The Burger Court Opinion Writing Database

Garrett v. United States

471 U.S. 773 (1985)

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 8, 1985

Re: No. 83-1842 - Garrett v. United States

Dear Bill:

I join.

Regards,

WEB

Justice Rehnquist

Copies to the Conference

HAB

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

CHAMBERS OF
THE CHIEF JUSTICE

April 2, 1985

Re: No. 83-1842 - Garrett v. United States

Dear Bill:

I join your March 25 draft.

Regards,

Justice Rehnquist

cc: Justice White
Justice Blackmun
Justice O'Connor

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 22, 1985

83-1842 Garrett v. United States

Dear John,

Thurgood, you and I are in dissent in the above. Would you be willing to take on the dissent?

Sincerely,

Bill

Justice Stevens

Justice Marshall

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 21, 1985

No. 83-1842

Garrett v. United States

Dear Bill,

I'll await the dissent.

Sincerely,

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 10, 1985

No. 83-1842

Garrett v. United States

Dear John,

Please join me.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 6, 1985

83-1842 - Garrett v. United States

Dear Bill,

I join your opinion and will perhaps write a few words on the side.

Sincerely,

Byron

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 21, 1985

Re: No. 83-1842-Garrett v. United States

Dear Bill:

I await the dissent.

Sincerely,

TM.

T.M.

Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 15, 1985

Re: No. 83-1842-Garrett v. U.S.

Dear John:

Please join me in your dissent.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

HAB

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 8, 1985

Re: No. 83-1842, Garrett v. United States

Dear Bill:

I have now had an opportunity to reflect on your writing and on the ensuing correspondence.

Your second draft is much more palatable to me than the first, for the reasons you and Sandara have so ably discussed.

I am still inclined to affirm, but I shall withhold my vote until I have the benefit of what will be said by the forthcoming dissent and your response thereto.

Sincerely,

Harry

Justice Rehnquist

cc: The Chief Justice
Justice White
Justice O'Connor

HAB

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 22, 1985

Re: No. 83-1842, Garrett v. United States

Dear Bill:

By separate note I am joining your opinion. Sometime ago, you gave me a note on the bench asking that I let you know if I had any concern about your reference to the Jeffers case. This reference is on page 20 of your opinion.

I, frankly, would feel a little better if you could see your way clear to omit the words "but that statement is not supported by a detailed examination of the legislative history." I think I know what you mean, but the phrase sounds to me unduly critical, even though you were one of the plurality there. It the phrase were omitted, I think all is said that need to be said anyway. Don't you agree?

Sincerely,

Harry

Justice Rehnquist

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 22, 1985

Re: No. 83-1842, Garrett v. United States

Dear Bill:

Please join me.

Sincerely,

H. A. B.

Justice Rehnquist

cc: The Conference

HAB

May 24, 1985

Re: No. 83-1842, Garrett v. United States

Dear Bill:

The suggestion set forth in your letter of May 23 has my approval.

Sincerely,

HAB

Justice Rehnquist

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 1, 1985

83-1842 Garrett v. United States

Dear Bill:

Please add at the end of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Lewis

Justice Rehnquist

lfp/ss

cc: The Conference

83-1842

(1)

Supreme Court of the United States
Memorandum

Feb, 19 85

Harvey —

In U.S. v. Garrett, the def contends that he cannot be prosecuted for both a "predicate" offense and of a "Continuing criminal enterprise." There is some language in your opinion re Jeffers about the similarities of the statute suggesting that there should

(2)

Supreme Court of the United States
Memorandum

, 19

be no pyramiding of penalties. The govt brief in Garrett seems to me to make out beyond peradventure of a doubt that there could be prosecutions for both a predicate offense & a "CCE" — that is just what happened in Garrett. I am

(3)

Supreme Court of the United States
Memorandum

, 19

going to circulate this a couple of days & try to show how Jeffers doesn't apply to the rec't relationship between the "predicate offense" + the "CCE". If you think I have done Jeffers justice & the Jeffers language, I hope you will let me know.

Best

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: FEB 20 1985

Recirculated: _____

WHR
I want the dissent

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1842

JONATHAN GARRETT, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[February ——, 1985]

JUSTICE REHNQUIST, delivered the opinion of the Court.

This case requires us to examine the double jeopardy implications of a prosecution for engaging in a "continuing criminal enterprise" (CCE), in violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U. S. C. § 848, when facts underlying a prior conviction are offered to prove one of three predicate offenses that must be shown to make out a CCE violation. Petitioner Jonathan Garrett contends that his prior conviction is a lesser included offense of the CCE charge, and, therefore, that the CCE prosecution is barred under *Brown* v. *Ohio*, 432 U. S. 161 (1977).

Between 1976 and 1981, Garrett directed an extensive marihuana importation and distribution operation involving off-loading, transporting, and storing boat loads of marihuana. These activities and related meetings and telephone calls occurred in several States, including Arkansas, Florida, Georgia, Louisiana, Massachusetts, Michigan, Texas, and Washington.

In March 1981, Garrett was charged in three substantive counts of an indictment in the Western District of Washington for his role in the off-loading and landing of approximately 12,000 pounds of marihuana from a "mother ship" at Neah Bay, Washington. He was named as a co-conspirator, but not indicted, in a fourth count charging conspiracy to import marihuana. Having learned that he was being inves-

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 7, 1985

Re: No. 83-1842 Garrett v. United States

Dear Sandra,

Your letter of March 7th--while not exactly a "join"--was the first sign of life I have had from any of those who voted to affirm the judgment of the Court of Appeals in this case. I intend to respond to it, but I first want to take time to digest what you have to say, so it will be a couple of days.

Sincerely,

wm

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 11, 1985

Re: No. 83-1842 Garrett v. United States

Dear Sandra,

Your letter makes it clear that this is a "hard" case under our precedents, but I think harder to reverse than to affirm.

Reversing and remanding this case, as you suggest on page 4 of your letter, would amount to a holding that the CCE statute as written and intended to operate by Congress violated the Double Jeopardy Clause. I think I am right in saying that in all of our double jeopardy cases, we have never held that an act of Congress is unconstitutional because a prosecution in accordance with its terms would violate double jeopardy. All of our cases dealing with federal prosecutions have treated the clause as a restriction on what courts and prosecutors may do in the light of normal presumptions about what Congress intended. In Brown v. Ohio, 432 U.S. 161 (1977) (which offers support to both sides in this case), we said:

> "[T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." Id., at 165.

Garrett's claimed double jeopardy consists of a second prosecution for an offense which includes as one of its elements a crime for which he has previously been convicted and sentenced. I think that a good argument can be made that this facet of double jeopardy analysis is far removed

from "fundamental fairness." It has arisen in a very few cases and usually as something of a technical defense to a major prosecution after an inadvertent minor prosecution. A classic example is our case of Fugate v. New Mexico, argued at the February session, where an affirmance would hardly make one feel that this particular defendant has been required to "run the gauntlet twice" in any meaningful sense of the word.

Virtually all of the cases mentioned in your letter involve a second prosecution after mistrial or a second prosecution after reversal on appeal, and they do implicate "fundamental fairness." In these cases the Court seems to have balanced the defendant's obvious interest in having a single jury decide his fate against the government's interest in prosecuting law breakers, with a strong feeling that a second trial cannot be had if the government attempts to abort the proceedings because they are not going well. This interest of the defendant in having his fate determined by the jury first empaneled to try him, along with the special weight attached to verdicts of acquittal, see Tibbs v. Florida, 457 U.S. 31, 41 (1982), seems to be in the mainstream of fundamental fairness in a way that I don't think trial for a greater offense after conviction of a lesser included offense necessarily is.

In the course of thinking about some of the observations in your letter, I began to ask myself precisely what was the claim being made by Garrett. Is it that he may not be put to trial again on a charge which includes as one of its elements the predicate offense of which he has already been convicted in Washington, or is it that the fact of his conviction for that offense may not subsequently be used to augment his punishment in any subsequent prosecution? If it is only the expense and harassment of again trying the issues involved in the Washington prosecution, I should think that claim could be answered by requiring the government, if requested, to stipulate to the facts proved in the Washington prosecution. But if Garrett's claim is the second and broader one, I think sustaining it would have the gravest implications for recidivist statutes. Whether a prior conviction is used to enhance the sentence for a subsequent crime, or is proved as an element of a subsequent crime, the defendant is being put at risk of additional punishment for the prior crime. The CCE provision is not an enhancement statute in the classical mold, because it contemplates the possibility of trying the offense a second time, but if the lesser included offense argument made by

defendant is sustained here, it would be very difficult to avoid having it rub off on other enhancement statutes.

Your letter suggests that the government may be able to salvage something of the statute even if we do hold that it may not base a CCE prosecution on the Washington offense by virtue of the necessary facts rule of Diaz v. United States, 223 U.S. 442 (1912), which involved a murder prosecution after an assault conviction on the same facts because the victim had died in the interim. This certainly seems to be good law, but when one moves from the classical Diaz-type case to the activities which can constitute a CCE offense, I think the rule poses great difficulties in application. Indeed, it becomes something of a scaled-down version of Bill Brennan's "same transaction" analysis for double jeopardy cases which the full Court has never accepted.

Garrett, who may have been more active than some of his counterparts but less active than others, was engaged in off-loading, transporting, and storing boat loads of contraband which required activities, meetings, and telephone calls in at least eight states. To say, as you do, that where the essential elements for the CCE are in existence at the time of the prosecution for the predicate offense, a later CCE prosecution is barred unless the government can show that it was unaware of the facts or not in possession of sufficient evidence to prosecute, does not take fully into account the government's own problems of coordination. But even if it did, it would surely give every defense attorney a field day of pre-trial hearings, discovery, and the like wherein he could properly claim the right to interrogate countless government functionaries about what they knew and when they knew it. Diaz is easy of application because it depends on the occurrence of one or two simple objective facts: when did the assault occur, when was the defendant tried for the assault, when did the death occur? In contrast, a CCE involves countless facts as well as subjective issues such as the knowledge of the government and the existence of sufficient evidence to justify prosecution.

Your final paragraph raises the concern that affirmance along the lines of my circulating draft might jeopardize the core double jeopardy protection against a second trial after the prosecution has honed its trial strategy or failed to muster sufficient evidence in the first proceeding. On the basis of my rethinking of the circulating draft in response to your letter, I think these problems can be obviated in a

manner consistent with an affirmance. So long as the government could not include as an element of the CCE offense the Washington charges if there had been a judgment of acquittal in Washington, I do not think the government is apt to prosecute a predicate offense by itself as a "dry run" for something bigger later. Not only would the defense also learn something about the government's case during the trial, but the threat of acquittal should force the government to lay all of its cards on the table at the trial of the predicate offense.

To implement this approach, I think we would have to state much more clearly than I have stated in the circulating draft that the double jeopardy concerns which flow from an acquittal of a lesser included offense are not the same as those which flow from a conviction. For the reasons I have discussed, I would let Congress create a statutory offense such as the CCE that has as one of its predicates a previous conviction for what is by definition a "lesser included offense." As a partial protection against harassment by the government -- which I take to mean a decision to make the defendant spend as much time and money on court proceedings as possible -- I would be willing to require the government to stipulate, at the request of the defendant, to the facts alleged in the CCE indictment that had already been proved in an earlier conviction. I think that further inquiry as to whether there was a "valid reason" for failure to bring all the charges at once would involve the sort of endless discovery, interrogatories, and pre-trial hearings that I would like to avoid.

The approach I have suggested would obviously entail some rewriting of parts of the circulating draft, but whether or not this approach makes sense to you, your letter has contributed considerably to the clarification of my own thinking on the matter.

Sincerely,

Bill

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 12, 1985

Re: No. 83-1842 Garrett v. United States

Dear Sandra,

Thank you for your letter of March 12th. I am going to go ahead and revise the circulating draft in the light of our exchange.

Sincerely,

WHR

Justice O'Connor

cc: The Conference

HHD

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 25, 1985

Re: 83-1842 Garrett v. United States

Dear Chief,

You have joined my circulating draft in this case, and Sandra and I have exchanged correspondence with copies to the Conference. I have talked to Byron about it, and also "touched base" with Harry. All five of us voted to affirm, but I am satisfied that my present circulating draft will have difficulty commanding five votes. The enclosed recirculation is substantially rewritten insofar as it deals with petitioner's claim that there cannot be a second prosecution which incorporates in one way or another the Washington conviction. Sandra is concerned that my first draft would allow the Government to put petitioner through the mill twice, even to the point of harassment; Byron expressed the tentative view that the traditional "lesser included offense" analysis is not applicable to the kind of offenses we have here.

My revision reserves the question of whether the predicate offense is a "lesser included offense" within the CCE, and goes on to hold that, even if it is, the Government was entitled to separately prosecute in this case because the CCE offense was continuing at the time that the indictment was returned for the Washington predicate offense. The result here is based on Diaz v. United States, 223 U.S. 442. It seems to me that in upholding the Government's two prosecutions here on this theory, we leave open the question of whether the same result would obtain had the CCE offense been completed at the time the indictment for the predicate offense was returned, and thus suggest to the Government that a different result might obtain if it deliberately goes after the petitioner one charge at a time when all the offenses are completed at the time of the first indictment. But it also leaves open the

question of whether petitioner will in that case prevail on his "lesser included offense" claim.

I have a feeling from reading the Court of Appeals opinions in this area that the real conflict is on the multiple punishment issue, with respect to which I think the Government is right for the reasons stated in Albernaz, 450 U.S. 333, and Missouri v. Hunter, 459 U.S. 359. I think the particular order of prosecution in this case was something of a "sport," and it seems that the Government typically prosecutes predicate offenses and the CCE at the same time. Thus I think the way this revised draft reads we are solving the principal conflict for which we took the case, and reserving for another day some aspects of the claim that two successive prosecutions, one for a predicate offense and one for a CCE, would violate the Double Jeopardy Clause.

Sincerely,

Justice White
Justice Blackmun
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT

¶ 4, 12, 13-18, 20

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: MAR 25 1985

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1842

JONATHAN GARRETT, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[March ——, 1985]

JUSTICE REHNQUIST, delivered the opinion of the Court.

This case requires us to examine the double jeopardy implications of a prosecution for engaging in a "continuing criminal enterprise" (CCE), in violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U. S. C. § 848, when facts underlying a prior conviction are offered to prove one of three predicate offenses that must be shown to make out a CCE violation. Petitioner Jonathan Garrett contends that his prior conviction is a lesser included offense of the CCE charge, and, therefore, that the CCE prosecution is barred under *Brown* v. *Ohio*, 432 U. S. 161 (1977).

Between 1976 and 1981, Garrett directed an extensive marihuana importation and distribution operation involving off-loading, transporting, and storing boat loads of marihuana. These activities and related meetings and telephone calls occurred in several States, including Arkansas, Florida, Georgia, Louisiana, Massachusetts, Michigan, Texas, and Washington.

In March 1981, Garrett was charged in three substantive counts of an indictment in the Western District of Washington for his role in the off-loading and landing of approximately 12,000 pounds of marihuana from a "mother ship" at Neah Bay, Washington. He was named as a co-conspirator, but not indicted, in a fourth count charging conspiracy to import marihuana. Having learned that he was being inves-

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 12, 1985

Re: No. 83-1842 Garrett v. United States

Dear John,

Thank you for your "progress report" of April 10th. Perhaps by some strange form of Hegelian thesis, antithesis, and synthesis, we will yet make sense out of this rather odd case.

If your conclusion is to the effect that the Government in this case may prosecute the CCE, but may not rely on the Washington charges in proving it, I will probably revise pages 15 and 16 to make explicit what I think is now implicit: there is a third way that the government could have proceeded against Garrett -- your way -- but I do not think the principles of double jeopardy law require the Government to give up the use of the Washington charges in the Florida prosecution under the circumstances of this case.

I also disagree with your suggestion that there was no evidence in the record of any illegal activity between the date of the Washington indictment in March and the date of the Florida indictment on July 16, 1981. Garrett, as you point out, was arrested on July 23, 1981 -- one week after the Florida indictment was returned -- and at that time told the arresting officer that he had just bought the truck he had been driving for $13,000.00 in cash, used it for smuggling, and that he had a yacht in Hawaii which he had purchased for $160,000.00 in cash. I think it would take an extraordinarily sympathetic jury to conclude that all of this cash had been amassed during the previous six days, and none of it before July 16th.

Finally, again in order to make explicit what is perhaps only implicit now, I intend to add a sentence at the top of

the carryover paragraph running from page 17 to page 18 which would read as follows:

> "We think that this evidence not only permits but requires the conclusion that the CCE charged in Florida, alleged to have begun in January 1976, and continued up to mid-July 1981, was under Diaz a different offense from that charged in the Washington indictment."

Sincerely,

Justice Stevens

cc: The Conference

Stylistic &
pp. 13, 14, 16, 18-19

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: MAY 14 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1842

JONATHAN GARRETT, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1985]

JUSTICE REHNQUIST, delivered the opinion of the Court.

This case requires us to examine the double jeopardy implications of a prosecution for engaging in a "continuing criminal enterprise" (CCE), in violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U. S. C. § 848, when facts underlying a prior conviction are offered to prove one of three predicate offenses that must be shown to make out a CCE violation. Petitioner Jonathan Garrett contends that his prior conviction is a lesser included offense of the CCE charge, and, therefore, that the CCE prosecution is barred under *Brown* v. *Ohio*, 432 U. S. 161 (1977).

Between 1976 and 1981, Garrett directed an extensive marihuana importation and distribution operation involving off-loading, transporting, and storing boat loads of marihuana. These activities and related meetings and telephone calls occurred in several States, including Arkansas, Florida, Georgia, Louisiana, Massachusetts, Michigan, Texas, and Washington.

In March 1981, Garrett was charged in three substantive counts of an indictment in the Western District of Washington for his role in the off-loading and landing of approximately 12,000 pounds of marihuana from a "mother ship" at Neah Bay, Washington. He was named as a co-conspirator, but not indicted, in a fourth count charging conspiracy to import marihuana. Having learned that he was being inves-

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 23, 1985

Re: 83-1842 - Garrett v. United States

Dear Harry:

I of course will accede to your desire that the phrase "but that statement is not supported by a detailed examination of the legislative history" on page 20 of the circulating draft be deleted. I think we are bound to offer some explanation for our modest change of heart, and therefore suggest revising the last paragraph on pages 20-21 to read as follows:

> In Jeffers v. United States, 432 U.S., at 156-157, a plurality of this Court stated that §848 "reflects a comprehensive penalty structure that leaves little opportunity for pyramiding of penalties from other sections of the Comprehensive Drug Abuse Prevention and Control Act of 1970." The focus of the analysis in Jeffers was the permissibility of cumulative punishments for conspiracy under §846 and for CCE under §848, and the plurality reasonably concluded that the dangers posed by a conspiracy and a CCE were similar and thus there would be little purpose in cumulating the penalties. The same is not true of the substantive offenses created by the Act and conspiracy, and by the same logic, it is not true of the substantive offenses and CCE. We have been required in the present case, as we were not in Jeffers, to consider the relationship between substantive predicate offenses and a CCE. We think here logic supports the conclusion, also indicated by the legislative history, that Congress intended separate punishments for the underlying substantive predicates and for the CCE offense. Congress may, of course, so provide if it wishes.

OK

If you have any problems with this language, could you let me know how to change it to keep the idea and still accommodate your wishes?

Sincerely,

Justice Blackmun

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: MAY 29 1985

Rp 16, 20+21

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1842

JONATHAN GARRETT, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1985]

JUSTICE REHNQUIST, delivered the opinion of the Court.

This case requires us to examine the double jeopardy implications of a prosecution for engaging in a "continuing criminal enterprise" (CCE), in violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U. S. C. § 848, when facts underlying a prior conviction are offered to prove one of three predicate offenses that must be shown to make out a CCE violation. Petitioner Jonathan Garrett contends that his prior conviction is a lesser included offense of the CCE charge, and, therefore, that the CCE prosecution is barred under *Brown* v. *Ohio*, 432 U. S. 161 (1977).

Between 1976 and 1981, Garrett directed an extensive marihuana importation and distribution operation involving off-loading, transporting, and storing boat loads of marihuana. These activities and related meetings and telephone calls occurred in several States, including Arkansas, Florida, Georgia, Louisiana, Massachusetts, Michigan, Texas, and Washington.

In March 1981, Garrett was charged in three substantive counts of an indictment in the Western District of Washington for his role in the off-loading and landing of approximately 12,000 pounds of marihuana from a "mother ship" at Neah Bay, Washington. He was named as a co-conspirator, but not indicted, in a fourth count charging conspiracy to import marihuana. Having learned that he was being inves-

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 4, 1985

MEMORANDUM TO THE CONFERENCE

RE: No. 2067, Mourad v. United States

This case was held for No. 83-1842, Garrett v. United States.

Petitioner ran a multi-kilogram heroin smuggling operation. He was convicted of engaging in a continuing criminal enterprise under 21 U.S.C. §848, of several counts of conspiracy to import and conspiracy to distribute under 21 U.S.C. §§846 and 963, and of numerous substantive counts of importing, distributing, and traveling in interstate commerce and using interstate facilities to promote and facilitate drug offenses. The CA2 (Timbers, Van Graafeiland, Newman) affirmed all of the convictions, but vacated the sentences on the conspiracy counts under Jeffers v. United States, 432 U.S. 137 (1977). The CA2 read Jeffers' prohibition on cumulative sentences for conspiracy and CCE narrowly, holding that cumulative punishments for substantive offenses and for a CCE do not violate the Double Jeopardy Clause. The CA2 remanded for the DC to consider whether to increase petitioner's sentence on the CCE count in view of the vacation of the conspiracy sentences.

Petitioner argues that the plurality's reasoning in Jeffers applies equally to substantive as well as conspiracy offenses, and thus that punishment for substantive predicates of a CCE cannot be cumulative with the punishment for the CCE. We expressly held to the contrary in Garrett.

Petitioner also challenges the failure of the DC specifically to charge the jury that the three violations which it finds to make up the "continuing series of violations" required by §848 must be related to each other. The CA2 found it unnecessary even to address this claim, and in the absence of a conflict I see nothing certworthy to it.

I will vote to deny.

Sincerely,

WHR

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 22, 1985

Re: 83-1842 - Garrett v. United States

Dear Bill:

I will be happy to take on the dissent.

Respectfully,

JPS

Justice Brennan

cc: Justice Marshall

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 22, 1985

Re: 83-1842 - Garrett v. United States

Dear Bill:

In due course I shall circulate a dissent in this case.

Respectfully,

John

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 10, 1985

Re: 83-1842 - Garrett v. United States

Dear Bill:

You are entitled to a progress report from me, since I previously indicated that I would be writing in dissent. I postponed work on a draft because I was not sure of the theory that the Court would adopt, but I am now getting into the case. Although further study may require me to modify my present analysis, I expect to adopt the position stated by the Government at pages 13-14 of its brief, namely, that the CCE prosecution is not barred, but that petitioner is entitled to a jury instruction directing it not to rely on the Washington evidence as one of the predicate offenses.

Conceivably this approach may require you to modify your analysis because, as I read your draft, it assumes (at page 15) that a contrary result would have forced the Government either (1) to postpone the Washington indictment until July 1981; or (2) to return the CCE indictment in March of 1981. If, however, the error could have been corrected by a proper jury instruction, the timing of the two indictments is not a problem at all.

In that connection, I should also note what I believe to be a flaw in your analysis. You rely heavily (at page 17) on the admissions that petitioner made on July 23, 1981, when he was arrested, and on the fact that the indictment alleges that the CCE continued into July. The indictment, however, had been returned a week earlier and, as I understand the record, there is no evidence of any illegal activity between the date of the Washington indictment in March and the date of the Florida indictment. Indeed, if you compare the two indictments, you will note that the Florida indictment focuses on the period between December 1976 and October

1979 (in fact, 33 of the 34 overt acts listed at App. 58-62 occurred between December 1976 and August of 1979), whereas the Washington indictment focuses on the period between September 1979 and October 1980 (see App. 4-5). And, of course, the jury was not instructed that it had to find that the CCE continued until July 1981.

Given the record in this case, including the abundant evidence of guilt that focused on incidents in 1977, 1978, 1979, and 1980, I submit that your statement that we "cannot tell" (page 17) whether the jury would have returned the same verdict if the indictment had been returned in March 1981, instead of July 1981, is somewhat disingenuous.

In all events, I will get my thoughts on paper as promptly as I can.

Respectfully,

John

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 15, 1985

Re: 83-1842 - Garrett v. United States

Dear Bill:

Just two brief replies to the latest Hegelian antithesis.

First, I agree that the petitioner did not accumulate all that cash between July 16 and July 23; my point is that he might well have accumulated all of it prior to the Neah Bay transactions and therefore pursuant to the CCE activities that are described in the Florida indictment.

Second, I agree with you that the CCE offense that was charged in the Florida indictment is a different offense from that charged in the Washington indictment. The problem with the case is that the Government relied on the transaction that was the subject of the Washington indictment in its proof and the jury may well have considered that transaction one of the predicate offenses necessary to establish the CCE charge.

I'll spell this out more carefully in my dissenting opinion.

Respectfully,

Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: MAY 8 1985

Recirculated: _____

Please join me in your dissent

JPS

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1842

JONATHAN GARRETT, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1985]

JUSTICE STEVENS, dissenting.

While I agree with the Court that petitioner's conviction for importing 12,000 pounds of marihuana into Neah Bay, Washington on August 26, 1980, does not bar his prosecution for a continuing criminal enterprise that began in December 1976, and continued into October of 1979, I do not agree with the Court's analysis of the double-jeopardy implications of the first conviction or with its decision to affirm the judgment of the Court of Appeals. In my opinion, the separate indictment, conviction and sentencing for the Neah Bay transaction make it constitutionally impermissible to use that transaction as one of the predicate offenses needed to establish a continuing criminal enterprise in a subsequent prosecution under 21 U. S. C. § 848.

In order to explain my position, I shall first emphasize the difference between the Washington and the Florida proceedings and the limited extent of their overlap, then identify the relevant constraint that is imposed by the Double Jeopardy Clause, and finally note the flaw in the Court's analysis.

I

The Washington and Florida indictments ~~that~~ were returned within three months of each other; they focus on two sets of transactions that occurred in almost mutually exclusive time periods. The fact that the later Florida indictment

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: MAY 17 1985

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1, 8

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1842

JONATHAN GARRETT, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1985]

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

While I agree with the Court that petitioner's conviction for importing 12,000 pounds of marihuana into Neah Bay, Washington on August 26, 1980, does not bar his prosecution for a continuing criminal enterprise that began in December 1976, and continued into October of 1979, I do not agree with the Court's analysis of the double-jeopardy implications of the first conviction or with its decision to affirm the judgment of the Court of Appeals. In my opinion, the separate indictment, conviction and sentencing for the Neah Bay transaction make it constitutionally impermissible to use that transaction as one of the predicate offenses needed to establish a continuing criminal enterprise in a subsequent prosecution under 21 U. S. C. § 848.

In order to explain my position, I shall first emphasize the difference between the Washington and the Florida proceedings and the limited extent of their overlap, then identify the relevant constraint that is imposed by the Double Jeopardy Clause, and finally note the flaw in the Court's analysis.

I

The Washington and Florida indictments were returned within three months of each other; they focus on two sets of transactions that occurred in almost mutually exclusive time

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 7, 1985

No. 83-1842 Garrett v. United States

Dear Bill,

I have delayed responding to your circulation in this case until I could read and reflect on the double jeopardy analysis in our previous decisions. I agree with the conclusion in your draft that Congress intended the CCE to be a separate offense and not merely a sentence-enhancement provision with respect to the predicate offenses. I have some reservations, however, regarding your discussion of the constitutional limits imposed by the Double Jeopardy Clause on the power of Congress to authorize successive prosecutions based on the same underlying conduct. You note at pp. 15-16 that: "While it would clearly violate double jeopardy to prosecute and punish a defendant for a simple hat trick of drug offenses after prosecuting and punishing him for each of them separately, a continuing criminal enterprise is a great deal more than a hat trick." Your draft later acknowledges that the predicate offenses are "in theory and in fact ... lesser included incidents of the CCE," p. 17, but concludes that the predicate offenses and the CCE offense pose distinct threats to society warranting separate prosecution and punishment.

It seems to me that the concerns to prevent governmental overreaching that underlie the Double Jeopardy Clause, see, e.g., Ohio v. Johnson, No. 83-904 (June 11, 1984), slip op. at 8-9, impose some limits on the power of a legislature to authorize successive prosecutions even where there is legislative intent to create separate offenses for "distinct threats to society." I agree with your conclusion that the Double Jeopardy Clause generally should not bar prosecution on a compound-predicate offense such as a CCE following prosecution on one of the predicate offenses, and that it is desirable to distinguish offenses such as CCE and RICO from traditional substantive offenses. But it is necessary, I believe, to further explain why in this case double jeopardy does not prevent the Government from bringing two prosecutions when all of the facts necessary for the later prosecution were available earlier. Granted that a compound-predicate offense represents a distinct threat to society, I am hesitant to conclude from that fact that the government is totally unconstrained in bringing successive prosecutions.

The double jeopardy ban against reprosecution following a conviction, I believe, rests on two interests of the defendant: the interest in avoiding double punishment and the interest in finality. The first, as your opinion properly reflects, is a question of legislative intent. The Double Jeopardy Clause operates as a presumption against finding legislative intent of double punishment, which can be overcome by clear evidence to the contrary. The congressional intent with respect to the CCE offense is clearly to permit separate punishment for the predicate offenses and the substantive offense.

Our double jeopardy decisions have recognized that the defendant has a strong interest in finality. E.g., United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion); Green v. United States, 355 U.S. 184, 187-188 (1957). Nonetheless, the Court has in fact balanced that interest against the public interest in law enforcement and punishment of the guilty. For example, the Court has permitted retrial where a defendant obtains a reversal of a conviction on appeal on grounds other than insufficiency of the evidence. Tibbs v. Florida, 457 U.S. 31, 40-41 (1982); United States v. Ball, 163 U.S. 662 (1896). Similarly, where a mistrial is declared over the defendant's objection, double jeopardy does not bar reprosecution if the first trial was terminated because of "manifest necessity." Illinois v. Somerville, 410 U.S. 458 (1973). Even if mistrial is declared at the defendant's request in response to prosecutorial conduct that might be characterized as harrassment or overreaching, reprosecution is permitted unless the prosecutor intentionally "goaded" the defendant to move for mistrial. Oregon v. Kennedy, 456 U.S. 667 (1982).

In striking the balance in this context, the Court apparently has taken into account both the potential for government abuse and the availability of alternative measures to satisfy the public interest. See, e.g., Breed v. Jones, 421 U.S. 519 (1975); United States v. Wilson, 420 U.S. 332 (1975); Illinois v. Somerville, supra; Downum v. United States, 372 U.S. 734 (1963). Thus, however compelling the defendant's interest in finality, the Double Jeopardy Clause clearly has not been applied so as to guarantee in all instances only single prosecution for any given offense. As Justice Harlan noted in United States v. Jorn:

> "Certainly it is clear beyond question that the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense. Thus, for example, reprosecution for the same offense is permitted where the defendant wins a reversal on appeal of a conviction. United States v. Ball, 163 U.S. 662 (1896) . . . . The determination to allow reprosecution in these

> circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error." 400 U.S., at 483-484.

See also Oregon v. Kennedy, 456 U.S., at 672.

It is arguable that the balance tips in favor of allowing prosecution for CCE and RICO offenses after prosecution on a predicate offense because it is the defendant himself who engages in a continuing course of conduct that brings about the completed compound-predicate offense. This situation seems to me very much akin to the necessary facts exception to the Double Jeopardy Clause. Under that exception, the government is not prohibited from successive prosecutions where the defendant sets in motion a chain of events and the relevant facts change after the initial prosecution, e.g., the victim of an assault later dies from the wounds. Diaz v. United States, 223 U.S. 442, 449 (1912). In Diaz, reprosecution could only have been avoided by forcing the government to forego a timely prosecution for assault. The Court refused to find this result required by the Double Jeopardy Clause. I think similar reasoning would suggest that in CCE and RICO cases, the government generally should not be forced to forego prosecution for a predicate offense in order to wait and see whether the defendant later can be proved to have engaged in the other elements of the compound-predicate offense.

The difficulty in the present case is that the defendant, as the Government concedes, Brief of United States 44, had already engaged in all of the necessary CCE conduct by the time he was charged and prosecuted in Washington solely on one of the predicate offenses. Thus, to conclude here that double jeopardy does not bar subsequent prosecution on the CCE charges represents an extension of the principle acknowledged in Diaz. With respect to compound-predicate offenses, however, I believe that a proper balancing of the public interest in law enforcement and the defendant's interest in finality indicates that the government should not invariably be barred from bringing a subsequent prosecution where all the necessary facts existed at the time of the earlier prosecution, at least where those facts are not known by the government.

A compound-predicate offense such as CCE or RICO imposes criminal sanctions for a continuing course of conduct, and the offense can be made out by any of a number of predicate offenses. I do not think that double jeopardy requires the government to bring CCE charges, if at all, as soon as the minimal number of predicate offenses sufficient to warrant such charges fall into place. At the same time, where the government is aware of the elements necessary for a CCE, I am reluctant to conclude that double jeopardy allows it to choose deliberately to prosecute

first on one predicate offense and then to bring a subsequent prosecution on the CCE. Accordingly, where the essential elements for the CCE were in existence at the time of the earlier prosecution on the predicate offense, I am presently inclined to think that double jeopardy bars successive prosecution on the substantive CCE offense unless the government can show that it was unaware of the necessary facts or at least not in possession of sufficient evidence to justify a prosecution, and unable to have such evidence in the exercise of due diligence. Cf. Brown v. Ohio, 432 U.S. 161, 169, n. 7 (1977). Such an approach would accommodate both the defendant's interest in finality and the law enforcement concerns underlying statutory offenses such as CCE and RICO. In this case, the record apparently leaves unclear why the government delayed bringing the CCE charges, and remand would therefore be necessary.

Whether or not you agree with these comments, I hope that your opinion will explicitly address whether, apart from the intent of Congress and the fact that the CCE represents a distinct threat to society, double jeopardy limits the power of the government to bring a subsequent CCE prosecution that could have been brought at the time of an earlier prosecution on a predicate offense. For example, would the defendant have a double jeopardy claim if he could show this action was taken in bad faith or that no valid reason existed for the failure to bring all the charges at once? These circumstances touch upon concerns which we have previously identified as at the core of the Double Jeopardy Clause, see Tibbs v. Florida, 457 U.S., at 41, to prohibit a second trial merely to afford the prosecution an opportunity to hone its trial strategy or to supply evidence it failed to muster in the first proceeding.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 12, 1985

No. 83-1842 Garrett v. United States

Dear Bill,

Thank you for your thoughtful response to my letter of March 7. You observe that we have never previously invalidated a statute on double jeopardy grounds. My comments, however, should not be understood to suggest that I think statutes such as CCE or RICO are generally invalid. The reservations that I have concerning double jeopardy rest on the application of the CCE to the circumstances of this case, i.e., successive prosecution for the CCE after prosecution on a predicate offense when all charges conceivably could have been brought in the earlier prosecution.

I continue to believe that our cases support an approach that balances the defendant's interests in finality against the public interest in law enforcement. Your letter appears to agree with this proposition, inasmuch as you indicate that the government may be required to accept a stipulation as to a prior conviction and may be precluded from relying on a prior acquittal. At present, I am not certain what the precise balance should be in this context. I agree that inquiry into what the government knew or should have known is troublesome, and perhaps such an inquiry should be rejected in favor of a more easily administrable approach. I am not yet completely at rest on this and I look forward to reading further writing on this difficult issue.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 21, 1985

No. 83-1842 Garrett v. United States

Dear Bill,

Please join me in your opinion and I enclose a draft of a separate concurrence.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: Apr 21

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1842

JONATHAN GARRETT, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1985]

JUSTICE O'CONNOR, concurring.

I agree that, on the facts of this case, the Double Jeopardy Clause does not bar prosecution and sentencing under 21 U. S. C. §848 for engaging in a continuing criminal enterprise even though Garrett pleaded guilty to one of the predicate offenses in an earlier prosecution. This conclusion is admittedly in tension with certain language in prior opinions of the Court. *E. g., Brown* v. *Ohio*, 432 U. S. 161, 166 (1977). I write separately to explain why I believe that today's holding comports with the fundamental purpose of the Double Jeopardy Clause and with the method of analysis used in our more recent decisions.

The Double Jeopardy Clause declares: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U. S. Const., Amdt. 5. This constitutional proscription serves primarily to preserve the finality of judgments in criminal prosecutions and to protect the defendant from prosecutorial overreaching. See, *e. g.*, *Ohio* v. *Johnson*, —— U. S. ——, —— (1984) (slip op. 5); *United States* v. *DiFrancesco*, 449 U. S. 117, 128, 136 (1981). In *Green* v. *United States*, 355 U. S. 184 (1957), the Court explained:

> "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

p. 3

Stylistic Changes Throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: MAY 24

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1842

JONATHAN GARRETT, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1985]

JUSTICE O'CONNOR, concurring.

I agree that, on the facts of this case, the Double Jeopardy Clause does not bar prosecution and sentencing under 21 U. S. C. §848 for engaging in a continuing criminal enterprise even though Garrett pleaded guilty to one of the predicate offenses in an earlier prosecution. This conclusion is admittedly in tension with certain language in prior opinions of the Court. *E. g., Brown* v. *Ohio*, 432 U. S. 161, 166 (1977). I write separately to explain why I believe that today's holding comports with the fundamental purpose of the Double Jeopardy Clause and with the method of analysis used in our more recent decisions.

The Double Jeopardy Clause declares: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U. S. Const., Amdt. 5. This constitutional proscription serves primarily to preserve the finality of judgments in criminal prosecutions and to protect the defendant from prosecutorial overreaching. See, *e. g.*, *Ohio* v. *Johnson*, 467 U. S. ——, —— (1984) (slip op. 5); *United States* v. *DiFrancesco*, 449 U. S. 117, 128, 136 (1980). In *Green* v. *United States*, 355 U. S. 184 (1957), the Court explained:

> "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