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Amy J. Kappeler

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CHANGING THE TIDE OF DOUBLE JEOPARDY IN THE CONTEXT OF CONTINUING CRIMINAL ENTERPRISE

Rutledge v. United States, 116 S. Ct. 1241 (1996)

I. INTRODUCTION

In *Rutledge v. United States*,¹ the United States Supreme Court addressed the issue of whether a court may convict and impose concurrent sentences for continuing criminal enterprise (CCE)² and conspiracy to distribute controlled substances,³ a predicate offense of CCE.⁴ The Court held that conspiracy is a lesser included offense of CCE and that convictions for both offenses based upon the same underlying conduct violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.⁵ This decision ended eighteen years of ambiguity and confusion among the circuits created after Congress passed the CCE statute in 1970 and the Court published an ambiguous decision, *Jeffers v. United States*.⁶ In reaching its decision, the Court relied upon its historical interpretation of the Double Jeopardy Clause as prohibiting multiple punishments for the "same offense."⁷ The Court looked to the clear language of the CCE and conspiracy statutes in determining that, because the conspiracy statute describes a lesser included offense of CCE, conspiracy is the "same offense" as CCE.⁸ Thus, the Court remanded the case for vacation of one the convictions.⁹

This Note contends that the Court's failure to address inconsistencies between its reasoning in *Rutledge* and several of its prior deci-

¹ 116 S. Ct. 1241 (1996).

² 21 U.S.C. § 848 (1994).

³ 21 U.S.C. § 846 (1994).

⁴ *Rutledge*, 116 S. Ct. at 1241.

⁵ *Id.* at 1250-51.

⁶ 432 U.S. 137 (1977).

⁷ *Rutledge*, 116 S. Ct. at 1245; see U.S. CONST. amend. V, which provides, in pertinent part, "nor shall any person be subject for the same offense to be twice in jeopardy of life or limb. . . ."

⁸ *Id.* at 1247.

⁹ *Id.* at 1251.

sions in similar contexts will lead to confusion far greater than that resolved by the decision. First, the Court's conclusion that Congress did not intend to provide multiple punishment when CCE and drug conspiracy arise from the same act disregarded and is inconsistent with its analysis of congressional intent in *Garrett v. United States*¹⁰ where it faced a similar issue.¹¹ Second, the Court's reliance upon the *Blockburger*¹² "same-elements test" to conclude that conspiracy is a lesser included offense of CCE shared improper disregard for the question of whether the test should apply to compound offenses such as CCE. Finally, the Court's decision is inconsistent with its pronouncements in an analogous context, the Racketeer Influenced and Corrupt Organizations Act¹³ ("RICO"), in which the court has said that convictions for both RICO and conspiracy do *not* constitute double jeopardy.¹⁴

II. BACKGROUND

A. HISTORICAL INTERPRETATION OF THE DOUBLE JEOPARDY CLAUSE

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall be "twice put in jeopardy of life or limb" for the same offense.¹⁵ The United States Supreme Court has interpreted the Clause to provide three constitutional safeguards for defendants.¹⁶ The Clause "protects against a second prosecution for the same offense after acquittal. It protects against prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."¹⁷

In determining whether cumulative punishments or successive prosecutions violate the multiple punishment prong of the double jeopardy protection, the Court looks at whether two statutes relate to the "same offense."¹⁸ The Court has traditionally used the test promulgated in *Blockburger v. United States*,¹⁹ sometimes referred to as

¹⁰ 471 U.S. 773 (1985) (holding that conviction for CCE and narcotics importation, a predicate offense of CCE, does not violate the Double Jeopardy Clause).

¹¹ *Id.*

¹² *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (stating that two statutes define separate offenses if each requires proof of a fact that the other does not).

¹³ 18 U.S.C. §§ 1961-68 (1994).

¹⁴ *See, e.g., United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990), *cert. denied*, 500 U.S. 915 (1991).

¹⁵ U.S. CONST. amend. V; *see also Benton v. Maryland*, 395 U.S. 784 (1969) (holding that the Fifth Amendment's Double Jeopardy Clause applies to states through the Fourteenth Amendment).

¹⁶ *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

¹⁷ *Id.* (citations omitted).

¹⁸ *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

¹⁹ *Id.* *United States v. Dixon*, 509 U.S. 688, 704 (1993), overruled *Grady v. Corbin*, 495

the "same-elements" test, to determine whether two statutes punish the "same offense."²⁰ In *Blockburger*, the Court said that two offenses are not the same if "each provision requires proof of a fact which the other does not."²¹ The Court's subsequent decisions expanded the test to provide that two statutes define the "same offense" if one is a lesser included offense of the other.²²

More recently, the Court has used the *Blockburger* test as a means of determining congressional intent rather than as a strict rule to determine whether there has been a violation of the Double Jeopardy Clause.²³ The Court has said that the Double Jeopardy Clause "does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."²⁴ Thus, offenses are not the same for double jeopardy purposes if Congress intended cumulative prosecution and sentencing for an offense and its lesser included offense.²⁵ Therefore, even if the *Blockburger* test suggests that the offenses overlap for double jeopardy purposes, courts may still impose punishments for each offense if Congress made clear its intention to authorize such action.²⁶ However, in analyzing this issue, courts must presume that the legislature did *not* intend to impose two punishments for the same offense absent clear evidence to the contrary.²⁷

In addition, the Supreme Court has expanded the notion of what constitutes "punishment" for purposes of double jeopardy.²⁸ First, the Court has said that fines should be treated the same as cumulative prison sentences.²⁹ Thus, as the Court stated in *Jeffers v. United States*,³⁰ when a defendant is convicted of multiple, overlapping offenses, a fine for each constitutes multiple punishment in violation of

U.S. 508 (1990), thus ending a long debate by holding that courts should apply the *Blockburger* "same elements" test rather than the *Grady* "same conduct" test in determining whether two statutes define the same offense.

²⁰ *Dixon*, 509 U.S. at 696.

²¹ *Blockburger*, 284 U.S. at 304.

²² *See, e.g., Ball v. United States*, 470 U.S. 856, 861-64 (1985) (holding that prosecution for both "receipt" and "possession" of a firearm is multiple punishment because receipt necessitates proof of possession); *Whalen v. United States*, 445 U.S. 684, 693-94 (1980) (holding that rape and felony murder predicated on the rape constitute the same offense, and barred prosecution for both); *Brown v. Ohio*, 432 U.S. 161, 168 (1977) (stating that the *Blockburger* test leads to the conclusion that joyriding is a lesser included offense of auto theft).

²³ *Missouri v. Hunter*, 459 U.S. 359 (1983).

²⁴ *Id.* at 366.

²⁵ *See, e.g., id.*; *Garrett v. United States*, 471 U.S. 773, 794-95 (1985).

²⁶ *See, e.g., Garrett*, 471 U.S. at 794-95; *Hunter*, 459 U.S. at 369.

²⁷ *See, e.g., Ball*, 470 U.S. at 861; *Whalen*, 445 U.S. at 691-92.

²⁸ *See, e.g., Jeffers v. United States*, 432 U.S. 137, 155 (1977); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

²⁹ *Jeffers*, 432 U.S. at 155.

³⁰ *Id.*

the Double Jeopardy Clause.³¹

Second, in *Ball v. United States*,³² the Court said that collateral consequences may constitute impermissible multiple punishment.³³ The Court's examples of possible collateral consequences included: delaying the defendant's eligibility for parole, an increased sentence for a future offense, impeachment in future legal proceedings, and exacerbated societal stigma.³⁴ Even when prison sentences run concurrently, the existence of collateral consequences makes it as impermissible to impose a second conviction as to impose a cumulative prison sentence.³⁵ Therefore, where collateral consequences result, a prosecutor may seek and try more than one indictment, but a court can only convict and sentence a defendant for one of those counts.³⁶

B. CONTINUING CRIMINAL ENTERPRISE

In 1970, Congress responded to the country's drug problems by enacting the Comprehensive Drug Abuse Prevention and Control Act.³⁷ This Act shifted the focus of drug enforcement from small time users to drug peddlers, or "kingpins."³⁸ The Act created the crime of "continuing criminal enterprise" ("CCE"), for which a conviction results in mandatory sentences without parole.³⁹ Section 848 CCE is a compound crime.⁴⁰ The statute provides

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony and (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources.⁴¹

³¹ *Id.*

³² 470 U.S. 856 (1985) (holding that the Government could seek an indictment against defendant for receiving and possessing same weapon, but defendant could not suffer two convictions or sentences on that indictment).

³³ *Id.* at 865.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ 21 U.S.C. §§ 801-966 (1994).

³⁸ See Comprehensive Drug Abuse Prevention and Control Act of 1970, H.R. REP. NO. 91-1444 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4570; see also *Garrett v. United States*, 471 U.S. 773, 781 (1985); Susan W. Brenner, S.C.A.R.F.A.C.E.: A Speculation on Double Jeopardy and Compound Criminal Liability, 27 NEW ENG. L. REV. 915, 935-36 (1993).

³⁹ 21 U.S.C. § 848 (1994).

⁴⁰ See *id.* A "compound crime" is one in which two or more criminal elements must exist in order for the crime to exist. BLACK'S LAW DICTIONARY 286 (6th ed. 1990).

⁴¹ 21 U.S.C. § 848(c).

That is, the government must show that the defendant committed a series of narcotic violations, or "predicate offenses," while organizing or supervising at least five other people and deriving substantial income from the operation.⁴²

C. IMPLICATIONS OF DOUBLE JEOPARDY IN CCE CONTEXT

Although the CCE offense had been the subject of extensive constitutional scrutiny since its inception in 1970 and amendments in 1984,⁴³ The Supreme Court did not answer the constitutional question of whether convictions for CCE and any of its predicate offenses based upon the same series of actions violate the Double Jeopardy Clause until 1996.⁴⁴ Before *Rutledge*, the Supreme Court had dealt with this issue only two times and had not heard a CCE case since 1985.⁴⁵ In the interim, several lines of decisions developed among federal circuit courts as to whether the courts can enter convictions and sentences for both CCE and its predicate offense of narcotics conspiracy where a jury returns verdicts of guilty for both charges.⁴⁶

1. Supreme Court Decisions

a. *Jeffers v. United States*⁴⁷

Jeffers v. United States was the first case in which the Supreme Court addressed CCE. In *Jeffers*, a grand jury returned two indictments against Jeffers.⁴⁸ The first charged him with § 846 narcotics conspiracy and § 841 substantive distribution, which are both predicate offenses to CCE.⁴⁹ The second indictment charged him with operating a CCE.⁵⁰ The Government moved to join the indictments under one trial stating that the offensive acts involved a common plan.⁵¹ The court denied this motion.⁵² Then the Government made the seemingly contradictory claim, in response to a double jeopardy

⁴² See *id.*

⁴³ See Phillip H. Cherney, *Thrice in Jeopardy: The CCE Prosecution of Felix Mitchell*, 27 SANTA CLARA L. REV. 515, 516 (1987) (discussing the Court's fleshing out of issues relating to vagueness and cruel and unusual punishment).

⁴⁴ *Id.*

⁴⁵ See *Garrett v. United States*, 471 U.S. 773 (1985); *Jeffers v. United States*, 432 U.S. 137 (1977).

⁴⁶ See *infra* Part II.C.2.

⁴⁷ 432 U.S. 137 (1977).

⁴⁸ *Id.* at 140.

⁴⁹ *Id.* Section 848 requires, among other things, that the defendant acted "in concert with five or more other persons," while § 846 requires agreement among the defendant and one or more other parties. See 21 U.S.C. § 848(c).

⁵⁰ *Jeffers*, 432 U.S. at 141.

⁵¹ *Id.* at 142.

⁵² *Id.*

argument in Jeffers motion to dismiss, that the § 846 conspiracy and § 848 CCE were wholly separate offenses.⁵³ The trial court denied the motion to dismiss, implicitly accepting the argument that neither the parties nor the charges for each offense were the same.⁵⁴

After conviction for conspiracy in the first trial, Jeffers moved to dismiss the CCE case against him.⁵⁵ Contrary to his argument against the Government's joinder motion, Jeffers said that CCE and conspiracy were the same offense, so prosecution for CCE after his conviction for conspiracy violated the Double Jeopardy Clause.⁵⁶ The trial court rejected the motion, and the Seventh Circuit affirmed.⁵⁷ Jeffers appealed to the Supreme Court.⁵⁸

The Supreme Court refused to consider whether the Government's use of a single series of actions to prove both § 846 conspiracy and § 848 CCE violated the Double Jeopardy Clause.⁵⁹ Instead, a plurality held that by electing to have the offenses tried in separate proceedings, the defendant waived any right he may have had to object to the subsequent prosecution for CCE.⁶⁰ Justice White concurred with the judgment based upon his conclusion that conspiracy is not a lesser included offense of CCE.⁶¹ Thus, the Court allowed both of Jeffers' convictions to stand.⁶²

Although the Court did not squarely decide the constitutionality of convictions for both conspiracy and CCE, the opinion strongly suggested that, absent extenuating circumstances such as those in *Jeffers*, this would violate the Fifth Amendment.⁶³ First, although the Court's holding rendered it unnecessary for the plurality to examine the lesser included offense issue, the Court assumed that conspiracy was a lesser included offense of CCE "for purposes of argument."⁶⁴ The plurality rejected the Government's argument that the "in concert" language in § 848 required something different than the element of "agreement" required by § 846 for a conviction of narcotics conspiracy.⁶⁵ Thus, the Court concluded that § 846 conspiracy is a lesser in-

⁵³ *Id.* at 144.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See *Jeffers v. United States*, 532 F.2d 1101 (7th Cir. 1976).

⁵⁸ *Jeffers*, 432 U.S. 137.

⁵⁹ *Id.* at 152.

⁶⁰ *Id.*

⁶¹ *Id.* at 158 (White, J., concurring in the judgment in part).

⁶² *Id.*

⁶³ *Id.* at 149-57.

⁶⁴ *Id.* at 149-50.

⁶⁵ *Id.* at 148-49.

cluded offense of § 848 CCE.⁶⁶

Finally, after concluding that the government had the right to prosecute the defendant for both offenses, the plurality examined whether the court could permissibly impose cumulative punishment in the form of separate fines.⁶⁷ The Court said that even though the Government had the right to try the defendant for both offenses, Congress did not intend for courts to impose multiple penalties.⁶⁸ Thus, the Court remanded the case to reduce the total of the defendant's two fines from \$125,000 to \$100,000, the maximum amount allowable under § 848.⁶⁹

b. *Garrett v. United States*⁷⁰

Examining a similar issue, the Court in *Garrett v. United States* held that a conviction for CCE and narcotics importation, a substantive predicate offense⁷¹ of CCE, did not violate the Double Jeopardy Clause.⁷²

Garrett organized and directed an enterprise that imported and distributed marijuana.⁷³ He pled guilty to a charge for importing, and a jury sentenced him to five years in prison and a \$15,000 fine.⁷⁴ Two months later and in a different district, the Government charged him with CCE.⁷⁵ Based upon evidence of importation used to prove the previous charge, the jury found Garrett guilty.⁷⁶ The court sentenced Garrett to forty years imprisonment to be served consecutively with his earlier sentence.⁷⁷ The Eleventh Circuit affirmed.⁷⁸

On appeal to the Supreme Court, the defendant claimed that his conviction for CCE violated double jeopardy because facts from his

⁶⁶ *Id.* at 150-51. The Court went on to say that although *Brown v. Ohio*, 432 U.S. 161 (1977), prohibits prosecution for a greater offense and its lesser included offense, as this would be prosecution for the "same offense" in violation of the Double Jeopardy Clause, the defendant triggered an exception to *Brown* by electing to have the offenses tried in separate proceedings.

⁶⁷ *Jeffers*, 432 U.S. at 155-57.

⁶⁸ *Id.* at 157.

⁶⁹ *Id.* at 157-58.

⁷⁰ 471 U.S. 773 (1985).

⁷¹ Courts often distinguish between a "substantive" predicate offense, that is one which is complete in itself and not dependent upon another, and a predicate offense of "conspiracy" which depends upon the existence of another "target crime" contemplated by the conspiracy.

⁷² *Garrett*, 471 U.S. at 793.

⁷³ *Id.* at 775.

⁷⁴ *Id.*

⁷⁵ *Id.* at 776.

⁷⁶ *Id.* at 776-77.

⁷⁷ *Id.*

⁷⁸ *Garrett v. United States*, 727 F. 2d 1003 (11th Cir. 1984).

prior conviction for drug importation were used to prove necessary elements of CCE.⁷⁹ The defendant said that since his prior conviction was for a lesser included offense of CCE, the conviction implicated both the multiple punishment and the successive punishment prongs of double jeopardy.⁸⁰

In an opinion written by Justice Rehnquist,⁸¹ the Court held that because Congress intended to allow cumulative sentences for CCE and conspiracy, the convictions did not violate double jeopardy.⁸² Justice Rehnquist said that the language, structure and legislative history of the Controlled Substances Act indicate that Congress intended CCE to be a distinct offense punishable in addition to, not as an alternative for, predicate offenses.⁸³ The Court assumed that, absent evidence to the contrary, in creating CCE and its predicate offenses, Congress intended to authorize cumulative punishment.⁸⁴

The Court briefly distinguished this case from *Jeffers*.⁸⁵ Justice Rehnquist said that in the case of conspiracy and CCE, the dangers to be protected against are sufficiently similar, and thus cumulative punishment is unnecessary.⁸⁶ The Court stated that convictions for CCE and a substantive predicate offense such as drug importation, are distinguishable, so that the Court in *Garrett* faced a distinct issue not addressed in *Jeffers*.⁸⁷

2. *Split in the Circuits*

The federal circuit courts utilized differing interpretations of the Supreme Court's pronouncements on double jeopardy in the context of CCE and conspiracy.⁸⁸ The approaches differed in whether they allowed convictions and sentences for each offense. The ambiguity of *Jeffers* and the lack of a consistent standard left the multiple punish-

⁷⁹ *Garrett v. United States*, 471 U.S. 773, 777-78 (1985).

⁸⁰ *Id.*

⁸¹ Justice Rehnquist was joined by Chief Justice Burger and Justices Blackmun, White, and O'Connor.

⁸² *Garrett*, 471 U.S. at 793.

⁸³ *Id.* at 778-86.

⁸⁴ *Id.* at 793.

⁸⁵ *Id.* at 794.

⁸⁶ *Id.*

⁸⁷ *Id.* at 794-95.

⁸⁸ See *United States v. Rutledge*, 40 F.3d 879, 886 (7th Cir. 1994) (holding that a court may enter convictions for both CCE and conspiracy); *United States v. Medina*, 940 F.2d 1247 (9th Cir. 1991) (holding that a court can only enter judgment for either CCE or conspiracy, but if one of the convictions is overturned on appeal, the other may be reinstated); *United States v. Aiello* 771 F.2d 621, 632-35 (2d Cir. 1985) (holding that findings of guilt for CCE and conspiracy must be combined and entered as a single conviction); *United States v. Smith*, 703 F.2d 627 (D.C. Cir. 1983) (per curiam) (holding that courts may enter only one judgment on convictions for CCE and conspiracy).

ment prong of double jeopardy in "disarray."⁸⁹

A majority of the circuits have held that courts may enter only one judgment when a jury finds a defendant guilty of both conspiracy and CCE.⁹⁰ Most of these courts interpreted *Jeffers* to prohibit convictions and sentences for both offenses.⁹¹ These courts believed that *Jeffers* concluded that conspiracy is a lesser-included offense of CCE, so punishments for both would violate double jeopardy.⁹² Some of the majority courts cited the Court's decision in *Ball v. United States*⁹³ as support for the conclusion that CCE and conspiracy convictions violate double jeopardy's prohibition against multiple punishment because of the adverse collateral consequences of a second conviction.⁹⁴

The Second and Third Circuits adopted an intermediate position.⁹⁵ In those circuits, when a jury returns verdicts of guilty for CCE and conspiracy charges based on the underlying conduct, the courts "combined" the two convictions into a single count.⁹⁶ The punishment for this count could not exceed that maximum allowable for the greater offense.⁹⁷

The Ninth Circuit took a position similar to the Second and Third Circuits.⁹⁸ Although it did not specifically address a conviction for CCE and § 846 conspiracy, the Ninth Circuit adopted a general approach for cases in which the court may charge and try a defendant for two offenses but may enter only one conviction.⁹⁹ In such cases, the court stayed the sentence and entry of judgment of conviction on all but one count.¹⁰⁰ Then, the Circuit authorized the district court to

⁸⁹ *Fernandez v. United States*, 500 U.S. 948 (1991) (White, J., dissenting from denial of certiorari).

⁹⁰ See, e.g., *United States v. Jones*, 918 F.2d 909 (11th Cir. 1990) (per curiam); *United States v. Rivera*, 900 F.2d 1462 (10th Cir. 1990); *United States v. Butler*, 885 F.2d 195 (4th Cir. 1989); *Smith*, 703 F.2d at 627; *United States v. Michel*, 588 F.2d 986 (5th Cir. 1979).

⁹¹ See *Jones*, 918 F.2d at 909; *Rivera*, 900 F.2d at 1462; *Smith*, 703 F.2d at 627; *Butler*, 885 F.2d at 195; *Michel*, 588 F.2d at 986.

⁹² *Jones*, 918 F.2d at 909; *Rivera*, 900 F.2d at 1462; *Smith*, 703 F.2d at 627; *Butler*, 885 F.2d at 195; *Michel*, 588 F.2d at 986.

⁹³ 470 U.S. 856 (1985).

⁹⁴ *United States v. Montanye*, 962 F.2d 1332, 1346-47 (8th Cir. 1992); *United States v. David*, 940 F.2d 722, 738-39 (1st Cir. 1991); *United States v. Schuster*, 769 F.2d 337, 343-45 (6th Cir. 1985).

⁹⁵ See, e.g., *United States v. Fernandez*, 916 F.2d 125, 128-29 (3d Cir. 1990); *United States v. Aiello* 771 F.2d 621, 632-35 (2d Cir. 1985).

⁹⁶ See *Fernandez*, 916 F.2d at 128-29; *Aiello*, 771 F.2d at 632-35.

⁹⁷ See *Fernandez*, 916 F.2d at 128-29; *Aiello*, 771 F.2d at 632-35.

⁹⁸ See *United States v. Medina*, 940 F.2d 1247, 1252-53 (9th Cir. 1991); *United States v. Palafox*, 764 F.2d 558, 564 (9th Cir. 1985).

⁹⁹ See *Medina*, 940 F.2d at 1252-53; *Palafox*, 764 F.2d at 564.

¹⁰⁰ Cf. *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1582 (9th Cir. 1989) (holding that conviction on drug conspiracy offense must be vacated in light of CCE conviction, but not stating whether drug conspiracy conviction could be reinstated if CCE conviction

enter a judgment of conviction and sentence on the remaining count or counts if a court ultimately reverses the entered conviction.¹⁰¹

The Seventh Circuit's position on this issue was at odds with all of the other circuits.¹⁰² The Seventh Circuit held that double jeopardy allowed separate convictions for CCE and conspiracy, as long as the cumulative sentence did not exceed the maximum allowable under the CCE statute.¹⁰³ Like the other circuits, the Seventh Circuit cited *Jeffers* as support for this conclusion.¹⁰⁴ The court interpreted the *Jeffers* Court's upholding of concurrent sentences as condoning separate sentences.¹⁰⁵ Also, in *United States v. Bond*,¹⁰⁶ the Seventh Circuit rejected the *Ball* Court's approach to collateral consequences of multiple convictions.¹⁰⁷ The *Bond* court stated that the unavailability of parole for the CCE conviction negates the concern that multiple convictions will hurt the defendant at parole time.¹⁰⁸

III. FACTS AND PROCEDURAL HISTORY

Tommy Rutledge organized and supervised a cocaine distribution enterprise from November 1986 until his arrest by federal agents in December 1990.¹⁰⁹ Rutledge began the enterprise by personally making biweekly deliveries of cocaine to Roger Malott in Astoria, Illinois.¹¹⁰ Rutledge initially purchased the cocaine from Juan Gonzalez, an acquaintance from prison and a member of Chicago's Latin Kings street gang.¹¹¹

Rutledge's operations continued when he moved from Chicago to Youngstown, Illinois.¹¹² In Youngstown, Rutledge relied upon Roberto Laurel, another member of the Latin Kings, to provide weapons and drugs.¹¹³ Around this time, Rutledge recruited Malott and at least seven others to join his enterprise.¹¹⁴ These employees deliv-

was overturned).

¹⁰¹ See, e.g., *id.*

¹⁰² See, e.g., *United States v. Rutledge*, 40 F.3d 879, 886 (7th Cir. 1994); *United States v. Bafia*, 949 F.2d 1465, 1473 (7th Cir. 1991); *United States v. Bond*, 847 F.2d 1233, 1238-39 (7th Cir. 1988), *cert. denied*, 117 S. Ct. 270 (1996).

¹⁰³ See, e.g., *Rutledge*, 40 F.3d at 886; *Bafia*, 949 F.2d at 1473; *Bond*, 847 F.2d at 1238-39.

¹⁰⁴ See, e.g., *Rutledge*, 40 F.3d at 886; *Bafia*, 949 F.2d at 1473; *Bond*, 847 F.2d at 1238-39.

¹⁰⁵ *Bond*, 847 F.2d at 1238-39.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1239.

¹⁰⁸ *Id.*

¹⁰⁹ *Rutledge*, 40 F.3d at 882-83.

¹¹⁰ *Id.* at 882.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

ered cocaine and collected debts for Rutledge's drug sales.¹¹⁵ To maintain control over his operation, Rutledge secured a cache of firearms which he bought and traded for cocaine.¹¹⁶

From November 1988 until his arrest in July 1989, Rutledge based his operations in a trailer in Youngstown that he shared with three of his underlings.¹¹⁷ In July 1989, the Illinois State Police searched the trailer based upon statements made by Malott.¹¹⁸ Upon finding weapons, but no drugs, the police arrested Rutledge.¹¹⁹ When Rutledge discovered that Malott had made incriminating statements to the police, Rutledge threatened Malott and another employee with serious harm if either testified against him in court.¹²⁰ Consequently, both testified before a state grand jury that Rutledge had no involvement with drugs or guns, forcing the state to release Rutledge.¹²¹

After his release, Rutledge continued his drug operations until federal authorities arrested him in December 1990.¹²² The United States District Court for the Central District of Illinois charged Rutledge with six offenses related to his dealings in drugs and firearms: operating a continuing criminal enterprise in violation of 21 U.S.C. § 848, conspiring to distribute cocaine in violation of 21 U.S.C. § 846, distributing cocaine in violation of 21 U.S.C. § 841(a)(1), possessing a firearm after being convicted of a felony in violation of 18 U.S.C. § 922(g), and two counts of using or carrying a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c).¹²³

After a nine-day trial in which several of Rutledge's employees testified against him, a jury found Rutledge guilty on each of the six counts.¹²⁴ The court sentenced Rutledge to three terms of life imprisonment without parole for the CCE offense, the drug conspiracy offense, and the substantive cocaine distribution offense.¹²⁵ The court also sentenced Rutledge to a sentence of ten years imprisonment for possession of a firearm as a convicted felon, five years imprisonment for carrying a firearm in relation to drug trafficking, and an additional

¹¹⁵ *Id.* The employees included Shelly Henson, Richard Hagemaster, Rick Bolen, Randy Mustread, Kim Mummert, Tom Crowe, and Stan Winters. *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 882-83.

¹²⁰ *Id.* at 883.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Brief for the United States at 2, *Rutledge v. United States*, 116 S. Ct. 1241 (1996) (No. 94-8769).

¹²⁴ *Rutledge v. United States*, 116 S. Ct. 1241, 1244 (1996).

¹²⁵ Brief for the United States at 3, *Rutledge* (No. 94-8769).

ten-year sentence for the similar sixth count.¹²⁶ Rutledge was to serve all six of these prison sentences concurrently.¹²⁷ Finally, pursuant to 18 U.S.C. § 3013, the court imposed a fifty-dollar special assessment on each count for a total of \$300.¹²⁸

On appeal, the Seventh Circuit affirmed.¹²⁹ In a pro se supplemental brief, Rutledge argued that the conviction and sentence on both the CCE and conspiracy charge violated the Double Jeopardy Clause of the Fifth Amendment by punishing him twice for the same offense.¹³⁰ Although it agreed with the premise that the conspiracy charge was a lesser included offense of the CCE charge, the Seventh Circuit stated that the trial court did not violate Rutledge's Fifth Amendment rights.¹³¹ Relying upon its decision in *United States v. Bond*,¹³² and the Supreme Court decision in *Jeffers v. United States*,¹³³ the court held that concurrent sentences for CCE and conspiracy are permissible when the cumulative punishment does not exceed the maximum sentence allowable under the CCE statute.¹³⁴

The United States Supreme Court granted certiorari¹³⁵ to determine whether the convictions for CCE and conspiracy violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.¹³⁶

IV. SUMMARY OF OPINION

The United States Supreme Court reversed the Seventh Circuit in a unanimous opinion written by Justice Stevens.¹³⁷ Justice Stevens agreed that conspiracy is a lesser included offense of CCE.¹³⁸ However, contrary to the Seventh Circuit, Justice Stevens asserted that

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *United States v. Rutledge*, 40 F.3d 879 (7th Cir. 1994). This appeal also affirmed Shelly Henson's and Richard Hagemaster's convictions for conspiring to distribute cocaine in violation of 21 U.S.C. § 846.

¹³⁰ *Id.* at 886. Other issues raised on appeal and dismissed as meritless included: Rutledge's contention that the court denied him a fair trial because several jurors saw him in handcuffs outside the courtroom; his contention that testimony regarding his connection with the Latin Kings was irrelevant and prejudicial and thus the court should have excluded it; and his contention that because one witness did not did not testify at trial, the court should have omitted the witness' statements from the presentence report.

¹³¹ *Id.*

¹³² 847 F.2d 1233, 1238 (7th Cir. 1988).

¹³³ 432 U.S. 137, 155-57 (1977).

¹³⁴ *Rutledge*, 40 F.3d at 886.

¹³⁵ *Rutledge v. United States*, 115 S. Ct. 2608 (1995).

¹³⁶ *Rutledge v. United States*, 116 S. Ct. 1241 (1996).

¹³⁷ *Id.* at 1244.

¹³⁸ *Id.* at 1250.

Congress intended to authorize only one punishment for the act of conspiring.¹³⁹ Consequently, one of Rutledge's convictions and the concurrent sentence constituted impermissible punishment for the same offense and required vacation.¹⁴⁰

Justice Stevens began by stating the general rule that courts may not "prescrib[e] greater punishment than the legislature intended."¹⁴¹ Where two statutory provisions address the "same offense," a court must presume that a legislature did not intend to impose two punishments for that offense.¹⁴² According to Justice Stevens, the Court determines whether two statutes describe the "same offense" by applying the test promulgated in *Blockburger v. United States*,¹⁴³ which looked at "whether each provision requires proof of a fact which the other does not."¹⁴⁴ Furthermore, Justice Stevens pointed out that two different statutes define the "same offense" when one offense is a lesser included offense of the other.¹⁴⁵

The Court then applied the *Blockburger* rule to *Rutledge* and determined that CCE clearly requires proof of additional elements beyond those of conspiracy.¹⁴⁶ However, according to Justice Stevens, the tougher question under *Blockburger* was whether conspiracy required proof of any element not included in the CCE offense.¹⁴⁷

In examining this issue, the Court noted that *Jeffers*¹⁴⁸ explicitly rejected the proposition that the "in concert" element of CCE may be satisfied by something less than "an actual agreement among the parties" required in a prosecution for conspiracy.¹⁴⁹ The Court also pointed out that appellate courts have consistently held that conspiracy is a lesser included offense of CCE.¹⁵⁰ For these reasons, the Court held that conspiracy is not distinguishable from CCE and characterized conspiracy as a lesser included offense of CCE.¹⁵¹

Next, Justice Stevens rejected the Government's argument that even if conspiracy is a lesser included offense of CCE, the second con-

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1250-51.

¹⁴¹ *Id.* at 1245 (quoting *Missouri v. Hunter*, 459 U.S. 359, 366 (1983)) (internal quotations omitted).

¹⁴² *Id.* (citing *Ball v. United States*, 470 U.S. 856, 861 (1985); *Whalen v. United States*, 445 U.S. 684, 691-92 (1980)).

¹⁴³ 284 U.S. 299, 304 (1932).

¹⁴⁴ *Rutledge*, 116 S. Ct. at 1245 (quoting *Blockburger*, 284 U.S. at 304).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ 432 U.S. 137 (1977).

¹⁴⁹ *Rutledge*, 116 S. Ct. at 1246 (citing *Jeffers v. United States*, 432 U.S. 137 (1977)).

¹⁵⁰ *Id.* at 1247.

¹⁵¹ *Id.*

viction does not constitute a punishment when the defendant serves the two sentences concurrently.¹⁵² According to Justice Stevens, the fifty-dollar assessment for the second conviction will always constitute a second punishment.¹⁵³ Furthermore, regardless of the fifty-dollar assessment, he determined that the Court's decision in *Ball v. United States*¹⁵⁴ limited the Government's argument.¹⁵⁵ Justice Stevens said that even where a second sentence is served concurrently, the collateral consequences of the second conviction and sentence make it just as impermissible as a cumulative sentence.¹⁵⁶ The Court determined that, at the very least, the fifty-dollar assessment constituted an impermissible collateral consequence.¹⁵⁷

Justice Stevens also disagreed that the Government could overcome the general presumption against allowing multiple punishments because Congress intended to allow courts to impose them in the case of CCE and conspiracy.¹⁵⁸ First, Justice Stevens criticized the Government's use of *Jeffers*¹⁵⁹ to support this argument.¹⁶⁰ He said that the Court's decision to uphold convictions for conspiracy and CCE in *Jeffers* did not control the present case and, furthermore, had no relation to congressional intent.¹⁶¹ Justice Stevens noted that the plurality upheld the convictions there because the petitioner waived his right to object to the second conviction, while the concurrence maintained that the two convictions were not for the "same offense."¹⁶² Justice Stevens would not infer a suggestion by the plurality in *Jeffers* that Congress intended to allow dual convictions.¹⁶³

In response to the Government's final argument, Justice Stevens said that the Court had already developed rules to avoid the need to provide a "back up" conviction in case a defendant successfully appealed the greater offense.¹⁶⁴ Most federal appellate courts have concluded that a court may enter a judgment for a lesser included offense when a court reverses a conviction for the greater offense on grounds that only affect the greater offense.¹⁶⁵ Because neither legislatures

¹⁵² *Id.* at 1247-48.

¹⁵³ *Id.* at 1247.

¹⁵⁴ 470 U.S. 856 (1985). See *supra* notes 32-36 and accompanying text.

¹⁵⁵ *Rutledge*, 116 S. Ct. at 1248.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ 432 U.S. 137, 152-54 (1977) (allowing convictions for both conspiracy and CCE).

¹⁶⁰ *Rutledge v. United States*, 116 S. Ct. 1241, 1248 (1996).

¹⁶¹ *Id.* at 1248-49.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1250.

nor courts feel it necessary to impose multiple convictions, Justice Stevens rejected the Government's argument that Congress intended to do so in creating the CCE and conspiracy statutes.¹⁶⁶

Justice Stevens concluded that narcotics conspiracy constitutes a lesser included offense of CCE and that Congress did not intend to authorize more than one punishment for a single act of conspiring.¹⁶⁷ Therefore, multiple convictions and sentences for CCE and conspiracy violate the Double Jeopardy Clause.¹⁶⁸ Accordingly, the Court remanded the case with instructions to vacate one of Rutledge's convictions and sentences.¹⁶⁹

V. ANALYSIS

While the Supreme Court definitively resolved the issue of whether convictions and sentences for CCE and conspiracy constitute double jeopardy, the Court's reasoning was troubling for several reasons. In Part A below, this Note argues that the Court inappropriately disregarded *Garrett*,¹⁷⁰ the applicable precedent in *Rutledge*.¹⁷¹ Part B contends that the Court applied the wrong test in determining whether CCE and conspiracy constitute the "same offense" for purposes of double jeopardy. Part C argues that the Court should have based its decision upon reasoning used in the analogous context of RICO and conspiracy. Finally, Part D offers as a possible explanation for the Court's inappropriate decision in *Rutledge* its conservative adherence to the letter of the law.

A. THE COURT SHOULD HAVE APPLIED THE *GARRETT* REASONING TO *RUTLEDGE*

1. *Because There is no Legitimate Distinction Between Garrett and Jeffers, Garrett is the Controlling Precedent in Cases of Convictions for CCE and Conspiracy such as Rutledge*

The Court should have applied the *Garrett* reasoning to this case. In both *Garrett* and *Jeffers*, the Court addressed the issue of whether conviction for CCE and one of its lesser offenses constitutes double jeopardy.¹⁷² Because the *Garrett* decision conflicted with the *Jeffers*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1250-51.

¹⁷⁰ *Garrett v. United States*, 471 U.S. 773 (1985).

¹⁷¹ *Rutledge v. United States*, 116 S. Ct. 1241 (1996).

¹⁷² *Garrett* addressed CCE and narcotics importation; *Jeffers* addressed CCE and narcotics conspiracy.

plurality and the distinction between the two cases is attenuated at best, the Court should have acknowledged *Garrett* as a reevaluation of the CCE statute and applied its reasoning to *Rutledge*. In doing so, the Court would have found that Congress intended cumulative punishment for drug conspiracy and CCE.

The Court in *Garrett* made an unconvincing distinction between the issue there and the issue in *Jeffers*.¹⁷³ The Court said that the *Jeffers* Court based its decision upon a belief that the dangers against which conspiracy and CCE statutes protect are so similar that there is no sense in cumulating penalties.¹⁷⁴ By contrast, the dangers protected against by the two crimes in *Garrett*, drug importation and CCE, are not so similar as to warrant this same conclusion.¹⁷⁵ Actually, only the four justice plurality in *Jeffers* believed that the dangers were similar.¹⁷⁶ More accurately, the *Jeffers* Court based its holding on its belief that CCE already prohibit conspiracy, and this reasoning applies to *any* of CCE's predicate offenses.¹⁷⁷ Thus, because the *Jeffers* Court decided that convictions for CCE and any one of its predicate offenses constitute double jeopardy, and no legitimate distinction between *Garrett* and *Jeffers* exists, *Garrett* effectively overruled *Jeffers*. Accordingly, at least one circuit has rejected the conclusion that § 848 CCE and § 846 conspiracy protect against similar dangers.¹⁷⁸

One could argue that the underlying facts supporting CCE and a substantive predicate offense versus CCE and the narcotics conspiracy offense justify the Court's distinction between *Garrett* and *Jeffers*.¹⁷⁹ For example, a defendant could violate the importation statute, sell the drugs to one other person, and be involved in CCE based upon an entirely different source of narcotics. On the other hand, if a defendant is working in agreement with at least five others for purposes of § 846 conspiracy, he will necessarily be working "in concert" with them for purposes of § 848 CCE, an argument accepted by the Court in *Rutledge*.¹⁸⁰ Thus, although convictions for CCE and conspiracy will always be punishment for the same conduct, punishment for CCE and

¹⁷³ See *Garrett*, 471 U.S. at 794-95.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Jeffers v. United States*, 432 U.S. 137, 148-50 (1977). Justice White concurred in the judgment in part and stated that he did not believe that conspiracy is a lesser included offense of CCE. *Id.* at 158 (White, J., concurring in the judgment in part and dissenting in part). Also, the dissenters explicitly rejected the notion that CCE and conspiracy are so similar as to prohibit convictions for both. *Id.* at 159 (Stevens, J., concurring in the judgment in part and dissenting in part).

¹⁷⁷ See *id.* at 148-50.

¹⁷⁸ See *United States v. Fernandez*, 822 F.2d 382, 384 (3d Cir. 1987).

¹⁷⁹ See *Garrett*, 471 U.S. at 794-95.

¹⁸⁰ See *Rutledge v. United States*, 116 S. Ct. 1241, 1246 (1996).

one of its substantive predicates could be punishment for two separate and unrelated acts. In this context, multiple convictions for the latter are distinct and do not constitute double jeopardy.

However, this distinction is irrelevant if Congress intended to punish a defendant for both CCE and each of its underlying offenses.¹⁸¹ If the CCE and conspiracy statutes protect against distinct dangers in the same way CCE and its substantive predicate offense statutes do, *Garrett's* distinction from *Jeffers* fails, and *Garrett* is the appropriate precedent for cases regarding CCE and each of its predicate offenses. Though not explicitly overruling *Jeffers*, the *Garrett* decision created a new means of analysis for CCE and each of its predicate offenses. The Court should have applied this more recent analysis to *Rutledge*.

2. *If the Court Had Applied Garrett to Rutledge, It Would Have Come to the Conclusion that the Convictions for CCE and Conspiracy Did Not Constitute Double Jeopardy*

The *Garrett* Court's analysis suggested that the Court should reject double jeopardy claims in subsequent examinations of convictions for CCE and *all* of its underlying offenses, including conspiracy.¹⁸² The Court inappropriately failed to follow this direction in *Rutledge*. First, the Court's conclusion in *Garrett* that the language of § 848 creates a distinct offense, punishable separately from other offenses, applies to conspiracy in the same way it applies to substantive predicate offenses. Conspiracy is prohibited by a statute distinct from the CCE statute just as the other predicate offenses are prohibited by their own separate statutes.¹⁸³ The Court noted that the language of CCE "affirmatively states an offense for which punishment will be imposed."¹⁸⁴ The Court emphasized the distinction between a statute that imposes its own penalty and a "recidivist" statute that simply enhances the penalty imposed for other violations.¹⁸⁵ Because CCE provides its own penalty, and a separate section of the Controlled Substances Act¹⁸⁶ provides the recidivist provision, CCE is a distinct offense.¹⁸⁷ This reasoning provides support for the proposition that CCE is distinct from each of its predicate offenses, including conspir-

¹⁸¹ See, e.g., *Garrett*, 471 U.S. at 794-95; *Missouri v. Hunter*, 459 U.S. 359, 369 (1983); see also *infra* notes 188-95 and accompanying text.

¹⁸² See 471 U.S. at 773.

¹⁸³ See, e.g., 21 U.S.C. § 846 (1994) (prohibiting narcotics conspiracy); 21 U.S.C. § 921 (1994) (prohibiting narcotics importation).

¹⁸⁴ *Garrett*, 471 U.S. at 779.

¹⁸⁵ *Id.* at 781.

¹⁸⁶ 21 U.S.C. § 849 (1994).

¹⁸⁷ *Garrett*, 471 U.S. at 779.

acy, and therefore punishable in addition to its underlying offenses.

The *Garrett* Court's analysis of legislative intent applies to conspiracy as well as substantive predicate offenses.¹⁸⁸ The Court's analysis concluded that Congress created CCE as an offense separate from its predicates.¹⁸⁹ The Court looked to congressional debate over whether CCE should be a recidivist provision or a new, distinct offense.¹⁹⁰ The CCE statute was introduced in the House as a recidivist provision, but the House Committee substituted that provision with the current CCE statute.¹⁹¹ Representative Poff described the statute as embodying "a new separate criminal offense with a separate criminal penalty."¹⁹²

In addition, the *Garrett* Court concluded that the legislative history gave no indication that Congress intended to substitute the predicate offenses with a conviction under CCE.¹⁹³ According to the *Garrett* Court, specifying that a defendant should be convicted and punished for both offenses would have been stating the obvious, as the entire debate suggests that Congress intended to create a new enforcement tool, not substitute existing tools.¹⁹⁴ For instance, Representative Weicker said, "This bill goes further in providing those persons charged with enforcing it a wide variety of enforcement tools which will enable them to more effectively combat the illicit drug trafficker and meet the increased demands we have imposed on them."¹⁹⁵

Although some still argue that legislative history is inconclusive as to whether Congress intended to punish defendants under both CCE and conspiracy statutes,¹⁹⁶ the *Garrett* Court squarely rejected this notion.¹⁹⁷ The Court pointed out that precedent requires that Congress "clearly" and "specifically" authorize multiple punishment.¹⁹⁸ Faced with this requirement, the *Garrett* Court still found the legislative history conclusive, implying that the history was sufficiently "clear and specific."¹⁹⁹

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (citing H.R. REP. NO. 91-1444, reprinted in 1970 U.S.C.A.N. 4566, 4651).

¹⁹⁰ *Id.* at 782-84.

¹⁹¹ *Id.* at 782-83.

¹⁹² *Id.* at 783 (quoting H.R. REP. NO. 91-1444); see also 116 CONG. REC. 33302 (1970) (remarks of Rep. Eckhardt).

¹⁹³ *Garrett*, 471 U.S. at 782-85.

¹⁹⁴ *Id.* at 784.

¹⁹⁵ *Id.* at 785 (quoting 116 CONG. REC. 33630-33631 (1970)).

¹⁹⁶ See, e.g., Kenneth G. Schuler, *Continuing Criminal Enterprise, Conspiracy, and the Multiple Punishment Doctrine*, 91 MICH. L. REV. 2220, 2246 (1993).

¹⁹⁷ *Garrett*, 471 U.S. at 784-85.

¹⁹⁸ *Id.*; *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Whalen v. United States*, 445 U.S. 684, 692-93 (1980); see also *Albernaz v. United States*, 450 U.S. 333, 340 (1981) (stating that the *Blockburger* rule is controlling absent "a clear indication of contrary legislative intent").

¹⁹⁹ *Garrett*, 471 U.S. at 785.

Therefore, as the controlling precedent, the *Garrett* analysis of congressional intent applies to conspiracy just as it applies to substantive predicate offenses, and the Court should have applied it as such in *Rutledge*. Instead, the *Rutledge* Court failed to squarely address the issue of legislative history and only rejected the Government's position that Congress intended to allow courts to convict defendants for both CCE and conspiracy.²⁰⁰ The Court therefore failed to give congressional intent the weight it traditionally has been given in issues of double jeopardy. Had the Court accounted for congressional intent and applied the *Garrett* analysis, it would have determined that Congress intended separate and cumulative punishment for CCE and conspiracy. Accordingly, it should have determined that conviction and sentencing for both does not violate the Double Jeopardy Clause.

B. THE COURT SHOULD HAVE ADDRESSED THE POSSIBLE
INAPPLICABILITY OF THE *BLOCKBURGER* ANALYSIS

The Court inappropriately applied the *Blockburger*²⁰¹ analysis to this case. The Court disregarded the ongoing debate over whether the *Blockburger* test should apply to the double jeopardy analysis in cases of compound offenses like CCE or whether, more appropriately, courts should simply look to congressional intent.²⁰² Justice Stevens utilized the *Blockburger* test as the primary means of determining whether conspiracy is a lesser included offense of CCE, and therefore concluded that conviction for both violates the Double Jeopardy Clause.²⁰³ The *Rutledge* Court should have acknowledged the conflicting approaches and seized the opportunity to definitively settle the matter.

The first indication that the *Blockburger* same-element analysis may not apply to compound offenses appeared in Justice Rehnquist's dissent in *Whalen v. United States*.²⁰⁴ Justice Rehnquist said, "[T]he *Blockburger* test, although useful in identifying statutes that define greater and lesser included offenses in the traditional sense, is less satisfactory, and perhaps even misdirected, when applied to statutes defining 'compound' and 'predicate' offenses."²⁰⁵

Justice Rehnquist's view prevailed in *Garrett v. United States*.²⁰⁶ There, the Court adopted the presumption that when Congress cre-

²⁰⁰ *Rutledge v. United States*, 116 S. Ct. 1241, 1248-49 (1996).

²⁰¹ *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

²⁰² See, e.g., *Whalen*, 445 U.S. at 684.

²⁰³ *Rutledge*, 116 S. Ct. at 1245-46.

²⁰⁴ *Whalen*, 445 U.S. at 708 (Rehnquist, J., dissenting).

²⁰⁵ *Id.*

²⁰⁶ 471 U.S. 773 (1985).

ates two distinct offenses it intends to permit cumulative sentences.²⁰⁷ This conclusion is antithetical to the *Blockburger*²⁰⁸ analysis, which provides that conviction under two statutes violates the Double Jeopardy Clause unless Congress explicitly provides otherwise.²⁰⁹

The view that *Blockburger* does not apply to compound offenses gained further support in *United States v. Dixon*.²¹⁰ There, the Court determined that *Blockburger* was the correct test for determining whether two statutes create the "same offense;" however, the Court could not agree as to the test's applicability to compound offenses.²¹¹ Justice Rehnquist again voiced his hesitance in applying *Blockburger* to cases of greater and lesser included offenses.²¹²

Unfortunately, the majority in *Dixon* did not rebut this aspect of Rehnquist's dissent, thus leaving the disposition of the matter in flux. Therefore, the debate over whether the *Blockburger* test applies to compound offenses still exists, and the *Rutledge* Court inappropriately disregarded it. It is unlikely that the Court's failure to address this issue reflects its approval of the position that the *Blockburger* test does apply to compound offenses. If the Court did condone this position, it would have explicitly so stated, as it stated its intention to put an end to the debate over whether convictions for CCE and conspiracy constitute double jeopardy.

Furthermore, had the Court looked to analysis in recent decisions, including *Garrett* and *Dixon*, it would have properly concluded that the *Blockburger* test certainly does not apply to every compound offense.

C. THE COURT SHOULD HAVE ANALYZED DOUBLE JEOPARDY IN THE CONTEXT OF RICO

Many courts and scholars have made a sound analogy between the CCE statute²¹³ and the RICO statute.²¹⁴ Both CCE and RICO re-

²⁰⁷ *Id.* at 793.

²⁰⁸ *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

²⁰⁹ *Id.*

²¹⁰ 113 S. Ct. 2849 (1993).

²¹¹ *Id.* Justice Scalia and Justice Rehnquist agreed that *Blockburger* controlled but did not agree on how to apply *Blockburger* to the compound offenses at issue. *Id.* at 2852; *id.* at 2865 (Rehnquist, J., concurring in part and dissenting in part).

²¹² *Id.* at 2868.

²¹³ 21 U.S.C. § 848 (1996).

²¹⁴ 21 U.S.C. § 1962 (1994); *see, e.g.*, *United States v. Pungitore*, 910 F.2d 1084, 1107-11 (3d Cir. 1990); *22nd Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals, 1991-1992*, 81 GEO. L. J. 853, 1240-44 (1993); Susan W. Brenner, *Of Complicity and Enterprise Criminality: Applying Pinkerton Liability to RICO Actions*, 56 MO. L. REV. 931, 990-1005 (1991); Anne Bowen Poulin, *Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model*, 25 CONN. L. REV. 95, 132 (1992).

quire predicate offenses, and Congress enacted both to combat organized crime. Thus, although RICO cases are not controlling in the CCE context, the courts' reasoning in such cases is applicable. In coming to its decision in *Rutledge*, the Court improperly disregarded this analogy.

Courts have found that punishing RICO enterprise and conspiracy offenses cumulatively does not violate the Double Jeopardy Clause.²¹⁵ For example, in *United States v. Pungitore* the Third Circuit addressed the issue of whether conviction and sentencing for RICO and conspiracy violate the Double Jeopardy Clause.²¹⁶ The *Pungitore* court stated that *Garrett* applied to allow cumulative punishments for RICO and its predicate offense of conspiracy.²¹⁷ The court cited an earlier Third Circuit case²¹⁸ that applied *Garrett* to RICO and one of its substantive predicate offenses.²¹⁹ The *Pungitore* court could not find any "principled way to distinguish [conspiracy] from [the earlier predicate offense]."²²⁰ According to the court, legislative history indicating that Congress intended cumulative punishment for RICO and its substantive predicate offenses applied equally to RICO and conspiracy.²²¹

Due to the similarities in the RICO and CCE statutes, the Supreme Court should have looked to the RICO context in deciding *Rutledge*. Like the *Pungitore* court, it should have applied *Garrett's* analysis of CCE and its underlying offenses rather than the analysis in *Jeffers*. In doing so, it would have come to the conclusion that Congress intended to create multiple punishment for CCE and each of its predicate offenses, including conspiracy, and therefore that sentences for CCE and conspiracy do not constitute Double Jeopardy.

D. THE COURT'S CONSERVATIVE IDEALS REGARDING ITS ROLE EXPLAIN THE COURT'S DECISION IN *RUTLEDGE*

Due to the Court's unwillingness to abandon its conservative ideals, it inappropriately disregarded precedent and thus arrived at an improper decision. The Court's decision in *Rutledge v. United States*, while seemingly antithetical to much of its recent double jeopardy ju-

²¹⁵ See, e.g., *Pungitore*, 910 F.2d at 1107-11; *United States v. West*, 877 F.2d 281, 292 (4th Cir. 1989); *United States v. Watchmaker*, 761 F.2d 1459, 1477 (11th Cir. 1985); cf. *United States v. Sutton*, 642 F.2d 1001, 1040 (6th Cir. 1980) (en banc) (where evidence of RICO conspiracy and violation is identical, the two charges must merge for sentencing).

²¹⁶ *Pungitore*, 910 F.2d at 1107-11.

²¹⁷ *Id.*

²¹⁸ *United States v. Grayson*, 795 F.2d 278, 286 (3d Cir. 1986).

²¹⁹ *Pungitore*, 910 F.2d at 1108.

²²⁰ *Id.* at 1108 n.24.

²²¹ *Id.* at 1108.

risprudence, may reflect the modern Court's commitment to judicial restraint.²²² One scholar described several criminal law decisions as indicative of the Court's desire to apply the Constitution and federal statutes as written, rather than creating new law.²²³ In particular, Chief Justice Rehnquist "has shown a willingness to rule in favor of criminal defendants when their arguments are supported by the plain meaning or clear history of a particular law."²²⁴ Put another way, the Court has demonstrated a marked reluctance to look to legislative history where the statute itself could provide an acceptable answer.

For instance, in *Robinson v. United States*,²²⁵ the Court unanimously struck down a five-year sentence enhancement to a 157-month cocaine possession sentence.²²⁶ The Court based its decision upon the plain language of a federal enhancement statute, 18 U.S.C. § 924(c)(1) (1988).²²⁷ The Court emphasized its belief that the Court's job is to interpret and apply law, while it is up to Congress to write the law.²²⁸

In another case, *Lonchar v. Thomas*,²²⁹ the Court ruled without dissent in favor of a criminal defendant.²³⁰ There, Georgia asked the Court to exclude a habeas petition based upon the defendant's alleged "bad faith delay" in filing the petition.²³¹ The Court rejected this request based upon the plain language of the applicable federal rule, which placed no restrictions or deadlines on the filing of first habeas petitions.²³² Although these decisions may indicate the Court's willingness to protect criminal defendants, perhaps they can better be described as favoring the letter of law.²³³

²²² See L. Anita Richardson, *Translating the Letter of Law: Court's Focus on Interpretation Brings Surprising Results in Criminal Cases*, 82 A.B.A.J. 50 (1996); see also Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 346 (1989) (analyzing Supreme Court's emphasis on judicial restraint in its environmental decisions); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 433, 528 (1993) (stating that Court applies fundamental value of judicial restraint in reviewing economic regulation).

²²³ Richardson, *supra* note 222, at 50. But see Michael S. Gershowitz, Note, *Waiver of the Plea-Statement Rules*, 86 J. CRIM. L. & CRIMINOLOGY 1439 (1996) (discussing *United States v. Mezzanatto*, 115 S. Ct. 797 (1995), where the majority failed to follow the plain meaning of the statute at issue, but the dissent by Justice Souter relied heavily upon that plain meaning).

²²⁴ Richardson, *supra* note 222, at 50.

²²⁵ 116 S. Ct. 501 (1995).

²²⁶ *Id.* at 509.

²²⁷ *Id.* at 506.

²²⁸ *Id.* at 506-9.

²²⁹ 116 S. Ct. 1293 (1996).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ See Richardson, *supra* note 222.

Awareness of this trend of unanimous and near-unanimous decisions makes *Rutledge* less surprising, and it provides at least a partial explanation for what motivated the *Rutledge* Court. For instance, neither the plain language of the statute nor the legislative history explicitly provide multiple punishments in *Rutledge*. Rather than looking to legislative history for evidence of intent, the Court based its opinion on the plain language, or *absence* of plain language in the statute. This desire to apply the letter of the law may also explain the *Rutledge* Court's reluctance to apply *Garrett*, as the analysis there rested primarily on an examination of legislative history rather than on plain language.

VI. CONCLUSION

The Court's decision in *Rutledge v. United States* does not comport with the trend the Court had been following in the context of continuing criminal enterprise and double jeopardy jurisprudence. If the Court had looked at the analysis of plain language and legislative history as described in *Garrett v. United States*, the possible inapplicability of the *Blockburger* test in determining whether two statutes impermissibly punish a criminal defendant for the "same offense," and decisions in the analogous context of RICO and racketeering conspiracy, it would have come to an opposite and better reasoned conclusion. The positive aspect of this decision is that it finally put an end to the ongoing confusion over whether convictions and sentences for continuing criminal enterprise and narcotics conspiracy violate double jeopardy. Unfortunately, the grounds upon which the Court based its decision raise questions as to the soundness and finality of the Court's reasoning and *stare decisis*.

AMY J. KAPPELER