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Abstract

On January 8, 1973, Paul Hayes was indicted by a Fayette County, Kentucky grand jury for forgery of a check in the amount of $88.30, a violation of a Kentucky statute punishable by a term of two to ten years in prison.

KEYWORDS: safeguards, plea, bargaining

Criminal Law: Weighing the Need for Procedural Safeguards in Plea Bargaining: Bordenkircher v. Hayes

On January 8, 1973, Paul Hayes was indicted by a Fayette County, Kentucky grand jury for forgery of a check in the amount of $88.30, a violation of a Kentucky statute punishable by a term of two to ten years in prison.[1] During plea negotiations attended by Hayes, his retained counsel, and the clerk of the court, the state prosecutor offered to recommend a five-year sentence, provided that Hayes would plead guilty. The prosecutor informed the accused, however, that, upon a refusal to plead guilty, he would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act. Such an indictment, together with a conviction on the forgery charge, would subject Hayes to a mandatory sentence of life imprisonment in light of his two prior felony convictions.[2] At the time of the original indictment, the prosecutor was in possession of sufficient evidence to ask the grand jury for an indictment under the Habitual Criminal Act.[3] When Hayes

1. KY. REV. STAT. §434.130 (1973) (repealed 1975).
2. KY. REV. STAT. §431.190 (1973) (repealed 1975).
   At the time of Hayes' trial, the statute provided that "[a]ny person convicted a . . . third time of a felony . . . shall be confined in the penitentiary during his life." That statute has been replaced by KY. REV. STAT. §532.080 (Supp. 1977) under which Hayes would have been sentenced to, at most, an indeterminate term of 10 to 20 years. §532.080(6)(b). In addition, under the new statute, a previous conviction is a basis for enhanced sentencing only if a prison term of one year or more was imposed, the sentence or probation was completed within five years of the present offense, and the offender was over the age of 18 when the offense was committed. At least one of Hayes' prior convictions did not meet these conditions.
Bordenkircher v. Hayes, 434 U.S. 357, 359 n. 2 (1978). *See* note 3 *infra*.
3. [Hayes] was 17 years old when he committed his first offense. He was charged with rape but pled guilty to the lesser included offense of "detaining a female." One of the other participants in the incident was sentenced to life imprisonment. [Hayes] was sent not to prison but to a reformatory where he served five years. [Hayes'] second offense was robbery. This time he was found guilty by a jury and was sentenced to five years in prison, but he was placed on probation and served no time. Although [Hayes'] prior convictions brought him within the terms of the Habitual Criminal Act, the offenses themselves did not result in

subsequently refused to plead guilty, he was indicted under the habitual criminal statute, was found guilty on the forgery charge, was found to have two prior felony convictions and was sentenced to life imprisonment.[4]

The Kentucky Court of Appeals,[5] in an unpublished opinion,[6] upheld the conviction and sentence, holding that "the prosecutor's decision to indict [Hayes] as an habitual offender was a legitimate use of available leverage in the plea bargaining process."[7] The United States District Court for the Eastern District of Kentucky agreed and denied a petition for writ of habeas corpus.[8]

The United States Court of Appeals for the Sixth Circuit, relying on *Blackledge v. Perry*[9] and *North Carolina v. Pearce*,[10] unanimously

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imprisonment; yet the addition of a conviction on a charge involving $88.30 subjected [Hayes] to a mandatory sentence of imprisonment for life.

434 U.S. at 370 (Powell, J., dissenting).

4. 434 U.S. at 359.

5. The Kentucky Court of Appeals is no longer the highest state court since, by amendment to the Constitution of Kentucky, effective January 1, 1976, the judicial system has been changed. The highest state court is now the Supreme Court of Kentucky. KY. CONST. §109.

6. Hayes v. Commonwealth, No. 73-766 (Ky. March 1, 1974), *memorandum opinion not to be cited as authority.*

7. 434 U.S. at 359.

8. Opinion of the District Court is unreported. 434 U.S. at 360 n. 4.

9. 417 U.S. 21 (1974). Perry was convicted in the District Court of North Carolina on the misdemeanor charge of assault with a deadly weapon. Entitled as of right to a trial *de novo* in the Superior Court, Perry filed a notice of appeal. Prior to the trial *de novo*, the prosecutor returned to the grand jury and obtained an indictment increasing the misdemeanor to "the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury." *Id.* at 23. Perry pleaded guilty and "was sentenced to a term of five to seven years in the penitentiary." *Id.* The Court held that it was "not constitutionally permissible for the State to respond to defendant's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo.*" *Id.* at 28-29. In a footnote to the *Perry* opinion, the Court called for a different result where the prosecution could not have brought the felony charge initially. *Id.* at 29 n.7.

10. 395 U.S. 711 (1969). Pearce was convicted for assault with intent to commit rape. Subsequently, Pearce was successful in collaterally attacking his conviction but, upon retrial, was reconvicted and given an increased sentence. *Pearce* was decided with Simpson v. Rice. *Id.* Pearce's sentence was increased by 2 years, 11 months. *Id.* at 713 n. 1. Rice's sentence was increased by 25 years. *Id.* at 714 n. 4. The Court held that imposing an increased sentence upon reconviction, without delineating the reasons for the increase, after a defendant had successfully appealed his original conviction, was tantamount to punishing the defendant for having his original conviction set aside and, therefore, was a violation of due process of law. *Id.* at 726.

reversed and held that Hayes was denied due process of law because the prosecutor's tactics placing Hayes "in fear of retaliatory action for insisting upon his constitutional right to stand trial."[11] The Sixth Circuit remanded the case, ordering that Hayes be discharged "except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument."[12]

The United States Supreme Court granted certiorari[13] and, in a five to four decision,[14] reversed and HELD: "the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment."[15]

The ruling in *Hayes* can best be explained by the Court's view that "this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop the charge as part of the plea bargain."[16] In plea bargaining cases, the Supreme Court has traditionally approved of procedures where the state encourages guilty pleas by providing for a lesser penalty or by promising to recommend a lighter sentence or to reduce charges.[17] Under such a system, it is inevitable that the entry of a plea by a defendant will be encouraged to some extent by the "fear of the possibility of a greater

11. Hayes v. Cowan, 547 F.2d 42-45 (6th Cir. 1976).

12. *Id.* at 45.

13. 431 U.S. 953 (1977).

14. 434 U.S. 357 (1978). Stewart, J., delivered the opinion of the Court, in which Burger, C.J., and White, Rehnquist, and Stevens, J.J., joined. Blackmun, J., filed a dissenting opinion, in which Brennan and Marshall, J.J., joined. Powell, J., filed a dissenting opinion.

15. 434 U.S. at 365.

16. 434 U.S. at 360-61.

17. Brady v. United States, 397 U.S. 742 (1970). In this decision, which promotes the legitimacy of plea bargaining, the Court held Brady's guilty plea valid as voluntary, even though his plea may have been coerced by the death penalty provision of the Federal Kidnapping Act (held to be unconstitutional in United States v. Jackson, 390 U.S. 570 (1968)). The Court found that Brady's plea was motivated by his "desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged." 397 U.S. at 751. Parker v. North Carolina, 397 U.S. 790 (1970), decided the same day as *Brady*, involved similar issues and produced the same judicial result. *See* Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEXAS L. REV. 193, 252 (1977) [hereinafter cited as Dix].

penalty upon conviction."[18] The Court has also accepted as inevitable and permissible the fact that the plea bargaining system discourages defendants from asserting their trial rights.[19] "By tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty."[20]

However, the Supreme Court has also prohibited states from imposing penalties upon defendants for choosing to do "what the law plainly allows them to do."[21] In *North Carolina v. Pearce,*[22] the state was prohibited from increasing, without adequate explanation, a defendant's sentence upon reconviction that followed a successful appeal. Such an unexplained increase in sentence was found to be a product of state vindictiveness against a defendant for exercising his right to appeal. "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial."[23] In *Blackledge v. Perry,*[24] once the defendant had indicated his intention to exercise his statutory right to trial *de novo,* the state was prohibited from bringing a more serious charge based on the same conduct.[25] The bringing of such an increased charge was similarly found to be a product of prosecutorial vindictiveness against a defendant for exercising his right to appeal. It was held to be a violation of due process of law for "the State to respond to Perry's invocation of his statutory right to appeal by bringing a more

18. 434 U.S. at 363.

19. *Id.* at 364. The *Hayes* Court cited Chaffin v. Stynchcombe, 412 U.S. 17 (1973), where the Court considered *inter alia* the constitutionality of circumstances in the criminal process which encourage the waiver of constitutional rights. In discussing the holdings of the plea bargaining cases on this issue, the *Chaffin* Court stated: "Although every such circumstance has a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices was upheld as an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Id.* at 31.

20. 434 U.S. at 364.

21. *Id.* at 363.

22. *See* note 10 *supra.*

23. 395 U.S. at 725.

24. *See* note 9 *supra.*

25. The North Carolina two-tiered system allows a misdemeanor defendant convicted in an inferior trial court to seek, as of right, a new trial in a court of general jurisdiction. N.C. GEN. STAT. §7A-290 (Supp. 1977).

serious charge against him prior to trial *de novo.*"[26]

The question before the Court in *Hayes* was whether the Sixth Circuit Court of Appeals was correct in placing a new procedural safeguard on plea bargaining by applying the due process prohibition against prosecutorial vindictiveness, established in *Pearce* and *Perry*, to the plea bargaining procedure used by the prosecutor in *Hayes*.

The Sixth Circuit, in applying the rule expressed in *Pearce* and *Perry* to the plea bargain procedure used by the prosecutor in *Hayes*, had made two findings. First, the bringing of an increased charge after plea negotiations had failed was the product of prosecutorial vindictiveness against Hayes for exercising his right to plead not guilty.[27] Second, the prosecutor abused his broad discretionary charging powers by using those powers to coerce Hayes "into foregoing his right to trial."[28]

With regard to the Sixth Circuit's findings, the Supreme Court observed that, even though the prosecutor in *Hayes* did not procure the indictment on the increased charge until after the plea negotiations had ended, Hayes was fully aware of the terms of the offer.[29] Further, the

26. 417 U.S. at 23.

27. 547 F.2d at 44.

28. *Id.*

29. 434 U.S. at 360. The Court indicated that it may have reached a different result in "a situation . . . where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty." *Id.* In a footnote to that statement, the Court cited United States ex rel. Williams v. McMann, 436 F.2d 103 (2nd Cir. 1970), and United States v. Ruesga-Martinez, 534 F.2d 1367, 1370 (9th Cir. 1976), stating that it did not necessarily endorse the decisions. *Id.* at 360 n. 5.

In United States ex rel. Williams v. McMann, Williams, indicted for selling heroin, agreed to plead guilty to the lesser offense of attempted sale and was sentenced to an indeterminate term of 3 to 7 years. A few days after sentencing, the prosecution discovered that Williams had been convicted of a felony in 1949 and returned him to court for mandatory sentencing as a second felony offender. As a recidivist, Williams faced from 3¾ to 15 years in prison. Williams was granted permission to withdraw his guilty plea and was tried and convicted on the original indictment. "At sentencing, Williams' attorney for the first time questioned the constitutionality of the older 1949 conviction. The prosecution did not take issue with the contention; Williams was accordingly treated as a first felony offender." 436 F.2d at 104. Williams was sentenced to a term of 5 to 10 years. On petition for writ of habeas corpus, Williams relied on North Carolina v. Pearce, *supra* note 10, and contended that he should only have been tried for attempted sale and, upon conviction, should only have received a maximum sentence of 3 to 7 years (the terms of the plea bargain). The Second Circuit affirmed the lower court's denial of the writ, distinguishing *Pearce* by the fact that the increased sentence in *Williams* stemmed from a conviction for a more serious crime. The *Williams* court

Court noted that the effect of the Sixth Circuit's ruling would require a finding of prosecutorial vindictiveness and a "violation of due process of law whenver [a prosecutor's] charging decision is influenced by what he hopes to gain in the course of plea bargaining negotiations."[30] The Court went on to point out the importance and benefits of plea bargaining to the criminal justice system, citing the case of *Blackledge v. Allison.*[31] In addition, the Court discussed the failure of the Sixth Cir-

went on to explain that, when a defendant revokes his plea, the state is not required to maintain its part of the plea bargain. Interestingly, Circuit Court Judge Hays, who concurred in the *Williams* opinion, pointed out that, in Simpson v. Rice, *supra* note 10 (the companion case to *Pearce*), "[t]he fact that Rice had reneged on his part of the plea bargain did not prevent the Court from giving him the benefit of the lower sentence which had previously been imposed upon him." 436 F.2d at 107.

In United States v. Ruesga-Martinez, the appellant was charged with the misdemeanor of unlawful entry into the United States, even though the prosecution was aware that appellant was a multiple offender and could have been charged with a felony. The appellant pleaded not guilty and later refused to sign a waiver of his right to trial before a district judge, a statutory right under 18 U.S.C. §3401(b). Subsequently, the U.S. Attorney charged the appellant with the felony violation as a multiple offender. Appellant was found guilty and sentenced to 18 months imprisonment. The Ninth Circuit, applying North Carolina v. Pearce, *supra* note 10, and Blackledge v. Perry, *supra* note 9, reversed and held that there was "a significant possibility that such discretion [on the part of the prosecutor] may have been exercised with a vindictive motive or purpose, [and] the reason for the increase in the gravity of the charges must be made to appear." 534 F.2d at 1369. The prosecution contended, *inter alia,* "that it was entitled to bring the more serious charges as a consequence of its authority to engage in plea bargaining." 534 F.2d at 1370. The Ninth Circuit conceded that it had "consistently reaffirmed the right of the prosecution to bring a heavier charge in the event that the accused reneges on his bargain, [but] no plea bargain was entered into in the present case." *Id.* Finally, and most important in the plea bargaining/vindictiveness context, the Ninth Circuit stated, "[w]e find no merit in [the prosecutor's] suggestion that the power of the prosecution to adjust the charges against an accused at will inheres in its power to engage in plea bargaining." *Id.* at 1370-71.

30. 434 U.S. at 361.

31. 431 U.S. 63 (1977). In *Allison,* the Court held that a petition for a writ of habeas corpus should not have been summarily dismissed where the petitioner was challenging the validity of his guilty plea alleging an unkept promise accompanied by specific factual allegations, the truth or falsity of which could not be determined from the record. As to the importance and benefits of plea bargaining, the Court stated:

> Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there

cuit to consider the existing procedural safeguards in plea bargaining, *i.e.*, "the importance of counsel during plea negotiations, *Brady v. United States*[32] . . . the need for a public record indicating that a plea was knowingly and voluntarily made, *Boykin v. Alabama*[33] . . . and the requirement that a prosecutor's plea bargain promise must be kept, *Santobello v. New York*[34] . . . ."[35]

The Supreme Court clearly disagreed with the findings of the court of appeals that the products of state vindictiveness, found to exist in the *Pearce* and *Perry* situations, requiring a due process restraint on the state's sentencing and charging powers, were also present in the *Hayes* plea bargain situation.

In giving its reasons for finding the court of appeals "mistaken" in its opinion, the Court first reaffirmed the principle, established in *Pearce* and *Perry*, that vindictiveness against "a defendant who had chosen to exercise a legal right to attack his original conviction" is a violation of due process.[36] However, the Court, citing *Colten v. Kentucky*[37] and *Chaffin v. Stynchcombe*[38] (both of which were decided in light of *Pearce*), emphasized that the due process violations in *Pearce*

> may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.

Id. at 71.

32. 397 U.S. 742. Addressing the issue of procedural safeguards, the *Brady* Court stated:

> [O]ur view . . . is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendant's admissions that they committed the crimes with which they are charged.

397 U.S. at 758.

33. 395 U.S. 238 (1969). In *Boykin*, the Court held that it was reversible error for the trial judge to accept a guilty plea without an affirmative showing on the record that it was intelligently and voluntarily made.

34. 404 U.S. 257 (1971). In *Santobello*, the Court held that a state's failure to keep a commitment made during plea bargaining requires that the judgment be vacated and the case be remanded for determination as to whether the circumstances require specific performance of the agreement, or that the defendant be given the opportunity to withdraw his guilty plea. *Id.* at 262-63.

35. 434 U.S. at 362.

36. *Id.*

37. 407 U.S. 104 (1972).

38. 412 U.S. 17 (1973).

and *Perry* "lay not in the possibility that a defendant might be deterred from the exercise of a legal right . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction."[39] In applying the *Pearce* rule to *Colten* and *Chaffin,* the Court had considered whether the allegedly vindictive state action contained the requisite elements of retaliation. In *Colten,* the state action was an increased fine subsequent to an exercise of right to trial *de novo.* The Court considered whether the *de novo* court had any relationship with the court which had originally convicted the defendant or any relationship with the previous decision which would motivate it to retaliate against the defendant. Finding *inter alia* that the *de novo* court was separate and distinct from the original court, the Supreme Court distinguished *Pearce* on the fact that Pearce's retrial and reconviction, resulting in an increased sentence, took place in the same court which had first incorrectly convicted Pearce.[40] In *Chaffin,* the allegedly vindictive state action was an increased sentence imposed by a jury subsequent to a successful appeal. The Court considered whether the jury could have been motivated to retaliate against the defendant, but found that the jurors had no knowledge of the prior sentence and would have been "unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals."[41] Therefore, to apply the due process restraints against vindictiveness on the sentencing or charging powers of the state, there must be a clear showing that the danger of vindictiveness exists, but such danger will be found to exist only where the requisite elements of retaliation are present.

Arguendo, the requisite elements of retaliation born out of the application of *Pearce* to *Chaffin* and *Colten* were present in the *Hayes* case. The prosecutor in *Hayes* was certainly "sensitive to the institutional interests that might occasion" (and in this case did occasion) increased charges by a prosecutor "desirous of discouraging what he regards as meritless" pleas of not guilty. However, in applying the *Pearce* and *Perry* rule to *Hayes,* the Court was able to create a new

39. 434 U.S. at 363.

40. Other facts leading the Court in *Colten* to find that there was no retaliatory motive in imposing an increased sentence were: that the *de novo* court was not being "asked to do over what it thought it had already done correctly," that the *de novo* court did not have to find error in the lower court's decision, and that "in all likelihood the trial *de novo* court is not even informed of the sentence imposed by the inferior court." 407 U.S. at 118.

41. 412 U.S. at 27.

element of retaliation and distinguish the cases. The Court found that the requisite element of retaliation present in *Pearce* and *Perry*, but lacking in *Hayes*, was the "State's *unilateral* imposition of a penalty upon a defendant who had chosen to exercise a legal right."[42] In support of its finding that state action arising out of a plea bargain is not unilaterally imposed, the Court looked to the dissenting opinion of Justice Brennan in *Parker v. North Carolina*,[43] where he characterized plea bargaining as a "give-and-take negotiation . . . between the prosecution and the defense, which arguably possess relatively equal bargaining power."[44] Therefore, the Court reasoned, since plea bargaining in its ideal state is not unilateral, but rather "a give-and-take negotiation," the standard for measuring the possibility of vindictiveness in plea bargaining is whether "the accused is free to accept or reject the prosecution's offer."[45]

Having established unilateral state action as a requisite element of retaliation, the Court rationalized its refusal to find the possibility of vindictiveness in the *Hayes* plea bargaining situation by expounding on the public policy need to preserve the state's leverage in plea negotiations. "Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial."[46] To protect this "mutuality of advantage," the Court re-

42. 434 U.S. at 362 (emphasis added).

43. 397 U.S. 790 (1970). In *Parker*, the majority held that a law which allowed for the waiver of the death penalty on a capital charge if the accused pleaded guilty had no effect on the validity of a guilty plea. Justice Brennan, in a separate dissenting opinion, called for a "particularly sensitive scrutiny of the voluntariness of guilty pleas entered under this type of death penalty scheme." *Id.* at 809 (Brennan, J., dissenting). Brennan reasoned that, while plea bargaining was a "give-and-take negotiation . . . between the prosecution and the defense, which arguably possess relatively equal bargaining power," the imposition of a legislative penalty as severe as a death sentence to encourage guilty pleas upset the balance in bargaining power. *Id.*

44. 397 U.S. at 809 (Brennan, J., dissenting).

45. 434 U.S. at 363. Whether a criminal defendant faced with a threat from the prosecutor is reasonably able to make an intelligent choice was questioned by Justice Blackmun in his dissenting opinion. *See* text accompanying notes 54 and 55 *infra*.

46. 434 U.S. at 363. The *Hayes* Court relied on Brady v. United States, *supra* note 17, for its "mutuality of advantage" argument. In *Brady*, the Court stated:

> [T]he State and the defendant find it advantageous to preclude the possibility of the maximum penalty authorized by law. . . . It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than

fused to deny to prosecutors the leverage gained by threatening to bring increased charges against a defendant subsequent to unsuccessful plea negotiations.

The Court also addressed the court of appeals' finding that the prosecutor in *Hayes* abused his broad discretionary charging powers by using those powers as leverage in the plea negotiations. Recognizing that the charging of defendants is entirely within the prosecutor's discretion, the Court quoted *Oyler v. Boles,*[47] which stated that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[48] The *Hayes* Court refused to hold that a prosecutor's "desire to induce a guilty plea" was an "unjustifiable standard" on which to base his charging decision.[49] Since the *Hayes* Court had already expressed its intention to protect the prosecutor's leverage, it is not surprising that the Court would not restrict that leverage by curtailing the prosecutor's discretion in bringing charges. The Court found that to hold otherwise "would contradict the very premises that underlie the concept of plea bargaining itself."[50] Although it conceded that broad

might be imposed if there were a guilty verdict after a trial by judge or jury. 397 U.S. at 752.

47. 368 U.S. 448 (1962). Oyler v. Boles was consolidated with Crabtree v. Boles. The facts in *Crabtree* and the due process arguments propounded by the defendant against the procedure used by the prosecutor to charge the defendant under the West Virginia recidivist statute help to define the issues involved in *Hayes*. Crabtree had pleaded guilty to forging a $35 check, an offense punishable by a term of 2 to 10 years in prison. *Id.* at 450. In accordance with West Virginia's habitual criminal statute, W. VA. CODE §6131 (1961), the prosecuting attorney, just prior to sentencing, filed an information charging that Crabtree had two prior felony convictions. *Id.* at 450. "The trial judge, after cautioning Crabtree of the effect of the information and his rights under it, inquired if he was in fact the accused person. Crabtree . . . represented by counsel . . . admitted in open court that he was such person." *Id.* at 450-51. The Court then sentenced Crabtree to life imprisonment. In a petition for a writ of habeas corpus, Crabtree argued, *inter alia,* "that procedural due process under the Fourteenth Amendment requires notice of the habitual criminal accusation *before* the trial on the third offense or at least in time to afford a reasonable opportunity to meet the recidivist charge." *Id.* at 451-52. The Court held that Crabtree was not deprived of due process because "the record clearly shows that both petitioners personally and through their lawyers conceded the applicability of the law's sanctions to the circumstances of their cases." *Id.* at 454.

48. *Id.* at 456.

49. 434 U.S. at 364.

50. *Id.* at 364-65.

prosecutorial discretion carries with it the potential for abuse, and that there are constitutional boundaries on its breadth, the Court made it clear that the conduct of the prosecutor in the instant case was well within those boundaries.[51]

Finally, the Court, expressing its concern that plea bargaining had only recently been accorded legitimacy by the Supreme Court,[52] was wary of imposing any restrictions on the process which could have the effect of causing plea bargaining to revert to its clandestine past.

Because plea bargaining has become the principal method of determining guilt and sentence in the American system of criminal justice, a majority of the Court was understandably cautious in regulating a process which plays such an enormous role in the judicial system. The majority in *Hayes* held that a prosecutor's *threat* to reindict was no different from the situation where a prosecutor offers to drop a charge. The majority also found that Hayes had made a voluntary and intelligent choice among his alternative courses of action. However, Justice Blackmun, in his dissenting opinion, questioned whether a defendant faced with a threat from a prosecutor is reasonably able to make an intelligent choice.[53] Where the defendant is faced with clear-cut alternatives and he knows what he has been charged with and what the possible penalties will be, he can probably make an intelligent choice. However, when a defendant must evaluate a prosecutor's propensity for carrying out his threats of bringing an increased charge, the possibility for an intelligent choice among alternatives is significantly reduced.[54] A contrary holding in *Hayes* would have prohibited a prosecutor from bring-

51. *Id.* at 365.

52. *Id.* The Court cited to Blackledge v. Allison, 431 U.S. 63, 76 (1977), where it had stated:

> Only recently has plea bargaining become a visible practice accepted as a legitimate component in the administration of criminal justice. For decades it was a *sub rosa* process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges. Indeed, it was not until our decision in Santobello v. New York, 407 U.S. 257, that lingering doubts about the legitimacy of the practice were finally dispelled.

The *Santobello* opinion has the distinction of being the first Supreme Court opinion where the Court actually stated that plea bargaining was "an essential component of the administration of justice" which, "[p]roperly administered, . . . is to be encouraged." 404 U.S. at 260.

53. 434 U.S. at 369 n. 2.

54. Dix, *supra* note 17, at 257. Dix categorizes a defendant's "anticipation of unfavorable exercise of official discretion" as an "unacceptable influence upon the decision to waive." *Id.*

ing an increased charge after plea negotiations had failed. Such a prohibition would have encouraged prosecutors to bring all possible well-grounded charges against a defendant prior to plea bargaining, thereby allowing him to make an intelligent choice among his alternatives.

The effect that such a restraint on prosecutors would have on defendants was considered by Justice Blackmun in his dissenting opinion:

> The consequences to the accused would still be adverse, for then he would bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea. Nonetheless, it is far preferable to hold the prosecution to the charge it was originally content to bring and to justify in the eyes of its public.[55]

Thus, it was Blackmun's view that the function of a prosecutor is to serve the public interest, and any charge a prosecutor brings against a defendant should be calculated to serve the ends of the criminal justice system. A similar view was expressed by Justice Powell in his dissenting opinion:

> [In *Hayes*], the prosecutor evidently made a reasonable, responsible judgment not to subject an individual to a mandatory life sentence when his only new offense had societal implications as limited as those accompanying the uttering of a single $88 forged check and when the circumstances of his prior convictions confirmed the inappropriateness of applying the habitual criminal statute. I think it may be inferred that the prosecutor himself deemed it unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment.[56]

The minority in *Hayes* was willing to provide the accused with procedural safeguards in the plea bargaining arena, even at a cost to him. It was the dissenters' view that the public interest in a fair and effective criminal justice system is not subordinate to the interest of the prosecutor.[57] Therefore, according to a minority of the Court, prohibit-

55. 434 U.S. at 368.

56. *Id.* at 371.

57. The view that the prosecutor's function is to serve the public interest is also reflected in the ABA Standards Relating to the Prosecution Function, §3.9 (Approved Draft, 1971):

> 3.9 Discretion in the charging decision.
>
> (a) In addressing himself to the decision whether to charge, the prosecutor should first determine whether there is evidence which would support a conviction.

ing a prosecutor from bringing an increased charge after plea negotiations have failed would allow a defendant to make an intelligent choice in plea bargaining, would protect the accused from prosecutorial vindictiveness and would help to insure that the public interest was being served.

The majority opinion in *Hayes* will maintain plea bargaining in its status quo. The minority argues for plea bargaining reform through restraints on prosecutorial discretion.[58] In light of the fact that plea bargaining, in its present form, is under attack by prosecuting attorneys,[59] defense attorneys,[60] and commentators,[61] the majority's decision

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(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence exists which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;

(ii) the extent of the harm caused by the offense;

(iii) the disproportion of the authorized punishment in relation to the particular offense of the offender;

(iv) possible improper motives of a complaint;

(v) prolonged non-enforcement of a statute, with community acquiescence;

(vi) reluctance of the victim to testify;

(vii) cooperation of the accused in the apprehension or conviction of others;

(viii) availability and likelihood of prosecution by another jurisdiction.

(c) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his record of convictions.

(d) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in his jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(e) The prosecutor should not bring or seek charges greater in number or degree than he can reasonably support with evidence at trial.

58. *See generally* National Advisory Commission on Criminal Justice Standards and Goals, *Report on Courts* at 3 (1973).

The Commission recognizes that those who criticize the informal administrative processing of criminal defendants do so primarily because the administrative procedure involves numerous discretionary decisions made by the various participants in the process, especially the prosecutor. It is this discretionary nature of administrative processing—and the actual or potential abuse of the power to make discretionary decisions—that needs attention.

59. *See generally* M. HEUMANN, PLEA BARGAINING, THE EXPERIENCES OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS (1977).

60. *Id.*

may hinder the improvement of the plea bargaining process.

Robert J. Crowe

61. *See, e.g.*, Dix, *supra* note 17, at 260; Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564 (1977).