CASELAW APPENDIX (E)

Prosecutorial Misconduct & Vindictive Prosecution

People v Sullivan, 209 AD2d 558, 558-59 (2d Dept. 1994). Due to prosecutorial misconduct.

People v. Sullivan, 209 A.d.2d 558, 558-559 (2d Dept. 1994). Prosecutorial misconduct.

U.S. v. Velsicol Chem. Corp., 498 F. Supp. 1255 (D.D.C. 1980). The Court ruled that due process would not tolerate judicial vindictiveness or retaliation for pursuit of a statutory right. "(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." 395 U.S. at 725, 89 S. Ct. at 2080. The vindictive prosecution doctrine reaches all prosecutions "that pose a realistic likelihood of "vindictiveness,' " Perry, 417 U.S. at 27, 94 S. Ct. at 2102, whether or not the prosecutor acted out of vindictiveness in fact. "(T) he evil to which Pearce is directed is the apprehension on the defendant's part of receiving a vindictively-imposed penalty for the assertion of rights." U.S. v. Jamison, 164 U.S. App. D.C. 300, 505 F.2d 407, 415 (D.C.Cir.1974). The Ninth Circuit has also ruled in a number of situations that the apprehension or appearance of prosecutorial vindictiveness is sufficient to warrant a dismissal when a defendant is thwarted in the exercise of his rights. The "mere appearance of vindictiveness is enough to place the burden on the prosecution (to show a legitimate motive)." U.S. v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976). "Later, in *U.S. v. Groves*, 571 F.2d 450 (9th Cir. 1978), that court, relying in part on Jamison, ruled that the government bore the "heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive purpose." Thus, in addition to mere appearances, this proceeding involves an explicit threat, the gravamen of which is an intent to retaliate for the exercise of a right. That threat was carried out in the felony indictment presently before the Court. The limits of acceptable exercise of prosecutorial discretion in charging decisions are exceeded when, as in this case, the prosecutor threatens defendant with increased charges and then "ups-the-ante" without adequate justification. As the district court in U.S. v. DeMarco so aptly stated, "(t)he day our

Constitution permits prosecutors to deter defendants from exercising any and all of their guaranteed rights by threatening them with new charges fortunately has not yet arrived." 401 F. Supp. 505, 510 (C.D.Cal.1975), aff'd 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827, 98 S. Ct. 105, 54 L. Ed. 2d 85 (1977). The prosecutorial vindictiveness motion warrants a dismissal of the present indictment against Velsicol and the individual defendants. U.S. v. Alvarado-Sandoval, 557 F.2d 645 (9th Cir. 1977) ("appearance of vindictiveness, not vindictiveness itself, is the touchstone..."); U.S. v. DeMarco, 550 F.2d 1224, 1227 (9th Cir. 1977) ("apprehension of vindictiveness and the "appearance of vindictiveness' are adequate to bring this case squarely within Blackledge (v. Perry)."") (citation omitted). The circuit courts of appeal have developed a number of standards for examining prosecutorial decision making for impermissible motives. See discussion and cases cited in U.S. v. Andrews, 612 F.2d 235, 249-254 (6th Cir. 1979) (Keith, J. dissenting). Actual vindictiveness, however, is always regarded as an impermissible factor in prosecutorial decision making. See e.g., Hardwick v. Doolittle, 558 F.2d 292, 299-300 (5th Cir. 1977), cert. denied, 434 U.S. 1049, 98 S. Ct. 897, 54 L. Ed. 2d 801 (1978).

Atchak v. State, 640 P.2d 135, (Ak App., 1981.). Existence of prosecutorial vindictiveness must be established by an objective standard, on the basis of the totality of the circumstances in each case; the subjective belief of defendant is not determinative; on the other hand, it is not necessary that actual malice or retaliatory motivation exist on the part of the prosecution. Determining the strength of the appearance of prosecutorial vindictiveness is a process which involves, first, an inquiry as to the prosecution's "stake" in deterring the exercise of the specific right asserted by defendant, and, second, scrutiny of the state's conduct for a connection between assertion of a right by defendant and an increase or threatened increase in charges by the state. Prosecutorial mistake, negligence or misunderstanding will not suffice to rebut a prima facie showing of prosecutorial vindictiveness. It is not appropriate, where apparent prosecutorial vindictiveness would result, to allow the state to alter an initial charging decision which amounted to a calculated risk, rather than an exercise of prosecutorial discretion made for legitimate, strategic reasons. Explanation offered by the State in the record and in its argument on appeal was inadequate to dispel the strong appearance of prosecutorial vindictiveness which led to defendant's abandonment of any attempt to challenge the validity of his original and superseding indictments; the prosecutor

admitted creating a situation in which defendant was forced to choose between a possible manslaughter charge and waiver of his right to challenge the indictments against him for leaving the scene of an accident involving injury without stopping to render aid. Court should not hesitate to reverse a conviction when a substantial flaw in the underlying indictment is found, regardless of the strength of the evidence against the accused or the fairness of the trial leading to conviction. While we realize that prosecutorial independence is a vital consideration involved in all cases dealing with the Pearce/Blackledge rule, our solicitude for the independent discretion of the state diminishes significantly when, in increasing or threatening to increase a charge, the prosecution simply attempts to alter, without significant intervening circumstances, a fully informed decision which it previously made. As held in Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977), cert. denied, 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978) (citation omitted): We recognize that there is a broad ambit to prosecutorial discretion, most of which is not subject to judicial control. But if Blackledge teaches any lesson, it is that a prosecutor's discretion to reindict a defendant is constrained by the due process clause.... (O)nce a prosecutor exercises his discretion to bring certain charges against the defendant, neither he nor his successor may, without explanation, increase the number of or severity of those charges in circumstances which suggest that the increase is retaliation for the defendant's assertion of statutory or constitutional rights. As stated in *U.S. v. Ruesga-Martinez*, 534 F.2d at 1369 (footnotes and citations omitted; emphasis in original): Pearce and Blackledge ... establish, beyond doubt, that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive. We do not question the prosecutor's authority to bring the felony charges in the first instance, nor do we question the prosecutor's discretion in choosing which charges to bring against a particular defendant. But when, as here, there is a significant possibility that such discretion may have been exercised with a vindictive motive or purpose, the reason for the increase in the gravity of the charges must be made to appear. We do not intend by our opinion to impugn the actual motives of the (prosecution) in any way. But Pearce and Blackledge seek to reduce or eliminate apprehension on the part of an accused that he may be subjected to retaliatory or vindictive punishment by the prosecution only for attempting to exercise his procedural rights. Hence, the mere appearance of

vindictiveness is enough to place the burden on the prosecution. We note that previous cases have invoked the Pearce/Blackledge doctrine despite affirmative findings of a lack of malice or improper motivation on the part of the prosecution. See, e.g., *U.S. v. Groves*, 571 F.2d at 453; *U.S. v. Ruesga-Martinez*, 534 F.2d at 1369-70. The Alaska Supreme Court has consistently held that courts should not hesitate to reverse a conviction when a substantial flaw in the underlying indictment is found, regardless of the strength of the evidence against the accused or the fairness of the trial leading to the conviction. *Keith v. State*, 612 P.2d 977, 980-81 (Alaska 1980); *Adams v. State*, 598 P.2d 503, 510 (Alaska 1979).

Berger v. U.S., 55 S. Ct. 629, 295 U.S. 78 (U.S. 1935). Justice Sutherland best explained the duties and obligations of prosecutors: "The U.S. Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." 295 U.S. at 88, 55 S. Ct. 633. And, as Justice Douglas more figuratively described this same duty: "The function of the prosecutor under the federal Constitution is not to tack as many skins of victims as possible against the wall. His function is to vindicate the rights of the people as expressed in the laws and give those accused of crime a fair trial." *Donnelly v. De Christoforo*, 416 U.S. 637, 648-649, 94 S. Ct. 1868, 1874, 40 L. Ed. 2d 431 (1974) (Douglas J., dissenting).

Jackson v. Walker, 585 F2d 139 (5th Cir. 1978). Three months later we decided Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977). Hardwick, which interpreted Blackledge and related cases, makes it clear that in some cases the apprehension of vindictiveness is sufficient only to establish a prima facie showing of unconstitutional vindictiveness. Upon this showing, the burden shifts to the state to demonstrate that the reason for the increase in charging was other than to retaliate against the defendant for the exercise of her legal rights. If the state fails to meet this burden, the court must find actual

vindictiveness and a violation of the due process clause. In Blackledge the Supreme Court made clear that a prosecutor's discretion to reindict a defendant is limited by the due process clause. In that case the defendant, convicted of an assault misdemeanor in a state court, claimed his right to a trial De novo in a higher court. The prosecutor then obtained a superseding indictment charging the defendant with a felony, assault with intent to kill, based on the same act as the earlier charge. Significantly, the Court stated that it saw no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment ..., however, (is) not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, ... "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 (prosecutor).' 417 U.S. at 28, 94 S. Ct. at 2102, quoting North Carolina v. Pearce, 395 U.S. 711, 725, 89 S. Ct. 2072, 2080, 23 L. Ed. 2d 656. In effect Blackledge sets up a per se rule for some situations. It lays down the principle that in some situations a due process violation can be established by a showing that defendants might have a reasonable apprehension of prosecutorial vindictiveness, without a showing that the prosecutor actually had a vindictive or retaliatory motive to deter appeals. There are at least two reasons for such a per se rule. First, it is difficult to prove in court the actual state of mind of a prosecutor during his exercise of discretion. And second, reindictments that look vindictive, even though they are not, may still make future defendants so apprehensive about the vindictiveness of prosecutors that they will be deterred from appealing their convictions. Hardwick and other cases speak in terms of "actual malice" or "actual vindictiveness." In one sense these terms are misleading. For a prosecution to be unconstitutional, it is not necessary that the prosecutor bear any ill will toward the particular defendant in the case. The unconstitutional motive may be simply the prosecutor's intent to discourage other criminal appeals in the future by "upping the ante" in the current appeal, even though he feels no particular malice for the current defendant. Of course, a prosecutor may also intend to punish the current defendant for appealing. The terms "malice" and "vindictiveness" more accurately describe only the latter motive, but the due process clause proscribes both motivations.

U.S. v. Alvarado-Sandoval, 557 F.2d 645 (9th Cir. 1977). Defense counsel was not prepared at that time to enter a plea because he wished to investigate the possibility of raising a question about the legality of the search. The magistrate stated from the bench that he understood defendant's position concerning the possibility of motions and set the case for further proceedings. Thereafter, the U.S. Attorney advised the court and defense counsel that the Government would be considering the case for a possible felony indictment. On June 17, 1976 a two-count indictment was filed in the U.S. District Court charging appellant with felony violations of 8 U.S.C. §§ 1325 and 1326. On August 5, 1976 appellant moved the court to dismiss the indictment as the product of a violation of the principles established in *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); and *U.S. v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976). The district court denied the motion. Appellant was subsequently tried and convicted of the felony charges. Appearance of vindictiveness, not vindictiveness in fact, is the touchstone of Blackledge, Pearce and Ruesga-Martinez. The Government attempts to distinguish Ruesga-Martinez, which is otherwise identical, on the ground that the appellant in this case did not affirmatively assert a right which then precipitated a "raising of the ante" by the Government. The failure to interpose a formal motion before the magistrate, does not effectively distinguish this case from Ruesga-Martinez. Appellant's counsel made plain his intention to proceed under the misdemeanor charge. Here, as in Ruesga-Martinez, the appearance of vindictiveness existed. It was only after the appellant, through his counsel, indicated that no plea would be entered and only after the understanding of possible motions was referred to by the magistrate, that the assistant U.S. Attorney indicated that a felony indictment would be considered. All of the information about appellant's prior record was known to the U.S. Attorney's office before these events occurred. It is immaterial that, due to a failure of communication within the office, the assistant U.S. Attorney who initially appeared was not personally aware of that record.

U.S. v. Basurto, 497 F.2d 781 (9th Cir. 1974). With that great power and authority there is a correlative duty, and that is not to permit a person to stand trial when he knows that perjury permeates the indictment. At the point at which he learned of the perjury before the grand jury, the prosecuting attorney was under a duty to notify the court and the grand jury, to correct the cancer of justice that had become apparent to him. To permit the appellants to stand trial when the

prosecutor knew of the perjury before the grand jury only allowed the cancer to grow. We also note that jeopardy had not attached at the time the prosecutor learned of the perjured testimony, nor had the statute of limitations for the offenses charged run. Under *Illinois v. Somerville*, 410 U.S. 458, 35 L. Ed. 2d 425, 93 S. Ct. 1066 (1973), if the prosecutor had brought the perjury to the court's attention before the trial commenced and the indictments had been dismissed, the Double Jeopardy Clause of the Fifth Amendment would not have barred trial under a new indictment. We hold that the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached. Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court and opposing counsel -- and, if the perjury may be material, also the grand jury -- in order that appropriate action may be taken. We base our decision on a long line of cases which recognize the existence of a duty of good faith on the part of the prosecutor with respect to the court, the grand jury, and the defendant. While the facts of these cases may not exactly parallel those of the instant case, we hold that their rulings regarding the consequences of a violation or abuse of this prosecutorial duty must be applied where the prosecutor has knowledge that testimony before the grand jury was perjured. See *Mooney v. Holohan*, 294 U.S. 103, 79 L. Ed. 791, 55 S. Ct. 340 (1935); *Giles v. Maryland*, 386 U.S. 66, 17 L. Ed. 2d 737, 87 S. Ct. 793 (1967); *Napue v. Illinois*, 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959); *Alcorta v. Te*xas, 355 U.S. 28, 2 L. Ed. 2d 9, 78 S. Ct. 103 (1957); *Hysler v. Florida*, 315 U.S. 411, 86 L. Ed. 932, 62 S. Ct. 688 (1942); *Pyle v. Kansas*, 317 U.S. 213, 87 L. Ed. 214, 63 S. Ct. 177 (1942). In *Napue v. Illinois*, supra, the Supreme Court reaffirmed the principle stated in many of its prior decisions that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, [citations]. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. [Citations.]" 360 U.S. at 269. The Court reiterated "the principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty..." Id. See *Giles v. Maryland*, supra, at 74. The Court held in Napue that the prosecution's use of known false testimony at trial required a reversal of the petitioner's conviction. The same result must obtain when the government allows a defendant to stand trial on

an indictment which it knows to be based in part upon perjured testimony. The consequences to the defendant of perjured testimony given before the grand jury are no less severe than those of perjured testimony given at trial, and in fact may be more severe. The defendant has no effective means of cross-examining or rebutting perjured testimony given before the grand jury, as he might in court. In *Mesarosh v. U.S.*, 352 U.S. 1, 1 L. Ed. 2d 1, 77 S. Ct. 1 (1956), while a review of the petitioners' convictions was pending in the Supreme Court, the Solicitor General informed the Court of indications he had just received that one of the government's witnesses at trial had testified falsely in other proceedings. While the government believed that the witness' testimony at trial "was entirely truthful and credible," it suggested a remand to the district court for a determination of the credibility of the witness' testimony. Solely on the basis of the government's representations, the Supreme Court reversed the convictions and directed that petitioners be granted a new trial. The Court stated, inter alia, that "Mazzei [the witness], by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity... Pollution having taken place here, the condition should be remedied at the earliest opportunity. "'The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts... Fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.' *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 124, 100 L. Ed. 1003, 76 S. Ct. 663." 352 U.S. at 14. Permitting a defendant to stand trial on an indictment which the government knows is based on perjured testimony cannot comport with this "fastidious regard for the honor of the administration of justice." Because the prosecuting attorney did not take appropriate action to cure the indictment upon discovery of the perjured grand jury testimony, we reverse appellants' convictions. The Court relied upon Justice Holmes' statement in *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 392, 40 S. Ct. 182, 64 L. Ed. 319 (1920), that "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all..." Thus, the test that should have been used in this case is that any statements made by Basurto that related to or were prompted by any inadmissible evidence, or that would not have been made but for the possession of such evidence by the government agents, were

the "fruits" of, were derived from, such evidence and should have been excluded.

Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) U.S. Supreme Court: "[A] state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits." 378 U.S.79.

U.S. Supreme Court Mesarosh V. U.S., 352 U.S. 1 (1956). The witness's credibility has been wholly discredited by the disclosures of the Solicitor General; the dignity of the U.S. Government will not permit the conviction of any person on tainted testimony; this conviction is tainted; and justice requires that petitioners be accorded a new trial. In this case, it cannot be determined conclusively by any court that the testimony of this discredited witness before a jury was insignificant in the general case against petitioners; it has tainted the trial as to all petitioners. Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

"The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See McNabb v. U.S., 318 U.S. 332 . Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 124 .

The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the

judgments below with direction to grant the petitioners a new trial.

U.S. v. Carrillo, 709 F.2d 35 (9th Cir. 1983). In as much as an obligation to testify did not become a condition and because Carrillo fulfilled all other obligations under the agreement, under settled notions of fundamental fairness the government was bound to uphold its end of the bargain. See U.S. v. Irwin, 612 F.2d 1182, 1189-91 (9th Cir. 1980) (recognition of enforceability of cooperation agreements); *U.S. v. Garcia*, 519 F.2d at 1345 & n.2 (same); cf. *Johnson v. Mabry*, 707 F.2d 323 (8th Cir. 1983) (constitutional right to fairness requires that government be scrupulously fair when negotiating plea agreements and that government honor terms of its proposal even in the absence of defendant's detrimental reliance); *U.S. v. Minnesota Mining & Mfg. Co*., 551 F.2d at 1111 (where defendants fully discharge their obligations under plea agreement government is bound to fulfill its promise to forego future criminal prosecution); *U.S. v. Hallam*, 472 F.2d 168, 169 (9th Cir. 1973) (same). The remedy for the breach of this promise rests within the sound discretion of the trial court. See *Santobello v. New York*, 404 U.S. 257, 263, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); *U.S. v. Minnesota Mining & M* F.2d at 1112. By dismissing the indictment the district court effectively enforced the agreement. The remedy granted was not outside the district court's discretion. Id.