in February 1976, when a Park Police officer stopped Respondent for speeding on the Baltimore-Washington Parkway. The officer spotted a suspicious package under the armrest in Respondent's car and asked him to lift up the armrest.

Instead, Respondent got into his car, placed it suddenly in gear, and roared off, knocking the officer onto the rear of Respondent's car and then onto the highway. The officer recovered, got into his vehicle, and gave chase at high speeds, but was unable to apprehend Respondent.

The officer thereupon filed a complaint in federal magistrate's court in Hyattsville, charging a number of petty and misdemeanor offenses, including a misdemeanor assault charge under Section 113(d) of Title 18 of the United States Code. A warrant was issued for Respondent's arrest and he was apprehended several weeks later.

He appeared at a preliminary hearing at which he was bound over for trial before the magistrate and released on bond. He failed to appear for the trial and he was not found until three years later, when the

magistrate was advised that he was in jail in Virginia. Arrangements were made to transport Respondent to Hyattsville, where the magistrate's court is located, and he appeared there on May 24th, 1979.

On that day cases in the magistrate's court were being handled by an attorney from the Antitrust Division who was serving on a two-week detail in the magistrate's court. She conferred briefly with the Park Police officer --

QUESTION: Are there lots of antitrust cases out there?

MR. FREY: No, I think this is a training program for people who want a little court experience.

She conferred briefly with the police officer who had filed the complaint and been the victim of the assault, and she also discussed with Respondent's counsel the possibility of a plea bargain. However, Respondent indicated that he was not interested in a plea bargain and instead demanded a jury trial on the charges.

Since at the time the magistrate had no power to conduct jury trials, the case was perforce referred to the district court in Baltimore, where Assistant United States Attorney Norton was assigned to handle the case. As a result of Mr. Norton's reevaluation of the

case in the course of his preparation for trial, the original charges were superseded in an indictment containing the felony charge of assaulting a federal officer with a dangerous weapon, in violation of 18 U.S.C. 118. It is the validity of that charge that is the subject of inquiry today.

In response to Respondent's motion to dismiss on vindictive prosecution grounds, the prosecutor filed an affidavit explaining his reasons for seeking the felony indictment, which were as follows:

First, his assessment of the gravity of Respondent's conduct in connection with the commission of the offense itself;

Second, Respondent's criminal record, which showed a lengthy prior history of violent crime;

Third, his judgment that the assault on the Park Police officer was related to a major narcotics transaction;

Fourth, his belief that Respondent had committed perjury at the preliminary hearing in 1976 when he testified that he had been in Atlanta and not on the Baltimore-Washington Parkway at the time of the incident;

And finally, Respondent's flight to avoid trial on the initial charges.

The prosecutor further averred that his decision to seek the felony indictment was not motivated in any way by, nor did he ever consider, Respondent's request for a jury trial in district court.

The district court denied the motion to dismiss the felony assault charge, finding that the prosecutor had adequately dispelled any appearance of retaliatory intent. Respondent was sentenced to five years imprisonment on the charge. The Court of Appeals reversed.

The Court of Appeals concluded that the simple fact of the return of a more severe charge after the assertion of the right to a jury trial created an appearance of vindictiveness that establishes "a per se violation of the due process clause, requiring dismissal of the new charges."

It further held that the fatal appearance of vindictiveness could not be rebutted by any explanation of the prosecutor other than a showing that the increased charges could not have been brought in the first instance.

Now, before turning to my argument I'd like to make a couple of preliminary observations about the case. The first is, I think the Court should appreciate the sweeping effect of the Fourth Circuit's rule,

because the rule is really tantamount to saying that in all but a very small proportion of cases the initial charge that's brought by the prosecutor cannot be increased.

All that's necessary to trigger the appearance of vindictiveness and the almost irrebuttable presumption of a due process violation under the Fourth Circuit's holding is the exercise of a right by the Defendant. And in a criminal case rights start being exercised fast and furious shortly after the initial filing of the initial charges.

And the kind of explanation that the Fourth Circuit would accept to rebut the appearance of vindictiveness and to show that there was no retaliatory motive is strictly limited to what would be an extremely small class of cases.

Now, the second point I wanted to make preliminarily is that the purpose of the vindictive prosecution due process prohibition is not to protect generally against unjustified charging decisions. The protection against abuse of the prosecutor's discretion generally in charging decisions is the grand jury and the trial and the judicial procedures incident thereto, as well as the political pressures and the supervision within the executive branch over the prosecutor's

conduct.

The purpose of the vindictive prosecution doctrine is specifically to protect against a vindictive retaliation forrrthe exercise of a right by the defendant. Now, here it's important to note that the Court of Appeals readily concluded, in their words, that there was no actual vindictiveness on the part of the prosecutor in this case, and Respondent has never alleged to the contrary.

In fact, it's absolutely clear on the facts of this case that the jury demand was wholly irrelevant to the prosecutor's decision to increase the charges.

QUESTION: Mr. Frey, would you concede that in a case when there is actual vindictiveness involved that the court should make inquiry into that and then --

MR. FREY: Well, that would --

QUESTION: -- base its ruling on --

MR. FREY: That would depend on the nature of the claim of vindictiveness. If we're talking about a situation like Bordenkircher, where there was a retaliation for the refusal to plead guilty as part of the plea bargaining process, there would be no occasion for further inquiry.

But we would agree that in some circumstances the defendant could make a showing that an increase in

charges was -- appeared to be a --

QUESTION: Well, if the proper showing were made, then you would concede that the court under those circumstances could dismiss the higher --

MR. FREY: Yes. But I think it's an important part of our argument that the circumstances in which there might be a proper showing to require such an inquiry are quite limited.

QUESTION: Yes.

QUESTION: Would you concede it for purposes of a pretrial situation?

MR. FREY: Well, our argument with regard to the pretrial situation us essentially that there should be no presumption of vindictiveness, that what the Court of Appeals did here and what the courts of appeals have been doing in what we think is a misinterpretation of Pearce and Perry is to equate the mere exercise of a right followed by an increase in charges with a presumed vindictiveness on the part of the Government. And we do not believe that has any place in the analysis of these cases.

I think we are not prepared to say, and we certainly don't need to for purposes of this case, to go as far as Judge Meritt went in the Andrews case and say that it's perfectly all right for the prosecutor to be

vindictive in the pretrial context. We're not urging that upon the Court in this case.

QUESTION: You're not urging the application of a per se rule either way, in other words?

MR. FREY: We are not. Let me just explain how I view the structure of the issues and perhaps our position will become clearer. It seems to me that every due process vindictiveness claim essentially presents two questions.

The first part -- the first question is whether the defendant who is making the claim has shown enough to make out a prime facie case of a due process violation and to shift to the prosecutor the burden of explaining his actions. Of course, if not enough has been shown, then that's the end of the matter and the motion should be denied.

The second question, if enough has been shown to call for an explanation by the prosecutor, is what kinds of explanations should be deemed acceptable to rebut such a prima facie case.

Now, here the question is whether the Respondent, by simply showing that he demanded a jury trial and that at some time subsequent to that demand more severe charges were returned, did enough to make out a prima facie case of vindictive prosecution. The

Court of Appeals, importing the principles of Pearce and Perry to the pretrial context, has held that those facts suffice to create a presumption if vindictiveness, in effect.

We say that in the pretrial context there should instead be a presumption of regularity in the prosecutor's action and that the burden should be on the Defendant to show concrete and specific facts from which a conclusion of actual vindictiveness on the part of the prosecutor can be drawn. Now, this presumption of regulatory in prosecutorial charging decisions is the rule in every other context of which I am aware. This is the only exception.

And I'd like to call to the Court's attention the treatment of selective prosecution claims. These claims are quite analogous, it seems to me, to vindictive prosecution claims. Surely the bringing of a prosecution on account of a person's race or political views or religion is every bit as invidious a practice as bringing a prosecution to retaliate against the exercise of a right.

Equally, the possibility of an invidiously discriminatory motive underlying a prosecution is present in virtually every case. Yet, it has never been thought, and I think it's quite clear, that those things

combined are not enough to make out a prima facie case and to require the prosecutor to come in and explain his reasons for his actions, let alone rigidly restricting the reasons for his actions to practically nothing that can justify it.

Now, in Pearce and Perry the Court confronted cases in which vindictiveness appeared to be the most likely explanation for the increased penalty exposure of the defendants, and indeed cases in which no non-vindictive explanation was ever tendered. In fact in the Rice case, which was the companion of Pearce, the district court found actual vindictive retaliation against the appeal, and in Pearce -- in the Pearce case the Court described the state's assertion as nothing more than the naked power to do what it did.

Now, in the pretrial context we submit that the circumstances are entirely different, and this difference consists principally of two elements: The first element is that the exercise of rights by defendants in pretrial contexts is an entirely commonplace event. It is not likely to provoke a vindictive or retaliatory response by the prosecutor that the defendant has pleaded not guilty, that he's asked for a jury trial, that he's moved to suppress evidence, that he sought a continuance or asked for a

severance or a change of venue.

These are everyday occurrences, everyday grist to the prosecutor's mill, and to presume that the prosecutor would react in an unprofessional and unfair manner by retaliating against that kind of occurrence is simply contrary to common sense. In fact, I submit that the prosecutor generally would be astounded if a defendant exercised no rights in the pretrial context.

Now, not only is the exercise of a right by a defendant in the pretrial context therefore not a likely occasion for a retaliatory response by the prosecutor, but equally the process of preparation for the trial itself will inevitably give the prosecutor a better grasp of the facts of the case and can be expected in some cases to reveal reasons for concluding that the initial charges were too lenient.

So that this is again a context in which it is not unlikely. Superseding indictments are common. Sometimes the initial severity of charges is reduced because the prosecutor concludes in his pretrial preparation that they were too severe. Sometimes the severity is increased because he concludes that it was too lenient.

QUESTION: Mr. Frey, can I interrupt you just a second. In this particular case, where the argument

is made that the increased charges were in response to the jury demand, do you think the prosecutor was under a duty to explain his reasons or not.

MR. FREY: No.

QUESTION: So your position is he didn't even have to file the affidavit?

MR. FREY: That's correct, that is our position. Our position is essentially threefold:

First of all, that the mere showing of the exercise of a right followed by an increase in charges is not enough to make out the prima facie case of prosecutorial vindictiveness;

Secondly, that looking at the -- if you went beyond that, there's nothing about the circumstances of this case beyond those bare facts that might make out -- let me back up.

Our view is that there should be no presumption from these facts that the prosecutor acted vindictively. That does not mean that the Defendant, unaided by a presumption, could not make a showing that in a particular case the prosecutor said, I'll fix that SOB's wagon.

QUESTION: What would it take? I guess one of the questions is, when if ever is a factual inquiry appropriate or necessary? Would you concede it could

ever -- is there anything he could do to require the prosecutor --

MR. FREY: Yes. I would think that there may be circumstances in which it could be demonstrated from the particular facts of the case that the prosecutor acted vindictively. He may have said something. That would be one category of case. Or his behavior may otherwise appear so inexplicable from looking at the record of the case -- this is before asking him for an explanation -- that the only conclusion the Court could draw was that he was retaliating against the exercise of a right.

But our basic proposition is that normally in the pretrial context that is simply not a reasonable conclusion. And what the Court of Appeals is doing is indulging a presumption in these cases, and in the law of evidence a presumption is something that says, if facts A and B are established it is sufficiently likely that fact C follows that we will presume fact C and place the burden on the opponent of that fact to disprove it.

QUESTION: You said normally. Mr. Frey, is it normal for a prosecutor to increase the charge when a man asks for a jury trial? Is that the normal procedure?

MR. FREY: Let me say, what is common is for a prosecutor to increase charges after they have initially been brought.

QUESTION: No. Will you answer my question: Is it normal for a --

MR. FREY: It's neither normal nor abnormal.

QUESTION: -- for a prosecutor -- sir?

MR. FREY: I would say it's neither normal nor abnormal. It's simply, the demand for a jury trial is simply not likely to trigger any particular response one way or the other.

QUESTION: When it does, is it warranted to look into it?

MR. FREY: Our submission is that it is not warranted to presume from the mere fact that Respondent asked for a trial trial and that subsequent charges were filed that there was vindictive prosecution, and therefore there is -- he failed to state a claim upon which relief can be granted.

QUESTION: Couldn't you just ask the prosecutor, well, why did you do it?

MR. FREY: Well, you could just ask the prosecutor why did you do it.

QUESTION: Aren't you entitled to ask him?

MR. FREY: Well, our submission is that you're

not, but that if you are the kind of explanation that the prosecutor gave here is satisfactory.

QUESTION: Well, isn't the judge within his right to ask, or is the prosecutor --

MR. FREY: Well, I think the issue is whether the defendant is within his rights to demand an inquiry into the subject.

QUESTION: Does he have that right?

MR. FREY: No, not in this -- our position is, not in this context. And let me turn to the practical aspects of this problem to explain just why we think this is so. When the -- as I said at the outset, it's almost inconceivable, except in a case in which there's already been plea negotiations and the defendant has agreed to plead guilty before any charges are actually filed, it's virtually inconceivable that rights will not have been exercised by the defendant in a criminal case by the time a superseding indictment is returned.

So when we say, does the defendant have a right to have it inquired into, what we are essentially saying is that every time a superseding indictment has been filed the defendant has the right to call upon the court, and the court has the duty to respond to this call, get in the witnesses, get in the prosecutor, make the prosecutor give an explanation, have a hearing, in

the Ninth Circuit have a pretrial appeal.

The amount of resources, the amount of delay that is potentially involved is much too great for the problem that this procedure is designed to guard against.

QUESTION: Well, you've added a lot to mine. Mine is that the defendant asks and at the defendant's request the judge says: Mr. Prosecutor, why did you raise this charge, period. That's all he asks. And that takes how much time?

MR. FREY: Well, that may or may not take very long, depending on the procedures that ensue. I assume normally a prosecutor would have no objection to satisfying the judge's curiosity.

QUESTION: I am not interested in whether the prosecutor has objection. I'm interested as to whether the judge has a right to ask him.

MR. FREY: Well, I think that the judge probably has a right to ask him virtually anything that he'd like to ask him.

QUESTION: But if the judge asks him, he's exercising a discretionary right. There's not going to be any appeal or any appellate review of any kind of whether the judge should or shouldn't have asked him. If he asked him, the prosecutor is probably very likely

to respond, isn't he?

MR. FREY: He's probably likely to respond. But I think --

QUESTION: Well, doesn't he have to respond to a judge's request?

MR. FREY: Well, yes, Justice Marshall, I think he should respond. But I think the question that the Court has to focus on is whether the defendant has the right that the Court of Appeals said he had in this case, to have this hearing at which the prosecutor is essentially gagged.

QUESTION: I'm not talking about this case. I said, in an ordinary case, you remember, the man's charge is raised after he asks for a jury trial. And he says: Judge, this man has raised my charge after I asked for a jury trial. I'd like to know why. The judge says: I agree. Mr. Prosecutory, why?

The prosecutor is obliged to answer in my opinion.

MR. FREY: I will accept that the prosecutor should answer that question. But I'm not sure what consequences would follow --

QUESTION: And that doesn't take a whole lot of time.

MR. FREY: But that's not the issue, Justice

Marshall, in this case. The issue is not whether the prosecutor has to give an answer. The issue is whether, when he acts, he is presumed to act vindictively and he has a heavy burden of rebutting that presumption, and whether his hands should be tied behind his back --

QUESTION: I understood that this court cast aside the vindictiveness point, on page 4A of the appendix to your petition for certiorari: "On this record, we readily conclude that the prosecutor did not act with actual vindictiveness in seeking the felony indictment."

MR. FREY: But they still reversed the Respondent's conviction.

QUESTION: But they said that.

MR. FREY: They did say that.

QUESTION: You can't go beyond what they said, can you?

MR. FREY: Well, we're not -- I think we'll ask you to look behind what they said or look at it through specially colored glasses. I'm not asking you to look behind what they said.

QUESTION: Mr. Frey, before we leave this point, if the judge asks the prosecutor, why did you enhance the charges after a jury demand, presumably nine out of ten prosecutors would say, well, I reexamined the

case and I concluded this was the appropriate charge, you know, the appropriate charge for these facts. Then it seems to me the more serious question is, does he have to get on the witness stand and be subject to examination and all that.

Would there ever be a situation in your view where the prosecutor would have to subject himself to cross-examination?

MR. FREY: Well, let me say this, Justice Stevens. We would far prefer that procedure to the rule of the Fourth Circuit which prohibits explanation.

QUESTION: I understand.

MR. FREY: And while it may be unseemly in some way to have the prosecutor get on the stand and to have the judge and the defendant probing his motives in making a charging decision, it is far preferable to throwing out the case the prosecutor --

QUESTION: Are there facts that you think could be alleged by a defendant that would create a sufficient appearance of vindictiveness to require that kind of procedure?

MR. FREY: I think there probably could be. That is, we have not taken the position that no matter what the prosecutor does or why he does it in the pretrial context there would never be a due process

vindictiveness violation.

QUESTION: What you're saying as I understand you is that the mere sequence of events which we have in this case is not enough to create the kind of presumption that requires that kind of response.

MR. FREY: And that in general, the mere sequence of the exercise of a right followed at some point in the future by an increase charge is not enough.

QUESTION: But in this particular case you would have said it would have been wrong for the judge to require either the affidavit or any kind of an evidentiary hearing. I think that's what you --

MR. FREY: I think he should have denied the Defendant's motion to dismiss without any hearing.

QUESTION: I understand.

MR. FREY: but I don't wish to say that he's not entitled to ask the prosecutor --

QUESTION: It's your position that this alone is not enough?

MR. FREY: That is our position.

QUESTION: And didn't you also say that you can conceive of situations where it would require the judge --

MR. FREY: I can also conceive in selective

prosecutions of situations. But what is necessary -- and the same rule ought to be true here -- is a very specific showing of particular facts by the defendant from which the most reasonable conclusion is that there has been a vindictive retaliation by the prosecutor. If he's done that, then I think it may be appropriate to call upon the prosecutor to respond.

QUESTION: Mr. Frey, would the facts alleged here be sufficient in your view to allow the Defendant to request a hearing on the question?

MR. FREY: No.

QUESTION: Even though he had the burden of going forward at the hearing?

MR. FREY: Well, but this is like in a civil case if you file a complaint which fails to state a claim upon which relief -- fails to state facts that make out a claim upon which relief can be granted. You're not entitled to a trial to see whether something might be there.

QUESTION: All right. So in your view, these -- this particular situation was not enough to even enable the Defendant to request a hearing?

MR. FREY: That is our position, and that is our position generally, not just about this case but about most of the vindictive prosecution cases that

we've lost, particularly in the Ninth Circuit, where nothing more has been shown than the exercise of a right followed by an increase in charges.

QUESTION: Mr. Frey, I'm confused a little bit by the Government's position. Does it depart at all from your brief?

MR. FREY: No.

QUESTION: Because in your brief you say there's no logical basis for extending Pearce and Perry beyond their setting to the pretrial stage of a criminal prosecution.

MR. FREY: Well, what we are referring to there is not the notion that due process applies to vindictive responses, but the presumption of vindictiveness and the prophylactic rule of Pearce and Perry, which restrict the kinds of explanations that can be offered. Those are the things that we say don't belong in the pretrial context.

We don't say there can never be a due process claim. But what Pearce and Perry did was they said, when you've shown an appeal followed by an increase in charges or an increase in penalty exposure, that's it, the prosecution is finished, due process is violated.

QUESTION: Are you saying in the pretrial stage it should be an actual factual inquiry and a

certain amount of evidence to be adduced by the defendant before any inquiry is made?

MR. FREY: That he has to overcome a presumption of regularity in the prosecutor's charging decision.

I think I'll reserve the balance of my time for rebuttal if I may.

CHIEF JUSTICE BURGER: Mr. Spence?

ORAL ARGUMENT OF PAUL W. SPENCE, ESQ.

ON BEHALF OF RESPONDENT

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

This case is about a Defendant who was originaly charged with a petty offense, a misdemeanor violation, who was brought before a United States magistrate by the prosecution for trial at a time when the Government was satisfied to proceed on said petty offense and misdemeanor violations. The Respondent's only action at that time, indeed his only action subsequent to that time, was his exercise of his right to a jury trial.

As a consequence, this individual was forced to face felony charges. No matter how the actions of the second prosecutor in this case can be characterized, no matter how benignly labeled those actions can be,

this situation smacks of the sort of prosecutorial reaction to the exercise of a procedural right that was proscribed by this Court in Blackledge v. Perry.

But for Mr. Goodwin's election for a jury trial, he would have disposed of his case in the misdemeanor, petty offense context before the United States magistrate in Hyattsville.

QUESTION: Are you stating that as a factual matter, Mr. Spence, that either the Court of Appeals or the district court reached the factual conclusion that the Government upped the ante because of his invocation of the right to a jury trial?

MR. SPENCE: Mr. Justice Rehnquist, it's more of a practical conclusion. Assuming the court --

QUESTION: Can you answer the question?

MR. SPENCE: As a factual matter, they did not find that actual vindictiveness was present here, in other words, that the jury trial did not prompt the felony charges. As a practical matter, but for his election of a jury trial, the Fourth Circuit did hold he would not have faced those felony charges.

QUESTION: Well, what does that mean, as a practical matter? Does that simply mean that that the raising of the charges came after the request for jury trial?

MR. SPENCE: Well, that's certainly part of it. But the other part, the more important part of it, is had this individual not elected his right to a jury trial, which by procedures brought his case to Baltimore for the jury trial, he would have remained at the Hyattsville court for the misdemeanor, petty offense prosecution.

QUESTION: Would have been tried before the magistrate.

MR. SPENCE: That's correct, Your Honor. Therefore, but for his election the procedures, the system would have worked to keep him in Hyattsville, and the extra procedures that followed would not have occurred.

QUESTION: But the Fourth Circuit explicitly ruled out vindictiveness, malice, in its opinion.

MR. SPENCE: That's correct, Your Honor.

QUESTION: So that takes the legs off of the table that you were just erecting, doesn't it?

MR. SPENCE: Well, I don't believe so, Your Honor. This case certainly is not and has never been one involving actual vindictiveness. Petitioner is certanly correct in stating that. It has been conceded from the outset that no actual vindictiveness in the terms of a subjective malice or bad faith on the part of

the second prosecutor was present.

However, the prophylactic measure established by this Court in Blackledge v. Perry does not require or wait for a showing of actual vindictiveness or a showing of actual retaliatory motivation on the part of the Government. That's made very clear by this Court in Blackledge, which explicitly states that they did not find actual vindictiveness in the case before it and disclaimed any reliance on such a finding.

Rather than a remedial rule which is designed only to cure the effects of actual vindictiveness, the Blackledge Court fashioned a preventive measure that went to or was designed to purge not only the possibility of actual retaliation, actual vindictiveness, but also to free defendants from the fear of such retaliation.

This Court recognized in that case, as well as in the preceding case of North Carolina v. Pearce, that due to the extraordinary difficulty of proving actual motivations and subjective intent of a judge or a prosecutor, any requirement of actual vindictiveness would completely undermine the due process protection that this Court desired to erect. Therefore, in recognition of that, the Blackledge Court devised this prophylactic measure which is applicable in those

situations where the hazard of vindictiveness is sufficient enough to implicate the underlying rationale of that measure.

Contrary to the Petitioner's counsel's assertions, it is not a situation, it is not a measure, that is applicable every time there is an exercise of a procedural right and a certain upping of the ante, so to speak, follows it. That is not the ruling of Blackledge v. Perry. It is also not the ruling of the Fourth Circuit Court of Appeals.

The bottom line analysis is that only in those situations that generate a substantial, a realistic likelihood of vindictiveness will they then apply a prophylactic measure, particularly in the pretrial setting. Obviously, the exercise of procedural rights by the defendant is indeed commonplace. Obviously, reactions in certain ways by the prosecutor is as well commonplace. Not every one of those interplays will give rise to the application of the prophylactic measures set forth in Blackledge.

However, in those situations where the circumstances do give rise to the requisite substantial realistic likelihood of vindictiveness, then the prophylactic measure does apply. Both the Court of Appeals in this case as well as the trial court,

recognizing the similarity between this case and the facts in Blackledge v. Perry, held that a realistic likelihood of vindictiveness was present, that the hazard inherent in the facts before the court were substantial enough to warrant the application of the prophylactic rule.

QUESTION: Mr. Spence, do you think the Court of Appeals rule here that, including among the pretrial activities of a defendant the request for a jury trial, that would trigger this presumption that you're talking about, this prophylactic rule, was based on its assessment of how often after a request for a jury trial a prosecutor does or does not increase the charges?

MR. SPENCE: I would have to say no, Mr. Justice Rehnquist, because certainly no facts, no empirical data, was before the court at that time.

QUESTION: What do you think it's based on?

MR. SPENCE: Well, I think it's based on, the Court of Appeals' holding in this case, Your Honor, is based on the facts before it, which indicates that whatever ongoing investigation, whatever pretrial preparation which the Government asserts in justification for the felony charges, was indeed completed prior to the May 24, 1979, appearance by Mr. Goodwin before the magistrate.

Thus there is indeed no justification or no changed circumstances or new evidence subsequent to the exercise of the jury trial right that could have justified the felony charges. Therefore, rather than relying on empirical data which would lead one to conclude that the only possible basis for the increased charges was vindictive motive, it looked to the facts in this case and found simply that the jury trial right preceded the increased charges and that nothing -- no intervening circumstance or changed circumstance came after the jury trial right and the increase of charges --

QUESTION: Mr. Spence, isn't there always an intervening circumstance, namely that the lawyers are getting ready to try a case instead of just file some pleadings? Doesn't that almost always generate a reassessment of the case?

MR. SPENCE: Well, there's no question, Your Honor, that there is always pretrial preparation --

QUESTION: Which often leads to a different appraisal of the seriousness of the offense.

MR. SPENCE: Our position, Your Honor, would not preclude the bringing of further charges if that reappraisal or ongoing investigation disclosed new facts that would justify new charges. That is not the case

before the Court, however. The case before the Court is a situation where those facts that are offered in support of the new charges were known to the Government, perhaps not to the second prosecutor but to the Government, in its entirety prior to the May 24, 1979, election by Mr. Goodwin of his right to a jury trial.

QUESTION: What about his failure to show up.

MR. SPENCE: No question, Your Honor, that Mr. Goodwin's absence from the jurisdiction for three years, his failure to appear at trial, is obviously a justification for that charge and perhaps greater charges. The factor of his absence from the jurisdiction was obviously known to the Government in 1976, for the next three years up until the time of his return on May 24, 1979.

At that time, our position certainly would not require the Government to stand still or to stand pat on those charges which they brought three years ago. They were entirely able to bring new charges at that time, not only a failure to appear charge but greater charges. However --

QUESTION: Mr. Spence, there have been comments in some of the writings along here that your position, if it prevails, will force prosecutors to throw the works at the defendant at the very start of

every case. Do you have any comment on that?

MR. SPENCE: Yes, sir, Mr. Justice Blackmun, I do, a couple. First of all, we believe that that's speculative.

QUESTION: This would be counterproductive if it happened, wouldn't it?

MR. SPENCE: If the Government's position is correct, then indeed it would be a counterproductive effect to our application in this case. However, we believe, first of all, it's speculative. It's certainly unclear at least, and there's certainly no empirical data establishing that that in a great majority of cases is not what happens already.

Second of all, even if this rule went through, as we suggest, this Court follows the Fourth Circuit Court of Appeals, there is no indication that that's indeed what the prosecution will do in the future, that is bring the most serious charges at the outset.

Perhaps more importantly, as Your Honor noted in your dissent in Bordenkircher v. Hayes, it is perhaps far preferable to require the Government to do just that, to bring the charges at the outset, to have the Government be content with those charges it first brings and wants to justify to the public, to have out in the open their charging decision, to have defendants know

what they're in for in the beginning, rather than behind the scenes upping the ante and having the defendants in the dark as to what they face, bring the most serious --

QUESTION: There could be some defendants who wouldn't agree with you.

MR. SPENCE: I'm sorry, Your Honor?

QUESTION: There could be some defendants who wouldn't agree with you.

MR. SPENCE: Certainly --

QUESTION: That you should start off upping up the charges.

MR. SPENCE: Certainly we don't agree -- certainly we would not ignore --

QUESTION: What do you need to trigger the automatic rule that you want? One, that the charge is increased? Is that enough?

MR. SPENCE: Well, that's certainly part of it, Your Honor. You certainly need --

QUESTION: My question was, is that enough?

MR. SPENCE: No, sir.

QUESTION: That's not enough?

MR. SPENCE: No, sir.

QUESTION: What else do you need?

MR. SPENCE: You need a motivation on the part

of the prosecutor to discourage the exercise of that right. You also need --

QUESTION: Well, if I understand the Government, if you can show it they don't mind you showing it.

QUESTION: And the Fourth Circuit ruled out the motivation that you're driving at, did they not, in their opinion?

MR. SPENCE: The Fourth Circuit clearly did not rely on any actual vindictiveness.

QUESTION: Well, what else is there in the case?

MR. SPENCE: Well, there's much, much more to the case than merely actual vindictiveness. This Court in both the North Carolina v. Pearce and Blackledge v. Perry noted obviously the primary concern of actual vindictiveness. But there is also another concern, and that is the problem that other defendants will be chilled in their exercise of these rights, particularly the exercise of a jury trial right, by the knowledge that the stakes can be increased if they do exercise this right.

There is this secondary goal of the prophylactic meaure. It does not focus only on actual vindictiveness, but also goes to remove the apprehension

of vindictiveness. The objective reality of vindictiveness which was sought to be proscribed by the measure in Blackledge v. Perry is precisely that objective reality or circumstances that exist in this case and which the Fourth Circuit found generate a realistic hazard of vindictiveness sufficient at that point to generate a presumption of prosecutorial misconduct.

QUESTION: What if the prosecutors in the Fouth Circuit, or some of them, senior prosecutors, issued a memorandum to the staff lawyers, the Assistant United States Attorneys in the case of the federal: Hereafter, after -- once you have arrived at the proper charge, you will increase it by the next higher offense to enhance our bargaining position with the defendant.

Is that prosecutorial vindictiveness?

MR. SPENCE: And they do that in the event that a jury trial is required?

QUESTION: Just a flat rule. Every time that they've decided they have a manslaughter case, then they're going to push it up to some kind of a homicide, other homicide, or if it's a second degree, if there are degrees in the jurisdiction, push it up to first.

MR. SPENCE: That, Your Honor, brings in to some extent the notions established in Bordenkircher v.

Hayes, and that is, where a defendant is given a free choice and full notice of what the consequences are, then perhaps the punitive aspect of actual vindictiveness will be allowed. In the situation which Your Honor posits, I believe that the generalized threat, and perhaps even the vague threat, of adding charges should a right be exercised would be insufficient to bring that context into the Bordenkircher v. Hayes context and still be within the rationale of Blackledge v. Perry.

Obviously, we recognize the difference in context between this case and that in Blackledge v. Perry. But any distinction between pretrial and posttrial setting is relevant only to the extent that it reflects on the prosecutorial interest in discouraging the exercise of a right.

We do not argue, and we believe the Court of Appeals did not state, that any exercise of a right pretrial followed by the upping of the ante generates a presumption of prosecutorial misconduct. We believe that is not their holding. We do not urge that ruling to this Court.

Rather, we only state what Blackledge states, and that is when that scenario, when that procedural context with other circumstances generates the

substantial hazard of vindictiveness, at that point there is a presumption of prosecutorial misconduct, at which point the Government must justify the increase in charges.

QUESTION: Mr. Spence, why isn't the defendant adequately protected by a rule which would allow for dismissal if there is actual vindictiveness, but not otherwise? Why isn't that entirely adequate?

MR. SPENCE: That would go part of the way, Justice O'Connor. However, Blackledge requires one step further. First of all, it requires a freedom of apprehension of actual vindictiveness, as opposed to only actual vindictiveness.

More importantly, however, I think the rule which Your Honor advances would simply generate the type of litigation, the type of inquiry into the subjective intent of judges and prosecutors, which this Court in Pearce and Perry has decided is just not appropriate.

QUESTION: Do we have to make that kind of an inquiry in selective prosecution claims?

MR. SPENCE: I believe with respect to selective prosecution this Court has decided to require defendants to make the preliminary showing insofar as the substantial hazard of vindictiveness. That's what this Court has required in those areas.

QUESTION: Well, why shouldn't this be treated in the same fashion?

I think that's how this case should be treated, Your Honor.

As to selective prosecution cases, I am frank to admit that I am not positive as to the standard which this Court would require in analyzing such claims or in analyzing the Government's rebuttal of such claims. We would only state there is a difference here, and that is a difference set up by this Court, that the presumption of prosecutorial vindictiveness will arise when that realistic likelihood of vindictiveness has been shown at the outset by the defendant, when he has met his initial burden to show that the circumstances existent in the case generate the substantial hazard of retaliation.

QUESTION: Has this Court ever decided a selective prosecution case?

MR. SPENCE: It has.

QUESTION: What?

MR. SPENCE: I believe the most recent one in which this Court found invidious selective prosecution was in the Wick Woe case sometime ago, Your Honor.

QUESTION: Wick Woe v. Hopkins?

MR. SPENCE: Hopkins, yes, sir.

QUESTION: That was some time ago.

QUESTION: Sort of before he was born.

MR. SPENCE: The difficulty, as mentioned just

recently, in exploration of the actual motivations of a prosecutor or a judge is no less significant here than it is in the post-trial setting, and certainly warrants the application of the prophylactic measure only in those narrow instances where the realistic likelihood of vindictiveness is present.

Bordenkircher v. Hayes, frequently and consistently relied upon by the Government in thi case, does not either advance or support its position with respect to the sole importance of actual vindictiveness or the nonapplicability of Blackledge v. Perry in the pretrial setting. The Bordenkircher v. Hayes decision by this Court rests on the express determination that plea bargaining is an essential component to the administration of the criminal justice system, and that it is the give and take process of plea bargaining, the fact that the defendant knows what he is in for, knows the consequences of his elections that voids that process of any punitive aspects. The key elements are those --

QUESTION: But you don't think it would be punitive if the prosecutors deliberately, as a matter of regular practice, always enhanced the charge as I suggested in the hypothetical?

MR. SPENCE: Your Honor, if in this case or in

any case such as this the prosecutor said if you exercise your right to a jury trial we will then do A to you, in other words, a specific threat as to what they would do, in that case we believe Bordenkircher v. Hayes would control and in effect allow that actual vindictiveness. However, the distinction between Blackledge and Bordenkircher and between this case and the situation Your Honor advances is the simple fact that the Respondent in this case had no choice as a matter of fact. He had no idea, no notice that if he exercised his right to a jury trial these new and substantially higher charges would be brought against him.

That simple fact completely obviates or undermines any reliance by the Government on Bordenkircher v. Hayes. We submit that Blackledge v. Perry stands unaffected by this Court's ruling in Bordenkircher v. Hayes, requires affirmance of the Court of Appeals decision.

The Government refers to ongoing investigation and pretrial preparation that provided the bases for more serious charges against Mr. Goodwin. However, a review of the record reveals quite simply that prior to the return of the defendant to Hyattsville for trial in May of 1979, prior to the Government in effect

committing itself to a trial on the petty offense and misdemeanor charges, the prosecution had that information which it now asserts justified the felony indictment.

The ongoing investigation which is spoken of by the Petitioner was in effect completed prior to May 24, 1979. The office in charge, the victim, was also in effect the investigating agent. He had found out about Mr. Goodwin's record. He had found out about Mr. Goodwin's alleged participation in narcotics trafficking. Obviously, the Government at the time prior to his election of a jury trial right were well aware of his flight, were well aware of the possibility of the perjury aspect of the preliminary hearing, and of course were aware of the seriousness and the nature of the charges. All these factors were known to the prosecution prior to Mr. Goodwin's election for a jury trial, yet they were content to proceed to trial at that time.

There was ample opportunity for the prosecutor and the prosecution to reassess the charges. Certainly in no way did the defendant preclude any opportunity for such re-evaluation. All the prosecution in this case or in other cases need do to avoid the limitations of the Court of Appeals or of this Court in Blackledge v. Perry

is to make informed appropriate decisions to prosecute at the outset. Respondent's position is simply that the decision below is required by this Court's previous holdings in North Carolina v. Pearce and Blackledge ve. Perry. We are not arguing -- and as I believe I made clear already -- that the prophylactic rule is always applicable in the pretrial setting. Rather, it is applicable in the pretrial setting as the post-trial setting only when a substantial hazard of vindictiveness is set up by the circumstances.

We are not asking this Court to adopt a rule or to continue a rule that will generate inappropriate litigation. First of all, only narrow circumstances will justify an inquiry, will justify the application of the presumption of prosecutorial vindictiveness. Further, this Court or other courts certainly would be entitled to fashion a preliminary procedure such as that fashioned in Franks v. Delaware where the defendant would have an obligation to make a substantial preliminary showing requiring such an inquiry which this Court is concerned about.

Perhaps even more importantly, if this Court eschews reliance on Blackledge because there is no actual vindictiveness in this case, this Court and other courts will be left with a standard which will require

explorations into the subjective intent and motivations of prosecutors. Every word, every deed, every action of the prosecutor will come under scrutiny. This would be precisely the type of litigation, be precisely the unseemly task which this Court tried to avoid in Blackledge v. Perry that would now come about by only requiring actual vindictiveness.

Finally, we are not advocating that this position will unduly restrict prosecutorial discretion. Obviously Blackledge v. Perry to some degree imposes a restraint in the name of due process upon the prosecution. However, as in this case, it is not unreasonable restraint if proper prosecutorial procedure is followed at the outset. We are not asking for any change in procedure. The present system and procedures allows for deliberation by the prosecution.

This Court's opinion in Lavasco, or United States v. Lavasco certainly establishes that the prosecution is under no specific or strict time restraints with respect to the bringing of charges. There is certainly plenty of time generally, certainly plenty of time in this case, given the fact that the prosecution did have the information available to it prior to the defendant's election of a jury trial to make a decision that it would be content to live with

throughout the proceedings.

QUESTION: What happens, Counsel, if in the federal system a man is charged with selling cocaine and the day before the trial they discover that the person that he sold the cocaine to was a child, and they changed the indictment to a request for the death penalty? They couldn't do it, could they, under your theory?

MR. SPENCE: Your Honor, we -- no, no, sir. We believe that if new information arises subsequent to the exercise of procedural right that legitimately and justifies the bringing of new charges, then it's permissible.

The Fourth Circuit opinion which does indeed hold that the only way the prosecutor could have justified the increased charges in this case was to show that the charges could not have been brought at the outset is a simple recognition of the fact that that was the only explanation in this case. The information supporting the felony indictment was known to the prosecution prior to May 24, 1979. It was known through Officer Morrissette and the prosecutor at Hyattsville, this information which the second prosecutore ultimately relied upon for the bringing of a felony indictment. The Court of Appeals did not address that situation

where subsequent to the exercise of a jury trial right new information was garnered.

Our position, of course, is that the Fourth Circuit is right, but this Court need not go so far as the Fourth Circuit did to affirm its decision. The facts before this Court and before the Fourth Circuit are very narrow. A situation where an individual will go before the magistrate and then exercise a jury trial right with potential for higher charges is a fairly rare one. However, the point in this case is simply that due to the officer's investigation, the prosecutor's role at Hyattsville, indeed, the second prosecutor's knowledge of some of the background facts prior to the exercise of the jury trial right, there were no new circumstances, no new evidence that would have justified the increased charges. If there had been, we probably would not be here, such charges would have been justified. Certainly in your hypothesis, Mr. Justice Marshall, we believe the added charges would be appropriate.

QUESTION: What about the situation of one prosecutor who is simply either inexperienced or incompetent and he makes a bad judgment. The staff cannoot re-examine that judgment?

MR. SPENCE: Your Honor, we believe the --

QUESTION: His superiors cannot re-examine

it?

MR. SPENCE: We believe under these circumstances, Your Honor, due process of law would outweigh the interest in allowing the Government to reassess the decision of one of its own. Certainly the Government was acting as a unit here. There is no valid contention, we believe, that simply because the first prosecutor was located in Hyattsville, away from the Baltimore prosecutor's office, that that should justify a re-evaluation or an entirely new assessment of the procedures.

Referring this Court to the plea bargaining cases, obviously one individual must know what the other individual is doing; the left hand must know what the right hand is doing. The prosecution operates as a unit.

We suggest to the Court that if the Government --

QUESTION: Well, this rule will govern the prosecutor -- that you are advancing will govern a prosecutorial office with 100 prosecutors as well as one with two or three.

MR. SPENCE: That's correct, Your Honor.

QUESTION: And are you seriously suggesting that with 100 prosecutors, as you put it, the right hand

must always bound to know what the left hand is doing?

MR. SPENCE: Yes, sir.

QUESTION: Oh.

MR. SPENCE: Particularly.

For example, again referring to the plea bargaining cases, I think it can be stated with accuracy that should one of 100 prosecutors make a firm plea agreement, certanly any of the other 99 prosecutors will be bound by that. We believe the situation here is no different.

QUESTION: This is quite a different matter from a plea bargaining case.

MR. SPENCE: Well, there certainly are elements of due process that are implicated in both situations, we believe, Your Honor. And certainly --

QUESTION: I believe that what you are arguing for is kind of a mini-double-double jeopardy, isn't it, that it doesn't start when the jury is empanelled but when the indictment is first returned, that the prosecutor would be best advised to just get everything out on the table right then because if he doesn't, there's going to be judicial inquiry into why he didn't from then on.

MR. SPENCE: There are certainly, Your Honor, double jeopardy implications in this entire analysis.

However --

QUESTION: But is that really sound, because we have held double jeopardy starts when the jury is empanelled. It doesn't go before that.

MR. SPENCE: Due process rationale advanced by this Court, although perhaps having implications of double jeopardy principles, is not confined by the double jeopardy approach. Indeed, a significant difference would be that if a prosecutor is negligent or does make a mistake the first time around, the defendant does not walk free and clear as in a double jeopardy situation where if double jeopardy applies, the defendant may be free to go. In this situation the negligence would only go so far as to free the defendant of the more serious charges.

We believe that if the information is known to the Government, if the one out of 100 attorneys, Chief Justice Burger, are aware of the facts, that the interest in encouraging proper prosecutorial procedure should be considered by this Court, and that is mistakes occur, as perhaps in this case occurred when the prosecutor did not act on that information to which he had access to and to which he knew, that any cost because of that mistake should be borne by the Government, that the appropriate response is not the

sacrifice of due process interests which this Court has recognized in North Carolina v. Pearce and Blackledge v. Perry.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Frey, do you have anything further?

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. FREY: Yes.

I have to take strenuous issue with several characterizations of my colleague about what is going on here. And the first of these has to do with his confusion of the prosecution with the prosecutor. The prosecution, in his view, includes the police. Let's keep in mind -- and although I don't want to concentrate too much on the particular facts of this case -- these initial charges were brought by a police officer.

Now, the prosecutor who allegedly had an adequate opportunity to make a binding decision -- and let me say this is not just punishing the Government if you don't allow the increase in charges, but punishing the public at large -- this is a prosecutor who was assigned to the Hyattsville Magistrate Court, and what happens there is she walks in in the morning, she is handed 20 or 30 files of cases that are on the docket

that day, she struggles as best she can with that. The idea that the Government should be bound by what happened at that initial proceeding and should be barred from bringing what are otherwise entirely appropriate charges seems to me quite indefensible.

Now, let me say for example, suppose the U.S. Attorney had a policy that he announced -- and we don't need to go this far, but suppose he had a policy that said whenever a case is going to go to trial we are going to assign a prosecutor to review the initial charge with great care to determine whether it was too severe or too lenient or whether it should be changed. This is announced policy.

Now, I find it hard to believe that such a policy would violate the due process clause of the Constitution. Yet that is the inescapable conclusion if you agree with my colleague and with the Court of Appeals.

Now, let me turn to this question of whether the exercise of the right to jury trial is only one of a narrow category of cases in which there is a substantial hazard of a vindictive response. The exercise of a right to a jury trial is one of the most routine, common occurrences in a criminal case. If that is enough to cause a prosecutor to retaliate vindictively and out of

spite against the defendant, then any exercise of a right by a defendant at the pretrial stage is going to be enough.

Now, in fact, the prosecutor -- the Respondent says in his brief it is a lot of work for the prosecutor to have to try a case instead of having it tried in Magistrate's Court. That does not distinguish the case from Colten v. Kentucky where it is a lot of work for the judge to have to try the case at the second level when, if the defendant did not seek a trial de novo, the judge would not be burdened with that extra effort.

Also, with respect to Justice Blackmun's question, the Court in Colten said precisely the same thing. They said that the first level judge was likely to impose a higher sentence if he was aware that the sentence he was imposed would limit the sentence that could be imposed if a trial de novo was sought. The same kind of thing is going on here. The prosecutor plainly has incentives to bring higher charges where the prosecutor himself has brought the initial charges and not, as here, a police officer.

And also I might say that from talking to prosecutors in the Ninth Circuit where we have had most of our vindictive prosecution cases and most of our losses, there is unquestionably a chilling effect on the

prosecutor's decision to re-evaluate the case because if even, no matter how appropriate they may feel some superseding or changed charge is, they know that if they bring that charge there's going to be a full dress hearing in the District Court, followed by an appeal, and it is just more grief than it's worth, and it's too bad that the appropriate charges can't be brought, but in most cases that is the result of a rule like this.

Now, I also wanted to point out that Respondent has really drawn back from the Court of Appeals rule as to what kind of justifications are acceptable because the Court of Appeals said we would have to show that the charges could not have been brought, and by that I think they meant we would have to show that we didn't know or have evidence of some aspect of the offense behavior itself.

In this case we knew all the facts about the offense, but there were additional facts that came along later on that properly entered the prosecutor's discretion and judgment that the Fourth Circuit would not --

QUESTION: Are you suggesting the cure for this is for all prosecutors to make a preliminary decision and then up it one or two points?

MR. FREY: Well, I would not recommend to

prosecutors that they do that, but that is where the Court would be driving them with such a ruling, yes.

CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:08 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

UNITED STATES v. LEARLEY REED GOODWIN # 80-2195

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BY Diane Hammond