Opening the Umbrella: The Expansion of the Prosecutorial Vindictiveness Doctrine in United States v. Jenkins

Melodie Bales
NOTES

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You are a prosecutor. You are handed a case file concerning a recidivist offender allegedly involved in a series of four robberies in your jurisdiction. You are told to indict the suspect by the end of the day. After reading through the file, however, it appears that although there is strong evidence the suspect committed the most recent robbery, the evidence is weaker when it comes to the other three. Do you charge the suspect with all four crimes? Do you wait to see whether new evidence will surface later? If you are a federal prosecutor in the Ninth Circuit, the decision is clear: indict the suspect on all four counts, even if the evidence is weak.

Traditionally, prosecutors enjoy broad discretion when determining whether to charge a person with a crime.1 Courts, however, must ensure that the government does not bring charges for improper purposes, such as retaliation.2 The basis for this judicial oversight is to protect defendants' due process rights from government infringement.3 At bottom, due process is the foundation of the U.S. criminal-justice system.4

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2. Id. at 325.
3. See id. The Due Process Clause of the Fifth Amendment mandates: "[n]o person shall be... deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment contains its own Due Process Clause with respect to the states, providing: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.
4. See Solomon, supra note 1, at 325 (explaining that the Fifth and Fourteenth Amendments provide the constitutional basis for "prohibit[ing] the prosecutor's misuse of his charging authority"). Specifically, the Supreme Court, in Bordenkircher v. Hayes, stated that vindictive prosecution violates the Due Process Clause of the Fourteenth Amendment. Bordenkircher v. Hayes, 434 U.S. 357, 362 (1978) (quoting North Carolina v. Pearce, 395 U.S. 711, 725 (1969)).
The doctrine of prosecutorial vindictiveness is deeply rooted in Supreme Court jurisprudence. The doctrine originally arose to prevent judicial vindictiveness—to protect defendants who successfully appealed convictions. The Supreme Court next applied the doctrine to prosecutorial charging decisions, finding vindictiveness where a prosecutor increased charges from misdemeanor to felony after a defendant exercised his statutory right to seek a new trial. In *Blackledge v. Perry*, decided in 1974, the Supreme Court held that any "increased punishment upon retrial after appeal . . . that pose[s] a realistic likelihood of 'vindictiveness'" violates due process. Although the concept of vindictive prosecution seems straightforward, the federal circuit courts have interpreted "vindictiveness" in various ways and have grappled with the doctrine's application.

Once a realistic likelihood of vindictiveness is shown, a presumption of vindictiveness arises. However, the prosecutor can rebut this presumption by presenting objective evidence explaining the reason for the charges. The federal circuit courts have interpreted and expanded the *Blackledge* principle,

5. Vindictive prosecution has been defined by the United States Court of Appeals for the Seventh Circuit as behavior that results from “specific animus or ill will” or that occurs when a prosecutor “charges a more serious violation . . . in retaliation for the exercise of a legal or constitutional right in connection with the original charge.” United States v. DeMichael, 692 F.2d 1059, 1061-62 (7th Cir. 1982).

6. See Alabama v. Smith, 490 U.S. 794, 798, 501 (1989) (discussing a significant number of Supreme Court cases establishing and construing the prosecutorial vindictiveness doctrine).

7. See *Pearce*, 395 U.S. at 726 (holding that judges ordering harsher sentences for defendants who had successfully won a trial de novo upon appeal must base their sentencing decision on “objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding”).


9. *Blackledge*, 417 U.S. at 27. Additionally, the Court noted that due process also requires that defendants be free to exercise their rights to challenge their convictions without the fear of retaliation by prosecutors. *Id.* at 28.

10. See United States v. Andrews, 612 F.2d 235, 257 (6th Cir. 1979) (Keith, J., dissenting) (“Given the chaotic nature of the law in the circuits regarding prosecutorial vindictiveness, we can expect further guidance on this question from the Supreme Court in the near future.”); see also Wasman v. United States, 468 U.S. 559, 570 (1984) (“*Pearce* is not without its ambiguities . . . .”); Hardwick v. Doolittle, 558 F.2d 292, 299 (5th Cir. 1977) (“Decisions after *Pearce* have not been entirely consistent in applying the *Pearce* Principle.”); Solomon, *supra* note 1, at 331-40 (discussing the various tests used by the circuit courts, which highlight that even slight variations in interpretations of Supreme Court precedent can have a significant effect on vindictiveness rulings).

11. United States v. Jenkins (*Jenkins 1*), 504 F.3d 694, 700 (9th Cir. 2007).

12. See *Blackledge*, 417 U.S. at 28, 29 n.7 (noting an example in which a defendant’s due process was not violated because the prosecutor’s subsequent harsher charge was not done in bad faith).
attempting to safeguard the rights of defendants while ensuring that prosecutors continue to have broad discretion in making charging decisions.\footnote{See, e.g., United States v. Griffin, 617 F.2d 1342, 1348 (9th Cir. 1978) (emphasizing that prosecutors must be given discretion to bring charges based on the “legitimate requirements of the justice system,” and noting that “[n]othing in Blackledge presumed to give a defendant a free ride for separate crimes he may have committed, or to prevent a prosecutor from bringing new charges as a result of changed or altered circumstances which properly bear on prosecutorial discretion”); Hardwick, 558 F.2d at 302 (stating that adopting an “apprehension of vindictiveness” standard rather than an actual vindictiveness standard would essentially “render the prosecutor’s discretion meaningless”); United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir. 1977) (explaining that the Blackledge Court’s reasoning was based on its conclusion “that fear of vindictiveness for exercising a statutory right to appeal was as forceful as actual vindictiveness in chilling a defendant’s ‘free and unfettered’ choice in deciding to appeal” (citation omitted)).}

*United States v. Jenkins (Jenkins I)* came to the United States Court of Appeals for the Ninth Circuit after the government appealed the district court’s decision to dismiss the case based on its finding of an appearance of prosecutorial vindictiveness.\footnote{Jenkins I, 504 F.3d at 697–98.} The Ninth Circuit affirmed the district court’s decision, finding that the defendant’s confession to prior acts of illegal-alien smuggling—given while testifying at her trial for importing marijuana—could not be used as the basis for alien smuggling charges because its use raised a presumption of vindictiveness that the government failed to rebut.\footnote{Id. at 697, 701–02.} The Ninth Circuit denied a rehearing en banc, and a seven-judge dissent lamented the extension of the doctrine.\footnote{United States v. Jenkins (Jenkins II), 518 F.3d 722, 723–29 (9th Cir. 2008) (O’Scannlain, J., dissenting from denial of the rehearing en banc). The chief dissent was authored by Judge Diarmuid F. O’Scannlain, and was joined by Chief Judge Alex Kozinski, and Judges Andrew J. Kleinfeld, Richard C. Tallman, Consuelo M. Callahan, Carlos T. Bea, and Milan D. Smith, Jr. Id. at 723. The dissent argued that the Jenkins I majority not only “contradict[ed]” Ninth Circuit precedent, but also created a circuit split that would only further confuse the doctrine’s application. Id. at 723–29.}

This Note will examine the background and potential impact of *Jenkins I* on the doctrine of prosecutorial vindictiveness. First, this Note will examine the origins of the doctrine in Supreme Court decisions and discuss how the federal courts of appeal have interpreted the doctrine since its inception. Specifically, this section will explore how the circuits have either narrowed or expanded the scope of the doctrine over time. Second, this Note will address the Ninth Circuit’s application of the doctrine in *Jenkins I*. In particular, this section will investigate whether the Ninth Circuit properly applied the doctrine when it affirmed the dismissal of criminal charges for vindictive prosecution based on new charges brought during trial for conduct unrelated to the trial. Third, this Note will evaluate the impact of *Jenkins I* on the Ninth Circuit and other courts’ precedent and predict the possible impact of the decision on the doctrine. This section will show that *Jenkins I* effectively protects defendants...
who confess to crimes while testifying at trial for different crimes. Thus, as
this section will demonstrate, prosecutors will be forced to charge defendants
with all possible crimes, even if the evidence is weak at the time the charges
are brought. Finally, this Note will conclude that Jenkins I was wrongly
decided because it expanded the doctrine beyond the scope recognized by other
circuits, overextending the protections of the Due Process Clause.

I. THE ORIGINS AND COMPETING INTERPRETATIONS OF THE PROSECUTORIAL
VINDICTIVENESS DOCTRINE

A. The Supreme Court Announces the General Rules

In 1969, the Supreme Court acknowledged the issue of vindictiveness in
North Carolina v. Pearce.\textsuperscript{17} In Pearce, the Supreme Court reviewed two
consolidated cases, both of which involved a convicted criminal defendant who
successfully challenged his conviction and who, upon conviction after retrial,
received a longer sentence without apparent justification for the extension.\textsuperscript{18}
The Court held that “[d]ue process of law . . . 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 therefore,
“whenever a judge imposes a more severe sentence upon a defendant after a
new trial, the reasons for doing so must affirmatively appear.”\textsuperscript{19}

In Blackledge v. Perry, the Court extended the Pearce rule to include
prosecutorial vindictiveness.\textsuperscript{20} The defendant in Blackledge was convicted of a
misdemeanor and exercised his right to seek a new trial.\textsuperscript{21} The prosecutor then
charged Perry with a felony for the same actions that resulted in Perry’s
misdemeanor conviction.\textsuperscript{22} The Court found that even though there was “no
evidence that the prosecutor acted in bad faith or maliciously,” his actions
violated Perry’s right to due process because “a defendant [must] be freed of
apprehension of such a retaliatory motivation.”\textsuperscript{23}

In neither Pearce nor Blackledge did the Court require a showing of actual
vindictiveness on the part of the judge or prosecutor in order to establish a due

\textsuperscript{17} North Carolina v. Pearce, 395 U.S. 711, 725 (1969).
\textsuperscript{18} Id. at 713–16, 726.
\textsuperscript{19} Id. at 725–26. The reasons given by the judge “must be based upon objective
information concerning identifiable conduct on the part of the defendant occurring after the time
of the original sentencing proceeding.” Id. Further, the Court recognized that “due process . . .
requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of
the sentencing judge.” Id. at 725.
\textsuperscript{21} Id. at 22.
\textsuperscript{22} Id. at 23.
\textsuperscript{23} Id. at 28. Specifically, the Court was concerned that prosecutors might discourage
appeals by “upping the ante” on defendants, in effect threatening defendants that harsher charges
would be brought in subsequent trials. Id. at 27–28.
process violation. The Court was concerned that the fear of vindictiveness would deter defendants from exercising their rights, therefore it held that due process is offended by actions that “pose a realistic likelihood of ‘vindictiveness.’”

While Pearce and Blackledge arose in the post-trial appeal setting, the Supreme Court has also addressed vindictiveness in the pretrial setting. In the pretrial setting, however, the Court has been more willing to extend deference to prosecutorial discretion and less willing to find a presumption of vindictiveness. In United States v. Goodwin, the Court indicated that the timing of the prosecutor’s action affects whether the prosecutor’s actions are presumed to be vindictive. One of the primary reasons for this distinction lies in the Court’s general vindictiveness rationale. For example, in Blackledge, the Court indicated that vindictiveness was more likely to be found in situations in which a prosecutor’s actions could be driven by an effort to save time and money by discouraging defendants from exercising their legal rights, such as in seeking a retrial.

24. See id. at 28 (noting that Pearce did not require “actual retaliatory motivation,” and finding that causing apprehension of such motivation is sufficient to raise the presumption of vindictiveness).

25. Id. at 27–28.


27. See, e.g., United States v. Goodwin, 457 U.S. 368, 380–82 (1982) (finding no presumption of vindictiveness where a defendant requested a jury trial based on misdemeanor charges and was later charged with a felony, because prosecutors have broad discretion to amend charges based on newly discovered information or modified trial strategy); Bordenkircher, 434 U.S. at 358–59, 362–65 (finding that due process was not violated where a prosecutor carried out a threat made during plea negotiations, when the defendant did not accept the government’s plea offer). It is nearly impossible to prove vindictiveness in the material setting after Bordenkircher, and it has even been argued that Bordenkircher shifted the underlying rationale of the vindictiveness rule from protecting a defendant from government pressure that would deter the defendant from exercising a legal right, to a focus on protecting the defendant from government retaliation. See Solomon, supra note 1, at 330–31.

28. See Goodwin, 457 U.S. at 381–82 (noting that a prosecutor’s initial charging decision “should not freeze future conduct” and “may not reflect the extent to which an individual is legitimately subject to prosecution,” and concluding that “the timing of the prosecutor’s action in this case suggests that a presumption of vindictiveness is not warranted”).

29. See Blackledge, 417 U.S. at 27. In Goodwin, the Court found that the defendant’s request for a jury trial, as opposed to a bench trial, did not provide the prosecutor with a sufficient incentive “to engage in ‘self-vindication,’” and therefore did not give rise to a presumption of vindictiveness. See Goodwin, 457 U.S. at 383. The defendant in Goodwin argued that the government was retaliating because the defendant requested a trial by jury, but the Court found that a trial by jury is not as burdensome on the government as a retrial, which was the issue in Blackledge. Id. Thus, the Court found that the likelihood of “institutional bias” present in Blackledge was absent in Goodwin because the incentive to avoid a costly retrial was also absent. Id. The Court noted that in the Blackledge context, a prosecutor has a “personal stake” in deterring a new trial, whereas prosecutors generally are not concerned with whether a trial will be a bench or jury trial. Id.
Although *Pearce* and *Blackledge* are settled law, the Court has admittedly "been chary about extending the *Pearce* presumption of vindictiveness when the likelihood of vindictiveness is not as pronounced as it was in *Pearce* and *Blackledge." The Court has repeatedly noted that the government generally has broad discretion when bringing charges, and has explained that "[t]his broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." The Court has recognized that there are multiple factors that prosecutors weigh when making charging decisions, including "the strength of the case" that "courts are [not] competent to undertake."

**B. Application of the Doctrine in the Ninth Circuit**

1. *The Rule and the Rationale Behind the Rule*

The seminal Ninth Circuit case applying *Pearce* and *Blackledge* is *United States v. Ruesga-Martinez*. In *Ruesga-Martinez*, the Ninth Circuit found vindictive prosecution where the prosecutor increased the charges against the defendant from a misdemeanor to a felony after the defendant pled not guilty and refused to waive his rights to be tried by a district judge or a jury. In so doing, the court established the rule that where a defendant is reindicted after exercising a 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."

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30. Wasman v. United States, 468 U.S. 559, 566 (1984) (noting that the reluctance to extend the *Pearce* presumption stems from the concern that the presumption works to bar "legitimate" criminal prosecution).

31. Wayte v. United States, 470 U.S. 598, 606–07 (1985). Though *Wayte* arose in the context of selective prosecution, the Court pointed to *Bordenkircher* and *Goodwin* when discussing the great difficulties and potential policy concerns inherent in judicial review of prosecution decisions. *Id.* at 607.

32. *Id.* The Court listed factors weighed by the government when making charging decisions, including "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Id.* Additionally, the Court noted that considerations of judicial economy counsel against allowing judges to review charging decisions, because such review "delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Id.* Thus, the Court has indicated that judicial review of charging decisions presents both separation-of-powers concerns and practical issues. *See id.*


34. *Ruesga-Martinez*, 534 F.2d at 1368, 1371. In this case, the defendant refused to waive his rights to trial by a district judge and trial by jury. *Id.* at 1368.

35. *Id.* at 1369. The court stressed that it was neither admonishing the prosecutor nor questioning the prosecutor's charging decision, but rather, it was eliminating any apprehension of
A key policy consideration in these cases is the deterrent effect on defendants because courts do not want defendants to refrain from fully exercising their rights out of fear of government retaliation. In *United States v. Griffin*, the Ninth Circuit acknowledged the need to curb the deterrent effect that subsequent charges might have on a defendant’s decision to exercise a right, but explained that when assessing the deterrence factor, courts must also remember the need to respect prosecutorial discretion:

Prosecutors require a certain amount of discretion in bringing indictments, including the extent to which an indictment covers all the acts of the defendant which constitute crimes. Nothing in *Blackledge* presumed to give a defendant a free ride for separate crimes he may have committed, or to prevent a prosecutor from bringing new charges as a result of changed or altered circumstances which properly bear on prosecutorial discretion. Thus, the Ninth Circuit has traditionally deferred to the charging decisions of prosecutors, while emphasizing the prophylactic nature of the rule. In possibly the most cited statement regarding the rule, the Ninth Circuit vindictive prosecution when exercising a legal right. *Id.* In addition, the Ninth Circuit later held that procedural rights, the exercise of which is relevant to determining vindictiveness, are not confined to constitutionally protected rights; so long as the right at issue is sufficiently similar to those at issue in *Pearce* and *Blackledge*, it will be protected. See *United States v. DeMarco*, 550 F.2d 1224, 1227 (9th Cir. 1977). *Pearce* addressed the exercise of a right to appeal, and *Blackledge* addressed the exercise of a right to a new trial. *Id.* In *DeMarco*, the defendant “insisted” on exercising his right to change venue. *Id.* After the court granted the motion to change venue, the government obtained a second indictment against him based on conduct known at the time of the first indictment. *Id.* at 1226. Further, the prosecutor had previously threatened to bring the additional charges if the defendant successfully changed venue. *Id.*

36. *DeMarco*, 550 F.2d at 1227; *Ruesga-Martinez*, 534 F.2d at 1369.

37. *United States v. Griffin*, 617 F.2d 1342, 1348 (9th Cir. 1980). In *Griffin*, the Department of Justice delayed in filing a second indictment against the defendant because the Federal Bureau of Investigations (FBI) was still investigating the crimes that formed the basis for the second indictment and were “wholly unrelated” to the crimes charged in the first indictment. *Id.* at 1347. However, the court noted that defendants should not be able to point to the deterrence effect of alleged vindictive prosecution as a “shield” to avoid “legitimate” prosecution. *Id.* at 1348 (finding that because the FBI’s investigation was ongoing, the defendant should have been on notice that additional charges might be filed).

38. *Id.* (citing *Blackledge v. Perry*, 417 U.S. 21, 29 n.7 (1974)).

39. *DeMarco*, 550 F.2d at 1227. The court pointed out that the rule limits prosecutorial discretion and checks retaliation against defendants who take advantage of their procedural rights. *Id.* The Ninth Circuit, however, has identified situations where the threat of additional charges would not deter a defendant from exercising a procedural or constitutional right. For example, in *United States v. Robison*, the defendant won a reversal of his death sentence, only to be subsequently indicted on other charges. *United States v. Robison*, 644 F.2d 1270, 1271 (9th Cir. 1981). Robison argued that the government was retaliating against him because he exercised his rights in prior cases, successfully getting one conviction reversed and other charges dismissed; the Ninth Circuit rejected this argument. *Id.* at 1272–73. The court found that the later charges—carrying only a ten-year maximum sentence—could not have deterred Robison from seeking a reversal of his death sentence. *Id.* at 1273.
explained its rationale: "[t]he prophylactic rule is designed not only to relieve the defendant who has asserted his right from bearing the burden from ‘upping the ante’ but also to prevent chilling the exercise of such rights by other defendants who must make their choices under similar circumstances in the future."  

2. The “Appearance of Vindictiveness” Test and Rebutting the Presumption Once It Has Been Established

When assessing prosecutorial vindictiveness claims, the Ninth Circuit takes several steps. In Griffin, the Ninth Circuit articulated a totality-of-the-circumstances approach, under which it assessed whether the “overall picture” reflects the appearance of vindictiveness. Specifically, the court looked at the charging decision to determine whether it “suggest[ed] the ‘appearance of vindictiveness.’” If the defendant establishes facts that trigger the presumption, the burden shifts to the prosecution to rebut it by showing that “the prosecutorial decision was justified by either independent reasons or intervening circumstances.”

3. “Factual Nucleus” of Charges Is Only One Factor in Determining Vindictiveness and Is Not a Decisive Factor

The Ninth Circuit has distinguished between subsequent charges based on the same or related conduct as the original charge and subsequent charges

40. DeMarco, 550 F.2d at 1227.
41. Griffin, 617 F.2d at 1347-48.
42. Robison, 644 F.2d at 1272 (citing Griffin, 617 F.2d at 1347). The appearance-of-vindictiveness approach has been criticized for being overreaching. See Solomon, supra note 1, at 342-43. The Ninth Circuit has found an “appearance of vindictiveness . . . even when the defendant has not . . . asserted any legal right.” See United States v. Alvarado-Sandoval, 557 F.2d 645, 645-46 (9th Cir. 1977); see also Solomon, supra note 1, at 333 (noting that the Alvarado-Sandoval Court held that when a prosecutor raised a charge from a misdemeanor to a felony after a defendant delayed in filing a plea, the prosecutor’s actions suggested the appearance of vindictiveness). However, the appearance-of-vindictiveness approach has also been heralded as a way to provide defendants relief in situations where vindictiveness would be impossible to detect because the theory turns on a prosecutor’s subjective, and presumably secret, motives. See Nancy Rader Whitehead, Note, Evaluating Prosecutorial Vindictiveness Claims in Non-plea-bargained Cases, 55 S. CAL. L. REV. 1133, 1148 (1982) (noting that “rarely will the evidence clearly indicate that retaliation was the only possible motive for the charging decision”).
43. Robison, 644 F.2d at 1272. In Griffin, the Ninth Circuit indicated that evidence suggesting that an “intervening circumstance,” other than the defendant’s assertion of his rights, between the lesser initial charge and the greater subsequent charge, such as additional findings from an ongoing investigation, reduces the appearance of vindictiveness. See Griffin, 617 F.2d at 1348 (finding that where an investigation was ongoing, the defendant should have expected that the subsequent charge could be brought at some point). Another example of an intervening circumstance includes new facts or evidence discovered by a prosecutor after a trial. See United States v. Preciado-Gomez, 529 F.2d 935, 939 (9th Cir. 1976). In Preciado-Gomez, the court went on to point out that where “valid reasons exist” for “pursuing more serious charges,” “courts should refrain from interfering with the prosecutor’s right to exercise his discretion.” Id.
based on conduct unrelated to the original charge.\(^4\) It has held that there is a greater likelihood of vindictiveness when the subsequent charges are based on conduct related to the conduct at issue in the original charge.\(^5\) Conversely, vindictiveness is less likely when the subsequent charge is based on conduct unrelated to the conduct in the original charge.\(^6\) However, this factor alone, though important, is not dispositive in determining whether the presumption arises.\(^7\) In sum, the Ninth Circuit has adopted an appearance-of-vindictiveness test based on the totality of the circumstances surrounding new charges, with one factor being whether the new charges arise out of the same facts as the initial charges.\(^8\)

\(\footnotesize{4}\) See United States v. Groves, 571 F.2d 450, 454 (9th Cir. 1978); DeMarco, 550 F.2d at 1226. Ultimately, however, the Ninth Circuit rejected the government’s contention that Blackledge was distinguishable, noting that “[t]he factual nucleus of both indictments was the same.” Id.

\(\footnotesize{5}\) See Groves, 571 F.2d at 454 (explaining that although the factual similarities between the charges is a factor for determining vindictiveness, it is only one of the factors). In Groves, the court found that the two crimes charged were “interrelated” because the first charge of cocaine possession was based on evidence discovered during an interrogation related to the second charge of marijuana trafficking. Id.

\(\footnotesize{6}\) See Griffin, 617 F.2d at 1347-48. In Griffin, the Ninth Circuit found that the government’s delay in bringing a second indictment did not raise the presumption of vindictiveness in part because the second indictment was based on a separate investigation into separate conduct by a separate government agency. Id. In addition, it reiterated the holding in Groves that the relationship between the conduct underlying the indictments is only one factor, “in the context of the whole case,” that courts use to determine whether prosecutorial conduct rises to the level of vindictiveness. Id. at 1348. The Ninth Circuit has stated that when “the second charge is unrelated to the first, the presumption [of vindictiveness] does not arise.” United States v. Martinez, 785 F.2d 663, 669 (9th Cir. 1986), amended on other grounds by 855 F.2d 621 (9th Cir. 1988).

\(\footnotesize{7}\) Groves, 571 F.2d at 454; see also Robison, 644 F.2d at 1272–73. In Robison, the court found that no presumption of vindictive prosecution existed when the two sets of charges “arose from events separate and distinct” from each other. Id. The Ninth Circuit noted that whether the new charges arise “out of the same nucleus of operative facts as the original charge . . . is one of the key indicia scrutinized by courts when confronted with a claim of vindictive prosecution.” Id. at 1272–73. Though it is not a dispositive factor, the court stated that the defendant’s failure to show that the charges in the two indictments were based on similar facts “weakened” the defendant’s case. Id. The court further noted that the defendant’s argument essentially boiled down to a fallacious “post hoc” argument—the mere fact that the second charge followed the exercise of a right did not mean that the second indictment was brought because the defendant exercised his rights. Id. at 1273.

\(\footnotesize{8}\) Robison, 644 F.2d at 1272.
C. Restrained Approach to the Doctrine Favoring Prosecutorial Discretion in Bringing Charges

1. The Majority Approach: Distinguishing Between Subsequent Charges Brought for the Same and Other Crimes

The consensus among the federal courts of appeals that have addressed this issue is that separate charges based on separate crimes do not raise the presumption of vindictiveness. The United States Court of Appeals for the Fifth Circuit has recognized that prosecutors may add charges in the course of a trial without violating the defendant’s right to due process because the government has broad discretion in making charging decisions. The United States Court of Appeals for the Eleventh Circuit has held that the presumption of vindictiveness does not arise where the prosecutor brings subsequent charges based on conduct unrelated to earlier charges. The United States Court of Appeals for the Eighth Circuit has held that "a presumption of vindictiveness arises only when a prosecutor chooses to bring a more serious charge against a defendant in a second trial." The United States Court of Appeals for the District of Columbia Circuit has held that a presumption of vindictiveness does not arise when, among other things, the criminal activity alleged in a subsequent indictment is separate and apart from that alleged in the first.

49. Williams v. Bartow, 481 F.3d 492, 501 (7th Cir. 2007); United States v. Johnson, 171 F.3d 139, 141–42 (2d Cir. 1999); United States v. Andrews, 612 F.2d 235, 244 (6th Cir. 1980); see United States v. Peoples, 360 F.3d 892, 896 (8th Cir. 2004); United States v. Gary, 291 F.3d 30, 34 (D.C. Cir. 2002); Humphrey v. United States, 888 F.2d 1546, 1549 (11th Cir. 1989).

50. See United States v. Krezdorn, 718 F.2d 1360, 1364 (5th Cir. 1984). According to the Fifth Circuit’s decision in Krezdorn, courts should not look at the various factors, such as the timing of added charges or the nucleus of facts upon which the charges are based. Id. Nor should courts attempt to “strike the delicate balance between the rights of defendant and prosecutor,” but rather, courts should look at the bigger picture. Id. Specifically, the Fifth Circuit has held that no presumption will arise “if any objective event or combination of events in those proceedings should indicate to a reasonable minded defendant that the prosecutor’s decision to increase the severity of charges was motivated by some purpose other than a vindictive desire to deter or punish appeals.” Id. at 1365. Conversely, if the proceedings reflect no possible evidence that the charges were brought for a purpose other than vindictiveness, the presumption properly arises and the government must rebut the presumption by a preponderance of the evidence. Id.

51. Humphrey, 888 F.2d at 1549. In Humphrey, the defendant claimed that because the government filed charges while he pursued habeas relief following his conviction, the government’s conduct raised the presumption of vindictiveness. Id. at 1548. However, the court found that these facts took the case out of the Blackledge rule, which only proscribes “retaliation by substituting a more serious charge for the original charge.” Id. at 1549.

52. Peoples, 360 F.3d at 896 (finding that the presumption of vindictiveness did not arise when the government renewed its notice to seek the death penalty after the defendant was awarded a new trial even though the notice was withdrawn during the first trial).

53. See Gary, 291 F.3d at 33–34 (finding that the government exercised proper authority in issuing a second indictment, even though the defendant had already successfully appealed, explaining that even though the government brought a second indictment against the defendant
In *United States v. Andrews*, the United States Court of Appeals for the Sixth Circuit explicitly rejected the Ninth Circuit’s approach to the presumption of vindictiveness, distinguishing between a prosecutor’s decision to substitute charges and the decision to bring additional charges based on independent events. The *Andrews* court refused to extend the presumption of vindictiveness to a situation where the government brought a conspiracy charge that arose out of the same facts as the original charge, but where the court found that the new charge was additional, as opposed to substitute, and distinct from the original charges. Addressing the *Ruesga-Martinez* decision, the *Andrews* court found that the Ninth Circuit inappropriately extended the prosecutorial vindictiveness doctrine, stating that the “broad and strong language” of *Ruesga-Martinez* was “philosophically incompatible” with the Sixth Circuit’s interpretations of *Pearce* and *Blackledge*.

after the defendant successfully challenged her sentence on the first indictment, the government had the right to bring indictments for all of the defendant’s criminal activity).

54. See *Andrews*, 612 F.2d at 241, 243–45 (explaining that when “alleged criminal conduct will support only a single charge, with the prosecution having the option of charging the defendant under different provisions of the law carrying varying penalties . . . once the judgment is made as to which penal statute is to be invoked, the full extent of prosecutorial discretion has been exercised”). The same is true of a final sentencing decision made by a judge in the *Pearce* context. *Id.* at 241. In contrast, when a prosecutor does not “exhaust[] [his] arsenal of potential charges with the initial indictment,” and subsequently brings new, additional charges based on a separate substantive offense, “the full extent of prosecutorial judgment and/or discretion [has] not been exercised” and no presumption of vindictiveness arises. *Id.* The Sixth Circuit explained that although the difference between added and substituted charges is a “subtle,” but “critical” distinction, it is one that has been recognized by other courts. *Id.* at 242–43.

55. See *id.* at 241. In *Andrews*, the defendants were indicted for narcotics offenses, among other things, and eventually posted bail. *Id.* at 237. After making bail, the government charged the defendants with conspiracy, in addition to the narcotics charges. *Id.* The defendants responded by arguing that the conspiracy charges were brought in retaliation for asserting their right to bail. *Id.* The Sixth Circuit found that although the subsequent charges arose out of “the same total factual pattern” as the initial charges, conspiracy is a separate crime and therefore constituted an additional, as opposed to a substitute, charge. *Id.* at 241. Ultimately, the Sixth Circuit remanded the case to the district court, which wrongly applied the standard for substituted charges. See *id.* at 245.

56. *Id.* at 244. The court noted that while it strongly disagreed with the Ninth Circuit’s vindictiveness jurisprudence, it agreed with the Fifth Circuit’s “basic approach” to the doctrine. *Id.* The court also identified *Ruesga-Martinez* as the source of the “appearance of vindictiveness” standard. *Id.* at 243 n.10. The *Andrews* court rejected the appearance-of-vindictiveness standard, and instead relied on the “realistic likelihood of vindictiveness” standard, finding it to be more grounded in Supreme Court precedent. *Id.* at 244. The benefit of the realistic-likelihood test is that it “strikes an appropriate balance between the apparent vindictiveness and actual vindictiveness standards,” protecting “a defendant’s due process rights while allowing the prosecution sufficient opportunity to justify its actions.” Solomon, *supra* note 1, at 346. Judge Gilbert S. Merritt, Jr., in his concurring opinion in *Andrews*, went so far as to state that the doctrine of prosecutorial vindictiveness “is theoretically endless and unmanageable unless limited to the post-conviction, double jeopardy context.” *Andrews*, 612 F.2d at 246 (Merritt, J., concurring). Judge Merritt was concerned that the prosecutorial vindictiveness doctrine is based on “elusive” concepts that fail to take into account the adversarial nature of the criminal-justice
The United States Court of Appeals for the Seventh Circuit has also found that the presumption of vindictiveness does not arise where subsequent charges are based on different conduct than the original charges. In *Williams v. Bartow*, the defendant was charged with sexually assaulting a child in 1996. At the defendant's trial, two witnesses testified that they too had been sexually assaulted by the defendant in 1990. The defendant was subsequently convicted of sexual assault for the 1996 incident twice, and in the third trial the government charged the defendant with two additional counts of sexual assault based on the earlier testimony. The defendant argued that the additional charges were vindictive, but the Seventh Circuit disagreed. The court noted that the new charges were based on a factually distinct crime unrelated to the original charges. Significantly, the court pointed out that the evidence presented at trial by the 1990 victims, under oath, gave the prosecutor "new reasons for bringing the charges based on the earlier incident." The Seventh Circuit also noted that the Supreme Court had not ruled on the precise issue presented: whether *Blackledge* applies in cases where the defendant is charged for unrelated crimes after a successful appeal, rather than for crimes arising out of the same factual scenario. The court ultimately held that if a prosecutor brings charges based on criminal conduct unrelated to that which supported the initial charges, "the defendant must demonstrate actual vindictiveness rather than relying on the presumption recognized in *Blackledge* and *Thigpen*.

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57. See *Williams v. Bartow*, 481 F.3d 492, 501 (7th Cir. 2007).
58. Id. at 495.
59. Id. at 495–96. The prosecutor stated that he did not bring charges earlier because he needed more evidence. Id. at 494–95; accord *United States v. Mallah*, 503 F.2d 971, 988 (2d Cir. 1974) ("It is one thing to increase a charge from manslaughter to murder, and quite another to charge a defendant, subsequent to a successful appeal, with a second murder.").
60. *Williams*, 481 F.3d at 501.
61. Id. (citing *Humphrey v. United States*, 888 F.2d 1546, 1549 (11th Cir. 1989)) (noting that it is proper to distinguish between charges based on the same set of facts and charges based on different facts).
62. Id. (noting that even though the prosecutor had police reports from the 1990 event, once the prosecutor had the testimony of the girls, he took a "new approach" to the prosecution).
63. Id. at 502. The court reiterated that the Eleventh Circuit found this distinction significant, reasoning that the presumption does not apply where later charges relate to "other criminal conduct." Id. The court also found that the Ninth Circuit reached the same conclusion in *Martinez*. Id. at 502–03 (citing *United States v. Martinez*, 785 F.2d 663, 669 (9th Cir. 1986)).
64. Id. at 502. The Seventh Circuit noted the emphasis the Wisconsin state court placed on the fact that the prosecutor brought additional charges only after the two 1990 victims testified at trial. Id. at 503. Thus, "the[] circumstances were ... vastly different from those confronted by
The United States Court of Appeals for the Second Circuit follows the same rule, holding in United States v. Johnson that "a new federal prosecution following an acquittal on separate federal charges does not, without more, give rise to a presumption of vindictiveness." In Johnson, the government did not explain why it waited until the defendant had been acquitted of the first charges before bringing the second set of charges. The court even acknowledged that it was "conceivable" that the new charges were brought to retaliate against the defendant for exercising his right to a jury trial, which resulted in an acquittal. However, the court concluded that there was no "realistic likelihood" of vindictiveness because the government might have had other reasons for not bringing the charges earlier, therefore the presumption of vindictiveness did not arise. The Second Circuit, in Johnson, relied heavily on the United States Court of Appeals for the Third Circuit's decision in United States v. Esposito, in which the court held that a second set of charges predicated on the same criminal conduct as prior charges—of which the defendant was acquitted—did not trigger a presumption of vindictiveness. Although Esposito did not deal with separate charges based on separate criminal conduct, the Third Circuit generally noted that new charges supported by evidence did not raise a presumption of vindictiveness because the charges were brought to punish the defendant for the crimes he committed and not for the defendant's exercise of a right. In addition, both the Second and Third Circuits noted the possible negative consequences a contrary holding might have on the criminal-justice system, namely that prosecutors would be forced to bring every conceivable charge at once—"overcharging" an offense—to avoid being barred from bringing additional charges at a later point.

The Second Circuit addressed an issue related to vindictiveness in United States v. Bryser, holding that a defendant's testimony at trial for one set of charges could be used as the basis for bringing subsequent charges. In
Bryser, the defendant argued that charges brought against him subsequent to his testimony in court should be thrown out because he testified to the criminal conduct while on trial for another crime. The court found that the defendant could not possibly expect he would be immune from prosecution of other crimes if he admitted to them on the stand. The Second Circuit, consistent with its application of the vindictiveness doctrine, found that granting the defendant immunity would "lead[] to the absurd result that incriminating statements may not be used as evidence because they were made otherwise in aid, or under the umbrella, of a constitutional right."

Therefore, the majority of circuits that have addressed this issue have held that the presumption of vindictiveness does not arise where subsequent charges are brought for different crimes than those originally charged.

2. Overcoming the Presumption: Various Ways by which the Government Can Prove Charges Are Not Vindictively Motivated and Thus Rebut the Presumption

Once the presumption of vindictiveness has been raised, the burden shifts to the government to provide objective, non-vindictive reasons for bringing the subsequent charges. In general, the federal courts of appeals give prosecutors the benefit of the doubt that charges are brought for legitimate reasons. For this reason, the courts accept a variety of explanations for charging decisions. Additionally, courts have found delayed charges may be justified, and therefore do not necessarily give rise to a presumption of vindictiveness.

73. Id. The defendant pointed to Simmons v. United States, which held that if a defendant takes the stand in his own defense, his testimony may not be used against him with respect to the initial charges. Id.; see Simmons v. United States, 390 U.S. 377, 394 (1968).

74. Bryser, 95 F.3d at 186–87.

75. Id. at 187 (noting also that "[a]ncillary 'losses' of constitutional rights may often attend the commission of criminal acts").

76. See United States v. Goodwin, 457 U.S. 368, 374 (1982) (citing North Carolina v. Pearce, 395 U.S. 711, 726 (1969)) (citing the Pearce rule and reiterating that the objective information must be entered into the record so that "the constitutional legitimacy of the increased sentence may be fully reviewed on appeal"); United States v. Saltzman, 537 F.3d 353, 360 (5th Cir. 2008) ("Even if a defendant establishes a realistic likelihood of vindictiveness, however, the government still has an opportunity to proffer legitimate, objective reasons for its conduct."); United States v. Andrews, 612 F.2d 235, 241 n.6 (6th Cir. 1979) (noting that the Supreme Court has not resolved whether substituted charges could be justified).

77. See United States v. Barner, 441 F.3d at 1319 (11th Cir. 2006) (finding the presumption rebutted where the government brought superseding charges to correct a charging mistake); United States v. O'Hara, 301 F.3d 563, 571 (7th Cir. 2002) (finding the presumption rebutted where new charges were based on evidence that was previously unavailable to the prosecution); United States v. Johnson, 171 F.3d 139, 141 (2d Cir. 1999) (finding the prosecution might have had some legitimate reason that was not fully revealed at trial).

78. See Barner, 441 F.3d at 1319; O'Hara, 301 F.3d at 571; Johnson, 171 F.3d at 141.

79. See O'Hara, 301 F.3d at 571 (finding the presumption rebutted where witness testimony became available after the initial charging decision); Johnson, 171 F.3d at 141 (refusing to find the presumption when the government did not provide a reason for delay in bringing the
The circuit courts have identified various ways prosecutors can demonstrate that allegedly vindictive charges were not brought in retaliation against a defendant. For example, the prosecutor may rebut the presumption of vindictiveness by showing that new evidence was obtained after the original charges were brought, or that an intervening event occurred. Additionally, the prosecution could point to "mistake or oversight in the initial action, a different approach to prosecutorial duty by the successor prosecutor, or public demand for prosecution on the additional crimes allegedly committed." Thus, the general rule among the circuits is that a variety of explanations by the government can rebut a presumption of vindictiveness once it is raised.

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80. See Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977); see also Andrews, 612 F.2d at 245 n.14 ("Inadvertence and prosecutorial inexperience would be within the range of explanations blunting a claim of prosecutorial vindictiveness."). In Andrews, the court recognized the distinction between added and substituted charges, finding that additional charges based on separate crimes could raise the presumption of vindictiveness, which the prosecution could rebut by introducing evidence to "reasonably explain or justify the action taken and negate any inference of vindictiveness in fact." Andrews, 612 F.2d at 245. The Sixth Circuit, in Andrews, found that this standard incorporated the defendant's and the prosecution's perspectives, and also provided the trial court with discretion in assessing the veracity of the prosecution's purported motives. Id.

81. See, e.g., United States v. Suarez, 263 F.3d 468, 480 (6th Cir. 2001) (finding the presumption rebutted where new charges were based on new evidence); Hardwick, 558 F.2d at 301.

82. See Byrd v. McKaskle, 733 F.2d 1133, 1136 (5th Cir. 1984) (citing United States v. Krezdorn, 718 F.2d 1360, 1365 (5th Cir. 1983)) (finding that an increase in charges did not raise the presumption of vindictiveness because an amendment to the Texas Penal Code drastically cut the sentence of the original indictment).

83. See Hardwick, 558 F.2d at 301. The Fifth Circuit has also found that when prosecutors are making arguments like those noted in Hardwick, "the burden of proof (to a preponderance of the evidence) remains on the defendant who raised the affirmative defense" and only shifts to the prosecutor if the record reveals no possible objective reason for the prosecutor's decision to bring additional charges. Krezdorn, 718 F.2d at 1365. In addition, it is important to note that these possible arguments are "illustrative rather than exhaustive." Hardwick, 558 F.2d at 301 (finding that a prosecutor's decision to bring more severe charges against a defendant could be easily explained). Consistent with the Fifth Circuit, the Second Circuit has held that an increase in charges was justified when a new prosecutor was assigned a misdemeanor case and then added a felony charge. See United States v. Ricard, 563 F.2d 45, 48 (2d Cir. 1977) ("[T]his was a reasonable step for the prosecutor to take.").

84. See, e.g., United States v. Barner, 441 F.3d 1310, 1319 (11th Cir. 2006); O'Hara, 301 F.3d at 571; Johnson, 171 F.3d at 141; Byrd, 733 F.2d at 1138; Andrews, 612 F.2d at 245 n.14; Hardwick, 558 F.2d at 301.
II. SITUATING UNITED STATES V. JENKINS WITHIN THE NINTH CIRCUIT'S PROSECUTORIAL VINDICITIVENESS JURISPRUDENCE

A. Jenkins I Works its Way to the Ninth Circuit

The Ninth Circuit most recently addressed the doctrine of prosecutorial vindictiveness in United States v. Jenkins (Jenkins I). In October 2004, Sharon Ann Jenkins, a U.S. citizen, was twice caught at the United States-Mexico border attempting to smuggle undocumented aliens into California. Jenkins was first caught on October 19, 2004, at which time she admitted to being paid to smuggle non-citizens. Jenkins was caught a second time on October 20, 2004, waived her Miranda rights, and told officers that although she had been paid to drive the vehicle into California, she was unaware that there were undocumented aliens hidden in the vehicle. However, the government did not charge Jenkins for either border-crossing attempt.

On January 9, 2005, Jenkins was again stopped at the border, and a search of her vehicle revealed large amounts of marijuana. After border agents read Jenkins her Miranda rights, she claimed that she thought she was smuggling undocumented aliens across the border and did not know about the marijuana. Jenkins was charged with illegally importing marijuana into the United States, and at trial she testified in her own defense. Jenkins’s testimony included a confession to smuggling undocumented aliens on two prior occasions and echoed her statements to the border official at the January incident that she believed she was once again smuggling undocumented aliens, and not marijuana.

While the jury deliberated in the marijuana case, the government charged Jenkins with smuggling an undocumented alien, and later charged her for both October 2004 incidents. In the district court, Jenkins successfully moved to dismiss the alien-smuggling charges on the basis that the charges were vindictive. Jenkins claimed that “the government brought the alien smuggling charges in retaliation for her exercising her right to testify” in her

85. United States v. Jenkins (Jenkins I), 504 F.3d 694, 697 (9th Cir. 2007).
86. Id. at 697–98.
87. Id.
88. Id. at 698.
89. Id.
90. Id.
91. Id. Jenkins pointed to the October incidents, admitting that she had been paid to bring non-citizens across the border twice before and that she had been caught both times. Id.
92. Id.
93. Id.
94. Id. The jury convicted Jenkins of the marijuana smuggling charges, and Jenkins pled not guilty to the alien-smuggling charges. Id. at 698 & n.1.
95. Id.
own defense. The government argued that the charges were not vindictive because even though the government theoretically could have brought the charges earlier, Jenkins’s testimony under oath regarding the earlier crimes strengthened the government’s case. The government appealed the district court’s dismissal to the Ninth Circuit.

B. The Ninth Circuit’s Response to the Arguments in Jenkins I

1. The Majority Opinion of Jenkins

The Ninth Circuit in Jenkins I noted from the outset that it was addressing a claim of presumptive vindictiveness rather than actual vindictiveness. Not surprisingly, therefore, the Ninth Circuit concluded that the filing of the alien-smuggling charges created the appearance of vindictiveness thus triggering a presumption of vindictiveness. The court reached this conclusion upon determining that the government had a strong case against Jenkins before she ever testified at the marijuana trial. Specifically, it pointed to Jenkins’s October admissions to border officials and her admission in January to the border official regarding the October incidents. In addition, the court flatly rejected the government’s argument that the presumption of vindictiveness does not arise in cases where the subsequent charges “do not arise out of the same nucleus of operative fact.” The court stressed that the relatedness of the conduct upon which the charges are based is just one of the many factors affecting a vindictiveness determination.

The court then turned to the question of whether the government rebutted the presumption of vindictiveness, concluding that it did not. The court stated that to overcome the presumption, the government “must show that the

96. Id.
97. Id.
98. Id. at 699.
99. Id. Jenkins argued that the government brought the charges stemming from the October incidents because she testified at trial, thereby raising the presumption of vindictiveness. Id. at 698–99.
100. Id. at 699–701.
101. Id. at 700. The court noted that the government’s case “essentially was open and shut even before Jenkins testified in court.” Id.
102. Id. The court pointed out that although Jenkins received Miranda warnings before the second and third statements, the record was not clear that she had received the warning before the first statement in October. Id. at 700 n.2.
103. Id. at 700–01.
104. Id. at 701. The court acknowledged that Martinez appeared to foreclose the possibility that a presumption of vindictiveness can arise in situations where the subsequent charges are unrelated to the earlier charges. Id. However, it also noted that Martinez relied on Robison to reach this conclusion, and that Robison stated that the “relatedness of the charges ‘is neither dispositive nor essential to prove vindictiveness.’” Id. (quoting United States v. Robison, 644 F.2d 1270, 1272 (9th Cir. 1981)).
105. Id. at 701–02.
additional charges 'did not stem from a vindictive motive, or [were] justified by independent reasons or intervening circumstances that dispel the appearance of vindictiveness.'\textsuperscript{106} The government again argued that although it had evidence before trial, once Jenkins admitted to the October crimes under oath, the government had "no choice but to bring charges" because "to walk away from [the opportunity] would be inexcusable."\textsuperscript{107} The court rejected this argument and agreed with the district court's observation that the government had more evidence before Jenkins's testimony than is generally needed for a conviction.\textsuperscript{108} Finding that the government did not overcome the presumption of vindictiveness, the Ninth Circuit affirmed the district court's dismissal of the indictments related to the two October incidents.\textsuperscript{109}

2. The Dissent of Jenkins II and the Possible Impact of the Decision

After affirming the district court's decision in 2007, the Ninth Circuit denied the government's petition to rehear the case en banc in 2008 in \textit{United States v. Jenkins (Jenkins II)}.\textsuperscript{110} Seven judges dissented from the denial of rehearing, concluding that Jenkins did not establish the presumption of vindictiveness, and that the government's actions were well within its discretion.\textsuperscript{111} At the outset, the dissent pointed out the "well-established principle that courts should tread upon prosecutorial charging decisions with hesitation."\textsuperscript{112} The dissent concluded that the majority had effectively usurped the prosecutor's role, deciding that the government should have brought the charges earlier because it \textit{could} have.\textsuperscript{113}

\textsuperscript{106} \textit{Id.} at 701 (quoting \textit{United States v. Gallegos-Curiel}, 681 F.2d 1164, 1168 (9th Cir. 1982)).

\textsuperscript{107} \textit{Id.} (alteration in original). The government also argued that it did not wait to file the charges until after the trial was over because it wanted to avoid appearing vindictive. \textit{Id.} at 702. The court rejected this argument as well, finding that the government should have known Jenkins would testify about the two October crimes on the stand, and should therefore not have been surprised when she did. \textit{Id.}

\textsuperscript{108} \textit{Id.} at 701–02. The court stated that "although a confession in open court certainly added to the repertoire of evidence against Jenkins, we find the government's explanation unpersuasive." \textit{Id.} at 701.

\textsuperscript{109} \textit{Id.} at 702. Judge Suzanne B. Conlon, Senior United States District Judge for the Northern District of Illinois, sitting by designation, dissented from the decision in \textit{Jenkins I} for many of the same reasons articulated in the dissent from the denial of rehearing en banc. Therefore, this Note will not explore each dissent in detail; rather, this Note will focus on the dissent from the denial of rehearing en banc, which incorporates Judge Conlon's concerns.

\textsuperscript{110} \textit{United States v. Jenkins (Jenkins II)}, 518 F.3d 722, 723 (9th Cir. 2008).

\textsuperscript{111} \textit{Id.} at 723–24 (O'Scannlain, J., dissenting from the denial of rehearing en banc).

\textsuperscript{112} \textit{Id.} at 724. The dissent cited the Supreme Court's language in \textit{Wayte} dealing with selective prosecution, which stated that "the decision to prosecute is particularly ill-suited to judicial review" because courts simply cannot assess the strengths of a given case, or the government's motives and stake in a given case. \textit{Id.} at 725 (citing \textit{Wayte v. United States}, 470 U.S. 598, 607 (1985)).

\textsuperscript{113} \textit{Id.} at 725. The dissent argued that courts are in no position to weigh the same factors that the government does because courts have a very limited perspective of the charging process.
In reaching this conclusion, the dissent highlighted several places where it believed the majority opinion diverged from Ninth Circuit precedent. First, the dissent stated that the presumption of vindictiveness is not triggered when the new charge arises out of a different factual nucleus rather than the same nucleus. It further noted that the Seventh and Eleventh Circuits followed the same rule.

The dissent also pointed to United States v. Baker, a Ninth Circuit case standing for the proposition that "the content of a defendant's testimony on his own behalf can be used as the basis for a new prosecution against him." The dissent noted that the rationale behind this rule is that defendants should not be able to testify to crimes and then expect that the government will be barred from prosecuting that crime. Additionally, in Jenkins I, there was evidence

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1. Id.
2. Id. at 725–28.
3. Id. at 725 (quoting United States v. Martinez, 785 F.2d 663, 669 (9th Cir. 1986)).
4. See id. at 726–27. The Seventh Circuit addressed the precise issue in Williams v. Bartow. See supra notes 57–64 and accompanying text. In Williams, the defendant was on trial for child molestation in 1996, and a victim who was molested by the defendant in 1990 testified at the trial, leading the government to charge the defendant for the 1990 acts. See Williams v. Bartow, 481 F.3d 492, 501 (7th Cir. 2007). The Jenkins II dissent pointed out that after the prosecution introduced new charges based on the 1990 event, the Seventh Circuit found that the charges were not vindictive and, therefore, could stand. Jenkins II, 518 F.3d at 726 (O'Scannlain, J., dissenting from the denial of rehearing en banc). The Williams court had made a clear distinction between new charges based on related events and new charges arising out of different events. Williams, 481 F.3d at 502–03. The dissent in Jenkins II noted that the Jenkins II decision came out the exact opposite way, despite the fact that the facts of Jenkins I were closely aligned with those in Williams. Jenkins II, 518 F.3d at 726 (O'Scannlain, J., dissenting from the denial of rehearing en banc).

11. Jenkins II, 518 F.3d at 726–27 (O'Scannlain, J., dissenting from the denial of rehearing en banc). The dissent found that the majority opinion was at odds with the Eleventh Circuit's decision in Humphrey v. United States. Id. In Humphrey, prosecutors brought additional auto-theft charges against the defendant while the defendant was challenging a prior conviction. Humphrey v. United States, 888 F.2d 1546, 1549 (11th Cir. 1989). The Eleventh Circuit found that because the charges were brought for different conduct than that originally charged, no presumption of vindictiveness arose. Id. The Jenkins II dissent specifically noted that the Eleventh Circuit recognized a distinction between Blackledge and Humphrey, because Blackledge simply proscribed "substituting" harsher charges, whereas Humphrey was based on entirely new charges arising out of "independent acts." See Jenkins II, 518 F.3d at 727 (O'Scannlain, J., dissenting).

12. Jenkins II, 518 F.3d at 727 (O'Scannlain, J., dissenting from the denial of rehearing en banc) (citing United States v. Baker, 850 F.2d 1365, 1370 (9th Cir. 1988) (rejecting defendant's argument that his confessions at trial could not be used against him)). In Baker, the Ninth Circuit recognized the rule established by the Supreme Court in Harrison v. United States that "a defendant's testimony at a former trial is admissible against him in a later proceeding." Baker, 850 F.2d at 1370 (citing Harrison v. United States, 392 U.S. 219, 222 (1968)).

13. See Jenkins II, 518 F.3d at 727 (O'Scannlain, J., dissenting from the denial of rehearing en banc). The concern of the dissent is that the Jenkins II rule is at odds with Baker and also
that Jenkins had not been read her *Miranda* rights before her first confession at the first October incident, making the government’s argument that the in-court testimony strengthened the case more plausible.\(^\text{120}\)

In addition, the dissent was concerned that the *Jenkins I* rule was overly broad, and would have the practical effect of requiring a vindictiveness ruling whenever a criminal defendant has been previously charged with a crime.\(^\text{121}\)

Finally, the dissent noted that the *Jenkins I* decision created a circuit split on the issue of whether separate charges that are based on separate criminal conduct can trigger the presumption of vindictiveness.\(^\text{122}\) The dissent sided with the Fourth, Eighth, and Tenth Circuits, concluding that the presumption should only arise where the new charges are brought based on the same crime and are harsher.\(^\text{123}\) In closing, the dissent reiterated the untenable precedent set by *Jenkins I* and lamented the fact that the court had overstepped its boundaries, becoming too judicially active in the determination of when and where to bring charges—traditionally, decisions primarily within the prosecutor’s discretion.

In sum, the Ninth Circuit, in both *Jenkins I* and *Jenkins II*, believed that the decisions were consistent with Ninth Circuit precedent in treating the factual

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120. See *id.* at 724 & n.1; see also United States v. Jenkins (*Jenkins I*), 504 F.3d 694, 704 (9th Cir. 2007) (Conlon, J., dissenting) (pointing out that even the majority recognized that there is no evidence Jenkins received the proper *Miranda* warnings at the first October incident, and noting that while confessions to border agents are contestable by defendants, confessions under oath are “virtually unchallengeable” and therefore much stronger evidence). The dissent in *Jenkins I* also argued that Jenkins’s confession at trial served as an intervening cause, which normally justifies subsequent charges and rebuts the presumption of vindictiveness. *Jenkins I*, 504 F.3d at 704 (Conlon, J., dissenting).

121. *Jenkins II*, 518 F.3d at 727 (O'Scannlain, J., dissenting from the denial of rehearing en banc). The dissent pointed out that the traditional vindictiveness standard required a court to find vindictiveness only where a charging decision poses “a realistic likelihood of vindictiveness,” *id.* (quoting Blackledge v. Perry, 417 U.S. 21, 27 (1974)), but that the *Jenkins* rule pushes the court beyond its traditional role, requiring it to judge whether the government had a strong enough case to charge the defendant earlier. *Id.*

122. *Id.* at 728 (relying on United States v. Peoples, 360 F.3d 892, 892 (8th Cir. 2004), on which the Eighth Circuit held that the presumption is limited to cases where harsher charges are brought in a subsequent trial).

123. *Id.* (finding that generally, vindictiveness “involves a showing that the prosecutor has re-indicted the defendant and increased the severity of the charge, after the defendant has exercised a statutory or constitutional right” (quoting United States v. Burt, 619 F.2d 831, 836 (9th Cir. 1980))).

124. *Id.* The dissent predicted that *Jenkins* would lead to the “perverse result of compelling prosecutors to rely on ever-weaker evidence in bringing charges, lest they lose the opportunity to pursue those charges.” *Id.*
nucleus of charges as only one factor in determining vindictiveness.\textsuperscript{125} The dissents, on the other hand, concluded that the \textit{Jenkins I} decision not only veered away from Ninth Circuit precedent, but also diverged from other circuits that found the factual nucleus of charges to be a decisive and crucial factor in determining whether vindictiveness occurred.\textsuperscript{126}

III. \textit{JENKINS I NOT ONLY REFLECTS A SHIFT IN NINTH CIRCUIT JURISPRUDENCE, IT SOLIDIFIES A SPLIT WITH THE CONSENSUS OF OTHER CIRCUITS}

A. Jenkins I Did Not Confine the Presumption to Instances Where Subsequent Charges Are Based on the Same Underlying Conduct

In \textit{Jenkins I}, the defendant committed three distinct and separate crimes, each occurring on different dates.\textsuperscript{127} The Ninth Circuit in \textit{Jenkins I} concluded that because the defendant admitted to the two prior crimes when she was caught committing them, and then again while testifying in her own defense, the government was barred from prosecuting those two crimes.\textsuperscript{128} This is precisely the kind of judicial oversight of prosecutorial charging decisions that other courts have avoided.\textsuperscript{129}

\textit{Jenkins I} departed from the Ninth Circuit's precedent set forth in \textit{United States v. Martinez}, which clearly stated that the presumption of vindictiveness does not arise when the later charges are not related to the initial charges.\textsuperscript{130} In clear contradiction to this precedent, the Ninth Circuit in \textit{Jenkins I} stressed that

\begin{itemize}
  \item \textsuperscript{125} \textit{Jenkins I}, 504 F.3d at 700–01.
  \item \textsuperscript{126} \textit{Jenkins II}, 518 F.3d at 725 (O'Scannlain, J., dissenting from the denial of rehearing en banc).
  \item \textsuperscript{127} \textit{Jenkins I}, 504 F.3d at 698. Jenkins attempted to smuggle undocumented aliens into the United States on October 19, 2004, and October 20, 2004, and attempted to smuggle marijuana on January 9, 2005. \textit{Id}.
  \item \textsuperscript{128} \textit{Id}. at 702.
  \item \textsuperscript{129} \textit{See} \textit{Wayte v. United States}, 470 U.S. 598, 607 (1985) (finding that the government has broad discretion to prosecute, because "the decision to prosecute is particularly ill-suited to judicial review"); \textit{see also} \textit{United States v. Barner}, 441 F.3d 1310, 1319 (11th Cir. 2006); \textit{United States v. O'Hara}, 301 F.3d 563, 571 (7th Cir. 2002); \textit{United States v. Johnson}, 171 F.3d 139, 141 (2d Cir. 1999); \textit{United States v. Andrews}, 612 F.2d 235, 243–44 (6th Cir. 1980) (noting that prosecutors have "traditional and proper discretion in deciding which of multiple charges against a defendant are to be prosecuted or whether they are all to be prosecuted at the same time" (internal citation omitted)).
  \item \textsuperscript{130} \textit{See} \textit{United States v. Martinez}, 785 F.2d 663, 669 (9th Cir. 1986) (citing United States v. Robison, 644 F.2d 1270, 1273 (9th Cir. 1981) ("The defendant's position is weakened by the fact that the instant prosecution is based on a different set of facts from those previous prosecutions.")); \textit{see also} \textit{United States v. Griffin}, 617 F.2d 1342, 1347-48 (9th Cir. 1980) (finding that "an investigation into conduct different from that which has already been made the subject of an indictment should not be limited by the time schedule established for the earlier prosecution").
\end{itemize}
the nucleus of events upon which the charges are based is a non-determinative factor, even though it was the decisive factor in **Martinez**.\(^{132}\)

**Jenkins I** also split with the consensus among the circuits that had addressed this issue that the nucleus of events plays a significant role when determining whether the presumption arises.\(^{133}\) The distinction between charges based on the same conduct and charges based on different conduct makes sense, given the rationale and effect of the distinction\(^{134}\) and the Supreme Court’s wariness in extending the doctrine.\(^{135}\) In **Goodwin**, the Supreme Court reiterated that due process only requires the presumption in cases where prosecutors may be retaliating against defendants who have exercised a right.\(^{136}\) The Due Process Clause, however, does not provide criminals with blanket immunity for any criminal acts admitted in the course of trial.\(^{137}\) Yet the Ninth Circuit in **Jenkins I** held exactly that—that such confessions cannot be used against criminals if the government could potentially have brought the charges earlier.\(^{138}\)

Under the **Jenkins** rule, the defendant not only receives a windfall by escaping meritorious prosecution, but the prosecutor is barred from charging the defendant with a legitimate crime, even when the crime is unrelated to the original crime. Thus, a prosecutor is placed in a tricky predicament: either bring every potential charge based on every possible crime against a defendant at the same time regardless of the strength of the evidence, or delay bringing all possible charges and risk losing the chance of ever bringing them.

Curtailing the prosecutor’s charging discretion in this way seems counterintuitive and antithetical to our criminal-justice system. If **Jenkins I** had dealt with charges arising from the same nucleus of events, it would make more sense for the court to presume vindictiveness in the subsequent prosecution. If a prosecutor increased charges after the defendant exercised a legal right, that decision would be difficult to justify to a court and would

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131. **Jenkins I**, 504 F.3d at 700–01.

132. **Martinez**, 785 F.2d at 669 (noting that **Blackledge** never intended to give “the defendant a free ride for separate crimes he may have committed”).

133. *See* Williams v. Bartow, 481 F.3d 492, 501–03 (7th Cir. 2007); Johnson, 171 F.3d at 141; Humphrey v. United States, 888 F.2d 1546, 1549 (11th Cir. 1989); Andrews, 612 F.2d at 244.

134. *See* United States v. Jenkins (**Jenkins I**), 518 F.3d 722, 723–29 (9th Cir. 2008) (O’Scannlain, J., dissenting from the denial of rehearing en banc). The debate over whether added charges should be distinguished from substituted charges is not a recent development, and commentators have recognized that the distinction has created confusion among courts. *See* Whitehead, supra note 42, at 1145 (pointing out that disregarding the distinction could force a prosecutor to charge a defendant with every possible crime in order to avoid a vindictiveness charge later in the proceedings).


137. *See*, e.g., United States v. Bryser, 95 F.3d 182, 187 (2d Cir. 1996).

138. *See* United States v. Jenkins (**Jenkins I**), 504 F.3d 694, 700 (9th Cir. 2007).
reflect a "realistic likelihood of vindictiveness." However, when determining whether an actual, realistic likelihood of vindictiveness existed, the Ninth Circuit seemed more focused on deciding whether the prosecution could have charged the defendant earlier, thereby substituting its own judgment on charging decisions that are traditionally left to the prosecutor's broad discretion.

The Supreme Court has not applied the presumption of vindictiveness when additional charges have been brought against a defendant for crimes unrelated to the original crimes, but that is exactly what the Ninth Circuit did in Jenkins I. This decision effectively bars prosecutors from bringing subsequent charges based on criminal conduct known by the government at the time the initial charges were brought once a trial begins. Therefore, prosecutors will be forced to bring all possible charges at the outset of a case, thus drastically reducing the prosecutor's discretion in making charging decisions.


140. See United States v. Jenkins (Jenkins II), 518 F.3d 722, 727 (9th Cir. 2008) (O'Scannlain, J., dissenting from the denial of rehearing en banc); Jenkins I, 504 F.3d at 700. The Jenkins II dissent pointed out that the Ninth Circuit's inquiry into whether prosecutors could possibly have brought charges at an earlier time was wrong, and that the court should have instead been testing whether the prosecution's actions reflected a realistic likelihood of vindictiveness. Id. It has been argued that the appearance test ultimately "places an undue burden on the government to justify its actions" because the test creates too high a bar for the government to overcome. See Solomon, supra note 1, at 342. Additionally, Solomon argues that when courts apply the appearance test, which imposes closer review of charging decisions, they ignore "the adversarial nature of the criminal justice process." Id.

141. See Williams v. Bartow, 481 F.3d 492, 502 (7th Cir. 2007) (recognizing that the Supreme Court has not yet addressed whether Blackledge applies in cases where new charges are based on different crimes than those originally charged).

142. See Jenkins I, 504 F.3d at 700–01 ("[R]elatedness of the charges 'is neither dispositive nor essential to prove vindictiveness.'" (quoting United States v. Robison, 644 F.2d 1270, 1272 (9th Cir. 1981))).

143. See United States v. Andrews, 612 F.2d 235, 243 (6th Cir. 1980) ("We do not read [presumption-of-vindictiveness precedent] as taking away from prosecutors their traditional and proper discretion in deciding which of multiple charges against a defendant are to be prosecuted or whether they are all to be prosecuted at the same time." (citation omitted)).

144. Cf. United States v. Johnson, 171 F.3d 139, 141–42 (2d Cir. 1999) (noting that prosecutors might overcharge defendants to avoid being barred from bringing charges later); United States v. Esposito, 968 F.2d 300, 306 (3d Cir. 1992) (finding that a Jenkins-like application of the presumption would create a new rule "requir[ing] prosecutors to bring all possible charges in an indictment or forever hold their peace").
B. The Ninth Circuit Did Not Recognize the Explanation Offered by the Prosecution to Rebut the Presumption of Vindictiveness, Contrary to Other Circuits

The government in Jenkins I provided several reasons for bringing the new charges later than was possible, but the Ninth Circuit rejected them.\textsuperscript{145} Primarily, the prosecutor pointed to Jenkins's confession to both October 2004 incidents while testifying under oath at trial.\textsuperscript{146} The court rejected this explanation, finding that the prosecution could have brought the charges earlier because Jenkins already confessed to those crimes at the time of each incident to border officials.\textsuperscript{147}

However, the Seventh Circuit reached the opposite conclusion in Williams v. Bartow, a case procedurally similar to Jenkins I.\textsuperscript{148} In Williams, the court found the sworn testimony of sexual assault victims much more persuasive and significant than their accusations outside of court, especially because before trial, the only report the prosecutor had from the girls was given when they were quite young.\textsuperscript{149} Similarly, the testimony given by Jenkins was stronger evidence than her out-of-court confession to border officials.\textsuperscript{150} As the dissent in Jenkins I pointed out, it is much easier for defendants to challenge confessions made to law-enforcement officers than it is to challenge confessions made under oath.\textsuperscript{151}

Thus, the Ninth Circuit in Jenkins I should have given more weight to Jenkins's sworn confession and should have found that the confession was an intervening cause for bringing the later charges.\textsuperscript{152} Instead, the Ninth Circuit determined that the distinction between in-court, under-oath confessions, and an out-of-court statement to an arresting officer was insignificant and thus foreclosed prosecution of those crimes.\textsuperscript{153} In effect, the court sided with the defendant on principle rather than deciding the case based on precedent.

\textsuperscript{145} Jenkins I, 504 F.3d at 701–02.
\textsuperscript{146} Id. at 698.
\textsuperscript{147} Id. at 700–01. The Ninth Circuit admitted, however, that one of the confessions might not have occurred subsequent to proper Miranda warnings. Id. at 700 n.2. But see Johnson, 171 F.3d at 141 (finding that even though the government did not provide an excuse as to why it waited to bring additional charges until the defendant was acquitted by a jury, the presumption did not arise because the government could have had a legitimate reason for the delay).
\textsuperscript{148} See Williams v. Bartow, 481 F.3d 492, 501 (7th Cir. 2007).
\textsuperscript{149} Id. at 501.
\textsuperscript{150} Jenkins I, 504 F.3d at 701; cf. United States v. Saltzman, 537 F.3d 353, 362 (5th Cir. 2008) (ruling that a concession in open court could serve as the basis for added charges).
\textsuperscript{151} Jenkins I, 504 F.3d at 704 (Conlon, J., dissenting). The dissent pointed to the possibility that officers did not read Jenkins her Miranda rights before the first confession, which could serve as a basis for her to challenge the admissibility of the evidence. Id.
\textsuperscript{152} See id.; see also United States v. Bryser, 95 F.3d 182, 187 (2d Cir. 1996) (refusing to provide immunity from prosecution based on incriminating statements made during the course of a trial for other crimes).
\textsuperscript{153} Jenkins I, 504 F.3d at 701–02.
C. The Underlying Rationale of the Doctrine Does Not Support the Jenkins I Decision, Because Jenkins’s Testimony Was Not Burdensome to the Government

The Supreme Court has clearly articulated one method of identifying vindictiveness: an examination of the burden placed on the government by a defendant’s exercise of a right. In Blackledge, the Court noted that because new trials are so costly for the government, prosecutors have a “considerable stake” in deterring defendants from appealing. Therefore, the rule against vindictive prosecution exists, at least in part, to affect the incentive a prosecutor may have to use additional charges as a means to prevent costly criminal trials. It makes sense, then, that the presumption is triggered more easily in cases where the government is burdened by the defendant’s actions.

The converse of this rule also makes sense: in cases where the right exercised by a defendant does not burden the government, the presumption is less easily triggered. In Jenkins I, the right exercised by the defendant was testifying in her own defense. The burden placed on the government by the exercise of this right was far less than that imposed by an appeal or a retrial. In keeping with this aspect of the Supreme Court’s rationale behind the vindictiveness rule, the presumption of vindictiveness should not have arisen in Jenkins I.

D. The Prosecutorial Vindictiveness Doctrine Should Be Cabined Rather than Expanded, Contrary to the Ninth Circuit’s Holding in Jenkins I

The Supreme Court has reiterated that, in general, the decision whether to prosecute rests solely with the government. Although the federal courts of appeals agree with this premise, Jenkins I marks a dramatic shift in the type and intensity of judicial scrutiny of government charging decisions. As the

154. See United States v. Goodwin, 457 U.S. 368, 383 (1982) (finding that where harsher charges are brought following a defendant’s request for a jury trial, the presumption does not arise because a jury trial is not necessarily more burdensome than a bench trial); Blackledge v. Perry, 417 U.S. 21, 27–29 (1974) (finding that the presumption arises more easily when harsher charges are brought during a retrial, because the government must expend much time and effort to retry a defendant).

155. Blackledge, 417 U.S. at 27.

156. See id. at 27–28.

157. United States v. Jenkins (Jenkins I), 518 F.3d 722, 724 (9th Cir. 2008) (O’Scannlain, J., dissenting from the denial of rehearing en banc).

158. See Blackledge, 417 U.S. at 27–28.

159. See Wayte v. United States, 470 U.S. 598, 607–08 (1985) (noting that “[i]n our criminal-justice system, the Government retains ‘broad discretion’ as to whom to prosecute,” and that when courts scrutinize charging decisions, they must be careful not to “undermine prosecutorial effectiveness by revealing the Government’s enforcement policy”).

160. See Jenkins II, 518 F.3d at 725 (O’Scannlain, J., dissenting from the denial of rehearing en banc) (“Given the Supreme Court’s admonition against judicial oversight of prosecutorial charging decisions, it is not surprising that the doctrine of presumed vindictiveness has been
Supreme Court noted, courts are not in a good position to review decisions to charge because the government considers many factors when making charging decisions.\textsuperscript{161}

In \textit{Jenkins I}, the court reviewed the government's evidence with respect to Jenkins's prior criminal conduct before Jenkins testified, and determined that because the government had a strong enough case before hearing the testimony, the fact that its case became stronger after the testimony was of no consequence.\textsuperscript{162} It appears that after \textit{Jenkins I}, the Ninth Circuit will permit courts to substitute their own judgment as to when certain charges could or should have been brought instead of confining its reviews to the real question: whether the government truly acted with vindictiveness.\textsuperscript{163}

In addition, the Ninth Circuit's rule is inconsistent with the Supreme Court's warning against judicial oversight of charging decisions.\textsuperscript{164} Such judicial scrutiny is not good for any party involved criminal proceedings. It is not good for defendants who will face more charges based on less reliable evidence. It is not good for prosecutors who will be placed in a very difficult position with respect to charging decisions. It is not good for the integrity of the criminal-justice system because it could result in admitted criminals gaming the system to receive immunity.

\textbf{E. Jenkins I Will Lead to Further Erosion of the Doctrine and Greater Judicial Oversight ofProsecutorial Discretion}

The Ninth Circuit in \textit{Jenkins I} ignored the distinction between subsequent charges based on unrelated conduct and subsequent charges based on conduct arising out of the same factual nucleus.\textsuperscript{165} Because this rule departs from Martinez, which stressed the importance of this distinction in determining

\textsuperscript{161} See \textit{Wayte}, 470 U.S. at 607 (listing factors such as "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan").

\textsuperscript{162} \textit{Jenkins I}, 504 F.3d at 701–02.

\textsuperscript{163} Cf. United States v. Krezdom, 718 F.2d 1360, 1365 (5th Cir. 1984) (explaining that the Fifth Circuit looks to see whether a defendant could realistically believe the prosecution's charges were vindictive).

\textsuperscript{164} See United States v. Wasman, 468 U.S. 559, 566 (1984) (explaining the reluctance in extending the Blackledge doctrine); see also \textit{Wayte}, 470 U.S. at 607 (addressing the selective prosecution doctrine generally, but also noting the inherent difficulties in judicial oversight of charging decisions).

\textsuperscript{165} \textit{Jenkins II}, 518 F.3d at 725, 728 (O'Scannlain, J., dissenting from the denial of rehearing en banc).
whether the presumption arises, courts following Jenkins I are left to wonder just how important the distinction really should be. Particularly because other circuits treat this distinction as dispositive evidence of no vindictive motive, Jenkins I creates significant confusion among the circuits.166 Because other circuits have expressed disagreement with the Ninth Circuit in this area, other circuits will likely not follow Jenkins I.167 With respect to the vindictiveness doctrine, the Ninth Circuit seems to be moving in the opposite direction of the other circuits.

In addition, the Jenkins I decision seems to raise the bar for the showing that the prosecution must make to rebut the presumption of vindictiveness. In Jenkins I, the court did not consider a subsequent confession under oath to be an intervening circumstance, which would rebut the presumption.168 However, the Seventh Circuit reached the opposite conclusion, finding that such testimony clearly strengthens a prosecutor’s case, constitutes a meaningful intervening event, and therefore undermines any allegation of vindictiveness.169 Similarly, the Fifth Circuit has identified several ways by which prosecutors may overcome the presumption once it is established, each of which is at least somewhat incompatible with Jenkins.170 However, the Ninth Circuit does not provide such guidance, and courts looking to Jenkins I will likely find that more is required of prosecutors in the Ninth Circuit to rebut the presumption of vindictiveness. The consequence of this heightened standard is that courts may now provide defendants, such as Jenkins, blanket immunity for crimes committed and admitted under oath.

IV. CONCLUSION

Because defendants must be able to defend themselves without fearing retaliation from prosecutors, the doctrine of prosecutorial vindictiveness is

166. See Williams v. Bartow, 481 F.3d 492, 501–02 (7th Cir. 2007); United States v. Peoples, 360 F.3d 892, 896 (8th Cir. 2004) (citing Blackledge v. Perry, 417 U.S. 21, 28–29 (1974)) (“A presumption of vindictiveness arises only when a prosecutor chooses to bring a more serious charge against a defendant in a second trial.”); United States v. Miller, 948 F.2d 631, 633 (10th Cir. 1991); Humphrey v. United States, 888 F.2d 1546, 1549 (11th Cir. 1989); United States v. Andrews, 612 F.2d 235, 244 (6th Cir. 1979).

167. See, e.g., Andrews, 612 F.2d at 244 (disagreeing with the Ninth Circuit’s interpretation of Supreme Court vindictive prosecution precedent).

168. United States v. Jenkins (Jenkins I), 504 F.3d 694, 701 (9th Cir. 2007). Particularly because there was a potential Miranda violation during the arrest for the first border-smuggling incident, it would make sense that an under-oath confession would be a compelling intervening circumstance. See id. at 704 (Conlon, J., dissenting) (concluding that Jenkins’s trial testimony was much stronger evidence when compared to the confession to the border official).

169. See Williams, 481 F.3d at 501 (finding that testimony which was under oath and subject to cross-examination was much stronger evidence than out-of-court statements).

170. See Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977) (providing that acceptable explanations for delay in bringing charges include “mistake or oversight in the initial action, a different approach to prosecutorial duty by the successor prosecutor, or public demand for prosecution on the additional crimes allegedly committed”).
necessary in certain procedural settings. That, however, is the extent of the doctrine. As the Supreme Court has articulated, the Due Process Clause is not designed to give defendants any type of umbrella protection against legitimate charges by the government.\textsuperscript{171} The effect of the Ninth Circuit's rule in \textit{Jenkins I} is that defendants may become immune to prosecution for crimes they admit to committing while on trial for separate criminal behavior. \textit{United States v. Jenkins} exemplifies the Ninth Circuit's expansion of the doctrine beyond its original purpose as a procedural safeguard into a defendant's weapon that accomplishes far more than protecting due process rights.