CRIMNAL PROCEDURE

Professor Leipold

CASE #1

The first case that we will read, California v. Greenwood, involves an interpretation of the Fourth Amendment to the U.S. Constitution, which says:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The first part of the amendment prohibits the police from conducting "unreasonable" searches and seizures. The second part describes the requirements for a search or arrest warrant. A warrant is an order by a judge that allows the police to search a place for evidence of a crime or to arrest a person suspected of a crime. If the police obtain a warrant, then the search or arrest is almost always considered "reasonable" (and so satisfies the first part of the amendment), because the police received court permission in advance to engage in the search and seizure.

Greenwood is a case about searches, and in particular, searches made without a search warrant. The question before the Supreme Court is whether the search the police carried out was reasonable, or whether it was unreasonable because the police did not get a search warrant first.

As you read Greenwood, ask yourself the following questions:

1. How does the Court distinguish a "reasonable" from an "unreasonable" search? That is, what test does the Court apply?

2. How does the Court justify its conclusion about what "society" is prepared to accept as reasonable?

3. Assume for a minute that the Court decided that the police conduct violated the Fourth Amendment. What remedy would Billy Greenwood receive if the Court decided that this constitutional rights were violated?

Supreme Court of the United States

CALIFORNIA, Petitioner
v.
Billy GREENWOOD and Dyanne Van Houten.

No. 86–684.
Argued Jan. 11, 1988.
Decided May 16, 1988.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined. KENNEDY, J., took no part in the consideration or decision of the case.

Attorneys and Law Firms

Michael J. Pear argued the cause for petitioner. With him on the briefs were *Cecil Hicks* and *Michael R. Capizzi.*

Michael Ian Garey, by appointment of the Court, argued the cause for respondents and filed a brief for respondent Greenwood. *Richard L. Schwartzberg* filed a brief for respondent Van Houten.

Opinion

***37** Justice WHITE delivered the opinion of the Court.

The issue here is whether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home. We conclude, in accordance with the vast majority of lower courts that have addressed the issue, that it does not.

I

In early 1984, Investigator Jenny Stracner of the Laguna Beach Police Department received information indicating that respondent Greenwood might be engaged in narcotics trafficking. Stracner learned that a criminal suspect had informed a federal drug enforcement agent in February 1984 that a truck filled with illegal drugs was en route to the Laguna Beach address at which Greenwood resided. In addition, a neighbor complained of heavy vehicular traffic late at night in front of Greenwood's single-family home. The neighbor reported that the vehicles remained at Greenwood's house for only a few minutes.

Stracner sought to investigate this information by conducting a surveillance of Greenwood's home. She observed several vehicles make brief stops at the house during the late-night and early morning hours, and she followed a truck from the house to a residence that had previously been under investigation as a narcotics-trafficking location.

On April 6, 1984, Stracner asked the neighborhood's regular trash collector to pick up the plastic

garbage bags that Greenwood had left on the curb in front of his house and to turn the bags over to her without mixing their contents with garbage from other houses. The trash collector cleaned his truck bin of other refuse, collected the garbage bags from the street in front of Greenwood's house, and turned the bags over to Stracner. The officer searched through the rubbish ***38** and found items indicative of narcotics use. She recited the information that she had gleaned from the trash search in an affidavit in support of a warrant to search Greenwood's home.

Police officers encountered both respondents at the house later that day when they arrived to execute the warrant. The police discovered quantities of cocaine and hashish during their search of the house. Respondents were arrested on felony narcotics charges. They subsequently posted bail.

The police continued to receive reports of many late-night visitors to the Greenwood house. On May 4, Investigator Robert Rahaeuser obtained Greenwood's garbage from the regular trash collector in the same manner as had Stracner. The garbage again contained evidence of narcotics use.

Rahaeuser secured another search warrant for Greenwood's home based on the information from the second trash search. The police found more narcotics and evidence of narcotics trafficking when they executed the warrant. Greenwood was again arrested.

The Superior Court dismissed the charges against respondents on the authority of *People v. Krivda,* 5 Cal.3d 357, 486 P.2d 1262 (1971), which held that warrantless trash searches violate the Fourth Amendment and the California Constitution. The court found that the police would not have had probable cause to search the Greenwood home without the evidence obtained from the trash searches.

The Court of Appeal affirmed. 182 Cal.App.3d 729 (1986). The California Supreme Court denied the State's petition for review of the Court of Appeal's decision. We granted certiorari, and now reverse.

II

The warrantless search and seizure of the garbage bags left at the curb outside the Greenwood house would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable. *O'Connor v. Ortega,* 480 U.S. 709 (1987); *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Respondents do not disagree with this standard.

They assert, however, that they had, and exhibited, an expectation of privacy with respect to the trash that was searched by the police: The trash, which was placed on the street for collection at a fixed time, was contained in opaque plastic bags, which the garbage collector was expected to pick up, mingle with the trash of others, and deposit at the garbage dump. The trash was only temporarily on the street, and there was little likelihood that it would be inspected by anyone.

It may well be that respondents did not expect that the contents of their garbage bags would become

known to the police or other members of the public. An expectation of privacy does not give rise to Fourth Amendment protection, ***40** however, unless society is prepared to accept that expectation as objectively reasonable.

Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops,[4] and other members of the public. See *Krivda, supra,* 5 Cal.3d, at 367, 486 P.2d, at 1269. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage "in an area particularly suited for ***41** public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," *United States v. Reicherter,* 647 F.2d 397, 399 (CA3 1981), respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

Furthermore, as we have held, the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public. Hence, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States, supra,* 389 U.S. at 351. We held in *Smith v. Maryland,* 442 U.S. 735 (1979), for example, that the police did not violate the Fourth Amendment by causing a pen register to be installed at the telephone company's offices to record the telephone numbers dialed by a criminal suspect. An individual has no legitimate expectation of privacy in the numbers dialed on his telephone, we reasoned, because he voluntarily conveys those numbers to the telephone company when he uses the telephone. Again, we observed that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.,* at 743–744.

Similarly, we held in *California v. Ciraolo, supra,* that the police were not required by the Fourth Amendment to obtain a warrant before conducting surveillance of the respondent's fenced backyard from a private plane flying at an altitude of 1,000 feet. We concluded that the respondent's expectation that his yard was protected from such surveillance was unreasonable because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." *Id.,* 476 U.S., at 213–214.

Our conclusion that society would not accept as reasonable respondents' claim to an expectation of privacy in trash left for collection in an area accessible to the public is reinforced by the unanimous rejection of similar claims by the Federal Courts of Appeals. See *United States v. Dela Espriella,* ***42** 781 F.2d 1432, 1437 (CA9 1986); *United States v. O'Bryant,* 775 F.2d 1528, 1533–1534 (CA11 1985); *United States v. Michaels,* 726 F.2d 1307, 1312–1313 (CA8), cert. denied, 469 U.S. 820 (1984); *United States v. Kramer,* 711 F.2d 789, 791–794 (CA7), cert. denied, 464 U.S. 962 (1983); *United States v. Terry,* 702 F.2d 299, 308–309 (CA2), cert. denied *sub nom. Williams v. United States,* 461 U.S. 931 (1983); *United States v. Reicherter, supra,* at 399; *United States v. Vahalik,* 606 F.2d 99, 100–101 (CA5 1979) (*per curiam*), cert. denied, 444 U.S. 1081 (1980); *United States v. Crowell,* 586 F.2d 1020, 1025 (CA4 1978), cert. denied, 440 U.S. 959 (1979); *Magda v. Benson,* 536 F.2d 111, 112–113 (CA6 1976) *(per curiam); United States v. Mustone,*

469 F.2d 970, 972–974 (CA1 1972). In *United States v. Thornton,* 746 F.2d 39, 49, and n.11 (1984), the court observed that "the overwhelming weight of authority rejects the proposition that a reasonable expectation of privacy exists with respect to trash discarded outside the home and the curtilege [*sic*] thereof." In addition, of those state appellate courts that have considered the issue, the vast majority have held that the police may conduct warrantless searches and seizures of garbage discarded in public areas. [citing many state cases]

III

[Sections 3 and 4 of the opinion are omitted]

V

The judgment of the California Court of Appeal is therefore reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice KENNEDY took no part in the consideration or decision of this case.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Every week for two months, and at least once more a month later, the Laguna Beach police clawed through the trash that respondent Greenwood left in opaque, sealed bags on the curb outside his home. Complete strangers minutely scrutinized their bounty, undoubtedly dredging up intimate details of Greenwood's private life and habits. The intrusions proceeded without a warrant, and no court before or since has concluded that the police acted on probable cause to believe Greenwood was engaged in any criminal activity.

Scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior. I suspect, therefore, ***46** that members of our society will be shocked to learn that the Court, the ultimate guarantor of liberty, deems unreasonable our expectation that the aspects of our private lives that are concealed safely in a trash bag will not become public.

I

"A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant." *United States v. Jacobsen,* 466 U.S. 109, 120, n. 17 (1984) (citations omitted). Thus, as the Court observes, if Greenwood had a reasonable expectation that the contents of the bags that he placed on the curb would remain private, the warrantless search of those bags violated the Fourth Amendment.

….

Our precedent … leaves no room to doubt that had respondents been carrying their personal effects in opaque, sealed plastic bags—identical to the ones they placed on the curb—their privacy would have been protected from warrantless police intrusion. So far as Fourth Amendment protection is concerned, opaque plastic bags are every bit as ***49** worthy as [any other container].

II

Respondents deserve no less protection just because Greenwood used the bags to discard rather than to transport his personal effects. Their contents are not inherently any less private, and Greenwood's decision to discard them, at least in the manner in which he did, does not diminish his expectation of privacy.[2]

***50** A trash bag, like any of the above-mentioned containers, "is a common repository for one's personal effects" and, even more than many of them, is "therefore ... inevitably associated with the expectation of privacy." *Sanders*, 442 U.S., at 762. "[A]lmost every human activity ultimately manifests itself in waste products...." *Smith v. State*, 510 P.2d 793, 798 (Alaska). See *California v. Rooney*, 483 U.S. 307, 320–321, n.3 (1987) (WHITE, J., dissenting) (renowned archaeologist Emil Haury once said, "[i]f you want to know what is really going on in a community, look at its garbage"); Weberman, The Art of Garbage Analysis: You Are What You Throw Away, 76 Esquire 113 (1971) (analyzing trash of various celebrities and drawing conclusions about their private lives). A single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it. A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. It cannot be doubted that a sealed trash bag harbors telling evidence of the "intimate activity associated with the 'sanctity of a man's home and the privacies of life,' " which the Fourth Amendment is designed ***51** to protect.

….In evaluating the reasonableness of Greenwood's expectation that his sealed trash bags would not be invaded, the Court has held that we must look to "understandings that are recognized and permitted by society." Most of us, I believe, would be incensed to discover a meddler—whether a neighbor, a reporter, or a detective—scrutinizing our sealed trash containers to discover some detail of our personal lives. That was, quite naturally, the reaction to the sole incident on which the Court bases its conclusion that "snoops" and the like defeat the expectation of privacy in trash. When a tabloid reporter examined then-Secretary of State ***52** Henry Kissinger's trash and published his findings, Kissinger was "really revolted" by the intrusion and his wife suffered "grave anguish." N.Y. Times, July 9, 1975, p. A1, col. 8. The public response roundly condemning the reporter demonstrates that society not only recognized those reactions as reasonable, but shared them as well.

***53** That is not to deny that isolated intrusions into opaque, sealed trash containers occur. When, acting on their own, "animals, children, scavengers, snoops, [or] other members of the public," (footnotes omitted), *actually* rummage through a bag of trash and expose its contents to plain view, "police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public."

….

[But] the mere *possibility* that unwelcome meddlers *might* open and rummage through the containers does not negate the expectation of privacy in their contents any more than the possibility of a burglary negates an expectation of privacy in the home; or the possibility of a private intrusion negates an expectation of privacy in an unopened package; or the possibility that an operator will listen in on a telephone conversation negates an expectation of privacy in the words spoken on the

telephone. "What a person ... seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected." *Katz,* 389 U.S., at 351–352 1. We have therefore repeatedly rejected attempts to justify a State's invasion of privacy on the ground that the privacy is not absolute. See *Chapman v. United States,* 365 U.S. 610, 616–617 (1961) (search of a house invaded tenant's Fourth Amendment rights even though landlord had authority to enter house for some purposes).

Nor is it dispositive that "respondents placed their refuse at the curb for the express purpose of conveying it to a third party, ... who might himself have sorted through respondents' trash or permitted others, such as the police, to do so." In the first place, Greenwood can hardly be faulted for leaving trash on his curb when a county ordinance ***55** commanded him to do so, Orange County Code § 4–3–45(a) (1986), and prohibited him from disposing of it in any other way, see Orange County Code § 3–3–85 (1988). Unlike in other circumstances where privacy is compromised, Greenwood could not "avoid exposing personal belongings ... by simply leaving them at home." *O'Connor, supra,* at 725. More importantly, even the voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of a privacy expectation in it. Were it otherwise, a letter or package would lose all Fourth Amendment protection when placed in a mailbox or other depository with the "express purpose" of entrusting it to the postal officer or a private carrier; those bailees are just as likely as trash collectors (and certainly have greater incentive) to "sor[t] through" the personal effects entrusted to them, "or permi[t] others, such as police to do so." Yet, it has been clear for at least 110 years that the possibility of such an intrusion does not justify a warrantless search by police in the first instance. See *Ex parte Jackson,* 96 U.S. (6 Otto) 727, 24 L.Ed. 877 (1878).

III

In holding that the warrantless search of Greenwood's trash was consistent with the Fourth Amendment, the Court paints a grim picture of our society. It depicts a society in which local authorities may command their citizens to dispose of their personal effects in the manner least protective of the ***56** "sanctity of [the] home and the privacies of life," *Boyd v. United States,* 116 U.S., at 630, and then monitor them arbitrarily and without judicial oversight—a society that is not prepared to recognize as reasonable an individual's expectation of privacy in the most private of personal effects sealed in an opaque container and disposed of in a manner designed to commingle it imminently and inextricably with the trash of others. *Ante,* at 1628. The American society with which I am familiar "chooses to dwell in reasonable security and freedom from surveillance," *Johnson v. United States,* 333 U.S. 10, 14 (1948), and is more dedicated to individual liberty and more sensitive to intrusions on the sanctity of the home than the Court is willing to acknowledge.

I dissent.

CASE #2

Bordenkircher v. Hayes involves a claim by a criminal defendant that the prosecutor treated him unfairly – so unfairly that it violated the Due Process Clause of the 14th Amendment to the U.S. Constitution. The Due Process Clause says in part that "No state shall … deprive any person of life, liberty, or property, without due process of law." Although the contours of the due process clause are complex, the basic meaning is that the government must treat citizens with fundamental fairness before taking adverse action against them.

Paul Hayes claimed that the prosecutor in his criminal case violated due process during the plea bargain process. Although sometimes criminal charges result in a trial, most of the time a defendant will plead guilty to the charges – that is, he will admit that he committed a crime. His reason for admitting guilt is often that the prosecutor offered him a "plea bargain," which involves the prosecutor offering some benefit – reducing the current criminal charge, dropping some other charge, recommending a reduced prison sentence – in return for a guilty plea. Hayes argues that, while plea bargaining generally is a legitimate practice, the prosecutor can't bring improper pressure on a defendant to force a guilty plea, and that in his (Hayes's) case, this is what the prosecutor did.

There are a couple of terms in *Hayes*, that may be unfamiliar. The Court refers to defendant Hayes being "re-indicted." An indictment is a formal criminal charge. If the prosecutor obtains an indictment on one charge, then changes her mind before trial about the proper charge to bring, she will get a new indictment (i.e., she will "re-indict"). After the indictment the defendant will attend an "arraignment," which is a simple, in-court procedure that happens prior to trial, where the defendant is told of the charges against him and is asked whether he pleads guilty or not guilty.

Some questions to keep in mind while reading *Hayes*:

1. what were the terms of the plea bargain that were offered to Paul Hayes?

2. What precise rule is Hayes asking the Supreme Court to adopt?

3. What limits, if any, does *Hayes* put on prosecutors who want to negotiate a plea bargain with the defendant?

Supreme Court of the United States

Don BORDENKIRCHER, Superintendent, Kentucky State Penitentiary, Petitioner,
v.
Paul Lewis HAYES.

No. 76–1334.

Argued Nov. 9, 1977.
Decided Jan. 18, 1978.

Attorneys and Law Firms

Robert L. Chenoweth, Frankfort, Ky., for petitioner.

J. Vincent Aprile II, Frankfort, Ky., for respondent.

Opinion

***358** Mr. Justice STEWART delivered the opinion of the Court.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to re-indict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged.

I

The respondent, Paul Lewis Hayes, was indicted by a Fayette County, Ky., grand jury on a charge of uttering a forged instrument in the amount of $88.30, an offense then punishable by a term of 2 to 10 years in prison. After arraignment, Hayes, his retained counsel, and the Commonwealth's Attorney met in the presence of the Clerk of the Court to discuss a possible plea agreement. During these conferences the prosecutor offered to recommend a sentence of five years in prison if Hayes would plead guilty to the indictment. He also said that if Hayes did not plead guilty and "save[d] the court the inconvenience and necessity of a trial," he would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act, which would subject Hayes to a mandatory sentence of ***359** life imprisonment by reason of his two prior felony convictions. Hayes chose not to plead guilty, and the prosecutor did obtain an indictment charging him under the Habitual Criminal Act. It is not disputed that the recidivist charge was fully justified by the evidence, that the prosecutor was in possession of this evidence at the time of the original indictment, and that Hayes' refusal to plead guilty to the original charge was what led to his indictment under the habitual criminal statute.

A jury found Hayes guilty on the principal charge of uttering a forged instrument and, in a separate proceeding, further found that he had twice before been convicted of felonies. As required by the habitual offender statute, he was sentenced to a life term in the penitentiary. The Kentucky Court of Appeals rejected Hayes' constitutional objections to the enhanced sentence, holding in an unpublished opinion that imprisonment for life with the possibility of parole was constitutionally permissible in light of the previous felonies of which Hayes had been convicted, and that the

prosecutor's decision to indict him as a habitual offender was a legitimate use of available leverage in the plea-bargaining process.

***360** On Hayes' petition for a federal writ of habeas corpus, the United States District Court for the Eastern District of Kentucky agreed that there had been no constitutional violation in the sentence or the indictment procedure, and denied the writ. The Court of Appeals for the Sixth Circuit reversed the District Court's judgment. *Hayes v. Cowan*, 547 F.2d 42. While recognizing "that plea bargaining now plays an important role in our criminal justice system," the appellate court thought that the prosecutor's conduct during the bargaining negotiations had violated the principles of *Blackledge v. Perry*, 417 U.S. 21, which "protect[ed] defendants from the vindictive exercise of a prosecutor's discretion." 547 F.2d, at 44. Accordingly, the court ordered that Hayes be discharged "except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument." *Id.*, at 45. We granted certiorari to consider a constitutional question of importance in the administration of criminal justice.

II

It may be helpful to clarify at the outset the nature of the issue in this case. While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty. As a practical matter, in short, this *361 case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain.

The Court of Appeals nonetheless drew a distinction between "concessions relating to prosecution under an existing indictment," and threats to bring more severe charges not contained in the original indictment—a line it thought necessary in order to establish a prophylactic rule to guard against the evil of prosecutorial vindictiveness. Quite apart from this chronological distinction, however, the Court of Appeals found that the prosecutor had acted vindictively in the present case since he had conceded that the indictment was influenced by his desire to induce a guilty plea. The ultimate conclusion of the Court of Appeals thus seems to have been that a prosecutor acts vindictively and in violation of due process of law whenever his charging decision is influenced by what he hopes to gain in the course of plea bargaining negotiations.

III

We have recently had occasion to observe: "[W]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. ***362** Properly administered, they can benefit all concerned." *Blackledge v. Allison*, 431 U.S. 63, 71. The open acknowledgment of this previously clandestine practice has led this Court to recognize the importance of counsel during plea negotiations, the need for a public record indicating that a plea was knowingly and voluntarily made, *Boykin v. Alabama*, 395 U.S. 238, 242, and the requirement that a prosecutor's plea-bargaining promise must be kept, *Santobello v. New York*, 404 U.S. 257, 262. The decision of the Court of Appeals in the

present case, however, did not deal with considerations such as these, but held that the substance of the plea offer itself violated the limitations imposed by the Due Process Clause of the Fourteenth Amendment. For the reasons that follow, we have concluded that the Court of Appeals was mistaken in so ruling.

IV

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." *Chaffin v. Stynchcombe, supra,* 412 U.S., at 32–33, n. 20. See *United States v. Jackson,* 390 U.S. 570. But in the "give-and-take" of plea bargaining, [between the prosecution and defense, which arguably possess relatively equal bargaining power], there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.

Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial. *Brady v. United States, supra,* 397 U.S., at 752. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. 397 U.S., at 758. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial. See ABA Project on Standards for Criminal Justice, Pleas of Guilty § 3.1 (App. Draft 1968).***364**

While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Chaffin v. Stynchcombe, supra,* 412 U.S., at 31. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

It is not disputed here that Hayes was properly chargeable under the recidivist statute, since he had in fact been convicted of two previous felonies. In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles,* 368 U.S. 448, 456. To hold that the prosecutor's desire to induce a guilty plea is an "unjustifiable standard," which, like race or religion, ***365** may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself. Moreover, a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with

the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged.

There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.

Accordingly, the judgment of the Court of Appeals is

Reversed.

Mr. Justice BLACKMUN, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

The Court now says … that [the] concern with vindictiveness is of no import in the present case, despite the difference between five years in prison and a life sentence, because we are here concerned with plea bargaining where there is give-and-take negotiation, and where, it is said, ***367** "there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." Yet in this case, … the prosecutor [] admitted that the sole reason for the new indictment was to discourage the respondent from exercising his right to a trial. Even had such an admission not been made, when plea negotiations, conducted in the face of the less serious charge under the first indictment, fail, charging by a second indictment a more serious crime for the same conduct creates "a strong inference" of vindictiveness.

Prosecutorial vindictiveness, it seems to me, in the present narrow context, is the fact against which the Due Process Clause ought to protect.

Mr. Justice POWELL, dissenting.

Although I agree with much of the Court's opinion, I am not satisfied that the result in this case is just or that the ***369** conduct of the plea bargaining met the requirements of due process.

Respondent was charged with the uttering of a single forged check in the amount of $88.30. Under Kentucky law, this offense was punishable by a prison term of from 2 to 10 years, apparently without regard to the amount of the forgery. During the course of plea bargaining, the prosecutor offered respondent a sentence of five years in consideration of a guilty plea. I observe, at this point, that five years in prison for the offense charged hardly could be characterized as a generous offer. Apparently respondent viewed the offer in this light and declined to accept it; he protested that he was innocent and insisted on going to trial. Respondent adhered to this position even when the prosecutor advised that he would seek ***370** a new indictment under the State's Habitual Criminal Act which would subject respondent, if convicted, to a mandatory life sentence because of two prior felony convictions.

The prosecutor's initial assessment of respondent's case led him to forgo an indictment under the habitual criminal statute.…No explanation appears in the record for the prosecutor's decision to escalate the charge against respondent other than respondent's refusal to plead guilty. The prosecutor has conceded that his purpose was to discourage respondent's assertion of constitutional rights, and the majority accepts this characterization of events.

It seems to me that the question to be asked under the circumstances is whether the prosecutor reasonably might have charged respondent under the Habitual Criminal Act in the first place. The deference that courts properly accord the ***371** exercise of a prosecutor's discretion perhaps would foreclose judicial criticism if the prosecutor originally had sought an indictment under that Act, as unreasonable as it would have seemed. But here the prosecutor evidently made a reasonable, responsible judgment not to subject an individual to a mandatory life sentence when his only new offense had societal implications as limited as those accompanying the uttering of a single $88 forged check and when the circumstances of his prior convictions confirmed the inappropriateness of applying the habitual criminal statute. I think it may be inferred that the prosecutor himself deemed it unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment.

There may be situations in which a prosecutor would be fully justified in seeking a fresh indictment for a more serious offense. The most plausible justification might be that it would have been reasonable and in the public interest initially ***372** to have charged the defendant with the greater offense. In most cases a court could not know why the harsher indictment was sought, and an inquiry into the prosecutor's motive would neither be indicated nor likely to be fruitful. In those cases, I would agree with the majority that the situation would not differ materially from one in which the higher charge was brought at the outset..

But this is not such a case. Here, any inquiry into the prosecutor's purpose is made unnecessary by his candid acknowledgment that he threatened to procure and in fact procured the habitual criminal indictment because of respondent's insistence on exercising his constitutional rights….[This] is not a constitutionally permissible exercise of discretion. I would affirm the opinion of the Court of Appeals on the facts of this case.