COMMENTS

Successive Prosecutions and the Continuing Criminal Enterprise: The Double Jeopardy Analysis in *Garrett v. United States*

Introduction

In *Garrett v. United States*,[1] the Supreme Court reviewed a double jeopardy challenge to a conviction under the Continuing Criminal Enterprise ("CCE") provision of the federal drug enforcement laws.[2] The CCE requires proof of other felony drug offenses, "predicate offenses," as one of its elements.[3] In *Garrett*, the defendant was tried and convicted of a felony violation of the drug laws, and then the government introduced evidence underlying this conviction in a separate trial on a CCE charge.[4]

One of the guarantees of the Double Jeopardy Clause[5] prevents successive prosecutions for the "same offense."[6] The included offense rule of double jeopardy doctrine is that two offenses are the "same offense" for successive prosecution purposes if proof of one offense necessarily establishes the other.[7] Garrett argued that the government violated his double jeopardy right against successive prosecutions for the same offense when it used his previous conviction as a predicate underlying a CCE.[8] The Supreme Court rejected this claim on the dubious ground that the prose-

1. 105 S. Ct. 2407 (1985). Justice Rehnquist wrote the opinion in which Chief Justice Burger and Justices Blackmun and White joined. Justice O'Connor concurred in the judgment but offered theoretically different grounds for rejecting the defendant's claim. *Id.* at 2420 (O'Connor, J., concurring). Justice Stevens wrote a dissent in which Justices Brennan and Marshall joined. *Id.* at 2422 (Stevens, J., dissenting). Justice Powell took no part in the decision.

2. 21 U.S.C. § 848 (1982).

3. 21 U.S.C. § 848(b)(2) (1982). *See infra* notes 35-47 and accompanying text.

4. 105 S. Ct. at 2410.

5. U.S. CONST. amend. V.

6. *See infra* notes 56-105 and accompanying text.

7. *Garrett*, 105 S. Ct. at 2411.

8. *Id.* at 2416. Garrett raised a second double jeopardy challenge in which he argued that the underlying drug offenses must be considered the same as the CCE for purposes of the separate double jeopardy prohibition on multiple punishments for the same offense. *Id.* at 2419-20. The Court also rejected the multiple punishment plea. *Id. See infra* note 123.

cution's case fell within an exception to the Double Jeopardy Clause which lies when the greater offense has not been completed at the time of prosecution for the included offense.[9] *Garrett* is also troubling because the majority suggested that a lesser included offense must occur simultaneously with the greater offense to invoke the Double Jeopardy Clause, and because Justice O'Connor adopted a balancing approach in which the defendant's criminal conduct *after* his first prosecution is weighed against his interest in the finality of that prosecution.[10] Though each of these three positions appears analytically unsound, each, if adopted in future double jeopardy cases, has the potential of severely limiting a defendant's protection against successive prosecution in CCE cases.

This Comment examines the Supreme Court's analysis of the successive prosecution claim in *Garrett*. First, it introduces the facts and the decision. It then reviews the legislative and judicial history of the CCE statute, the history and policies of the Double Jeopardy Clause, and the concept of included offenses. It next examines and questions the three major positions taken by the majority justices. Finally, the Comment discusses the impact of *Garrett* on future successive prosecution double jeopardy claims under the CCE statute.

I. *Garrett v. United States*

A. The Facts

In March of 1981, a federal grand jury in Washington returned a four count indictment against Jonathan Garrett and three other defendants for activities relating to the importation of approximately 12,000 pounds of marijuana at Neah Bay, Washington, between September 1979 and October 1980.[11] After this indictment but before trial, Garrett discovered that he was under investigation in Florida for conducting a Continuing Criminal Enterprise.[12] His motion to consolidate the Washington indictment with all other "charges anticipated, investigated and currently pending" was denied on the ground that only currently pending charges could be consolidated.[13]

Garrett entered a plea of guilty to one count of importation of marijuana.[14] He was fined $15,000 and sentenced to five years in prison. The district court dismissed the remaining counts without prejudice to the government's right to prosecute on any other offenses Garrett may have

9. 105 S. Ct. at 2417-19.

10. *Id.* at 2416-17, 2420-22 (O'Connor, J., concurring).

11. *Id.* at 2423 (Stevens, J., dissenting).

12. *Id.* at 2410.

13. *Id.*

14. In violation of 21 U.S.C. §§ 952, 960(a)(1), 960(b)(2), and 18 U.S.C. § 2 (1982). 105 S. Ct. at 2410.

committed.[15]

In July of 1981, a federal grand jury in Florida returned an eleven count indictment against Garrett and five other defendants.[16] Garrett was charged with having conducted a CCE from January 1976 to July 1981,[17] and with having committed three substantive offenses: conspiracy to possess marijuana with intent to distribute,[18] conspiracy to import marijuana,[19] and use of a telephone to facilitate illegal drug activities.[20]

At trial, the government introduced "extensive and dramatic evidence"[21] of Garrett's Washington importation offense, even though the Florida indictment did not allege that offense as a predicate to the CCE charge.[22] The trial court did not instruct the jury to exclude the importation offense from its consideration of predicate offenses to the CCE charge.[23] Garrett was found guilty on the CCE charge, sentenced to forty years imprisonment, and was fined $100,000.[24] Because the jury was allowed to consider evidence of Garrett's Washington offense when deliberating on the CCE charge, the conviction may have rested on that offense.[25] On appeal, Garrett claimed that the CCE prosecution impermissibly placed him in jeopardy for the second time on that offense.

B. The Decision

1. Justice Rehnquist's Opinion

Justice Rehnquist examined Garrett's argument that the predicate offenses of a CCE are lesser-included offenses in a CCE.[26] He questioned this position by arguing that the CCE differs from the typical included offense setting. In the typical setting, the lesser-included and greater offenses are committed simultaneously in a single course of conduct, while in the CCE setting the offenses are committed at different times and in different places. This difference indicated to Justice Rehnquist that the included offense analysis had no application to the CCE setting.[27]

15. 105 S. Ct. at 2410.
16. *Id.* at 2423 (Stevens, J., dissenting).
17. *Id.*
18. In violation of 21 U.S.C. §§ 841, 846 (1982). 105 S. Ct. at 2410.
19. In violation of 21 U.S.C. §§ 952, 960, and 963 (1982). 105 S. Ct. at 2410.
20. In violation of 21 U.S.C. §§ 963, 846, and 843(b) (1982). 105 S. Ct. at 2410.
21. 105 S. Ct. at 2425 (Stevens, J., dissenting).
22. *Id.*
23. *Id.* at 2426.
24. 105 S. Ct. at 2411. These penalties related solely to the CCE conviction. Garrett was also sentenced to fourteen years in prison and received a $45,000 fine on conviction for the other charges. *Id.*
25. The Florida jury was specifically instructed that importation of marijuana was an offense they could consider when deliberating on the CCE charge. *Id.* at 2425 n.21 (Stevens, J., dissenting).
26. *Id.* at 2411-15. *See infra* notes 123-174 and accompanying text.
27. 105 S. Ct. at 2415-17.

However, Justice Rehnquist assumed for purposes of decision that Garrett's importation offense was a lesser included offense in the CCE. Nevertheless, he rejected the double jeopardy claim on the grounds that an exception to included offense principles controlled. This exception holds that prosecution for a greater offense after prosecution for a lesser-included offense does not offend the Double Jeopardy Clause if the defendant could not have been prosecuted for the greater offense at the time he was prosecuted for the lesser-included offense.[28]

2. *Justice O'Connor's Concurring Opinion*

Justice O'Connor also assumed that Garrett's Washington offense was a lesser-included offense in the CCE. However, she too rejected Garrett's claim by balancing the State's and the defendant's interests under the Double Jeopardy Clause.[29] Weighing the defendant's continued criminal conduct after the first prosecution, Justice O'Connor's scale tipped against double jeopardy protection.[30]

3. *Justice Stevens' Dissent*

Justice Stevens dissented from both Justice Rehnquist's and Justice O'Connor's positions.[31] He regarded the CCE statute as clearly creating an included offense situation.[32] Further, he perceived that the prevailing rationales both depended on evidence which allegedly indicated the continuation of criminal activities. Justice Stevens stated bluntly that he could discern no constitutional significance in this evidence.[33] Rather, he argued for application of the traditional included offense analysis which would result in sustaining the double jeopardy claim.[34]

II. The Continuing Criminal Enterprise Offense

A. Statutory History of the CCE

Congress enacted the CCE provision[35] because it felt that federal

28. *Id.* at 2417-19.

29. *Id.* at 2420-21 (O'Connor, J., concurring). *See infra* notes 176-224 and accompanying text.

30. 105 S. Ct. at 2422 (O'Connor, J., concurring).

31. *Id.* at 2422 (Stevens, J., dissenting).

32. Asserting that the concept of included offenses is applicable to complex statutory offenses, Justice Stevens stated that it "clearly" applied to the CCE statute. *Id.* at 2424.

33. *Id.* at 2426.

34. *Id.* at 2422-26.

35. 21 U.S.C. § 848 (1982). The CCE statute provides:

(a) Penalties; forfeitures

(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activ-

drug enforcement laws had been, "for the most part, ineffective in halting the increased upsurge of drug abuse throughout our United States."[36] The CCE offense was intended to reach "the organized crime offender, . . . the professional criminal"[37] rather than "the casual drug user and experimenter."[38] The statute identified and punished the leaders of criminal drug enterprises.

Congress considered two conflicting methods to achieve this goal. The first, which was rejected, was a "recidivist approach."[39] This method was intended to create "special penalties . . . for these special criminals."[40] The jury would consider "only evidence concerning the basic crime which has been charged."[41] A postconviction presentencing procedure would be created to identify those persons who had coordi-

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ity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B)from which such person obtains substantial income or resources.

(c) Suspension of sentence and probation prohibited

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203—24-207), shall not apply.

(d) Jurisdiction of courts

The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

36. 116 CONG. REC. 33630 (1970) (remarks of Rep. Weicker).

37. *Id.* (remarks of Rep. Poff).

38. *Id.* at 33631 (remarks of Rep. Weicker).

39. This approach was embodied in the original bill introduced in the House of Representatives. *Garrett,* 105 S. Ct. at 2413.

40. 116 CONG. REC. 33630 (1970) (remarks of Rep. Poff).

41. *Id.*

nated criminal drug enterprises.[42] The judge could enhance the convicted defendant's sentence by five to twenty-five years, based on an evaluation submitted by the government. This method raised due process concerns, because the defendant would not know what evidence was offered to the judge in the sentencing phase.[43]

The second method, which was adopted by Congress, was an "offense approach."[44] It defined a new and separate offense. The government would have to establish all the elements of the CCE at trial. The "offense method" made prior violations of the drug laws elements of the CCE, rather than regarding them as evidence to be evaluated under the "recidivist method." This method was hailed in Congress as consistent with the "traditional American Criminal process,"[45] which requires the government to prove at trial every element of an offense.

In its present form the CCE offense is comprised of two tiers of elements. The first tier requires a series of felony violations of the drug laws by the defendant.[46] The second tier requires: (1) that the defendant undertook the first tier violations with five or more other persons; (2) that he supervised the other persons; and (3) that he acquired "substantial income or resources" from those violations.[47] These second tier elements identify the drug enterprise organizer.

B. Judicial History of the CCE Offense

As the congressional history had foreshadowed,[48] defendants charged with a CCE raised due process "void for vagueness" challenges to the CCE statute, particularly to its use of the words "continuing" and "series of offenses." They argued that the CCE statute did not give adequate notice of the conduct it prohibited.[49] These challenges, however,

42. *Garrett*, 105 S. Ct. at 2414. The factors listed in the second tier of the current statute would have been used to show the need for enhanced punishment of particular defendants. An evaluation of the defendant based on these factors would have been presented to the judge prior to sentencing.

43. 116 CONG. REC. 33631 (1970) (remarks of Rep. Eckhardt). Criticizing the "recidivist approach," Rep. Eckhardt stated: "I think it is intellectually fraudulent to draw a distinction between postsentencing procedure and the conviction of a separate crime." *Id.*

44. This approach was embodied in an amendment proposed by Rep. Dingell. *Garrett*, 105 S. Ct. at 2414.

45. 116 CONG. REC. 33631 (1970) (remarks of Rep. Eckhardt).

46. 21 U.S.C. § 848(b)(1) (1982). The violations must be drug related offenses. *See, e.g.*, United States v. Webster, 639 F.2d 174 (4th Cir. 1981) (it was error to instruct jury that interstate travel in aid of unlawful activity could be a predicate offense).

47. 21 U.S.C. § 848(b)(2) (1982).

48. *See supra* text accompanying notes 39-43.

49. *See* United States v. Dickey, 736 F.2d 571 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 957 (1985); United States v. Valenzuela, 596 F.2d 1361 (9th Cir. 1979); United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974); United States v. Sisca, 503 F.2d 1337 (2d Cir. 1974); United

were summarily rejected by the lower courts.[50] The word "continuing" was held sufficiently precise because it indicated a "definite period of time."[51] The term "series of offenses" was held to require at least three violations, based on the common understanding that "series" means three or more.[52] Moreover, the defendants' arguments that the statute did not provide sufficient notice of what constituted illegal activity were rejected, because a CCE involves a comprehensive plan to commit other felonies which defendants clearly know are wrongful.[53]

Although the lower federal courts rejected void for vagueness challenges, their opinions reveal a certain flexibility accorded proof of a CCE. The language of the statute, read strictly, requires proof of a CCE to be based on underlying offenses, but in practice there is often an attenuated relationship between proof of the CCE and proof of its predicate offenses. For example, in *United States v. Barnes*[54] the court observed:

> Proof that [defendant] rented two expensive apartments in New Jersey, masquerading in one as Hoby Darling and in the other as Wallace Rice, gave rise to a reasonable inference that he was entitled to exercise certain prerogatives of authority. Evidence that he was attended by bodyguards was likewise illuminating; ordinary narcotic dealers are not so carefully shielded. The jury could also conclude that narcotic underlings do not drive around with $132,000 in cash in the trunk of their car.[55]

States v. Bergdoll, 412 F. Supp. 1308 (D. Del. 1976); United States v. Collier, 358 F. Supp. 1351 (E.D. Mich. 1973), *aff'd*, 493 F.2d 327 (6th Cir.), *cert. denied*, 419 U.S. 831 (1974).

Other judicial developments beyond the scope of this Comment involve the parole and forfeiture provisions. For an eighth amendment challenge to the parole provision, see United States v. Lozaw, 427 F.2d 911 (2d Cir. 1970); United States v. Bergdoll, 412 F. Supp. 1308 (D. Del. 1976). For challenges to the forfeiture provision, see United States v. Raimondo, 721 F.2d 476 (4th Cir. 1983), *cert. denied,* 105 S. Ct. 133 (1984) (provision gave adequate notice of forfeiture); United States v. Mannino, 635 F.2d 110 (2d Cir. 1980) (property bought with enterprise's profits was subject to forfeiture provision); United States v. Veon, 538 F. Supp. 237 (E.D. Cal. 1982) (forfeiture provision is in personam, not in rem).

50. *Id.*

51. United States v. Bergdoll, 412 F. Supp. 1308, 1317 (D. Del. 1976) (five day period satisfied "continuing" language of statute).

52. United States v. Michel, 588 F.2d 986 (5th Cir.), *cert. denied,* 444 U.S. 825 (1979); United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), *cert. denied sub nom.* Miller v. United States, 429 U.S. 1100 (1977).

53. *See* United States v. Manfredi, 488 F.2d 588 (2d Cir. 1973), *cert. denied,* 417 U.S. 936 (1974) (conduct is only that which violator knows is wrongful and contrary to law).

54. 604 F.2d 121 (2d Cir. 1979).

55. *Id.* at 157. *See also* United States v. Bascaro, 742 F.2d 1335, 1357 (11th Cir.), *reh'g denied,* 749 F.2d 733 (11th Cir. 1984) (en banc), *cert. denied,* 105 S. Ct. 957 (1985) (defendant oversaw purchase of boats and property and selected "off loading" sites); United States v. Dickey, 736 F.2d 571 (10th Cir. 1984) (defendant spent large sums of money on personal items and offered a large bribe to a Coast Guard officer, indicating that he had a sizeable stake in the enterprise).

This evidence did not establish any predicate offenses. However, introduction of this evidence is consistent with the underlying policy of the CCE to imprison the coordinators of drug enterprises and thereby disable the enterprises. Therefore, although the statute requires proof of predicate offenses, it appears from *Barnes* that other evidence which relates only tangentially to the predicate offenses can be used to prove a CCE.

III. The Double Jeopardy Clause

A. Purposes and Scope of the Clause

The Fifth Amendment to the United States Constitution provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[56] The double jeopardy principle is "one of the oldest ideas found in western civilization"[57] and by the sixteenth century was embodied in common law pleas.[58] The Double Jeopardy Clause embodies three principal guarantees: protection from reprosecution following conviction, protection from reprosecution following acquittal, and protection against multiple punishments.[59]

The twin purposes of the Double Jeopardy Clause are to guarantee the finality of judgments and to guard against prosecutorial overreaching.[60] As Justice Frankfurter wrote:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated

56. U.S. CONST. amend. V. The Double Jeopardy Clause was held applicable to the States through the Fourteenth Amendment in Benton v. Maryland, 395 U.S. 784 (1969). *Benton* overruled Palko v. Connecticut, 302 U.S. 319 (1937), in which the Court had held that federal double jeopardy protection standards were only applicable to the states in cases presenting a "hardship so acute and shocking that our policy will not endure it." *Palko,* 302 U.S. at 328.

57. Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting). This opinion describes the Greek, Roman, English, and American Colonial double jeopardy sources. The oldest reference appears to be a statement by Demosthenes in 355 B.C. United States v. Jenkins, 490 F.2d 868, 870 (2d Cir. 1973), *aff'd*, 420 U.S. 358 (1975).

58. These were *autrefoits acquit, autrefoits convict, autrefoits attaint,* and pardon. 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 335-36 (Sharswood ed. 1873). *But see* United States v. Scott, 437 U.S. 82, 87 (1978) (stating that the historical purposes of double jeopardy "are necessarily general in nature, and their application has come to abound in often subtle distinctions which cannot by any means all be traced to the original three common-law pleas. . . .").

59. North Carolina v. Pearce, 395 U.S. 711, 717 (1969). There are two distinct settings encompassed by these principles: (1) multiple punishments for the same offense imposed in a single trial; and (2) successive prosecutions for the same offense.

60. *Garrett,* 105 S. Ct. at 2420 (O'Connor, J., concurring). *See* Green v. United States, 355 U.S. 184, 190 (1957) (the Double Jeopardy Clause protects the defendant from having to "run the gantlet [sic]" a second time); United States v. Jorn, 400 U.S. 470 (1971) (double jeopardy allows the defendant to conclude his confrontation with society in one proceeding).

> attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[61]

The root policy of double jeopardy is fairness to the defendant. Even though society's interest in punishing offenses is great, the Double Jeopardy Clause permits the government to prosecute a criminal defendant only once for a single offense.

The Double Jeopardy Clause does not bar a second prosecution by a different sovereign.[62] Nor is the double jeopardy protection violated when a defendant's conviction is set aside on appeal and a retrial is ordered by the appellate court.[63] Double jeopardy will bar retrial once the defendant is acquitted.[64] When trial ends in a mistrial or is significantly interrupted,[65] double jeopardy limits the situations in which a defendant may be retried.[66] Double jeopardy also prevents the prosecution from

61. *Green*, 355 U.S. at 187-88.

62. For a discussion of dual sovereignty and double jeopardy, see generally Note, *Double Jeopardy and Federal Prosecution After State Jury Acquittal*, 80 MICH. L. REV. 1073 (1982); Note, *Emerging Standards in Supreme Court Double Jeopardy Analysis*, 32 VAND. L. REV. 609, 621-26 (1979).

63. United States v. Ball, 163 U.S. 662 (1896). For a discussion of double jeopardy issues when the government appeals a conviction for the purposes of increasing sentence, see Mulvihill, *What is Double Jeopardy?: No Clear Answer in United States v. Di Francesco*, 1981 DET. C.L. REV. 1147 (1981). It has also been suggested that retrial after successful appeal of a conviction serves the defendant's interests because appellate courts are less likely to reverse a conviction if this would result in freeing the defendant. United States v. Tateo, 377 U.S. 463, 466 (1964).

64. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (Double Jeopardy Clause prevented government appeal of an order granting the defendant an acquittal following a deadlocked jury). The "acquittal" finality policy is so strong that it is not outweighed by society's interests even when "the acquittal was based upon an egregiously erroneous foundation." Fong Foo v. United States, 369 U.S. 141, 143 (1962).

65. For example, when the trial ends in a hung jury, the judge dies, a juror is disqualified, or war closes the courts. *See generally,* Note, *Double Jeopardy: Multiple Prosecutions Arising From The Same Transaction*, 15 AM. CRIM. L. REV. 259, 287 (1978) [hereinafter cited as Note, *Double Jeopardy*].

66. In the mistrial setting the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 689 (1949). In *Wade*, the Court held that the defendant's trial may be discontinued if circumstances "manifest a necessity" for so doing. *Id.* at 690. In this situation the defendant's valued right is balanced against society's interests: "What has been said is enough to show that a defendant's right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.* at 689. *See also* United States v. Jorn, 400 U.S. 470, 485 (1971) (manifest necessity requires a "scrupulous exercise of judicial discretion" to determine whether justice would be served by a continuation of the trial); Illinois v. Somerville, 410 U.S. 458 (1972) (over the defendant's objection the judge declared a mistrial based on a defective indictment and retrial for the same offense on a valid indictment was not barred).

simply dismissing juries until it believes conviction will be obtained.[67]

Though the wording and policies of the Double Jeopardy Clause are fairly simple, double jeopardy law is complex and confusing.[68] Commentators and courts alike have failed to develop and apply a consistent double jeopardy theory.[69] One troubling issue is the meaning of the words "same offense."[70] A narrow interpretation is that only the offense charged in the first trial is proscribed from prosecution in a second proceeding. A broad interpretation of the words is the "single transaction" theory: any two offenses, no matter how dissimilar, are considered the same offense if they occur during one criminal transaction.[71] The Supreme Court has adopted a moderate position, rejecting the single transaction theory,[72] but recognizing that two offenses defined by statute

67. *See* Downum v. United States, 372 U.S. 734 (1963) (double jeopardy protection attaches when the jury is sworn); Serfas v. United States, 420 U.S. 377 (1975) (in non-jury trials jeopardy attaches when the first witness is sworn); *see also* Crist v. Bretz, 437 U.S. 28, 34 (1978) ("it became firmly established by the end of the 19th century that a defendant could be put in jeopardy even in a prosecution that did not culminate in a conviction or an acquittal."). But see Justice Powell's dissent in *Crist* in which he argues that this doctrine was not intended by the founding fathers, but was judicially integrated "without articulated thought" into double jeopardy analysis. *Id.* at 47 (Powell, J., dissenting). Double jeopardy does not attach in a pretrial proceeding in which there is no risk of conviction, such as preliminary examination. Collins v. Loisel, 262 U.S. 426 (1923); United States v. Martin Linen Supply Co., 485 F.2d 1143 (5th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).

68. *See* Comley, *Double Jeopardy*, 35 YALE L.J., 674, 675 (1926) (describing double jeopardy as a "quaint relic of medieval jargon"); Note, *Criminal Law—Double Jeopardy*, 24 MINN. L. REV. 22 (1940) ("The riddle of double jeopardy stands out today as one of the most commonly recognized yet most commonly misunderstood maxims in the law."); Whalen v. United States, 445 U.S. 684, 702 (1980) (Rehnquist, J., dissenting) (separate principles in multiple punishment cases have been "tied together . . . in what may prove to be a true Gordian knot."); Sanabria v. United States, 437 U.S. 54, 80 (1978) (Blackmun, J., dissenting) (the Supreme Court is trying "to create order and understanding out of the confusion of . . . decisions on the Double Jeopardy Clause.").

69. *See* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81; McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 WASHBURN L.J. 1 (1983).

70. Justice Rehnquist has described the words "same offense" as "deceptively simple in appearance but virtually kaleidoscopic in application." *Whalen*, 445 U.S. at 700 (Rehnquist, J., dissenting).

71. For presentation of this theory, see Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring) ("In my view, the Double Jeopardy Clause requires the prosecution, except in most limited cirumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction."); *see also* Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 YALE L.J. 962, 967-69 (1980) [hereinafter cited as Note, *Double Jeopardy Clause as a Bar*]; Note, *Double Jeopardy*, *supra* note 65, at 259.

72. *Garrett*, 105 S. Ct. at 2418 ("We have steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause."). The main objection to the single transaction theory is that "transaction" is a malleable term, the content of which cannot be defined precisely. However, the same transaction test has been adopted in several jurisdictions and enjoys wide support among commentators. *See* Note, *Double Jeopardy Clause as a Bar*, *supra* note 71, at 968 n.36.

may sometimes be regarded as the same.[73]

B. The Concept of Lesser-Included Offenses

The concept of lesser-included offenses appears to have originated as an amelioration of rigid common law rules of pleading. In *The King v. Vandercomb and Abbott*,[74] a prosecution for a larceny offense was barred because the formal charges mistakenly listed the larceny as the second of two offenses, when it had actually occurred first. To allow prosecution, the *Vandercomb* court created a new rule: any second offense could be prosecuted after an acquittal on the first offense, unless proof of the first offense (the "greater" offense) would also establish the second offense (the "lesser included" offense).[75]

The concept of a lesser-included offense answers the double jeopardy question of whether two offenses are the same offense. Lesser-included and greater offenses are considered the same offense for purposes of the prohibition against multiple punishment, because punishment for the lesser-included offense is an alternative to punishment for the greater offense.[76] Lesser-included and greater offenses are also considered the same offense for purposes of the prohibition against successive prosecutions: the possibility of punishment on the lesser-included offense at the trial for the greater offense precludes a second jeopardy on the lesser offense.[77]

In *Blockburger v. United States*,[78] the Supreme Court developed a test to distinguish between included and separate offenses. The defendant made one drug sale which violated two distinct statutory prohibitions: selling a drug which was not in its original stamped package and selling a drug without a buyer's written order.[79] The defendant argued that the two offenses arose out of one act and were thus the same offense for double jeopardy purposes. The Court rejected this argument and held that if each offense requires proof of a fact which the other offense

73. *See infra* notes 74-93 and accompanying text.

74. 168 Eng. Rep. 455 (C.C.R. 1796).

75. *Id.* at 461.

76. The included offense concept is codified in the Federal Rules of Criminal Procedure which state: "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or of an offense necessarily included therein if the attempt is an offense." FED. RULES CRIM. P. 31(c).

77. The possibility of conviction on a lesser-included offense is enhanced by practical considerations. *See, e.g.*, United States v. Keeble, 412 U.S. 205, 212-13 (1973) (when the jury is convinced that a defendant is guilty of some offense it is likely to resolve doubt in favor of conviction).

78. 284 U.S. 299 (1932). *Blockburger* involved a multiple punishment double jeopardy claim, despite the fact that in formulating the test the Court cited Gavieres v. United States, 220 U.S. 338 (1911) which involved a successive prosecution double jeopardy claim. *Blockburger*, 284 U.S. at 304.

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

does not, the two offenses are not the same.[80] Two offenses are the same offense when proof of one offense establishes a second offense, thereby revealing a greater and a lesser-included offense.[81]

Although the *Blockburger* test[82] was applied to multiple punishment[83] and successive prosecution[84] double jeopardy claims, these were subsequently regarded as involving distinct issues.[85] In the context of multiple punishments for the same offense, the *Blockburger* test as a rule of constitutional law came under attack.[86] The Double Jeopardy Clause has now been construed to pose no restraint on Congress' power to define and prescribe the measure of punishment for offenses.[87] Under currently accepted analysis,[88] if Congress intends to punish a lesser-included offense and a greater offense, it can. This view indicates that, although *Blockburger* offers a presumption that two offenses are the same, this presumption can be overcome by a showing that Congress intended to pun-

80. *Id.* at 304.

81. *Id.*

82. The *Blockburger* test is also known as the "same evidence" test. Three theoretical formulations of this test have been identified: (1) the same-required-evidence test, which focuses on the abstract statutory proof required in each case; (2) the same-alleged-evidence test, which focuses on the indictments in each case; and (3) the same-actual-evidence test, which focuses on the actual evidence at each trial. Note, *Double Jeopardy Clause as a Bar, supra* note 71 at 965 n. 23. The same-required-evidence test is the true *Blockburger* test, while the same-alleged-evidence test appears to have fallen into "deserved desuetude," and the same-actual-evidence test was never seriously advocated. *Id.*

83. For a discussion of the multiple punishment setting, see generally Thomas, *Multiple Punishment 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. (1984); McKay, *supra* note 55; Comment, *Cumulative Sentences for One Criminal Transaction Under the Double Jeopardy Clause: Whalen v. United States*, 66 CORNELL L. REV. 819 (1981).

84. For a discussion of the successive prosecution context, see generally Note, *Double Jeopardy, supra* note 65; Note, *Double Jeopardy: The Prevention of Multiple Prosecutions*, 54 CHI.[-]KENT L. REV. 549 (1977).

85. Courts do not always appreciate the difference between the multiple punishment and successive prosecution settings. The two situations are often presented as species of the same problem: "If two offenses are the same under this test for purposes of barring [multiple punishments] at a single trial, they necessarily will be the same for purposes of barring successive prosecutions." Brown v. Ohio, 432 U.S. 161, 166 (1977).

86. *See generally,* Note, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965) [hereinafter cited as Note, *Twice in Jeopardy*].

87. *Garrett,* 105 S. Ct. at 2412. "Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Brown v. Ohio, 432 U.S. at 165. Justice Rehnquist has even stated that the Double Jeopardy Clause should "play no role whatsoever in deciding whether cumulative punishments may be imposed under different statutes at a single criminal proceeding." Whalen v. United States, 445 U.S. 684, 705 (1980) (Rehnquist, J., dissenting). *But see* McKay, *supra* note 69, at 21 n.128 (the emerging view that the Double Jeopardy Clause places no limitations on the legislative branch has "shallow root, even from a historical perspective.").

88. Whalen v. United States, 445 U.S. 684 (1980). ,445 U.S. 684 (1980).

ish both the lesser-included and the greater offense.[89] Therefore, the controlling question in the multiple punishment setting is Congressional intent,[90] and *Blockburger* becomes merely a "useful canon of statutory construction"[91] or an aid in interpreting legislative intent.[92] The *Blockburger* presumption no longer controls multiple punishment double jeopardy claims.[93]

C. Successive Prosecutions For the Same Offense

In the context of successive prosecutions the *Blockburger* test appears to have retained its vitality. In *Brown v. Ohio*,[94] the defendant argued that he could not be prosecuted for auto theft because of his previous conviction for the lesser-included offense of joyriding.[95] Applying *Blockburger*, the Court accepted the Ohio Supreme Court's interpretation of auto theft as "joyriding with the intent to permanently deprive the owner of possession."[96] Therefore, joyriding did not require proof of a fact in addition to proof of auto theft. Because the *Blockburger* test

89. This was firmly established in *Whalen*. The *Whalen* approach was reaffirmed in Albernaz v. United States, 450 U.S. 333, 340 (1981) (*Blockburger* is the starting point in double jeopardy analysis, but it does not control when legislative intent is clear).

There are two implications of the Court's reduction of *Blockburger* to a mere tool of inquiry. First, a court may find that the legislature intended to punish both offenses, notwithstanding *Blockburger*'s indication that two offenses are the same. Second, a court may find that the legislature did not intend to punish both offenses, notwithstanding *Blockburger*'s indication that two offenses are not the same. *See, e.g.*, Simpson v. United States, 435 U.S. 6 (1977) (*Blockburger* indicated separate offenses but the Court found that Congress intended that an enhanced penalty for robbery with a firearm under 18 U.S.C. § 2113(d) (1984) should merge with an enhanced penalty for any felony committed with a firearm under 18 U.S.C. § 924 (1984)).

90. If an inquiry into legislative intent does not reveal a clear answer, then double jeopardy protection should probably be granted in accordance with the policy of resolving "doubts in the enforcement of a penal code against the imposition of a harsher punishment." Bell v. United States, 349 U.S. 81, 83 (1955).

91. *Garrett*, 105 S. Ct. at 2412.

92. *Id.*

93. A second double jeopardy test based on notions of collateral estoppel may prevent successive prosecutions even given separate offenses. In Ashe v. Swenson, 397 U.S. 436 (1970), the Supreme Court applied collateral estoppel principles to double jeopardy theory. In *Ashe*, six victims had been robbed as a group. The government was barred from prosecuting the defendant for the robberies of five victims because he had already been prosecuted and acquitted of the robbery of one victim. The *Brown* Court explained the rule: "Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Brown*, 432 U.S. at 166 n.6.

94. 432 U.S. 161 (1977). In *Brown*, the Court's double jeopardy analysis hinged on the Ohio Supreme Court's interpretation of Ohio law.

95. *Id.* at 162-64.

96. The Court stated that "the greater offense is . . . by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." *Id.* at 168. The Court also observed that the sequence of prosecution for greater and lesser-included offenses is "immaterial." *Id.*

revealed the presence of greater and lesser-included offenses, the Court accepted the defendant's plea and held that his constitutional rights were violated when he was placed in jeopardy on the auto theft charge.[97]

In applying the *Blockburger* test, courts compare the statutory elements of the offenses at issue to see if one is included in the other.[98] *Blockburger* has been called the "same evidence" test, which refers only to the same required evidence in statutory terms, not the same actual evidence presented at trial.[99] This "statutory" approach, however, sometimes produces an insufficient distinction. For example, a felony may be used to establish the requisite intent to prove murder, yet examination of the statutory language alone does not reveal that a felony is included in the murder. Thus, strict adherence to the "statutory" approach would not prevent the use of evidence, previously introduced to prove a felony, in a murder prosecution.

A second line of inquiry has been suggested to meet the inadequacies of the "statutory" test. In *Illinois v. Vitale*,[100] the Court reaffirmed the "statutory" test but in dicta pointed the way to a supplemental approach: examination of the actual evidence produced at both trials. The defendant in *Vitale* was convicted of the offense of failing to reduce his automobile's speed and was later prosecuted for involuntary manslaughter.[101] The Supreme Court was uncertain whether failing to reduce speed was a lesser-included offense in the manslaughter offense.[102] Writing for the

97. *Id.* at 169-70. For the view that even the clear adoption of *Blockburger* still provides "minimal protection against multiple trials," see Note, *Double Jeopardy, supra* note 65, at 279. For the proposition that cases like *Whalen* and *Albernaz*, which deal with the multiple punishment setting, do not undermine *Brown*, see Westen & Drubel, *supra* note 69, at 121 n.188 ("It is important to distinguish here between the constitutional standards for multiple punishment and the distinct standards for multiple prosecution. Although the *Blockburger* test operates as nothing more than a rebuttable presumption for purposes of multiple punishment, it may have a restricted and more rigid application in the context of multiple prosecution.").

The dual implications of *Blockburger* were described by Justice Rehnquist: "The meaning of ["same" offense] may vary from context to context, so that two charges considered the same offense so as to preclude [successive prosecutions] need not be considered the same offense so as to bar separate punishments for each charge at a single proceeding." *Whalen*, 445 U.S. 685, 700 (1980) (Rehnquist, J., dissenting). Justice Stewart held the contrary opinion that "[n]o 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. . . ." *Albernaz*, 450 U.S. at 345 (Stewart, J., concurring). Justice Marshall has stated: "I do not believe that the phrase 'the same offence' should be interpreted to mean one thing for purposes of the prohibition against [successive] prosecutions and something else for purposes of the prohibition against multiple punishment." Missouri v. Hunter, 459 U.S. 359, 369 (1983) (Marshall, J., dissenting).

98. *Blockburger* required comparison of the "distinct statutory provisions." *Blockburger*, 284 U.S. at 304.

99. *See supra* note 82.

100. 447 U.S. 410 (1980).

101. *Id.* at 412-13.

102. *Id.* at 412, 419.

majority, Justice White observed that the defendant would have a "substantial" double jeopardy claim if the government attempted to prove that failure to reduce speed was the reckless act required to establish the manslaughter offense.[103] Though this method of examining the actual evidence at trial has received criticism,[104] it does provide a means for distinguishing included offense situations from separate offenses when the statutory test proves inadequate.[105]

IV. The Court's Rejection of *Garrett*'s Successive Prosecution Claim

A. Pre-*Garrett* Analysis Regarding CCE and Predicate Offenses

Soon after the enactment of the CCE statute courts had to decide the question of whether the CCE offense presented an included offense situation.[106] This question implicated both the multiple punishment and successive prosecution prohibitions of the Double Jeopardy Clause. If the predicate offenses were lesser-included offenses within the CCE, then

103. *Id.* at 420. Justice Stevens characterized this possibility as "dispositive" rather than merely substantial. *Id.* at 426 (Stevens, J., dissenting). It was clear from the Court's reasoning that this "same-actual-evidence" approach is properly applied only where the evidence establishes one entire offense and is used subsequently to establish one element of another offense. Justice White derived the test by analogy to Harris v. Oklahoma, 433 U.S. 682 (1977) (prosecution for robbery with a firearm barred by earlier prosecution for felony murder based on the robbery). Mere overlapping evidence will raise no double jeopardy issue if the "two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact.*" Gavieres v. United States, 220 U.S. 338 (1911) (quoting Burton v. United States, 202 U.S. 381 (1906)(emphasis added)). The approach in *Vitale* is not a revival of direct application of the same-alleged-evidence test or the same-actual-evidence test, *supra* note 82. Rather, it is a use of these approaches to supplement the same-required-evidence test when the latter proves inadequate to the complexities of the crimes. As one commentator has pointed out, the "same evidence" test is made difficult by the uncertainty as to exactly what evidence will be presented. *See* Note, *The Impact of Expanded Rules for Determining What Constitutes the "Same Offense" for Double Jeopardy Purposes: Illinois v. Vitale*, 1980 B.Y.U.L. REV. 948 (1980).

104. *See* Illinois v. Zegart, 83 Ill. 2d 440, 415 N.E.2d 341, *cert. denied,* 452 U.S. 948 (1981). In dissenting from a denial of certiorari, Chief Justice Burger criticized the Illinois Supreme Court's finding that the Double Jeopardy Clause barred a second prosecution where the State intended to use the same factual basis which led to the first conviction (crossing over the center line) as the basis for the second conviction (manslaughter).

105. For a fascinating example of the interplay between statutory elements and evidence, see Sanabria v. United States, 437 U.S. 54 (1978). The defendant was prosecuted for the federal crime of conducting an illegal gambling business in violation of state law and was acquitted on allegations that he ran a horse-betting business. Justice Marshall, writing for the majority, rejected the government's contention that it might later prosecute the defendant on a numbers business charge, pointing out that there was but one business proscribed by statute, notwithstanding the possibility of many types of gambling in this business. *Id.* at 70-73.

106. See discussion of Jeffers v. United States, 432 U.S. 137 (1977) and its progeny, *infra* notes 107-119 and accompanying text.

they were arguably the "same offense" as the CCE for double jeopardy purposes.

In *Jeffers v. United States*,[107] the Court addressed this included offense question. In the multiple punishment context the Court concluded that the predicate offense of conspiracy should be considered the "same offense" as a CCE, because the two offenses posed many of the same dangers, and Congress probably did not intend to punish both.[108] Thus, the defendant's sentences for conspiracy and for a CCE could not both stand. In the successive prosecution setting, the Court assumed for purposes of decision that conspiracy was a lesser-included offense in a CCE.[109] Under this untested assumption, a defendant who had been tried for conspiracy could not subsequently be tried for a CCE if conspiracy was used as a predicate offense, and vice versa.[110]

Although the multiple punishment double jeopardy question is presented with every CCE prosecution, successive prosecution situations are rare. After *Jeffers* only two cases dealt with successive prosecution double jeopardy challenges. In *United States v. Lurz*,[111] the defendant was convicted of a conspiracy to violate the drug laws. Evidence underlying this conviction was later introduced in a CCE trial. The Fourth Circuit ruled that the conspiracy evidence did not violate the defendant's double jeopardy rights because it was limited to proving the second tier elements of the CCE.[112] The jury was not permitted to consider the conspiracy as one of the three predicate offenses underlying the CCE. However, *Lurz* implied that the defendant's double jeopardy rights would have been violated if the evidence had been used to establish a predicate offense.[113]

In *United States v. Middleton*,[114] the CCE count against the defendant was dismissed at trial. This was the equivalent of an acquittal.[115] The government then sought to prosecute the defendant for an importation offense, proof of which had been introduced in the CCE trial. The First Circuit barred prosecution for the importation offense, explaining that it was a lesser-included offense in the CCE.[116] The Court stated that a "defendant convicted or acquitted of a crime which includes several

107. 432 U.S. 137 (1977).

108. *Id.* at 156-58.

109. *Id.* at 149-50.

110. *Id.*

111. 666 F.2d 69 (4th Cir. 1981), *cert. denied*, 459 U.S. 842 (1982).

112. *Id.* at 77.

113. "The government concedes, as it must, that Section 846 is a lesser included offense of Section 848. The government also recognizes the well-settled principle that the double jeopardy clause prohibits trial of a defendant on a greater offense after he has been convicted of a lesser included offense." *Lurz*, 666 F.2d at 75 n.10.

114. 673 F.2d 31 (1st Cir. 1982).

115. *Id.* at 32.

116. *Id.* at 33-34.

essential elements, as [a CCE] does, may not be tried subsequently for a lesser-included offense."[117] Thus, both *Lurz* and *Middleton* assumed that a CCE's predicate offenses are lesser-included offenses and are therefore the same as the CCE for successive prosecution purposes.

As *Lurz* indicated, evidence of a prior offense could be introduced in a CCE prosecution under a limiting jury instruction which restricted its use to proving the second tier elements of the CCE.[118] This approach did not offend the Double Jeopardy Clause because previously tried offenses were not used as first tier predicate offenses on which the jury could base a CCE conviction.[119]

B. *Garrett* Under *Blockburger* and the Pre-*Garrett* Analysis

Garrett argued that his importation offense was a lesser-included offense in the CCE, and thus these two offenses were the same offense for purposes of the prohibition against successive prosecutions. Under *Blockburger*,[120] an examination of the statutory language shows that the predicate offenses are necessarily established on proof of a CCE. Examination of the evidence presented at the two trials also leads to this result — the evidence of Garrett's Washington offense was not introduced for a limited purpose.[121] Therefore, because the jury may have used the Washington offense as a predicate to establish a CCE,[122] it would appear that Garrett was twice tried for the same offense.

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117. *Id.* at 33.

118. *See supra* notes 46-47 and accompanying text.

119. *See, e.g., Lurz*, 666 F.2d at 77 ("The fact that prior convictions comprise one element of an offense does not offend the double jeopardy clause, as long as the prior convictions are used for [a] limited purpose . . . to prove [the second tier elements] and not [a predicate]."); *Middleton*, 673 F.2d at 33-34 (no double jeopardy issue would arise "if a defendant were charged with possession of a controlled substance subsequent to an acquittal under [a CCE], as long as evidence of possession had not been introduced at the earlier trial.").

120. It can probably be argued that the *Blockburger* test deserves a higher degree of deference in the successive prosecution setting than in the multiple punishment setting. This follows from Justice Rehnquist's own observation that the words "same offense" may have different meanings in the two contexts. *See supra* note 97. Punishing a defendant for both a greater and a lesser-included offense following a single prosecution is entirely different from trying him for a greater offense and then trying him for a lesser-included offense. The former situation simply does not implicate the policy of protecting a defendant from expending time, energy and money, enduring the stigma of accusation, and risking his liberty in a second trial. Thus, whether or not the legislature has power to punish two crimes separately does not necessarily answer the objection that the Double Jeopardy Clause will not tolerate successive prosecutions for those crimes.

121. "There is no need to reach the question whether the Neah Bay evidence may have been admissible for a limited purpose because no instructions regarding a limited use were given." *Garrett*, 105 S. Ct. at 2426, n.22 (Stevens, J., dissenting).

122. Of course, the jury may not have regarded the importation offense as a predicate offense, but this is unclear. However, Justice Stevens points out that "the fact that the government might have proven a CCE by relying on felonies A, B, C, and D, or perhaps B, C, and D,—would not prevent it from relying just on A, B, and C." *Id.* at 2425 n.20.

C. Justice Rehnquist's Rejection of Included Offense Principles in the Successive Prosecution Setting

Writing for four justices,[123] Justice Rehnquist called into question whether Garrett's importation offense should be regarded as a lesser-included offense in a CCE. He contrasted Garrett's pattern of criminal activity with the auto theft and joyriding of the defendant in *Brown v. Ohio*,[124] concentrating on the simultaneous occurrence or non-occurrence of the offenses. *Brown* functioned for Justice Rehnquist as a paradigm of included offense situations. By distinguishing *Brown* from *Garrett* he concluded that the included offense doctrine could be properly applied only in *Brown*.[125]

The conduct of the defendant in *Brown* was fairly simple in time and place. Brown stole a car and was arrested. Even though he possessed the car for several days and drove it from one city to another before the arrest, the conduct constituted a "single crime."[126] By contrast, Garrett's activity was clearly "multi-layered conduct, both as to time and to place . . . ."[127] According to his indictments, Garrett had violated federal drug laws in Florida, Louisiana, and Washington.[128] Presumably, he had interstate and international contacts. His Florida indictment alleged criminal activities over the span of five and one half years.[129]

For Justice Rehnquist, then, the significant difference between *Brown* and *Garrett* was that *Brown* involved a single criminal course of conduct while *Garrett* involved several instances of conduct which were isolated from each other in time and place.[130] The idea of a "single course of conduct" is alien to a CCE setting:

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123. Justice O'Connor concurred, forming a five-justice majority. She too was "willing to assume, *arguendo*, that the 1981 conviction for importation of marijuana is a lesser included offense [in the CCE]." *Garrett*, 105 S. Ct. at 2421 (O'Connor, J., concurring). In rejecting Garrett's multiple punishment claim, Justice Rehnquist conducted an extensive inquiry into legislative intent. *Id.* at 2411-15. This inquiry demonstrated that Congress intended to punish the predicate offenses and the CCE separately. *Id.* This was sufficient to rebut the *Blockburger* presumption that predicates are the same offense as a CCE. Justice Rehnquist distinguished *Jeffers* (*see supra* notes 107-109 and accompanying text) on the basis that *Garrett* did not present a conspiracy conviction as a predicate. He concluded that punishment for importation and punishment for a CCE were clearly mandated by legislative intent, and, therefore, did not constitute multiple punishments for the same offense. *Id.* at 2419. It is unclear what effect this holding in *Garrett* has on *Jeffers*' contrary holding regarding conspiracy and a CCE.

124. 432 U.S. 161 (1977).

125. 105 S. Ct. at 2415-17.

126. *Brown*, 432 U.S. at 169.

127. *Garrett*, 105 S. Ct. at 2417.

128. *Id.*

129. *Id.* at 2416.

130. Justice Rehnquist observed: "[Garrett's] various boat-load smuggling operations in Louisiana, for example, obviously involved incidents of conduct wholly separate from his 'mother boat' operations in Washington." *Id.* at 2417.

> Whenever it was during the five-and-one-half-year period alleged in the indictment that Garrett committed the first of the three predicate offenses required to form the basis for a continuing criminal enterprise prosecution, it could not then have been said with any certainty that he would necessarily go ahead and commit the other violations required to render him liable on a continuing criminal enterprise charge.[131]

In *Garrett* Justice Rehnquist observed that "[e]very minute that Nathaniel Brown drove or possessed the stolen automobile he was simultaneously committing both the lesser-included misdemeanor and the greater felony, but the same simply is not true of Garrett."[132] The same is not true of Garrett's offenses because one offense alone does not satisfy all the elements of the CCE.[133]

Justice Rehnquist regarded simultaneous commissions of greater and lesser-included offenses as a distinguishing factor between the same offense and separate offenses. In Justice Rehnquist's view, "included" only referred to offenses comprised in a single criminal episode.[134] This reflected the view that the "doctrine of included offenses is applicable only when the same act is relied upon for more than one conviction."[135] Where there are separate acts, Justice Rehnquist concluded, there is no proper application of the included offense doctrine.[136]

This view was also endorsed by Justice Blackmun, dissenting in *Brown*. He argued that joyriding and auto theft were separate acts and therefore should be regarded as separate offenses.[137] Justice Blackmun based this conclusion on the fact that the joyriding and auto theft of-

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131. *Id.*

132. *Id.*

133. *Id.*

134. *See generally* United States v. McCue, 160 F. Supp. 595 (D. Conn. 1958) (income tax evasion and failure to supply information); Dotye v. Commonwealth, 289 S.W.2d 206 (Ky. 1956) (attempted abortion and abortion); People v. Perkins, 147 Cal. App. 2d 793, 305 P.2d 932 (1957) (contributing to the delinquency of a minor and child molestation).

135. People v. Greer, 30 Cal. 2d 589, 600, 184 P.2d 512, 518 (1947) ("Although the offense of contributing to the delinquency of a minor is necessarily included in [statutory rape and lewd and lascivious conduct,] defendant could be convicted of all three offenses if separate acts served as the basis of each count."). *See also* 21 AM. JUR. 2D *Criminal Law* § 277 (1981) ("Placing a defendant in jeopardy for one act is no bar to prosecuting him for a separate and distinct act, even though the other act is so closely connected in point of time that it is impossible to separate the evidence relating to either on the first trial.").

136. 105 S. Ct. at 2417.

137. Justice Blackmun wrote:

> This Court, I fear, gives undeserved emphasis, *ante*, at 163-164 to the Ohio Court of Appeals' passing observation that the Ohio misdemeanor of joyriding is an element of the Ohio felony of auto theft. That observation was merely a preliminary statement, indicating that the theft and any simultaneous unlawful operation were one and the same. But the Ohio Court of Appeals then went on flatly to hold that such simultaneity was not present here.

Brown, 432 U.S. at 172 (Blackmun, J., dissenting).

fenses could be isolated in time.[138] However, the *Brown* majority rejected this view, stating that the Double Jeopardy Clause was "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."[139]

Justice Rehnquist's position, therefore, was a resurrection of the argument interred in *Brown*. Justice Rehnquist viewed the *Garrett* facts and the CCE crime as presenting a situation which is the complete opposite of *Brown*. Indeed, the contrast between the pattern of criminal conduct in each case was so striking that *Garrett* demanded rejection of the included offense paradigm concededly applicable in *Brown*.[140]

Justice Rehnquist accorded simultaneity exalted status as an element of included offenses. He argued that included offenses are present only when one offense necessarily includes another and where the offenses are committed simultaneously.[141] Simultaneity is thus regarded as indispensable to included offense situations.[142]

Justice Rehnquist's injection of simultaneity into the included offense equation, however, finds meager support in the theory of included offenses. Though simultaneity is present in included offenses involving simple crimes,[143] there is no reason why it is essential to the concept.[144] Included offense theory prior to *Garrett* focused on jeopardy: whether proof of one offense was sufficient to convict a defendant of a second offense. Under this approach, the CCE is no different from other included offense situations. A jury may convict on the three predicate offenses and acquit on a CCE charge. It can also convict on the CCE charge. Jeopardy on the CCE charge necessarily implies jeopardy on a predicate offense. The presence of simultaneity does not affect a defendant's jeopardy for the CCE *and* its predicate offenses.[145]

Furthermore, applying a simultaneity requirement to a complex crime is questionable. The CCE offense, a single offense, is not committed by simultaneous acts. It is committed by a series of separate acts which are interpreted as the indicia of a unified plan, even though the acts are unrelated in time and place. The CCE is a single course of conduct. Applying a rule of simultaneity to so complex an offense derides the substance and spirit of the statute.

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138. *Id.* at 171-72.

139. *Id.* at 169.

140. 105 S. Ct. at 2417.

141. *Id.* at 2416-17.

142. *Id.*

143. *See, e.g.,* offenses listed *supra* at note 134.

144. *Jeffers* itself sanctioned the application of included offense analysis to the CCE, a complex crime. 432 U.S. at 151-54.

145. *See supra* note 77 and accompanying text.

Yet even assuming that simultaneity is necessary for included offense situations, simultaneity of a kind is present in the CCE setting. Though a CCE's predicate offenses may bear no relation to each other in time and place, each predicate offense shares the same relationship with the CCE as every other predicate offense. To distinguish one predicate from another and to view the Washington events as "wholly separate"[146] from the activities in the southern United States is thus profoundly misdirected. Justice Rehnquist should have examined the presence or absence of simultaneity in the relationship between a CCE and its group of predicates. Here a kind of simultaneity does exist. A CCE's predicates are necessarily committed in the time period comprising the actions that constitute the CCE. To maintain otherwise is to undermine the use of the predicate offenses in establishing a CCE.[147]

Thus, Justice Rehnquist refused to apply included offense principles to the CCE statute. This was based on the assumption that simultaneity of commissions is essential to the concept of included offenses. However, this assumption is not necessarily sound. The possibility of two jeopardies on the lesser offense, regardless of whether the crimes are simple or complex, appears to be the crucial situation which gave rise to the included offense rule.[148]

D. The Exception to the Included Offense Regarding Successive Prosecutions

1. Diaz v. United States

The majority in *Garrett* assumed that Garrett's Washington importation offense was a lesser-included offense in his CCE,[149] and held that the exception to included offense principles established in *Diaz v. United States*[150] controlled the decision.[151] The *Diaz* exception allows prosecution for a greater offense after prosecution for the lesser-included offense, if the greater offense was not completed at the time the lesser-included offense was prosecuted.[152]

In *Diaz* the defendant was convicted for assault and battery. The victim later died from the effects of the assault, and the defendant was charged with homicide. Arguing that the assault and battery charge was a lesser-included offense in the homicide charge, the defendant claimed that the assault and battery conviction barred the homicide

146. *Garrett*, 105 S. Ct. at 2417.

147. Thus, Justice Rehnquist's opinion has a schizoid appearance. The Washington importation offense was not part of the CCE for included offense purposes, but it was part of the CCE for conviction purposes. 105 S. Ct. at 2418-19.

148. *See supra* note 77 and accompanying text.

149. *Garrett*, 105 S. Ct. at 2418.

150. 223 U.S. 442 (1912).

151. *Garrett*, 105 S. Ct. at 2419.

152. *Diaz*, 223 U.S. at 446.

prosecution.[153]

The Supreme Court rejected the defendant's argument and established a new rule: a double jeopardy plea would not be sustained if the prosecution for the lesser offense had already begun before the greater offense was completed.[154] The Court emphasized that at the time of the assault and battery prosecution it was impossible to prosecute on the homicide charge.[155] Blind adherence to the included offense principle would have had the anomalous result of preventing prosecution for an offense which had yet to occur. A second prosecution would preserve society's right to prosecute and punish the second offense. Thus, the *Diaz* exception was created to allow prosecution for the greater offense in spite of the general double jeopardy rule regarding included offenses.

The *sine qua non* of the *Diaz* exception was society's inability to prosecute the second offense at the time it prosecuted the first.[156] Though the *Diaz* exception has invariably been invoked in cases with subsequently occurring facts,[157] dicta in *Brown v. Ohio* extended the application of the exception to cases where facts necessary to establish the greater offense have not been discovered at the time the lesser offense is prosecuted.[158] Although the *Brown* dicta has not been applied, the idea is consistent with *Diaz:* it is impossible to bring a second charge without knowledge of its requisite facts.

The *Diaz* exception is consistent with the underlying double jeopardy policy concerns. A defendant's assurance of finality as to the lesser charge is preserved, because the lesser offense is not regarded as included in the second prosecution.[159] In addition, the *Diaz* exception limits the potential for prosecutorial harassment or overreaching, because the prosecution must bring the second charge if possible.[160] Thus, the *Diaz* exception accommodates society's interest in punishing crimes without violating the policy concerns of the Double Jeopardy Clause.

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153. *Id.*

154. *Id.* at 449.

155. The *Diaz* Court stated: "At the time of the trial for the [assault and battery] the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense." *Id.*

156. The Court in *Diaz* observed that the death of the victim was the event that made a homicide prosecution possible: "Then, and not before, was it possible to put the accused in jeopardy for that offense." *Id.* at 448-49.

157. Prior to *Garrett,* the *Diaz* exception also seems to have been applied only to situations in which the subsequently occurring fact was the death of the victim. *See* FELLMAN, THE DEFENDANT'S RIGHTS TODAY 380 (1976) ("It has been explained that no murder had occurred at the time of the first trial, and that the state does not have to postpone the trial for the assault indefinitely to wait and see whether the victim will die.").

158. *Brown,* 432 U.S. at 169 n.7.

159. *Diaz,* 223 U.S. at 449.

160. "[I]f the victim is dead at the time of the assault charge, a later charge of homicide should be barred." FRIEDLAND, DOUBLE JEOPARDY 95 (1969) (interpreting similar doctrine in Canadian law).

2. *Justice Rehnquist's Application of* Diaz

Justice Rehnquist drew an analogy between the lesser-included and greater offenses in *Diaz* and *Garrett*. Diaz's assault and battery charge corresponded to Garrett's importation offense, and Diaz's homicide corresponded to the CCE. Justice Rehnquist then demonstrated that Garrett's CCE, like Diaz's homicide, was not completed at the time Garrett was prosecuted for the importation offense.[161]

The cornerstone of this analogy was the jury's finding that Garrett continued his criminal enterprise after the Washington conviction. This finding was supported by certain evidence presented at trial. While out on bail awaiting sentence, Garrett was arrested for a traffic violation. He made some incriminating statements to the police, saying that he was a smuggler and that he owned a boat and had recently purchased a truck.[162] He was also carrying $6,253 in cash, thirty dollars of which was in quarters.[163] The utility to a drug enterprise of a boat, truck, quarters for long-distance phone calls, and large amounts of capital supported the jury's finding that Garrett continued to operate a drug enterprise after his importation conviction.[164]

Using these facts, Justice Rehnquist supported his analogy. *Diaz* permits prosecution for a greater offense if it is completed after prosecution for a lesser included offense. Garrett completed his CCE after his importation conviction. Therefore, prosecution for Garrett's CCE, using evidence of the importation offense as a predicate offense, was not barred.[165]

By applying *Diaz* to the facts in *Garrett*, Justice Rehnquist assumed that the principles relating to an offense that has a clear point of completion (the death of the victim) also apply to an offense which continues even after it is statutorily complete. This assumption is dubious. The victim's death in *Diaz* was significant because it completed the offense of homicide. Thus, a correct analogy of a CCE to *Diaz* would be as follows: When a defendant commits one or two drug offenses, the government would be unable to prosecute for a CCE; a third offense, however, satisfies the series of offenses requirement of the CCE statute, and the government could prosecute for a CCE. *Diaz* would permit the prosecution to use evidence of the first two offenses in proving a CCE in this situation, even though the government may have already prosecuted the first two offenses. This, however, was not the situation in *Garrett*. Garrett's CCE was complete, in the sense that the statutory elements were satisfied,

161. *Garrett*, 105 S. Ct. at 2418-19.
162. *Id.* at 2418.
163. *Id.*
164. *Id.*
165. *Id.* at 2419.

before his Washington importation prosecution began.[166]

3. *The* Diaz *Exception After* Garrett

Justice Rehnquist's application of *Diaz* to *Garrett* subtly changed the *Diaz* exception. In *Diaz* the facts occurring subsequent to Diaz's prosecution for assault and battery were necessary to bring the second prosecution for homicide. Justice Rehnquist, however, viewed this "necessity" as indicating what is necessary to obtain conviction.[167] He stated: "We cannot tell without considerable sifting of the evidence and speculating as to what juries might do whether the Government could in March 1981 have successfully . . . prosecuted Garrett for a different continuing criminal enterprise—one ending in March 1981."[168] The significant factor for Justice Rehnquist was "successful prosecution." The *Diaz* inquiry was thus changed from "could the government have prosecuted?" to "could the government have obtained conviction?"[169]

By defining necessity in terms of the quantum of evidence needed to convict, Justice Rehnquist misinterpreted *Diaz*. In *Diaz*, "necessity" clearly meant that which is necessary to proceed with the second prosecution.[170] *Diaz* stressed the prosecution's inability to proceed on the second prosecution for homicide. Had the government been able to prosecute the homicide offense at the time it prosecuted for assault and battery, double jeopardy would have barred successive prosecutions.[171] It was the inability to prosecute the second offense, not the inability to convict, that permitted the government to place the defendant in jeopardy on the greater offense after his trial on the lesser-included offense.

Even assuming that evidence discovered subsequent to the Washington prosecution invoked the *Diaz* exception in *Garrett*, Justice Rehnquist's application of *Diaz* is undercut by the fact that the subsequently discovered evidence was not discovered by the prosecution until after the commencement of the CCE prosecution in Florida.[172] When the government filed the CCE indictment, it could not have relied on an allegation that Garrett continued his CCE activities in order to introduce evidence

166. *See id.* at 2425 n.20 (Stevens, J., dissenting).

167. *Id.* at 2418.

168. *Id.*

169. While the former question presented a standard which was easily applied, the latter question is imponderable and allows no second guessing of the government's choice.

170. *See supra* note 155. The homicide charge was "not capable of judicial determination." Commonwealth v. Evans, 101 Mass. 25, 26 (1869). *See also* Wyatt v. Municipal Court, 242 Cal. App. 2d 845, 51 Cal. Rptr. 862 (1966) (when the new fact constitutes a new crime not susceptible of adjudication in the first proceeding, the determination in the first proceeding is not a bar to a prosecution for the newly developed crime). *But see* Note, *Double Jeopardy*, 1982 ANN. SURV. AM. LAW 493, 511 n.143 (subsequently discovered evidence is "significant new evidence," which tends to support Justice Rehnquist's view).

171. *See supra* note 160 and accompanying text.

172. *Garrett*, 105 S. Ct. at 2416-18.

of the Washington importation offense, because the facts supporting this allegation were yet to be discovered.[173] Garrett's CCE prosecution could not have been brought as a result of the government's discovery of a completed or continuing offense by Garrett.[174]

Thus, Justice Rehnquist fit the *Garrett* facts into a subtly altered *Diaz* exception. In Justice Rehnquist's view, Garrett's continued criminal activities after his first prosecution indicated that the greater CCE offense was not complete when he was convicted on the lesser-included importation charge. The flaw in this application is that *Diaz* speaks to the *possibility* of bringing a prosecution for the greater offense, not to the probability of obtaining conviction on the greater offense.

E. Justice O'Connor's Balancing Approach in *Garrett*

Justice O'Connor, in her concurring opinion, balanced the competing policy interests involved in a CCE prosecution.[175] Rather than applying the *Diaz* exception,[176] Justice O'Connor weighed the interests of defendants in finality and protection from prosecutorial overreaching against "the compelling public interest in punishing crimes."[177] Significantly, Justice O'Connor also included the defendant's criminal conduct in this weighing process.[178] According to Justice O'Connor, this balancing of competing interests comported with the "fundamental purpose of the Double Jeopardy Clause."[179] By concluding that society's interests outweighed the defendant's, she found that the Double Jeopardy Clause was not offended in *Garrett*.[180]

To some extent policy interests are always balanced in double jeopardy analysis.[181] The Double Jeopardy Clause does not impose an abso-

173. The Florida indictment was filed on July 16, 1981. Garrett's incriminating statements were made a week later. *Garrett*, 105 S. Ct. at 2426 (Stevens, J., dissenting).

174. Surely, if the prosecution had evidence of a continuing offense discovered in the period between the Washington conviction and the Florida indictment, the evidence would have been presented at trial.

175. 105 S. Ct. at 2421-22 (O'Connor, J., concurring).

176. Justice O'Connor found "merit" to the position that the *Diaz* exception should be limited to "circumstances where the facts *necessary* to the greater offense occur or are discovered after the first prosecution." *Id.* at 2421 (emphasis in original).

177. *Id. See infra* note 231 and accompanying text.

178. 105 S. Ct. 2422 (O'Connor, J., concurring).

179. *Id.* at 2420.

180. *Id.* at 2422.

181. Justice O'Connor states that the result in *Garrett* "comports . . . with the method of analysis used in our more recent decisions." *Id.* at 2420 (O'Connor, J., concurring). *See also* Westen & Drubel, *supra* note 69, at 103 ("In each case one must balance the defendant's interest in finality against 'the public interest in assuring that each defendant shall be subject to a just judgment on the merits. . . .' ") (quoting United States v. Scott, 437 U.S. 82, 101 (1978)). Westen and Drubel list the interests protected by the Double Jeopardy Clause in "ascending degrees of importance" as: "(1) an interest in finality which may be overcome relatively easily; (2) an interest in avoiding double punishment which comes armed with a presumption in the

lute prohibition on two trials for the same offense.[182] Justice O'Connor stated that the "finality guaranteed by the Double Jeopardy Clause is not absolute, but instead must accommodate the societal interest in [prosecuting offenses]."[183]

On the defendant's side of the balance is the policy of finality:[184] a defendant should be able to conclude his "confrontation with society" in one proceeding.[185] Finality is prominent in mistrials, where the defendant is subjected to a second trial after an abortive first trial. Finality protects the defendant from the "embarassment, expense and ordeal and . . . continuing state of anxiety and insecurity"[186] occasioned by successive prosecutions. Finality is promoted by limiting society to one trial for one offense.[187]

The finality policy also protects defendants from prosecutorial overreaching or harassment.[188] Typically, overreaching means attempts to obtain conviction in successive prosecutions,[189] or attempts by the prosecution to "hone its case" in successive prosecutions.[190] Overreaching has two elements: misconduct by the prosecutor and hardship to the defendant.[191] Overreaching may include attempts by the prosecution to create a mistrial.[192]

On society's side of the balance is the interest in vindicating its crim-

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defendant's favor; and (3) an interest in nullification—*viz*, an interest in allowing the system to acquit against the evidence—which is absolute." Westen & Drubel, *supra* note 69, at 84.

182. In the mistrial setting "[t]he double jeopardy clause will not bar reprosecution when a mistrial is declared without a defendant's consent, providing that either the circumstances reveal a 'manifest necessity' for the declaration or that the ends of public justice would otherwise be defeated." *Jeffers*, 432 U.S. 137, 158 (1977).

183. *Garrett*, 105 S. Ct. at 2420 (O'Connor, J., concurring).

184. *Id.* Finality applies to judgment and non-judgment situations: "Although the primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment, this Court has also developed a body of law guarding the separate but related interest of a defendant in avoiding [successive] prosecutions even where no final determination of guilt or innocence has been made." United States v. Scott, 437 U.S. 82, 92 (1978) (citation omitted).

185. *See supra* note 66 and accompanying text.

186. Green v. United States, 355 U.S. 184, 187 (1957). A second trial "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted." Arizona v. Washington, 434 U.S. 497, 503-04 (1978) (footnotes omitted).

187. "[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." United States v. Jorn, 400 U.S. 470, 479 (1971).

188. "Harassment is not a synonym for inconvenience. All repeated prosecutions distress defendants." Note, *Twice in Jeopardy, supra* note 86, at 286.

189. *See Green*, 355 U.S. at 187.

190. *See* Ashe v. Swenson, 397 U.S. 436 (1970).

191. Note, *Twice in Jeopardy, supra* note 86, at 286.

192. *Id.* at 286-88.

inal laws.[193] Thus, there is a great interest in bringing criminals to justice, as well as the related interest of maintaining and perfecting the guilt adjudication process.[194]

The new factor which Justice O'Connor injected into the balance was Garrett's criminal conduct.[195] Citing *Jeffers v. United States*[196] and *Ohio v. Johnson,*[197] Justice O'Connor stated that a defendant, by pursuing criminal conduct, may tip the successive prosecution double jeopardy balance against protection.[198]

In *Jeffers,* the defendant was charged in one proceeding with conspiracy to distribute narcotics and in another proceeding with conducting a CCE.[199] The government moved to consolidate the charges in one trial.[200] The defendant resisted and was tried separately for the two offenses.[201] When the defendant argued that he had been tried twice on the same offense, the Supreme Court used his opposition to the consolidation to defeat the double jeopardy claim: the defendant forfeited any objection to the second trial because he had, by resisting consolidation, required that the government try him in two separate proceedings.[202]

In *Johnson,* the defendant was charged with a lesser-included and a greater offense and entered a guilty plea on the lesser offense.[203] He then resisted prosecution on the greater offense.[204] The *Johnson* Court held that the defendant's guilty plea could not be used "as a sword to prevent the State from completing its prosecution" for the greater offense.[205]

Justice O'Connor acknowledged Garrett's interest in finality,[206] and noted the absence of prosecutorial overreaching.[207] She also noted society's interest in prosecuting CCE offenses. Presumably, the balance was equal at this point.[208] Justice O'Connor then weighed Garrett's conduct in continuing his CCE activities, and the balance tipped in the government's favor: "Where a defendant continues unlawful conduct after the

193. The defendant's interest must "accommodate the societal interest in prosecuting and convicting those who violate the law." *Garrett,* 105 S. Ct. at 2420 (O'Connor, J., concurring).

194. Double jeopardy itself is a societal interest. By specifically including this protection in the Bill of Rights, the founding fathers obviously recognized it as such. Balancing the defendant's interests against society's interests effaces this realization.

195. 105 S. Ct. at 2421-22 (O'Connor, J., concurring).

196. 432 U.S. 137 (1977). *See also supra* notes 107-109 and accompanying text.

197. 467 U.S. 493 (1984), *reh'g denied,* 105 S. Ct. 20 (1984).

198. 105 S. Ct. at 2421-22 (O'Connor, J., concurring).

199. *Jeffers,* 432 U.S. at 140-42.

200. *Id.* at 142.

201. *Id.* at 142-44.

202. *Id.* at 152-54.

203. *Johnson,* 467 U.S. at 496.

204. *Id.*

205. *Id.* at 502.

206. 105 S. Ct. at 2420 (O'Connor, J. concurring).

207. *Id.* at 2422.

208. *But see infra* note 231 and accompanying text.

time the Government prosecutes him for a predicate offense, I do not think he can later contend that the Government is foreclosed from using that offense in another prosecution to prove the continuing violation of [the CCE]."[209] As in Justice Rehnquist's application of *Diaz*,[210] it was Garrett's conduct after his Washington conviction that defeated his double jeopardy plea.

Justice O'Connor's use of Garrett's conduct differed significantly from Justice Rehnquist's use. For Justice Rehnquist, Garrett's conduct established further evidence of the CCE, which invoked the *Diaz* exception.[211] In contrast, Justice O'Connor used Garrett's conduct as a weighty factor in the double jeopardy balance.[212]

Justice O'Connor believed that Garrett's conduct, which continued his "confrontation with society,"[213] should operate as a waiver of double jeopardy protection. She wrote: "As the Court noted in another context, 'the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice.' "[214] Thus, Justice O'Connor saw a CCE defendant as making a conscious choice in the CCE setting: to continue criminal activities and waive double jeopardy protection, or to desist from criminal activities and claim double jeopardy protection.[215]

From a policy perspective, Justice O'Connor's position, that there is no double jeopardy protection while a defendant continues to commit the greater offense, is persuasive. It is based on notions of fundamental fairness. If a defendant truly wishes to conclude his confrontation with society in one proceeding, then he must stop committing the greater offense after trial on the lesser-included offense: if Garrett wanted relief from a continuing state of anxiety and insecurity, then he should have stopped his continuing criminal activity. Under Justice O'Connor's balancing ap-

209. *Garrett*, 105 S. Ct. at 2422 (O'Connor, J., concurring). Justice Rehnquist cryptically intimated agreement with this opinion: "One who insists that the music stop and the piper be paid at a particular point must at least have stopped dancing himself before he may seek such an accounting." *Id.* at 2417.

210. *See supra* notes 161-166 and accompanying text.

211. *See supra* note 163 and accompanying text.

212. *See supra* notes 195-198 and accompanying text.

213. 105 S. Ct. at 2422 (O'Connor, J., concurring). Justice O'Connor appeared to interpret the phrase "confrontation with society" as including a defendant's criminal violations rather than merely society's prosecution of him. *Id.*

214. *Id.* (quoting United States v. Scott, 437 U.S. 82, 99 (1978)).

215. If a defendant does not continue criminal activity, this will not necessarily mean he will succeed on a double jeopardy claim. Justice O'Connor carefully leaves this issue open: "Moreover, I note that we do not decide in this case whether a defendant would have a valid double jeopardy claim if the Government failed in a later prosecution to allege and to present evidence of a continuing violation of [a CCE] after an earlier conviction for a predicate offense." *Id.* at 2422.

proach, a defendant must cease committing the greater offense before he may claim finality on the lesser-included offense.

Justice O'Connor's use of waiver also finds some support in other double jeopardy settings.[216] The elements of knowledge, voluntariness, and intent, applicable to waivers of other constitutional rights,[217] do not seem to apply in double jeopardy cases, where waiver is "vague and malleable."[218] Double jeopardy waiver has been inferred from the defendant's actions,[219] and this supports Justice O'Connor's inference of waiver from Garrett's actions.[220]

Jeffers and *Johnson,* however, lend only weak support to Justice O'Connor's position. Those cases involved procedural maneuvering by the defendants at trial, and protecting the integrity of the trial process by preventing a defendant from building error into the system.[221] In *Jeffers* and *Johnson*, the defendants were prevented from creating a double jeopardy issue. Both defendants knew of the two charges against them and made a conscious effort to split the government's case.[222] In contrast, Garrett, faced with only one charge, made no attempt to split the government's case or create a double jeopardy issue. By moving to consolidate all charges against him, Garrett even attempted to facilitate prosecution and avoid a double jeopardy issue.[223] Garrett in no sense created the double jeopardy issue at trial. Thus, the procedural machinations in *Jeffers* and *Johnson* are distinguishable from Garrett's conduct, and this difference should caution against extrapolating waiver principles from *Jeffers* and *Johnson* to *Garrett.*[224]

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216. For a discussion of waiver in the double jeopardy setting, see Note, *Criminal Law—Waiver of Double Jeopardy Right: The Impact of Jeffers v. United States*, 14 WAKE FOREST L. REV. 842 (1978) [hereinafter cited as Note, *Waiver of Double Jeopardy*].

217. *See id.* at 848 ("The Supreme Court has often disposed of cases based on double jeopardy waiver while ignoring standards of voluntariness, knowledge, and intent.").

218. *Id.* at 846-48.

219. *See, e.g.,* Ferina v. United States, 340 F.2d 837 (8th Cir.), *cert. denied,* 381 U.S. 902 (1965).

220. However, Justice O'Connor's application of waiver is novel. Waiver has only been applied to (1) a defendant's appeal of his conviction, (2) a defendant's request for a mistrial, (3) situations where the defendant was solely responsible for separate trials, and (4) situations where the defendant requested separate trials. *See* Note, *Waiver of Double Jeopardy, supra* note 216, at 848-50. One commentator has argued that *Jeffers* relies more on notions of estoppel than waiver. Note, *Double Jeopardy, supra* note 65, at 269.

221. This is a policy which has significance independent of the specific double jeopardy issue presented. The integrity of the trial process must be maintained vis-a-vis all attempts to pervert it, notwithstanding the involvement of specific constitutional rights.

222. *See supra* notes 201-203 and accompanying text.

223. *Garrett*, 105 S. Ct. at 2410.

224. *Jeffers* and *Johnson* can further be distinguished from *Garrett* because the defendants were solely responsible for separate trials. *See* Note, *Double Jeopardy, supra* note 65, at 269 ("It is unclear, however, what burden defendant bears if the government is partially responsible for the two trials.").

Even assuming that waiver principles apply to a CCE, Justice O'Connor's approach suffers from the fact that double jeopardy protection is made to depend on a determination of guilt which is made only *after* a defendant's second trial. For example, if Garrett had been acquitted on the CCE charge, it would then be clear that his activities after the Washington conviction would not be "wrongful." Garrett's postconviction conduct would not have weighed against him, and he would have had a valid double jeopardy claim. It is ironic that the merits of a double jeopardy claim can only be determined after a second prosecution which itself raises a double jeopardy issue. Thus, however sound from a policy perspective Justice O'Connor's balancing test is, it puts trial courts in an impossible position: faced with a double jeopardy plea under facts similar to *Garrett*, the trial judge must base his ruling on an assessment of the defendant's guilt made outside of a trial proceeding. Although Justice O'Connor's balance is sound in theory, it is untenable in practice because the "conduct" factor cannot be proved beyond a reasonable doubt without a second trial.

F. *Garrett* and Future CCE Prosecutions

The holding in *Garrett* is that the *Diaz* exception to double jeopardy included offense principles is applicable to a CCE. After a series of drug offenses by a defendant, the government may prosecute any of the drug offenses, and then reintroduce those offenses as predicate offenses of a CCE, provided it alleges a continuation of the CCE after the earlier prosecutions. This CCE prosecution may be brought regardless of whether the government could have prosecuted the predicate offenses and the CCE together in one trial.

Justice O'Connor's opinion offers an alternative approach for allowing prosecution for a CCE after prosecutions for its predicate offenses. Where a defendant continues to commit the greater offense, he waives double jeopardy protection.[225] This approach also permits prosecution for a CCE when the government alleges a continuation of the CCE.

Both Justice Rehnquist's and Justice O'Connor's approaches are facilitated by the flexibility in proof by which the government may show a continuation of the CCE.[226] *Garrett* makes it clear that a violation of the drug laws is unnecessary to support an allegation that a defendant continued his CCE.[227] Circumstantial evidence of varying degrees of proba-

225. *See supra* note 198 and accompanying text.

226. *See supra* notes 54-55 and accompanying text.

227. The evidence of a continuation of criminal activities cited by the majority hardly amounts to a drug offense. *See supra* note 163 and accompanying text.

tive value will suffice to establish the continuation.[228]

Even if the government is unable to allege a continuation of the CCE, dicta in *Garrett* indicates that the use of previously prosecuted predicate offenses to establish a CCE may not be limited to the *Diaz* exception.[229] Justice Rehnquist's included offense analysis would accomplish this result. If predicate offenses are not regarded as lesser-included offenses, then no double jeopardy issue arises.[230] Second, Justice O'Connor indicated that to apply double jeopardy principles to the CCE setting would "force the Government's hand" with respect to prosecution.[231] This approach suggests that the governmental interest in prosecuting CCE's outweighs the defendant's interest in finality, even in the absence of the defendant's criminal conduct after conviction for a predicate offense. Given the weight of this interest, Justice O'Connor might have rejected Garrett's appeal even if he had not continued his CCE. Clearly, these approaches would place the CCE beyond the pale of successive prosecution double jeopardy protection.

A defendant whose case presents a *Garrett* type situation finds himself in a double jeopardy straitjacket. When the government intends to use previously prosecuted offenses to establish a CCE, the defendant will only be able to circumvent *Garrett* by attacking the government's continuation allegation. To make the *Diaz* exception inapplicable, a defendant must argue that subsequently discovered evidence supporting a continuation allegation will not be needed to successfully prosecute him for a CCE.[232] The irony of this argument is immediately apparent: The defendant implicitly asserts that some evidence is sufficient to convict him of a CCE. Furthermore, the only way to avoid Justice O'Connor's analysis is to argue that the balance is unworkable in practice, because the conduct factor is only capable of being weighed after the second trial. However, this amounts to a complete rejection of Justice O'Connor's balancing test.

Conclusion

In *Garrett*, the Supreme Court effectively removed any successive prosecution double jeopardy protection from CCE prosecutions that in-

228. Nothing discovered by the Government subsequent to the Washington conviction established a violation of the drug laws as required by the CCE statute. *See* 21 U.S.C. 848 (b)(1)-(2), *supra* note 35.

229. 105 S. Ct. at 2418-19.

230. The two offenses would be regarded as separate offenses under the Double Jeopardy Clause.

231. *Garrett,* 105 S. Ct. at 2422 (O'Connor, J., concurring). Justice Rehnquist also voices this concern: "We do not think that the Double Jeopardy Clause may be employed to force the Government's hand . . . however we were to resolve Garrett's lesser-included-offense argument." *Id.* at 2417.

232. *See supra* notes 167-169 and accompanying text.

volve evidence of previous convictions as predicate offenses underlying the CCE. Justices Rehnquist and O'Connor provided a litany of reasons: The included offense doctrine may be inapplicable to the CCE statute; the *Diaz* exception to the included offense rule controls the facts in *Garrett*; Garrett's claims must fail as a result of balancing double jeopardy policies; and defendants may not use the Double Jeopardy Clause to force the government's hand with regard to when to bring a CCE prosecution. Though the positions have fundamental weaknesses in derivation and in application to *Garrett*, they unquestionably reflect the approach the Rehnquist Court is likely to take when presented with future successive prosecution double jeopardy claims.

*By Richard Finacom**

* B.A., University of California, Berkeley, 1981; Member, third year class.