

# The Burger Court Opinion Writing Database

*Bordenkircher v. Hayes*

434 U.S. 357 (1978)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

December 27, 1977

Dear Potter:

Re: 76-1334 Bordenkircher, Supt. Ky. State  
Penitentiary v. Hayes

I join.

Regards,

WSB

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM.J. BRENNAN, JR.

December 27, 1977

RE: No. 76-1334 Bordenkircher v. Hayes

Dear Harry:

I'd be very happy to have you write the dissent  
in the above.

Sincerely,

*Bill*  
7

Mr. Justice Blackmun

cc: Mr. Justice Marshall

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM.J. BRENNAN, JR.

January 5, 1978

RE: No. 76-1334 Bordenkircher v. Hayes

Dear Harry:

Please join me in the dissenting opinion you have  
prepared in the above.

Sincerely,

*Biel*

Mr. Justice Blackmun

cc: The Conference

To: The Chief  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Powell  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Powell  
Mr. Justice Blackmun  
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: DEC 21 1977

1st DRAFT

Recirculated:

## SUPREME COURT OF THE UNITED STATES

No. 76-1334

Don Bordenkircher, Superintendent,  
Kentucky State Penitentiary,  
Petitioner,  
v.  
Paul Lewis Hayes. } On Writ of Certiorari to  
the United States  
Court of Appeals for  
the Sixth Circuit.

[January —, 1978]

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 reindict 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 two to 10 years in prison. Ky. Rev. Stat. § 434.130 (repealed 1974). 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 the court the inconvenience and necessity of a trial," he would return to the grand jury to seek an indictment under the Kentucky Habitual

To: The Chief Justice

Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: \_\_\_\_\_

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**2nd DRAFT**

**SUPEREME COURT OF THE UNITED STATES**

No. 76-1334

Don Bordenkircher, Superintendent,  
Kentucky State Penitentiary,  
Petitioner,  
v.  
Paul Lewis Hayes.

On Writ of Certiorari to  
the United States  
Court of Appeals for  
the Sixth Circuit.

[January —, 1978]

**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 reindict 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 two to 10 years in prison. Ky. Rev. Stat. § 434.130 (repealed 1974). 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 the court the inconvenience and necessity of a trial," he would return to the grand jury to seek an indictment under the Kentucky Habitual

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

February 15, 1978

MEMORANDUM TO THE CONFERENCE

Re: Case Held for No. 76-1334, Bordenkircher v. Hayes

No. 76-1327, Goodroe v. United States  
February 17 Conference, list 9, page 27

The petitioner, a convicted felon, was originally indicted under 18 U.S.C. § 1202(a)(1) for receiving and possessing a firearm in commerce. The statute carries a maximum prison term of two years. On January 10, 1976, the prosecutor made a plea offer, which the petitioner did not accept. On February 24 the prosecutor obtained a superceding indictment charging petitioner under 18 U.S.C. § 922(h) with receiving a firearm that had been shipped in interstate commerce. This statute carries a maximum prison term of five years. Petitioner moved to dismiss the superceding indictment on the ground that it was a product of prosecutorial vindictiveness.

This case differs from Bordenkircher in that the threat of the more serious indictment was not part of the original plea offer. But, the District Court found, after a hearing, that the prosecutor acted because this Court's January 13 decision in Barrett v. United States made clear that petitioner was indictable under § 922, not because petitioner had refused his plea offer. I agree with the Solicitor General that this finding of fact does not merit review by this Court.

Petitioner's objections to the applicability and scope of § 922 are insubstantial in light of Barrett and Scarborough v. United States.

I shall vote to deny certiorari.

P.S.  
P.S.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 3, 1978

Re: No. 76-1334 - Bordenkircher v. Hayes

Dear Potter:

I agree.

Sincerely,



Mr. Justice Stewart

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 5, 1978

Re: No. 76-1334, Bordenkircher v. Hayes

Dear Harry:

Please join me in your dissent.

Sincerely,

  
T. M.

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 27, 1977

Re: No. 76-1334 - Bordenkircher v. Hayes

Dear Bill:

If you and Thurgood approve, I shall be glad to try  
my hand at a short dissent in this case.

Sincerely,

H. A. B.

Mr. Justice Brennan

cc: Mr. Justice Marshall ✓

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 28, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1334 - Bordenkircher v. Hayes

In due course I shall try my hand at a dissent in  
this case.

HAB.

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 1/5/78

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-1334

Don Bordenkircher, Superintendent,  
Kentucky State Penitentiary,  
Petitioner,  
v.  
Paul Lewis Hayes. } On Writ of Certiorari to  
the United States  
Court of Appeals for  
the Sixth Circuit.

[January —, 1978]

MR. JUSTICE BLACKMUN, dissenting.

I feel that the Court, although purporting to rule narrowly (that is, on "the course of conduct engaged in by the prosecutor in this case," *ante*, p. 8), is departing from, or at least restricting, the principles established in *North Carolina v. Pearce*, 395 U. S. 711 (1969), and in *Blackledge v. Perry*, 417 U. S. 21 (1974). If those decisions are sound and if those principles are salutary, as I must assume they are, they require, in my view, an affirmation, not a reversal, of the judgment of the Court of Appeals in the present case.

In *Pearce*, as indeed the Court notes, *ante*, p. 5, it was held 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." 395 U. S., at 725. Accordingly, if, on the new trial, the sentence the defendant receives from the court is greater than that imposed after the first trial, it must be explained by reasons "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding," other than his having pursued the appeal or collateral remedy. *Id.*, at 726. On the other hand, if the sentence is imposed by the jury and not by the court, the jury is not aware of the original sentence, and the second sentence is not otherwise shown to be a product of vindictive-

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: \_\_\_\_\_

Recirculated: 1/16/78

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-1334

Don Bordenkircher, Superintendent,  
Kentucky State Penitentiary,  
Petitioner,  
v.  
Paul Lewis Hayes. } On Writ of Certiorari to  
the United States  
Court of Appeals for  
the Sixth Circuit.

[January —, 1978]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

I feel that the Court, although purporting to rule narrowly (that is, on "the course of conduct engaged in by the prosecutor in this case," *ante*, p. 8), is departing from, or at least restricting, the principles established in *North Carolina v. Pearce*, 395 U. S. 711 (1969), and in *Blackledge v. Perry*, 417 U. S. 21 (1974). If those decisions are sound and if those principles are salutary, as I must assume they are, they require, in my view, an affirmance, not a reversal, of the judgment of the Court of Appeals in the present case.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

December 28, 1977

No. 76-1334 Bordenkircher v. Hayes

Dear Potter:

As I indicated at Conference, this case has troubled me - perhaps primarily because the life sentence seems terribly unjust.

I nevertheless voted tentatively to reverse, and I remain in this posture. But before coming to rest, I will await circulation of the dissenting opinion.

Sincerely,



Mr. Justice Stewart

Copies to the Conference

LFP/lab

nb/ss 1/11/78

Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

No. 76-1334 Bordenkircher v. Hayes From: Mr. Justice Powell

MR. JUSTICE POWELL, dissenting.

Filed Circulated: JAN 12 1978

Although I agree with much of the Court's opinion, I am not satisfied that the result is just in this case or that the conduct of the plea bargaining satisfied 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 two to ten 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 an especially 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 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 forego an indictment under the habitual criminal statute. The circumstances of

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

1st DRAFT

Recirculated: 16 JAN 1978

## SUPREME COURT OF THE UNITED STATES

No. 76-1334

Don Bordenkircher, Superintendent,  
Kentucky State Penitentiary,  
Petitioner,  
*v.*  
Paul Lewis Hayes.

On Writ of Certiorari to  
the United States  
Court of Appeals for  
the Sixth Circuit.

[January —, 1978]

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 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 two 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 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 forego an indictment under the habitual criminal statute. The circumstances of respondent's prior convictions are relevant to this assessment and to my view of the case.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

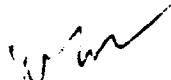
January 3, 1978

Re: No. 76-1334 - Bordenkircher v. Hayes

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

December 21, 1977

Re: 76-1334 - Bordenkircher v. Hayes

Dear Potter:

Please join me.

Respectfully,



Mr. Justice Stewart

Copies to the Conference