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Constitutional Law - Fifth Amendment - Double Jeopardy Clause

Christine H. Nooning

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Recent Decisions

CONSTITUTIONAL LAW—FIFTH AMENDMENT—DOUBLE JEOPARDY CLAUSE—The United States Supreme Court held that when relevant conduct is used to increase an accused's sentence and the resulting sentence falls within the range specified by Congress, the resulting sentence is for the crime of conviction only, and the Government may subsequently prosecute the accused for the same conduct.

Witte v. United States, 115 S. Ct. 2199 (1995).

In June of 1990, Steven Kurt Witte ("Witte") and several other co-conspirators arranged with Roger Norman ("Agent Norman"), an undercover Drug Enforcement Administration ("DEA") agent, to import marijuana from Mexico and cocaine from Guatemala into the United States.[1] Thereafter, Witte's Mexican source advised him that cocaine could be added to the marijuana shipment.[2] In August of 1990, Mexican authorities arrested five of Witte's co-conspirators and seized 591 kilograms of cocaine at an airstrip.[3] Witte was not arrested at that time.[4] In January of 1991, Witte agreed to purchase marijuana from Agent Norman.[5] On February 7, 1991, after the drug transaction took

1. Witte v. United States, 115 S. Ct. 2199, 2202 (1995). Agent Norman was to fly marijuana from Mexico and cocaine from Guatemala into the United States and Witte was to provide ground transportation once Agent Norman brought the drugs into the United States. *Witte*, 115 S. Ct. at 2202.

2. *Id.* The cocaine would be included in the shipment if the plane had additional space or if less marijuana than had been anticipated was delivered to Witte's co-conspirators in Mexico. *Id.*

3. *Id.*

4. *Id.* Agent Norman did, however, meet with Witte to explain that because of the arrest of Witte's co-conspirators at the landing field where Agent Norman was to acquire the contraband, Agent Norman's pilots were unable to land. *Id.* The conspiracy temporarily ceased at this point. *Id.*

5. *Id.* Agent Norman agreed to sell Witte 1,000 pounds of marijuana, and

place, Agent Norman arrested Witte and another co-conspirator in Houston, Texas.[6]

In March of 1991, Witte was indicted for conspiring and attempting to possess marijuana with intent to distribute.[7] The indictment included only the January-February 1991 transaction.[8] Witte entered into a plea bargain with the Government under which he agreed to plead guilty to the attempt charge and cooperate with the Government.[9] The Government agreed to dismiss the conspiracy charge.[10] Furthermore, if Witte substantially cooperated, the Government agreed to file a motion under the Federal Sentencing Guidelines (the "Guidelines") for a downward departure.[11]

In calculating Witte's sentence, the United States Probation Office considered the quantity of all drugs, including the planned 1990 shipments, because under the Guidelines all "relevant conduct" may be considered.[12] For sentencing

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Witte agreed to procure $50,000 for a down payment and provide ground transportation. *Id.*

6. *Witte*, 115 S. Ct. at 2202. Witte gave Agent Norman $25,000 of the $50,000 as a down payment, and DEA undercover agents recovered approximately 375 pounds of marijuana. *Id.*

7. *Id.* at 2202-03. Witte was indicted for violating 21 U.S.C. § 841(a) (1994), which provides in pertinent part: "[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance." 21 U.S.C. § 841(a). Witte was also indicted for attempt and conspiracy in violation of 21 U.S.C. § 846 (1994), which provides: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." *Id.* § 846.

8. *Witte*, 115 S. Ct. at 2203.

9. *Id.* Witte's plea agreement required him to provide "truthful and complete information concerning this and all other offenses about which [he] might be questioned by agents of law enforcement." *Id.* Further, the agreement provided that if needed, Witte would testify for the Government. *Id.*

10. *Id.*

11. *Id.* A downward departure is a reduction in sentence which may be granted by the sentencing judge when a defendant has assisted the government in the investigation or prosecution of another person. *See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 5K1.1 (Nov. 1993) [hereinafter U.S.S.G.]. The Guidelines direct the sentencing court to consider, among other things, "the significance and usefulness of the defendant's assistance . . . the truthfulness, completeness and reliability of any information or testimony provided by the defendant . . . [and] the nature and extent of the defendant's assistance." *Id.*

12. *Witte*, 115 S. Ct. at 2203. "Relevant conduct" under the Guidelines is defined as:

> (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
> (B) in the case of jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy) all reasonably

purposes, therefore, Witte was held accountable for the total amount of drugs involved in the 1990 uncompleted transaction and the 1991 completed transaction because Witte's conduct was determined to be part of a continuing conspiracy.[13]

At the sentencing hearing, both the Government and Witte argued that the 1990 activities were not part of the same continuing conspiracy.[14] However, the district court concluded that the 1990 activities were part of the same continuing conspiracy and should be considered in determining the sentence.[15] Therefore, Witte's sentence was increased two levels for the 1990 activities.[16]

In September of 1992, Witte was indicted for conspiracy and attempt to import cocaine based on his activities in 1990.[17] Witte moved to dismiss on the basis that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution[18] prohibits multiple punishments for the same

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> foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense . . . .

U.S.S.G., *supra* note 11, § 1B1.3

13. *Witte*, 115 S. Ct. at 2203.

14. *Id.* The Government argued against including the 1990 cocaine activities as relevant conduct to enhance Witte's sentence for the 1991 marijuana conviction because the Government wanted to prosecute Witte and gain another conviction which would result in consecutive sentences. *See* United States v. Witte, 25 F.3d 250, 253 (5th Cir. 1994), *aff'd*, 115 S. Ct. 2199 (1995). Otherwise, the second conviction would run concurrently with the first if the criminal conduct for the second offense was considered to be part of the same course of conduct for which Witte had been previously sentenced. *See* U.S.S.G., *supra* note 11, § 5G1.3(b) cmt., n.2.

15. *Witte*, 115 S. Ct. at 2203. The Guidelines allow a judge to adjust an accused's sentence for uncharged acts that constitute relevant conduct. U.S.S.G., *supra* note 11, § 1B1.3. The Guidelines also permit a sentencing judge to consider the "types and quantities of drugs not specified in the count of conviction." *Id.* § 2D1.1 cmt., n.12.

16. *Witte*, 115 S. Ct. at 2203. If Witte were sentenced for only the 1991 marijuana transaction, the sentence would have been in the range of 63 to 78 months. *Witte*, 25 F.3d at 253. Instead, the inclusion of the 1990 activities increased his sentence to 292 to 365 months. *Id.* However, for accepting responsibility for his actions, Witte's sentence was decreased two levels, and because Witte's cooperation was substantial, the Government's request for a downward departure was granted. *Id.* The decrease and downward departure to Witte's sentence resulted in Witte being sentenced to 144 months in prison. *Id.* at 253-54.

17. *Witte*, 115 S. Ct. at 2203. Witte was indicted for violating 21 U.S.C. § 963 (1994), which provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 963. In Witte's case, the object of the conspiracy was the "import[ation] into the United States from any place outside thereof, any controlled substance." *Id.* § 952.

18. The Fifth Amendment to the United States Constitution provides in perti-

crime.[19] The district court agreed and dismissed the indictment against Witte.[20] The United States Court of Appeals for the Fifth Circuit reversed the district court and held that Witte could be prosecuted for his 1990 activities.[21] The United States Supreme Court granted certiorari[22] because the holding of the Fifth Circuit contradicted rulings of the Tenth Circuit and Second Circuit Courts of Appeals.[23]

The United States Supreme Court held that relevant conduct may be used to enhance Witte's sentence; and because the resulting sentence fell within the range specified by Congress, the punishment was for the offense of conviction only.[24] Therefore, the Court held that Witte may be subsequently prosecuted and punished for conduct used to enhance his prior sentence.[25]

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nent part that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

19. *Witte*, 115 S. Ct. at 2203-04.

20. *Id.* at 2204. The district court dismissed the Government's action against Witte because Witte's double jeopardy rights would be violated if Witte were punished at a criminal trial for the second charge because the conduct forming the basis for the second charge was considered by the sentencing judge to be "relevant conduct" and had already been used as a basis for increasing Witte's sentence for the first charge. *See Witte*, 25 F.3d at 254.

21. *Witte*, 25 F.3d at 263. The Fifth Circuit noted that while Double Jeopardy always prohibits multiple prosecutions for the same offense, it does not prohibit multiple *punishments* for the same offense. *Id.* at 254-55. The court concluded that no issue of multiple prosecutions arose because Witte was never prosecuted in a criminal proceeding for his 1990 activities. *Id.* at 255.

The Supreme Court interpreted the Fifth Circuit's opinion as holding that the use of Witte's 1990 uncharged conduct to enhance his sentence for his 1991 activities did not constitute "punishment" for the prior conduct. *Witte*, 115 S. Ct. at 2204. The Fifth Circuit did recognize such a principle. However, the Fifth Circuit did not base its ruling on this principal, but instead found that Congress intended to permit a second punishment for prior conduct that was subsequently used to increase a related sentence. *Witte*, 25 F.3d at 258-60 (citing Williams v. Oklahoma, 358 U.S. 576 (1959)).

22. Witte v. United States, 115 S. Ct. 715 (1995) (granting certiorari).

23. *Witte*, 115 S. Ct. at 2204. Both the Tenth and Second Circuits held that when relevant conduct of an accused is considered in determining punishment under the Guidelines, the accused may not be subsequently indicted on charges based on that same conduct. *Id. See* United States v. McCormick, 992 F.2d 437 (2d Cir. 1993) (holding that because Congress did not intend for the accused to be punished in other states for similar schemes to defraud, the accused could not be punished in Connecticut for the fraudulent conduct after a Vermont court used the Connecticut conduct to enhance his sentence for fraud in Vermont); United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991) (holding that because the legislature did not intend for the accused to be punished under both South Dakota and Utah law for mailing methamphetamines from South Dakota to Utah, the accused could not be punished in Utah after the Utah possession was used to enhance his sentence for conviction of possession in South Dakota), *cert. denied*, 503 U.S. 994 (1992).

24. *Witte*, 115 S. Ct. at 2208.

25. *Id.* at 2209.

Justice O'Connor delivered the opinion for the majority[26] and affirmed the doctrine that the Double Jeopardy Clause prohibits the Government from both prosecuting and punishing an accused more than once for the same offense.[27] However, Justice O'Connor noted that Witte was never prosecuted or convicted for his 1990 criminal activities.[28] The Court noted that Witte was prosecuted only for his 1991 offenses.[29] The Court reasoned that Witte's 1991 conviction for attempt to import marijuana and the subsequent prosecution for the 1990 conspiracy and attempt to import cocaine were not the same offense; therefore, the subsequent prosecution for Witte's 1990 activities was not prohibited.[30]

Moreover, before Witte's double jeopardy rights could be violated, the majority concluded that Witte must have been previously punished for his 1990 criminal activities.[31] Punishment, according to the Court, goes beyond the imposition of the sentence.[32] Thus, the Court determined that because Witte was never convicted for his 1990 activities, the enhancement of Witte's prior sentence did not amount to punishment for that same conduct.[33]

In support of its holding, the Court first determined that the Supreme Court's decision in *Williams v. Oklahoma*[34] was controlling.[35] The Court noted that in *Williams*, the Court held that a sentencing court may use a separate crime to enhance an

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26. *Id.* at 2202. Justice O'Connor was joined in Parts I, II, and IV of the opinion by Chief Justice Rehnquist and Justices Kennedy, Souter, Ginsburg, and Breyer; and in Part III of the opinion by Justices Stevens, Souter, Ginsburg, and Breyer. *Id.*

27. *Id.* at 2204. *See* United States v. Halper, 490 U.S. 435 (1989). In *Halper*, the Court noted that it had "many times held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *Halper*, 490 U.S. at 440.

28. *Witte*, 115 S. Ct. at 2204.

29. *Id.*

30. *Id.* The Court applied the test announced in Blockburger v. United States, 284 U.S. 299 (1932), in which the Court stated: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304.

31. *Witte*, 115 S. Ct. at 2205. In determining sentences, the Court noted that judges have traditionally considered an accused's prior convictions and past criminal behavior which had not resulted in a conviction. *Id.*

32. *Id. See* Ball v. United States, 470 U.S. 856, 862 (1985) (finding that "'punishment' must be the equivalent of a criminal conviction and not simply the imposition of the sentence.").

33. *Witte*, 115 S. Ct. at 2208.

34. 358 U.S. 576 (1959).

35. *Witte*, 115 S. Ct. at 2206.

accused's sentence only if the resulting sentence falls within the statutorily authorized range of punishment for that crime.[36] Second, the Court noted that it had continuously upheld recidivism statutes that allow judges to consider earlier crimes as aggravating circumstances in order to enhance a sentence for a later crime.[37] Third, the majority cited *McMillan v. Pennsylvania*,[38] in which the Court held that a standard of proof below the standard required at a criminal trial is permissible at sentencing hearings in order to prove additional facts that relate to an accused's character and conduct.[39] Therefore, the Court concluded that when uncharged relevant conduct has been considered in imposing a sentence, the resulting sentence is not punishment for the uncharged conduct, but, instead, is punishment for the crime of conviction only.[40]

In addressing Witte's concerns that he should not receive a second sentence for the 1990 cocaine activities that were used to enhance his sentence for the 1991 marijuana offense, the Court determined that safeguards exist to protect against violating Witte's double jeopardy rights.[41] First, the Court found that the Guidelines require an accused's sentences to run concurrently if the accused was convicted for conduct that was used to enhance a prior sentence.[42] In addition, the Court found that the Guidelines allow district courts, in some cases, to consider the fact that a prior sentence was enhanced by the conduct for which the accused had been convicted and now stood to be sentenced.[43] The Court concluded that sentencing courts have retained discretion because sentences outside the parameters of the Guidelines may be imposed when aggravating or mitigating circumstances not covered by the Guidelines have been

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36. *Id.* In *Williams*, the accused had previously pled guilty to murdering his kidnapped victim. *Williams*, 358 U.S. at 585. In accord with the state sentencing statute, the sentencing judge took the accused's prior guilty plea for murder into consideration in determining the accused's sentence for the kidnapping conviction. *Id.* The sentencing judge imposed the death penalty, and the Supreme Court upheld the sentence. *Id.* at 580-81, 586-87.

37. *Witte*, 115 S. Ct. at 2206. The later sentence, according to the Court, is more severe because the crime is repetitive. *Id.*

38. 477 U.S. 79 (1986).

39. *Witte*, 115 S. Ct. at 2206-07. In *McMillan*, the Court affirmed a five-year minimum sentence because the sentencing judge found, by a preponderance of the evidence, that during the commission of the felony, the accused "visibly possessed a firearm." *McMillan*, 477 U.S. at 91-92.

40. *Witte*, 115 S. Ct. at 2207.

41. *Id.* at 2208-09.

42. *Id.* The Court followed the Fifth Circuit's interpretation of the Guidelines. *See Witte*, 25 F.3d. at 261.

43. *Witte*, 115 S. Ct. at 2209.

proved.[44]

In a concurring opinion,[45] Justice Scalia criticized the majority's finding that Witte's second prosecution did not violate his double jeopardy rights.[46] According to Justice Scalia, the majority mistakenly viewed Witte's enhanced punishment as punishment for the crime of conviction only and not as punishment for the uncharged, relevant conduct.[47] Justice Scalia accused the majority of destroying the traditional protection afforded by the Double Jeopardy Clause as previously interpreted by the Court.[48] However, Justice Scalia concurred because he contended that the Double Jeopardy Clause prohibits only subsequent prosecutions, not subsequent punishments for the same offense, and Witte had not been prosecuted twice for the same crime.[49]

Justice Stevens dissented in part from the Court's holding[50]

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44. *Id.* The Guidelines permit a sentencing judge to impose a sentence outside the range set by Congress if the judge determines "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." U.S.S.G., *supra* note 11, § 5K2.0, policy statement.

45. *Witte*, 115 S. Ct. at 2209 (Scalia, J., concurring). Justice Thomas joined in the concurrence. *Id.*

46. *Id.*

47. *Id.* at 2210.

48. *Id.* Justice Scalia contended that the Court departed from the traditional meaning of the Double Jeopardy Clause upheld in United States v. Halper, 490 U.S. 435 (1989). *Id.* at 2209. Justice Scalia criticized the majority particularly because he believed that the majority was destroying the right created previously by the Court that protected against subsequent punishments. *Id.* According to Justice Scalia, the majority was giving Witte the following message: "We do not punish you twice for the same offense . . . but we punish you twice as much for one offense solely because you also committed another offense, for which other offense we will also punish you (only once) later on." *Id.* at 2210. Justice Scalia could see no difference in the majority's distinction. *Id.*

49. *Id.* at 2210. Justice Scalia gave no reason for this view, but cited his dissent in Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1948 (1994) (holding that a civil tax imposed on a person previously accused and prosecuted for possession of drugs is a second punishment which violates the accused's double jeopardy rights) (Scalia, J., dissenting). *Id.* In dissent in *Kurth Ranch*, Justice Scalia clearly contended that the Double Jeopardy Clause does not prohibit successive punishments. *Kurth Ranch*, 114 S. Ct. at 1959. Further, in dissent in *Kurth Ranch*, Justice Scalia insisted that the Eight Amendment's prohibition of cruel and unusual punishment restricts subsequent punishments so far as the "nature" of the punishment is concerned, and the Eighth Amendment's prohibition against excessive bails restricts the "cumulative extent" of the punishment. *Id.* Finally, Justice Scalia concluded in *Kurth Ranch* that the Double Jeopardy Clause prohibits successive prosecutions, while the Due Process Clause governs cumulative punishments. *Id.*

50. *Witte*, 115 S. Ct. at 2210 (Stevens, J., concurring in part and dissenting in part). Justice Stevens found that Witte was already punished for his 1990 cocaine attempt offense because Witte's sentence was enhanced by over 200 months at the

because he believed that the majority overlooked an important distinction made in the Guidelines between the character of an offense and the character of an offender.[51] The character of an accused, according to Justice Stevens, has been provided for in the Guidelines under the "criminal history" section.[52] Justice Stevens asserted that because the character of an accused is revealed by prior convictions, a recidivist's sentence should be greater than it would be if the accused were a first-time offender.[53] The character of an offense, according to Justice Stevens, has also been provided for in the Guidelines under the "relevant conduct" section.[54] However, Justice Stevens contended that if relevant conduct is used to enhance an accused's sentence, the relevant conduct has the same effect on an accused's sentence as it would have if the sentence were the result of a criminal trial and conviction; and, therefore, subsequent prosecution is barred by the Double Jeopardy Clause.[55]

Although Justice Stevens agreed with the majority's finding that the Guidelines generally ensure that an accused's sentences in two proceedings will amount to no more than the sentence the accused would have received had the offenses been consolidated into one trial, Justice Stevens disagreed that the safeguards within the Guidelines protect against Double Jeopardy violations.[56] Justice Stevens asserted that Double Jeopardy protects an accused from more than just a second

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sentencing hearing for the 1991 offense. *Id.*

51. *Id.* at 2211.

52. *Id. See* U.S.S.G., *supra* note 11, § 4A1.1 (providing that an accused's sentence may be increased for prior offenses for which the accused had been previously sentenced or when the instant offense had been committed while on probation, parole, etc., or when the offense was a violent crime which was not included in any other point category).

53. *Witte*, 115 S. Ct. at 2211. Justice Stevens reasoned that a recidivist's sentence should be increased not because the recidivist should be punished for prior bad acts, but instead, because the recidivist has refused to reform, and the recidivist's bad character has been revealed by a prior criminal record. *Id.* A "recidivist" is one who repeatedly commits crimes. BLACK'S LAW DICTIONARY 1269 (6th ed. 1990).

54. *Witte*, 115 S. Ct. at 2210. *See supra* note 12 for the Guidelines' definition of "relevant conduct."

55. *Witte*, 115 S. Ct. at 2212. Justice Stevens reasoned that imposing punishment at a sentencing hearing for prior conduct not proven at a criminal trial would produce the same result as if the accused had been punished after a criminal trial. *Id.* According to Justice Stevens, Witte's sentence was based on the totality of the drugs under both the 1990 and 1991 transactions. *Id.* Therefore, Justice Stevens concluded that Witte was already sentenced for his 1990 cocaine activity. *Id.*

56. *Id.* at 2213, 2214 n.4.

punishment.[57] Double Jeopardy, according to Justice Stevens, also protects against the burdens incidental to a second prosecution.[58] Moreover, Justice Stevens contended that even if Witte did not receive an additional sentence at the second trial, a second conviction in and of itself is punishment and is forbidden by the Double Jeopardy Clause.[59]

Finally, Justice Stevens asserted that the Court had already rejected the idea that punishment has occurred only when an accused has been convicted at a criminal trial.[60] According to Justice Stevens, the two cases relied on by the Court, *McMillan* and *Williams*, did not support its holding.[61]

The Fifth Amendment's protection against double jeopardy was clearly established in 1873 in *Ex Parte Lange*,[62] when the United States Supreme Court decided the issue of whether a sentencing court may impose both a fine and imprisonment when a statute provides alternative sentences of fine or imprisonment.[63] In *Lange*, the accused was convicted of appropriating, for his own personal use, mailbags of the United States Post Office.[64] The statute provided alternative sentences of either imprisonment for one year or less, or a fine of not more than two hundred dollars;[65] however, the judge imposed both

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57. *Id.*

58. *Id.*

59. *Id.* Justice Stevens cited Ball v. United States, 470 U.S. 856, 865 (1985) (holding that a "second conviction, even if it results in no greater sentence, is an impermissible punishment.").

60. *Witte*, 115 S. Ct at 2213.

61. *Id.* at 2212-13 The majority cited *McMillan* to support the view that the enhancement of a sentence based on information proven at a sentencing hearing does not amount to punishment. *Witte*, 115 S. Ct. at 2208. Justice Stevens cited United States v. Halper, 490 U.S. 435, 438 (1982) and Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1948 (1994) as the Court's rejection of the proposition that "punishment under the Double Jeopardy Clause only occurs when a court imposes a sentence for an offense that is proven beyond a reasonable doubt at a criminal trial." *Id.* at 2213.

Additionally, Justice Stevens contended that *Williams*, the principal case relied on by the Court, was decided over ten years before the Double Jeopardy Clause was applied to the states through the Fourteenth Amendment. *Id. See* Benton v. Maryland, 395 U.S. 784, 794 (1969) (holding that the Double Jeopardy Clause "should apply to the States through the Fourteenth Amendment.").

62. 85 U.S. (18 Wall.) 163 (1873).

63. *Lange*, 85 U.S. (18 Wall.) at 175.

64. *Id.* at 166.

65. *Id.* Lange was convicted under a federal statute, which read in pertinent part: "[A]ny person who shall steal, purloin, or embezzle any mail-bag or other property in use by or belonging to the Post-office Department . . . shall . . . if the value of the property be less than twenty-five dollars . . . be imprisoned not more than one year, or be fined not less than ten nor more than two hundred dollars." Act of June 8, 1872, ch. 335, 17 Stat. 320 § 290 (repealed).

sentences.[66] The Court held that once an alternative punishment is imposed by a sentencing court, the sentencing court lacks authority to impose additional punishment.[67] According to the Court, the Double Jeopardy Clause's protection against a second punishment, based on the same facts, for the same offense was a well-settled principle in English and American law.[68] The Court further reasoned that protecting against the risk of a second punishment is most important because, without it, a sentencing court could impose several sentences on the same verdict.[69] The constitutional protection against Double Jeopardy, the Court concluded, clearly protects an accused from being prosecuted or punished a second time for the same offense.[70]

Twenty years later, in *Moore v. Missouri*,[71] the Court considered the question of whether an accused's double jeopardy rights are violated by a state statute that permits an accused's second sentence to be increased based on a prior conviction.[72] In *Moore*, the accused had previously been convicted and sentenced for grand larceny and had served his term.[73] After release, the accused was convicted of burglary in the second degree, and the court considered the prior conviction for grand larceny when imposing a life sentence on the accused.[74] The Court held that a state may inflict harsher sentences for subsequent convictions if the state treats all who are similarly

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66. *Lange*, 85 U.S. (18 Wall.) at 166. After the accused paid the fine and spent five days in jail, the sentencing court changed the sentence to only imprisonment for one year. *Id.*

67. *Id.* at 176. Therefore, the Court ordered the accused to be released from prison. *Id.* at 178.

68. *Id.* at 168.

69. *Id.* at 167-71.

70. *Id.* at 169.

71. 159 U.S. 673 (1895).

72. *Moore*, 159 U.S. at 676.

73. *Id.* at 673-74.

74. *Id.* at 673. The Missouri statute, under which the accused was sentenced, reads in pertinent part:

> If any person convicted of any offence punishable by imprisonment in the penitentiary . . . shall be discharged . . . and shall subsequently be convicted of any offence committed after such pardon or discharge, he shall be punished as follows: First, if subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which, under the provisions of this law, might extend to imprisonment in the penitentiary for life, then such person shall be punished by imprisonment for life.

MO. REV. STAT. § 3959 (1879) (current version at MO. ANN. STAT. § 558.016 (Vernon 1979)).

situated the same.[75] The Court found that an increased punishment is not a second punishment for a first offense because an offender's persistence in committing crimes reveals a need for greater punishment.[76] The offender, according to the Court, did not change after the first punishment.[77] The offender chose to repeat the crime; therefore, the Court reasoned that the offender's own conduct aggravated the offender's guilt.[78]

The question of whether the Government may prosecute an accused for violating more than one statute based on a single act was addressed by the Court in *Blockburger v. United States*.[79] In *Blockburger*, the accused made two sales of morphine hydrochloride to the same person.[80] For the first sale, the accused was found guilty of one count of selling drugs not in the original stamped package.[81] For the second sale, the accused was found guilty of violating two separate statutes: selling drugs not in the original stamped package and selling drugs without a written order from the purchaser.[82] The Court held that when an accused has been charged with the violation of two statutes from a single act or transaction, the test to be applied is whether each of the offenses charged against the accused requires proof of at least one additional fact not included in the elements of the other offense.[83] The Court determined that Congress intended to create two separate offenses, and because each included proof of additional elements not contained in the other, the accused's single act violated both statutes.[84] Thus,

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75. *Moore*, 159 U.S. at 678.

76. *Id.* at 677.

77. *Id.*

78. *Id.*

79. 284 U.S. 299, 301 (1932).

80. *Blockburger*, 284 U.S. at 301.

81. *Id.* The Harrison Act, under which the accused in *Blockburger* was convicted, provided that "it shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package." Harrison Act, ch. 1, 38 Stat. 785, 786 (1914), *amended by* ch. 18, 40 Stat. 1057, 1131 (1919) (repealed 1939). The "aforesaid drugs" include "opium or cocoa leaves or any compound, manufacture, salt, derivative, or preparation thereof." *Id.* at 785.

82. *Blockburger*, 284 U.S. at 301. The accused in *Blockburger* argued that the charge for the sale of drugs not in the original stamped package and the charge for the sale of drugs without a written order from the purchaser were the same offense; and, therefore, the accused should have been charged only once. *Id.* The Harrison Act, under which the accused was convicted, provides that "[i]t shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold." ch. 1, 38 Stat. at 786.

83. *Blockburger*, 284 U.S. at 304.

84. *Id.*

the Court held that the accused could be prosecuted under both statutes.[85]

In *Williams v. Oklahoma*,[86] the Court had to determine whether a sentencing court could impose the death penalty for kidnapping when the accused had previously pled guilty to murdering his kidnapped victim.[87] The accused first pled guilty to a charge of murder and was sentenced to life in prison.[88] The accused subsequently pled guilty to kidnapping.[89] At sentencing the court considered the fact that the accused murdered his victim and sentenced the accused to death.[90] The Court held that the accused was not being punished a second time for the same offense.[91] First, the Court reasoned that under Oklahoma law, kidnapping and murder are separate crimes; and, therefore, the charge of kidnapping does not include murder.[92] Next, the Court recognized that Oklahoma had enacted a statute that provided a range of sentencing for kidnapping, which included death.[93] The Court determined that a judge may consider all aggravating and mitigating circumstances related to a crime.[94] Therefore, the *Williams* Court concluded that the accused's act of killing his victim could be considered at sentencing because it was an aggravating circumstance.[95]

Whereas the Court in *Blockburger* determined the issue of whether the Government may prosecute violations of multiple

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85. *Id.* Additionally, the Court determined that the accused made two distinct sales of drugs not in the original stamped package because the first sale was complete and the second sale was the result of a new bargain. *Id.* at 303.

86. 358 U.S. 576 (1959).

87. *Williams*, 358 U.S. at 581. The accused in *Williams* kidnapped and killed a young man. *Id.* at 577-78. The accused forced himself into the victim's car, held the victim at gunpoint, shot and killed the victim, and then escaped in the victim's car. *Id.*

88. *Id.* at 578.

89. *Id.*

90. *Id.* at 578, 581. The statute under which the accused was sentenced provides in pertinent part:

> Every person who, without lawful authority, forcibly seizes and confines another or inveigles or kidnaps another, for the purpose of extorting any money, property or thing of value or advantage from the person so seized . . . shall be guilty of a felony, and upon conviction shall suffer death or imprisonment in the penitentiary, not less than ten (10) years.

OKLA. STAT. ANN. tit. 21, § 745 (1951) (current version at OKLA. STAT. ANN. tit. 21, § 681 (West 1983)).

91. *Williams*, 358 U.S. at 586.

92. *Id.*

93. *Id.* at 585. *See* OKLA. STAT. ANN tit. 21, § 681.

94. *Williams*, 358 U.S. at 586. According to the Court, imposing the death penalty for kidnapping is solely within the discretion of the sentencing judge who must consider all the facts involved in the crime. *Id.* at 585.

95. *Id.* at 585.

statutes by a single act, the Court in *Ball v. United States*[96] determined the subsidiary issue of whether an accused may be convicted and punished for multiple violations of a statute by a single act.[97] In *Ball*, the accused was convicted of both illegal receipt of a firearm and illegal possession of a firearm.[98] The Court determined that before a sentencing court may punish, it must ascertain whether Congress intended for the single act to be punished under different statutes.[99] The Court applied the *Blockburger* test and determined that "punishment" must consist of more than a sentence—it must amount to a criminal conviction.[100] According to the *Ball* Court, Congress must have intended for separate punishments to punish for the same conduct; otherwise, an accused could not be convicted or punished for multiple offenses.[101] Because receipt of the firearm required that the accused in *Ball* also possess it, the Court decided that Congress could not have intended to subject Ball to two convictions for the same act.[102]

One year later, in *McMillan v. Pennsylvania*,[103] the Court confronted the issue of whether a state, for sentencing purposes, must prove beyond a reasonable doubt a particular fact that aggravated the crime but which was not proven at the criminal trial.[104] At issue was a Pennsylvania statute which requires a sentencing judge to impose a minimum sentence if, at the sentencing hearing, it was proved by a preponderance of the

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96. 470 U.S. 856 (1985).

97. *Ball*, 470 U.S. at 859, 861. The accused was convicted of both receiving and possessing a firearm shipped in interstate commerce from South Carolina to Virginia and was sentenced to consecutive terms of imprisonment. *Id.* at 857-58.

98. *Id.* at 858. The accused in *Ball* was convicted of receiving a firearm under 18 U.S.C. § 922(h) (1988), which provides, in pertinent part, that it "shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(h). The accused was also convicted of possessing a firearm under 18 U.S.C. § 1202(a) (repealed 1986) which provided, in pertinent part, that anyone who "has been convicted by a court of the United States . . . of a felony . . . and who receives, possesses, or transports in commerce . . . any firearm shall be fined . . . or imprisoned." *Id.* § 1202(a).

99. *Ball*, 470 U.S. at 862.

100. *Id.* at 861. *See supra* note 30 for the text of the *Blockburger* test.

101. *Ball*, 470 U.S. at 861.

102. *Id.* Moreover, the Court reasoned that requiring the sentences to run concurrently would not remedy the problem. *Id.* at 864. The Court reasoned that Congress did not intend to punish for both offenses, and further, because Congress authorized only one punishment, the accused's additional sentence did not disappear merely because it was served at the same time as the other sentence. *Id.* at 864-65.

103. 477 U.S. 79 (1986).

104. *McMillan*, 477 U.S. at 84.

evidence that the convicted visibly possessed a firearm during the commission of certain felonies.[105] Each of the accused in *McMillan* was convicted of a felony included in the sentencing statute.[106] The Court held that the state did not have to prove possession beyond a reasonable doubt because possession is a sentencing factor and not a element of the crime.[107] According to the Court, the principle requiring states to prove the elements of a crime beyond a reasonable doubt pertains only to criminal trials.[108] The Court reasoned that the state legislature decided not to include the visible possession of a firearm as an element of certain felonies, but instead to include it in the sentencing statute.[109] The Court concluded that sentencing courts merely determine whether a firearm was used in committing a felony, and the statute sets the punishment if the fact is proven at the sentencing hearing by a preponderance of the evidence.[110]

The question of whether a civil penalty constitutes punishment under the Double Jeopardy Clause when an accused has been previously convicted and sentenced for the same conduct arose in *United States v. Halper*.[111] In *Halper*, the

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105. *Id.* The Pennsylvania sentencing statute at issue provides that a person convicted of "murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery . . . aggravated assault . . . or kidnapping . . . shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement." 18 PA. CONS. STAT. § 2702 (1982). The statute further directs the sentencing judge to "consider any evidence presented at the trial and . . . afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and [to] determine, by a preponderance of the evidence, if this section is applicable." *Id.*

106. *McMillan*, 477 U.S. at 82. Petitioner McMillan shot his victim after an argument and was convicted of aggravated assault. *Id.* Petitioner Peterson shot and killed her husband and was convicted of voluntary manslaughter. *Id.* Petitioner Dennison shot an acquaintance and was convicted of aggravated assault. *Id.* Petitioner Small robbed a store at gunpoint and was convicted of robbery. *Id.*

107. *Id.* at 90.

108. *Id.* at 85. *See In re* Winship, 397 U.S. 358, 364 (1970) (holding that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). *See also* Patterson v. New York, 432 U.S. 197, 210 (1977) (holding that the "Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.").

However, the *McMillan* Court further held that the Court had previously rejected the requirement that all facts considered at a sentencing hearing which affect the sentence be proven beyond a reasonable doubt. *McMillan*, 477 U.S. at 84. *See Patterson*, 432 U.S. at 207 (refusing to hold that facts which are related to the "severity of punishment" must be proven beyond a reasonable doubt).

109. *McMillan*, 477 U.S. at 85-86.

110. *Id.* at 91. Consequently, the Court noted that the *Winship* principle was not violated. *Id.* at 89.

111. 490 U.S. 435 (1989).

accused was convicted of over sixty counts of making false, fictitious or fraudulent claims against the United States and was sentenced and fined.[112] After Halper's conviction, the Government sought to recover damages through a civil action against Halper.[113] The *Halper* Court reasoned that the determining factor was the purpose of the sanction, not the nature of the proceeding.[114] Consequently, the Court recognized that it did not matter whether a proceeding is called civil or criminal because the name of the proceeding does not determine whether the Constitution is violated.[115] The Court concluded that the aim of the subsequent civil action was to punish; and, therefore, the accused's double jeopardy rights were violated because the accused had already been tried, convicted and sentenced for the same conduct.[116]

After a review of the history of the Double Jeopardy Clause, the conclusion is inescapable that the Supreme Court has stepped beyond constitutionally tolerable limits. Prior to *McMillan*, the Court stood on firm constitutional ground. In both *Moore* and *Williams*, increasing an accused's sentence was justified by prior convictions.[117] However, no prior conviction

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112. *Halper*, 490 U.S. at 437. The accused worked as a manager for a medical laboratory which provided medical services for New York City patients who were eligible for Medicare. *Id.* The accused submitted claims to Blue Cross which contained fees that were higher than the services actually rendered. *Id.* Blue Cross forwarded the overcharges to the federal government. *Id.* The accused was sentenced to two years imprisonment and fined $5,000. *Id.*

The civil code under which the accused was prosecuted read in pertinent part:

> A person . . . is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person . . . knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved.

31 U.S.C. § 3729 (1983) (amended 1986).

113. *Halper*, 490 U.S. at 438.

114. *Id.* at 447.

115. *Id.* at 447-48.

116. *Id.* at 448, 452. Therefore, the Court held that the additional civil penalty was a second punishment which violated the accused's double jeopardy rights. *Id.* at 452. The Court clearly stated that the rule it announced was for "the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449. However, the Court noted that its rule is a rule based on reason. *Id.*

117. *See Moore*, 159 U.S. at 673; *Williams*, 358 U.S. at 581. Enhancing an accused's sentence based on recidivism, as the Court held in *Moore*, is justifiable because the offender refused to change his criminal ways. *Moore*, 159 U.S. at 677. Enhancing an accused's sentence based on the commission of additional crimes, as the Court held in *Williams*, is also justifiable because of the aggravating nature of the offense. *Williams*, 358 U.S. at 586.

existed in Witte's case.[118] The Court continued to stand on firm constitutional ground in *Blockburger* and *Ball* when it ruled that an accused could be prosecuted and punished for violations of multiple statutes if Congress intended that an accused be punished under the applicable statutes.[119] However, the question in *Witte* was not whether Witte may be punished for both offenses.[120] Instead, the critical question was whether Witte, in fact, had already been punished for the offense.[121]

The Court was required to address two elements in order to determine whether Witte was already punished for uncharged conduct. First, the Court addressed the issue of whether a sentencing court may increase an accused's sentence for conduct not proven at a criminal proceeding.[122] Second, the Court addressed the question of whether once an accused's sentence has been enhanced, may the Government subsequently prosecute and punish the accused for that same conduct?[123]

First, by allowing proof of the possession of a firearm to be established at a sentencing hearing by a preponderance of the evidence,[124] the Court in *McMillan* took its first step into constitutionally-impermissible territory and gave its blessing to punishment without a prior conviction.[125] In circumventing the

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118. *Witte*, 115 S. Ct. at 2203.

119. *See Blockburger*, 284 U.S. at 304. The Court determined in *Blockburger* that an accused could not be prosecuted for the same act under more than one statute unless the statutes contain one element of the crime that the others did not. *Id.* In *Ball*, the Court held that an accused may only be punished for violating more than one statute by the same act if Congress must have intended for a accused to be punished under both offenses. *Ball*, 470 U.S. at 861.

120. *Witte*, 115 S. Ct. at 2203-04. Witte did not appeal the sentencing enhancement. *See Witte*, 25 F.3d at 254.

121. *Witte*, 115 S. Ct. at 2204. Witte asked the district court to dismiss the subsequent indictment against him because he was already punished for the conduct at the prior sentencing hearing. *Id.* at 2203-04. Consequently, the issue on appeal was whether or not the sentencing enhancement was the equivalent of punishment for double jeopardy purposes. *Id.* at 2204.

122. *Id.* at 2206-07.

123. *Id.* at 2207-09.

124. *See McMillan*, 477 U.S. at 91.

125. *See* ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING § 18-3.6 (3d ed. 1994) [hereinafter ABA STANDARDS]. The ABA rejects sentencing which allows a judge to consider uncharged conduct in determining sentences because the "infliction of punishment for a given crime ought to be preceded by conviction for that crime." *Id.*

Judge Norris of the Ninth Circuit warned that "a defendant whose liberty is at stake in a sentencing hearing is accorded less procedural protection than is an alien facing deportation, a mentally-ill person facing civil commitment, or a defendant in a civil fraud suit." *Forum on the Sentencing Guidelines: Suggestions for the New Administration and the 103rd Congress*, 5 FED. SENT. REPTR. 187 (1993) [hereinafter *Forum*].

requirement of a criminal conviction and allowing punishment for uncharged conduct to be imposed at a sentencing hearing, the Court sanctioned the violation of an accused's constitutional rights under the Sixth and Fourth Amendments.[126] Unlike a criminal trial, a sentencing hearing does not guarantee an accused's rights to a jury trial, to confront witnesses, or to exclude evidence obtained by an illegal search.[127] Furthermore, judges at sentencing hearings are permitted to admit evidence, including hearsay, that would otherwise be inadmissible in a criminal proceeding.[128]

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126. *See* ABA STANDARDS, *supra* note 125, § 18-3.6. The ABA suggests that an accused's Sixth Amendment guarantees to a jury trial and to confront witnesses, as well as the Fourth Amendment protection against unlawful searches and seizures, are not afforded at sentencing hearings. *Id.*

The Sixth Amendment to the Constitution provides:

> In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend VI.

The Sixth Amendment right to confront requires that all witnesses against the accused appear and testify in court, with the accused present, so that the accused may cross-examine such witnesses. BLACK'S LAW DICTIONARY 300 (6th ed. 1990).

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV.

The Fourth Amendment's protection against unlawful searches and seizures prohibits the prosecution from using illegally-obtained or tainted evidence against an accused at his trial. BLACK'S LAW DICTIONARY 564 (6th ed. 1990).

127. Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses be Applied*, 22 CAP. U. L. REV. 1 (1993). Becker states:

> The defendant has no absolute right to compel the attendance of witnesses at the sentencing hearing . . . or to confront the prosecution's sources that may be used to enhance the sentence. Indeed there is no absolute right to a hearing. All of the procedures are within the discretion of the sentencing judge . . . .

Id. at 9-10.

128. *See* U.S.S.G., *supra* note 11, § 6A1.3. The Guidelines provide that when sentencing judges determine facts relevant to the sentencing, the judge "may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." *Id.* The Guidelines also provide that a court may admit reliable hearsay and out-of-court statements by unidentified informants. *Id.* § 6A1.3 cmt.

The decision in *McMillan* makes the decision in *Witte* possible. Only after the Court crossed the constitutional boundary in *McMillan* to allow uncharged conduct to be used at sentencing hearings to enhance the sentence for a crime of conviction could the Court in *Witte* then sanction the violation of an accused's double jeopardy rights by allowing the accused to be subsequently prosecuted and punished for the very same conduct used to enhance a prior sentence.[129]

In determining the second issue, the Court should have followed the reasoning used in *Halper* because *Halper* is most analogous to *Witte*. In both *Witte* and *Halper*, the sentencing courts attempted to punish an accused twice for the same conduct. However, in *Halper*, the disguised attempt to punish a second time occurred after the criminal trial and conviction. Whereas in *Witte*, the disguised attempt to punish occurred before the criminal trial and conviction. Furthermore, in following *Halper*, the *Witte* Court would not have looked to the label "sentencing hearing" to determine if Witte's double jeopardy rights were violated.[130] Instead, the *Witte* Court would have looked to the purpose of the sentencing hearing and determined that the Constitution was violated.[131]

Although the Guidelines camouflage the double jeopardy violation by requiring Witte's two sentences to run concurrently, the second sentence does not disappear simply because it runs concurrently with the first.[132] Moreover, even if Witte did not serve one additional day in jail, as Justice Stevens pointed out, the burden of a second prosecution, and more importantly, any

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See also ABA STANDARDS, *supra* note 125, § 18-3.6. The ABA found that at sentencing hearings, the "rules of evidence are not in force and the admission of hearsay, even double and triple hearsay, is commonplace." *Id.* Hearsay evidence is defined as "testimony in court of a statement made out of court . . . offered to show the truth of matters asserted therein." BLACK'S LAW DICTIONARY 722 (6th ed. 1990). Hearsay is repetition of what a witness has heard another say; therefore, the reliability of the statement is questionable because the credibility of the statement cannot be derived from the witness who is testifying. *Id.*

The statutory authority to enhance sentences based on uncharged conduct concerns several federal judges. *See Forum*, *supra* note 125, at 187. Judge Noonan of the Ninth Circuit stated in the Federal Sentencing Reporter: "If the judges of the United States could vote, the guidelines would be repealed." *Id.* Judge Noonan expressed his concern that "neither constitutional law nor the law of evidence has kept pace with the development of a system based on unadjudicated conduct." *Id.*

129. *See Witte*, 115 S. Ct. at 2208.

130. *See Halper*, 490 U.S. at 447-48.

131. *Id.* at 448.

132. *Cf. Ball*, 470 U.S. at 861 (reasoning that when a single act violates more than one statute and Congress did not intend separate punishments, any additional sentence imposed does not disappear merely because the sentence is served at the same time as the other sentence).

conviction based upon a second prosecution, would violate Witte's double jeopardy rights.[133]

In conclusion, both *McMillan* and *Witte* should be overruled. The holdings in *McMillan* and *Witte* are not separate, but instead are joined in a symbiotic relationship. The violation of due process rights sanctioned by *McMillan* creates the opportunity for the violation of double jeopardy rights. The violation of the double jeopardy rights sanctioned by *Witte* exacerbates the violation of due process rights. Although the words of the Fifth Amendment protect the accused from the consequences of this unconstitutional process, the United States Supreme Court, unfortunately, did not.

Christine H. Nooning

133. *Witte*, 115 S. Ct. at 2214 (Stevens, J., concurring in part and dissenting in part).