Upping the Ante against the Defendant Who Successfully Attacks His Guilty Plea: Double Jeopardy and Due Process Implications

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I. Introduction

The vast majority of all criminal convictions in the United States district courts are the results of guilty pleas. For example, the President's Commission on Law Enforcement and Administration of Justice reported that 90.2 percent of the convictions in federal courts in 1964 were by pleas of guilty. The proportion in the state courts is similarly high. However, because a plea of guilty constitutes a waiver of, inter alia, the fundamental rights to a trial by jury, to remain silent, to present witnesses in one's defense, to confront one's accusers, and to be convicted by proof beyond all reasonable doubt, courts have treated the guilty plea as "a serious and sobering occasion." Consequently, the Supreme Court has long recognized that, upon timely application, a guilty plea should be vacated where it is "shown to have been unfairly obtained or given through ignorance, fear or inadvertence." However, once the guilty plea is withdrawn or vacated, the problem arises whether the recharging discretion of the prosecuting authority has in any way been affected by the prior plea procedure. For example, where the defendant has pleaded guilty to a lesser included offense and his plea is later withdrawn or otherwise voided, can the prosecutor recharge the greater offense, or is he limited to the offense to which the defendant had previously pleaded? The concern of this note is with the conflicting rationales employed and results obtained by those federal courts which have attempted to resolve this issue.

2 E.g., in 1964, guilty pleas accounted for 95.5 percent of all criminal convictions in the trial courts of general jurisdiction in New York. In 1965, the figure for California was 74 percent. Id.
9 Kercheval v. United States, 274 U.S. 220, 224 (1927) (dictum). Although the Court was there opining in reference to pleas of guilty in federal courts, as more fundamental rights began to be applied to the states, the Court extended this protection to the state defendant. See, e.g., Moore v. Michigan, 355 U.S. 155 (1957) (state defendant held entitled to assistance of counsel when pleading guilty); Boykin v. Alabama, 395 U.S. 238 (1969) (trial court required to interrogate the defendant who enters a plea of guilty so that the waiver of fundamental rights will affirmatively appear in the record).
The Supreme Court has not resolved the conflict. However, the federal courts that have ruled have resolved the issue on the basis of the propriety vel non of an analogy to or an extension of two Supreme Court decisions: *Green v. United States* and *North Carolina v. Pearce*.

In *Green*, the Court held that where a defendant had been tried for first-degree murder and the jury returned a verdict of guilty of second-degree murder, the defendant had been impliedly acquitted of murder in the first degree and a second trial on that charge violated the fifth amendment prohibition of double jeopardy. In so holding, the Court rejected the contention that Green had waived his defense of double jeopardy by choosing to appeal his second-degree murder conviction, stating:

> The law should not, and in our judgment does not, place the defendant in such an incredible dilemma. Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.

In *North Carolina v. Pearce*, the Court was faced with the constitutionality vel non of a court's imposing a more severe sentence on the "successful" appellant after his retrial. While noting that it had long been established that the guarantee against double jeopardy "imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside," the Court pointed out that it is patently unconstitutional to penalize those who choose to exercise their constitutional rights. Furthermore, "the very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to 'chill the exercise of basic constitutional rights.'" Hence, the Court held that while neither the double jeopardy clause of the fifth amendment nor the equal protection guarantee of the fourteenth amendment imposes an absolute bar to a more severe sentence upon reconviction, the due process clause of the fourteenth amendment requires that:

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13 The seminal antecedents of the constitutional protection against double jeopardy were the common law pleas of *autrefois acquit* (former acquittal) and *autrefois convict* (former conviction). *See generally Sigler, A History of Double Jeopardy, 7 AM. J. LEGAL HIST. 283 (1963); Note, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965). In *Green* the defendant was held entitled to the benefit of the plea *autrefois acquit* or implied acquittal.

14 The Court had previously held in *Palko v. Connecticut*, 302 U.S. 319 (1937), that the federal double jeopardy standards were not binding on the states unless there was a showing of "hardship so acute that our policy will not endure it." *Id.* at 328. Since *Green* involved violations of the District of Columbia Code, the viability of *Palko* was not there in issue. Subsequently, however, in *Benton v. Maryland*, 395 U.S. 784 (1969), *Palko* was reconsidered and the Court held: "We today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our Constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled." *Id.* at 794.

15 *355* U.S. at 193-94 (footnote omitted).

16 *395* U.S. 711 (1969). *Pearce* was decided the same day as *Benton v. Maryland, see note 14 supra.*

17 *395* U.S. at 719-20, *citing United States v. Ball, 163 U.S. 662 (1896).*

18 *395* U.S. at 720 (emphasis within; footnote omitted).

19 *Id.* at 724, *citing United States v. Jackson, 390 U.S. 570, 582 (1968).*

20 *Id.* at 723.
[V]indictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant’s exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

Recognizing that proof of the existence of a retaliatory motive on the part of the trial judge would be extremely difficult, the Court made its decision more explicit:

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

As previously noted, the federal courts which have confronted the issue under consideration have relied on Green or Pearce. Hence, a given case is typically seen to turn on whether the judge impliedly acquits (Green) the defendant of the greater offense when he accepts the latter's plea of guilty to the lesser included offense, or whether the chilling effect on appeals that the vindictiveness of a court might have at sentencing (Pearce) is just as real and impermissible where the prosecution is not similarly limited upon recharging.

This note will conclude with the suggestion that Green is dispositively inapposite to the situation of conviction by guilty plea, in that the latter does not fairly give rise to an implication of acquittal of the more serious charge. It will also be suggested that the key to Pearce was “vindictiveness” and that therefore it is necessary to limit the preclusive effect of an extension of the Pearce principle to the prosecutor to those situations which would give rise to an inference of vindictive behavior by the prosecutor.

II. The Green Analogy: Implied Acquittal and Former Jeopardy

A. Courts Rejecting the Green Analogy

The first consideration of the validity of an analogy to the Green theory of implied acquittal came in the Tenth Circuit Court of Appeals decision, Ward v. Page. The defendant was indicted by a grand jury in Oklahoma for first-degree

21 Note that while the Supreme Court has never held that the states are constitutionally compelled to grant appellate review to the criminal defendant, once such avenues are established by a state sua sponte, they must be kept free of impediment or discrimination. Rinaldi v. Yechter, 384 U.S. 305, 310 (1966).
22 395 U.S. at 725 (footnote omitted).
23 Id. at 726.
24 Id.
murder. He pleaded not guilty and the case went to trial. However, after two
days of trial the defendant was allowed to enter a plea of guilty to first-degree
manslaughter, and was sentenced to serve forty years. Subsequently, Ward
brought state habeas corpus proceedings seeking to have his conviction set aside
on the grounds that his plea was involuntary, based upon promises made by the
prosecution and tacitly by the trial judge.  
26 After the appeal in the state courts
proved unavailing, a federal district court eventually ruled that his plea of guilty
had indeed been involuntary.  
27 The state chose to retry him on the original
charge, first-degree murder. He was convicted by a jury and this time sentenced
to life imprisonment. Ward again appealed to the Oklahoma Court of Criminal
Appeals. Although that court found, upon the particular facts of the case, that
the state was estopped to retry him for murder, nevertheless, rather than reverse,

hat it held that implicit in the jury's conviction for murder was a finding of guilt
of manslaughter, and simply reduced the sentence to the original forty years.  
28 Ward filed a petition for a writ of habeas corpus in the United States District
Court. It was denied and he appealed to the Tenth Circuit Court of Appeals.
Relying on the Green theory of implied acquittal,  
29 he contended that his retrial
for murder exposed him to double jeopardy in violation of his right to due process
of law under the fifth and fourteenth amendments.  

However, the Ward court was not moved by the fact that the defendant's
situation was "facially analogous" to that of the defendant in Green.  
30 The court
noted that the rule there established was that the jury which is able to convict
on the greater offense impliedly acquits the defendant of that offense when it


29 Actually, the court more frequently analogized to Benton v. Maryland, 395 U.S. 784
(1969), than it did to Green. In Benton, the Supreme Court, following Green, held that the
retrial for both burglary and larceny after a jury had acquitted the defendant of larceny at
the first trial was a violation of double jeopardy as to the latter charge. And as it had done
in Green, the Court held that the state may not condition "an appeal of one offense on a
c coerced surrender of a valid plea of former jeopardy on another offense." 395 U.S. at 796.
30 Hence, the court in Ward was concerned that there first be a valid plea of former jeopardy.
Since Green involved an implied acquittal of the greater offense of first-degree murder while
Benton dealt with an express acquittal on a separate count, it would seem that the former is,
factually, more nearly apposite to Ward's situation. Nevertheless, the court chose to rely on
Benton, probably because, unlike Green, that case involved a state conviction as did Ward. See
note 14 supra. To avoid confusion, the writer has referred simply to Green in the text.  
30 The Court also relied on its own decision, Booker v. Phillips, 418 F.2d 424 (10th Cir.),
cert. denied, 399 U.S. 910 (1970). In Booker, it was held the rationale of Green precluded
the state of Kansas from retrying the defendant for first-degree murder after he had been once
tried for that offense and the jury had found him guilty of first-degree manslaughter, even
though he was again convicted only of first-degree manslaughter at the second trial. The Court
held:

The fact that unlike the situation in Green v. United States, the appellant here
has not been convicted of a greater offense at the second trial is of no consequence . . . . It is not the conviction of the greater offense but the reprovocation for the of-
fense that is repugnant to the Constitution. Stated conversely, it is not important
that the defendant may have successfully run the gantlet for a second time; what is
critical is that he should not have been required to run again at all.
418 F.2d at 426. The following year the Supreme Court similarly held in Price v. Georgia,
398 U.S. 323 (1970). (The defendant in Price had actually received a lighter sentence on his
second conviction.) For a similar case, which was cited in both Booker and Price, see United
States ex rel. Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965), cert. denied, 383 U.S. 913
(1966).
returns a verdict of guilty of the lesser included offense. And while the defendant waives the defense of former jeopardy by appealing his conviction, that waiver does not extend to an offense of which he was acquitted. However, since “absent an acquittal on the greater offense, a criminal defendant may be retried, after reversal on appeal, for all the charges in the original indictment,” the court reasoned that the *sine qua non* of a valid invocation of the Green theory was an acquittal. This was believed to be the dispositive distinction in the present case: Ward had been convicted of the lesser included offense on a plea of guilty. “It is true,” the court noted, “that a guilty plea is as final as a jury verdict but the double jeopardy implications reverberating from a guilty plea and a jury verdict are not identical.” As the court found no basis for implying that Ward had been acquitted of first-degree murder where his prior conviction was pursuant to a plea of guilty to manslaughter, it held that Oklahoma did not violate Ward’s right not to be placed twice in jeopardy, and affirmed his conviction.

While the Fourth Circuit Court of Appeals has not ruled on the issue under consideration, at least one lower court in that circuit has rejected the theory that an accepted plea of guilty to a lesser offense gives rise to an implication of acquittal on the greater charge. In *Harris v. Anderson,* the defendant had been convicted of common law robbery after he had withdrawn his plea of guilty to the lesser offense of larceny from the person. Harris contended that the state’s acquiescence in his plea of guilty to the lesser offense was an implied acquittal of the greater offense. The court rejected the defendant’s “clever” argument, however, and held:

A withdrawn guilty plea is a nullity; the state cannot use the withdrawn plea as an admission in evidence, *Kercheval v. United States.* In like token, the defendant should not be allowed to make use of it in the manner desired here. It was up to him to assess the weight of the evidence against him and to determine whether or not he wished to risk trial on the charges set out in the indictment.

However, the characterization of a guilty plea as “a nullity” proves too much. In *Benton v. Maryland,* the Supreme Court, following *Green,* held that the state may not condition “an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense.” Maryland argued that *Green* did not apply because Benton’s previous jury conviction of burglary had been pursuant to an absolutely void indictment, and that he could not have been placed in jeopardy by a void indictment. Nevertheless, the Court stated: “This argument sounds a bit strange, however, since the petitioner could quietly have served out his sentence under this ‘void’ indictment had he not appealed his burglary conviction.” Hence, whereas a void indictment may be a nullity in

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31 424 F.2d at 493.
32 Id.
34 274 U.S. 220 (1927).
37 Id. at 796. See note 29 supra.
38 Id.
some contexts, the Court in Benton refused to so treat it for purposes of former jeopardy. Similarly, while a withdrawn guilty plea may be a nullity in that it may not be admitted as evidence in a trial, it does not automatically follow that, while the plea stood, it did not carry any jeopardy overtones.

The Harris court also seemed to place great weight on the fact that the defendant had stood trial on the greater charge as a result of “his own independent initiative and decision to withdraw his plea.” However, this clearly sounds like waiver, and, in light of Green and Benton, as noted above, is not a valid response to an argument of former jeopardy.

While both the Ward and the Harris courts arrived at the same result, the cases are certainly factually distinguishable in that judgment had been entered prior to withdrawal of the guilty plea in Ward, whereas in Harris, the plea was withdrawn before judgment had been entered. However, this distinction should not be of dispositive proportion to a former jeopardy argument. The Supreme Court has held in Boykin v. Alabama that a plea of guilty “is itself a conviction; nothing remains but to give judgment and determine punishment.” Hence, if a plea of guilty to a lesser included offense is “itself a conviction” of that offense, it would seem to make no difference, for purposes of ascertaining whether that conviction operates as an implied acquittal of the greater offense, whether judgment was pronounced before or after withdrawal of the plea.

B. Courts Adopting the Green Theory of Implied Acquittal

In arriving at its result, the Ward court stated, “... [W]e have found no cases, and appellant alludes to no authority, which suggests that a guilty plea to a lesser offense operates as an acquittal on all greater offenses.” The lack of authority was changed the next day, however, by the Sixth Circuit Court of Appeals in Mullreed v. Kropp.

In Mullreed, the defendant was initially charged with armed robbery based on allegations that he and an accomplice had struck a female bar attendant with a chair and then fled with $40 from a cash register. At arraignment, Mullreed requested appointed counsel and then stood mute as the court entered a plea of not guilty, stating that it would take the matter of counsel under advisement. Shortly thereafter, having serious misgivings as to whether a chair would constitute a dangerous weapon pursuant to the Michigan armed robbery statute, the prosecutor informed the defendant that he was adding a second count to the information, the lesser offense of unarmed robbery. Mullreed pleaded guilty to the second count and was sentenced to serve 10 to 15 years in the state prison. Subsequently, he waged a successful collateral attack on his conviction in the United States District Court for the Eastern District of Michigan arguing that notwithstanding his request for counsel he had been sentenced without such

39 364 U.S. at 466.
41 Id. at 242.
42 424 F.2d at 493.
43 425 F.2d 1095 (6th Cir. 1970).
assistance.\textsuperscript{45} However, upon his release Mullreed was immediately arrested and recharged with armed robbery, the first count in the original information. He was then tried by a jury, convicted, and sentenced this time to serve 15 to 30 years. A writ of habeas corpus having been denied by the Michigan courts as well as the federal district court, Mullreed petitioned the Sixth Circuit Court of Appeals, alleging that the conviction of armed robbery was a violation of the double jeopardy clause of the fifth amendment.

Like its Tenth Circuit counterpart in \textit{Ward}, the \textit{Mullreed} court saw the controlling issue to be whether the defendant stood convicted of an offense of which he had been previously “acquitted.” However, unlike the \textit{Ward} court, it refused to take such a restrictive view of an accepted guilty plea:

Stripped to its essence, we have in this case a situation where the court has sentenced Mullreed on a lesser included offense pursuant to his plea of guilty. The difference between this case and \textit{Benton}\textsuperscript{46} is that in that case a jury had made an express acquittal. In \textit{Green}, the verdict was silent as to the first degree murder charge, upon which the Court held that the defendant had been acquitted. The State urges these as distinctions of constitutional dimensions. We think not. We hold that the situation here in substance is not distinguishable from \textit{Benton} and \textit{Green}.

The court’s theory was that since Michigan statutes and court rules require that a judge not accept a guilty plea unless he is satisfied that there is a “factual basis” for the plea,\textsuperscript{48} and since the defendant was originally convicted of a crime statutorily defined as one committed by a robber “not being armed with a dangerous weapon,”\textsuperscript{49} Mullreed’s conviction pursuant to that statute necessarily involved an affirmative finding that he had not committed “armed” robbery, just as the jury verdict in \textit{Green} had constituted a finding that the defendant had not committed first-degree murder.

The Sixth Circuit followed \textit{Mullreed} in \textit{Rivers v. Lucas},\textsuperscript{50} where it stated that the former had established that “for purposes of testing a double jeopardy plea there is no difference between the jury’s refusal to convict on the more serious charge and a court’s implicit refusal to do so when it accepts a guilty plea to a lesser included offense.”\textsuperscript{51}

In \textit{Rivers} it was held that where the defendant was charged with first-degree murder and was convicted pursuant to a plea of guilty to manslaughter, his subsequent successful attack on that conviction did not enable the State of Michigan to retry him for the more serious charge. The court pointed out that shortly after \textit{Mullreed} had been announced the Supreme Court rendered its decision in \textit{Price v. Georgia}.

\textsuperscript{46} For a brief discussion of Benton v. Maryland, 395 U.S. 784 (1969), see notes 14 & 29 \textit{supra}.
\textsuperscript{47} 477 F.2d at 1101-02.
\textsuperscript{48} Mich. Comp. Laws Ann. § 768.35 (1948); Mich. General Court Rule 785.3(2).
\textsuperscript{50} 477 F.2d 199 (6th Cir.), \textit{vacated and remanded to consider mootness}, 414 U.S. 896 (1973).
\textsuperscript{51} 477 F.2d at 202.
\textsuperscript{52} 398 U.S. 323 (1970).
was a protection against the "risk of conviction" of an offense of which one has
been acquitted.\textsuperscript{53} Apparently believing that \textit{Price} added strength to its decision
in \textit{Mullreed},\textsuperscript{54} the court held:

The continuation principle of jeopardy makes it possible for appellee Rivers
to be tried again for the same offense of which he was convicted by his
guilty plea (manslaughter), but his successful appeal did not open the way
for him to be once again subjected to the risk of a prosecution for murder.\textsuperscript{55}

However, the State of Michigan contended that another post-\textit{Mullreed}
Supreme Court decision, \textit{Santobello v. New York},\textsuperscript{56} had overruled \textit{Mullreed}. In
\textit{Santobello}, the defendant had been indicted on two felony counts. Pursuant to
a plea bargain, he pleaded guilty to a lesser included offense in return for the
prosecutor's promise not to make any recommendation as to sentence. Sub-
sequently, the defendant unsuccessfully sought to have his plea withdrawn when
a different prosecutor recommended the maximum sentence. However, the
Supreme Court held that the second prosecutor's lack of privity to the agree-
ment was no excuse for his not honoring the plea-inducing promise made by his
predecessor.\textsuperscript{57}

To be sure, \textit{Santobello} was concerned with the ramifications for the volun-
tariness of a negotiated guilty plea of a breach of the agreement by a subsequent
prosecutor. However, Michigan's claim in \textit{Rivers} that \textit{Santobello} had "over-
ruled" \textit{Mullreed} was based on a dictum by the \textit{Santobello} Court. In remanding
the case to the New York courts to decide whether to grant specific performance
of the plea bargain or to allow Santobello to withdraw his plea of guilty to the
lesser included offense, the Court had stated in a footnote: "if the state decides
to allow withdrawal of the plea, the petitioner will, of course, plead anew to
the original charge . . . ."\textsuperscript{58} However, the \textit{Rivers} court dismissed the contention
that this dictum was necessarily inconsistent with its holding in \textit{Mullreed}, by
pointing out that while the Court had stated that upon withdrawal the defen-
dant would plead anew to the original charge, "the Court did not say, or even
intimate, that he could not plead the constitutional prohibition against double
jeopardy as a bar to prosecution on the more serious of the two counts."\textsuperscript{59}

\textit{Rivers} was decided April 24, 1973. The State of Michigan appealed.
However, on June 18, 1973, the Supreme Court of Michigan decided \textit{People v. McMiller}.\textsuperscript{60} Prior to \textit{McMiller}, the law in Michigan, by virtue of several courts of
appeals decisions,\textsuperscript{61} was that the state may reinstate the greater charge after

\textsuperscript{53} Id. at 329. See note 30 supra.
\textsuperscript{54} However, similar to \textit{Green}, in \textit{Price} it was the jury's conviction on manslaughter which
gave rise to the implication of acquittal for murder. Hence, any analogy to \textit{Price} still begs the
question of whether the same inference is appropriate in the context of the guilty plea.
\textsuperscript{55} 477 F.2d at 202.
\textsuperscript{56} 404 U.S. 237 (1971).
\textsuperscript{57} Id. at 262.
\textsuperscript{58} Id. at 263 n.2.
\textsuperscript{59} 477 F.2d at 202. On remand in \textit{Santobello}, the state court ordered specific performance
of the plea arrangement; hence, the double jeopardy issue never developed. \textit{People v. Santo-
\textsuperscript{60} 389 Mich. 425, 208 N.W.2d 451 (1973).
the defendant's plea of guilty to the lesser included offense is vacated. However, the Michigan Supreme Court had not ruled on the issue; and when it did in McMiller, it overruled those decisions. Although it explicitly rejected the double jeopardy rationale of Mullreed and Rivers, the court held: "[U]pon the acceptance of a plea of guilty, as a matter of policy, the state may not thereafter charge a higher offense arising out of the same transaction." On October 15, 1973, the United States Supreme Court granted certiorari on Rivers, and in the same order vacated the judgment of the Sixth Circuit Court of Appeals and remanded the case to that court for a consideration of whether it had been mooted by McMiller. On remand, the case was declared moot, without opinion.

However, notwithstanding that Rivers was ultimately vacated as moot, Mullreed still stands; and the language of the court in Rivers leaves no doubt that the rule in the Sixth Circuit will remain that a conviction by plea of guilty to a lesser included offense places the defendant in jeopardy on the greater offense and, as such, the prohibition against double jeopardy prevents his being "retried" for the greater offense following a successful attack on his guilty plea. While in the Tenth Circuit, Ward v. Page established that retrial on the greater offense is not barred since the reverberations from a plea of guilty to a lesser included offense are not seen to be the same as those from a jury verdict, thus leaving no rational basis for a finding of implied acquittal. And although the Fourth Circuit Court of Appeals has not addressed the issue, at least one lower court in that circuit, in Harris v. Anderson, has ruled consistent with Ward.

C. Criticism of the Double Jeopardy Theory

The fifth amendment prohibition against double jeopardy, which was held applicable to the states through the due process clause of the fourteenth amend-

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62 389 Mich. at 430, 208 N.W.2d at 452.
63 389 Mich. at 434, 208 N.W.2d at 454.
65 For an analysis of the Sixth Circuit rule, see Comment, 7 IND. L. REV. 761 (1974).
66 A dictum by the Ninth Circuit Court of Appeals also suggests a predisposition toward the Ward result:

We have grave doubts as to [the defendant's] pressing his motion for leave to withdraw his plea. If he is ultimately successful, we know of nothing to prevent the government from reviving the two counts which were dismissed by the trial judge.

United States v. Wells, 430 F.2d 225, 230 (9th Cir. 1970). See also ABA STANDARDS, The Prosecution Function § 4.3 (1971):

Fulfillment of Plea Discussions. . . . (c) If the prosecutor finds he is unable to fulfill an understanding previously agreed upon in plea discussions, he should give notice promptly to the defendant and cooperate in securing leave of the court for the defendant to withdraw any plea and take other steps appropriate to restore the defendant to the position he was in before the understanding was reached or plea made.

Note also that while the Third Circuit Court of Appeals has not ruled on whether double jeopardy bars prosecution of the greater offense after the defendant succeeds in overturning his conviction of the lesser offense by plea of guilty, that court has ruled on a similar issue. In United States v. Rines, 453 F.2d 878 (1971), the court held that the dismissal of a count charging assault on a federal officer, at the time of sentencing in consideration for a plea of guilty to a count charging knowing and unlawful entry of a federally insured bank with intent to commit robbery and larceny, and indictment on the assault charge after the defendant had withdrawn his guilty plea, did not place the defendant twice in jeopardy on the latter charge. Id. at 880.
ment in \textit{Benton v. Maryland},\textsuperscript{67} is threefold.\textsuperscript{68} It prohibits multiple punishments for the same offense.\textsuperscript{69} It prohibits a second prosecution for the same offense after conviction (former conviction).\textsuperscript{70} And it prohibits a second prosecution for the same offense after acquittal (former acquittal).\textsuperscript{71}

In relation to the issue presently under consideration, that is whether the defense of double jeopardy is available to one who has been convicted of the greater offense following the reversal of his conviction pursuant to a plea of guilty to the lesser offense, it is clear that an allegation of multiple punishment is inappropriate.\textsuperscript{72} Likewise, the plea of former conviction is unavailable as the defendant has not previously been convicted of the greater offense.\textsuperscript{73} Hence, it is apparent that the defense of double jeopardy will lie here only if the defendant is entitled to the benefit of the former acquittal plea.

The Supreme Court based its decision in \textit{Green} on alternative grounds: (1) the verdict of guilty of second-degree murder was an implicit acquittal of the charge of first-degree murder;\textsuperscript{74} (2) the dismissal of the jury without the defendant's consent marked the end of his jeopardy for first-degree murder.\textsuperscript{75} Neither of these theories is appropriate to the situation of conviction by plea.

When the implied acquittal theory is applied to the guilty plea situation under consideration, the issue becomes whether the acceptance by the court of a guilty plea to a lesser offense gives rise to the same implications regarding the greater charge that a jury verdict was held to present in \textit{Green}. As noted above, the Sixth Circuit, in \textit{Mullreed and Rivers}, has clearly answered in the affirmative: "[F]or purposes of testing a double jeopardy plea there is no difference between the jury's refusal to convict on the more serious charge and a court's implicit refusal to do so when it accepts a guilty plea to a lesser included offense."\textsuperscript{76} On the other hand, on facts similar to those in \textit{Rivers}, the Tenth Circuit rejected this reasoning in \textit{Ward}, finding no basis for an implication of acquittal: "It is true that a guilty plea is as final as a jury verdict but the double

\begin{itemize}
\item \textsuperscript{67} 395 U.S. 784 (1969).
\item \textsuperscript{69} United States v. Benz, 282 U.S. 304, 307 (1931); Ex parte Lange, 85 U.S. (18 Wall.) 163, 169 (1874).
\item \textsuperscript{70} \textit{In re Nielsen}, 131 U.S. 176, 189 (1899).
\item \textsuperscript{71} \textit{Green} v. United States, 355 U.S. 184, 190-91 (1957); United States v. Ball, 163 U.S. 662, 669 (1896).
\item \textsuperscript{72} For an example of a situation where this protection has been held to be a defense, see \textit{North Carolina v. Pearce}, 395 U.S. 711, 718-19 (1969): "We hold that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense" (footnote omitted).
\item \textsuperscript{73} Of course it is indisputable, at least since \textit{United States v. Ball}, 163 U.S. 662 (1896), that no doubt jeopardy claim will lie to prevent reprocessing for the same offense where the defendant has succeeded in getting his first conviction set aside. This rule, typically referred to as the "Ball principle" is alternatively supported either on the theory that, by successfully attacking his erroneous conviction, the defendant waives the protection against being retried, or on the theory that jeopardy "continues" until the final settlement of any one prosecution — the idea being that the double jeopardy bar is aimed not at successive "trials," but at successive "prosecutions." See generally Mayers & Yarborough, \textit{Bis Vexari: New Trials and Successive Prosecutions}, 74 Harv. L. Rev. 1 (1960); Comment, \textit{Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence}, 31 U. Chi. L. Rev. 365 (1964).
\item \textsuperscript{74} 355 U.S. at 190.
\item \textsuperscript{75} \textit{Id.} at 191.
\item \textsuperscript{76} \textit{Rivers v. Lucas}, 477 F.2d 199, 202 (6th Cir. 1973).
\end{itemize}
jeopardy implications reverberating from a guilty plea and a jury verdict are not identical.\textsuperscript{77}

The preferability of the Tenth Circuit's reasoning is compelling. The Sixth Circuit's analogy to \textit{Green} is specious and reflective of a misunderstanding of the rationale there employed by the Court.

The bare bones of a valid plea of former acquittal or implied acquittal are an opportunity to convict, coupled with a refusal to do so. In \textit{Green} the Court noted:

\begin{quote}
Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gauntlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder, it chose the latter.\textsuperscript{78}
\end{quote}

Significantly, the jury had a "choice." It had the opportunity to convict on the first-degree-murder charge but refused. It was the declined opportunity, or election against, which gave rise to the implication of acquittal and allowed the Court to treat the situation as "if the jury [had] returned a verdict which expressly read: 'We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.'"\textsuperscript{79}

Hence, to favorably analogize the conviction of a lesser offense by guilty plea to \textit{Green} is to demand the untenable assumption that the trial judge who accepts the defendant's plea to the lesser offense has a concomitant "choice" of finding the defendant guilty of the greater offense. For only then may the defendant fairly be said to have been placed in jeopardy on that charge.\textsuperscript{80} Certainly no one can argue that the judge who is tendered a plea of guilty to manslaughter has the option of responding with a conviction of murder.\textsuperscript{81} The trial judge's

\textsuperscript{77} 424 F.2d at 493.
\textsuperscript{78} 355 U.S. at 190.
\textsuperscript{79} Id. at 191.
\textsuperscript{80} See People v. McMiller, 389 Mich. 425, 431, 208 N.W.2d 451, 453 (1973), where on facts similar to those in \textit{Rivers}, the Supreme Court of Michigan rejected the implied acquittal theory of \textit{Mullreed} and \textit{Rivers}. The court held:

Unlike a jury trial, a choice was not offered to the independent fact finder [trial judge] to find him guilty of murder, first or second, or manslaughter. It is this "choice" of the fact finder that provides the basis for the implication of acquittal. It is the exposure to it that puts one in "jeopardy."

And Justice Brennan stated in a dissenting opinion: "[A] plea of guilty is made by the defendant himself. It cannot be said that he has implicitly acquitted himself of the higher charge by his plea to the lesser offense." 389 Mich. at 437, 208 N.W.2d at 455 (dissenting opinion). Note, however, that the \textit{McMiller} court reached the same result as \textit{Mullreed} and \textit{Rivers}, but on a policy rationale. See text accompanying note 63 \textit{supra}.

\textsuperscript{81} In Commonwealth v. Therrien, 359 Mass. 500, 269 N.E.2d 687 (1971), the Supreme Judicial Court of Massachusetts had occasion to rule on this issue and held:

Unlike the jury in the \textit{Green} case, the judge here did not have the option to find the defendant guilty of first-degree murder. His only choice was to accept or reject the plea to second-degree murder. Had he rejected it, the defendant would then have been tried to a jury on the first-degree-murder charge. No one would reasonably argue that a jury trial following rejection of a guilty plea to second-degree murder would be barred because of former jeopardy on the ground that the judge by rejecting the plea had inferentially found the defendant guilty of first-degree murder . . . . The question of guilt of first-degree murder was one which the judge did not have the power to decide, and one which was never before him. Therefore the defendant was never placed in jeopardy by the judge's consideration of his guilty plea of anything more than that to which he pleaded guilty.

359 Mass. at 504-05, 269 N.E.2d at 690-91.
fact-finding responsibility in such situations is to determine whether or not there is a factual basis for the plea, and cannot reasonably be thought to extend to the ascertainment of guilt or innocence of an offense which is not before him.

Thus, it is not the conviction per se of a lesser offense, but the declined opportunity to convict on the greater offense which occasions the implication of acquittal of the latter. As the Court held in Green: "... Green's claim of former jeopardy is not based on his previous conviction for second-degree murder but instead on the original jury's refusal to convict him of first-degree murder."

Hence, as it cannot reasonably be said that the judge who accepts a plea of guilty to a lesser offense thereby "refuses to convict" on the greater offense, there would seem to be no basis for an implication of acquittal on the latter. Consequently, prosecution for the greater offense, following a vacation of the plea of guilty, should not be barred on the grounds of former jeopardy.

Nor is the alternative ground given as support for the Green decision reasonably available to the defendant convicted by a plea. While the greater part of the Green opinion was devoted to the implied acquittal theory, the Court gave an alternative ground of support for the result reached:

> Here, the jury was dismissed without returning any express verdict on that charge [first-degree murder] and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore, it seems clear, under established principles of former jeopardy, that Green's jeopardy for first-degree murder came to an end when the jury was discharged so that he could not be retried for that offense.

While the court did not expound on this theory, it was obviously referring to the long-established rule that it is not essential that a verdict of guilt or innocence be returned for a defendant to have been once placed in jeopardy so as to bar a second trial on the same charge. That is, the defendant is generally regarded as having been placed in jeopardy when the jury has been empanelled and sworn, or, in the case of trial to the court, when the judge begins to hear
evidence.

And, a subsequent dismissal without the defendant’s consent or in the absence of “manifest necessity” will be with prejudice.

However, to favorably analogize this principle to the proceeding at which the defendant’s plea of guilty to a lesser included offense is being considered would be to presume that the defendant were on trial for the greater charge. That is, it assumes that when the judge makes his Rule 11 determination, he is not merely ascertaining the presence vel non of a factual basis for the plea of guilty to the lesser included offense, but is “beginning to hear the evidence” on the greater offense with an eye toward and the opportunity of determination of guilt or innocence of the latter charge as well. For only then might the defendant validly claim to have been placed in jeopardy on that charge. The most basic awareness of the plea bargaining and conviction by guilty plea processes compels the conclusion that such reasoning is legal fiction of the greatest sort. In deciding whether he will accept the defendant’s guilty plea to the lesser offense, the trial judge has neither the purpose nor the opportunity to convict on the greater charge.

Neither Green nor its progeny lend support to the argument that a conviction by plea of guilty to a lesser offense bars a subsequent prosecution for the greater offense following a successful attack by the defendant on the original conviction. Such a defendant has never before run the “risk or hazard” of conviction on the greater charge.

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III. The Extension of Pearce

As previously stated, some courts have relied on the Supreme Court decision in North Carolina v. Pearce to decide whether a defendant may be prosecuted for the greater offense following a successful attack by the defendant on the original conviction. Such a defendant has never before run the “risk or hazard” of conviction on the greater charge. He has never been “jeopardized” on that charge, nor, a fortiori, has he been acquitted of it.

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85 United States v. Kimbrew, 580 F.2d 538, 540 (6th Cir. 1977); Hunter v. Wade, 169 F.2d 973, 975 (10th Cir. 1948), aff’d 336 U.S. 684 (1949).
86 It would seem that the defendant who has withdrawn his plea could hardly contend that “dismissal” was without his consent.
89 The assumption that such a defendant is on trial for the greater offense is indeed difficult to make when it is realized that he is not even “on trial” for the lesser offense. See Brady v. United States, 397 U.S. 742, 748 (1970), where the Supreme Court noted that one facet of the guilty plea is that it signifies “the defendant’s consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or judge” (emphasis added).
92 See text accompanying notes 16 through 24 supra.
94 Id. at 725.
fear of such a retaliatory motive would be an affront to due process by virtue of its chilling effect on the defendant's right to appeal, the Court held that an increased sentence following retrial may be justified only where the record affirmatively reflects that the higher sentence was in response to identifiable intervening conduct of the defendant.95

A. Extending the Pearce Principle to the Prosecutor

The first attempt to resolve the issue under consideration by an extension of the Pearce principle to the prosecutor came just three weeks after Pearce in Sefcheck v. Brewer.96 In Sefcheck, the defendant was charged with uttering a false check. He pleaded guilty and was sentenced to serve not more than seven years.97 Subsequently, he appealed his conviction on the grounds that his plea had not been entered personally (he was in prison at the time), nor in the presence of counsel. His plea was voided and the charge was dismissed. However, the county attorney immediately brought a new information, this time for a greater offense—uttering a forged instrument. The defendant pleaded not guilty, was convicted by a jury, and given a mandatory sentence of not more than 10 years. On petition for a writ of habeas corpus to the United States District Court for the Southern District of Iowa, Sefcheck contended that his conviction for uttering a forged instrument was, inter alia, a violation of the double jeopardy clause of the fifth amendment and that its effect was an impermissible conditioning of his right to appeal.

Passing over the double jeopardy argument, the court held that Pearce was controlling and invalidated the defendant's conviction on the higher charge.98 The court's theory was that there was no meaningful distinction between Pearce, where the defendants were retried on the same charges and given greater sentences than had been given on their original voided convictions, and the case before it, where after the defendant's initial conviction was voided, he was tried for a different offense carrying a greater punishment.99 The effect was thought to be the same in either case—an impermissible burden on the right to attack one's conviction. Hence the court held:

This same principle must apply to all state officials, including the county attorney. Fear that the county attorney may vindictively increase the charge would act to unconstitutionally deter the exercise of the right of appeal or collateral attack as effectively as fear of a vindictive increase in sentence by the court.100

95 Id. at 726.
96 301 F. Supp. 793 (S.D. Ia. 1969). The Eighth Circuit Court of Appeals has not yet ruled as to whether either Green or Pearce prevents the prosecutor from recharging the greater offense after the defendant has succeeded in invalidating his plea of guilty to the lesser included offense.
97 It should be noted that Sefcheck is distinguishable from the cases previously discussed, as well as from those which follow, in that here the defendant was originally charged with only the lesser offense. This distinction will be dealt with below.
98 301 F. Supp. at 794-95.
99 Id. at 795 (footnote omitted).
100 Id.
Nevertheless, under *Pearce* the judge is not absolutely precluded from giving a higher sentence upon retrial; however, he may do so only if justification for the same affirmatively appears in the record in the form of identifiable intervening conduct of the defendant. By analogy, the *Sefcheck* court provided a similar opportunity to the prosecutor but found no "legally justifiable, compelling reason" for his having brought the higher charge and invalidated the resulting conviction.

The *Sefcheck* court found it impermissible for a prosecutor to follow a defendant's successful attack on his conviction by bringing a higher charge than he had brought *ab initio*. However, when the propriety vel non of an extension of *Pearce* to the prosecutor came before the Second Circuit Court of Appeals in *United States ex rel. Williams v. McMann*, the facts were different and so was the result. Circuit Judge Kaufman phrased the issue before the court as follows:

The question before us is whether a 5 to 10 year sentence which [the defendant] is currently serving because of his conviction after trial for feloniously selling a narcotic drug is constitutionally invalid in view of the lighter indeterminate sentence of 3 to 7 years originally imposed upon his plea of guilty (later withdrawn) to the lesser charge of attempted felonious sale.

The court began by stating that, "Williams, with commendable candor, recognizes that the strength of his claim derives entirely from the Supreme Court's recent decision in *Pearce*." The court proceeded to review the holding in *Pearce* and pointed out that it was not a higher sentence per se that the Supreme Court had found constitutionally offensive in that case, but rather a higher sentence imposed in retaliation for the defendant's attack on his first conviction. And that it was to assure against such retaliation that the Court had laid down the requirement that an increased sentence on reconviction be justified by explicit reference to identifiable intervening conduct of the defendant. Williams argued that since no such justification supported his increased sentence, it was invalid under *Pearce*. The court quickly dismissed this contention, however, pointing out that far from the trial judge wreaking vengeance or vindictiveness on the defendant in violation of *Pearce*, the second conviction was for a greater offense. Under New York statutory law, the judge was without discretion to award the lighter sentence after the conviction for the greater offense. Hence, the court held: "given this complete and obvious explanation for the longer sentence, we see no need to demand the type of justification ordered in *Pearce*."

101 395 U.S. at 723.
102 Id. at 726.
103 301 F. Supp. at 795.
105 The factor that precipitated the defendant's withdrawal of his guilty plea was the postsentencing discovery by the state of the defendant's prior felony record, with the resulting need to resentence him as a recidivist. Since the prosecutor's plea-inducing prediction regarding sentencing was now a significant underestimate, Williams was allowed to withdraw his plea. *Id.* at 104.
106 *Id.* at 104.
107 *Id.*
108 *Id.* at 105.
Satisfied that the judge had not violated *Pearce*, the court turned to the ramifications of that decision for the prosecutor. The defendant argued that the prosecutor’s unsupported refusal to allow him to plead innocent to the lesser charge of attempting a felonious sale created a presumption of vindictiveness under *Pearce*. Citing *Sefcheck*, the court stated that it had “no quarrel with the proposition that prosecutorial vindictiveness can be no less an affront to those values we characterize as ‘due process’ than judicial vindictiveness.” However, the court thought there was a dispositive distinction between the present case and *Sefcheck*. The prosecutor in the latter case had responded to the defendant’s successful withdrawal of his guilty plea to the original charge by filing a new, more serious information. Whereas, in *Williams*, the court reasoned, there was no basis for an inference of vindictiveness; the original charge had been reduced as a result of a plea bargain. When the defendant revoked his part of the agreement, the prosecutor was “forced to proceed on the original charge.”

Circuit Judge Hays, concurring in the result, would have limited the rationale to distinguishing *Pearce* on the ground that, unlike *Pearce*, here the second trial was for a more serious offense; hence, the higher sentence was justified. In his opinion it was unwise to go further and “advance a theory that the guilty plea situation, because it represents a bargain between the defendant and the prosecutor, *ipso facto*, requires the application of different legal principles.”

His concern was that the majority had overlooked certain implications of *Simpson v. Rice*, the companion case to *Pearce*. In *Rice*, the defendant had originally been convicted by a guilty plea. Judge Hays thought it was a fair assumption that Rice’s original sentence had been a favorable reflection of a plea bargain. And even though by successfully attacking his plea it might have been said that the defendant had reneged on his part of the bargain, the Supreme Court did not deny him the benefit of that bargain, but treated his case precisely as it did Pearce’s conviction by trial. That is, the sentence imposed as a result of the plea bargain was to be treated as the frame of reference for the ascertainment of vindictiveness *vel non*. Hence, Judge Hays was of the opinion that *Pearce* was inapplicable as distinguishable on its facts (the higher sentence here being imposed pursuant to a conviction of a higher offense). And, in light of *Rice*, it was untenable to alternatively argue that even if *Pearce* is applicable, the defendant’s revocation of his part of the bargain was sufficient justification for a departure from the *Pearce* principle.

Nevertheless, the court in *Williams* sustained the defendant’s conviction of the greater charge—the felonious sale of a narcotic drug. However, in so holding, the court stated: “*Pearce* would have application, if a prosecutor for no valid reason charged a defendant whose first conviction had been set aside, with

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109 Id. (footnote omitted).
110 Id. at 106.
111 Id. at 107 (concurring opinion).
112 Id.
114 The majority responded in a footnote, 436 F.2d at 106 n.7, pointing out that while Rice may have hoped for favorable sentencing as a result of his pleading guilty, “there is not a hint in the Supreme Court’s opinion or in the opinions below that an express agreement had been reached.”
a more serious offense based upon the same conduct." This was, of course, the precise factual situation in Sefcheck, where that court did hold the Pearce principle controlling. Hence, it would seem that the court was tacitly endorsing the Sefcheck holding, although it found no Pearce problem where the second prosecution was for a charge which the prosecutor had brought ab initio.

B. The Pearce Progeny

Since the Pearce decision in 1969, the Supreme Court has had several occasions to rule on possible extensions of the principle therein established. In Colten v. Kentucky, the Court was called upon to rule on the applicability to Pearce to Kentucky’s two-tier system for adjudicating certain criminal cases whereby a defendant who has been charged with a misdemeanor may be tried first in an inferior court, and then, if dissatisfied with the outcome, may, without the need to allege error, have a trial de novo in a court of general jurisdiction. Emphasizing that Pearce was directed at insuring the absence of “vindictiveness” on the part of the sentencing judge against the defendant who had successfully attacked his conviction, the Court noted:

[T]he court which conducted Colten’s trial and imposed the final sentence was not the court with whose work Colten was sufficiently dissatisfied to

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115 426 F.2d at 105.
116 Although not in the context of a voided guilty plea, the Second Circuit again had occasion to rule on the limiting effects of the Pearce principle in United States v. Mallah, 503 F.2d 971 (2d Cir. 1974). Mallah involved several defendants and a multitude of issues relating to drug convictions. However, one defendant, Pacelli, had been convicted of conspiracy in the sale of cocaine, as well as various related substantive counts. Subsequently, his convictions were reversed on the grounds that an accomplice-witness had testified at his trial and denied having been promised anything by the government, when, in fact, he had been promised immunity. Whereupon, the prosecutor brought similar charges, this time, however, involving heroin. Pacelli was convicted of those charges and appealed contending that the substitution of the more serious charges was a vindictive response to his having embarrassed the district attorney’s office by his disclosure that it had promised the witness-accomplice immunity while purporting otherwise.

While stating that in Williams it had recognized that the Pearce principle was applicable “to enhanced charges as well as to enhanced sentences,” 503 F.2d at 987, the court again, as it had done in Williams, refused to invalidate the convictions. Noting that it might be a dispositionally different case if, for example, the government had added to a previous charge of selling narcotics a charge of selling those same narcotics to a minor, id. at 988, the court held:

It is one thing to increase a charge for manslaughter to murder, and quite another to charge a defendant, subsequent to a successful appeal, with a second murder. In the words of Williams, “Pearce would have application, if a prosecutor . . . charged a defendant whose first conviction had been set aside, with a more serious offense based upon the same conduct,” 436 F.2d at 105 (emphasis added). Here, the heroin counts are based upon acts which are distinct from [the cocaine charges] previously brought against appellant. The government’s decision to prosecute appellant for [the heroin charges] is well within the traditionally broad ambit of prosecutorial discretion.

503 F.2d at 988 (emphasis within).

Hence, while the Second Circuit has yet to reverse a conviction on the basis of a prosecution violation of the Pearce principle, its language in both Williams and Mallah leaves little doubt but that it is so predisposed where the situation is sufficiently indicative of vindictiveness. The court’s extraction of the Williams language, regarding the applicability of Pearce to the prosecutor, without reference to the fact that Williams involved a voided guilty plea suggests that the court is of the opinion that the nature of the original voided conviction—that is, whether by plea or by trial—is irrelevant to a Pearce-type determination.

seek a different result on appeal; and it is not the court that is asked to do
over what it thought it had already done correctly.\textsuperscript{118}

Hence, finding that the trial de novo system did not suggest the possibility of
vindictiveness on the part of the "resentencing" judge, the Court held that \textit{Pearce}
would not apply so as to require justification for the higher sentence given after
the new trial.\textsuperscript{119}

Similarly, in \textit{Chaffin v. Stynchombe},\textsuperscript{120} the Court refused to extend the
\textit{Pearce} principle to the jury. The Court held\textsuperscript{121} that, in the absence of knowledge
of the prior sentence or evidence that the second sentence is otherwise the product
of vindictiveness, the rendition of a stiffer sentence \textit{by a jury} on retrial does not
deny the defendant due process of law. Distinguishing \textit{Pearce}, the Court noted:

As was true in \textit{Colten}, the second sentence is not meted out by the same
judicial authority whose handling of the prior trial was sufficiently unaccept-able to have required a reversal of the conviction. Thus, the jury, unlike the judge who has been reversed, will have no personal stake in the
prior conviction and no motivation to engage in self-vindication.\textsuperscript{122}

Thus, finding the potential for vindictive abuse of the sentencing process by the
different jury in the second trial to be de minimis in a properly controlled court-
room, the Court refused to extend to the jury the resentencing restrictions placed
on the trial court in \textit{Pearce}.

In a footnote to \textit{Chaffin},\textsuperscript{123} the Court revealed that the defendant had also
argued that a higher sentence on retrial to a jury might result from vindictive-
ness on the part of the prosecutor, expressed in the form of asking for a stiffer
sentence. However, the Court was of the opinion that the mere request for a
higher sentence than was sought at the first trial did not support an inference
of a vindictive motive:

Prosecutors often request more than they can reasonably expect to get, knowing that the jury will customarily arrive at some compromise sentence. The prosecutor's strategy also might well vary from case to case depending on such factors as his assessment of the jury's reaction to the proof and to
the testimony of witnesses for and against the State. Given these practical
considerations, and constrained by the bar against his informing the jury of
the facts of prior conviction and sentence, the possibility that a harsher
sentence will be obtained through prosecutorial malice seems remote.\textsuperscript{124}

However, in the Court's most recent consideration of its holding in \textit{Pearce},

\textsuperscript{118} \textit{Id.} at 116-17.
\textsuperscript{119} Note also that the Court clarified the effect of \textit{Pearce} where it is applicable, in North Carolina v. Rice, 404 U.S. 244, 247 (1971): "\textit{Pearce} does not invalidate the conviction ... [but] requires only resentencing; the conviction is not \textit{ipso facto} set aside and a new trial required."
\textsuperscript{120} \textit{Id.} at 17 (1973).
\textsuperscript{121} \textit{Id.} at 26-28.
\textsuperscript{122} \textit{Id.} at 27.
\textsuperscript{123} \textit{Id.} at 27 n.13.
\textsuperscript{124} \textit{Id.}, citing United States \textit{ex rel.} Williams v. McMann, 436 F.2d 103, 105-06 (2d Cir. 1970), \textit{cert. denied}, 402 U.S. 914 (1971).
Blackledge v. Perry,125 the Court held that the prosecutor's charging discretion may indeed be a legitimate object of the Pearce principle. As in Colten, the facts involved a two-tier system of criminal adjudication.126 The facts showed that the defendant, an inmate of a North Carolina penitentiary, had an altercation which resulted in his being charged with the misdemeanor of assault with a deadly weapon. Following a trial to the court in an inferior court of North Carolina's two-tier system, Perry was convicted of the misdemeanor charge and was given a six-month sentence to be served at the completion of the prison term he was then serving. Following his conviction in the inferior court, he exercised his absolute right to a trial de novo by filing a notice of appeal to the court of general jurisdiction. However, while the defendant's appeal was pending, the prosecutor obtained a grand jury indictment for the offense of assault with a deadly weapon with intent to kill inflicting serious bodily injury—a felony. The indictment covered the same conduct as the original misdemeanor charge of which Perry was convicted in the inferior court. He pleaded guilty to the indictment and was sentenced to a term of five to seven years in the penitentiary, to be served concurrently with the time he was then serving.127 Subsequently, the defendant petitioned the United States District Court for the Eastern District of North Carolina for a writ of habeas corpus alleging that the felony indictment subjected him to double jeopardy and also denied him due process of law. The district court denied the writ on the grounds that Perry had not exhausted his state remedies. However, the Fourth Circuit Court of Appeals reversed on the basis that any resort to the state courts would be futile as the Supreme Court of North Carolina had consistently rejected the arguments asserted in the defendant's petition.128 On remand, the district court granted the writ, holding that the bringing of the felony indictment violated Perry's constitutional protection from double jeopardy. The Fourth Circuit affirmed without opinion.129

The Supreme Court found it necessary to reach only the petitioner's due process claim.130 As it had done in Colten and Chaffin, the Court emphasized that the key to Pearce was the potential for vindictiveness and limited the issue accordingly: "The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires

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126 See text accompanying note 117 supra.
127 While it may appear intellectually suspect to follow an appeal of a misdemeanor with a guilty plea to a felony, the Court suggested in a footnote, 417 U.S. at 23 n.2, that the apparent motivation for the plea of guilty was an expectation that any sentence received pursuant to that plea would be served concurrently with his present sentence, rather than consecutively, as was the case on his original sentence. While this expectation was realized, the collateral effect of applicable North Carolina law regarding the commencement—for purposes of marking time—of the sentence resulted in a bad bargain.
128 Perry v. Blackledge, 453 F.2d 856 (4th Cir. 1971).
130 The Supreme Court rested the decision in Perry on the due process rationale of Pearce, and simply noted, without comment, that the district court had based its decision on double jeopardy grounds. 417 U.S. at 24-25. In a dissenting opinion, id. at 32, Justice Rehnquist suggested that the majority so elected because of the Court's decision in Diaz v. United States, 223 U.S. 442 (1912). In Diaz, the defendant was tried and convicted for assault and battery. Subsequently, the assault victim died and the defendant was then tried and convicted for homicide. The Supreme Court rejected his contention that his original trial for assault and battery had placed him in jeopardy on the homicide charge thus barring the second prosecution on grounds of double jeopardy. Noting that at the time of the trial for assault and
a rule analogous to that of the *Pearce* case."\(^{131}\)

In reaching an affirmative conclusion to that question, the Court noted that a trial de novo would require increased burdens on the prosecutor and his resources, and might even result in the previously convicted defendant going free. As such the prosecutor was deemed to have a significant stake in discouraging appeals. Therefore, the critical concern was evident:

> [I]f the prosecutor has the means readily at hand to discourage such appeals—by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial.\(^{132}\)

Hence, unlike the situation with the jury in *Chaffin* and the de novo judge in *Colten*, the potential for vindictiveness was seen as more than "de minimis." The Court conceded the absence of any allegation of malice or bad faith on the part of the prosecutor in *Perry*, but pointed out that *Pearce* "was not grounded on the proposition that actual retaliatory motivation must inevitably exist"; rather, a legitimate "fear of such vindictiveness" is sufficient to invoke the restraints of due process.\(^{133}\) Consequently, the Court extended the *Pearce* principle to the prosecutor in the trial de novo situation, finding it constitutionally impermissible for him to be able to discourage an appellant from exercising his statutory right of appeal by increasing the charge from a misdemeanor to a felony.

Perhaps the clearest rule that can be ascertained from *Pearce* and its progeny is that due process requires the imposition of *Pearce*-type restrictions where (1) the situation is suggestive of the possibility of a vindictive motive (2) on the part of one having the opportunity to realize that vindictiveness (3) in a manner which tends to chill the exercise of a constitutional or statutory right by penalizing one who chooses to exercise that right, and (4) where the record is devoid of justification in the form of objective information regarding the defendant's intervening conduct.
C. Criticism of an Extension of Pearce to the Prosecutor

Certainly, in light of the Court's holding in Perry, there is no longer a question as to the viability of the Sefcheck and Williams holdings that the prosecutor is just as capable of vindictively chilling the exercise of a right to appeal or collateral attack as was the judge in Pearce, and, hence, is a proper object of the Pearce principle. It is only a matter of ascertaining what situations are sufficiently suspect to justify the extension.

Any attempt to analyze the propriety of an extension of the Pearce principle to the prosecutor's discretion following the avoidance of a guilty plea would seem to require a distinction between a plea of guilty to the full information, followed by an information alleging a more serious offense based upon the same conduct after a successful attack on the first conviction (Sefcheck134); and a plea of guilty to a lesser offense than that of the full information which plea is the result of negotiation, followed by reinstatement of the full information after the plea is avoided (Williams135).

Perry would seem to be persuasive authority for an extension of Pearce to the Sefcheck scenario. The situation is strongly suggestive of vindictiveness—the prosecutor follows a successful attack on a guilty plea to the full original charge with a greater charge based on the same conduct, which charge he could have brought ab initio but did not. This is exactly what appears to have bothered the Court in Perry. The Court stated in a footnote: "This would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset. . . ."136 Like Perry, the Sefcheck scenario clearly opportunates the prosecutor to wreak vengeance on the defendant for having attacked his first conviction, and calls for a similar prophylactic rule. However, Pearce allowed the judge to justify his higher sentence by a showing in the record evidence of intervening conduct of the defendant which was thought to warrant the higher sentence, thus negating any inference of vindictiveness.137 Both Sefcheck138 and Williams139 provided a similar opportunity to the prosecutor. However, the Court in Perry made no reference to this aspect of the Pearce holding. This may be partially explainable by the fact that a given charge necessarily must be based on acts committed at the time of the alleged crime, and since the Pearce justification was limited to intervening conduct of the defendant, there would seem to be a situation of mutual exclusion. Nevertheless, such would not necessarily always be the case. It is suggested that it would be consistent with the concerns of Pearce to allow the prosecutor to show that the mitigating circumstances which prompted him to originally charge a lesser offense than the facts warranted had been negated by intervening conduct of the defendant. The possibility of pretentious circumvention is obvious, but could be virtually

134 See text accompanying note 96 supra.
135 See text accompanying note 104 supra.
136 417 U.S. at 29 n.7.
137 See note 15 supra.
138 301 F. Supp. at 795.
139 436 F.2d at 105.
eliminated by a requirement of "objective information concerning identifiable conduct" as in Pearce.

The Williams-type scenario, however, appears dispositively dissimilar. Unlike in Sefcheck, the situation is not suggestive of a vindictive motive. The defendant who reneges on his part of a plea arrangement is forced to lie in a bed of his own making. As the Second Circuit Court of Appeals stated in Williams:

When Williams was successful in revoking his part of the bargain by having his plea of guilty set aside, it is hardly surprising, and scarcely suggestive of vindictiveness, that the prosecution was forced to proceed on the original charge which the grand jury had returned in the first instance. . . . 140

While the suggestion that the district attorney was totally devoid of discretion was an overstatement, the fact remains that a vindictive motive is not reasonably inferable from the mere act of reestablishing the status quo after the negotiated plea to the lesser offense is withdrawn.

It might be suggested that such reasoning merely begs the question at hand; that the defendant who contemplates the exercise of his right of direct or collateral attack on his conviction will be discouraged from doing so if he knows that, if he is "successful," the prosecutor may recharge the full original information. Again, however, Pearce did not invalidate all higher sentences on retrial; it found a due process violation only where the higher sentence was reflective of vindictiveness of the court. As the Court noted in Perry:

The lesson that emerges from Pearce, Colten, and Chaffin is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a realistic likelihood of "vindictiveness." 141

Unlike the prosecutor who responds to the defendant's successful attack on his guilty plea by bringing a greater information, the prosecutor who merely reinstates the same charge which he had originally brought cannot fairly be said to have vindictively "upped the ante." Hence, the situation does not demand the restraints of the Pearce principle.

IV. Conclusion

In conclusion, it would seem that if retrial for the greater offense is to be precluded following a successful attack on a plea of guilty to a lesser offense, the rationale for the prohibition must be derived elsewhere than from the Green theory of double jeopardy. Unlike the jury in Green, the court which is tendered a plea of guilty to the lesser offense does not have the opportunity to convict on the greater offense. Hence, it does not follow from his acceptance of that plea that he has declined the opportunity to convict on the greater charge—thus giving rise to an implication of acquittal.

140 Id. at 106.
On the other hand, an assessment of the preclusive effect of the *Pearce* principle on the prosecutor’s charging discretion in the wake of a voided guilty plea requires a distinction on the basis of how that discretion was exercised *ab initio*. As previously noted, the Supreme Court did not hold in *Pearce* or its progeny that due process is offended *whenever* a second proceeding results in a higher sentence or greater exposure, but only where such a result is obtained in the context of a situation strongly suggestive of vindictiveness. Consequently, any extension of *Pearce* as a limitation on the recharging discretion of the prosecuting authority should be limited to those situations which suggest a vindictive reprisal by the prosecutor against the defendant for having attacked his former plea. Reinstating the full prenegotiation information—be that the greater offense or additional charges dropped in consideration of the plea—does not fairly give rise to an inference of a vindictive motive on the part of the prosecutor, and, hence, should not invoke the restrictions of the *Pearce* principle. The situation is different, however, where the prosecutor “ups the ante” by bringing a charge in excess of that originally brought, based upon the same conduct. This sequence of events is strongly suggestive of prosecutorial vindictiveness, and, in the absence of justification in the form of an affirmative showing of objective, intervening misconduct of the defendant, should be prohibited. In such situations, the *Pearce* restriction on the trial court furnishes little protection. For example, the *Sefcheck* court noted that in that case, upon the defendant’s conviction for the greater offense, under Iowa law, “the trial judge [had] no choice of whether to increase the sentence. . . . The increased sentence in this case flows from the actions of the prosecuting attorney, not from those of the court.” To condone such activity would be to dilute the effect of *Pearce* by enabling the prosecutor to do precisely what was there proscribed to the trial court—penalize a defendant for exercising his right to attack his conviction.

—Virgil L. Roth

142 301 F. Supp. at 795 n.1.