The Burger Court Opinion Writing Database

Jeffers v. United States
432 U.S. 137 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 26, 1977

Re: 75-1805 - Jeffers v. United States
75-6933 - Brown v. Ohio

MEMORANDUM TO THE CONFERENCE:

I have Lewis' memorandum of March 25 and Potter's response of March 25.

I agree in part.

(1) I would affirm Jeffers on the "waiver."

(2) I would affirm in Brown or alternatively I would give a DIG vote. I would not vote to reverse on any ground.

Were I to reach the merits in Brown, I might well agree with Lewis' view, but not in any sense on the basis that 143 years ago a Justice cited a state case with apparent approval and that the state case "points the way."

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1977

Re: 75-1805 Jeffers v. U.S.

Dear Harry:

I join.

Regards,

WEB

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1977

RE: 75-1805 - Jeffers v. United States

75-6933 - Brown v. Ohio

Dear Harry:

In accordance with your memo of June 9, these cases will be stricken from the list of those that are set for Monday.

Regards,

Warren

Mr. Justice Blackmun

Copies to the Conference

cc: Mr. Cornio

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 2, 1977

RE: No. 75-1805 Jeffers v. United States

Dear John:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 25, 1977

75-1805 - Jeffers v. United States
75-6933 - Brown v. Ohio

Dear Lewis,

I agree with your memorandum. It seems to me it would be utterly foolish to write an opinion in Brown simply to announce the self-evident proposition that it is not unconstitutional to convict a person of two separate offenses involving separate transactions committed on separate dates. If that is the issue that a majority of the Court think that the Brown case presents, then I think we should dismiss the writ as improvidently granted.

Like you, however, I would be willing in the Brown case to take the Ohio Court of Appeals at its explicit word and proceed upon the assumption that the case involves prosecution for a greater offense after conviction of a lesser included offense. I am now convinced that this violates the constitutional guarantee against double jeopardy -- without even a limited invocation of the "same transaction" test. If the lesser included offense is conceptualized as "A," and the greater offense as "A" + "B," then it follows that a prosecution for "A" + "B" after conviction for "A" is a second prosecution for "A."

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 3, 1977

No. 75-1805, Jeffers v. U. S.

Dear John,

Please add my name to your dissenting opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 6-7-77

Recirculated: _____

No. 75-1805, JEFFERS v. UNITED STATES

MR. JUSTICE WHITE, concurring in part in the judgment and dissenting in part.

Because I agree with the United States that Iannelli v. United States, 420 U.S. 770 (1975), controls this case, I for that reason concur in the judgment of the Court with respect to petitioner's conviction. For the same reason and because the conspiracy proved was not used to establish the continuing criminal enterprise charged, I dissent from the Court's judgment with respect to the fines and from Part IV of its opinion.

No Changes ✓

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 6-10-77

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1805

Garland Jeffers, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1977]

MR. JUSTICE WHITE, concurring in part in the judgment and dissenting in part.

Because I agree with the United States that *Iannelli* v. *United States*, 420 U. S. 770 (1975), controls this case, I for that reason concur in the judgment of the Court with respect to petitioner's conviction. For the same reason and because the conspiracy proved was not used to establish the continuing criminal enterprise charged, I dissent from the Court's judgment with respect to the fines and from Part IV of its opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 2, 1977

Re: 75-1805 - Jeffers v. United States

Dear John:

Please join me.

Sincerely,

T.M.

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 30, 1977

Re: No. 75-1805 - Jeffers v. United States

Dear Lewis:

I should have back from the printer on Tuesday a proposed opinion in this case. This has been revised generally in line with the suggestions contained in your letter of May 24. One or two other changes have been made as a result of my having an opportunity to review your proposed opinion in No. 75-6933, Brown v. Ohio.

I believe that Jeffers is now in shape so that it and Brown can live together. You know, of course, that I shall not join Brown.

Sincerely,

HAB.

Mr. Justice Powell

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: MAY 31 1977

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1805

Garland Jeffers, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1977]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case involves the extent of the protection against multiple prosecutions afforded by the Double Jeopardy Clause of the Fifth Amendment, under circumstances in which the defendant *opposes* the Government's efforts to try charges under 21 U. S. C. §§ 846 and 848 in one proceeding. It also raises the question whether § 846 is a lesser included offense of § 848. Finally, it requires further explication of the Court's decision in *Iannelli* v. *United States,* 420 U. S. 770 (1975).

I

A. According to evidence presented at trial, petitioner Garland Jeffers was the head of a highly sophisticated narcotics distribution network that operated in Gary, Ind., from January 1972 to March 1974. The "Family," as the organization was known, originally was formed by Jeffers and five others and was designed to control the local drug traffic in the city of Gary. Petitioner soon became the dominant figure in the organization. He exercised ultimate authority over the substantial revenues derived from the Family's drug sales, extortionate practices, and robberies. He disbursed funds to pay salaries of Family members, commissions of street workers, and incidental expenditures for items such as apartment rental fees, bail bond fees, and automobiles for certain members. Finally, he maintained a strict and ruthless disci-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 3, 1977

Sally - Write
a Join

Re: No. 75-1805 - Jeffers v. United States

Dear Lewis:

Thank you for your letter of June 1. I am making some revisions in the proposed opinion and shall definitely include your first suggestion. I think it is a good one. This goes to the printer today and, hopefully, will be ready for recirculation by Monday.

Sincerely,

HAB.

Mr. Justice Powell

STYLISTIC CHANGES pp. 2, 4, 5, 7, 12, 14, 15, 16

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

3rd DRAFT

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 6 1977

SUPREME COURT OF THE UNITED STATES

No. 75–1805

Garland Jeffers, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1977]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case involves the extent of the protection against multiple prosecutions afforded by the Double Jeopardy Clause of the Fifth Amendment, under circumstances in which the defendant *opposes* the Government's efforts to try charges under 21 U. S. C. §§ 846 and 848 in one proceeding. It also raises the question whether § 846 is a lesser included offense of § 848. Finally, it requires further explication of the Court's decision in *Iannelli* v. *United States*, 420 U. S. 770 (1975).

I

A. According to evidence presented at trial, petitioner Garland Jeffers was the head of a highly sophisticated narcotics distribution network that operated in Gary, Ind., from January 1972 to March 1974. The "Family," as the organization was known, originally was formed by Jeffers and five others and was designed to control the local drug traffic in the city of Gary. Petitioner soon became the dominant figure in the organization. He exercised ultimate authority over the substantial revenues derived from the Family's drug sales, extortionate practices, and robberies. He disbursed funds to pay salaries of Family members, commissions of street workers, and incidental expenditures for items such as apartment rental fees, bail bond fees, and automobiles for certain members. Finally, he maintained a strict and ruthless disci-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 9, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-1805 - Jeffers v. United States

Scheduling this case for Monday places great pressure on the reporter's office and on the print shop. With some of the votes just having come in, and with the necessary revisions, headnote and line-up problems are evident.

I therefore request that this case not come down on Monday. Everything should be in order for the next decision day, presumably Thursday.

I suppose that No. 75-6933, Brown v. Ohio, should also go over, unless the cites to Jeffers are eliminated. I doubt if the world will come to an end if it is held for a week from today. Lewis agrees.

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 16, 1977

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 75-1805 - Jeffers v. U.S.

There are two cases being held for Jeffers:

The first is No. 76-5663, Harris v. Oklahoma. Harris is also a hold for Brown v. Ohio. Lewis has agreed to cover it in his memorandum concerning the Brown holds, so I shall not cover it here.

The second is No. 75-7001, Kirk, et al. v. United States. This originally was a hold for United States v. Donovan, but after that case came down in January, this was further held for Jeffers.

Petitioner Eugene Kirk was the ringleader of a massive narcotics operation in St. Louis. After a trial with numerous codefendants, he was convicted of the following: (a) one count of conspiring to distribute heroin, in violation of 21 U.S.C. § 846; (b) four counts of distributing heroin, in violation of § 841(a)(1); (c) twelve counts of using a telephone to facilitate the conspiracy, in violation of § 843(b); and (d) one count of engaging in a continuing criminal enterprise, in violation of § 848. Kirk received a sentence of eight years and a special parole term of three years on the conspiracy count, and consecutive sentences of the same length on each of the § 841(a)(1) counts, for a total of 40 years' imprisonment and 15 years special parole. On the § 848 count, he also received 40 years, to be served concurrently with the other sentences. Finally, Kirk received 12 consecutive two-year sentences for the § 843(b) counts.

On appeal to the CA 8 and here, the only point relevant to Jeffers that petitioner raises is that § 848 is unconstitutionally vague. He does not assert that the statute violates the Double Jeopardy Clause. In light of the fact that Kirk did not suffer multiple trials, as Jeffers

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 25, 1977

No. 75-1805 Jeffers v. United States
No. 75-6933 Brown v. Ohio

MEMORANDUM TO THE CONFERENCE:

Although some of the votes were "shaky", we ended up with a majority to affirm both of these cases. In Jeffers, including Potter's tentative vote, I count five votes for affirmance on the theory that Jeffers - as a deliberate tactical decision - effectively waived any claim of right not to be prosecuted for the greater offense. This view is supported, I think, by the rationale in Dinitz. But a decision on this ground would not address the merits of the issue which I assume prompted us to take the case.

The posture in Brown is even less satisfactory in this respect. There are five votes (in varying degree of firmness) to affirm, but two or three of these (including my vote) are based on reading the Ohio court's opinion as holding that there were two entirely separate offenses. A disposition of the case on this state law ground would have no precedential value. Indeed, viewed in this light the case is a prime DIG candidate.

Byron is right in saying that if these two cases go off on the above grounds we will have accomplished little or nothing by taking them.

The central issue on the merits is whether, following conviction on a lesser included offense, the double jeopardy clause bars trial on the greater offense. I stated at Conference that I had not come to rest on the issue, as I voted to dispose of both cases on other grounds. I have given further thought to the merits, and if we reach this

issue in Brown I am now prepared to vote that conviction on the lesser offense does bar trial for the greater. Although we never have decided this squarely, In re Nielsen - with its reliance on State v. Cooper, 13 N.J. Law Reports (1 Green) 361 (1833) - is relevant authority, especially as to the perception of what was meant by double jeopardy at the time of the adoption of the Constitution. For example, Blackstone, quoted in Cooper at 375, stated that conviction of manslaughter would bar a later indictment for murder. Moreover, I believe this view has been followed generally by the federal courts. See, e.g., Ekberg v. United States, 167 F.2d 380, 386 (CA1 1948); Giles v. United States, 157 F.2d 588, 590 (CA9 1946); Robinson v. Neil, 366 F. Supp. 924, 927-928 (E.D. Tenn. 1973).

I still would prefer not to reach the merits issue in Jeffers. He deliberately made his own election. I would leave him with its fruits. The policy underlying double jeopardy simply has no application in his case. But I could reach the merits in Brown. The opinion of the Ohio court is no model of clarity. Although it could be read as identifying two separate offenses under Ohio law, the opinion also stated explicitly that one was the lesser included offense of the other.

In short, I am willing - if my vote will enable us to resolve the question that prompted the grants in these cases - to reach the merits in Brown and reverse in that case. This does not suggest any general endorsement of the "same transaction" view except in this precise context.

L.F.P.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 24, 1977

No. 75-1805 Jeffers v. United States
No. 75-6933 Brown v. Ohio

Dear Harry:

Thank you for the opportunity to read your Jeffers draft. Although we are not far apart, I think our treatment of the included offense problem in the present drafts may not be completely consonant in two respects.

First, there are two possible rationales for holding that double jeopardy bars successive prosecutions for a lesser included and a greater offense. One is that under the established test for determining whether two offenses are the same - whether each offense requires proof that the other does not (Blockburger) - the lesser and the greater offense are the "same offense." The other is that in successive prosecutions for the lesser and the greater, the elements of the lesser ordinarily are at issue twice.

In Jeffers, pp. 18-19, you use language that might be read as suggesting that the second of these rationales is decisive. I have attempted in Brown to rely solely on the Blockburger test, leaving open whether the second would justify the same result. As I am not sure where the repeated-proof rationale might lead us, and as I don't need to rely on it, my preference simply is to leave it for another day.

Second, on p. 20 of the Jeffers draft you list the exceptions to Brown in somewhat greater detail than I do in notes 5 and 7 of my draft in Brown. We are in accord on your second and third exceptions. In fact, if you have no objections, I would propose to incorporate the substance of your statement of the second exception in place of my present note 7, which states it in a more restrictive manner.

I am not so sure about the first exception that you refer to where "the first court had no jurisdiction to try the lesser offense." Recognition of this exception was dictum in both Diaz and Grafton and seems to have been undercut by Waller v. Florida, 397 U.S. 387 (1970), which held that the various instrumentalities of a State are responsible as one sovereign for compliance with the double jeopardy guarantee. I would prefer not to state that limited jurisdiction may be an exception to the rule in Brown if I can avoid it.

In summary, our drafts will harmonize completely if (i) you join me in relying solely on the Blockburger test, and (ii) you allow me to state the exceptions, omitting the "jurisdiction" exception. Alternatively, I think our present drafts can "live together" about as they are.

It has been most helpful to have your draft. I enclose my Chamber's draft of Brown that I should have given you this morning.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

June 1, 1977

No. 75-1805 Jeffers v. United States

Dear Harry:

Although I am with you, I have a couple of suggestions that you may wish to consider.

On pages 14 and 15, you use the word "waiver" in describing the defendant's insistence upon separate trials. In view of the Zerbst connotation of "waiver", I have thought of defendant's conduct as constituting an election. You might, for example, consider as a substitute for the last sentence on page 13 something along the following lines:

> "Similarly, although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceedings, there is no violation of the double jeopardy clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election."

If you decide to make a change in that sentence, I suppose a corresponding change would be appropriate in the first full sentence on page 15.

I have renewed my acquaintance with Dinitz in writing Brown v. Ohio. You merely cite Dinitz on page 13. It occurs to me that emphasis of its policy might be helpful. For example, at the end of Part II (top of page 15), it could be noted that the government's entitlement to prosecute petitioner for the § 848 offense was entirely consistent with the policy expressed in Dinitz. See 424 U.S., at 608-609.

These are merely private suggestions. I will join you in any event.

Sincerely,

Mr. Justice Blackmun

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 3, 1977

No. 75-1805 Jeffers v. United States

Dear Harry:

Please join me.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 25, 1977

Re: No. 75-1805 - Jeffers v. United States
No. 75-6933 - Brown v. Ohio

Dear Lewis:

I agree with you that the "waiver" point could be an adequate basis for disposition of Jeffers. I would be very much opposed, however, to reach the merits of what several of the Conference apparently feel is the "big" issue in a state case, and avoid it in a federal case. Whatever one may think of Benton v. Maryland, there is no question but what Potter is right when he says as soon as we start applying Blockburger principles to state convictions, we are inexorably drawn in to a determination of what may or may not be lesser included offenses under the laws of the particular state with which we are dealing. As you note on page 2 of your memorandum, the opinion of the Ohio court "is no model of clarity", and "it could be read as identifying two separate offenses under Ohio law", although it "also stated explicitly that one was the lesser included offense of the other." In such a jumbled situation as this, I think the use of Brown as a vehicle for deciding the "big issue" would be a serious mistake.

Sincerely,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1977

Re: No. 75-1805 - Jeffers v. United States

Dear Harry:

Please join me.

Sincerely,

WR

Mr. Justice Blackmun

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

75-1805 Jeffers v. United States

From: Mr. Justice Stevens

Circulated: JUN 1 1977

Recirculated: _____

MR. JUSTICE STEVENS, dissenting.

There is nothing novel about the rule that a defendant may not be tried for a greater offense after conviction of a lesser included offense. It dates back at least to the days of Blackstone, and "has been this Court's understanding of the Double Jeopardy Clause at least since In Re Nielsen was decided in 1889," Brown v. Ohio, post, at 7.[1/] I would not permit the prosecutor to claim ignorance of this ancient rule, or to evade it by arguing that the defendant failed to advise him of its existence or its applicability.

The defendant surely cannot be held responsible for the fact that two separate indictments were returned,[2/] or for the fact that other defendants were named in the earlier indictment, or for the fact that the government elected to proceed to trial first on the lesser charge.[3/] The other defendants had valid objections to the government's motion to consolidate the two cases for trial.[4/] Most trial lawyers will be startled to learn that a rather routine joint opposition to that motion to

1/As the Court notes in Brown, Nielson cites an 1833 New Jersey case; that case in turn quotes Blackstone. State v. Cooper, 13 N.J.L. 361, 375. See 4 Blackstone, Commentaries *336.

2/The Court implies that the result in this case would be different "if any action by the government contributed to the separate prosecution on the lesser and greater charges." Ante, 14, n. 18. I wonder how the grand jury happened to return two separate indictments.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 2 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1805

Garland Jeffers, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1977]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

There is nothing novel about the rule that a defendant may not be tried for a greater offense after conviction of a lesser included offense. It can be traced back to Blackstone, and "has been this Court's understanding of the Double Jeopardy Clause at least since *In Re Nielsen* was decided in 1889," *Brown* v. *Ohio, post,* at 7.[1] I would not permit the prosecutor to claim ignorance of this ancient rule, or to evade it by arguing that the defendant failed to advise him of its existence or its applicability.

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[1] As the Court notes in *Brown*, *Nielson* cites an 1833 New Jersey case; that case in turn quotes Blackstone. *State* v. *Cooper*, 13 N. J. L. 361, 375. See 4 Blackstone, Commentaries *336.

[2] The Court implies that the result in this case would be different "if any action by the government contributed to the separate prosecution on the lesser and greater charges." *Ante*, 14 n. 18. I wonder how the grand jury happened to return two separate indictments.

[3] The Government retained the alternative of trying petitioner on both charges at once, while trying the other defendants separately for conspiracy. The prosecutor never attempted this course, and defense counsel—not having had an opportunity to read the opinion the Court announces today—had no reason to believe he had a duty to suggest it.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 9, 1977

Re: 75-1805 - Jeffers v. U.S.

Dear Harry:

The printer said he would have this back later this afternoon, but I thought you might like to see it right away.

Respectfully,

Mr. Justice Blackmun

— 1

pp. 1-3

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 9 77

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1805

Garland Jeffers, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1977]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting in part.

There is nothing novel about the rule that a defendant may not be tried for a greater offense after conviction of a lesser included offense. It can be traced back to Blackstone, and "has been this Court's understanding of the Double Jeopardy Clause at least since *In Re Nielsen* was decided in 1889," *Brown* v. *Ohio*, *post*, at 7.[1] I would not permit the prosecutor to claim ignorance of this ancient rule, or to evade it by arguing that the defendant failed to advise him of its existence or its applicability.

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[1] As the Court notes in *Brown*, *Nielsen* cites an 1833 New Jersey case; that case in turn quotes Blackstone. *State* v. *Cooper*, 13 N. J. L. 361, 375. See 4 Blackstone, Commentaries *336.

[2] The plurality implies that the result in this case would be different "if any action by the Government contributed to the separate prosecution on the lesser and greater charges." *Ante*, 14 n. 20. I wonder how the grand jury happened to return two separate indictments.

[3] The Government retained the alternative of trying petitioner on both charges at once, while trying the other defendants separately for conspiracy. The prosecutor never attempted this course, and defense counsel—not having had an opportunity to read today's plurality opinion—had no reason to believe he had a duty to suggest it.