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## NOTES

### Continuing Criminal Enterprise, Conspiracy, and the Multiple Punishment Doctrine

Kenneth G. Schuler

In 1970, Congress responded to the near "epidemic"<sup>1</sup> drug problem by enacting the Comprehensive Drug Abuse Prevention and Control Act.<sup>2</sup> The Act created the crime of engaging in a continuing criminal enterprise (CCE),<sup>3</sup> an offense designed "to serve as a strong deterrent to those who otherwise might wish to engage in the illicit traffic [of narcotics], while also providing a means for keeping those found guilty of violations out of circulation."<sup>4</sup> Congress hoped to achieve its penal objective by targeting "drug kingpins" and subjecting offenders to severe mandatory sentences<sup>5</sup> without the possibility of parole.<sup>6</sup> The CCE statute requires proof that an individual has committed a series of violations of the narcotics laws<sup>7</sup> while organizing or supervising at least five other people.<sup>8</sup>

While several commentators have lamented the impact of the "War on Drugs" on civil liberties,<sup>9</sup> few have analyzed the relationship

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1. H.R. REP. NO. 1444, 91st Cong., 2d Sess., pt. 1, at 6 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4572.

2. Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. §§ 801-966 (1988 & Supp. III 1991)).

3. 21 U.S.C. § 848 (1988). The continuing criminal enterprise offense consists of five elements: (1) a felony violation of the narcotics laws, § 848(c)(1); (2) as "part of a continuing series of violations" of the narcotics laws, § 848(c)(2); (3) undertaken in concert with five or more other persons, § 848(c)(2)(A); (4) "with respect to whom" the defendant is an organizer or supervisor, § 848(c)(2)(A); and (5) the defendant obtains substantial income from the activities, § 848(c)(2)(B). The third and fourth prongs of the CCE offense therefore require federal prosecutors to establish conspiratorial conduct to obtain a conviction. *See generally infra* text accompanying notes 167-74.

4. H.R. REP. NO. 1444, *supra* note 1, pt. 1, at 10, *reprinted in* 1970 U.S.C.C.A.N. at 4576.

5. 21 U.S.C. § 848(a) provides for a minimum of twenty years imprisonment for CCE offenders. The statute also authorizes a life sentence for engaging in a CCE. 21 U.S.C. § 848(a)-(b) (1988). A CCE defendant also faces the possibility of fines up to two million dollars. 21 U.S.C. § 848(a) (1988). Congress amended the CCE statute in 1988 to allow prosecutors to seek the death penalty in cases in which a drug lord causes the murder of an individual. 21 U.S.C. § 848(e) (1988).

6. 21 U.S.C. § 848(d) prohibits the suspension of sentence for a CCE conviction.

7. 21 U.S.C. § 848(c)(1)-(2) (1988).

8. 21 U.S.C. § 848(c)(2)(A) (1988).

9. *See, e.g.,* Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987); James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165 (1990).

between continuing criminal enterprise convictions, conspiracy convictions, and the Double Jeopardy Clause<sup>10</sup> of the Fifth Amendment.<sup>11</sup> The potential Double Jeopardy Clause violation arises because of the Multiple Punishment Doctrine, which mandates that “no man can be twice lawfully punished for the same offence.”<sup>12</sup> Given that prosecutors have broad discretion in selecting charges,<sup>13</sup> defendants accused of operating a continuing criminal enterprise are often charged with conspiring to violate the narcotics laws as well.<sup>14</sup> Courts then must consider whether convicting and sentencing a defendant for both CCE and conspiracy violates the Multiple Punishment Doctrine. The purposes that the Multiple Punishment Doctrine serves and the impact that multiple convictions can have upon criminal defendants both highlight the importance of the issue. Unfortunately, the federal courts have not formulated a consistent solution to the question, leaving the contours of the Multiple Punishment Doctrine in “disarray.”<sup>15</sup> A majority of the circuit courts of appeals hold that conspiracy is a lesser-included offense within continuing criminal enterprise and vacate convictions and sentences for conspiracy in order to avoid double punishment.<sup>16</sup> Conversely, four circuits have decided that retaining convictions for both CCE and conspiracy does not offend the Double Jeopardy Clause, but those circuits disagree as to how to deal with the convictions and sentences.<sup>17</sup>

This Note argues that the Multiple Punishment Doctrine prohibits the imposition of concurrent convictions and sentences upon criminal defendants found guilty of engaging in a CCE and conspiring to violate narcotics laws. Part I surveys the values underlying the Multiple Punishment Doctrine and traces the evolution of the Supreme Court’s

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10. “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .” U.S. CONST. amend. V.

11. See generally Phillip H. Cherney, *Thrice In Jeopardy: The CCE Prosecution of Felix Mitchell*, 27 SANTA CLARA L. REV. 515 (1987); George C. Thomas III, *Sentencing Problems Under the Multiple Punishment Doctrine*, 31 VILL. L. REV. 1351 (1986); Doreen A. Yanik, *Recent Case*, 21 SETON HALL L. REV. 514 (1991).

12. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873). The Multiple Punishment Doctrine is one of the three double jeopardy protections recognized by the Supreme Court. See *infra* text accompanying notes 20-22.

13. The Supreme Court has held that the state may try a defendant for both greater- and lesser-included offenses, even though the defendant may be sentenced for only one of the crimes. *Ohio v. Johnson*, 467 U.S. 493, 500 (1984).

14. See, e.g., *United States v. Chambers*, 944 F.2d 1253, 1256 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1217 (1992); *United States v. Medina*, 940 F.2d 1247, 1249 (9th Cir. 1991); *United States v. Duke*, 940 F.2d 1113, 1115 (8th Cir. 1991); *United States v. David*, 940 F.2d 722, 726-27 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 2301 (1992); *United States v. Paulino*, 935 F.2d 739, 745-46 (6th Cir.), *cert. denied*, 112 S. Ct. 315 (1991); *United States v. Rivera-Martinez*, 931 F.2d 148, 152 (1st Cir.), *cert. denied*, 112 S. Ct. 184 (1991).

15. *Fernandez v. United States*, 111 S. Ct. 2249 (1991) (White, J., dissenting from denial of certiorari).

16. See *infra* note 103.

17. See introduction *infra* section II.B.

application of the doctrine to modern criminal law. Part II examines the various methods employed by the circuit courts of appeals to deal with simultaneous convictions and sentences for CCE and conspiracy. Part III reviews the test, identified in Part I, that the Supreme Court has implicitly utilized to analyze Multiple Punishment Claims and evaluates CCE and conspiracy convictions under this standard. This Note concludes that the majority approach — mandating the vacation of conspiracy convictions and sentences obtained simultaneously with a CCE conviction — is the only method utilized by the courts of appeals that comports with the Multiple Punishment Doctrine.

## I. THE GENESIS, EVOLUTION, AND PURPOSES OF THE MULTIPLE PUNISHMENT DOCTRINE

This Part reviews the historical underpinnings of the Multiple Punishment Doctrine and the manner in which the Supreme Court has applied the doctrine to modern criminal law, including continuing criminal enterprise prosecutions. Section I.A examines the origin of the multiple punishment bar and surveys the doctrine's constitutional functions, focusing on protection it provides against adverse collateral consequences. Section I.B describes the Supreme Court's test for analyzing disputes involving the potential for double punishment in violation of the Fifth Amendment. Section I.C reviews the Court's interpretation of the doctrine in cases involving CCE convictions and concludes that the Supreme Court has not formulated a coherent body of precedent for evaluating multiple punishment claims in the CCE conspiracy context.

### A. *The Purposes of the Multiple Punishment Doctrine*

The notion that no person should be subject to criminal prosecution or punishment twice for the same offense is perhaps the oldest<sup>18</sup> and most widely recognized<sup>19</sup> guarantee in the Bill of Rights. The

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18. See 1 DEMOSTHENES 589 (J.H. Vince trans., 1970), *quoted in* Whalen v. United States, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting) (“[T]he laws forbid the same man to be tried twice on the same issue . . . .”); see also 4 WILLIAM BLACKSTONE, COMMENTARIES \*335 (“[I]t is a] universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offense.”); 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 213 (London 5th ed. 1797) (1628) (prior acquittal “of the same felony” precludes a second trial); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 36, § 10, at 377 (London 4th ed. 1762) (1716-1721) (“the Party ought not to be brought twice into Danger of his Life for the same Crime”).

The Multiple Punishment Doctrine apparently originated out of the plea of *autrefois convict*, which prevented a person previously convicted and sentenced for an offense from being tried for the same crime. See 2 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 251 (1778).

19. Both the ancient Greeks and the English common law prohibited double jeopardy. See *supra* note 18. The notion has also been recognized in a number of other Western legal systems, including Roman and canon law. See JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 1-3 (1969). Jewish law also contained a prohibition on the multiplication of punishments. See GEORGE HOROWITZ, THE SPIRIT OF JEWISH LAW 170

Supreme Court describes double jeopardy as encompassing three separate protections: protection against retrial following acquittal, protection against retrial following conviction, and protection against multiple punishments for the same offense.<sup>20</sup> The Court long ago recognized that the third protection — “that no man can be twice lawfully punished for the same offence”<sup>21</sup> — was “clearly [contained within] the *spirit* of the [Fifth Amendment].”<sup>22</sup>

The seminal case regarding multiple punishment, *Ex parte Lange*,<sup>23</sup> involved a claim of excessive punishment raised by a defendant sentenced to both imprisonment and a fine, even though the applicable statute authorized only one of the punishments.<sup>24</sup> The Court, after surveying the common law, reasoned that the protection against multiple punishments forms the core of the Double Jeopardy Clause:

For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, [a person] can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. *It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution.*<sup>25</sup>

The Court ordered Lange’s release because he had fully satisfied one of

(1953) (“for one offense, only one punishment might be inflicted”). Today, the right of a criminal defendant not to be subjected to punishment more than once for a crime is well recognized in industrialized societies. *See generally* SIGLER, *supra*, at 118-54.

20. *See* United States v. Halper, 490 U.S. 435, 440 (1989) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

21. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873).

22. *Lange*, 85 U.S. (18 Wall.) at 170.

23. 85 U.S. (18 Wall.) 163 (1873).

24. 85 U.S. (18 Wall.) at 175.

25. 85 U.S. (18 Wall.) at 173 (emphasis added). Several commentators have argued that the Framers of the Constitution viewed the protection against multiple punishments as the preeminent aspect of the Double Jeopardy Clause. *See, e.g.,* Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 266 n.13 (1965). The argument stems from Madison’s initial wording of the Clause, which provided that “[n]o person shall be subject . . . to more than one punishment or one trial for the same offence.” 1 ANNALS OF CONG. 451-52 (Joseph Gales ed., 1789).

This argument presumes that, although the wording of the Clause was altered, the meaning assigned to the Clause was not. The limited record surrounding the change in wording does not provide any definitive reason to accept or reject this notion. Representative Benson moved to amend the original wording of the Clause to ensure habeas corpus relief, arguing that the prohibition on multiple trials would prevent persons convicted unfairly from obtaining a second trial. In his estimation, “[t]he humane intention of the clause was to prevent more than one punishment.” *Id.* at 782. The amendment was defeated by a large margin, however. *Id.* Representative Lawrence subsequently introduced a motion to limit the right against self-incrimination to criminal trials, which was adopted. *Id.* Representative Lawrence’s refined wording apparently altered the phrasing of the Double Jeopardy Clause as well.

The Supreme Court has apparently accepted this reading of the Double Jeopardy Clause’s historical significance. *See* United States v. Halper, 490 U.S. 435, 440 (1989) (noting that “[i]n drafting his initial version of what came to be our Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment”).

the alternative statutory penalties.<sup>26</sup> In so doing, the Court recognized the Multiple Punishment Doctrine as an essential foundation of the Constitution's bulwark protecting criminal defendants from double jeopardy.

The judiciary has not interpreted the prohibition on multiple punishments consistently, however. One commentator astutely suggests that judges have conducted Double Jeopardy Clause inquiries without reference to the justifications which should inform a court's decision-making.<sup>27</sup> Such lackadaisical jurisprudence may explain why then-Justice Rehnquist noted that double jeopardy doctrine was mired in "confusion."<sup>28</sup> Yet, the purposes underlying a rule of law may ultimately be the most important guide in conducting the judicial inquiry in an individual case.<sup>29</sup> Hence, an inquiry into the constitutionality of imposing convictions and sentences for both CCE and conspiracy ought to begin with the purposes underlying the Multiple Punishment Doctrine. Using these goals to analyze multiple punishment claims should yield a better decisionmaking process and a presumptively superior result.

The Multiple Punishment Doctrine serves three constitutional objectives. Initially, the doctrine limits the state's discretion to subject a citizen to punishment exceeding that condoned by the legislature by acting through the office of the prosecutor.<sup>30</sup> Indeed, the doctrine's significance has become more pronounced as the proliferation of statutory offenses has greatly increased the prosecutor's power over a criminal defendant.<sup>31</sup> This imbalance of power may manifest itself in

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26. 85 U.S. (18 Wall.) at 175.

27. Note, *supra* note 25, at 266 ("We are rarely told why it is wrong to retry for the same crime or punish twice. . . . The judiciary is content to apply the double jeopardy prohibition with only a reverent nod to its policies."); see also *United States v. Maza*, 983 F.2d 1004, 1010 (11th Cir. 1993) ("Unfortunately, case law interpreting the Double Jeopardy Clause is often applied without regard to the context in which it arose . . . . The rather indiscriminate application of the rules from one context into another puts at risk many of the interests the Double Jeopardy Clause is intended to protect . . . .").

28. *Whalen v. United States*, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting).

29. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112 (1921) ("Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired."); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("Still it is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitively to an end which it subverses, and when the grounds for desiring that end are stated or are ready to be stated in words.").

30. See, e.g., SIGLER, *supra* note 19, at 182-87; Cherney, *supra* note 11, at 519-20; Note, *supra* note 25, at 304-06. The Supreme Court has emphasized that the Double Jeopardy Clause generally limits the power of prosecutors to obtain punishment in excess of that authorized by the legislature. See *Brown v. Ohio*, 432 U.S. 161, 165 (1977).

31. See SIGLER, *supra* note 19, at 156 ("[A]n increasing number of criminal statutes have been created, a development which has weakened the significance of double jeopardy as it has increased the power of the prosecutor."); Note, *supra* note 25, at 304. The prosecutor's advantage may be even greater when conspiracy charges are brought in addition to substantive offenses, as in the context of a CCE prosecution. SIGLER, *supra* note 19, at 171-72 ("Federal

several ways. The profusion of statutory crimes allows the prosecutor to choose a punishment and select a crime to fit that punishment.<sup>32</sup> A prosecutor might also threaten to seek convictions under a variety of overlapping statutes to coerce a defendant into accepting a plea bargain.<sup>33</sup> Finally, the ability to prosecute a defendant for several statutory offenses increases the probability that the prosecutor will obtain a conviction on at least one of the charges.<sup>34</sup>

The importance of protection from arbitrary and oppressive prosecutorial conduct should be readily apparent: "Double jeopardy was designed to thwart government tyranny. A disgruntled prosecutor or an inflamed democracy can be just as tyrannical as a monarch."<sup>35</sup> Judicial enforcement of the Multiple Punishment Doctrine blunts the ability of a prosecutor to utilize such discretion against a defendant.<sup>36</sup>

The Multiple Punishment Doctrine concomitantly reinforces the constitutionally mandated demarcation of powers between the three branches of government.<sup>37</sup> A court can punish a defendant under multiple statutory provisions only if the legislature has authorized punishment under two or more statutes.<sup>38</sup> This rule reflects the legislature's exclusive authority to define criminal behavior and to establish appropriate punishments.<sup>39</sup> As the Supreme Court has noted, "[i]f a

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attorneys have been most adept in the use of of conspiracy charges to secure more ease in utilizing evidence, to avoid the statute of limitations, to obtain more and easier double convictions, and to bolster their personal reputation for diligence.").

32. Note, *supra* note 25, at 304-05.

33. *Id.* at 305 ("Given the choice of contesting guilt and risking crushing sentence, or pleading guilty to one of the offenses, an uncertain defendant may well capitulate.").

34. See *Missouri v. Hunter*, 459 U.S. 359, 372 (1983) (Marshall, J., dissenting) ("[W]here the prosecution's evidence is weak, its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict."); see also *Ball v. United States*, 470 U.S. 856, 867 (1985) (Stevens, J., concurring) (arguing that prosecutorial tactic of bringing multiple charges tends to "tilt the scales of justice against the defendant"). This type of state conduct has been approved by the Court, however. See *supra* note 13.

35. Note, *supra* note 25, at 292.

36. See *Brown v. Ohio*, 432 U.S. 161, 169 (1977) ("The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.").

37. See, e.g., Michael P. Doss, Comment, *Resentencing Defendants and the Protection Against Multiple Punishment*, 133 U. PA. L. REV. 1409, 1419 (1985) ("[T]he multiple punishment bar act[s] as a restriction upon judicial power.").

38. See *infra* text accompanying notes 74-78. Indeed, the Supreme Court has suggested that "the role of the constitutional guarantee [against double jeopardy] is limited to assuring that the court does not exceed its legislative authorization." *Brown*, 432 U.S. at 165 (emphasis added); see also *Hunter*, 459 U.S. at 366 ("[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.") (emphasis added). For a criticism of this approach, see *infra* note 75.

39. See, e.g., *Hunter*, 459 U.S. at 368 ("Legislatures, not courts, prescribe the scope of punishments."). Peter Westen and Richard Drubel suggest that double jeopardy also constrains the legislature's power to fashion penalties. They argue that "the Double Jeopardy Clause acts as an indirect restraint on the legislature, because it demands a certain standard of clarity from the

federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates . . . the constitutional principle of separation of powers."<sup>40</sup>

The importance of maintaining strict boundaries between the powers of the three branches of government in our democracy is undisputed.<sup>41</sup> Violation of the separation of powers in the criminal justice context uniquely corrodes our system of republican government,<sup>42</sup> for the division of power between the legislature and the judiciary in the area of criminal law is indispensable to democratic governance.<sup>43</sup> Moreover, a judge's ability to cumulate punishments for overlapping offenses represents "[b]y its nature . . . an arbitrary power."<sup>44</sup> While guidelines afford judges latitude to determine individual sentences, the number of statutes violated by a single act of the defendant simply "is not relevant" to that determination.<sup>45</sup>

Finally, the Multiple Punishment Doctrine provides a measure of finality for the criminal defendant. The prohibition on multiple punishments minimizes the defendant's "anxiety and insecurity"<sup>46</sup> regarding the sentencing process.<sup>47</sup> Once a defendant has "fully suffered . . . [the] punishment[]" to which alone the law subjected him,<sup>48</sup> the imposition of further sanctions offends universal notions of fairness.<sup>49</sup> The

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legislature before multiple punishment will be allowed." Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 118.

40. *Whalen v. United States*, 445 U.S. 684, 689 (1980); see also *Brown*, 432 U.S. at 165 ("once the legislature has acted courts may not impose more than one punishment for the same offense"); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 178 (1873) (after sentencing a defendant to the maximum penalty for an offense, "[the court's] authority was ended").

41. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 697-99 (1988) (Scalia, J., dissenting); THE FEDERALIST No. 47 (James Madison).

42. See *Whalen*, 445 U.S. at 689 (judicial overreaching in the sentencing context "trenches particularly harshly on individual liberty").

43. See, e.g., CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS 152 (Thomas Nugent trans., 1966) ("Again, there is no liberty, if the judiciary power be not separated from the legislative . . . . Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be then the legislator.").

44. Note, *supra* note 25, at 306.

45. *Id.* at 307; cf. UNITED STATES SENTENCING GUIDELINES MANUAL § 4A1.2(a)(2) (1990) [hereinafter U.S.S.G.] (concurrent sentences are not aggregated for the purpose of establishing a defendant's criminal history points).

46. *Green v. United States*, 355 U.S. 184, 187 (1957).

47. See *United States v. McHan*, 966 F.2d 134, 139 (4th Cir. 1992) ("The Double Jeopardy Clause imposes a rule of finality for criminal law judgments to protect persons from the burden, expense, embarrassment, and harassment of multiple prosecutions and punishments for the same offense."); cf. *Doss*, *supra* note 37, at 1419-20 (arguing that double jeopardy protects a defendant's interest in finality and therefore precludes resentencing on counts remaining after reversal of the primary convictions).

48. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1873).

49. *Lange*, 85 U.S. (18 Wall.) at 178 (excess punishment is forbidden "by the dearest principles of personal rights"); see also *United States v. Halper*, 490 U.S. 435, 447 (1989) (describing "the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments" and declaring that "[the] constitutional protection [against multiple punishments] is intrinsically personal.").



Multiple Punishment Doctrine guarantees a defendant that satisfaction of the legislatively authorized sentence will terminate the punishment imposed by society. In *Ball v. United States*,<sup>50</sup> the Court recognized the potential for "adverse collateral consequences"<sup>51</sup> when a defendant is convicted of multiple, overlapping offenses. Criminal convictions are often used to deny parole, to impeach a witness' testimony, and to enhance sentences under recidivist statutes. Convictions for lesser-included offenses may therefore result in adverse consequences in subsequent criminal proceedings. *Ball* construed the Multiple Punishment Doctrine to limit the legal effects of a single act in future legal proceedings, reinforcing finality in the criminal justice system.

The Supreme Court has identified four adverse consequences that might flow from the retention of unconstitutional convictions upon a defendant's record: the social stigma resulting from a felony conviction, ineligibility for parole, impeachment of character in future legal proceedings, and increased sentences under recidivist statutes.<sup>52</sup> The effect of additional convictions on a person's reputation cannot be quantified, yet the Constitution creates a presumption that the incremental degradation associated with each conviction constitutes punishment.<sup>53</sup> This consequence alone might justify the conclusion that the retention of conspiracy convictions in addition to a CCE conviction is constitutionally suspect. The reduced possibility for parole, however, is irrelevant in this context because the CCE statute forbids the suspension of a sentence imposed for the offense.<sup>54</sup>

Three adverse consequences may flow from allowing convictions for conspiracy to coexist with a CCE conviction. First, the multiplication of convictions increases the defendant's susceptibility to impeachment in subsequent legal proceedings. Evidence of prior felony convictions is admissible to impeach a witness at trial.<sup>55</sup> The retention

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50. 470 U.S. 856 (1985).

51. 470 U.S. at 865.

52. 470 U.S. at 865; see also *Street v. New York*, 394 U.S. 576, 579 n.3 (1969); *Sibron v. New York*, 392 U.S. 40, 55-56 (1968); *Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968).

53. See *Sibron* 392 U.S. at 40:

It is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable. And even if we believed that an individual had reached that point, it would be impossible for us to say that he had no interest in beginning the process of redemption with the particular case sought to be adjudicated.

392 U.S. at 56 (footnote omitted).

54. 21 U.S.C. § 848(d) (1988).

55. See FED. R. EVID. 609. Most states have similar rules governing the admissibility of evidence establishing past criminal wrongdoing. See, e.g., MCCORMICK ON EVIDENCE § 43, at 93-95 (Edward W. Cleary ed., 3d ed. 1984). The federal rule does contain a potential safeguard against the utilization of convictions for conspiracy, however. The Federal Rules of Evidence allow the prosecution to offer proof of past convictions provided that "the court determines that the probative value of admitting [the] evidence outweighs its prejudicial effect to the defendant." FED. R. EVID. 609(a). This requirement, however, hardly inspires enough confidence to enable one to presume that there is no danger of collateral punishment.

of convictions for both the greater and lesser offenses increases the chance that an adverse party can successfully impeach the credibility of the former prisoner, as the sheer number of convictions may unduly influence a jury. "Although [the defendant] could explain that [the] convictions arose out of the same transaction, a jury might not be able to appreciate this subtlety."<sup>56</sup> The credibility of a previously convicted felon might then play a pivotal role in deciding that person's fate in a subsequent criminal proceeding.<sup>57</sup>

The potential sentencing of a defendant as a recidivist presents additional adverse collateral consequences in the CCE context. Although the federal sentencing guidelines count only those convictions arising from separate transactions in calculating a defendant's criminal history score,<sup>58</sup> many states have enacted less sophisticated recidivist sentencing statutes. Such statutes merely count *the number* of convictions on a defendant's record, regardless of the circumstances under which those convictions were obtained.<sup>59</sup> A convicted CCE

56. *Benton v. Maryland*, 395 U.S. 784, 791 (1969).

57. *See, e.g., United States v. Johnson*, 720 F.2d 519, 522 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1310 (1984) (defendant convicted of conspiracy to distribute cocaine; admission of evidence of prior convictions upheld "in view of the importance of Johnson's credibility"); *United States v. Young*, 702 F.2d 133, 137 (8th Cir. 1983) (defendant convicted of assault; admission of prior conviction upheld because "[c]redibility was extremely important in this case").

58. U.S.S.G., *supra* note 45, § 4A1.2 application note 3 (1990) ("Cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing."). The Sentencing Manual does invite judges to depart from the guidelines in the event that the exclusion of related convictions "underrepresents the seriousness of the defendant's criminal history and the danger that he presents to the public." *Id.* Hence, the possibility exists that the retention of lesser-included offenses will generate adverse collateral consequences in the Federal penal system.

59. ALA. CODE § 13A-5-9 (1975) (distinguishing between two and three prior convictions); ALASKA STAT. § 12.55.125 (1962 & Supp. 1992) (distinguishing between two and three prior convictions); ARK. CODE ANN. § 5-4-501 (Michie 1987) (distinguishing between four or fewer felony convictions); DEL. CODE ANN. tit. 11, § 4214 (1987 & Supp. 1992) (distinguishing between two and three prior convictions); FLA. STAT. ch. 775.084 (1991); HAW. REV. STAT. § 706-606.5 (Supp. 1992) (distinguishing between two and three prior convictions); IDAHO CODE § 19-2514 (1987); IOWA CODE § 902.8 (1983); KAN. STAT. ANN. § 21-4504 (1988); LA. REV. STAT. ANN. § 529.1 (West 1992) (distinguishing between two, three, and four prior convictions); MICH. COMP. LAWS ANN. §§ 769.11, 769.12 (West Supp. 1991) (distinguishing between two and three prior convictions); NEV. REV. STAT. § 207.010 (1991) (distinguishing between two and three prior convictions); N.D. CENT. CODE § 12.1-32-09(1) (Supp. 1991); OHIO REV. CODE ANN. § 2929.01 (Baldwin 1992); TENN. CODE ANN. §§ 40-35-106 to -108 (1990) (distinguishing four or more prior convictions); VT. STAT. ANN. tit. 13, § 11 (1974); WASH. REV. CODE § 9.92.090 (West 1988); W. VA. CODE § 61-11-18 (1992).

Three states require that a sentence have been imposed on the conviction in order for it to be counted under the recidivist sentencing statute. *See* MASS. GEN. L. ch. 279, § 25 (1990); NEB. REV. STAT. § 29-2221 (1989); UTAH CODE ANN. § 76-8-1001 (Supp. 1992). Collateral consequences would flow from the imposition of concurrent sentences for conspiracy convictions in these states, rendering suspect the Seventh Circuit's assertion that such sentences entail "no risk of collateral consequences." *United States v. Bond*, 847 F.2d 1233, 1239 (7th Cir. 1988).

Most jurisdictions follow the federal scheme and require that convictions arise out of separate transactions to count against the defendant under the recidivist sentencing scheme. ARIZ. REV. STAT. ANN. § 13-604(H) (1989); CAL. PENAL CODE § 667(a) (West 1988 & Supp. 1991); COLO. REV. STAT. § 16-13-101(1)-(2) (1986); CONN. GEN. STAT. § 53a-40(d) (1983); D.C. CODE ANN. § 22-104a(b)(2) (1989); GA. CODE ANN. § 17-10-7(c) (1990); ILL. COMP. STAT. ch. 38,

felon may confront the prospect of sentencing in a state with such a crude criminal conviction accounting system.<sup>60</sup> “[T]his possibility . . . [although] remote,”<sup>61</sup> clearly magnifies the defendant’s punishment when lesser-included convictions are retained.<sup>62</sup>

Finally, simultaneous convictions for CCE and conspiracy may subject a defendant to lengthy pretrial detention if the defendant is later arrested on unrelated charges. The government can detain persons arrested in the federal system until trial based in part on their “criminal history.”<sup>63</sup> A majority of states have similar provisions.<sup>64</sup>

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para. 33B-1(c) (1992); IND. CODE ANN. § 35-50-2-8(b) (Supp. 1979); KY. REV. STAT. ANN. § 532.080(4) (Michie/Bobbs-Merrill 1990); MINN. STAT. ANN. § 609.152(c) (West Supp. 1991); MISS. CODE ANN. § 99-19-81 (Supp. 1992); MO. REV. STAT. § 558.016(3) (Supp. 1992); MONT. CODE ANN. § 46-18-501 (1985); N.H. REV. STAT. ANN. § 651:6(I)(c) (1988); N.J. STAT. ANN. § 2C44-3(a) (West 1982); N.M. STAT. ANN. § 31-18-17 (Michie Supp. 1992); N.Y. PENAL LAW § 70.10(c) (McKinney 1987); N.C. GEN. STAT. § 14-7.1 (1986); N.D. CENT. CODE § 12.1-32-09(1)(c) (Supp. 1991); OKLA. STAT. TIT. 21, § 51(B) (1991); R.I. GEN. LAWS § 12-19-21(A) (Supp. 1992); S.C. CODE ANN. § 17-25-50 (Law. Co-op 1976); S.D. CODIFIED LAWS ANN. § 22-7-9 (1988); TEX. PENAL CODE ANN. § 12.42 (West Supp. 1990); WYO. STAT. § 6-10-201 (1988).

Five states have enacted habitual offender laws that require only that a person have been convicted of one previous felony. In these states, the retention of convictions on the lesser-included conspiracy counts would not affect the flow of collateral consequences because the CCE conviction would suffice to justify the additional incarceration authorized by the statute. ME. REV. STAT. ANN. tit. 15, § 757 (West Supp. 1992); MD. CRIM. LAW CODE ANN. § 643B (1988); OR. REV. STAT. § 161.725(2) (1991); 42 PA. CONS. STAT. ANN. § 9714(a) (1982); WIS. STAT. § 939.62(2) (1989-1990).

Virginia has not enacted a recidivist sentencing statute.

60. A previously convicted felon would encounter the prospect of adverse consequences under two types of habitual offender sentencing plans. In the states that simply require conviction of a person for a minimum number of offenses to be considered a recidivist, a single criminal scheme could qualify the person as a habitual felon, regardless of the fact that the convictions stemmed from the “same transaction.” In those states that adjust the severity of the sentence handed out to habitual felons, multiple conspiracy convictions arising out of one criminal enterprise may well qualify a defendant under the most serious offender status, earning the defendant a term of life imprisonment. See *supra* note 59.

61. *Benton v. Maryland*, 395 U.S. 784, 790-91 (1969).

62. *Benton*, 395 U.S. at 790-91.

63. 18 U.S.C. § 3142(g)(3)(A) (1988).

64. See generally JOHN S. GOLDKAMP, TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICA 67 (1979) (“Prior criminal record is specified [as a criteria for withholding bail] in the guidelines of thirty-six states.”); *id.* at 60 (“Overall, the right to bail described in state guidelines appears to be defined principally in terms of seriousness of the offense charged, possible penalty, and record of prior convictions.”).

Several states permit pretrial detention based in part on an accused’s record of convictions. See CAL. PENAL CODE § 1275 (West Supp. 1993); COLO. REV. STAT. § 16-4-101(b)(III) (Supp. 1992); ILL. REV. STAT. ch. 38, para. 110-6.1(d)(2)(A) (Smith-Hurd Supp. 1992); MASS. GEN. L. ch. 276, § 58 (1990); N.Y. CRIM. PROC. L. §§ 510.10-30 (McKinney 1984 & Supp. 1993).

Most states look at prior convictions to determine the conditions to be imposed pursuant to pretrial release. See ALA. R. CRIM. PROC. 7.2(a) (1992); ALASKA STAT. § 12.30.020(c)(8) (1990); ARK. R. CRIM. PROC. 8.5(b)(vii) (Michie 1993); DEL. CODE ANN. tit. 11, § 2105 (1987); D.C. CODE ANN. § 23-1321(b) (1989); FLA. STAT. ch. 903.046(2) (1991); IDAHO CRIM. R. 46(a) (1992); IOWA CODE § 811.2(2) (1983); KAN. STAT. ANN. § 22-2802(4) (1988); ME. REV. STAT. ANN. tit. 15, § 1026(4) (West Supp. 1992); MD. CODE ANN., Ct. R. 4-216(f) (1993); MINN. R. CRIM. PROC. 6.02(2) (West 1993); MO. REV. STAT. § 544.455(2) (1986); MONT. CODE ANN. §§ 46-9-301, -501 (1985); NEB. REV. STAT. § 29-901.01 (1989); NEV. REV. STAT. §§ 178.4851, .4853 (1991); N.J. R. CRIM. PROC. 326-4 Cmt. (West 1993); N.C. GEN. STAT. § 15a-534(c) (1988); N.D. R. CRIM. PROC. 46(a)(1)(ii) (1992-1993); OHIO R. CRIM. PROC. 46(F) (Baldwin

The government may use multiple convictions for the same conduct to justify the lengthy incarceration of a defendant awaiting trial, a situation implicating "the individual's strong interest in liberty."<sup>65</sup> Hence, the retention of convictions for conspiracy, obtained simultaneously with a CCE conviction, potentially implicates the finality interest safeguarded by the Multiple Punishment Doctrine.<sup>66</sup>

The Multiple Punishment Doctrine affords criminal defendants protection against prosecutorial overreaching, undergirds the separation of legislative and judicial power, and promotes finality in criminal punishment. While it is easy to identify the protection offered by the doctrine, the procedure for evaluating cumulative punishment claims is not. The next section analyzes the Supreme Court's multiple punishment jurisprudence to isolate the test for scrutinizing complaints of excessive punishment.

### B. *Analyzing Multiple Punishment Claims*

Although one commentator describes double jeopardy doctrine as a "Gordian knot,"<sup>67</sup> a careful reading of the Supreme Court's pronouncements on the multiple punishment bar reveals a vague but useful strand of analysis for evaluating double punishment claims.<sup>68</sup> A

1992); ORE. REV. STAT. §§ 135.230-265 (1991); PA. R. CRIM. PROC. 4004 (1992); R.I. GEN. LAWS § 12-13-1.3(b) (Supp. 1992); S.C. CODE ANN. § 17-15-30 (Law. Co-op. 1985); S.D. CODIFIED LAWS § 23A-43-4 (1988); TENN. CODE ANN. § 40-11-118(b) (1990); VT. STAT. ANN. tit. 13, § 7554(b) (Supp. 1992); VA. CODE ANN. § 19.2-123(A) (Michie Supp. 1992); WIS. STAT. § 9.69.01(4) (1989-1990). Texas common law allows similar results based in part on previous convictions. See, e.g., *Smith v. State*, 829 S.W.2d 885, 887 (Tex. Ct. App. 1992). Some states permit the amount of bail to reflect the defendant's prior convictions. See IND. CODE ANN. § 35-33-8-4(b) (West 1986); KY. REV. STAT. ANN. § 431.525(1) (Michie/Bobbs-Merrill 1985); LA. CODE CRIM. PROC. ANN. art. 317 (West Supp. 1993); W. VA. CODE § 62-1C-3 (1992). The greater the number of convictions on a defendant's record, the more likely that the conditions accompanying release will be onerous — that is, heavily supervised release, release into custody, or extremely high bail. See GOLDKAMP, *supra*, at 67-68 (describing how states use defendants' prior criminal record to set high bail).

65. *United States v. Salerno*, 481 U.S. 739, 750 (1987). Others describe the deprivation of liberty accompanying pretrial detention and bail differently. See, e.g., ROY B. FLEMMING, *PUNISHMENT BEFORE TRIAL* 2 (1982) ("Punishment before trial, then, shares the same features as sentencing following conviction. Defendants lose their liberty, spend time in jail, and incur financial penalties."); Louis M. Natali, Jr. & Edward D. Ohlbaum, *Redrafting the Due Process Model: The Preventive Detention Blueprint*, 62 TEMP. L. REV. 1225, 1260 (1989) (lamenting "the right snatched away by the Court in *Salerno*" as a possible "harbinger of the future emasculation of civil liberty").

66. Retention of conspiracy convictions offends the doctrine only if conspiracy is a lesser-included offense within CCE and Congress did not intend to punish the offenses cumulatively. These subjects are discussed in Part III, *infra*.

67. George C. Thomas, *Multiple Punishments for the Same Offense: The Analysis After Missouri v. Hunter or Don Quixote, the Sargasso Sea, and the Gordian Knot*, 62 WASH. U. L.Q. 79, 79 & n.\* (quoting *Whalen v. United States*, 445 U.S. 684, 702 (1980) (Rehnquist, J., dissenting)) (1984).

68. See Julie R. Niemyer, Casenote, *The Multiple Punishment Protection of the Double Jeopardy Clause: Thomas v. Morris*, 22 CREIGHTON L. REV. 1081, 1100-01 (1989) (describing a two-part inquiry into multiple punishment claims).

court facing an excessive punishment claim must initially decide whether the crimes constitute identical offenses. If the offenses overlap for double jeopardy purposes, courts may still impose punishment on each count if the legislature has authorized them to do so. Absent a clear expression of the legislature's will, the Constitution requires the court to vacate convictions for lesser-included offenses to avoid cumulative punishment.<sup>69</sup>

The Supreme Court announced the first step in conducting a multiple punishment analysis — discerning whether two crimes constitute the “same offense” — in *Blockburger v. United States*.<sup>70</sup> In deciding whether statutory offenses overlap, “the test to be applied . . . is whether each provision requires proof of a fact which the other does not.”<sup>71</sup> Courts functionally conduct the analysis in terms of greater and lesser offenses. For example, the Court has noted that in order to convict a defendant of auto theft, a state must establish the lesser offense of joyriding, because all the elements of joyriding are also elements of theft.<sup>72</sup> In such a situation, “[t]he greater offense is therefore by definition the ‘same’ for purposes of double jeopardy as any lesser offense included in it.”<sup>73</sup> No multiple punishment occurs if a court finds that two offenses are distinct.

A conclusion that two charges overlap and therefore place a defendant in jeopardy of being convicted for a greater and lesser offense, however, does not end the inquiry. If “Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution.”<sup>74</sup> The rule of statutory construction outlined in *Blockburger* does not control when the legislature reveals its intent to punish cumulatively.<sup>75</sup> An excessive punishment claim obviously

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69. See *Ball v. United States*, 470 U.S. 856, 864-65 (1985).

70. 284 U.S. 299 (1932).

71. 284 U.S. at 304; see also *Grady v. Corbin*, 495 U.S. 508, 517 n.8 (1990) (“*Blockburger* [is] a test to determine the permissibility of cumulative punishments.”).

72. *Brown v. Ohio*, 432 U.S. 161, 167-68 (1977).

73. *Brown*, 432 U.S. at 168.

74. *Albernaz v. United States*, 450 U.S. 333, 344 (1981).

75. E.g., *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1982) (if “a legislature specifically authorizes cumulative punishment . . . a court’s task of statutory construction is at an end”); *Albernaz*, 450 U.S. at 340. Some commentators criticize the Court’s willingness to defer to the legislative branch. They argue that the Court has undermined the substantive protection of the Double Jeopardy Clause by defining its scope in terms of legislative formality. See *Hunter*, 459 U.S. at 370-74 (Marshall, J., dissenting) (“If the Double Jeopardy Clause imposed no restrictions on a legislature’s power to authorize multiple punishment, there would be no limit to the number of convictions a State could obtain on the basis of the same act . . .”); *Albernaz*, 450 U.S. at 333 (Stewart, J., concurring) (“No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not . . .”); Westin & Drubel, *supra* note 39, at 113 (the view “that the Double Jeopardy Clause imposes no restrictions whatsoever on the legislature’s definition of offenses . . . contradicts a handful of decisions”); Doss, *supra* note 37, at 1421 (“[T]he multiple punishment bar would be rendered meaningless by a reading that it protects only against the imposition of sentences in excess of legislated limits.”).

"cannot be resolved without determining what punishments the Legislative Branch has authorized."<sup>76</sup> If the relevant legislative history reveals an intent to authorize punishment under two overlapping statutes, a court should defer to the legislative will and impose a sentence for each violation.<sup>77</sup> If, however, an analysis of legislative intent fails to yield a definitive result, a court should vacate the convictions on the lesser counts to avoid adverse collateral consequences and the prospect of multiple punishment.<sup>78</sup>

The Supreme Court has formulated, albeit not explicitly acknowledged, this two-step inquiry for cumulative punishment claims. As the next section demonstrates, the Court has largely followed this jurisprudence in cumulative punishment cases challenging convictions and sentences under the CCE statute.

### C. Supreme Court Treatment of CCE and Double Jeopardy

The Supreme Court has examined the interaction between the continuing criminal enterprise statute and the Double Jeopardy Clause on two occasions. In *Jeffers v. United States*,<sup>79</sup> the Court questioned whether the government may punish an individual for both CCE and conspiracy to violate narcotics laws under 21 U.S.C. § 846.<sup>80</sup> The government initially indicted Garland Jeffers for conspiring to distribute cocaine and heroin, and it later indicted him for engaging in a continuing criminal enterprise.<sup>81</sup> Jeffers resisted the government's motion to consolidate the two trials, arguing that the proceedings would prejudice him since the indictments involved different groups of codefendants.<sup>82</sup> The district court denied the government's motion and conducted separate trials.<sup>83</sup> Jeffers was found guilty at both trials. Jeffers appealed, claiming that his conspiracy conviction precluded a subsequent conviction for CCE. Jeffers predicated his argument on the notion that conspiracy is a lesser-included offense within CCE.<sup>84</sup> The Court held that the *subsequent prosecution* did not offend the Double Jeopardy Clause because Jeffers had prevented a consolidated

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76. *Whalen v. United States*, 445 U.S. 684, 688 (1980); see also *Albernaz*, 450 U.S. at 332 ("[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.").

77. See *Hunter*, 459 U.S. at 368; *Albernaz*, 450 U.S. at 343.

78. See *Ball v. United States*, 470 U.S. 856, 864 (1985) ("[T]he only remedy consistent with the congressional intent is for the District Court . . . to vacate one of the underlying convictions.").

79. 432 U.S. 137 (1977) (plurality opinion).

80. 432 U.S. at 146-47.

81. 432 U.S. at 140-141.

82. 432 U.S. at 142-43.

83. 432 U.S. at 143.

84. 432 U.S. at 144-46. Jeffers originally raised the argument in an attempt to block the second trial but was not able to persuade either the trial or the appellate courts to do so. 432 U.S. at 144.

trial, thereby "waiving" his right to challenge the proceedings.<sup>85</sup>

The Court then evaluated Jeffers' claim that his sentences for the CCE conviction and the conspiracy convictions violated the multiple punishment bar. The Court assumed that conspiracy to distribute narcotics is a lesser-included offense within CCE,<sup>86</sup> as CCE requires proof of "concert[ed]" action between five or more individuals.<sup>87</sup> The Jeffers Court did not hold that CCE and conspiracy are overlapping offenses, however.<sup>88</sup> The Court instead turned to the legislative history of the CCE statute, finding no conclusive evidence that Congress intended to inflict cumulative punishment.<sup>89</sup> Its inquiry complete,<sup>90</sup> the Court concluded that Jeffers had indeed suffered double punishment because the lower court has fined him in excess of the statutory limit for CCE convictions.<sup>91</sup> However, the Court expressly declined to decide whether the imposition of *concurrent sentences* for conspiracy violated the multiple punishment bar because Jeffers' life sentence without possibility for parole negated any possible adverse collateral consequences.<sup>92</sup>

The Court returned to analyze the relationship between CCE and double jeopardy in *Garrett v. United States*.<sup>93</sup> Garrett pled guilty to one count of importation of marijuana in the Western District of Washington.<sup>94</sup> He was subsequently indicted and convicted in Florida

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85. 432 U.S. at 154.

86. The Court based its assumption on the traditional *Blockburger* analysis. See 432 U.S. at 150 ("§ 846 is a lesser-included offense of § 848, because § 848 requires proof of every fact necessary to show a violation under § 846"); 432 U.S. at 153 ("If the two charges had been tried in one proceeding, it appears that [Jeffers] would have been entitled to a lesser-included offense-instruction.").

87. 432 U.S. at 148-49.

88. See 432 U.S. at 153 n.20 (*Jeffers* does not settle whether conspiracy is a lesser-included offense "definitively.").

89. 432 U.S. at 155-57. As the Court noted, the House Report issued in conjunction with the Comprehensive Drug Abuse Prevention and Control Act of 1970, *supra* note 2, indicates that Congress intended CCE to constitute an exclusive penalty for those charged under its provisions. See H.R. REP. NO. 1444, *supra* note 1, pt. 1, at 10, reprinted in 1970 U.S.C.C.A.N. 4566, 4576 ("Except when continuing criminal enterprises serve as the basis for an indictment . . . [narcotics offenses] will carry penalties which vary, depending upon the danger of the drugs involved.").

90. Though the Court had evaluated Jeffers' argument by the traditional method of analyzing the offenses under the *Blockburger* test and then proceeding to examine congressional intent for permission to impose cumulative punishment, it rather cryptically denied conducting the two-step inquiry. Justice Blackmun maintained that because the Court had found no evidence of legislative intent to authorize multiple punishments, "this again makes it unnecessary to reach the lesser included offense issue." *Jeffers*, 432 U.S. at 155. The Court, however, scrutinized the issue in precisely the opposite manner. The Court *presumed* that conspiracy was a lesser-included offense and then proceeded to examine congressional intent. See *supra* notes 86 & 88.

91. 432 U.S. at 157-58.

92. 432 U.S. at 155 n.24. The Court subsequently decided that convictions and sentences for lesser-included offenses generally offend the Multiple Punishment Doctrine. See *Ball v. United States*, 470 U.S. 856, 864-65 (1985); see also *Thomas*, *supra* note 11, at 1391-92 (arguing that *Ball* implicitly overruled *Jeffers*).

93. 471 U.S. 773 (1985).

94. 471 U.S. at 775.

for conspiring to possess marijuana with intent to distribute and for participating in a CCE.<sup>95</sup> The government submitted proof of the Washington importation scheme to establish one of the "continuing series of violations" required by 21 U.S.C. § 848(c).<sup>96</sup> Garrett advanced two arguments on appeal. Initially, he argued that the use of the Washington scheme at the Florida trial placed him twice in jeopardy for the Washington transaction. The Court summarily rejected this claim, noting that Garrett's case fell within the well-recognized rule that jeopardy does not attach until an individual has completed all the elements of a crime.<sup>97</sup> Otherwise, the Court suggested, this theory would force the government into the "absurd" position of permitting a drug dealer to continue his operations until it could amass proof of a CCE violation.<sup>98</sup>

The Court also rejected Garrett's contention that the consecutive sentences imposed for importation and CCE constituted excessive punishment. The Court agreed that Garrett's offenses might be identical under the *Blockburger* test,<sup>99</sup> but it found that "[t]he language,

95. 471 U.S. at 776-77.

96. 471 U.S. at 776.

97. 471 U.S. at 787-93. See in this regard *Brown v. Ohio*, 432 U.S. 161, 169 n.7 (1977) ("An exception [to the Double Jeopardy Clause] may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred . . .").

98. *Garrett*, 471 U.S. at 785-86.

99. The *Garrett* Court cautioned in dicta against the "ready transposition of the 'lesser-included offense' principles of double jeopardy to the classically simple situation presented in *Brown [v. Ohio]* to the multilayered conduct, both as to time and to place, involved in [a CCE prosecution]." 471 U.S. at 789. The Court made this statement in the context of discussing Garrett's successive prosecution claim. Yet the Court conducted the traditional, two-step inquiry into Garrett's multiple punishment claim. See 471 U.S. at 779-80 (conducting two-step inquiry and concluding that "the *Blockburger* presumption must of course yield to a plainly expressed contrary view on the part of Congress [regarding cumulative punishment]").

The Supreme Court has recently questioned the wisdom of applying the traditional lesser-included offense analysis in "conspiracy prosecutions involv[ing] . . . allegations of multilayered conduct as to time and place." *United States v. Felix*, 112 S. Ct. 1377, 1385 (1992) (prosecution for conspiracy to manufacture methamphetamine following prior conviction for actual manufacture of the drug). Nonetheless, this Note analyzes CCE and conspiracy under the traditional lesser-included analysis. Initially, the Court has followed the traditional lesser-included analysis when analyzing the two crimes. See *Jeffers*, 432 U.S. at 150-51 (discussing lesser-included offense analysis in a CCE and conspiracy prosecution); *Garrett*, 471 U.S. at 794 (affirming in dicta the notion that conspiracy is a lesser-included offense within CCE). Second, the *Felix* Court's mode of analysis is inapposite to the multiple punishment inquiry in this Note. *Felix* did not involve the CCE statute. Moreover, *Felix* raised a subsequent prosecution claim rather than a multiple punishment claim. See 112 S. Ct. at 1380. The Court's holding in *Jeffers*, later upheld in *Garrett*, that Congress did not intend to punish CCE and conspiracy cumulatively, is intact. Finally, while conspiracy and a substantive crime are generally separate offenses, conspiracy usually is a lesser-included offense of a crime involving concerted criminal activity. *Iannelli v. United States*, 420 U.S. 770, 785 (1975). This notion has been termed "Wharton's Rule." In *Iannelli*, the Court discussed the operation of Wharton's Rule:

Wharton's Rule applies only to offenses that require concerted criminal activity, a plurality of criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because both require collective criminal activity. The substantive offense therefore presents some of the same threats that the law of conspiracy normally is



structure, and legislative history of [the Act] show in the plainest way that Congress intended the CCE provision to be a separate criminal offense which [is] punishable in addition to, and not as a substitute for, the predicate offenses."<sup>100</sup> The Court issued a limited holding compatible with *Jeffers* — that Congress had authorized cumulative punishment for “substantive predicate offenses.”<sup>101</sup> But the Court’s conclusion that substantive predicate offenses are not lesser-included offenses within CCE undermined *Jeffers*. The *Jeffers* Court’s assumption that conspiracy constitutes an offense included within CCE remained intact, however, because the *Garrett* majority recognized that *Jeffers* “reasonably concluded that the dangers posed by a conspiracy and a CCE were similar and thus there would be little purpose in cumulating the penalties.”<sup>102</sup>

The Supreme Court’s decisions regarding double jeopardy and CCE have not provided lower federal courts with clear guidance to resolve multiple punishment claims. Under *Garrett*, the government can punish defendants cumulatively for CCE and substantive narcotics offenses — that is, the actual importation, manufacture, or distribution of controlled substances. The Court has not resolved other multiple punishment issues, however. For instance, the *Jeffers* Court declined to decide whether conspiracy is a lesser-included offense within CCE. While *Garrett* followed in dicta the *Jeffers* Court’s assumption that CCE encompasses conspiracy, the issue remains open. Moreover, *Jeffers* raised other issues. The Court only reduced *Jeffers*’ fine and did not touch his concurrent prison sentences. The Court also declined to discuss *Jeffers*’ simultaneous convictions, although *Ball*, decided eight years later, appears to require the vacation of lesser-included convictions. Lower courts must decide whether this portion of *Jeffers* is still viable after *Ball*. The next Part examines the results of several years of struggle among the federal courts to answer these questions. Not surprisingly, the circuit courts of appeals have generated varying responses to excessive punishment claims advanced by defendants convicted of both conspiracy and CCE.

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thought to guard against, and it cannot automatically be assumed that the Legislature intended the conspiracy and the substantive offense to remain as discrete crimes upon consummation of the latter. Thus, absent legislative intent to the contrary, the Rule supports a presumption that the two merge when the substantive offense is proved.

420 U.S. at 785-86 (emphasis added) (footnote omitted). Wharton’s Rule is applicable to complex statutory crimes. See *Jeffers*, 432 U.S. at 147-51. Wharton’s Rule and lesser-included analysis thus control if continuing criminal enterprise requires proof of concerted activity and Congress has not authorized cumulative punishment. See *infra* text accompanying notes 170-78.

100. 471 U.S. at 779.

101. 471 U.S. at 794 (emphasis added).

102. 471 U.S. at 794; see also *United States v. Maza*, 983 F.2d 1004, 1009 (11th Cir. 1993) (“These decisions [holding conspiracy to be included within the definition of CCE] were not disturbed by the Supreme Court’s ruling in *Garrett* . . . that the substantive, predicate offenses, as distinguished from conspiracy, were not lesser-included offenses of CCE for purposes of double jeopardy.”) (footnote omitted).

## II. THE FEDERAL CIRCUITS' TREATMENT OF CCE AND CONSPIRACY UNDER THE MULTIPLE PUNISHMENT DOCTRINE

Part I concluded that the Supreme Court's treatment of multiple punishment claims involving CCE and conspiracy has shrouded the parameters of the Multiple Punishment Doctrine. The courts of appeals differ in their responses to the Court's unsettled jurisprudence. This Part examines several methods for dealing with multiple convictions for CCE and conspiracy. Section II.A analyzes the approach advocated by a majority of courts, which vacate both separate convictions and sentences imposed for conspiracy. Section II.B reviews three competing doctrines — the Second Circuit's combination approach, the Third Circuit's retention of separate convictions without sentences, and the Seventh Circuit's allowance of both convictions and concurrent sentences for conspiracy.

### A. *The Majority Rule — Vacating Convictions and Sentences*

A majority of the circuit courts of appeals have concluded that allowing the conviction of a defendant for conspiracy in addition to CCE violates the Multiple Punishment Doctrine.<sup>103</sup> The circuits adhering to the majority "vacation" rule can be separated into two camps. Some of the circuits reason that *Jeffers v. United States*<sup>104</sup> prohibits cumulative punishment for CCE and conspiracy, believing that the *Jeffers* Court held that conspiracy is a lesser-included offense within CCE.<sup>105</sup> Other circuits combine *Jeffers* with the Court's decision in *Ball v. United States*<sup>106</sup> — which held that convictions for lesser-included offenses violate the multiple punishment bar by generating adverse collateral consequences — to invalidate conspiracy convictions.<sup>107</sup> Although both approaches achieve the same result, this Note follows the circuits relying on *Ball* in analyzing the multiple punishment issue.<sup>108</sup>

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103. See, e.g., *United States v. Montanye*, 962 F.2d 1332, 1346-47 (8th Cir. 1992); *United States v. David*, 940 F.2d 722, 738 (1st Cir. 1991), cert. denied, 112 S. Ct. 2301 (1992); *United States v. Jones*, 918 F.2d 909, 910-11 (11th Cir. 1990) (per curiam); *United States v. Rivera*, 900 F.2d 1462, 1478 (10th Cir. 1990); *United States v. Butler*, 885 F.2d 195, 201-02 (4th Cir. 1989); *United States v. Schuster*, 769 F.2d 337, 344-45 (6th Cir. 1985), cert. denied, 475 U.S. 1021 (1986); *United States v. Smith*, 703 F.2d 627, 628 (D.C. Cir. 1983) (per curiam); *United States v. Michel*, 588 F.2d 986, 1001 (5th Cir.), cert. denied, 444 U.S. 825 (1979).

104. 432 U.S. 137 (1977).

105. See *supra* notes 86-92 and accompanying text.

106. 470 U.S. 856 (1985).

107. See *supra* note 69 and accompanying text.

108. See *infra* notes 184-98 and accompanying text.

The District of Columbia,<sup>109</sup> Fourth,<sup>110</sup> Fifth,<sup>111</sup> Tenth,<sup>112</sup> and Eleventh<sup>113</sup> Circuits, although joining in the majority result, have conducted only a cursory examination of the Multiple Punishment Doctrine and concluded that a defendant cannot be punished for both greater- and lesser-included offenses. These circuits simply assume that *Jeffers* held that CCE and conspiracy cannot be punished simultaneously.<sup>114</sup> This assumption is simply wrong; *Jeffers* reserved for decision the issue of whether the narcotics conspiracy and CCE statutes overlap.<sup>115</sup> Moreover, as one court has

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109. *United States v. Smith*, 703 F.2d 627 (D.C. Cir. 1983) (per curiam).

110. *United States v. Butler*, 885 F.2d 195 (4th Cir. 1989); see also *United States v. Lyles*, No. 91-6278, 1991 U.S. App. LEXIS 5529, at \*1-3 (4th Cir. Apr. 5, 1991) (per curiam). Before *Butler*, the Fourth Circuit adhered to the view espoused by the Third Circuit and allowed conspiracy convictions to stand but vacated conspiracy sentences. See, e.g., *United States v. West*, 877 F.2d 281, 292 (4th Cir.), cert. denied, 493 U.S. 959 (1989); *United States v. Porter*, 821 F.2d 968, 978 (4th Cir. 1987), cert. denied, 485 U.S. 934 (1988). Since the decision in *Butler*, one district court attempted to adopt the Second Circuit's "combination" doctrine, which merges the conspiracy convictions into the CCE conviction to guarantee that a felon is punished in the event that the CCE conviction is later vacated on appeal. See *United States v. Fuentes*, 729 F. Supp. 487, 491-93 (E.D. Va. 1989). The Fourth Circuit, acknowledging that it had given "mixed signals" on the issue, thwarted the district court's attempt and held simply that *Butler* was controlling. *United States v. Tanner*, No. 89-5237, 1990 U.S. App. LEXIS 19956, at \*15-18 (4th Cir. Nov. 9, 1990) (per curiam), cert. denied, 111 S. Ct. 1397 (1991).

111. *United States v. Michel*, 588 F.2d 986 (5th Cir.), cert. denied, 444 U.S. 825 (1979).

112. *United States v. Rivera*, 900 F.2d 1462, 1478 (10th Cir. 1990); see also *United States v. Stallings*, 810 F.2d 973, 975-76 (10th Cir. 1987). One panel in the Tenth Circuit attempted to adopt the combination approach heralded by the Second Circuit. See *United States v. Staggs*, 881 F.2d 1546, 1548 (10th Cir. 1989). The decision has apparently been ignored in subsequent cases, however. See *Rivera*, 900 F.2d at 1478.

113. *United States v. Jones*, 918 F.2d 909 (11th Cir. 1990) (per curiam). Two panels in the Eleventh Circuit have vacated conspiracy convictions on appeal and noted that those convictions are "merged" into the CCE conviction. E.g., *United States v. Alvarez-Moreno*, 874 F.2d 1402, 1414 (11th Cir. 1989), cert. denied, 494 U.S. 1032 (1990); *United States v. Brantley*, 733 F.2d 1429, 1436 (11th Cir. 1984), cert. denied, 470 U.S. 1006 (1985). Though this language replicates the phrasing used by those circuits adhering to the "combination approach," the Eleventh Circuit has not referred to the possibility that the conspiracy convictions might be resurrected to justify a defendant's incarceration upon reversal of a CCE count. The courts are apparently referring to the presumption — labeled Wharton's Rule — that a conspiracy offense merges with the substantive offense for sentencing purposes when the conspiracy is a lesser-included offense. See *Iannelli v. United States*, 420 U.S. 770, 785-86 (1975). Hence, this Note presumes that the Eleventh Circuit has not adopted the combination method.

114. See, e.g., *United States v. Jones*, 918 F.2d 909, 910 (11th Cir. 1990) (per curiam) ("The Supreme Court . . . [has] held that when a conspiracy serves as a predicate act for a CCE conviction based upon the same criminal agreement, the conspiracy conviction merges into the CCE conviction.") (citing *Jeffers*); *United States v. Porter*, 821 F.2d 968, 978 (4th Cir. 1987) ("Congress did not intend that an individual be punished under both § 846 (conspiracy) and § 848 (continuing criminal enterprise).") (citing *Jeffers*), cert. denied, 485 U.S. 934 (1988); *United States v. Michel*, 588 F.2d 986, 1001 (5th Cir.) ("Because conspiracy . . . is a lesser-included offense to conducting a continuing criminal enterprise, it cannot support a separate conviction and sentence.") (citing *Jeffers*), cert. denied, 444 U.S. 825 (1979).

115. *Jeffers*, 432 U.S. at 153 n.20; see also *United States v. Maza*, 983 F.2d 1004, 1009 n.9 (11th Cir. 1993) ("*Jeffers* cannot be cited as holding that [§] 846 is a lesser-included offense of the CCE [offense] because this was not necessary to its decision."); *United States v. Aguilar*, 849 F.2d 92, 98 (3d Cir. 1988) ("Although many courts have assumed otherwise, often relying on concessions to this effect by the government, we believe that *Jeffers* quite clearly did not hold

argued,<sup>116</sup> *Jeffers* allowed the imposition of concurrent sentences so long as the cumulative punishment did not exceed the statutory maximum.<sup>117</sup> Because *Jeffers* had been sentenced to life imprisonment without the possibility of parole, the Court let stand his concurrent sentence for conspiracy.<sup>118</sup> At best, these circuits' failure to evaluate multiple punishment claims in a more detailed fashion undercuts the logical force of the decisions because reference to the values underlying a legal rule is often crucial in judicial decisionmaking.<sup>119</sup> Worse, the reasoning utilized by these courts may weaken the credibility of the majority approach, as evinced by the difficulty which subsequent courts have faced in justifying precedent when confronted with the government's advocacy of one of the minority views.<sup>120</sup>

The remaining circuits adhering to the majority rule — the First,<sup>121</sup> Sixth,<sup>122</sup> and Eighth<sup>123</sup> — rely on the Supreme Court's deci-

conspiracy to be a lesser offense included within the greater crime of engaging in a CCE."), *cert. denied*, 498 U.S. 962 (1990).

116. *United States v. Bond*, 847 F.2d 1233, 1239 (7th Cir. 1988) ("The conclusion that concurrent sentences may be imposed under § 846 and § 848 has the support of *Jeffers*, where this happened.").

117. *Jeffers*, 432 U.S. at 156-58.

118. 432 U.S. at 155 n.24.

119. See *supra* text accompanying note 29.

120. See, e.g., *Tanner*, 1990 U.S. App. LEXIS 19956, at \*17 (responding to an argument urging adoption of the Second Circuit's "combination" approach without attempting to justify Fourth Circuit precedent).

121. *United States v. David*, 940 F.2d 722, 738-39 (1st Cir.), *cert. denied*, 112 S. Ct. 2301 (1991); see also *United States v. Cloutier*, 966 F.2d 24, 30 (1st Cir. 1992); *United States v. Abreu*, 952 F.2d 1458, 1464-65 (1st Cir.), *cert. denied*, 112 S. Ct. 1695 (1992); *United States v. Rivera-Martinez*, 931 F.2d 148, 152-53 (1st Cir.), *cert. denied*, 112 S. Ct. 184 (1991); *Restrepo v. United States*, 761 F. Supp. 211, 213-16 (D. Mass. 1991).

In *Cloutier*, the district court seemingly adopted the Second Circuit's combination approach at the urging of the government. See *Cloutier*, 966 F.2d at 27 ("The [district] court agreed with the government and merged the conspiracy and CCE sentences into one, so that there were two convictions and one sentence for the two counts."). The circuit court avoided the question "of whether the [district] court erred in merging the conspiracy and CCE counts," leaving that issue "for another day." 966 F.2d at 30-31.

122. *United States v. Schuster*, 769 F.2d 337, 343-45 (6th Cir. 1985), *cert. denied*, 475 U.S. 1021 (1986). The *Schuster* court actually instructed the trial court to vacate the conspiracy convictions and "merge them into the continuing criminal enterprise offense." 769 F.2d at 345. The court then cryptically added that the merger would "have limited effect on the sentence imposed under section 848 [CCE], for there was no consecutive time or fine imposed under the conspiracy charges." 769 F.2d at 345. The court did not clarify whether it was attempting to preserve the conspiracy convictions for resuscitation or simply noting that conspiracy is a lesser-included offense. See *supra* note 113.

Two subsequent decisions in the Sixth Circuit shed little light on the issue. In *United States v. Paulino*, 935 F.2d 739 (6th Cir.), *cert. denied*, 112 S. Ct. 315 (1991), the panel remanded the case to the trial court for vacation of the conspiracy conviction without reference to a "merger" of the two counts. 935 F.2d at 751. A subsequent decision by the Sixth Circuit alluded to merging conspiracy and CCE convictions but did not direct the trial court to do so. Rather, the court of appeals remanded the case to allow the trial court to choose which conviction to retain, since an anomaly in the sentencing guidelines made the defendant's sentence higher for conspiracy than for CCE. *United States v. Chambers*, 944 F.2d 1253, 1268-69 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1217 (1992).

sion in *Ball v. United States*<sup>124</sup> for the conclusion that concurrent lesser-included convictions violate the multiple punishment bar.<sup>125</sup> These circuits combine the implication of *Jeffers* — that conspiracy is a lesser-included offense within CCE — with the holding in *Ball* that convictions for lesser-included offenses entail adverse collateral consequences offensive to the Multiple Punishment Doctrine.<sup>126</sup> These circuits recognize that lesser-included conspiracy convictions result in double punishment because they may enhance subsequent sentences under recidivist statutes or be used to impeach trial testimony.<sup>127</sup> While other courts have questioned the doctrinal merit of the vacation approach,<sup>128</sup> the majority rule circuits resting on both *Jeffers* and *Ball* have successfully defended their analysis against the minority views.

### B. *Minority Approaches*

Four circuits have concluded that relevant precedent does not require the elimination of convictions or sentences for conspiracy when a defendant faces punishment for engaging in a continuing criminal enterprise. The Second and Ninth Circuits adhere to the view that “combining” conspiracy and CCE convictions into one conviction mitigates any cumulative punishment concerns. The Third Circuit argues that retaining convictions for both CCE and conspiracy, while vacating conspiracy sentences, is consistent with the Multiple Punishment Doctrine. Finally, the Seventh Circuit perceives the additional punishment imposed by the retention of concurrent sentences to be consistent with that authorized by the Court and Congress.

#### 1. *The Combination Approach*

The Second Circuit has proposed a unique alternative to the majority rule. Rather than vacating a defendant’s conspiracy conviction

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123. *United States v. Montanye*, 962 F.2d 1332, 1346-47 (8th Cir. 1992); see also *United States v. Holt*, 969 F.2d 685, 687 (8th Cir. 1992); *United States v. Duke*, 940 F.2d 1113, 1120 (8th Cir. 1991); *United States v. Possick*, 849 F.2d 332, 341 (8th Cir. 1988); *United States v. Grubbs*, 829 F.2d 18, 19 (8th Cir. 1987); *United States v. Maull*, 806 F.2d 1340, 1346-47 (8th Cir. 1986), cert. denied, 480 U.S. 907 (1987).

124. 470 U.S. 856 (1985).

125. See, e.g., *Duke*, 940 F.2d at 1120 (“[T]he Court has made it clear that the second conviction and not merely the second sentence violates the [D]ouble [J]eopardy [C]lause.”) (citing *Ball*); *Rivera-Martinez*, 931 F.2d at 148 (“*Ball* . . . serves as our polestar.”); *Schuster*, 769 F.2d at 344 (“Because the CCE and conspiracy charges are not subject to double punishment, the [conspiracy convictions] must be vacated.”) (citing *Ball*).

126. See, e.g., *Duke*, 940 F.2d at 1120; *Rivera-Martinez*, 931 F.2d at 152-53; *Schuster*, 769 F.2d at 344-45.

127. See *supra* text accompanying notes 50-62.

128. See *United States v. Fernandez*, 916 F.2d 125, 128-29 (3d Cir. 1990) (arguing that the majority rule “frustrates . . . [c]ongressional intent and is surely not required by the [D]ouble [J]eopardy [C]lause”), cert. denied, 111 S. Ct. 2249 (1991); *United States v. Bond*, 847 F.2d 1233, 1239 (7th Cir. 1988) (rejecting majority rule because *Jeffers* permits concurrent sentencing “provided [that] the cumulative punishment does not exceed the maximum under the CCE Act”).

tions, the Second Circuit advocates "combining" those charges with the CCE count so that only one conviction remains.<sup>129</sup> If an appellate court then reverses a defendant's continuing criminal enterprise conviction, the court will automatically reinstate the conspiracy convictions so that the defendant will not elude punishment.<sup>130</sup>

Although some circuits reject the Second Circuit's rule,<sup>131</sup> the Ninth Circuit recently has adopted the "combination approach."<sup>132</sup> The Ninth Circuit had been the most haphazard jurisdiction in this area, having implicitly reversed its stance twice. The Ninth Circuit initially viewed only conspiracy sentences imposed consecutively to a CCE sentence as offensive to the prohibition against cumulative punishment.<sup>133</sup> Following the Supreme Court's decision in *Ball*, however, another panel in the circuit concluded that even concurrent sentences "constitute[] cumulative punishment."<sup>134</sup> A few years later another panel again altered the circuit's doctrinal approach to the multiple punishment problem. In *United States v. Medina*,<sup>135</sup> the court noted that the majority rule places district courts "in a bind"<sup>136</sup> because it requires a sentencing judge to vacate otherwise valid convictions despite the potential reversal of the CCE conviction.<sup>137</sup> The court concluded that authorizing district court judges to sentence in the alternative presents a "more efficient course."<sup>138</sup> Hence, if an appellate court reverses the CCE charge, "the conviction and sentence on the lesser-included counts will be effective and subject to the same appeal," avoiding "needless remand."<sup>139</sup> Although the Ninth Circuit seems to have joined forces with the Second Circuit,<sup>140</sup> it has done so

129. See *United States v. Aiello*, 771 F.2d 621, 632-35 (2d Cir. 1985); see also *United States v. Benevento*, 836 F.2d 60, 73 (2d Cir. 1987), cert. denied, 486 U.S. 1043 (1988); *United States v. Amen*, 831 F.2d 373, 383-84 (2d Cir. 1987), cert. denied, 485 U.S. 1021 (1988); *United States v. Osorio Estrada*, 751 F.2d 128, 134-35 (2d Cir. 1984), modified on other grounds, 757 F.2d 27 (2d Cir.), and cert. denied, 474 U.S. 830 (1985).

130. *Aiello*, 771 F.2d at 634 n.6 ("[I]f the conviction of the greater offense were eventually to be overturned, our practice would, by design, resuscitate the lesser conviction and thereby ensure that the defendant would not avoid punishment . . .").

131. See *United States v. Rivera-Martinez*, 931 F.2d 148, 152-53 (1st Cir.), cert. denied, 112 S. Ct. 184 (1991); *United States v. Tanner*, No. 89-5237, 1990 U.S. App. LEXIS 19956, at \*17-18 (4th Cir. Nov. 9, 1990), modifying per curiam *United States v. Fuentes*, 729 F. Supp. 487, 492-93 (E.D. Va. 1989) (adopting the combination approach), cert. denied, 111 S. Ct. 1397 (1991); *Restrepo v. United States*, 761 F. Supp. 211, 216-17 (D. Mass. 1991).

132. *United States v. Medina*, 940 F.2d 1247, 1253 (9th Cir. 1991).

133. See *United States v. Burt*, 765 F.2d 1364, 1368-69 (9th Cir. 1985).

134. *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1582 (9th Cir. 1989), cert. denied, 497 U.S. 1003 (1990).

135. 940 F.2d 1247 (9th Cir. 1991).

136. 940 F.2d at 1253.

137. 940 F.2d at 1253.

138. 940 F.2d at 1253.

139. 940 F.2d at 1253.

140. See *supra* text accompanying notes 129-30 (describing the Second Circuit's adherence to the combination approach).

without officially recognizing the alliance.<sup>141</sup>

Courts advocating the "combination approach" have identified three reasons for doing so. First, the merging of separate convictions into a single count averts adverse collateral consequences from the conspiracy charges. As only one conviction remains following the merger, the conspiracy convictions will not harm a defendant in a collateral manner.<sup>142</sup> Additionally, "the reactivation of the lesser conviction facilitates the congressional purpose of ensuring that a defendant is punished for whatever degree of a crime he is adjudged to be guilty of having committed."<sup>143</sup> Finally, as *Medina* recognized, merging the conspiracy and CCE convictions reduces a potential burden on judicial resources. The "combination approach" eliminates the need to remand a case for vacation of the conspiracy convictions, because when the CCE count is affirmed, "the vacation will have been accomplished automatically."<sup>144</sup>

## 2. *Permitting Simultaneous Convictions*

The Third Circuit allows the retention of both CCE and conspiracy convictions while requiring the vacation of sentences received for the lesser-included conspiracy charges. In *United States v. Grayson*,<sup>145</sup> the court identified conspiracy as a lesser-included offense within CCE and recognized that imposing punishments for both crimes would vio-

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141. The *Medina* court did not cite any Second Circuit cases in adopting the combination method. See 940 F.2d at 1253.

142. *E.g.*, *United States v. Aiello*, 771 F.2d 621, 633 (2d Cir. 1985) ("A combined lesser conviction could not properly be considered, for instance, in determining a defendant's eligibility for parole, in sentencing him in the future under a recidivist statute or impeaching his credibility at a later trial."); *United States v. Fuentes*, 729 F. Supp. 487, 493 (E.D. Va. 1989) (combining convictions avoids cumulative punishment), *modified per curiam sub nom.* *United States v. Tanner*, 917 F.2d 1302 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1397 (1991).

143. *Aiello*, 771 F.2d at 634; *see also Fuentes*, 729 F. Supp. at 493 (merging convictions "minimizes the risk that [a] defendant's criminal conduct will go unpunished"); *cf. Medina*, 940 F.2d at 1253 (majority rule leaves courts "powerless to reinstate the potentially valid lesser-included counts of conviction"). The *Aiello* court concluded that there is "no practical difference between [Ball's] prescription to vacate a conviction and our practice of 'combining' a lesser conviction into a conviction on the greater offense." 771 F.2d at 634 n.6. The *Fuentes* court weighed the relative interests involved, concluding that "[a]ny inherent punitive effect flowing from the continuing existence of the merged lesser-included offense conviction . . . is outweighed by the interest in ensuring that those convicted of serious crimes do not unjustifiably escape punishment." 729 F. Supp. at 493.

144. 940 F.2d at 1253. For a full critique of this argument, see *infra* section III.C. At a minimum, in the event that an appellate court reverses a CCE conviction, a remand will be necessary to determine the defendant's sentence for conspiracy. The defendant will not have been sentenced for the resuscitated conviction, a condition necessary to justify the continued incarceration of the defendant. For example, appellate courts exercising the inherent power to impose a conviction for a lesser-included offense when reversing a conviction for a greater offense must remand the case for sentencing. *See, e.g.*, *United States v. Plenty Arrows*, 946 F.2d 62, 67 (8th Cir. 1991) (remanding case for resentencing upon imposing a conviction on a lesser-included offense).

145. 795 F.2d 278 (3d Cir. 1986), *cert. denied*, 481 U.S. 1018 (1987).

late the prohibition on multiple punishment.<sup>146</sup> The panel concluded that, "since it is the 'cumulation of sentence' which is illegal, we are not required to vacate [the conspiracy and CCE] convictions."<sup>147</sup> The Third Circuit justified its rejection of the majority rule in *United States v. Fernandez*.<sup>148</sup> Fernandez challenged the district court's refusal to expunge his conspiracy convictions, relying on the Supreme Court's decision in *Ball*.<sup>149</sup> Rejecting Fernandez' plea to adopt the majority approach, the Third Circuit maintained that "the narcotics conspiracy statutes of which Fernandez was convicted and the continuing criminal enterprise statute have different purposes."<sup>150</sup>

The Third Circuit has offered two justifications for retaining conspiracy convictions when a defendant is also convicted of engaging in a continuing criminal enterprise. First, the Third Circuit divines congressional intent "that predicate conspiracy and continuing criminal enterprise convictions may stand,"<sup>151</sup> thereby justifying any collateral consequences generated by the retention of separate convictions.<sup>152</sup> Moreover, the Third Circuit argues that simultaneous convictions serve society's interest in ensuring that the guilty do not escape punishment, because upon reversal of the CCE count the government can rely upon the conspiracy convictions to justify a defendant's incarceration.<sup>153</sup>

### 3. *Allowing Convictions and Concurrent Sentences*

The Seventh Circuit has held that not only is retention of separate convictions for conspiracy permissible, but imposing sentences for those offenses is also constitutional so long as the cumulative punish-

146. 795 F.2d at 287 (citing *Garrett v. United States*, 471 U.S. 773, 794 (1985)).

147. 795 F.2d at 287. A subsequent opinion appears to repudiate the reasoning contained in *Grayson*. In *United States v. Aguilar*, 849 F.2d 92 (3d Cir. 1988), the Third Circuit reversed the CCE conviction of a prisoner who had previously pled guilty to conspiracy. After designating conspiracy as a lesser-included offense of CCE, the court reasoned that "the proper remedy . . . is to reverse [the] CCE conviction, and not simply to vacate the sentence . . . received for that conviction." 849 F.2d at 96 (3d Cir.), *cert. denied*, 488 U.S. 924 (1988), and *cert. denied*, 498 U.S. 962 (1980). *Aguilar* did not overrule *Grayson*, however, because the court cautioned that its decision was "not concerned with the [D]ouble [J]eopardy [C]ause's protection against multiple punishments." 849 F.2d at 99.

148. 916 F.2d 125 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2249 (1991).

149. 916 F.2d at 126.

150. 916 F.2d at 127. *Compare Jeffers*, 432 U.S. at 156 ("[s]ection 848 itself reflects a comprehensive penalty structure that leaves little opportunity for pyramiding of penalties") with *Garrett*, 471 U.S. at 794 ("the dangers posed by a conspiracy and a CCE [are] similar and thus there would be little purpose in cumulating the penalties").

151. 916 F.2d at 128. The *Fernandez* court also opined that any collateral consequences flowing from the conspiracy convictions would not be "additional punishment" since the "same consequences" would naturally result from the initial CCE conviction. 916 F.2d at 128. This argument seemingly misapprehends the concept of adverse collateral consequences as explained in *Ball*. See *infra* notes 205-06 and accompanying text.

152. See 916 F.2d at 128-29.

153. *Fernandez*, 916 F.2d at 127-28.



ment does not exceed the maximum authorized by the CCE statute.<sup>154</sup> In *United States v. Bond*,<sup>155</sup> the court concluded that this approach comports with the Supreme Court's pronouncements regarding multiple punishment.<sup>156</sup> The *Bond* court argued that Congress had authorized these concurrent sentences: "It is not illogical to convict a person both of agreeing to do something [conspiracy] and succeeding on a grand scale [operating a continuing criminal enterprise]."<sup>157</sup> Additionally, *Bond* stressed that the Supreme Court in *Jeffers* upheld concurrent sentences on appeal,<sup>158</sup> which the *Bond* court interpreted as a confirmation that the retention of separate sentences is constitutionally permissible.<sup>159</sup> Finally, *Bond* rejected the notion that adverse collateral consequences might attach to conspiracy convictions, as "the unavailability of parole on the CCE conviction ensures that the multiplication of convictions does not count against the defendant at parole time."<sup>160</sup>

The advantages of the Seventh Circuit's method of dealing with conspiracy and CCE are nearly identical to the "combination" approach advocated by the Second and Ninth Circuits. First, the retention of conspiracy convictions allows the government to continue to

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154. This caveat creates minimal protection for the criminal defendant, as 21 U.S.C. § 848(b) & (d) allows a person convicted of engaging in a continuing criminal enterprise to be sentenced to life in prison without possibility of parole.

155. 847 F.2d 1233 (7th Cir. 1988).

156. *Bond* overruled sub silentio *United States v. Jefferson*, 714 F.2d 689, 703-06 (7th Cir. 1983), which required the vacation of convictions and sentences received for conspiracy when a defendant has also been convicted of operating a CCE. See *United States v. Bafia*, 949 F.2d 1465, 1472-1473 (7th Cir. 1991), cert. denied, 112 S. Ct. 1989 (1992). For an account of "the rather confusing progression of *Jefferson* . . . and its subsequent history," see *Bafia*, 949 F.2d at 1472-73.

*Bond's* method of decisionmaking has been criticized within the circuit. See *United States v. Moya-Gomez*, 860 F.2d 706, 754 (7th Cir. 1988) (reluctantly adhering to *Bond* because of stare decisis), cert. denied, 492 U.S. 908 (1989). *Bond* has also been eroded. In *United States v. Alvarez*, 860 F.2d 801 (7th Cir. 1988), cert. denied, 490 U.S. 1051 (1989), a different panel in the Seventh Circuit remanded a case for resentencing even though the trial court had imposed concurrent sentences in accordance with *Bond*. The court highlighted the "distinct possibility that the district court may have considered [the defendant's] guilt on the conspiracy conviction in sentencing him on the CCE conviction." 860 F.2d at 830. The court evaded *Bond* by suggesting that long CCE sentences might be presumptively invalid under *Jeffers* when a defendant has also been sentenced on conspiracy charges. 860 F.2d at 830 n.31; see also *Bafia*, 942 F.2d at 1474 ("it seems clear that the [defendant's] conspiracy sentence affected the CCE sentence in clear violation of *Alvarez*"); *United States v. Pace*, 898 F.2d 1218, 1238 (7th Cir. 1990) (sentencing judge "may not take the conspiracy conviction into account when sentencing . . . on the CCE count"). But see *United States v. Canino*, 949 F.2d 928, 949 (7th Cir. 1991) (upholding 26-year concurrent terms for CCE and conspiracy because the "cumulative punishment clearly does not exceed the maximum allowable under the CCE conviction"), cert. denied, 112 S. Ct. 1940 (1992).

157. 847 F.2d at 1238. The Seventh Circuit's reading of both Supreme Court precedent and congressional intent appears to suffer from the same deficiencies as the Third Circuit's approach. See *infra* text accompanying notes 212-18.

158. See *supra* text accompanying note 92.

159. 847 F.2d at 1239.

160. 847 F.2d at 1239. This argument ignores the potential for multiple convictions to affect collaterally a defendant's sentence under a recidivist statute, as well as the possibility for impeachment, identified by the Supreme Court in *Ball*. See *infra* section III.B.

incarcerate a prisoner who successfully challenges a CCE conviction but remains guilty of conspiracy.<sup>161</sup> Furthermore, the Seventh Circuit's approach avoids needless remands and thereby conserves judicial resources. If an appellate court reverses a CCE conviction, the conspiracy conviction remains intact, while the same result "would require extra motion if the [conspiracy] sentences had to be vacated . . . and resurrected at some future time."<sup>162</sup>

To summarize, the circuit courts of appeals have announced four differing interpretations of the Supreme Court's pronouncements on multiple punishment in the realm of CCE and conspiracy: vacating conspiracy convictions, combining conspiracy convictions with the CCE conviction, permitting simultaneous convictions without sentences, and allowing both simultaneous convictions and concurrent sentences. Each approach claims the support of Supreme Court precedent. The analysis in the next Part, however, concludes that only the majority vacation approach comports with the Court's pronouncements in *Jeffers* and *Garrett* and also eliminates the potential for multiple punishment through adverse collateral consequences.

### III. APPLYING THE MULTIPLE PUNISHMENT FRAMEWORK TO THE CIRCUITS' APPROACHES

This Part scrutinizes the interaction between continuing criminal enterprise and conspiracy, utilizing the test for Multiple Punishment Doctrine violations outlined in Part I. Section III.A analyzes the two crimes from the standpoint of established cumulative punishment jurisprudence and argues that the minority approaches that impose concurrent convictions or sentences for the two offenses stray from Supreme Court precedent. Section III.B more specifically examines the approaches generated by the Third and Seventh Circuits and rejects them as being inconsistent with the multiple punishment bar. Section III.C compares the vacation approach with the combination method and argues that the vacation approach alone is consistent with the Multiple Punishment Doctrine. This Part concludes that the vacation approach advocated by a majority of the courts of appeals best addresses the issue of cumulative punishment.

#### A. CCE and Conspiracy Under the Two-Step Inquiry

Part I outlined the Supreme Court's two-step analysis of cumulative punishment claims.<sup>163</sup> In order to establish a Multiple Punish-

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161. 847 F.2d at 1238.

162. 847 F.2d at 1238-39. The Seventh Circuit approach appears to avoid some of the difficulty inherent in the "combination" approach in this respect. An appellate court reversing a CCE conviction will not need to remand the case to the trial court to impose sentence on the remaining conspiracy counts if concurrent sentences are imposed. *See supra* note 144.

163. *See supra* text accompanying notes 67-78.

ment Doctrine violation, a defendant must prove that the two offenses are “the same” — that is, that one offense is necessarily included within the definition of the other — and that Congress has not clearly authorized punishment for the two offenses. This Note posits that conspiracy is a lesser-included offense within CCE; thus, the offenses are “the same” for the purposes of multiple punishment inspection.<sup>164</sup>

The first step in the multiple punishment inquiry is to examine the nexus between the CCE and conspiracy statutes to determine whether the offenses are the same under the *Blockburger* test.<sup>165</sup> The two crimes clearly overlap under the test. Initially, the statutes describe identical offenses. By satisfying the requirements of the CCE statute, the government will necessarily prove that a defendant conspired to violate narcotics laws. The CCE statute directs the prosecutor to establish that a defendant has committed a series of violations of the narcotics laws<sup>166</sup> “in concert with five or more other persons.”<sup>167</sup> Proof that a defendant acted *in concert* with at least five other individuals in the course of his criminal activities will involve evidence of at least one conspiracy.<sup>168</sup> In order to demonstrate that a defendant has conspired to violate the narcotics laws, a prosecutor therefore need not offer any proof independent of that required by the CCE statute.

Moreover, courts uniformly agree that conspiracy is indeed a lesser-included offense within the CCE statute. The Court in *Jeffers*, while not prepared to declare definitively the two offenses to be the same for double jeopardy purposes,<sup>169</sup> did note that “the phrase ‘in concert’ . . . has generally connoted cooperative action and agree-

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164. As previously noted, the Supreme Court has repudiated somewhat the lesser-included offense test in the context of complex prosecutions involving “multilayered conduct.” *United States v. Felix*, 112 S. Ct. 1377, 1385 (1992); *see also* *Garrett v. United States*, 471 U.S. 773, 789 (1985). In *Felix*, however, the Court merely reaffirmed the general rule (noted in *Garrett*) that “conspiracy to commit an offense and the offense itself . . . are separate offenses for double jeopardy purposes.” 112 S. Ct. at 1385. This type of analysis is inappropriate when conspiracy is an element of a “substantive” offense. Wharton’s Rule creates “an exception to the general principle that a conspiracy and the substantive offense that is its immediate end are discrete crimes for which separate sanctions may be imposed.” *Iannelli v. United States*, 420 U.S. 770, 771 (1975). *See supra* note 99.

165. This Note analyzes the CCE and conspiracy offenses under the *Blockburger* rule rather than relying on the assumption in *Jeffers* that the crimes are identical, as some majority-rule jurisdictions have done. *See supra* text accompanying notes 109-20.

166. 21 U.S.C. § 848(c)(2) (1988).

167. 21 U.S.C. § 848(c)(2)(A) (1988).

168. The government may choose to rely on substantive offenses (that is, actual importation and distribution) rather than conspiracy to establish the “series of violations” required by 21 U.S.C. § 848(c)(2). The prosecutorial strategy in such an instance will not obviate the need for proof of conspiracy, however. The government would have to establish that the substantive predicate offenses were masterminded by the defendant in coordination with at least five persons, which necessarily involves evidence of conspiratorial conduct. *See Jeffers v. United States*, 432 U.S. 137, 148 (1977) (“Even if § 848 were read to require individual agreements between the leader of the enterprise and each of the other five necessary participants, enough would be shown to prove a conspiracy.”).

169. *Jeffers*, 432 U.S. at 153 n.20.

ment."<sup>170</sup> The Court would probably be unwilling to renounce the assumption given that its interpretation in *Jeffers* comports with the generally accepted meaning of the term. Indeed, the Court's subsequent admonition in *Garrett* that the "dangers posed by a conspiracy and CCE [are] similar"<sup>171</sup> confirms the view that courts should regard conspiracy as a lesser-included offense of CCE. Finally, the circuit courts of appeals unanimously view conspiracy and CCE as lesser and greater offenses.<sup>172</sup>

The second step in a multiple punishment inquiry — inspecting legislative intent for authority to cumulate punishments — compels the conclusion that Congress intended to punish either CCE or conspiracy *but not both*. A survey of the structure and history of the continuing criminal enterprise statute does not indicate that Congress has "clear[ly]"<sup>173</sup> and "specially"<sup>174</sup> condoned punishment for conspiring to violate narcotics laws and engaging in a CCE. The CCE statute "reflects a comprehensive penalty structure that leaves little opportunity for pyramiding of penalties."<sup>175</sup> The legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970 supports a similar conclusion. Congress intended penalties for violations of the Act to vary with the dangerousness of the narcotics involved, "[e]xcept when continuing criminal enterprises serve as the basis for an indictment."<sup>176</sup> This language suggests that the judiciary should consider the penalties as exclusive rather than cumulative;<sup>177</sup> a conviction under the CCE statute should bar other criminal liability based on the same conduct. The Supreme Court has accepted this conclusion.<sup>178</sup> Thus, while "[i]t is not illogical to convict a person of both agreeing to do something [conspiracy] and succeeding on a grand scale [by operating a continuing criminal enterprise],"<sup>179</sup> the CCE statute, by its terms, already does so.<sup>180</sup> Moreover, one must view congres-

170. 432 U.S. at 149 n.14.

171. *Garrett v. United States*, 471 U.S. 773, 794 (1985).

172. *See United States v. Aguilar*, 849 F.2d 92, 98 n.11 (3d Cir. 1988) (collecting cases), *cert. denied*, 498 U.S. 962 (1990).

173. *Whalen v. United States*, 445 U.S. 684, 692 (1980).

174. *Whalen*, 445 U.S. at 693; *see also Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (Congress must "specifically authorize[] cumulative punishment"); *Albernaz v. United States*, 450 U.S. 333, 340 (1981) (*Blockburger* rule of statutory construction is controlling absent "a clear indication of contrary legislative intent").

175. *Jeffers v. United States*, 432 U.S. 137, 156 (1977).

176. H.R. REP. NO. 1444, *supra* note 1, pt. 1, at 10, *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576 (emphasis added).

177. *See Jeffers*, 432 U.S. at 156 n.26.

178. *See Jeffers*, 432 U.S. at 157 ("[T]he reason for separate penalties for conspiracies lies in the additional dangers posed by concerted activity. Section 848, however, already expressly prohibits this kind of conduct."); *see also Garrett v. United States*, 471 U.S. at 774 (1985).

179. *United States v. Bond*, 847 F.2d 1233, 1238 (7th Cir. 1988).

180. *See Jeffers*, 432 U.S. at 156-57 ("The policy reasons usually offered to justify separate punishment of conspiracies and underlying substantive offenses, however, are inapplicable to

sional intent in light of the Multiple Punishment Doctrine, which operates as a presumption in favor of lenity, forbidding cumulative punishment unless clearly authorized by the legislature.<sup>181</sup> The evidence regarding legislative authorization to cumulate the penalties for CCE and conspiracy is, at best, "inconclusive."<sup>182</sup> Indeed, no court has marshalled evidence of congressional intent to *allow* cumulative punishment.<sup>183</sup>

The above traditional, lesser-included analysis compels the conclusion that the government may not punish CCE and conspiracy cumulatively. However, courts should look to the underlying protections afforded a criminal defendant by the Multiple Punishment Doctrine to complete the multiple punishment inquiry.<sup>184</sup> Whether the protections are undermined essentially depends on the existence of adverse collateral consequences, which affect the criminal defendant's interest in finality.<sup>185</sup> The other interests served by the doctrine — protecting against prosecutorial overreaching and preserving the separation of powers — rest on the assumption that a defendant's sentence exceeds that authorized by the legislature. In the CCE and conspiracy context, the question of cumulative punishment<sup>186</sup> turns on whether collateral consequences will flow from retaining convictions for the lesser-included offense when a court convicts and sentences for operating a continuing criminal enterprise.<sup>187</sup>

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§§ 846 and 848."); cf. U.S.S.G., *supra* note 45, App. C amend. 66 background cmt. ("An adjustment [for the defendant's role in a conspiracy] is not authorized because the offense level of this guideline [CCE] already reflects an adjustment for [his conspiratorial] role in the offense.")

181. See generally Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1026 (1980). In the context of crimes involving conspiratorial conduct, the Wharton's Rule preserves the presumption, described by the Supreme Court as "an exception to the general principle that a conspiracy and the substantive offense that is its immediate end are discrete crimes for which separate sanctions may be imposed." *Iannelli v. United States*, 420 U.S. 770, 771 (1975). See *supra* note 99.

182. *Jeffers*, 432 U.S. at 156.

183. The courts allowing cumulative punishment have attempted to glean congressional authorization from the structure of the CCE statute. This line of argument suffers from two deficiencies. Initially, this contention contravenes the Supreme Court's reading of the CCE statute in *Jeffers*. See *Jeffers*, 432 U.S. at 155 ("[T]he first issue to be considered is whether Congress attempted to allow cumulative punishment for violations of §§ 846 and 848. We have concluded that it did not . . ."). Moreover, the perceived structural symmetry of the CCE and drug conspiracy statutes hardly qualifies as "a clear indication of . . . legislative intent" to cumulate punishment. *Whalen v. United States*, 445 U.S. 684, 692 (1980).

184. See *Ball v. United States*, 470 U.S. 856, 864-65 (1985).

185. See *supra* text accompanying notes 46-51.

186. This Note contends that the imposition of concurrent sentences for conspiracy convictions directly punishes a criminal defendant in violation of the Multiple Punishment Doctrine. See *infra* text accompanying notes 207-13.

187. A defendant in the position to challenge conspiracy convictions because of the potential for collateral consequences will inevitably encounter identical consequences from a CCE conviction. The fact that such negative consequences are "not unique" to the criminal defendant convicted of both CCE and conspiracy was proffered by the Third Circuit in *Fernandez* as a reason for concluding that preserving conspiracy convictions does not entail multiple punishment.

The retention of both conspiracy and CCE convictions generates four adverse collateral consequences in violation of the Double Jeopardy Clause. A defendant convicted both of conspiracy and engaging in a continuing criminal enterprise faces additional social stigma from each conspiracy conviction.<sup>188</sup> Second, the lesser-included conspiracy convictions heighten the possibility that a person convicted for CCE will be impeached in a future legal proceeding.<sup>189</sup> A jury might not comprehend the significance of the fact that several convictions stem from the same set of events.<sup>190</sup> Thus, lesser-included conspiracy convictions might provide the basis for impeachment, which could be critical for a defendant in a future proceeding. Third, the retention of lesser-included conspiracy convictions may subject defendants to recidivist sentencing statutes that enhance punishment based solely on the number of convictions on their records.<sup>191</sup> For instance, a defendant might be convicted for operating a continuing criminal enterprise, conspiracy to import narcotics, and conspiracy to distribute narcotics. Though part of *one coherent scheme*, these convictions would qualify the defendant as a habitual felon in several states.<sup>192</sup> Finally, the retention of lesser-included conspiracy convictions increases the risk that a defendant will endure pretrial detention pursuant to a subsequent arrest.<sup>193</sup> These consequences, however remote, exceed the punishment authorized by Congress.<sup>194</sup>

These adverse collateral consequences also undermine other interests that the Multiple Punishment Doctrine safeguards.<sup>195</sup> A vindictive prosecutor could easily discriminate between criminal defendants by charging certain defendants with multiple conspiracies, arbitrarily exposing them to the prospect of punishment greater than other, similarly situated defendants.<sup>196</sup> Additionally, prosecutors may wield the

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United States v. Fernandez, 916 F.2d 125, 128 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2249 (1991).

There are two reasons to reject this line of reasoning. First, the concern with adverse collateral consequences remains, because a defendant convicted of greater and lesser offenses is *more likely* to face the prospect of collateral sanctions of *increased severity*. See *supra* text accompanying notes 56-66. Moreover, the potential for adverse consequences presumably represents part of the penalty which the legislature intends when labeling certain conduct as criminal. Absent convincing evidence that the legislature intended those consequences to be multiplied by convictions for *portions* of the same conduct, however, courts ought to impose punishment for the greater offense alone. See *Ball*, 470 U.S. at 864-65; see also *infra* text accompanying notes 207-13.

188. See *Sibron v. New York*, 392 U.S. 40, 56 (1968).

189. See *supra* notes 55-57 and accompanying text.

190. See *Benton v. Maryland*, 395 U.S. 784, 791 (1969).

191. See *supra* text accompanying notes 58-62.

192. See *supra* note 59 and accompanying text.

193. See *supra* notes 62-66 and accompanying text.

194. *Ball v. United States*, 470 U.S. 856, 864-65 (1985).

195. See *supra* notes 30-45 and accompanying text.

196. Cf. Note, *supra* note 25, at 307 ("[T]here is evidence that defendants who have gained

possibility of multiple conspiracy convictions to coerce individual defendants into plea arrangements arbitrarily.<sup>197</sup>

Permitting a defendant to be convicted, sentenced, or both for conspiracy in addition to CCE penetrates the constitutional barrier erected between the legislative and judicial branches of government. Absent specific authorization from the legislature to cumulate punishments, allowing convictions for lesser offenses to stand goes beyond the scope of judicial power because those convictions invariably constitute punishment in excess of the legislatively enacted statutory scheme.<sup>198</sup>

Thus, the Supreme Court's test for evaluating multiple punishment claims and the constitutional values underlying the prohibition on cumulative punishment both suggest that conviction and sentencing for conspiracy *in addition to* CCE is inconsistent with the Multiple Punishment Doctrine. The next section examines the constitutionality of permitting a defendant convicted and sentenced for engaging in a CCE to be *concurrently* sentenced for conspiring to violate the narcotics laws.

#### B. *Unconstitutionality of Retaining Concurrent Convictions or Sentences: The Third and Seventh Circuit Approaches*

The conclusion that the Multiple Punishment Doctrine forbids cumulative sentencing for CCE and conspiracy implies that the Third and Seventh Circuits' approaches undermine the prohibition on multiple punishments. Thus, the reasons offered by the Third Circuit for retaining conspiracy convictions, while vacating sentences received for those counts, merit consideration.<sup>199</sup> The Third Circuit, in *United States v. Fernandez*, justified the retention of conspiracy convictions by arguing that "[t]here is simply no indication . . . that Congress *did not* intend to permit separate convictions to stand for the conspiracy and

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notoriety and those who have offended the police are frequently selected for multiple punishment.") (footnotes omitted).

197. See *supra* text accompanying note 33. A prosecutor may apply these incentives most effectively against persons entering the criminal justice system for the first time and facing both CCE and conspiracy charges. If the conspiracy charges do not count against the defendant, the person can rationally weigh the chances of conviction against the known consequences of conviction, since the range of punishment would be confined to the CCE statute. However, a defendant facing unknown criminal sanctions from multiple conspiracy convictions might find the incentive to waive the exercise of his or her constitutional rights irresistible. Cf. Note, *supra* note 25, at 305 & n.188.

198. See *supra* notes 37-40 and accompanying text; cf. *Jeffers v. United States*, 432 U.S. 137, 157 (1977) ("[The court] had no power, however, to impose on [Jeffers] a fine greater than the maximum permitted by § 848.").

199. *But cf.* Yanik, *supra* note 11, at 519 (praising Third Circuit for "enunciat[ing] the rule that if there exists one general sentence, the length of which is limited by the statutory maximum allowable under the more serious offense, then there is no perversion of the double jeopardy concept").

continuing criminal enterprise offenses.”<sup>200</sup> This conclusion both perverts the government’s constitutionally mandated burden to establish congressional authorization to cumulate punishments and ignores *Jeffers*’ reading of the CCE statutory scheme. Established precedent requires evidence that Congress *affirmatively intended* to punish cumulatively;<sup>201</sup> *Jeffers* explicitly concluded that Congress has not expressed the requisite intent in this arena.<sup>202</sup> Moreover, attempts to justify the retention of conspiracy convictions as a device for the continued incarceration of CCE offenders in the event of appellate reversal of CCE convictions<sup>203</sup> do not alter the constitutional equation. Although the Court has recognized a state’s interest in ensuring punishment of criminals for their offenses,<sup>204</sup> it has refused to “weigh” the values derived from the Double Jeopardy Clause. “[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no ‘equities’ to be balanced, for the Clause has declared a constitutional policy, based on grounds that are not open to judicial examination.”<sup>205</sup> The Third Circuit’s approach should not be condoned given the risk of excessive punishment inherent in the retention of separate convictions for the two offenses.<sup>206</sup>

The conclusion that retaining conspiracy convictions in addition to a CCE conviction violates the Multiple Punishment Doctrine also renders the Seventh Circuit’s approach — permitting both simultaneous convictions *and* concurrent sentences — constitutionally suspect. The Seventh Circuit aggravates the constitutional violation by permitting the imposition of concurrent sentences for conspiracy convictions. In *United States v. Bond*,<sup>207</sup> the court justified concurrent sentences by arguing that “*Jeffers* does not govern [as long as] the total punishment imposed by the district court is less than the maximum allowed by the CCE Act.”<sup>208</sup> Under this reasoning, no multiple punishment problem

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200. *United States v. Fernandez*, 916 F.2d at 125, 127 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2249 (1991).

201. *See, e.g.*, *Whalen v. United States*, 445 U.S. 684 (1980). The inquiry into congressional authorization is stated in terms of a rebuttable presumption in favor of lenity. “Accordingly, where two statutory provisions proscribe the ‘same offense,’ they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.” 445 U.S. at 692.

202. *See supra* text accompanying notes 89-91; *supra* notes 173-83.

203. *Fernandez*, 916 F.2d at 127-28.

204. *E.g.*, *United States v. Scott*, 437 U.S. 82, 92 (1978) (a defendant’s interest in finality weighs “against the public interest in insuring that justice is meted out to offenders”); *Burks v. United States*, 437 U.S. 1, 15 (1978) (“society maintains a valid concern for insuring that the guilty are punished”); *see also* Doss, *supra* note 37, at 1429 (“The state has an interest in insuring that proper punishment is imposed for a particular offense and defendant.”).

205. *Burks v. United States*, 437 U.S. at 11 n.6.

206. *See* *Ball v. United States*, 470 U.S. 856, 865 (1985) (“Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.”).

207. 847 F.2d 1233 (7th Cir. 1988).

208. 847 F.2d at 1239.



occurs if the sentencing court imposes concurrent sentences on the conspiracy counts for periods shorter than the sentence imposed for CCE. The *Jeffers* Court did not *approve* concurrent sentences but simply declined to address the issue as not ripe for adjudication.<sup>209</sup> The *Jeffers* Court simply did not address the issue of concurrent sentences because the defendant was sentenced to life in prison without parole.<sup>210</sup> Instead, *Jeffers* presumed that conspiracy falls within the statutory definition of a CCE.<sup>211</sup> The extensive discussion of adverse collateral consequences in *Ball v. United States*<sup>212</sup> eclipses the weak support that the Seventh Circuit's position purports to derive from *Jeffers*.<sup>213</sup>

The Supreme Court's pronouncements regarding the Multiple Punishment Doctrine mandate dismissing the Third and Seventh Circuit approaches. The combination approach and the majority vacation approach require greater scrutiny, however, as they appear facially to avoid constitutional infirmity.

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209. The *Jeffers* Court's refusal to vacate the defendant's concurrent conspiracy sentence does not undermine the conclusion that Congress did not intend to cumulate punishments. The Court correctly noted that the issue of multiple punishment for concurrent prison terms was not presented, since *Jeffers* had been sentenced to life in prison without the possibility of parole. *Jeffers v. United States*, 432 U.S. 137, 155 n.24 (1977). The Court simply argued that *Jeffers* would not suffer any additional punishment from the concurrent sentence. Because *Jeffers* would never be released, and because the existence of adverse collateral consequences presumes that the defendant might be made to suffer in a later criminal proceeding, *Ball*, 470 U.S. at 864-65, the issue was not in question.

The Seventh Circuit's reading of *Jeffers* in *Bond*, 847 F.2d at 1238-39, is less persuasive than the interpretation offered by other circuit courts of appeals. While the Double Jeopardy Clause does not forbid sentencing a defendant for both CCE and conspiracy in situations resembling *Jeffers* (when the defendant has been sentenced to life without possibility of parole), the imposition of multiple sentences will normally entail collateral consequences prohibited by the Multiple Punishment Doctrine. See *supra* text accompanying notes 188-99.

210. See *Jeffers*, 432 U.S. at 155 n.24 ("[S]ince [*Jeffers*] is not eligible for parole at any time, there is no need to examine the Government's argument that the prison sentences do not present any possibility of cumulative punishment."); see also *Restrepo v. United States*, 761 F. Supp. 211, 215 (D. Mass. 1991) ("*Bond* is not persuasive because it appears to be founded upon a misapprehension of the holding in *Jeffers*"). The panel in *Bond* also read *Garrett* to mean that "the Double Jeopardy Clause does not of its own force bar separate convictions for the CCE offense and its predicate felonies." 847 F.2d at 1239. The *Garrett* Court, however, took pains to distinguish between its holding that cumulative punishment is permissible for predicate *substantive* offenses and the decision in *Jeffers* that conspiracies are lesser-included offenses within CCE. See *Garrett v. United States*, 471 U.S. 773, 794-95 (1985).

211. See *Jeffers*, 432 U.S. at 150 ("So construed, [conspiracy] is a lesser-included offense of [CCE], because § 848 requires proof of every fact necessary to show a [conspiracy] as well as proof of several additional elements.").

212. 470 U.S. 856, 864-65 (1985); see also *supra* text accompanying notes 50-52.

213. The *Bond* court asserted that allowing concurrent convictions and sentences for conspiracy entails "no risk of collateral consequences," because parole is not available to those found guilty of operating a continuing criminal enterprise. 847 F.2d at 1239. The court simply failed to account for the other types of adverse collateral consequences identified in *Ball*. See *supra* text accompanying notes 188-98.

### C. Comparison of the Combination and Majority Approaches

Advocates argue that both the vacation and combination methods avoid adverse collateral consequences.<sup>214</sup> The vacation approach ensures that courts will never use conspiracy convictions as the basis for future sanctions against a defendant because the convictions disappear from the defendant's record. The combination approach arguably achieves the same result by merging the two convictions into one, while retaining the capacity to revive the conspiracy conviction upon reversal of the CCE conviction.<sup>215</sup>

Two courts have explicitly rejected the combination approach, justifying their decisions on the basis that the potential for collateral consequences remains.<sup>216</sup> Neither court, however, addressed the reasons underlying their conclusion.<sup>217</sup> Careful consideration reveals two ways in which the combination approach may infringe on the protections guaranteed by the Double Jeopardy Clause. Initially, the combination approach cannot guarantee that no adverse collateral consequences will follow from the merger of the convictions because the presence of the conspiracy convictions on a defendant's record invites their use against the defendant in a later sentencing or at a future trial. Conspiracy convictions are not "merged out of existence"<sup>218</sup> under the combination approach; less sophisticated jurisdictions may misperceive a defendant's record and count the conspiracy and CCE convictions independently in calculating a recidivist sentence. Thus, despite protestations to the contrary,<sup>219</sup> a defendant in a combination

214. See *supra* text accompanying notes 129-34; *supra* note 142 and accompanying text.

215. See *supra* note 143 and accompanying text.

216. See *United States v. Rivera-Martinez*, 931 F.2d 148, 153 (1st Cir.), *cert. denied*, 112 S. Ct. 184 (1991) ("If we were to embrace the minority viewpoint and allow the conspiracy conviction to stand on the theory that no additional punishment flowed from it, we would needlessly erode the prophylaxis afforded by the Double Jeopardy Clause."); *Restrepo v. United States*, 761 F. Supp. 211, 217 (D. Mass. 1991) ("While the Second Circuit approach may indeed be sufficient to satisfy *Ball*, [there is] no basis for striking out in such new territory when the Supreme Court has spoken so clearly on the matter.").

217. *E.g.*, *Rivera-Martinez*, 931 F.2d at 153 ("Even a guilty defendant has constitutional rights. The Double Jeopardy Clause protects those rights. It requires that the section 846 conviction be erased from the docket.").

218. *United States v. Osorio Estrada*, 751 F.2d 128, 135 (2d Cir. 1984), *modified on other grounds*, 757 F.2d 27 (2d Cir.), and *cert. denied*, 474 U.S. 830 (1985).

219. See, *e.g.*, *United States v. Aiello*, 771 F.2d 621, 633-34 (2d Cir. 1985) ("A combined lesser conviction could not properly be considered, for instance, in determining a defendant's eligibility for parole, in sentencing him in the future under a recidivist statute or in impeaching his credibility at a later trial."). The difficulty with this argument is that counting convictions for recidivist sentencing or impeachment purposes is often governed by *state law* under traditional notions of comity. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2607 (1991) ("Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States."); see also *Benton v. Maryland*, 395 U.S. 784, 790-91 (1969) (noting that adverse collateral consequences can be generated by state law). Thus, the well-intentioned efforts of the combination approach may be undermined by the crude tools of state law. See *supra* notes 55-66 and accompanying text.

jurisdiction may encounter adverse collateral consequences. This risk also exists in the combination approach because of the ontological difficulty in understanding what “combining” convictions entails.<sup>220</sup> While this risk cannot be quantified, this Note contends that any risk of adverse collateral consequences merits the rejection of the combination approach.<sup>221</sup> The Multiple Punishment Doctrine mandates that a defendant never be subjected to punishment for a lesser-included offense.<sup>222</sup> The combination approach cannot guarantee that result. The risk of additional punishment exists so long as the convictions appear on the defendant’s criminal record.<sup>223</sup>

Moreover, the combination approach entails the risk that a trial court will improperly consider the defendant’s conspiracy convictions in the sentencing process. This risk takes three forms. First, a trial court may improperly calculate a defendant’s sentence under the sentencing guidelines by assuming that the conspiracy convictions justify additional punishment and impose additional sentencing points upon a defendant for his or her “role in the offense.”<sup>224</sup> The additional points for conspiracy punish excessively because the penalty for concerted action is already reflected in the CCE sentence.<sup>225</sup> Additionally, a trial judge may — consciously or unconsciously — rely on conspiracy convictions in establishing the defendant’s base offense level.<sup>226</sup> The sen-

220. See *Osorio Estrada*, 751 F.2d at 135 (Kearse, J., concurring); see also Thomas, *supra* note 11, at 1388 (“It is not clear just what is meant by ‘combining’ convictions.”).

221. See *Ball v. United States*, 470 U.S. 856, 864-65 (1985); *Benton v. Maryland*, 395 U.S. 784, 790-91 (1969); *Restrepo v. United States*, 761 F. Supp. 211, 217 (D. Mass. 1991) (“While the Second Circuit’s approach may indeed be sufficient to satisfy *Ball*, [there is] no basis for striking out in such new territory when the Supreme Court has spoken so clearly on the matter.”).

222. *Brown v. Ohio*, 432 U.S. 161, 169 (1977) (“[T]he Fifth Amendment forbids . . . cumulative punishment for a greater and lesser-included offense.”).

223. See *Ball*, 470 U.S. at 865 (“[T]he presence of two convictions on the [defendant’s] record may . . . result in an increased sentence under a recidivist statute for a future offense.”) (emphasis added); cf. Thomas, *supra* note 11, at 1388 (“Creating quasi-convictions capable of springing into existence in the future is, however, a rather unusual solution to the multiple penalty problem.”).

224. See *United States v. Nixon*, 918 F.2d 895, 908 (11th Cir. 1990) (“[V]acation of conspiracy convictions is especially indicated here, where the trial judge’s reliance in sentencing on the lesser conspiracy count allowed a three to four level increase that is prohibited for the greater CCE count.”). The guidelines generally allow for a four-level increase in the base offense level “[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants.” U.S.S.G., *supra* note 45, § 3B1.1(a). Such conduct is part of the statutory definition of a CCE, so a “role in the offense” increase is prohibited for conspiratorial conduct in a continuing criminal enterprise.

225. The sentencing guidelines prohibit enhancement of offense levels for a defendant’s role in a CCE offense. See U.S.S.G., *supra* note 45, App. C amend. 66 background cmt. (“An adjustment . . . is not authorized because the offense level [for CCE] already reflects an adjustment for role in the offense.”).

226. See *United States v. Bafia*, 949 F.2d 1465, 1474 (7th Cir. 1991) (“the district court grouped the conspiracy and CCE convictions into one category and then applied the Guidelines”), *cert. denied*, 112 S. Ct. 1989 (1992); cf. *United States v. Cloutier*, 966 F.2d 24, 27 (1st Cir. 1992) (“the court . . . grouped the two counts together under U.S.S.G. § 3D1.2(d) and applied the offense guideline that produced the higher offense level”).

tence then reflects an aggregation of convictions impermissible under the Multiple Punishment Doctrine. Finally, a trial court might rely on a defendant's conspiracy conviction in setting the defendant's sentence within the range permissible under the sentencing guidelines.<sup>227</sup> While the Sentencing Commission has set rigid schedules for determining sentences, the trial judge retains discretion to fix a defendant's sentence within the range prescribed by the guidelines.<sup>228</sup> The combination approach thus generates the risk that the sentencing judge will impose a sentence toward the upper end of the range because of the conspiracy convictions. The risk of these sentencing errors arises because the combination approach implicitly regards conspiracy convictions as conduct independently warranting punishment.<sup>229</sup>

Even assuming that the combination method effectively eliminates the possibility for adverse collateral consequences, the approach fails on policy grounds. Proponents have marshaled two policy arguments in favor of merging conspiracy convictions into the CCE conviction. Initially, the Second Circuit maintains that combining the convictions ensures that a defendant does not escape punishment in the event that his CCE conviction is overturned on appeal.<sup>230</sup> In other words, the conspiracy convictions should be retained — albeit denied effect — as a basis for continued incarceration to further both penological objectives and public safety.

The continued incarceration argument is unpersuasive, however. State and federal appellate courts have long enjoyed the power to impose a conviction for a lesser-included offense upon reversal of a greater offense.<sup>231</sup> Courts justify this power, the constitutionality of which "has never seriously been questioned,"<sup>232</sup> on two grounds.

227. See *United States v. Alvarez*, 860 F.2d 801, 830 (7th Cir. 1988) ("[T]here remains the distinct possibility that the district court may have considered [the defendant's] guilt on the conspiracy conviction in sentencing him on the CCE conviction."), *cert. denied*, 490 U.S. 1051 (1989).

228. See U.S.S.G., *supra* note 45, § 2A1 ("Pursuant to the [Sentencing Reform] Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range.").

229. See, e.g., *United States v. Osorio Estrada*, 751 F.2d 128, 135 (2d Cir. 1984) (the conspiracy convictions are not "merged out of existence . . . [and] the part of the conviction on the lesser offense [remains] unaffected should the compound offense be invalidated as a matter of law"), *modified on other grounds*, 757 F.2d 27 (2d Cir.), and *cert. denied*, 474 U.S. 830 (1985).

230. See, e.g., *United States v. Aiello*, 771 F.2d 621, 634 (2d Cir. 1985) ("[T]he reactivation of the lesser conviction facilitates the congressional purpose of ensuring that a defendant is punished for whatever degree of a crime he is adjudged to be guilty of having committed."); see also *United States v. Blackston*, 547 F. Supp. 1200, 1209-10 (S.D. Ga. 1982), *modified sub nom. United States v. Brantley*, 733 F.2d 1429 (11th Cir. 1984), and *cert. denied*, 470 U.S. 1006 (1985).

231. See 3 WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 24.4(b)-(c) (1984 & Supp. 1991); see also *Morris v. Mathews*, 475 U.S. 237 (1986) (affirming a state appellate court's imposition of a conviction for a lesser-included offense).

232. *Dickenson v. Israel*, 482 F. Supp. 1223, 1225 (E.D. Wis. 1980), *affid.*, 644 F.2d 308 (7th Cir. 1981).

First, courts possess the power under the common law to direct that a conviction for the lesser offense be entered since “[a] jury’s finding of guilt on all elements of the greater offense is necessarily a finding of guilt on all elements of the lesser offense.”<sup>233</sup> Moreover, the federal judiciary can invoke the appellate courts’ statutory authority to “modify . . . any judgment . . . and direct the entry of such appropriate judgment . . . as may be just under the circumstances.”<sup>234</sup> The combination approach, therefore, offers no advantage over the majority approach in this regard.<sup>235</sup> Both methods guarantee the continued incarceration of potentially dangerous felons.

In addition, the Second Circuit’s fear that persons convicted of engaging in a criminal enterprise will escape punishment absent the combination approach is unjustified. First, if an appellate court reverses a CCE conviction because of evidentiary insufficiency, the inadequate proof will likely impugn a defendant’s conspiracy convictions as well because conspiracy is an element of CCE.<sup>236</sup> The same logic applies to reversals for constitutional error — conspiracy and CCE convictions are often obtained pursuant to identical enforcement practices,<sup>237</sup> so both convictions are likely to suffer from the same constitutional infirmity.<sup>238</sup> If the error does not infect the evidence of a conspiracy, the government is free to prosecute the defendant for that crime without

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233. *Government of the Virgin Islands v. Josiah*, 641 F.2d 1103, 1108 (3d Cir. 1981); *see also* *United States v. Plenty Arrows*, 946 F.2d 62, 66-67 (8th Cir. 1991); *United States v. Dickinson*, 706 F.2d 88, 93 (2d Cir. 1983); *United States v. Lamartina*, 584 F.2d 764, 766-67 (6th Cir. 1978), *cert. denied*, 440 U.S. 928 (1979); *United States v. Horning*, 409 F.2d 424, 426 (4th Cir. 1969).

234. 28 U.S.C. § 2106 (1988). For cases invoking this statutory authority to justify the imposition of a conviction on a lesser offense, *see* *Tinder v. United States*, 345 U.S. 565, 570 (1953); *United States v. Cobb*, 558 F.2d 486, 489 (8th Cir. 1977); *United States v. Industrial Lab. Co.*, 456 F.2d 908, 911 (10th Cir. 1972); *Allison v. United States*, 409 F.2d 445, 450-51 (D.C. Cir. 1969).

235. Professor Thomas argues that “[a]llowing multiple convictions for the same offense to stand in case some of the convictions are reversed on appeal . . . permits the state to hedge its bets in a way that violates the underlying purpose of the multiple punishment doctrine.” Thomas, *supra* note 11, at 1384 (footnote omitted).

236. *See* *United States v. Ordonez*, 737 F.2d 793, 805-06 (9th Cir. 1983) (reversing convictions for CCE and conspiracy because of evidence admitted in violation of the federal rules).

237. *See supra* text accompanying notes 13-14 (government normally indicts defendants for both offenses).

238. The Second Circuit has conceded this probability. *See* *United States v. Aiello*, 771 F.2d 621, 634 n.8 (2d Cir. 1985) (“Naturally, the lesser conviction would only reactivate if the error that produced the reversal of the conviction on the greater offense was not one that also tainted the conviction on the lesser offense.”). The combination approach thus appears to require excessive appeals. If a CCE conviction is reversed due to error, the appellate court must remand to the trial court for resentencing. The defendant must *again* appeal to contest the conviction and sentence for conspiracy, even if the conviction is challenged on the same grounds as the CCE conviction. *See infra* text accompanying notes 244-48.

Moreover, a defendant obtaining a reversal of his CCE conviction can generally be retried. *See infra* text accompanying note 245. Hence, vacating conspiracy convictions does not “immunize[] [a defendant] from retrial.” *United States v. Blackston*, 547 F. Supp. 1200, 1209 (S.D. Ga. 1982), *modified sub nom.* *United States v. Brauntley*, 733 F.2d 1249 (11th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985). The Second Circuit has also acknowledged this scenario. *See Aiello*, 771 F.2d at 634 (“If the government were able to retry the defendant on the greater charge and

offending the Double Jeopardy Clause.<sup>239</sup>

The Ninth Circuit suggests a second policy advantage for the combination approach — the conservation of scarce judicial resources. The Ninth Circuit reasons that the combination method avoids the need to remand a case to vacate conspiracy convictions because, upon affirmance of the CCE conviction, “the vacation will have been accomplished automatically.”<sup>240</sup> But this argument’s appeal fades upon inspection. Initially, the majority approach also avoids unnecessary remands because the trial court must vacate the conspiracy convictions at sentencing.<sup>241</sup> Additionally, a CCE conviction will never be “affirmed” in the sense contemplated by the Ninth Circuit. A conviction is normally subject to habeas corpus review,<sup>242</sup> so the conspiracy convictions must remain in effect until the defendant completes the maximum possible sentence for conspiracy if the combination method is to achieve the desired result. Thus, conspiracy convictions will never be vacated “automatically”; they must be vacated by the trial court in order to be purged from a defendant’s record.<sup>243</sup>

The majority approach better avoids taxing judicial resources. Under the combination approach, a defendant can initially appeal only the conviction and sentence for the CCE count because “the judgment on the lesser-included offense is not final until sentencing.”<sup>244</sup> The combination approach then permits the conspiracy conviction to be

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chose to do so, any conviction on the greater would again replace the conviction on the lesser . . . .”).

239. See *United States v. Tateo*, 377 U.S. 463 (1964) (double jeopardy not implicated when the government retries a defendant following the reversal of a conviction).

240. *United States v. Medina*, 940 F.2d 1247, 1253 (9th Cir. 1991).

241. See *Ball v. United States*, 470 U.S. 856, 864 (1985) (“[T]he only remedy consistent with congressional intent is for the District Court, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions.”).

242. “A prisoner in custody under sentence of a court established by Act of Congress claiming the right . . . that the sentence was in excess of the maximum authorized by law . . . may move the court which imposed the sentence to vacate, set aside, or correct the sentence . . . at any time.” 28 U.S.C. § 2255 (1988). *But cf.* *Gomez v. United States Dist. Court*, 112 S. Ct. 1652, 1653 (1992) (*per curiam*) (denying habeas motion because of “abusive delay”).

243. The Second Circuit admits that “the convictions on the lesser counts . . . would *not* be merged out of existence.” *United States v. Osorio Estrada*, 751 F.2d 128, 135 (2d Cir. 1984), *modified on other grounds*, 457 F.2d 27 (2d Cir.), *and cert. denied*, 474 U.S. 830 (1985). The merger doctrine generally requires a trial court to vacate convictions obtained for lesser-included offenses because they are said to “merge” into the conviction for the greater offense. See *supra* note 113.

244. *United States v. Stallings*, 810 F.2d 973, 976 (10th Cir. 1987). The Federal Rules of Appellate Procedure provide that “[i]n a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of . . . the judgment.” FED. R. APP. P. 4(b). A judgment must include both the verdict and a sentence. FED. R. CRIM. P. 32(b)(1) (“A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication *and* sentence.”) (emphasis added); *cf.* FED. R. CRIM. P. 32(a)(2) (“*After imposing sentence* in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant’s right to appeal . . . .”) (emphasis added). Thus, a defendant cannot appeal a “combined” conspiracy conviction until sentence has been imposed, which necessitates two sets of appeals in a combination approach jurisdiction.

revived if the appellate court reverses the CCE conviction. The case would be remanded to the trial court for sentencing on the defendant's conspiracy counts.<sup>245</sup> Only after sentencing could the defendant appeal the conspiracy conviction.<sup>246</sup> Thus, "[t]he minority position may result in two appeals from the same trial."<sup>247</sup> The majority approach avoids this possibility because the appellate court will necessarily review the propriety of the conspiracy conviction when deciding to exercise the authority to impose convictions for the lesser-included offenses.<sup>248</sup>

The compatibility of the majority rule with traditional excessive punishment doctrine provides a compelling argument in its favor. Since the CCE statute requires proof of conspiratorial conduct,<sup>249</sup> and Congress has not explicitly authorized cumulative punishment,<sup>250</sup> courts should vacate conspiracy convictions.<sup>251</sup> The vacation approach also realizes the values underlying the Multiple Punishment Doctrine. For example, the majority rule eliminates the possibility of adverse consequences flowing from separate convictions for CCE and conspiracy, a critical factor in the Supreme Court's multiple punishment analysis.<sup>252</sup> A defendant faces no danger of future collateral consequences under the majority approach, which purges the invalid convictions from the defendant's record.<sup>253</sup>

#### CONCLUSION

The Double Jeopardy Clause is among the most powerful and important aspects of the Bill of Rights. The Multiple Punishment Doctrine, derived from the Clause, is designed to further several goals, including limiting the potential for prosecutorial abuse, preserving the separation of powers, and preserving a criminal defendant's interest in finality. Permitting courts to impose conspiracy convictions for behavior identical to that deemed necessary by Congress to establish the separate offense of engaging in a continuing criminal enterprise poses a unique challenge to the prohibition on cumulative punishment. Retaining conspiracy convictions imposes excessive punishment on the criminal defendant because such convictions risk consequences ad-

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245. *United States v. Aiello*, 771 F.2d 621, 634 n.8 (2d Cir. 1985).

246. *Stallings*, 810 F.2d at 976.

247. 810 F.2d at 976.

248. See *United States v. Plenty Arrows*, 946 F.2d 62, 66-67 (8th Cir. 1991); *Government of the Virgin Islands v. Josiah*, 641 F.2d 1103, 1108-09 (3d Cir. 1981); *United States v. Lamartina*, 584 F.2d 764, 766-67 (6th Cir. 1978), *cert. denied*, 440 U.S. 928 (1979); *Allison v. United States*, 409 F.2d 445, 450-52 (D.C. Cir. 1969) (all reviewing evidence in favor of lesser-included offense).

249. See *supra* notes 166-68 and accompanying text.

250. See *supra* notes 173-83 and accompanying text.

251. See *supra* text accompanying note 69.

252. See *supra* text accompanying notes 46-52.

253. See *supra* text accompanying notes 214-15.

verse to the defendant beyond those intended by Congress. Eliminating conspiracy convictions from a defendant's criminal record is the only constitutionally sufficient response to the multiple punishment problem in the continuing criminal enterprise context.

The majority approach, mandating the vacation of lesser-included conspiracy convictions when a court simultaneously convicts a defendant of operating a continuing criminal enterprise, best addresses the risk of cumulative punishment through adverse collateral consequences. Even assuming that the combination method could avoid collateral consequences, the policy advantages proffered by the circuits adhering to the combination approach do not justify experimentation given the Supreme Court's clear expression in *Ball v. United States* of the constitutional need to vacate lesser-included convictions. Indeed, the vacation approach also prevails on policy grounds. The majority approach permits the judiciary to ensure that defendants will remain incarcerated if the court reverses their CCE conviction, and the vacation of convictions best conserves scarce judicial resources by avoiding two sets of appeals from the same trial.