Washington University Law Review

Volume 1975 | Issue 2

January 1975

Felony Charge After Appeal of Misdemeanor Conviction: Violation of Due Process, Blackledge v. Perry, 417 U.S. 21 (1974)

COMMENTS

FELONY CHARGE AFTER APPEAL OF MISDEMEANOR CONVICTION: VIOLATION OF DUE PROCESS

Blackledge v. Perry, 417 U.S. 21 (1974)

After an altercation with a fellow inmate in a North Carolina prison, petitioner was convicted of assault with a deadly weapon, a misdemeanor. Pursuant to North Carolina law, which gives a person convicted in a district court an unqualified right to a trial de novo in superior court, petitioner filed a notice of appeal.[1] Before the new trial began, the prosecutor obtained an indictment for felonious assault with intent to kill based on the same conduct. Petitioner pleaded guilty to the felony charge and was sentenced.[2] A federal district court granted a writ of habeas corpus,[3] which the Fourth Circuit Court of Appeals

1. N.C. GEN. STAT. § 7A-290 (Supp. 1974). A number of other states have a similar bifurcated procedure. For a partial list, see Colten v. Kentucky, 407 U.S. 104, 112 n.4 (1972).

2. Petitioner Perry had been sentenced to a six month term on the misdemeanor conviction, to be served after the term he was already serving. Following petitioner's guilty plea to the felony charge, the superior court imposed a five to seven year term, to be served concurrently with petitioner's present sentence. Since he had already served some seventeen months of the latter sentence, the effect of the five to seven year concurrent sentence was to increase petitioner's potential confinement by seventeen months, as opposed to the six month increase under the state district court sentence. Blackledge v. Perry, 417 U.S. 21, 23 n.2 (1974).

3. *Id.* at 24. The federal district court, in an unreported opinion, held that the imposition of the felony charge after the filing of the misdemeanor appeal violated petitioner's fifth amendment rights under the fifth amendment's double jeopardy clause. *Id.* The double jeopardy clause was applied to the states through the fourteenth amendment in Benton v. Maryland, 395 U.S. 784 (1969). The *Perry* federal district court relied upon the double jeopardy reasoning of Wood v. Ross, 434 F.2d 297 (4th Cir. 1970), a case similar to *Perry* that had been consolidated on appeal with another case, Rice v. North Carolina. In *Rice* the defendant had been given a longer sentence at his de novo trial for the same offense. Both cases were reversed on due process grounds for reason of the imposition of the harsher sentences, thus making the double jeopardy holding an alternative. *See* 5 U. RICHMOND L. REV. 401 (1971). For a case with similar facts, see Pettyjohn v. Evatt, 369 F. Supp. 865 (E.D. Tenn.), *aff'd mem.*, 500 F.2d 1403 (6th Cir. 1974).

The Supreme Court had faced a situation somewhat comparable to *Wood* in United States v. Ewell, 383 U.S. 116 (1966). Defendant's motion to vacate his conviction had

affirmed.[4] The Supreme Court affirmed and *held*: When a defendant exercises his statutory right to a trial de novo on appeal from a misdemeanor conviction, a state denies him due process of law if it then brings a felony charge against him based upon the same conduct, when there is no showing by the state that it was impossible to bring the more serious charge at the outset.[5]

Although the Constitution does not require a state to provide appellate review of criminal cases, a number of decisions have indicated that, "once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."[6]

---

been granted; thereafter the Government reindicted him on another charge related to the same conduct. The new charge, however, carried a lesser penalty than the original. The Court held that there was no violation of the double jeopardy clause, because there was no finding of "oppressive or culpable governmental conduct inhering in [the] facts." *Id.* at 123. Justices Brennan, Fortas, and Douglas, however, did find oppressive governmental conduct. *Id.* at 125, 126 (Brennan, J., concurring, Fortas, J., dissenting). *See also* Abbate v. United States, 359 U.S. 187, 196 (1959) (separate opinion of Brennan, J.); *In re* Nielsen, 131 U.S. 176 (1889).

In *Perry*, the petitioner's earlier application for a writ of habeas corpus had been dismissed by the federal district court for failure to exhaust available state remedies. Blackledge v. Perry, 417 U.S. 21, 23 (1974). The court of appeals reversed, holding that resort to the state courts was useless because two recent state cases had ruled on the precise point. Perry v. Blackledge, 453 F.2d 856 (4th Cir. 1971). The two cases cited by the court of appeals, State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970), and State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), however, did not involve more serious charges at the new trial. The only issue presented was the imposition of longer sentences. In fact, the single North Carolina case in point held that when an appeal was taken to the superior court, the defendants were "entitled to a trial *de novo* on the charge contained in the warrant, on which the appeal was taken." State v. Goff, 205 N.C. 545, 550, 172 S.E. 407, 409 (1934). In *Goff*, the defendants' original convictions had been for assault, a misdemeanor. After appealing to the superior court, they were indicted and convicted of felonious assault. The North Carolina Supreme Court remanded the case to the superior court "to be tried de novo on the warrant issued against the defendants, for which they were convicted and appealed to the Superior Court." *Id.* at 552, 172 S.E. at 410. Dicta in later cases, however, suggest a contrary result. *See* State v. Davis, 261 N.C. 655, 657, 135 S.E.2d 663, 663 (1964); State v. Cooke, 246 N.C. 518, 521, 98 S.E.2d 885, 887 (1957).

Although *Goff* did not involve a plea of guilty to the felony charge, the North Carolina law on the matter was less clear than the court of appeals in *Perry* indicated. Thus, under the exhaustion-of-state-remedies doctrine enunciated in *Ex parte* Hawk, 321 U.S. 114 (1944), and codified in 28 U.S.C. § 2254(b)-(c) (1970), the case probably should not have been considered until a clear North Carolina ruling had been made.

4. Blackledge v. Perry, 475 F.2d 1400 (4th Cir. 1973).

5. Blackledge v. Perry, 417 U.S. 21, 29 (1974). The Court also considered whether petitioner, as a result of his guilty plea, was precluded from raising his constitutional claims through federal habeas corpus proceedings. *See* note 33 *infra.*

6. Rinaldi v. Yeager, 384 U.S. 305, 310 (1966), *quoted in* Blackledge v. Perry, 417

As the quoted language implies, the cases have relied principally on the equal protection clause of the fourteenth amendment. More recently, however, the Supreme Court has used the fourteenth amendment's due process clause, supported by both the "chilling effect"[7] and the unconstitutional conditions[8] doctrines, to insure that a criminal defendant's statutory right to appeal is not unnecessarily impeded by the state.[9] Under the equal protection analysis, the issue is whether the state's review procedure operates "in a way that discriminates against some convicted defendants on account of their poverty,"[10] while the question in the due process cases is whether the procedure under examination unnecessarily "chill[s] the exercise of basic constitutional rights."[11]

The Supreme Court developed the due process "chilling effect" analysis in the context of criminal appeals in *North Carolina v. Pearce*.[12] The Court had to decide whether, after a defendant had suc-

---

U.S. 21, 28 n.6 (1974); *see* Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Douglas v. California, 372 U.S. 353 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956); *cf.* State v. Gurney, 37 Me. 156, 58 Am. Dec. 782 (1853) (statute requiring court, upon appeal and trial de novo, to double penalty imposed by first trial court in event of conviction held unconstitutional).

7. The "chilling effect" doctrine, which prohibits governmental acts that unnecessarily "chill the exercise of a constitutional right," was originally applied in first amendment cases. *See generally* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969). The leading criminal case applying the doctrine is United States v. Jackson, 390 U.S. 570 (1968), which held that because only a jury could recommend the death penalty under the Federal Kidnapping Act, the Act produced an unconstitutional "chill" on a defendant's fifth amendment right not to plead guilty and his sixth amendment right to trial by jury. *Id.* at 581-82. *See* Griffin v. California, 380 U.S. 609 (1965) (comment at trial by prosecutor about defendant's refusal to testify unconstitutionally penalized defendant's exercise of his right to remain silent.)

8. The unconstitutional condition doctrine prohibits conditioning the receipt of a governmental benefit or privilege upon the surrender of constitutional rights. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Frost & Frost Trucking Co. v. Railroad Comm'r, 271 U.S. 583 (1926); *cf.* Green v. United States, 355 U.S. 184 (1957). *See generally* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

9. *See* Chaffin v. Stynchcombe, 412 U.S. 17 (1973); North Carolina v. Pearce, 395 U.S. 711, 724-25 (1969); *cf.* United States v. Ewell, 383 U.S. 116, 126 (1966) (Fortas, J., dissenting).

10. Griffin v. Illinois, 351 U.S. 12, 18 (1956); *see* notes 6 & 7 *supra*.

11. North Carolina v. Pearce, 395 U.S. 711, 724 (1969), *quoting* United States v. Jackson, 390 U.S. 570, 582 (1968); *see* Chaffin v. Stynchcombe, 412 U.S. 17 (1973).

12. 395 U.S. 711 (1969), *noted in* 19 AM. U.L. REV. 290 (1970), 58 KY. L.J. 380 (1969), 39 U. CIN. L. REV. 427 (1970), 5 U. RICHMOND L. REV. 401 (1971).

cessfully appealed an earlier conviction, a court upon retrial and conviction could constitutionally impose a harsher sentence.[13] After discarding the double jeopardy[14] and equal protection arguments,[15] the Court concluded that the due process clause of the fourteenth amendment "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."[16] Since Pearce's original appeal had alleged the commission of constitutional error by the trial court,[17] the threat of increased punishment after a successful appeal would have "chilled the exercise of basic constitutional rights."[18] In the case of convictions set aside for nonconstitutional error, the Court applied a general due process notion of fundamental fairness:[19] If a state provides a right to criminal appellate review, it may not punish or even appear to threaten punishment of those who seek to exercise that right.[20]

13. *See* Aplin, *Sentence Increases on Retrial After* North Carolina v. Pearce, 39 U. CIN. L. REV. 427 (1970); Van Alstyne, *In Gideon's Wake: Harsher Penalties and the Successful Criminal Appellant*, 74 YALE L.J. 606 (1965); Note, *supra* note 7, at 837-40; Comment, *supra* note 8; Note, *In Van Alstyne's Wake:* North Carolina v. Pearce, 31 U. PITT. L. REV. 101 (1969).

14. 395 U.S. at 719-21, *citing* Stroud v. United States, 251 U.S. 15 (1919), *and* United States v. Ball, 163 U.S. 662 (1896).

15. 395 U.S. at 722-23.

16. *Id.* at 725. To insure that vindictiveness is not a factor, the Court required that whenever a judge imposes a harsher punishment at a new trial, the reasons must appear in the record and must be based upon behavior of the defendant since the time of the original sentencing. *Id.* at 726.

17. Pearce's conviction was reversed because an involuntary confession had been admitted into evidence. *Id.* at 713.

18. *Id.* at 724, *quoting* United States v. Jackson, 390 U.S. 570, 582 (1968). Although the Court is unclear on the point, the object of the "chill" in *Pearce* apparently was the petitioner's exercise of his statutory right to appeal to remedy the constitutional error in his first trial.

The "unconstitutional conditions" thesis maintains that requiring a defendant to risk harsher punishment upon retrial as a condition of receiving a fundamentally fair trial serves no justifiable state interest that would counterbalance the required surrender of constitutional rights. *See* Van Alstyne, *supra* note 13, at 613 & n.25.

19. 395 U.S. at 723-25; *see* Note, *In Van Alstyne's Wake, supra* note 13, at 106; 80 HARV. L. REV. 891, 897-98 (1967). The Court, however, also relied in part upon the equal protection cases, *see* note 6 *supra* and accompanying text, and several lower federal court cases, Worcester v. Commissioner, 370 F.2d 713, 718 (1st Cir. 1966); Short v. United States, 344 F.2d 550, 552 (D.C. Cir. 1965); Nichols v. United States, 106 F. 672, 679 (8th Cir. 1901), which asserted that a price could not be placed on appeals. 395 U.S. at 723-24.

20. 395 U.S. at 723-25. There is an obvious analytical problem which the Court had to resolve: If there is no constitutional right to appeal a conviction, what constitutional right is violated if a state "chills" the exercise of a statutory right to appeal when

Two post-*Pearce* cases emphasized that the due process review is concerned only with guarding against vindictive motivation on the part of the trial court rather than the possibility of increased punishment. In *Colten v. Kentucky*[21] the Supreme Court held that the *Pearce* rule did not apply when a greater punishment was imposed after a trial de novo in Kentucky's two-tiered trial system, which is comparable to that of North Carolina. The court that imposed the harsher sentence was not the one whose judgment was reversed, and the possibility that personal vindictiveness caused the harsher sentence was considered to be minimal.[22] In *Chaffin v. Stynchcombe*[23] the Court noted that *Pearce* had involved a trial judge who had been reversed, and held that a harsher sentence imposed by a jury upon retrial did not violate due process, provided the jury had no knowledge of the earlier sentence.[24]

In *Blackledge v. Perry*,[25] the Court based its decision upon *Pearce*, *Colten*, and *Chaffin* and concluded that the possibility of vindictiveness on the part of the prosecutor was so great that it was a denial of due process of law to allow him to bring felony charges against a convicted misdemeanant who wished to pursue his statutory right to appeal.[26] The Court reasoned that a prosecutor has a considerable interest in discouraging appeals since they

> clearly require increased expenditures of prosecutorial resourses before the defendant's conviction becomes final, and may even result in a formerly convicted defendant going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by "upping the ante" through a felony indictment . . . the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial.[27]

Although the reasoning in *Pearce* and *Perry* is comparable, the holding of the latter case is broader because the Court prohibited virtually

---

the defendant alleges only nonconstitutional error? While the inclusion of this situation in the ruling should promote the consistent treatment of defendants, the Court's reasoning on the issue lacked the precision of its earlier analysis of appeals from constitutional error.

21. 407 U.S. 104 (1972).

22. *Id.* at 116-17.

23. 412 U.S. 17 (1973).

24. *Id.* at 26.

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

26. *Id.* at 28-29. The Court did make clear, however, that if a state shows it was impossible to proceed on the more serious charge at the outset—for example, when a victim dies in the interval between the first and second trials—a more serious charge on trial de novo is permissible. *Id.* at 29 n.7.

27. *Id.* at 27-28.

all prosecution on more serious charges,[28] notwithstanding the prosecutor's demonstration of nonvindictive reasons. This complete bar, in part, prompted Mr. Justice Rehnquist to dissent. In his view, a prosecutor could have legitimate reasons for preferring to bring only misdemeanor charges in the lower court, even though the defendant might be guilty of a felony.[29] Once a convicted defendant appeals and is before the superior court, there may be no reason for the prosecutor not to proceed on the felony charge.[30] This analysis, however, neglects the primary evil that concerned the majority of the Court in both *Pearce* and *Perry*—restrictions of the exercise of a statutory right to appeal. Moreover, the difficulty of distinguishing vindictive and nonvindictive indictments[31] further justifies the broader holding of *Perry*.

Given the validity of the *Pearce* doctrine, that once a state establishes appellate procedures a defendant should be able to pursue his appeal without fear of retaliation,[32] the *Perry* result seems to be a sound[33] and

28. *Id.* at 28; *see* note 26 *supra.*

29. 417 U.S. at 34. Mr. Justice Rehnquist noted in particular the less burdensome procedures of the lowest level state courts.

30. *Id.* (Rehnquist, J., dissenting).

31. In *Pearce* the Court required that the reasons for a longer sentence "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726. Under Mr. Justice Rehnquist's view in *Perry*, however, the prosecutor supposedly would not have to justify his indictment by reporting any intervening behavior of the defendant. He would only need to assert that he had believed the defendant to be guilty of the felony in the first instance but had wanted to spare the state the expense of a felony trial. Additionally, under Colten v. Kentucky, 407 U.S. 104 (1972), a prosecutor would not be precluded from seeking a harsher sentence at the new trial if he could convince the court that he had justifiable reasons for doing so.

Allowing indictment for a more serious offense would seem justifiable when a defendant has plea bargained. If the defendant appeals, which is permissible under the North Carolina system, N.C. GEN. STAT. § 7A-290 (Supp. 1974), allowing a more serious indictment would seem fair, unless, of course, the plea was involuntary.

32. The uncertainty suggested by this clause follows from the imprecise constitutional underpinning of the *Pearce* rationale regarding appeals from nonconstitutional error. *See* note 20 *supra* and accompanying text.

33. Mr. Justice Rehnquist, however, found fault with the majority's conclusion that the vindictiveness to be prevented was indictment for a felony charge itself, rather than the imposition of a longer sentence. 417 U.S. at 37. Consequently, he favored remanding to the state court (assuming a violation of the *Pearce* standards) for a resentencing in accordance with *Pearce*. *Id.* at 37-38. The majority's reference to the collateral consequences of a felony conviction, *id.* at 28 n.6, was a partial answer to Justice Rehnquist's criticism.

In an analogous situation involving the double jeopardy clause, the Court found reversible error in the exposure of a defendant to the possibility of conviction for an offense for which he was not liable. Price v. Georgia, 398 U.S. 323 (1970). In *Price*,

the defendant had been convicted in a murder trial of the lesser-included offense of manslaughter. After that verdict was set aside on appeal, he was retried for murder, contrary to Green v. United States, 355 U.S. 184 (1957), and again convicted of manslaughter. The Supreme Court reversed the conviction, rejecting the state's argument that the error was harmless because the defendant had been convicted of the same crime at both trials and was not given a harsher sentence. The Court noted that the double jeopardy clause

> is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly.

398 U.S. at 331. The Court added that in such a situation the defendant "must be prepared to meet not only the evidence of the prosecution and the verdict of the jury but the verdict of the community as well." *Id.* at 331 n.10. The same reasoning would apply in the *Perry* situation, particularly because Perry was actually convicted of the felony and not just exposed to the possibility of conviction.

There was another issue before the Court in *Perry*: Was the petitioner precluded by his guilty plea from raising his constitutional claims in a federal habeas corpus proceeding? In answering that question in the negative, the Court first distinguished Tollett v. Henderson, 411 U.S. 258 (1973). The issue in *Tollett* was

> whether a state prisoner, pleading guilty with the advice of counsel, may later obtain release through federal habeas corpus by proving only that the indictment to which he pleaded was returned by an unconstitutionally selected grand jury.

Id. at 260. The Court answered the question in the negative characterizing the guilty plea as "a break in the chain of events which has preceded it in the criminal process." *Id.* at 267. A petitioner would only be able to obtain federal relief in such cases (that is, cases involving allegations of constitutional violations that occurred prior to a plea of guilty) when he could prove that the advice received from counsel was so incompetent that it precluded a voluntary and intelligent plea of guilty. *Id.*

The *Perry* Court distinguished *Tollett* by pointing out that the constitutional claim presented by Perry was, in effect, a plea in bar, which "went to the very power of the State to bring the defendant into court to answer the charge brought against him." 417 U.S. at 30. Mr. Justice Rehnquist seemed to recognize the distinction in his majority opinion in *Tollett*:

> A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry. . . .
>
> . . . Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution.

411 U.S. at 267, 268.

In spite of his apparent recognition of the difference between a defect that could be corrected and one that could not, Mr. Justice Rehnquist dissented in *Perry* on this issue and stated that any difference in the two cases was "at most semantic." 417 U.S. at 36. This conclusion is explained in part by his analysis of the principal issue under discussion. He was not convinced that the state's action was a denial of due process. *See* notes 29 & 30 *supra* and accompanying text.

The majority did fail to make clear how its due process bar differed from a double jeopardy claim. The latter is an explicit constitutional right forbidding prosecution in certain cases; nevertheless, it has been held to be waived by a plea of guilty. United States v. Hoyland, 264 F.2d 346, 351 (7th Cir. 1959); Caballero v. Hudspeth, 114 F.2d

just application of the rule.[34] While the incidence of the prosecutorial abuse described in *Perry* is unknown,[35] the Court's reasoning could be applied to cases in which a prosecutor brings a more serious felony charge after a less serious felony conviction has been reversed. Such a case may well involve retrial after the defendant's guilty plea had been set aside. Whether the *Pearce* and *Perry* rationale will be extended remains to be seen.[36]

545, 547 (10th Cir. 1940). *But cf.* Robinson v. Neil, 409 U.S. 505 (1973); McNeal v. Hallowell, 481 F.2d 1145 (5th Cir. 1973).

34. Arguably, however, the Court should not have reached the merits of the case. *See* note 3 *supra.*

Another argument that is available in some cases similar to *Perry* is that the filing of more serious charges chills the exercise of defendant's right to a jury trial, a right made applicable to state court trials in Duncan v. Louisiana, 391 U.S. 145 (1968). In some bifurcated trial systems, including North Carolina's, a jury trial is not available until the second trial in the superior court. N.C. GEN. STAT. § 7A-196(b) (1969). The Supreme Court has approved such bifurcated procedures, Colten v. Kentucky, 407 U.S. 104, 118-19 (1972). This argument was not available to petitioner in *Perry*, however, because the Supreme Court has not required that states make a jury trial available when the maximum possible term of incarceration does not exceed six months, Baldwin v. New York, 399 U.S. 66 (1970), and the original misdemeanor charge was not punishable by incarceration for more than six months. N.C. GEN. STAT. § 14-33(c) (1969), *as amended* N.C. GEN. STAT. § 14-33(b) (Supp. 1974) (maximum term increased to two years).

35. The question had been raised on appeal before *Perry*. Wood v. Ross, 434 F.2d 297 (4th Cir. 1970) (alternative holding) (practice constituted double jeopardy); Pettyjohn v. Evatt, 369 F. Supp. 865 (E.D. Tenn.) (retrial on more serious offense barred); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934) (defendants entitled to trial de novo on charge from which appeal was taken).

36. The Supreme Court has not yet addressed the issue. *Cf.* United States v. Ewell, 383 U.S. 116 (1965). State and lower federal courts have divided on the issue. *Compare* Mullreed v. Kropp, 425 F.2d 1095 (6th Cir. 1970) (more serious charge not allowed), *and* People v. McMiller, 389 Mich. 425, 208 N.W.2d 451 (1973) (same), *with* Ward v. Page, 424 F.2d 491 (10th Cir.), *cert. denied*, 400 U.S. 917 (1970) (more serious charge allowed), *and* Commonwealth v. Therrien, 359 Mass. 500, 269 N.E.2d 687 (1971) (same).

One court, relying on *Pearce* and *Perry* has found a due process violation in the reindictment of the accused for first degree murder after their original trial for second degree murder ended in a mistrial. United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974).