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## UNITED STATES v. ANDERSON—THE PLEA BARGAIN AS AN AGREEMENT TO BECOME AND TO REMAIN CONVICTED

In a criminal prosecution the defendant who enters into a typical plea bargain<sup>1</sup> escapes prosecution on a more serious offense by pleading guilty to a lesser charge.<sup>2</sup> In entering a guilty plea, the defendant waives a number of constitutional rights,<sup>3</sup> but nevertheless may attack the re-

1. Recent decisions of the Supreme Court have affirmed the validity of plea bargains as an effective tool in the administration of justice. See *Santobello v. New York*, 404 U.S. 257 (1971); *Parker v. North Carolina*, 397 U.S. 790 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Brady v. United States*, 397 U.S. 742 (1970). In these cases, "the Court went out of its way . . . to validate a number of aspects of present-day plea bargaining, approving the practice of granting lighter sentences or reducing charges in exchange for pleas of guilty, and putting its imprimatur upon the litany of the plea as it is performed in almost every court in the land." Tigar, *The Supreme Court 1969 Term, Forward: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 4 (1970). Courts and commentators often have noted the value of plea bargaining with respect to the conservation of judicial and prosecutorial resources. See, e.g., *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973); *Santobello v. New York*, *supra* at 260-61; *Brady v. United States*, *supra* at 752; *United States ex rel Williams v. McMann*, 436 F.2d 103 (2d Cir. 1970). See also Note, *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 30, 150 (1970).

Some commentators, however, continue to criticize the actual process of plea bargaining and question the constitutionality of the technique. See, e.g., White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971); Tigar, *supra* at 4-25; Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Chalker, *Judicial Myopia, Differential Sentencing and the Guilty Plea—A Constitutional Examination*, 6 AM. CRIM. L.Q. 187 (1968); Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780 (1956); Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972). See also *Tentative Standards Relating to Pleas of Guilty*, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (1967).

2. The charges usually arise from the same transaction, and the lesser offense frequently is included in the greater. See generally *Santobello v. New York*, 404 U.S. 257, 260-63 (1971).

3. A guilty plea "constitutes a waiver of the fundamental rights to a jury trial, *Duncan v. Louisiana*, 391 U.S. 145, to confront one's accusers, *Pointer v. Texas*, 380 U.S. 400, to present witnesses in one's defense, *Washington v. Texas*, 388 U.S. 14, to remain silent, *Malloy v. Hogan*, 378 U.S. 1, and to be convicted by proof beyond all reasonable doubt, *In re Winship*, 397 U.S. 358." *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring). The defendant does not waive, however, his right to counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (guilty plea to felony charge entered without counsel and without a specific waiver is involuntary).

The Supreme Court has recognized that though it acts as a practical restraint on the exercise of the right to a trial by jury, a plea bargain induced by the possibility of a more serious sentence following a jury trial nonetheless may be valid. *North Carolina*

sulting conviction.<sup>4</sup> If the conviction is set aside following defendant's appeal or collateral attack, the accused may be retried for the same offense.<sup>5</sup> This Comment focuses on the related question of whether the defendant may be brought to trial on the more serious charge originally contemplated but abandoned in favor of the plea bargain and consequent conviction.

Two inquiries lead to a proper disposition of this question. The first inquiry is whether under the double jeopardy clause of the fifth amendment,<sup>6</sup> the state, in prosecuting the lesser charge, relinquishes its right to prosecute the greater offense at a later time. If relinquishment is not found, the second inquiry is whether the facts of the case offer the likelihood that prosecutorial vindictiveness toward the defendant for having attacked successfully his first conviction may motivate the subsequent prosecution on the greater charge. If such a likelihood of vindictiveness exists, and the defendant is convicted of the greater offense, due process of law demands a reversal.<sup>7</sup>

In the federal system, judicial application of this dual-inquiry test has not yielded uniform results; although it appears that the due process inquiry presents an evidentiary problem that can be disposed of by the peculiar facts of each case, a conflict in the courts of appeals has emerged as to what constitutes "relinquishment" under the double jeopardy in-

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v. Alford, 400 U.S. 25 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970); *Brady v. United States*, 397 U.S. 742 (1970). More broadly, this trilogy holds that when a guilty plea is entered, a defendant is barred from later challenging the pretrial proceeding on constitutional grounds, though he may attack the voluntariness of the plea. *Lefkowitz v. Newsome*, 95 S. Ct. 886, 889 (1975); *Tollett v. Henderson*, 411 U.S. 258, 261-69 (1973). A state, however, may provide by statute that the right of constitutional attack is preserved despite a guilty plea. *Lefkowitz v. Newsome*, *supra* at 890-91.

4. The right of appeal is statutory, not constitutional. See *Blackledge v. Perry*, 94 S. Ct. 2098, 2101 n.4 (1974). See also Comment, *Plea Bargaining Mishaps—The Possibility of Collaterally Attacking the Resultant Plea of Guilty*, 65 J. CRIM. L. & C. 170 (1974).

5. *North Carolina v. Pearce*, 395 U.S. 711, 720-21 (1969); *United States v. Ball*, 163 U.S. 662 (1896); *Miller v. United States*, 224 F.2d 561 (5th Cir. 1955). See Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1283 (1964). See note 20 *infra*. On retrial, however, there are limitations on the sentence that a reconvicted defendant may receive. See *North Carolina v. Pearce*, *supra*, discussed at notes 30-36 *infra* & accompanying text.

6. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ." U.S. CONST. amend. V.

7. The fifth amendment guarantees due process of law, when a person is threatened by government action with deprivation of life, liberty or property. U.S. CONST. amend. V.

quiry. In *United States v. Anderson*,<sup>8</sup> the Court of Appeals for the Seventh Circuit recently held that when the government, federal or state, reduces a charge in return for a negotiated plea of guilty, it does not relinquish absolutely the right to prosecute the defendant for the greater charge. Under *Anderson*, a defendant therefore is not placed in double jeopardy when, following the vacation of a guilty plea to a lesser offense, the government prosecutes the greater offense. *Anderson* reaffirms the position taken by other circuits in rejecting the rationale of *Mullreed v. Kropp*<sup>9</sup> in which the Court of Appeals for the Sixth Circuit held that "there is implicit in a court's acceptance of a plea to an included lesser offense a determination that the right to prosecute the defendant on the more serious offense with which he is charged has been relinquished."<sup>10</sup> Examination of this conflict in particular, and the dual-inquiry test in general, must begin with a review of the relevant decisions of the Supreme Court.

#### THE DUAL-INQUIRY TEST AS FORMULATED BY THE SUPREME COURT

##### *Double Jeopardy*

Protection against double jeopardy,<sup>11</sup> "an indispensable requirement of a civilized criminal procedure,"<sup>12</sup> is embodied in the fifth amendment to the United States Constitution,<sup>13</sup> and has been held, under the incorporation doctrine, to be enforceable against the states through the fourteenth amendment.<sup>14</sup> Both the language and history of the double

8. 514 F.2d 583 (7th Cir. 1975).

9. 425 F.2d 1095 (6th Cir. 1970). See text accompanying notes 49-59 *infra*.

10. *Rivers v. Lucas*, 477 F.2d 199, 202 (6th Cir. 1973), *interpreting and aff'g* 425 F.2d 1095 (6th Cir. 1970).

11. In a jury trial, jeopardy attaches when the jury is impaneled and sworn. *Serfass v. United States*, 95 S. Ct. 1055, 1062 (1975); *Downum v. United States*, 372 U.S. 734 (1963). In a nonjury trial jeopardy attaches when the court begins to hear evidence. *Serfass v. United States*, *supra* at 1062; *Wade v. Hunter*, 336 U.S. 684, 688 (1949). When a trial is terminated prematurely before verdict is rendered, retrial is permissible only if the termination was with the consent of the defendant or as a result of manifest necessity. *Id.* at 688-89. This rule permits retrial when the jury is unable to reach a verdict. Since the necessity must be real and manifest, however, the accused escapes further prosecution if the judge declares a mistrial and dismisses the jury without justification. See, e.g., *United States v. Jorn*, 400 U.S. 470, 486-87 (1971). As to when jeopardy attaches, see J. SIGLER, *DOUBLE JEOPARDY* 39-47 (1969).

12. *Green v. United States*, 355 U.S. 184, 200 (1957) (Frankfurter, J., dissenting).

13. See note 6 *supra*.

14. *Benton v. Maryland*, 395 U.S. 784, 794 (1969), *overruling* *Palko v. Connecticut*, 302 U.S. 319 (1937); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (fourteenth amend-

jeopardy clause are laden with ambiguity,<sup>15</sup> thereby hindering a well-defined delineation of its scope. As noted by the Supreme Court, however, the double jeopardy principle is directed toward avoiding certain evils created by repeated governmental prosecutions for an alleged offense, specifically, harassment of the individual and the resultant probability that, through repeated prosecution, an innocent defendant may be found guilty.<sup>16</sup>

The double jeopardy clause has been held to bar a second prosecution for the same offense after acquittal,<sup>17</sup> or after conviction,<sup>18</sup> and to prohibit multiple punishments for the same offense.<sup>19</sup> It does not, however, bar retrial of a defendant on the same charge when the original conviction is overturned on appeal or by collateral attack at the instance of the accused.<sup>20</sup>

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ment guarantees a jury trial in state criminal prosecutions to which, if the trial were held in federal court, the sixth amendment would apply).

15. See Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283, 303-07 (1963); Note, *Double Jeopardy: A Problem Under Dual Sovereignty*, 53 NW. U.L. REV. 521, 526-27 (1958). See also *Breed v. Jones*, 95 S. Ct. 1779, 1788 (1975); *Green v. United States*, 355 U.S. 184, 201-02 (Frankfurter, J., dissenting).

16. The most complete statement of the Court appears in *Green v. United States*:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

355 U.S. at 187-88. For a thorough analysis of the philosophical background and judicial treatment of the double jeopardy prohibition, see Justice Frankfurter's dissent to *Green* at 198-219. See SIGLER, *supra* note 11 at 1-76.

17. *Benton v. Maryland*, 395 U.S. 784, 796 (1969); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Green v. United States*, 355 U.S. 184, 187 (1957); *United States v. Ball*, 163 U.S. 662, 671 (1896). See also SIGLER, *supra* note 15 at 39.

18. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *In re Nielsen*, 131 U.S. 176, 190 (1889).

19. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1873). At resentencing, when allowed, the defendant must be given credit for time served on the original sentence. *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969). See generally Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 263-66 (1965).

20. *United States v. Ball*, 163 U.S. 662 (1896). Retrial for the same offense has been justified on the grounds that an accused waives his double jeopardy defense in seeking reversal of an initial conviction, and on the theory of continuing jeopardy, that is, that the jeopardy of the first trial continues until final disposition of the case. See *Benton v. Maryland*, 395 U.S. 784, 811-12 (1969) (Harlan, J., dissenting); *Green v. United States*, 355 U.S. 184, 189 (1957); *Ward v. Page*, 424 F.2d 491, 493 (10th Cir.), *cert. denied*, 400 U.S. 917 (1970).

Both the waiver and the continuing jeopardy theories also have been applied to justify

In two principal cases the Supreme Court has considered the problem of applying the double jeopardy principle in cases involving multiple offenses arising from the same transaction. In the first, *Green v. United States*,<sup>21</sup> the defendant was charged with both arson and first degree murder. At trial, the jury was given instructions on these offenses, as well as on second degree murder which, in the District of Columbia where the case arose, was a lesser offense included in the offense of first degree murder. The jury found the defendant guilty of arson and second degree murder, but remained silent as to the first degree murder charge. On appeal, the second degree murder charge was reversed as unsupported by the evidence. The defendant was retried next for first degree murder and convicted. The Supreme Court held that retrial on the greater charge placed the defendant in double jeopardy. The silence of the original jury on the first degree murder charge was held to constitute an "implicit acquittal" of that offense, the effect of which was the same as a verdict expressly stated.<sup>22</sup> Green, once having been placed in peril of conviction for first degree murder, could not be forced to stand in jeopardy again. Jeopardy attached to the defendant on this charge when the jury in the original suit was empanelled and sworn. The Court refused to accept the contention that in appealing the con-

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retrial following acquittal and appeal by the state. Construction of the double jeopardy clause relative to appeals by the Government is set forth in *United States v. Wilson*, 95 S. Ct. 1013, 1022-23 (1975).

21. 355 U.S. 184 (1957). See Note, *Double Jeopardy: Defense in Retrial for Greater Offense Upon Reversal of Conviction of Lesser Offense*, 1957 DUKE L.J. 37; Note, *Defendant's Waiver of Double Jeopardy by Appealing Conviction for a Lesser Included Offense*, 66 YALE L.J. 592 (1957) (discussion of decision of Court of Appeals for the District of Columbia, 236 F.2d 708 (D.C. Cir. 1956), reversed by the Supreme Court decision cited above); 9 SYRACUSE L. REV. 331 (1958).

22. 355 U.S. at 190. See *Price v. Georgia*, 398 U.S. 323 (1970), citing *Green* at 327-30. Significantly, the Court's analysis treated the two offenses, first and second degree murder, as separate and distinct with respect to the application of double jeopardy protection. See 355 U.S. at 190-91. Determining when distinct statutory offenses should be construed as a unity has been a persistent problem in the interpretation and application of the double jeopardy prohibition. For uniformity, many jurisdictions employ an actual evidence test, by which prosecution of a second and purported separate offense is barred if the evidence introduced to prove a first offense to which jeopardy has attached also would prove the second. An exception usually is made, in applying this test, for related offenses of which the lesser is included in the greater, with the result that in most jurisdictions offenses so related are considered identical for double jeopardy purposes. This exception protects the defendant who is convicted of either of the two related offenses but would subject this same defendant to renewed prosecution for both offenses if his conviction were set aside. See Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513 (1949); Note, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965).

viction of second degree murder, the defendant had waived his constitutional defense of former jeopardy.<sup>23</sup>

The Court reaffirmed the *Green* doctrine in a second case, *Benton v. Maryland*,<sup>24</sup> in which the defendant had been convicted of burglary and acquitted of larceny by a jury. Before disposition of the defendant's appeal from this verdict, however, the Maryland Court of Appeals had held unconstitutional the process utilized by the state to select juries; as a result, the state gave the defendant the option of demanding reindictment and retrial, rather than further pursuing his appeal. Seizing this option, the defendant moved to dismiss the larceny charge on double jeopardy grounds; the trial judge, however, was not persuaded, and apparently distinguished *Green* by accepting the state's argument that the original indictment in *Benton* was void and therefore could not have placed the defendant in jeopardy of any offense.<sup>25</sup> Citing well-established precedent,<sup>26</sup> the Supreme Court disagreed, noting that since the trial court had exercised jurisdiction over the defendant, the defective jury selection process made the judgment voidable, not void. Accordingly, the Court refused to permit the state to allege its own failure to deny that the defendant previously had been placed in danger of conviction, and consequently the court reversed the conviction for larceny.<sup>27</sup>

### *Due Process*

Although focusing primarily on the double jeopardy relinquishment inquiry, and holding that the state relinquishes the right to prosecute a defendant for an offense implicitly found by a jury not to have been

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23. 355 U.S. at 191.

24. 395 U.S. 784 (1969), *overruling* *Palko v. Connecticut*, 302 U.S. 319 (1937). See Note, *Limits of the Concurrent Sentence Doctrine as a Jurisdictional Bar—The Fifth Amendment's Double Jeopardy Protection Applied to the States*, 65 NW. U.L. REV. 123 (1970); Comment, *The Retroactivity of Benton v. Maryland*, 1969 U. ILL. L.F. 517; 11 WM. & MARY L. REV. 564 (1969).

25. 395 U.S. at 796-97.

26. The Court noted that *United States v. Ball*, 163 U.S. 662 (1896), answered in the negative the state's argument that a void indictment creates no jeopardy. In *Ball*, three co-defendants were tried and two were convicted on an indictment found on appeal to contain insufficient allegations. On the retrial of all three, the defendant originally acquitted was convicted. His appeal on double jeopardy grounds was upheld. The Court held that the technical invalidity in the indictment was the fault of the government and therefore could not be used to override the defendant's jury acquittal. The Court in *Benton* noted that in both *Ball* and *Benton*, the indictments were not void, but voidable at defendant's option.

27. 395 U.S. at 796-97.

committed, *Green* also suggests that due process considerations are closely related to the double jeopardy inquiry: "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."<sup>28</sup> Although couched in double jeopardy terms, this language invokes the "chilling effect" notion that the defendant's right to attack his conviction would be impaired if a successful appeal would subject him to the threat of a subsequent, arbitrary prosecution on a more serious charge.<sup>29</sup>

This line of inquiry was crystallized by the Supreme Court in *North Carolina v. Pearce*.<sup>30</sup> There the defendant had been convicted and sentenced for assault to commit rape; several years later, the conviction was set aside, and subsequently the defendant was retried, convicted, and given a new sentence. Because the second sentence, together with the time already served, exceeded his original sentence, the defendant sought relief in the federal courts, alleging denial of his constitutional rights. Confronted with arguments based on both the double jeopardy and due process clauses, the Court refused to apply the double jeopardy principle, which would have imposed an absolute limit on sentences following retrial,<sup>31</sup> and chose instead to implement<sup>32</sup> a more flexible remedy under due process by holding that a more severe sentence following re-

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28. 355 U.S. at 193-94.

29. The Court noted: "Reduced to plain terms, the Government contends that in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal. . . . The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." 355 U.S. at 193.

Elsewhere the Court has stated: "It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to [impose] a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." *North Carolina v. Pearce*, 395 U.S. 711, 723-24 (1969). See Borman, *The Chilled Right to Appeal from a Plea Bargain Conviction: A Due Process Cure*, 69 NW. U.L. REV. 663 (1974).

30. 395 U.S. 711 (1969). See Aplin, *Sentence Increases on Retrial After North Carolina v. Pearce*, 39 U. CIN. L. REV. 427 (1970); Note, *In Van Alstyne's Wake: North Carolina v. Pearce*, 31 U. PITT. L. REV. 101 (1969); 55 A.B.A.J. 1077 (1969).

31. 395 U.S. at 718-19. Although the Court held that "neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction," *id.* at 723, it also held that the guaranty against double jeopardy "absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense." *Id.* at 718-19 (footnote omitted).

32. 395 U.S. at 723.



trial could be imposed only when it could be justified by "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."<sup>33</sup> Invoking the "chilling effect" doctrine,<sup>34</sup> the Court stated that:

Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. 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.<sup>35</sup>

This principle both protects the right of defendants to pursue appeal without fear of retaliation, and preserves the state's interest in sentencing convicted defendants in accordance with modern concepts of penology.<sup>36</sup>

In *Blackledge v. Perry*,<sup>37</sup> the due process vindictiveness inquiry was applied to examine the actions of prosecutors. In *Perry* the defendant, charged with the misdemeanor of assault with a deadly weapon, was tried and convicted by a judge having jurisdiction only of the trial of misdemeanors. When the defendant exercised a statutory right to trial de novo in a higher court, he was indicted for felony assault on the basis of the same conduct that had led to the misdemeanor charge. The Supreme Court held that the state violated the due process clause of the United States Constitution by pursuing a more serious charge against the defendant in response to his invocation of the statutory right to trial de novo.<sup>38</sup>

Following the rationale of *Pearce*, the Court in *Perry* stated that "[a] person convicted of an offense is entitled to pursue [appeal], with-

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33. *Id.* at 726. See note 29 *supra*. The Court also stated that "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." *Id.*

34. See note 29 *supra* & accompanying text.

35. 395 U.S. at 725 (footnote omitted).

36. *Id.* at 723. The majority in *Pearce* also disposed of *Simpson v. Rice* in the same opinion. Since the facts there suggested a plea bargain in the original proceedings, at least one judge has inferred that application of the *Pearce* doctrine is not limited by the presence of a negotiated plea. *United States ex. rel. Williams v. McMann*, 436 F.2d 103, 107 (2d Cir. 1970) (Hays, J., concurring), *cert. denied*, 402 U.S. 914 (1971) (discussed at notes 74-79 *infra* & accompanying text).

37. 94 S. Ct. 2098 (1974).

38. *Id.* at 2103.

out apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.”<sup>39</sup> The Court emphasized, however, that *Pearce* and its progeny<sup>40</sup> do not stand for the principle that the due process clause is offended “by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of ‘vindictiveness’.”<sup>41</sup>

The Court’s refusal in *Perry* to pursue a double jeopardy relinquishment inquiry is as significant as its further delineation of the due process vindictiveness inquiry. In *Perry*, the state by its initial refusal to prosecute the greater charge, arguably had placed the defendant in the same position as if he previously had been acquitted of the greater charge. Application of the *Green* holding to the facts in *Perry* would equate the “implicit acquittal” by a jury<sup>42</sup> to the decision of the state not to prosecute the felony charge initially, and would bar its subsequent prosecution following appeal from a conviction on the misdemeanor charge. Refusal so to extend the first step of the dual-inquiry test impliedly restricts expansion of the test. As noted previously, however, the courts of appeals have disagreed on this point.

#### THE DUAL-INQUIRY TEST AS FORMULATED BY THE FEDERAL COURTS OF APPEALS

##### *Double Jeopardy: The Relinquishment Inquiry*

Simply stated, *Green* and *Benton* demand that a defendant acquitted by a jury of one offense and convicted of a lesser included offense not be retried on the greater offense after a successful appeal. The government *relinquishes* its right to prosecute in the future any offense offered to the jury for disposition. In *Ward v. Page*<sup>43</sup> an appellate court

39. *Id.* at 2102-03.

40. *Perry* discussed two cases that limited the rationale of *Pearce* to the specific purpose of avoiding vindictiveness toward a defendant. In *Colten v. Kentucky*, 407 U.S. 104 (1972), and *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), the Court examined resentencing by a separate court or jury and deemed *Pearce* outside the scope of inquiry because the danger of vindictiveness was believed de minimus. In contrast, in *Perry* the Court, recognizing that “[a] prosecutor clearly has a considerable stake in discouraging [defendants] from appealing,” found the rule of *Pearce* applicable. 94 S. Ct. at 2102.

41. 94 S. Ct. at 2102.

42. See notes 21-22 *supra* & accompanying text.

43. 424 F.2d 491 (10th Cir.), *cert. denied*, 400 U.S. 917 (1970). *Ward* concerned

first considered the issue of whether the government likewise *relinquishes* its right to prosecute in the future a greater offense when it permits the defendant to plead guilty to a lesser included offense that subsequently is appealed successfully; under these circumstances the Court of Appeals for the Tenth Circuit held that there was no relinquishment.<sup>44</sup> Finding "no authority, which suggests that a guilty plea to a lesser offense operates as an acquittal on all greater offenses,"<sup>45</sup> the court stated that the defendant was outside the ambit of *Benton*<sup>46</sup> and denied relief on the grounds that he had not been acquitted of the charge he sought to avoid.<sup>47</sup> Although conceding that the defendant's guilty plea was as final as a jury verdict, the court refused to take the further step, urged by the petitioner, of equating the double jeopardy implications of a guilty plea with those of a jury verdict.<sup>48</sup>

The Court of Appeals for the Sixth Circuit, unpersuaded by the logic of *Ward*, found to the contrary in *Mullreed v. Kropp*,<sup>49</sup> a case that has not been followed by any other court of appeals. In *Mullreed*, the defendant, initially charged with armed robbery, entered a plea of guilty

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a defendant indicted for first-degree murder who pleaded guilty to the lesser included offense of first-degree manslaughter following two days of trial by jury. Subsequent to federal habeas corpus proceedings in which the guilty plea was held to be involuntary, *Ward v. Page*, 336 F.2d 602 (10th Cir. 1964), the defendant was retried on the original charge. Following a jury verdict of guilty of first degree murder and a sentence of life imprisonment, the defendant appealed, contending that the retrial constituted a second incident of jeopardy on the first degree murder charge. In reviewing the facts of the case, it should be remembered that jeopardy attaches in a jury trial when the jury is impaneled and sworn. See note 11 *supra*.

44. 424 F.2d at 493.

45. *Id.*

46. 395 U.S. 784 (1969). See notes 24-27 *supra* & accompanying text. See also *Booker v. Phillips*, 418 F.2d 424 (10th Cir. 1969) (cited by the *Ward* court as consistent with *Benton* but distinguishable from *Ward*).

47. 424 F.2d at 493. *Ward* eventually obtained relief in the state courts where the government was held estopped from reinstituting the greater charge, having previously elected to pursue only the lesser. *Ward v. State*, 444 P.2d 255 (Okla. Crim. App.), *cert. denied*, 393 U.S. 1040 (1968).

48. 424 F.2d at 493. In *Ward*, the accused did not plead guilty until his trial on the first degree murder charge and on the lesser, included manslaughter charge had begun. Therefore, he was placed in jeopardy on both charges. Because the trial was terminated prematurely, without a jury verdict, retrial was permissible only if the first trial had been terminated with the consent of the defendant or because of manifest necessity. See note 11 *supra*. This aspect of the double jeopardy protection is not addressed in *Ward* and apparently was not made an issue in the case.

49. 425 F.2d 1095 (6th Cir. 1970). For a discussion of issues raised by *Mullreed* and *Ward*, see Comment, *The Constitutionality of Reindicting Successful Plea-Bargain Appellants on the Original Higher Charges*, 62 CALIF. L. REV. 258 (1974).

to unarmed robbery, pursuant to a plea bargain. Sentenced to prison, he was released following a showing in habeas corpus proceedings that his request for counsel had been denied. Immediately rearrested, he was convicted in a jury trial of the original armed robbery charge. Relying upon *Green*<sup>50</sup> and *Benton*,<sup>51</sup> the court in *Mullreed* held that the defendant's trial on the armed robbery charge violated the double jeopardy clause of the fifth amendment.<sup>52</sup> Noting "a deliberate decision on the part of the State not to prosecute on the charge of armed robbery", the court stated that such a refusal amounted to a "relinquishment of its rights" to do so.<sup>53</sup> *Mullreed* clearly is an extension of the double jeopardy relinquishment inquiry as defined by the Supreme Court, for the defendant had neither pleaded guilty, nor been tried nor even been indicted on the greater charge during the first proceeding. In the initial pretrial proceeding, he could not have been found guilty of charges other than those to which he was willing to plead guilty. Therefore, whereas the action by the state in *Green* was deemed by the Court to be "contrary to both the letter and the spirit of the Fifth Amendment,"<sup>54</sup> the comparable action in *Mullreed* appears to be contrary to the spirit but not the letter of the double jeopardy provision.

Supreme Court decisions subsequent to *Mullreed* indicate that this extension of the definition of relinquishment under the double jeopardy inquiry has not been well-received. The Court's disposition of *Perry* on due process grounds argues against an inclination to extend the rule of *Green*.<sup>55</sup> Moreover, recent Supreme Court cases conclusively affirm the traditional definition of jeopardy as risk of conviction. In *Serfass v. United States*,<sup>56</sup> the Court held that criminal proceedings subsequent

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50. See notes 21-23 *supra* & accompanying text.

51. 425 F.2d at 1101-02.

52. *Id.* at 1102.

53. *Id.* at 1099. On the basis of the Michigan criminal statutes under which *Mullreed* was tried, the court concluded that it was "apparent that the conviction on the lesser offense requires an affirmative finding that the [defendant] was not armed. . . ." *Id.* at 1102. The case, however, is not delimited by this conclusion. See *Rivers v. Lucas*, 477 F.2d 199, 202 (6th Cir.), *vacated as moot*, 414 U.S. 896 (1973).

54. 355 U.S. at 198.

55. See text accompanying note 42 *supra*.

56. 95 S. Ct. 1055 (1975). *Serfass* concerned a criminal prosecution for wilful failure to report for induction into the armed forces. At a pre-trial hearing, the district court dismissed the indictment. The Government, pursuant to a specific statutory grant of the right to appeal in cases in which jeopardy had not attached, secured a reversal in the court of appeals. On certiorari, the defendant argued that in fact he had been in "constructive jeopardy" in the district court, where "the disposition of his motion to dismiss the indictment was, in the circumstances of [the] case, the 'functional equiva-

to the dismissal of an indictment at a pretrial hearing would not violate the double jeopardy prohibition because the defendant could not have been convicted at the hearing, and therefore, was not placed in jeopardy.<sup>57</sup> And in *United States v. Jenkins*,<sup>58</sup> the Court held the double jeopardy bar applicable when "[t]he trial, which *could have resulted in a judgment of conviction*, had long since terminated in respondent's favor."<sup>59</sup>

The recent case of *United States v. Anderson*<sup>60</sup> comports with this line of Supreme Court decisions. There, the defendant, initially charged with armed bank robbery,<sup>61</sup> was sentenced to ten years imprisonment after pleading guilty, pursuant to an agreement with the prosecutor, to the lesser offense of unarmed bank robbery.<sup>62</sup> On review, the appellate court noted that the sentence exceeded the statutory maximum and ordered the Government to file a memorandum addressing this illegality. At the suggestion of the government, the plea then was vacated; the defendant was reindicted and subsequently convicted by a jury of the original offense of armed bank robbery. The defendant again received a ten year sentence; this time, however, the term fell within statutory limits. The defendant appealed, alleging both double jeopardy and due process violations.

In examining the double jeopardy claim, the Court of Appeals for the Seventh Circuit found no violation of the fifth amendment. Rejecting

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lent of an acquittal on the merits. . . ." *Id.* at 1063. The Court rejected this argument by noting that jeopardy consistently has been defined as attaching when the defendant is put to trial before the trier of facts. *Id.* at 1062. This Comment suggests a qualification to this definition at notes 65-69 *infra* & accompanying text.

57. "Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier 'having jurisdiction to try the question of the guilt or innocence of the accused.'" *Id.* at 1064, *quoting* *Kepner v. United States*, 195 U.S. 100, 133 (1904). Because the defendant in *Serfass* had not waived his right to a jury trial, the district court, when it dismissed the indictment against him, was without jurisdiction to decide questions of guilt or innocence, and jeopardy, therefore, could not attach. Although the decision did not turn specifically on the issue of jury trial, if defendant had waived that right, a dismissal of an indictment, arguably, would have operated as an acquittal.

58. 95 S. Ct. 1006 (1975). *Jenkins*, like *Serfass*, notes 56 & 57 *supra*, involved prosecution for failure to submit to induction. After the district court had dismissed the indictment in the course of the trial, the Government sought to appeal, contending that dismissal of an indictment was not an acquittal. The Court held that since further proceedings to resolve factual issues would be required if the dismissal of the indictment were reversed, the double jeopardy bar applied.

59. *Id.* at 1013 (emphasis supplied).

60. 514 F.2d 583 (7th Cir. 1975).

61. Violation of 18 U.S.C. § 2113 (d) (1970).

62. Violation of 18 U.S.C. § 2113 (b) (1970).

the *Mullreed* rationale that the Government, in initially refusing to prosecute the more serious offense, had relinquished absolutely its right to do so, the court concluded that the Government had only "conditionally relinquished this right provided Anderson was convicted of and remained convicted of the [lesser offense]." <sup>63</sup> In so holding, *Anderson* distinguished *Green* by stating that in *Green* the "implicit acquittal on the greater charge was in no sense contingent on the continued viability of the conviction for the lesser offense." <sup>64</sup> Initially, this distinction appears to be warranted, for in *Green*, the defendant was deemed to have been in prior jeopardy for the greater offense because the prosecution had forced the defendant to face the danger of conviction for that offense by actually having a jury consider his guilt with regard to it, whereas in *Anderson* the state chose not to subject the defendant to the danger of conviction by a jury on the greater offense. This difference would seem to support the argument that Anderson had never been in jeopardy for the greater offense; Green had been implicitly acquitted, but Anderson had not. Upon closer consideration, however, the distinction is less clearly warranted, for it may be argued that Anderson, too, was essentially "acquitted."

Implicit in the prosecution's decision not to take the defendant to trial on the greater offense is a consideration of the likelihood of obtaining a conviction on that charge, which, in turn, entails a consideration of the guilt of the defendant. When the prosecution decided not to go to trial on the greater charge, and when this decision was allowed by the trial judge for the lesser offense, the prosecution and judge, in effect, "acquitted" the defendant, because following the conviction on the lesser offense the state was barred from prosecuting the greater offense.<sup>65</sup> Thus, immediately following his conviction, Anderson's status.

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63. 514 F.2d at 587.

64. *Id.*

65. Cf. *Green v. United States*, 355 U.S. 184, 191 (1957). Prosecution of the greater offense while the conviction of the lesser remained in effect clearly was barred by the plea bargain in *Anderson*.

In the more general factual situation of conviction of a lesser offense subsequent to a guilty plea but absent a plea bargain, prosecution for a greater, related offense arising from the same criminal episode uniformly has been held to be barred when the greater offense is similar to the lesser and, in some manner, an aggravated form of the lesser. Ultimately, this bar to further prosecution is based on legislative intent that the accused not be convicted of both offenses. This objective frequently is achieved in practice by considering the offenses as identical for double jeopardy purposes. This approach is advantageous to the defendant while he stands convicted of the lesser offense, but disadvantageous to him, if the conviction is vacated, because then it does not protect him from prosecution for both of the original charges. See note 22 *supra*.

with regard to immunity from prosecution on the greater offense was exactly the same as Green's status.<sup>66</sup> Although the peril faced by Anderson, due to the trial judge's consideration of the plea bargain, technically was insufficient to constitute "jeopardy" under present judicial construction, as Anderson was never formally before the trier of fact on the greater charge,<sup>67</sup> it reasonably can be argued that the peril was functionally equivalent to "jeopardy" and therefore within the scope of that term for double jeopardy purposes.<sup>68</sup> Under this expanded definition of "jeopardy," it follows that Anderson's fundamental right to raise the defense of prior jeopardy with respect to the greater offense attached at the moment of conviction on the lesser offense and could not be lost without a showing of effective waiver. Therefore, Anderson's appeal could operate to reopen the possibility of prosecution on the greater charge only if the appeal constituted an effective waiver of that fundamental right to raise the objection to being twice placed in jeopardy for the same offense.

When it is recognized that the distinction between *Green* and *Anderson* is more a difference of form than of substance, the following language from *Green* applies most compellingly to the facts in *Anderson*:

[T]he Government contends that Green "waived" his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a *successful* appeal of his improper conviction of second degree murder. We cannot accept this para-

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66. A status akin to implicit acquittal existed not only because before appeal of the lesser charge defendant could not have been tried on the greater, but also because, as "[t]he overwhelming majority of prosecutors view the strength or weakness of the state's case as the most important factor in the task of bargaining", Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 58 (1968) (footnote omitted), prosecution on the lesser charge necessarily implies that the state has rejected prosecution on the greater charge for lack of evidence.

67. "The Court consistently has adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of facts, whether the trier be a jury or a judge'." *Serfass v. United States*, 95 S. Ct. 1055, 1062 (1975), *quoting* *United States v. Jorn*, 400 U.S. 470, 479 (1971).

68. It should be noted that the Court has "disparaged 'rigid, mechanical' rules in the interpretation of the Double Jeopardy Clause," *Serfass v. United States*, 95 S. Ct. 1055, 1064 (1975), *citing* *Illinois v. Somerville*, 410 U.S. 458, 467 (1973), and one court has stated: "[t]he effect of the entire [plea bargaining] transaction, for double jeopardy purposes, is the equivalent of a jury's refusal to convict on the more serious charge." *Rivers v. Lucas*, 477 F.2d 199, 202 (6th Cir. 1973), *construing* *Mullreed v. Kropp*, 425 F.2d 1095 (6th Cir. 1970).

doxical contention. . . . In any normal sense, ["waiver"] connotes some kind of voluntary knowing relinquishment. . . .<sup>69</sup>

Is it so apparent that the defendant in *Anderson knowingly relinquished* what in substance amounted to "jeopardy rights" by appealing his conviction? It is submitted that the defendant's appeal did not constitute such a "voluntary knowing relinquishment." The Supreme Court has pointed out numerous times that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights."<sup>70</sup> In the absence of an explicit agreement by the defendant during the plea-bargaining process not to appeal, a finding of *knowing* relinquishment by so appealing reverses the above rule and incorrectly presumes a waiver.<sup>71</sup>

### *Due Process: The Vindictiveness Inquiry*

Simply stated, *North Carolina v. Pearce*<sup>72</sup> and *Blackledge v. Perry*<sup>73</sup> hold that a defendant is deprived of due process of law when a greater

69. 355 U.S. at 191 (emphasis added in part). The Court continued:

When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he "chooses" to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice.

*Id.* at 191-92. Quoting from *Kepner v. United States*, 195 U.S. 100, 135 (1904), the Court observed that "it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States." *Id.*

The concept of waiver is regarded uniformly in judicial decisions as signifying a *voluntary relinquishment* of a *known* legal right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *American Locomotive Co. v. Gyro Process Co.*, 185 F.2d 316, 318 (6th Cir. 1950). More recently, the Supreme Court has stated that waivers of constitutional rights must be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742 (1970) (footnote omitted). See also Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262 (1966); BLACK'S LAW DICTIONARY 1751 (4th ed. Rev. 1968). For a unique definition of "waiver", see *United States v. Jackson*, 390 U.S. 570 (1968) noted in Note, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 156 (1968) (though defendant's waiver of right to trial by jury comported with accepted definitions of "waiver," he nonetheless had no "meaningful choice" when confronted with the option of pleading guilty or facing a jury trial, when the jury was authorized to recommend the death penalty, which defendant could not receive on his guilty plea).

70. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) and *Hodges v. Easton*, 106 U.S. 408, 412 (1882).

71. As noted previously, however, notes 55-59 *supra* & accompanying text, this argument, though compelling, may not be well-received in light of recent Supreme Court cases defining double jeopardy as "risk of conviction."

72. 395 U.S. 711 (1969). See notes 30-36 *supra* & accompanying text.

73. 94 S. Ct. 2098 (1974). See notes 37-42 *supra* & accompanying text.



charge or sentence is imposed upon him *solely* for appealing a conviction. In *United States ex rel. Williams v. McMann*,<sup>74</sup> the Court of Appeals for the Second Circuit examined this rule when, in a complicated fact situation, it confronted the question of permissible prosecution following the vacation of a guilty plea. There, the defendant, charged with illegal sale of narcotics, was allowed to plead guilty to the lesser charge of attempted sale. Shortly after the anticipated sentence was imposed, it was discovered that the defendant had a prior felony conviction dating back fifteen years, which necessitated an extended sentence as the defendant was a second felony offender. Confronted with this result, the defendant requested and was permitted to withdraw his plea of guilty. Subsequently convicted by a jury of the original charge, the defendant successfully attacked the constitutionality of the felony conviction dating back fifteen years; he then was sentenced as a first felony offender for a term exceeding his original sentence under the lesser offense.

Surprisingly, the defendant did not attack his retrial on the greater offense as a violation of double jeopardy. Rather, he proceeded on due process grounds by arguing that *Pearce* required vacation of his sentence since the judge had not given any justification for the sentence imposed.<sup>75</sup> The court in *McMann* quickly disposed of this contention by noting that justification was not required since the defendant had received the shortest sentence permitted by statute for a first felony offender.<sup>76</sup>

Guided by a district court decision, *Sefcheck v. Brewer*,<sup>77</sup> which had anticipated *Perry* in applying the *Pearce* concepts to prosecutorial ac-

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74. 436 F.2d 103 (2d Cir. 1970), *cert. denied*, 402 U.S. 914 (1971).

75. *Id.* at 105. Justification in the record is required by *Pearce*, note 33 *supra*.

76. "Given this complete and obvious explanation for the longer sentence, we see no need to demand the type of justification ordered in *Pearce*." *Id.*

77. 301 F. Supp. 793 (S. D. Iowa 1969). *Sefcheck* involved a defendant who pleaded guilty to the charge of uttering a false check and was sentenced to a term not to exceed seven years. Upon a showing that his guilty plea was not entered personally and in the presence of counsel, the judgment and sentence were vacated as void. Following withdrawal of his plea, the defendant was convicted of the more serious offense of uttering a false instrument, and received a maximum sentence of ten years. In habeas corpus proceedings, the second judgment and sentence also were declared void, consistent with the rationale of *Pearce*. Noting the retaliatory motive that *Pearce* sought to deter, the court in *Sefcheck* stated: "Fear that the [prosecutor] 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." *Id.* at 795.

The court in *McMann* apparently agreed with the *Sefcheck* court that subsequent prosecution on a greater charge following appeal would be presumptively vindictive. See text accompanying notes 74 & 75 *supra*. *McMann* distinguished itself, however,

tions, the court next extended its inquiry to the question of vindictiveness on the part of the prosecutor. The defendant in *McMann* had argued that the prosecutor's re-institution of the higher charge following the withdrawal of the guilty plea was indicative of a retaliatory motive and therefore void on due process grounds. Although the defendant did not support this allegation with evidence, the court did consider whether re-instituting the original charges was presumptively vindictive. Analogizing to contract law, the court found it neither surprising nor suggestive of vindictiveness that the prosecutor pursued the greater charge after the defendant had revoked his "part of the bargain" by successfully appealing his guilty plea.<sup>78</sup> In so holding, the court apparently viewed the defendant's consideration in the plea bargain agreement as a promise to plead and *remain* guilty, rather than merely to plead

by noting that (1), the longer, second sentence (in *McMann*) was obviously justified on the ground that the second prosecution was for the greater offense originally brought against the defendant, and (2), prosecution on that greater offense was justified on the basis of "the faultless conduct of the prosecutor . . . when compared with that condemned in *Sefcheck v. Brewer* . . . where . . . the prosecutor filed a new, more serious information." 436 F.2d at 105-06. In *Sefcheck* no plea bargain was obtained; rather, the defendant simply pleaded guilty to the offense charged. The challenged action of the prosecutor was the indictment of the defendant following his successful appeal, on a greater offense not originally charged or contemplated. The court in *Sefcheck* found such action presumptively vindictive, and found no evidence in the facts of the case by which to refute the presumption. The second prosecution and judgment were held, therefore, to violate the constitutional due process protections. In contrast, the second prosecutor in *McMann* pursued a charge earlier abandoned as the result of a negotiated plea.

78. That the plea bargain has elements analogous to the elements of a simple contract was recognized by the Supreme Court in *Santobello v. New York*, 404 U.S. 257 (1971), in which a defendant entered into a plea bargain conditioned on the promise of the prosecutor not to make a sentence recommendation. The Court stated that this promise "can be said to be part of the inducement or *consideration*, [and] such *promise* must be fulfilled." *Id.* at 262 (emphasis supplied). The defendant was held to have "'bargained' and negotiated for a particular plea in order to secure dismissal of more serious charges [and the] condition that no sentence recommendation would be made. . . ." When such recommendation subsequently was made by the prosecutor, he was held to be in "breach of agreement" and his claim of inadvertence was considered no excuse. *Id.* This frequent use by the Court of terms of obvious significance in contract law indicates that it contemplates the plea bargain either as a contract in fact, or as a situation so closely analogous that it could be helpfully illuminated by the application of contract analysis. See also *Brady v. United States*, 397 U.S. 742 (1970) (duress and coercion, recognized defenses to the formation of a contract, if carried on by the state, are sufficient to invalidate a guilty plea; *id.* at 750); *United States v. Hammerman*, No. 75-1090 (4th Cir. 1975) (defendant allowed to withdraw negotiated plea because prosecutors misrepresented that district court would honor their recommendation that he not be imprisoned). See 1 A. CORBIN, CORBIN ON CONTRACTS § 6 (1963 and Supp. 1971).

guilty.<sup>79</sup> This rationale subsequently was adopted in *Anderson*, in which the court held that the contrary conclusion "gives the defendant more than the 'benefit of his bargain' and ensures that he will not even be placed in jeopardy once under certain circumstances."<sup>80</sup>

Such an approach solves the definitional problem of the defendant's consideration in the plea agreement by giving the Government the benefit of the doubt. Surely, application of this presumption would be invalid

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79. Support for the result in *McMann*, that defendant's consideration included the right to remain guilty, may be found in *Lefkowitz v. Newsome*, 95 S. Ct. 886 (1975), in which the Court stated: "Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained." *Id.* at 889. In analyzing the plea bargain as a contract, however, it would seem that such a legitimate expectation *only exists with respect to the facts of the case upon which the defendant's guilt is based*. Therefore, it is arguable that an appeal based on *procedural or constitutional grounds* demonstrating improper behavior by the government would *estop* the government from arguing that defendant, by so appealing, breached the plea bargain.

By agreeing in a plea bargain to become and remain convicted a defendant essentially is waiving his right to appeal. Although there is no federal constitutional right of appeal, *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), *McKane v. Durston*, 153 U.S. 684, 687-88 (1894), when a state establishes an appeal procedure, it must assure its constitutional application. *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973); *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969). See also *Lefkowitz v. Newsome*, *supra* at 890-91 (1975) (constitutional attacks on pretrial proceedings not waived by guilty plea when state statute specifically preserves this right). Demanding that a defendant waive this right in order to secure a plea bargain, is not, however, violative of this requirement. It is established that in entering a plea of guilty, a defendant consents not to exercise a number of his constitutional rights. See note 3 *supra*. Because the right of appeal does not rise to the dignity of a constitutional right, but is purely statutory, no convincing argument can be made on constitutional grounds against its waiver as a prerequisite to obtaining a plea bargain.

80. 514 F.2d at 587. In its due process analysis, *Anderson*, focusing on the contractual nature of the plea bargain, quickly disposed of defendant's reliance on *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974). Therein, defendants were indicted for second degree murder and brought to trial, during the course of which an error was committed by defendants' counsel, necessitating a mistrial. Following the prosecutor's subsequent reindictment of the defendants for the graver offense of first degree murder, the court held that this action was a denial of due process "absent any showing of justification for the increase in the degree of the crime initially charged. . . ." 505 F.2d at 413. *Anderson* distinguished this holding by noting that in *Jamison*, the Government had unilaterally elected to charge defendants initially with the lesser offense; the decision had not been jointly arrived at through a plea bargaining process. The Government's change in position could not be explained but for the mistrial and a resultant retaliation arising therefrom. By contrast, noted the *Anderson* court, the Government therein had not elected the charge that it would pursue if the matter eventually went to trial. Moreover, defendant's change in plea to not guilty was deemed ample justification for pursuing the greater charge. 514 F.2d at 588.

if a court has not attempted first to discern the exact understanding of the parties as to the possibility of appeal.<sup>81</sup> Moreover, failure to so find an understanding on this issue need not lead necessarily to the *McMann* and *Anderson* result. It could be argued that placing the benefit of the doubt with the defendant<sup>82</sup> would force prosecutors to negotiate the issue explicitly in order to dispel the presumption, and therefore precipitate a greater number of express agreements on this issue since prosecutors, more than any other class of attorneys, would be aware of with whom the benefit is placed. It also appears that, consistent with the emphasis accorded the protection of individual rights with respect to criminal justice administration, the benefit is properly placed with the accused.

### CONCLUSION

*United States v. Anderson* comports with the bulk of case law in its analysis of the dual-inquiry test. As to the first inquiry, the Government was found not to have relinquished absolutely its right to prosecute an offense that initially was abandoned in favor of a plea bargain. This analysis is consistent with recent case law defining jeopardy as "risk of conviction," but fails to recognize that immediately prior to the appeal of a negotiated guilty plea, a risk akin to jeopardy has attached to all greater offenses.<sup>83</sup> It therefore is submitted that the *Anderson* analysis of the first inquiry, though clearly supported by recent decisions, is questionable. As to the due process inquiry, *Anderson* did not find the Government vindictive in pursuing conviction for the greater offense once the defendant successfully had appealed his negotiated guilty plea. Although this approach is not categorically unreasonable, an equally viable approach would be to place a rebuttable presumption of vindictiveness on such action.

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81. Further developing the similarities between the plea bargain and the contract, it is clear that when a specific term has been negotiated, a court, upon knowledge thereof, should enforce it per se as part of its general duty to effect the expressed intent of the parties. See generally CORBIN, *supra* note 78, at §§ 538, 545 & 549. For a suggested revision of the entire process of the negotiation of a plea bargain, see Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 299-312 (1972).

82. At the least, defendant should be allowed to appeal constitutional and procedural matters without the loss of this benefit. See note 79 *supra*.

83. See note 68 *supra* & accompanying text.