APPENDICES

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116SCT1241, 134 LED2D 419, 517 US 292 RUTLEDGE v UNITED STATES

TOMMY L. RUTLEDGE, Petitioner

vs.

UNITED STATES

517 US 292, 134 L Ed 2d 419, 116 S Ct 1241

[No. 94-8769]

Argued November 27, 1995.

Decided March 27, 1996.

DECISION

Concurrent life sentences imposed for 21 USCS § 846 conspiracy offense and 21 USCS § 848 continuing criminal enterprise offense held to be cumulative punishment unauthorized by Congress.

SUMMARY

A person who organized and supervised a criminal enterprise that distributed cocaine was charged with several offenses, including (1) conducting a continuing criminal enterprise (CCE) in violation of 21 USCS § 848; and (2) participating in a conspiracy to distribute controlled substances in violation of 21 USCS § 846. The CCE count alleged that the person's actions were undertaken "in concert" with at least five other persons whom the person supervised. The conspiracy count alleged that the person conspired with four codefendants and others to engage in the unlawful distribution of cocaine. After a Federal District Court trial, the District Court entered a judgment of conviction on both the CCE count and the conspiracy count and imposed a sentence of life imprisonment without possible release on each count, the sentences to be served concurrently. Pursuant to 18 USCS § 3013, the person was also ordered to pay a special assessment of $50 on each count. The United States Court of Appeals for the Seventh Circuit, in affirming on appeal, expressed the view that (1) while the conspiracy charge was a lesser included

offense of the CCE charge, convictions and concurrent sentences could properly be imposed for conspiracy and CCE, provided that the cumulative punishment did not exceed the maximum under the CCE provision; and (2) the District Court, in imposing concurrent life sentences, had not imposed a cumulative penalty and thus had not violated the double jeopardy clause of the Federal Constitution's Fifth Amendment (40 F.3d 879).

On certiorari, the United States Supreme Court reversed the Court of Appeals' judgment and remanded the case for further proceedings. In an opinion by Stevens, J., expressing the unanimous view of the court, it was held that (1) the § 846 conspiracy was a lesser included offense of the § 848 CCE offense; <*pg. 420> (2) the second $50 assessment imposed by the District Court was an adverse collateral consequence of the second conviction; (3) the Supreme Court would adhere to the presumption that Congress intended to authorize only one punishment for a person who committed both a § 846 conspiracy offense and a § 848 CCE offense; and (4) one of the convictions, as well as that conviction's concurrent sentence, was thus cumulative punishment unauthorized by Congress and had to be vacated.

RESEARCH REFERENCES

21 Am Jur 2d, Criminal Law §§ 551, 552; 25 Am Jur 2d, Drugs and Controlled Substances §§ 140, 191, 192

8 Federal Procedure, L Ed, Criminal Procedure §§ 22:361, 22:372

8 Am Jur Trials 573, Defense of Narcotics Cases; 20 Am Jur Trials 351, Handling the Defense in a Conspiracy Prosecution; 44 Am Jur Trials 459, Representing Criminal Defendants at Sentencing Hearings

18 USCS § 3013; 21 USCS §§ 846, 848

L Ed Digest, Criminal Law § 85

L Ed Index, Comprehensive Drug Abuse Prevention and Control Act; Concurrent or Consecutive Sentences; Drugs and Narcotics; Lesser and Included Offenses

ALR Index, Comprehensive Drug Abuse Prevention and Control Act; Concurrent and Consecutive Sentences; Conspiracy; Continuing Offenses; Lesser Included Offenses; Sentence and Punishment

ANNOTATION REFERENCES

Propriety of lesser-included-offense charge in federal prosecution of narcotics defendant. 106

ALR Fed 236.

When may offender found guilty of multiple crimes under Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS §§ 841-851) be punished for only one offense. 80 ALR Fed 794.

Binding effect upon state courts of opinion of United States Supreme Court supported by less than a majority of all its members. 65 ALR3d 504.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Criminal Law § 85 - cumulative punishments - conspiracy - continuing criminal enterprise

1a, 1b, 1c. With respect to a person who organized and supervised a criminal enterprise that distributed cocaine and who was convicted of participating in a conspiracy to distribute controlled substances in violation of 21 USCS § 846 and of conducting a continuing criminal enterprise (CCE) in violation of 21 USCS § 848, one of the convictions, as well as that conviction's concurrent sentence, is cumulative punishment unauthorized by Congress and must be vacated, where (1) the "in concert" element of the CCE offense-that is, the allegation that person's actions were undertaken in concert with at least five other persons whom the person supervised-was based on the same agreement as the § 846 conspiracy; (2) sentences of life imprisonment without possible release were imposed on each count, the sentences to be served concurrently; (3) the person was ordered to pay a special assessment of $50 on each count, as required by 18 USCS § 3013; and (4) the second assessment was an adverse collateral consequence of the second conviction.

Criminal Law § 73 - punishment

2. Courts may not prescribe greater punishment than the legislature intended.

Criminal Law § 85 - cumulative punishments

3. In accord with principles rooted in common law and federal constitutional jurisprudence, the United States Supreme Court will presume that where two statutory provisions proscribe the same offense, a legislature does not intend to impose two punishments for that offense.

Criminal Law § 7 - separate offenses

4. If the same act or transaction constitutes a violation of two distinct statutory provisions, then the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.

Criminal Law § 7 - included offenses - conspiracy - continuing criminal enterprise

5a, 5b. With respect to the offense of conducting a continuing criminal enterprise (CCE) in violation of 21 USCS § 848, the "in concert" element of the CCE offense-under which a person is engaged in a CCE if the person undertakes a continuing series of violations in concert with five or more other persons with respect to whom the person occupies a position of organizer, a supervisory position, or any other position of management-requires proof of a conspiracy that would also violate 21 USCS § 846; conspiracy as defined in § 846 <*pg. 421> does not define a different offense from the CCE offense, as § 846 does not require proof of any fact that is not also a part of the CCE offense; a § 846 conspiracy is a lesser included offense of the CCE offense, because (1) the CCE offense is the more serious of the two, (2) only one of the CCE offense's elements is necessary to prove a § 846 conspiracy, and (3) a guilty verdict on a CCE offense charge necessarily includes a finding that the defendant also participated in a § 846 conspiracy.

Criminal Law § 69 - punishment

6. Under 18 USCS § 3013, which requires a Federal District Court to impose a $50 special assessment for every conviction of a federal offense, a second conviction amounts to a second punishment.

Courts § 772 - divided court

7. An unexplained affirmance by an equally divided United States Supreme Court is a judgment not entitled to precedential weight, no matter what reasoning may have supported the judgment.

Criminal Law § 85 - cumulative punishments

8a, 8b, 8c, 8d. The United States Supreme Court will adhere to the presumption that Congress intended to authorize only one punishment for a person who commits both a conspiracy offense as defined in 21 USCS § 846 and the offense of conducting a continuing criminal enterprise (CCE) in violation of 21 USCS § 848, because (1) every proof of a CCE demonstrates a conspiracy based on the same facts; (2) such an overlap is enough to conclude, absent more, that Congress did not intend to allow punishments for both offenses; (3) the fact that §§ 846 and 848 are different sections of the United States Code does not rise to the level of the clear statement necessary to conclude that despite the identity of the statutory elements, Congress intended to allow multiple punishments for persons who violate both § 846 and § 848; (4) the proximity of §§ 846 and 848 indicates that Congress understood those provisions to be directed to similar, rather than separate, evils; and (5) it is unpersuasive to argue that Congress must have intended to allow multiple convictions in order to provide a "back up" conviction, to prevent a

defendant who later successfully challenges the greater offense from escaping punishment altogether.<*pg. 422>

SYLLABUS

A jury found petitioner guilty of one count of participating in a conspiracy to distribute controlled substances in violation of 21 USC § 846 [21 USCS § 846] and one count of conducting a continuing criminal enterprise (CCE) "in concert" with others in violation of § 848. The "in concert" element of his CCE offense was based on the same agreement as the § 846 conspiracy. The District Court entered judgment of conviction on both counts and imposed a sentence of life imprisonment without possible release on each, the sentences to be served concurrently. Pursuant to 18 USC § 3013 [18 USCS § 3013], it also ordered petitioner to pay a special assessment of $50 on each count. The Seventh Circuit affirmed, relying on Jeffers v United States, 432 US 137, 53 L Ed 2d 168, 97 S Ct 2207, to reject petitioner's contention that his convictions and concurrent life sentences impermissibly punished him twice for the same offense.

Held:

The District Court erred in sentencing petitioner to concurrent life sentences on the § 846 and § 848 counts.

(a) It is presumed that a legislature does not intend to impose two punishments where two statutory provisions proscribe the "same offense." The test for determining whether there are two offenses is whether each of the statutory provisions requires proof of a fact which the other does not. Blockburger v United States, 284 US 299, 304, 76 L Ed 306, 52 S Ct 180. This Court has often concluded <*pg. 423> that two statutes define the "same offense" where one is a lesser included offense of the other. For the reasons set forth in Jeffers, 432 US, at 149-150, 53 L Ed 2d 168, 97 S Ct 2207 (plurality opinion); id., at 158, 159, n. 5, 53 L Ed 2d 168, 97 S Ct 2207 (dissenting opinion), and particularly because the plain meaning of § 848's "in concert" phrase signifies mutual agreement in a common plan or enterprise, the Court now resolves definitively that a guilty verdict on a § 848 charge necessarily includes a finding that the defendant also participated in a conspiracy violative of § 846. Conspiracy is therefore a lesser included offense of CCE.

(b) The Court rejects the Government's contention that the presumption against multiple punishments does not invalidate either of petitioner's convictions because the sentence on the second one was concurrent. That conviction amounts to a second punishment because a $50 special assessment was imposed on it. Cf. Ray v United States, 481 US 736, 95 L Ed 2d 693,

107 S Ct 2093 (1987) (per curiam). Even if the assessment were ignored, the force of the Government's argument would be limited by Ball v United States, 470 US 856, 861-865, 84 L Ed 2d 740, 105 S Ct 1668, in which the Court concluded that Congress did not intend to allow punishment for both illegally "receiving" and illegally "possessing" a firearm; held that the only remedy consistent with the congressional intent was to vacate one of the underlying convictions as well as the concurrent sentence based upon it; and explained that the second conviction does not evaporate simply because of its sentence's concurrence, since it has potential adverse collateral consequences-e.g., delay of parole eligibility or an increased sentence under a recidivist statute for a future offense-that make it presumptively impermissible to impose. Although petitioner did not challenge the $50 assessment below, the fact that § 3013 required its imposition renders it as much a collateral consequence of the conspiracy conviction as the consequences recognized by Ball.

(c) Also rejected is the Government's argument that the presumption against multiple punishments is overcome here because Congress has clearly indicated its intent to allow courts to impose them. Support for that view cannot be inferred from the fact that this Court's Jeffers judgment allowed convictions under both §§ 846 and 848 to stand, since those convictions were entered in separate trials, the Court's review addressed only the § 848 conviction, and that conviction was affirmed because the four-Justice plurality decided that Jeffers had waived any right to object, see 432 US, at 152-154, 53 L Ed 2d 168, 97 S Ct 2207, and because Justice White took the hereinbefore-rejected position that conspiracy was not a lesser included offense of CCE, see id., at 158, 53 L Ed 2d 168, 97 S Ct 2207 (opinion concurring in judgment in part and dissenting in part). As to this issue, then, the judgment is not entitled to precedential weight because it amounts at best to an unexplained affirmance by an equally divided court.

(d) The Government's argument that Congress intended to allow multiple convictions here to provide a "backup" conviction, preventing a defendant who later successfully challenges his greater offense from escaping punishment altogether, is unpersuasive. There is no reason why this particular pair of greater and lesser offenses should present any novel problem not already addressed by the federal appellate courts, which <*pg. 424> have uniformly concluded-with this Court's approval, see, e.g., Morris v Mathews, 475 US 237, 246-247, 89 L Ed 2d 187, 106 S Ct 1032-that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds affecting only the greater offense.

(e) Because the Court here adheres to the presumption that Congress intended to authorize only one punishment, one of petitioner's convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense and must be vacated under Ball, 470 US, at 864, 84 L Ed 2d

740, 105 S Ct 1668.

40 F.3d 879, reversed and remanded.

Stevens, J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL ARGUING CASE

Barry Levenstam argued the cause for petitioner.

James A. Feldman argued the cause for respondent.

Summaries of Briefs; Names of Participating Attorneys, p 1075, infra.

OPINION

[517 US 294]

Justice *Stevens* delivered the opinion of the Court.

[1a] A jury found petitioner guilty of participating in a conspiracy to distribute controlled substances in violation of 84 Stat. 1265, as amended, 21 USC § 846 [21 USCS § 846], and of conducting a continuing criminal enterprise (CCE) in violation of § 848. The "in concert" element of his CCE offense was based on the same agreement as the § 846 conspiracy. The question presented is whether it was therefore improper for the District Court to sentence him to concurrent life sentences on the two counts.

I

Petitioner organized and supervised a criminal enterprise that distributed cocaine in Warren County, Illinois, from 1988 until December 1990, when he was arrested by federal agents. He was charged with several offenses, of which only Count One, the CCE charge, and Count Two, the conspiracy charge, are relevant to the issue before us.

Count One alleged that during the period between early 1988 and late 1990, petitioner violated § 848[1] by engaging in

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a CCE that consisted of a series of unlawful acts involving the distribution of cocaine.[2] The count alleged that these actions were undertaken "in concert with at least five (5) other persons," that petitioner supervised those other persons, and that he obtained substantial income from the continuing series of violations. App. 2-3.

Count Two separately alleged that <*pg. 425> during the same period, petitioner violated 21 USC § 846 [21 USCS § 846][3] by conspiring with four codefendants and others to engage in the unlawful distribution of cocaine. The count alleged that each of the conspirators had furthered the conspiracy by performing an overt act involving the delivery, purchase, or distribution of cocaine. App. 3-5.

After a 9-day trial, a jury found petitioner guilty on all counts. The trial court entered judgment of conviction on both Count One and Count Two and imposed a sentence of life imprisonment without possible release on each count, the sentences to be served concurrently. Id., at 8-10. Pursuant to 18 USC § 3013 [18 USCS § 3013], petitioner was also ordered to pay a special assessment of $50 on each count.

[517 US 296]

On appeal, petitioner contended in a pro se supplemental brief that even though the life sentences were concurrent, entering both convictions and sentences impermissibly punished him twice for the same offense. The Court of Appeals for the Seventh Circuit accepted the premise of his argument, namely, that the conspiracy charge was a lesser included offense of the CCE charge. 40 F.3d 879, 886 (1994). The Court of Appeals nonetheless affirmed his convictions and sentences. Relying on its earlier decision in United States v Bond, 847 F.2d 1233, 1238 (1988), and our decision in Jeffers v United States, 432 US 137, 53 L Ed 2d 168, 97 S Ct 2207 (1977), it held that convictions and concurrent sentences may be imposed for conspiracy and CCE, "provided the cumulative punishment does not exceed the maximum under the CCE act." 40 F.3d, at 886.

The decision of the Seventh Circuit is at odds with the practice of other Circuits. Most federal courts that have confronted the question hold that only one judgment should be entered when a defendant is found guilty on both a CCE count and a conspiracy count based on the same agreements.[4] The Second and Third Circuits have adopted an intermediate position, allowing judgment to be entered on both counts but permitting only one sentence rather than the concurrent sentences

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allowed in the Seventh Circuit.[5] We granted certiorari to resolve the conflict. 515 US 1157, 132 L Ed 2d 852, 115 S Ct 2608 (1995).

II

[2][3] Courts may not "prescrib[e] greater punishment than the legislature <*pg. 426> intended." Missouri v Hunter, 459 US 359, 366, 74 L Ed 2d 535, 103 S Ct 673 (1983); Brown v Ohio, 432 US 161, 165, 53 L Ed 2d 187, 97 S Ct 2221 (1977). In accord with principles rooted in common law and constitutional jurisprudence, see Ex parte Lange, 18 Wall 163, 168-170, 21 L Ed 872 (1874), we presume that "where two statutory provisions proscribe the 'same offense,' " a legislature does not intend to impose two punishments for that offense. Whalen v United States, 445 US 684, 691-692, 63 L Ed 2d 715, 100 S Ct 1432 (1980); Ball v United States, 470 US 856, 861, 84 L Ed 2d 740, 105 S Ct 1668 (1985).

[4] For over half a century we have determined whether a defendant has been punished twice for the "same offense" by applying the rule set forth in Blockburger v United States, 284 US 299, 304, 76 L Ed 306, 52 S Ct 180 (1932). If "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Ibid. In subsequent applications of the test, we have often concluded that two different statutes define the "same offense," typically because one is a lesser included offense of the other.[6]

[517 US 298]

In this case it is perfectly clear that the CCE offense requires proof of a number of elements that need not be established in a conspiracy case.[7] The Blockburger test requires us to consider whether the converse is also true-whether the § 846 conspiracy offense requires proof of any element that is not a part of the CCE offense. That question could be answered affirmatively only by assuming that while the § 846 conspiracy requires proof of an actual agreement among the parties, the "in concert" element of the CCE offense might be satisfied by something less.

The Government advanced this precise argument in Jeffers v United States, 432 US 137, 53 L Ed 2d 168, 97 S Ct 2207 (1977),[8] but it managed to persuade only one Justice. Id., at 158, 53 L Ed2d 168, 97 S Ct 2207 <*pg. 427> (White, J., concurring). The position was rejected, to varying degrees, by the

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other eight. The four dissenters adopted, without comment, the proposition that conspiracy was a lesser included offense of CCE. See id., at 158, 159, n. 5, 53 L Ed 2d 168, 97 S Ct 2207. The remaining Justices joined Justice Blackmun's plurality opinion which, while declining to hold that conspiracy was a lesser included offense,[9] nonetheless explained why the Government's argument was inconsistent with the statute's text, with the way the words "in concert" have been used in other statutes, and with the legislative history of this statute.[10] Based on its understanding of the "more likely" interpretation of § 848, the plurality assumed, arguendo, "that § 848 does require proof of

[517 US 300]

an agreement among the persons involved in the continuing criminal enterprise. So construed, § 846 is a lesser included offense of § 848, because § 848 requires proof of every fact necessary to show a violation under § 846 as well as proof of several additional elements." Id., at 149-150, 53 L Ed 2d 168, 97 S Ct 2207.

[5a] In the years since Jeffers was decided, the Courts of Appeals have also consistently rejected the Government's interpretation of the "in concert" language of § 848; they have concluded, without exception, that conspiracy is a lesser included offense of CCE.[11] We think it is appropriate now to resolve the point definitively: For the reasons set forth<*pg. 428> in Jeffers, and particularly because the plain meaning of the phrase "in concert" signifies mutual agreement in a common plan or enterprise, we hold that this element of the CCE offense requires proof of a conspiracy that would also violate § 846. Because § 846 does not require proof of any fact that is not also a part of the CCE offense, a straightforward application of the Blockburger test leads to the conclusion that conspiracy as defined in § 846 does not define a different offense from the CCE offense defined in § 848. Furthermore, since the latter offense is the more serious of the two, and because only one of its elements is necessary to prove a § 846 conspiracy, it is appropriate to characterize § 846 as a lesser included offense of § 848.[12]

[517 US 301]

III

The Government contends that even if conspiracy is a lesser included offense of CCE, the resulting presumption against multiple punishments does not invalidate either of petitioner's convictions. The second conviction, the Government first argues, may not amount to a

punishment at all.

[6] We begin by noting that 18 USC § 3013 [18 USCS § 3013] requires a federal district court to impose a $50 special assessment for every conviction, and that such an assessment was imposed on both convictions in this case. As long as § 3013 stands, a second conviction will amount to a second punishment. Cf. Ray v United States, 481 US 736, 737, 95 L Ed 2d 693, 107 S Ct 2093 (1987) (per curiam) (presence of $50 assessment precludes application of "concurrent sentence doctrine"). The Government urges us not to rely on the assessment, however, pointing out that petitioner did not challenge it below, and noting that the question presented "presupposes" fully concurrent sentences. Brief for United States 7, n. 1.

If we ignore the assessment as the Government requests, the force of its argument would nonetheless be limited by our decision in Ball v United States, 470 US 856, 84 L Ed 2d 740, 105 S Ct 1668 (1985). There, we concluded that Congress did not intend to allow punishment for both illegally "receiving" and illegally "possessing" a firearm. Id., at 861-864, 84 L Ed 2d 740, 105 S Ct 1668. In light of that conclusion, we held that "the only remedy consistent with the congressional

[517 US 302]

intent is for the District Court . . . to exercise its discretion to vacate one of the underlying convictions" as well as the concurrent <*pg. 429> sentence based upon it. Id., at 864, 84 L Ed 2d 740, 105 S Ct 1668. We explained further:

"The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. See Benton v Maryland, 395 US 784, 790-791 [23 L Ed 2d 707, 89 S Ct 2056] (1969); Sibron v New York, 392 US 40, 54-56 [20 L Ed 2d 917, 88 S Ct 1889] (1968). Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment." Id., at 864-865, 84 L Ed 2d 740, 105 S Ct 1668.

Under Ball, the collateral consequences of a second conviction make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence.

[1b] The Government suggests, however, that petitioner will never be exposed to collateral consequences like those described in Ball because he is subject to multiple life sentences without

possibility of release. We need not conclusively resolve the matter, for there is no doubt that the second conviction carried with it, at very least, a $50 assessment. Although petitioner did not challenge the assessment below, 18 USC § 3013 [18 USCS § 3013] required the District Court to impose it, and the assessment was therefore as much a collateral consequence of the conspiracy conviction as the consequences

[517 US 303]

recognized by Ball would be. As a result, the conviction amounts to cumulative punishment not authorized by Congress.

IV

The Government further argues that even if the second conviction amounts to punishment, the presumption against allowing multiple punishments for the same crime may be overcome if Congress clearly indicates that it intended to allow courts to impose them. Hunter, 459 US, at 366, 74 L Ed 2d 535, 103 S Ct 673 (citing Whalen, 445 US, at 691-692, 63 L Ed 2d 715, 100 S Ct 1432); Garrett v United States, 471 US 773, 779, 85 L Ed 2d 764, 105 S Ct 2407 (1985) (allowing multiple punishment in light of Congress' "plainly expressed" view). The Government submits that such clear intent can be found here.

The Government finds support for its position in this Court's judgment in Jeffers because that judgment allowed convictions under both §§ 846 and 848 to stand. Those convictions, however, had been entered in separate trials and our review only addressed the conviction under § 848. The Court affirmed that conviction not because anyone on the Court suggested that Congress had intended to authorize dual convictions for the same offense,[13] but rather because the four-Justice plurality decided that <*pg. 430> Jeffers had waived any right to object to Jeffers' prosecution for that conviction, see Jeffers, 432 US, at 152-154, 53 L Ed 2d 168, 97 S Ct 2207, and because Justice White believed that the two prosecutions were for different offenses.

[7][8a] The sole ground for Justice White's critical fifth vote to affirm the judgment was his belief, set forth in a single short paragraph, that conspiracy was not a lesser included offense

[517 US 304]

of CCE. Id., at 158, 53 L Ed 2d 168, 97 S Ct 2207 (opinion concurring in judgment in part and dissenting in part). In Part II of this opinion we have rejected that view. Accordingly, even if we could infer that the plurality had silently reached the rather bizarre conclusion that Congress intended to allow dual convictions but to preclude other multiple punishments, only four Justices would have supported it, with four others explicitly disagreeing. As to this issue, then, the

judgment amounts at best to nothing more than an unexplained affirmance by an equally divided court-a judgment not entitled to precedential weight no matter what reasoning may have supported it. See Neil v Biggers, 409 US 188, 192, 34 L Ed 2d 401, 93 S Ct 375 (1972). The more important message conveyed by Jeffers is found not in the bare judgment, but in the plurality's conclusion, joined by the four dissenters, that CCE and conspiracy are insufficiently distinct to justify a finding that Congress intended to allow punishments for both when they rest on the same activity.[14]

[517 US 305]

V

[8c] Finally, the Government argues that Congress must have intended to allow multiple convictions because doing so would provide a "backup" conviction, preventing a defendant who later successfully challenges his greater offense from escaping punishment altogether-even if the basis for the reversal does not affect his conviction under the lesser. Brief for United States 20-22. We find the argument unpersuasive, for there is no reason why this pair of greater and lesser offenses should <***pg. 431***> present any novel problem beyond that posed by any other greater and lesser included offenses, for which the courts have already developed rules to avoid the perceived danger.

In Tinder v United States, 345 US 565, 570, 97 L Ed 1250, 73 S Ct 911 (1953), the defendant had been convicted of theft from a mailbox and improperly sentenced to prison for more than one year even though the evidence only supported a misdemeanor conviction. Exercising our "power to do justice as the case requires" pursuant to 28 USC § 2106 [28 USCS § 2106], we ordered the District Court to correct the sentence without vacating the underlying conviction. Relying on Tinder and the practice in "state courts, including courts governed by statutes virtually the same as Section 2106," the Court of Appeals for the District of Columbia Circuit later decided that its "power to modify erroneous judgments authorizes reduction to a lesser included offense where the evidence is insufficient to support an element of the [greater] offense stated in the verdict." Austin v United States, 382 F.2d 129, 140, 141-143 (1967).[15]

[517 US 306]

Consistent with the views expressed by the District of Columbia Circuit, federal appellate courts appear to have uniformly concluded that they may direct the entry of judgment for a lesser

included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense. See 8A J. Moore, Federal Practice ¶ 31.03[5], and n. 54 (2d ed. 1995); United States v Ward, 37 F.3d 243, 251 (CA6 1994) (after finding insufficient evidence to support CCE count, Court of Appeals vacated CCE conviction and sentence and remanded for entry of conspiracy conviction, which District Court had previously vacated as lesser included offense of CCE), cert. denied, 514 US 1030, 131 L Ed 2d 240, 115 S Ct 1388 (1995); United States v Silvers, 888 F. Supp. 1289, 1306-1309 (ND Md. 1995) (reinstating conspiracy conviction previously vacated after granting motion for new trial on CCE conviction). This Court has noted the use of such a practice with approval. Morris v Mathews, 475 US 237, 246-247, 89 L Ed 2d 187, 106 S Ct 1032 (1986) (approving process of reducing erroneous greater offense to lesser included offense as long as the defendant is not able to demonstrate that "but for the improper inclusion of the [erroneous] charge, the result of the proceeding probably would have been different"). See also Jones v Thomas, 491 US 376, 384-385, n. 3, 105 L Ed 2d 322, 109 S Ct 2522 (1989) (citing Morris).

There is no need for us now to consider the precise limits on the appellate courts' power to substitute a conviction on a lesser offense for an erroneous conviction of a greater offense.[16] We need only note that the concern motivating the Government in asking us to endorse either the Seventh Circuit's practice of entering concurrent sentences on CCE and <*pg. 432> conspiracy counts, or the Second Circuit's practice of entering

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concurrent judgments, is no different from the problem that arises whenever a defendant is tried for greater and lesser offenses in the same proceeding. In such instances, neither legislatures nor courts have found it necessary to impose multiple convictions, and we see no reason why Congress, faced with the same problem, would consider it necessary to deviate from the traditional rule.[17]

VI

[1c][5b][8d] A guilty verdict on a § 848 charge necessarily includes a finding that the defendant also participated in a conspiracy violative of § 846; conspiracy is therefore a lesser included offense of CCE. Because the Government's arguments have not persuaded us otherwise, we adhere to the presumption that Congress intended to authorize only one punishment. Accordingly, "[o]ne of [petitioner's] convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense" and must be vacated. Ball, 470 US, at 864, 84 L Ed 2d 740, 105 S Ct 1668.

The judgment of the Court of Appeals is reversed, and the case is remanded for further

proceedings consistent with this opinion.

It is so ordered.

FOOTNOTES

[1] Section 848(c) provides:

"(c) '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 a 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." 21 USC § 848(c) [21 USCS § 848(c)].

[2] The alleged unlawful acts included a series of cocaine transactions in violation of § 841(a) and the same conspiracy in violation of § 846 that was charged in Count Two.

[3] "§ 846. Attempt and conspiracy

"Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 USC § 846 [21 USCS § 846].

[4] See, e.g., United States v Rivera-Martinez, 931 F.2d 148, 153 (CA1), cert. denied, 502 US 862, 116 L Ed 2d 145, 112 S Ct 184 (1991); United States v Butler, 885 F.2d 195, 202 (CA4 1989); United States v Neal, 27 F.3d 1035, 1054 (CA5 1994), cert. denied, 513 US 1179, 130 L Ed 2d 1120, 115 S Ct 1165 (1995); United States v Paulino, 935 F.2d 739, 751 (CA6 1991), cert. denied, 502 US 1036, 116 L Ed 2d 787, 112 S Ct 883 (1992); United States v Possick, 849 F.2d 332, 341 (CA8 1988); United States v Hernandez-Escarsega, 886 F.2d 1560, 1582 (CA9 1989), cert. denied, 497 US 1003, 111 L Ed 2d 748, 110 S Ct 3237 (1990); United States v Stallings, 810 F.2d 973, 976 (CA10 1989); United States v Cruz, 805 F.2d 1464, 1479 (CA11 1986), cert. denied, 481 US 1006, 95 L Ed 2d 204, 107 S Ct 1631 (1987); United States v Anderson, 39 F.3d 331, 357 (CADC 1994), rev'd on other grounds, 59 F.3d 1323 (CADC 1995) (en banc).

[5] United States v Aiello, 771 F.2d 621, 634 (CA2 1985); United States v Fernandez, 916 F.2d 125, 128-129 (CA3 1990), cert. denied, 500 US 948, 114 L Ed 2d 490, 111 S Ct 2249 (1991).

6 See, e.g., Ball v United States, 470 US 856, 861-864, 84 L Ed 2d 740, 105 S Ct 1668 (1985) (concluding that multiple prosecutions were barred because statutes directed at "receipt" and "possession" of a firearm amounted to the "same offense," in that proof of receipt "necessarily" included proof of possession); Whalen v United States, 445 US 684, 691-695, 63 L Ed 2d 715, 100 S Ct 1432 (1980) (concluding that two punishments could not be imposed because rape and felony murder predicated on the rape were the "same offense"); Brown v Ohio, 432 US 161, 167-168, 53 L Ed 2d 187, 97 S Ct 2221 (1977) (in multiple proceedings context, applying Blockburger v United States, 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), to confirm state-court conclusion that offense of "joyriding" was a lesser included offense of auto theft).

7 The defendant must, for example, commit a series of substantive violations, be a leader of the criminal enterprise, and derive substantial income from it. The Government need not prove any of those elements to establish a conspiracy in violation of § 846. Even the "in concert" element of the CCE offense is broader than any requirement in § 846 because it requires at least five participants, while a conspiracy requires only two.

8 In Jeffers, we considered whether the Government could prosecute the defendant under § 848 even though he had previously been convicted of § 846 conspiracy on the basis of the same agreements. The Government argued that the multiple prosecution was permissible because the crimes were not the "same offense." "The Government's position is premised on its contention that agreement is not an essential element of the § 848 offense, despite the presence in § 848(b)(2)(A) of the phrase 'in concert with.' If five 'innocent dupes' each separately acted 'in concert with' the ringleader of the continuing criminal enterprise, the Government asserts, the statutory requirement would be satisfied. Brief for United States 23." 432 US, at 147, 53 L Ed 2d 168, 97 S Ct 2207. The Government relied on Iannelli v United States, 420 US 770, 43 L Ed 2d 616, 95 S Ct 1284 (1975), in which we construed 18 USC § 1955 [18 USCS § 1955] as not requiring proof of conspiracy. As Justice Blackmun pointed out, however, the language of § 1955 was significantly different from § 848 in that it omitted the words "in concert" and left open "the possibility that the five persons 'involved' in the gambling operation might not be acting together." 432 US, at 147-148, 53 L Ed 2d 168, 97 S Ct 2207.

9 The plurality did not need to hold that conspiracy was a lesser included offense because it found that even if it was, the petitioner waived whatever right he may have had to object to the second prosecution under § 848 when he opposed the Government's motion, brought before the first trial, to consolidate the proceedings. Id., at 149-150, 153-154, 53 L Ed 2d 168, 97 S Ct 2207.

10 The language of § 848 "restricts the definition of the crime to a continuing series of violations undertaken by the accused 'in concert with five or more other persons.' " Id., at 148, 53 L Ed 2d 168, 97 S Ct 2207. As a result, "a conviction [under § 848] would be impossible unless concerted activity were present. . . . Even if § 848 were read to require individual agreements between the leader . . . and each of the other five necessary participants, enough would be shown to prove a conspiracy." Ibid.

Furthermore, "[w]hen the phrase 'in concert' has been used in other statutes, it has generally connoted cooperative action and agreement. . . . This suggests that Congress intended the same words to have the same meaning in § 848. . . . Since the word 'concert' commonly signifies agreement of two or more persons in a common plan or enterprise, a clearly articulated statement from Congress to the contrary would be necessary before that meaning should be abandoned." Id., at 149, n. 14, 53 L Ed 2d 168, 97 S Ct 2207 (citations omitted); see 3 Oxford English Dictionary 658 (2d ed. 1989) (defining

"concert" as "[a]greement of two or more persons or parties in a plan, design, or enterprise; union formed by such mutual agreement"; "esp[ecially] in phrase in concert"); Webster's Third New International Dictionary 470 (1981) (defining "concert" as "agreement in a design or plan: union formed by mutual communication of opinions and views: accordance in a scheme"). Thus, "[i]n the absence of any indication from the legislative history or elsewhere to the contrary, the far more likely explanation is that Congress intended the word 'concert' to have its common meaning of agreement in a design or plan." Jeffers, 432 US, at 148-149, 53 L Ed 2d 168, 97 S Ct 2207.

11 See, e.g., Rivera-Martinez, 931 F.2d, at 152 (CA1); Aiello, 771 F.2d, at 633 (CA2); Neal, 27 F.3d, at 1054 (CA5); United States v Chambers, 944 F.2d 1253, 1268 (CA6 1991), cert. denied, 502 US 1112, 117 L Ed 2d 455, 112 S Ct 1217, sub nom. Lucas v United States, 503 US 989, 118 L Ed 2d 397, 112 S Ct 1680 (1992); Rutledge, 40 F.3d, at 836 (CA7); Possick, 849 F.2d, at 341 (CA8); (CA8); Hernandez-Escarsega, 886 F.2d, at 1582 (CA9); Stallings, 810 F.2d, at 975 (CA10); United States v Graziano, 710 F.2d 691, 699 (CA11 1983).

12 Garrett v United States, 471 US 773, 794-795, 85 L Ed 2d 764, 105 S Ct 2407 (1985), is not to the contrary. There, we affirmed the defendant's prosecution for a CCE violation even though he had previously pleaded guilty to a predicate crime of importing marijuana. Ibid. That holding, however, merely adhered to our understanding that legislatures have traditionally perceived a qualitative difference between conspiracy-like crimes and the substantive offenses upon which they are predicated. See, e.g., United States v Felix, 503 US 378, 389-390, 118 L Ed 2d 25, 112 S Ct 1377 (1992) (allowing prosecution for conspiracy after petitioner was convicted of underlying substantive offense, and citing Garrett as a similar case). No such difference is present here. In contrast to the crimes involved in Garrett, this case involves two conspiracy-like offenses directed at largely identical conduct. Jeffers v United States, 432 US, at 157, 53 L Ed 2d 168, 97 S Ct 2207; Garrett, 471 US, at 794, 85 L Ed 2d 764, 105 S Ct 2407 ("[T]he plurality [in Jeffers] reasonably concluded that the dangers posed by a conspiracy and a CCE were similar and thus there would be little purpose in cumulating the penalties").

13 Indeed, the parties insisted that the case did not involve multiple punishment concerns, Jeffers, 432 US, at 154, and n. 23, 53 L Ed 2d 168, 97 S Ct 2207, and the Government did not contend that Congress intended to authorize the imposition of dual punishments. Because neither the Court nor the parties addressed the issue, Jeffers is a singularly unlikely source for a holding that Congress clearly authorized multiple convictions. Cf. United States v L. A. Tucker Truck Lines, Inc., 344 US 33, 38, 97 L Ed 54, 73 S Ct 67 (1952).

14

[8b] The Government suggests that convictions are authorized for both §§ 846 and 848 because they are different sections of the United States Code. Brief for United States 16. This does not rise to the level of the clear statement necessary for us to conclude that despite the identity of the statutory elements, Congress intended to allow multiple punishments. After all, we concluded in Ball that the statutes at issue did not authorize separate convictions, and they were even more distant in the Code. See 470 US, at 863-864, 84 L Ed 2d 740, 105 S Ct 1668 (discussing 18 USC § 922(h) [18 USCS § 922(h)] and 18 USC App. § 1202(a) [18 USCS Appx § 1202(a)] (1984)). If anything, the proximity of §§ 846 and 848 indicates that Congress understood them to be directed to similar, rather than separate, evils. Cf. Albernaz v United States, 450 US 333, 343. 67 L Ed 2d 275, 101 S Ct 1137 (1981).

The Government further discerns congressional intent to allow multiple punishment from "significant

differences" between Ball and this case. Brief for United States 19-24. None of its arguments, however, demonstrates that Congress "specially authorized" convictions for both the greater and lesser included offenses we address today. Whalen, 445 US, at 693, 63 L Ed 2d 715, 100 S Ct 1432. The Government suggests, for example, that the statutes in Ball were directed at virtually identical activity, while CCE and conspiracy are not. As we have already concluded, however, every proof of a CCE will demonstrate a conspiracy based on the same facts. That overlap is enough to conclude, absent more, that Congress did not intend to allow punishments for both.

15 The Court of Appeals used this same power in Allison v United States, 409 F.2d 445 (CADC 1969), but noted: "[T]he circumstances in which such authority may be exercised are limited. It must be clear (1) that the evidence adduced at trial fails to support one or more elements of the crime of which appellant was convicted, (2) that such evidence sufficiently sustains all the elements of another offense, (3) that the latter is a lesser included offense of the former, and (4) that no undue prejudice will result to the accused." Id., at 450-451.

16 Indeed, because of our holding today, problems like the one presented in this case are unlikely to arise in the future. A jury is generally instructed not to return a verdict on a lesser included offense once it has found the defendant guilty of the greater offense. See, e.g., Seventh Circuit Pattern Criminal Jury Instruction 2.03, in 1 L. Sand, J. Siffert, W. Loughlin, & S. Reiss, Modern Federal Jury Instructions, p. 7-7 (1991).

17 In certain circumstances, it may be that the Government will investigate and prosecute an individual for one or more § 846 conspiracies without being aware of facts that would justify charging a defendant with a violation of § 848 as well. Moreover, a lesser included § 846 conspiracy may not always be coterminous with the larger CCE. Because neither instance is true here, we need not explore the consequences of our holding today for purposes of the successive prosecution strand of the Double Jeopardy Clause, see Diaz v United States, 223 US 442, 448-449, 56 L Ed 500, 32 S Ct 250 (1912); Brown v Ohio, 432 US, at 169, n. 7, 53 L Ed 2d 187, 97 S Ct 2221; see also Garrett, 471 US, at 786-793, 85 L Ed 2d 764, 105 S Ct 2407, nor need we address how prior convictions for lesser included § 846 offenses should be handled for purposes of entering judgment if the later § 848 conviction is obtained but then set aside.

INDEX TO APPENTICES

APPENDICES

APPENDIX A

INITIAL FILING

IN THE SEVENTH CIRCUIT COURT OF APPEALS

THE CLERK'S OFFICE REFUSED TO FILE THIS
AND INSTRUCTED THAT IT BE FILED IN MISSOURI

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
Office of the Clerk

Paige Wymore-Wynn
Clerk of Court

REPLY TO:
400 East 9th Street, Room 1510
Kansas City, MO 64106

June 14, 2021

RE: Tommy Rutledge

Receipt is acknowledged this date of the following:

Petition for Writ of Habeas Corpus XX

Complaint Under the Civil Rights Act

Motion Pursuant to 28 U.S.C. § 2255

Your case has been provisionally filed on June 10, 2021 pursuant to the Court En Banc Order of October 21, 1997, and assigned Civil Number 21-3148-CV-S-MDH-P before the Honorable Douglas Harpool. Any future reference to this case should bear the case number. This case is now referred to the court.

Effective October 1, 1999, cases filed in the Western District of Missouri will be maintained electronically. The electronic version of the file is the official record of the court. When you submit a pleading to us, it will be scanned into the file. It is your responsibility to keep this process in mind when submitting material for filing and to black out all personal identifiers and information that you do not want to be part of the public record. All pleadings should be legibly handwritten in ink or typed. If you must use the backs of your paper, please make sure that the print does not show through on the other side because this makes the scanning process less efficient.

When you wish to file additional documents in your case, you need only mail the **ORIGINAL** to the Court Clerk, 400 East 9th Street, Room 1510, Kansas City, MO 64106. If you wish to have a file-stamped copy of your filing, you must provide a copy and a self-addressed **postage paid** envelope with the original filing. The Court does not provide a free copy service regardless of in forma pauperis status. If the Court notifies you that a party is proceeding pro se (without an attorney), however, then you must mail a copy of all documents you file in the future to the pro se parties. If you are mailing discovery requests to defendants, a copy of all discovery requests must be mailed to all defendants. In your court case itself, however, you should file only a certificate of service stating the date on which you mailed a true and correct copy to each defendant or his/her attorney.

You must keep the court informed of any change in your address. Failure to do so may result in dismissal of your case.

Sincerely,

/s/ C. Davies
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

TOMMY RUTLEDGE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 6:21-cv-03148-MDH-P
	)	
JEFF KRUEGER,	)	
	)	
Respondent.	)	

ORDER TRANSFERRING CASE TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS

Plaintiff, currently confined at the United States Medical Center for Federal Prisoners in Springfield, Missouri, has filed pro se a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. A review of the motion indicates that movant is attacking a federal criminal conviction and sentence which arose in the United States District Court for the Central District of Illinois. Thus, the Court construes this claim as a writ of habeas corpus filed pursuant to 28 U.S.C. § 2255.

A § 2255 motion is filed with the federal court which imposed the sentence. *See* 28 U.S.C. § 2255(a). Therefore, this Court lacks jurisdiction over the motion. Pursuant to 28 U.S.C. § 1631, however, a court may, if it is in the interest of justice, transfer such action to any other court in which the action could have been brought at the time it was filed. Because movant is proceeding pro se and is a prisoner, the Court will transfer this action to the Western District of Missouri.

Accordingly, it is ORDERED that this petition for a writ of habeas corpus is transferred to the United States District Court for the Central District of Illinois for all further proceedings.

IT IS SO ORDERED.

/s/ Douglas Harpool
DOUGLAS HARPOOL, JUDGE
UNITED STATES DISTRICT COURT

Dated: June 16, 2021

 APPENDIX D

E-FILED
Thursday, 15 July, 2021 01:58:00 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

TOMMY RUTLEDGE.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 21-cv-1178
	)	
JEFF KRUEGER, Warden,	)	
	)	
Respondent.	)	

ORDER

SARA DARROW, Chief U.S. District Judge:

Before the Court is Petitioner Tommy Rutledge's Petition filed as a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 (Doc. 8), Motion to Appoint Counsel (Doc. 4), and Motion to Proceed in Forma Pauperis (Doc. 3). Mr. Rutledge originally filed this case in the District Court for the Western District of Missouri. However, the Western District of Missouri determined Mr. Rutledge's petition was attacking his federal criminal conviction and sentence imposed by the Central District of Illinois. *See* Doc. 6. Accordingly, the Western District of Missouri construed the motion as one filed pursuant to 28 U.S.C. § 2255, determined it did not have jurisdiction, and transferred the case here. *Id.*

However, as Mr. Rutledge has been told numerous times, he cannot bring another § 2255 motion without authorization from the Seventh Circuit. *See Rutledge v. United States*, No. 97-4054, 2007 WL 4553062, at *2 (C.D. Ill. Dec. 19, 2007) (dismissing Rutledge's Rule 60(b) motion for lack of jurisdiction); *Rutledge v. United States*, No. 97-4054 (C.D. Ill.), Dec. 23, 2009 Text Order (dismissing Motion to Alter Judgment), May 6, 2010 Text Order (dismissing Motion to Vacate), Oct. 26, 2012 Order, d/e 128 (dismissing motion and ordering $100.00 fine);

Rutledge v. United States, No. 12-3673 (7th Cir. June 25, 2013) (noting that Mr. Rutledge had filed six successive collateral attacks on his conviction without the Seventh Circuit's permission, denying certificate of appealability, and ordering sanction of $500 fine in accordance with *Alexander v. United States,* 121 F.3d 312 (7th Cir. 1997)).[1]

Mr. Rutledge's petition (Doc. 8), again reiterates the same claim that he brought in his original § 2255 motion and that he has attempted to relitigate time and time again. The Court does not have jurisdiction to entertain this claim again because he has not obtained permission from the Seventh Circuit pursuant to § 2255(h). The Court will refrain from imposing a fine for this frivolous filing only because Mr. Rutledge did not himself file the petition in this district and because he was not given an opportunity to object to the reclassification of his § 2241 petition as a § 2255 motion pursuant to *Castro v. United States,* 540 U.S. 375, 385 (2003).

Mr. Rutledge has also filed a motion to request counsel. When confronted with a motion to appoint counsel, the court should ask whether the petitioner has made efforts to obtain counsel and whether the petitioner appears competent to litigate the case himself. *Pruitt v. Mote*, 503 F.3d 647, 654 (7th Cir. 2007). As the Court finds that the petition is frivolous, the court does not find that appointment counsel is appropriate or necessary.

IT IS THEREFORE ORDERED: Petitioner Rutledge's Petition (Doc. 8) is DISMISSED for lack of jurisdiction, Petitioner's Motion to Appoint Counsel (Doc. 4) is DENIED, and Petitioner's Motion to Proceed In forma Pauperis (Doc. 3) is DISMISSED AS MOOT because there is no fee required for a § 2255 Motion.

Signed on this 15th day of July 2021.

/s/ Sara Darrow
Sara Darrow
Chief United States District Judge

[1] Mr. Rutledge has paid all fines imposed against him by under these orders.

60,HABEAS,PROSE

U.S. District Court
CENTRAL DISTRICT OF ILLINOIS (Peoria)
CIVIL DOCKET FOR CASE #: 1:21-cv-01178-SLD

Rutledge v. Krueger
Assigned to: Chief Judge Sara Darrow
Case in other court: Missouri Western, 6:21-cv-03148
Cause: 28:2241 Petition for Writ of Habeas Corpus (federa

Date Filed: 06/24/2021
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

Tommy Rutledge

represented by **Tommy Rutledge**
08829-026
USMCFP
PO Box 4000
Springfield, MO 65801-4000
PRO SE

V.

Respondent

Jeff Krueger
Warden

represented by **W. Scott Simpson**
UNITED STATES ATTORNEY'S OFFICE
318 S Sixth Street
Springfield, IL 62701-1806
217-492-4413
Email: w.scott.simpson@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Email All Attorneys
Email All Attorneys and Additional Recipients

Date Filed	#	Docket Text
06/10/2021		REFERRED TO PRISONER PRO SE, ***Set/Clear Flags to add attorney initials. (Davies, Cindy) (Entered: 06/14/2021)
06/10/2021	1	PETITION for Writ of Habeas Corpus filed by Tommy Rutledge.(Davies, Cindy) Modified on 6/24/2021: Duplicate Petition docketed in the CDIL as d/e 8 (JRK). (Entered: 06/14/2021)
06/10/2021	2	SUPPLEMENT TO PETITION for Writ of Habeas Corpus filed by Tommy Rutledge. (Attachment: # 1 Exhibits)(Davies, Cindy) (Entered: 06/14/2021)

06/10/2021	3	PETITIONER'S MOTION for leave to proceed in forma pauperis filed by Tommy Rutledge. Suggestions in opposition/response due by 6/29/2021. (Davies, Cindy) (Entered: 06/14/2021)
06/10/2021	4	PETITIONER'S MOTION for appointment of counsel filed by Tommy Rutledge. Suggestions in opposition/response due by 6/29/2021. (Davies, Cindy) (Entered: 06/14/2021)
06/10/2021	8	PETITION for Writ of Habeas Corpus, filed by Tommy Rutledge. *(This filing is duplicative to the original Petition 1 docketed on 6/10/2021 by the Western District of Missouri. It is re-docketed in the CDIL to create the necessary events in CMECF.)*(JRK) (Entered: 06/24/2021)
06/14/2021	5	New case acknowledgment letter mailed to petitioner. Screen sheet attached. - **for internal use only**. (Davies, Cindy) (Entered: 06/14/2021)
06/16/2021	6	ORDER TRANSFERRING CASE: ORDERED that this petition for a writ of habeas corpus is transferred to the United States District Court for the Central District of Illinois for all further proceedings. Signed on June 16, 2021 by District Judge M. Douglas Harpool. (Davies, Cindy) (Entered: 06/16/2021)
06/23/2021		Case electronically transferred to District of Central District of Illinois. This is a TEXT ONLY ENTRY. No document is attached. (Willis, Kathy) (Entered: 06/23/2021)
06/24/2021	7	Case transferred in from District of Missouri Western; Case Number 6:21-cv-03148. (Entered: 06/24/2021)

E-FILED
Monday, 19 July, 2021 09:24:51 AM
Clerk, U.S. District Court, ILCD

Judgment in a Civil Case (02/11)

UNITED STATES DISTRICT COURT

for the
Central District of Illinois

Tommy Rutledge,

Petitioner,

vs.

Jeff Krueger,

Respondent.

Case Number: 21-cv-1178

JUDGMENT IN A CIVIL CASE

DECISION BY THE COURT. This action came before the Court, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Petitioner Rutledge's Petition is DISMISSED for lack of jurisdiction.

Dated: 7/16/2021

s/ Shig Yasunaga
Shig Yasunaga
Clerk, U.S. District Court

Multi-Action Order

1:21-cv-01178-SLD Rutledge v. Krueger

60,HABEAS,PROSE

U.S. District Court

CENTRAL DISTRICT OF ILLINOIS

Notice of Electronic Filing

The following transaction was entered on 7/15/2021 at 2:03 PM CDT and filed on 7/15/2021

Case Name: Rutledge v. Krueger
Case Number: 1:21-cv-01178-SLD
Filer:
WARNING: CASE CLOSED on 07/15/2021
Document Number: 9

Docket Text:
ORDER entered by Chief Judge Sara Darrow on 7/15/2021. Petitioner Rutledges Petition [8] is DISMISSED for lack of jurisdiction, Petitioners Motion to Appoint Counsel [4] is DENIED, and Petitioners Motion to Proceed In forma Pauperis [3] is DISMISSED AS MOOT because there is no fee required for a § 2255 Motion. (RES)

1:21-cv-01178-SLD Notice has been electronically mailed to:

W. Scott Simpson w.scott.simpson@usdoj.gov, allison.ramsdale@usdoj.gov, CaseView.ECF@usdoj.gov

1:21-cv-01178-SLD Notice has been delivered by other means to:

Tommy Rutledge
08829-026
USMCFP
PO Box 4000
Springfield, MO 65801-4000

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1068668610 [Date=7/15/2021] [FileNumber=4132986-0] [246e936f8c2272f627ec8301490aaaa500ab50981ae3b8c099c439fecfe4ff93931 59d8eec663888c2db09080cbe6230b4449ccc5e0a7126b66fff4f8c5fed0f]]

APPENDIX E

TOMMY LEE RUTLEDGE, Petitioner, v. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS
22 F. Supp. 2d 871; 1998 U.S. Dist. LEXIS 15283
Case No. 97-4054
September 25, 1998, Decided
September 25, 1998, Filed

Editorial Information: Subsequent History

{1998 U.S. Dist. LEXIS 1} As Amended September 29, 1998. Affirmed by Rutledge v. United States, 230 F.3d 1041, 2000 U.S. App. LEXIS 26786 (7th Cir. Ill., 2000)Writ of habeas corpus dismissed, Judgment entered by Rutledge v. Cross, 2014 U.S. Dist. LEXIS 77290 (S.D. Ill., June 5, 2014)

Editorial Information: Prior History

United States v. Rutledge, 85 F.3d 632, 1996 U.S. App. LEXIS 32517 (7th Cir. Ill., 1996)

Disposition:

Rutledge's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255 [# 1] GRANTED IN PART and DENIED IN PART. Rutledge's Motions for Production of Telephone Recording [# 14], for Evidentiary Hearing [# 15] and Motions to Produce Statements by Michael Wright [# 21] and by Kim Mummert [# 22] DENIED. Respondent's Motion for Reconsideration of Court's June 18, 1998 prospective ruling [# 38] DENIED.

Counsel For Petitioner: Harold M. Jennings, Jennings Novick, Bloomington, IL.
For Respondent: Thomas A. Keith, Assistant United States Attorney, Peoria, IL.

Judges: Michael M. Mihm, Chief United States District Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Following his conviction for various drug-related offenses, petitioner inmate filed an application for writ of habeas corpus pursuant to 28 U.S.C.S. § 2255. The inmate also filed a motion for production of telephone recording, a motion for evidentiary hearing, motions to produce statements by certain witnesses, and a motion for reconsideration.Inmate was entitled to habeas relief vacating his continuing criminal enterprise conviction, as two predicate offenses listed in the indictment were impermissible, and reducing his sentence for distribution in accordance with sentencing guidelines.

OVERVIEW: The inmate was convicted of conspiracy to distribute cocaine under 21 U.S.C.S. § 846, conducting a continuing criminal enterprise under 21 U.S.C.S. § 848, distribution of cocaine under 21 U.S.C.S. § 841(a)(1), possession of a firearm by a felon under 18 U.S.C.S. § 922(g), and using or carrying a firearm during the commission of a drug felony under 18 U.S.C.S. § 924(c). The conspiracy to distribute count was vacated after the Supreme Court held that conspiracy to distribute controlled substances was a lesser-included offense of the continuing criminal enterprise count. The court granted the habeas petition to the extent of 1) vacating the continuing criminal enterprise count, as two of the predicate offenses were impermissible; 2) vacating the armed drug trafficker count because it was impossible to tell whether the jury convicted under the "use" or "carry" prong of § 924(c); and 3) reducing the sentence for the distribution count in accordance with 21 U.S.C.S. § 841. The court denied the habeas petition to the extent of reinstating the conspiracy to distribute conviction and affirming the felon

in possession of a firearm conviction and denied the inmate's remaining motions.

OUTCOME: The court granted the inmate's petition for writ of habeas corpus in part to the extent of vacating the continuing criminal enterprise and armed drug trafficker counts and reducing the sentence for the distribution count to 30 years. The court denied the petition to the extent of reinstating the conspiracy to distribute conviction and affirming the felon in possession of a firearm conviction. The court denied the inmate's other motions.

LexisNexis Headnotes

Criminal Law & Procedure > Habeas Corpus > Procedure > General Overview
Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Cause & Prejudice Standard
Criminal Law & Procedure > Habeas Corpus > Procedural Default > Actual Innocence & Miscarriage of Justice > Miscarriage of Justice

Relief under 28 U.S.C.S. § 2255 is limited to an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice. A § 2255 motion is neither a recapitulation of nor a substitute for a direct appeal. A petitioner is barred from raising in a § 2255 proceeding constitutional issues that could have been raised earlier unless he or she can show good cause and prejudice. Non-constitutional errors that could have been raised on appeal are barred in a § 2255 proceeding, regardless of cause and prejudice. Therefore, a petitioner may not raise three types of issues: (1) issues that he or his attorneys raised on direct appeal, absent a showing of changed circumstances; (2) non-constitutional issues that could have been, but were not, raised on direct appeal; or (3) constitutional issues that were not raised on direct appeal, unless petitioner can show both good cause for, and prejudice from, the procedural default.

Criminal Law & Procedure > Criminal Offenses > Weapons > Use > General Overview

18 U.S.C.S. § 924(c)(1) requires the imposition of specified penalties if the defendant during and in relation to any crime of violence or drug trafficking crime uses or carries a firearm.

Criminal Law & Procedure > Criminal Offenses > Weapons > Use > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Commission of Another Crime > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Commission of Another Crime > Elements
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Simple Use > Elements

18 U.S.C.S. § 924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense. Active employment certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm. By contrast, the mere placement of a firearm for protection at or near the site of a drug crime or its proceeds or paraphernalia, or nearby concealment of a gun to be at the ready for an imminent confrontation are no longer within the scope of 18 U.S.C.S. § 924(c)'s definition of "use." The Government is required to show more than the inert presence or storage of a firearm in order to establish the "use" prong.

Criminal Law & Procedure > Jury Instructions > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview

An erroneous jury instruction is harmless if, looking at the instructions and the record as a whole, the court can be convinced that a properly instructed jury would have reached the same verdict.

Criminal Law & Procedure > Jury Instructions > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > General Overview
Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview
Criminal Law & Procedure > Jury Instructions > Particular Instructions > Use of Particular Evidence

In cases where the jury instruction on "use" was clearly flawed, whether a 18 U.S.C.S. § 924(c)(10) conviction will be affirmed out right, reversed outright, or reversed and remanded depends on the nature of the evidence presented at trial. The essential framework is as follows: 1) if all the firearms evidence presented qualifies as either active-employment "use" or "carry" the court will affirm the conviction despite the bad instruction; 2) if none of the evidence presented qualifies as either active-employment "use" or "carry," the court will reverse the convictions outright; and 3) if some of the evidence presented could qualify as either active-employment "use" or "carry" but other firearms evidence presented exemplifies only possession of some other type of now-defunct, inactive "use," the court will reverse the conviction and remand for new trial, since we cannot be sure whether the jury convicted on the proper basis or the improper basis.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Continuing Criminal Enterprises > Elements

The Continuing Criminal Enterprise statute, 21 U.S.C.S. § 848, requires proof of five elements: (1) a violation of the federal narcotics laws; (2) which crime is part of a series of violations of the federal narcotics laws; (3) undertaken by the defendant and at least five other individuals; (4) with respect to whom the defendant holds a supervisory, managerial, or organizational role; and (5) from which the defendant receives substantial income or resources.

Criminal Law & Procedure > Jury Instructions > General Overview
Civil Procedure > Trials > Jury Trials > Jurors > Misconduct

A jury is presumed to follow the instructions of a court.

Criminal Law & Procedure > Sentencing > Merger
Criminal Law & Procedure > Trials > Entry of Judgments
Criminal Law & Procedure > Sentencing > Imposition > Evidence

Federal appellate courts may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense.

Criminal Law & Procedure > Sentencing > Merger
Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements
Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Penalties

A defendant who challenges of one of several interdependent sentences has no legitimate expectation of finality in any discrete portion of the sentencing package.

Criminal Law & Procedure > Sentencing > Criminal History > Prior Felonies
Civil Rights Law > Prisoner Rights > Restoration of Rights
Criminal Law & Procedure > Postconviction Proceedings > Expungement

18 U.S.C.S. § 921(a)(20), provides in part: What constitutes a predicate shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Criminal Law & Procedure > Sentencing > Criminal History > Prior Felonies

A person convicted of a felony shall be ineligible to hold an office created by the Constitution of this State until the completion of his sentence. 730 Ill. Comp. Stat. 5/5-5-5(b). A person sentenced to imprisonment shall lose his right to vote until his release from imprisonment. 730 Ill. Comp. Stat. 5/5-5-5(c). On completion of sentence of imprisonment or upon discharge from probation, conditional discharge or periodic imprisonment, or at any time thereafter, all license rights and privileges granted under the authority of this State which have been revoked or suspended because of the conviction of an offense shall be restored unless the authority having jurisdiction of such license rights finds after investigation and hearing that restoration is not in the public interest. 730 Ill. Comp. Stat. 5/5-5-5(d).

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

The defendant must show that his trial counsel's performance fell below an objective standard of reasonableness and that but for the professional errors of his trial counsel, the outcome would have been different. The court must indulge in a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance.

Criminal Law & Procedure > Sentencing > Guidelines
Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > General Overview

Under 21 U.S.C.S. § 841, a defendant can only be sentenced to a term of imprisonment of not more than 30 years.

Opinion

Opinion by: Michael M. Mihm

Opinion

{22 F. Supp. 2d 873}ORDER

This matter is before the Court on Petitioner, Tommy Lee Rutledge's ("Rutledge"), Petition for Writ of

Habeas Corpus Pursuant to 28 U.S.C. § 2255 [# 1], Petitioner's Motion for Production of Telephone Recording [# 14], Petitioner's Motion for Evidentiary Hearing [# 15], Petitioner's Motion to Produce Statements by Michael Wright [# 21], Petitioner's Motion to Produce Statements by Kim Mummert [# 22], and Respondent's Motion for Reconsideration of the Court's June 18, 1998 Prospective Ruling [# 38].

Rutledge's{**1998 U.S. Dist. LEXIS 2**} Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255 [# 1] is GRANTED IN PART and DENIED IN PART. The Clerk is directed to prepare a new Sentencing Order which reflects the determinations made within this Order. Petitioner's Motion for Production of Telephone Recording [# 14] is DENIED. Petitioner's Motion for Evidentiary Hearing [# 15] is DENIED. Petitioner's Motion to Produce Statements by Michael Wright [# 21] is DENIED. Petitioner's Motion to Produce Statements by Kim Mummert [# 22] is DENIED. Respondent's Motion for Reconsideration of Court's June 18, 1998 prospective ruling [# 38] is DENIED. The Court will hold a telephone status call with counsel within 14 days to determine whether the United States wishes to pursue the retrial of Count V.

Background

A jury convicted Tommy Lee Rutledge, Shelly Henson, Richard Hagemaster, and Stan Winters of conspiring to distribute cocaine in violation of 21 U.S.C. § 846. Additionally, the jury convicted Rutledge of conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848, distribution of cocaine in violation of 21 U.S.C. § 841(a)(1), possession of a firearm by a felon in violation of{**1998 U.S. Dist. LEXIS 3**} 18 U.S.C. § 922(g), and two counts of using or carrying a firearm during the commission of a drug felony in violation of 18 U.S.C. § 924(c).

Rutledge was sentenced to life imprisonment on the continuing criminal enterprise {**22 F. Supp. 2d 874**} count (Count I), life imprisonment without the possibility of release on the conspiracy to distribute narcotics count (Count II), and life imprisonment without the possibility of release on the distribution count (Count III). Rutledge also received a 10-year term of imprisonment on the possession of a firearm by a felon count (Count IV). The three life terms and the 10-year term were ordered to run concurrently. Rutledge was also sentenced to a 5-year term of imprisonment on one armed drug trafficker count (Count V) and a 10-year term of imprisonment on the other (Count VI). These convictions were consecutive to each other and the other sentences.

Rutledge appealed his conviction to the Seventh Circuit, which affirmed his conviction. United States v. Rutledge, 40 F.3d 879 (7th Cir. 1994). Subsequently, the Supreme Court reversed the Seventh Circuit's decision and remanded the case for a vacation of *either* Count I (CCE) or Count II (conspiracy to distribute{**1998 U.S. Dist. LEXIS 4**} narcotics), holding that conspiracy to distribute controlled substances is a lesser included offense of the continuing criminal enterprise offense. Rutledge v. United States, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996). This Court vacated Count II on May 29, 1996.

Rutledge filed a motion pursuant to 28 U.S.C. § 2255 to Vacate, Set Aside or Correct an Illegal Sentence on April 24, 1997. On November 12, 1997, this Court appointed counsel to represent him. On March 26, Rutledge filed a supplemental memorandum of facts and law supporting his previously filed § 2255 motion. The issues which require resolution are:

1. Whether Counts V and VI (both armed drug trafficker counts) must be vacated in light of the evidence, jury instructions and the Supreme Court's decision in United States v. Bailey

2. Whether the Count I (CCE) conviction must be set aside because the jury could have relied on impermissible predicate offenses?

3. If Count I (CCE) is vacated, can Count II (conspiracy) be revived?

4. Whether Count IV (felon in possession of firearm) must be vacated because of the restoration of certain civil rights?

5. Whether Count III (distribution**{1998 U.S. Dist. LEXIS 5}** of controlled substance) must be vacated due to his trial counsel's failure to conduct an adequate investigation of the facts, interview potential witnesses and present an alibi defense?

6. Whether the sentence imposed on Count III must be reduced to no more than 30 years because the sentence exceeds the maximum sentence proscribed by 21 U.S.C. § 841(b)(1)(C)?

7. Whether Rutledge was denied effective assistance of counsel as guaranteed by the Sixth Amendment?

Rutledge has also filed motions seeking the production of telephone recordings which were made from his place of incarceration [# 14], for an evidentiary hearing [# 15], and to produce statements by Michael Wright [# 21] and Kim Mummert [# 22]. As will be discussed below, this Court finds that the issues presented in the § 2255 motion are purely legal and that there is no need for additional evidence. Accordingly, these Motions are denied.

Standard of Review

Relief under 28 U.S.C. § 2255 is limited to an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice. Bischel v. United States, 32 F.3d**{1998 U.S. Dist. LEXIS 6}** 259, 263 (7th Cir. 1994) (internal citations and quotations omitted). A § 2255 motion is neither a recapitulation of nor a substitute for a direct appeal. Olmstead v. United States, 55 F.3d 316, 319 (7th Cir. 1995). A petitioner is barred from raising in a § 2255 proceeding constitutional issues that could have been raised earlier unless he or she can show good cause and prejudice. Bontkowski v. United States, 850 F.2d 306, 313 (7th Cir. 1988). Non-constitutional errors that could have been raised on appeal are barred in a § 2255 proceeding, regardless of cause and prejudice. Therefore, a petitioner may not raise three types of issues: (1) issues that he or his attorneys raised on direct appeal, absent a showing of **{22 F. Supp. 2d 875}** changed circumstances; (2) non-constitutional issues that could have been, but were not, raised on direct appeal; or (3) constitutional issues that were not raised on direct appeal, unless petitioner can show both good cause for, and prejudice from, the procedural default. Prewitt v. United States, 83 F.3d 812, 816 (7th Cir. 1996).1. **Counts V and VI (Armed Drug Trafficker) and the Bailey Rule**

Rutledge argues that his convictions on Counts**{1998 U.S. Dist. LEXIS 7}** V and VI (both armed drug trafficker counts pursuant to 18 U.S.C. § 924(c)) must be vacated because of the rule announced in Bailey v. United States, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995).

Section 924(c)(1) requires the imposition of specified penalties if the defendant "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm." At trial, this Court instructed the jury:

> To sustain the charge of using or carrying a firearm during a drug trafficking crime as alleged in Counts 5 and 6 of the indictment the Government must prove each of the following propositions beyond a reasonable doubt. First, that the defendant Tommy Lee Rutledge did knowingly use or carry a firearm. Second, that the firearm was used or carried during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States . . . . In reference to Counts 5 and 6, use of a firearm does not require that the weapon be found on or

near the defendant. A firearm is, quote, used, unquote, under federal law if its presence increased the likelihood of success of a drug offense as a means of protection or intimidation.**{1998 U.S. Dist. LEXIS 8}**Jury Instruction No. 18.

While the instruction given by this Court was an accurate statement of the law at the time of Rutledge's trial, before his appeal was exhausted, the Supreme Court decided Bailey, which changed the landscape of the "use" prong of 924(c)(1).

In Bailey, the Supreme Court held "that 924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." Bailey, 116 S. Ct. at 505. The Supreme Court stated that active employment "certainly includes brandishing, displaying, *bartering*, striking with, and most obviously, firing or attempting to fire, a firearm." Id. (emphasis supplied). By contrast, the mere placement of a firearm for protection at or near the site of a drug crime or its proceeds or paraphernalia, or nearby concealment of a gun to be at the ready for an imminent confrontation are no longer within the scope of § 924(c)'s definition of "use." Id. at 508. The Court made it clear that the Government was required to show more than the "inert presence" or "storage" of a firearm in order to establish the "use" **{1998 U.S. Dist. LEXIS 9}** prong.

It is the law of this Circuit that an erroneous jury instruction is harmless if, looking at the instructions and the record as a whole, the Court can be convinced that a properly instructed jury would have reached the same verdict. United States v. Williams, 33 F.3d 876, 879 (7th Cir. 1994). Rutledge, however, correctly argues that the general phrasing of the jury instruction at his trial makes it impossible to tell whether the jury convicted under the "use" or "carry" prong, and he is consequently entitled to the presumption that the jury's conviction rested solely on the "use" prong.

The Seventh Circuit was faced with this problem of applying Bailey retroactively in United States v. Jackson, 103 F.3d 561 (7th Cir. 1996). There, a three-tier standard was established for determining what relief is appropriate.

> In cases . . . where the jury instruction on "use" was clearly flawed, whether a § 924(c)(10) conviction will be affirmed out right, reversed outright, or reversed and remanded depends on the nature of the evidence presented at trial. The essential framework is as follows: 1) if all the firearms evidence presented qualifies as either active-employment**{1998 U.S. Dist. LEXIS 10}** "use" or "carry" we will affirm the conviction despite the bad instruction, *see, e.g.*, United States v. Baker, 78 F.3d 1241, 1245-1247 (7th Cir. 1996); 2) if none of the evidence presented qualifies **{22 F. Supp. 2d 876}** as either active-employment "use" or "carry," we will reverse the convictions outright, *see, e.g.*, United States v. Monroe, 73 F.3d 129, 132-33 (7th Cir. 1995); and 3) if some of the evidence presented could qualify as either active-employment "use" or "carry" but other firearms evidence presented exemplifies only possession of some other type of now-defunct, inactive "use," we will reverse the conviction and remand for new trial, since we cannot be sure whether the jury convicted on the proper basis or the improper basis, *see, e.g.*, United States v. Thomas, 86 F.3d 647, 650-51 (7th Cir. 1996). Jackson, 103 F.3d at 569.

The Government concedes that Count VI should be reversed. However, the parties dispute what should be done with Count V (Rutledge seeks outright vacation; the Government wants a new trial). The Government argues that there was some evidence of active "use" produced which would allow a retrial of Count V. The Government relies on evidence**{1998 U.S. Dist. LEXIS 11}** that Rutledge traded drugs for a guns on multiple occasions. Bailey specifically contemplates that "bartering" is an activity which would constitute "use". As there was testimony presented at trial that Rutledge bartered drugs for guns, this Court finds that Count V can be retried, as some of the evidence admitted at trial would support a conviction in the post-Bailey environment.

2. **Count I (CCE) and Impermissible Predicate Acts**

The CCE statute, 21 U.S.C. § 848, requires proof of five elements: (1) a violation of the federal narcotics laws; (2) which crime is part of a series of violations of the federal narcotics laws; (3) undertaken by the defendant and at least five other individuals; (4) with respect to whom the defendant holds a supervisory, managerial, or organizational role; and (5) from which the defendant receives substantial income or resources. United States v. Moya-Gomez, 860 F.2d 706, 745 (7th Cir. 1988).

Count I (CCE) of the indictment describes predicate acts as "including but not limited to the acts set forth hereinafter in Counts 3, 4, and 5 which Counts are incorporated by reference as if fully set forth here." From the discussion above, Count**{1998 U.S. Dist. LEXIS 12}** V needs to be retried. Count IV (felon in possession of firearm) is not a narcotics crime. Under the CCE statute the Government must prove a continuing series of violations of the *federal narcotics laws.* 21 U.S.C. § 848(b)(2). Rutledge argues that it is well settled that when a court has no way of knowing which alternative ground the jury utilized to determine guilt, and when one or more of those alternative grounds are legally impermissible, the court must reverse the conviction. Griffin v. California, 502 U.S. 46, 116 L. Ed. 2d 371, 112 S. Ct. 466 (1991). Accordingly, Petitioner's position is that since at least two of the predicate grounds mentioned in the indictment are impermissible, the CCE conviction is infirm. This Court agrees.

The Government points out that the jury instruction on the elements required to sustain a charge of CCE was proper. The jury instruction stated:

> The Government must prove each of the following propositions beyond a reasonable doubt.
>
> First: That the defendant Tommy Lee Rutledge violated a federal drug felony law; and
>
> Second: That the conduct took place as part -- that the conduct took place as a part of a continuing series**{1998 U.S. Dist. LEXIS 13}** of violations; and
>
> Third: That the defendant undertook this activity in concert with five or more persons; and
>
> Fourth: That the defendant acted as the organizer, supervisor or other positions of management of those five persons; and
>
> Fifth: That the defendant obtained substantial income or resources from the criminal enterprise.
>
> * * *
>
> A continuing series of drug violations under the continuing criminal enterprise statute means at least two felony violations of federal drug laws not including a conspiracy charge. The defendant need not be convicted of the two felony violations. Furthermore, the felony violations do not have to be alleged in the indictment. You **{22 F. Supp. 2d 877}** must agree that there were at least two felony violations but you do not have to agree on which two were committed.Jury Instruction Nos. 12-14.

The Government points out that the Seventh Circuit has upheld a CCE conviction where the trial court gave a general instruction regarding the predicate acts element of a CCE offense. United States v. Kramer, 955 F.2d 479, 486 (7th Cir.), *cert. denied*, 506 U.S. 998 (1992). In Kramer, a jury instruction was held permissible which indicated that the**{1998 U.S. Dist. LEXIS 14}** defendant must have "engaged in a continuing series of violations based upon the various predicate acts set forth in the indictment, together with any additional violations of the drug laws." Id. at 487 (emphasis included in the original jury instruction).

The circumstances of the present case are different. In Kramer the court succinctly stated, "if the government was not required to allege any of the possible predicate acts in the indictment, there can be no error where it has alleged all but a few of the acts." Id. at 488. In the case at hand, the jury was given a copy of the indictment which referred to Counts 3, 4, and 5 as being predicate acts. While the instruction in Kramer is perhaps not model, there the indictment did not go so far as to suggest acts which absolutely *cannot* be used as predicates.

At oral arguments on the instant Petition, the Government argued that the jury instruction given at Rutledge's trial was sufficient to expunge any taint which may have resulted from the inclusion of the impermissible grounds in the indictment. While it is well recognized that a jury is presumed to follow the instructions of a court, this Court cannot conclude**{1998 U.S. Dist. LEXIS 15}** that a technically correct refrain in a jury instruction can purge the tainted chorus of the indictment when the jury has been invited to consider impermissible predicate acts and has been presented with evidence of such.

On June 26, 1998 after oral argument on the instant § 2255 Motion, the Government filed a "Motion to Reconsider" the Court's prospective ruling and provided an additional argument on the CCE/predicate act issue. The Government argues:

> Even though [this Court might] set aside Count 5 because of the Supreme Court's decision in Bailey v. United States, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995), in order for the jury to have convicted the defendant of the Count 5 charge it had to find that the defendant used or carried a firearm "during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States, that is the distribution of cocaine . . . ." (Count 5 of the Indictment, [emphasis in Government's memorandum but not in Indictment]. Therefore, to find the defendant guilty of Count 5, the jury had to find that the defendant committed a federal drug offense of distributing cocaine in connection**{1998 U.S. Dist. LEXIS 16}** with or in proximity to a firearm.Government's Motion to Reconsider, filed June 26, 1998, at 2.

This, however, does not save the day for the Government. When the Court instructed the jury on the elements required to convict on Count V, it did not instruct the jury that the drug trafficking crime must be a felony. The Court instructed the jury, "that the firearm was used or carried during and in relation to a *drug trafficking crime for which he may be prosecuted in a court of the United States.*" (Transcript of Jury Instructions at 18) (emphasis added). This Court finds this instruction was insufficient, because it simply does not inform the jury that the predicate offense needs to be a felony. Some drug trafficking crimes which may be prosecuted in a federal court are not felonies. (*See* 21 U.S.C. § 844, making possession for a small amount of controlled substances punishable by imprisonment of one year or less). For the above reasons, the CCE conviction was improper and is accordingly vacated.

3. **Reinstatement of Conspiracy Count**

As the CCE conviction is invalid, the question becomes whether the conspiracy count can be reinstated. In short, this Court**{1998 U.S. Dist. LEXIS 17}** finds that there is good authority for so doing and accordingly orders the reinstatement of the conspiracy count.

{22 F. Supp. 2d 878} In United States v. Silvers, 888 F. Supp. 1289 (D. Md. 1995), a district court examined this very question. An extensive excerpt of this well reasoned opinion follows:

> The issue which the court now faces is whether defendant's lesser included conspiracy conviction may be reinstated now that the greater offense, CCE, no longer exists. This question appears to be a matter of first impression in this Circuit.As far as the court is aware, the only Circuit that has been squarely confronted with this issue is the Sixth. In United States v. Ward,

37 F.3d 243, 250 (6th Cir. 1994), the defendant was convicted of both conspiracy and CCE. Following the jury's verdict, the district court vacated the conspiracy conviction as a lesser included offense of CCE. The Sixth Circuit found that the evidence was insufficient for the jury to conclude that Ward had managed, supervised or organized five or more people. Id. at 250. The Sixth Circuit, however, did not find any error with respect to his conspiracy conviction. Accordingly, upon vacating Ward's conviction**{1998 U.S. Dist. LEXIS 18}** for CCE, the Sixth Circuit, without any discussion, "reinstated" his conspiracy conviction. Id. at 250.In addition to the Sixth Circuit's decision in Ward, it has been recognized by the Supreme Court, in another context, that a vacated conviction may lawfully be reinstated. In United States v. Wilson, 420 U.S. 332, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975), the Supreme Court held that a conviction may be reimposed where the trial court erroneously grants a judgment of acquittal notwithstanding the jury's verdict of guilty. In so holding, the Supreme Court recognized that reinstatement of a conviction does not implicate the Double Jeopardy Clause of the Fifth Amendment since it does not result in either a second prosecution or multiple punishments. Id. at 345, 95 S. Ct. at 1022. *See also* United States v. Jones, 763 F.2d 518, 525 (2d Cir.), ("The reinstatement of [the jury's] . . . verdict does not violate Jones' double jeopardy rights since he will not be subjected to a second trial for the same offense. When a guilty verdict is reinstated, double jeopardy is not implicated."), *cert. denied*, 474 U.S. 981, 106 S. Ct. 386, 88 L. Ed. 2d 339 (1985); Govt. **{1998 U.S. Dist. LEXIS 19}** of the Virgin Islands v. Josiah, 641 F.2d 1103, 1108 (3d Cir. 1981) ("The Double Jeopardy Clause is not offended when the government appeals a post-verdict judgment of acquittal if reversal on appeal would merely reinstate the jury verdict. . .. This is so because the defendant 'will not twice be tried and thus will not twice be put in jeopardy for the same offense.'") (*quoting* United States v. Schoenhut, 576 F.2d 1010, 1018 n. 7 (3d Cir.), *cert. denied*, 439 U.S. 964, 99 S. Ct. 450, 58 L. Ed. 2d 421 (1978)).While Wilson and the cases following it plainly involve a factual scenario distinct from the case at bar, the court nevertheless believes that the Supreme Court's holding, and the reasoning underlying it, are fully applicable here. If an appellate court may properly reinstate a conviction on direct appeal, there is no reason why a district court should not be able to do likewise on collateral review. [FN44] *See* United States v. Maddox, 944 F.2d 1223, 1233 (6th Cir.) ("Thus there is no question that we could reverse and order that the conviction be reinstated. It follows a *fortiori* that it would not violate double jeopardy principles for the district**{1998 U.S. Dist. LEXIS 20}** court to make the same determination after a timely motion for reconsideration."), *cert. denied*, 502 U.S. 950, 112 S. Ct. 400, 116 L. Ed. 2d 349 (1991); North Carolina v. Pearce, 395 U.S. 711, 720, 89 S. Ct. 2072, 2078, 23 L. Ed. 2d 656 (1969) ("That a defendant's conviction is overturned on collateral rather than direct attack is irrelevant for these purposes [of double jeopardy] . . ."); Hardwick v. Doolittle, 558 F.2d 292, 297 (5th Cir. 1977) ("When a conviction is overturned on direct appeal *or on collateral attack*, the double jeopardy clause does not bar retrial. . .") (emphasis added), *cert. denied*, 434 U.S. 1049, 98 S. Ct. 897, 54 L. Ed. 2d 801 (1978).FN44. This is especially true where, as here, defendant has effectively raised this issue for the first time by bringing a successful challenge to his CCE conviction. In this regard, defendant can have no legitimate expectation of finality with respect to the **{22 F. Supp. 2d 879}** court's vacation of his conspiracy conviction when he has challenged the greater offense upon which that vacation was solely based. *Cf.*, United States v. Shue, 825 F.2d 1111, 1115 (7th Cir. 1987) ("Where the defendant challenges one of several**{1998 U.S. Dist. LEXIS 21}** interdependent sentences (or underlying convictions) he has, in effect, challenged the entire sentencing plan . . . [and] he can have no legitimate expectation of finality in any discrete portion of the sentencing package after a partially successful appeal.").That a vacated conviction may legitimately be reinstated has also been recognized by several Circuits in another context as well. In United States v. Hooper, 139 U.S. App. D.C. 171, 432 F.2d 604 (D.C.Cir. 1970), the appellant challenged two bank robbery

convictions for which he had been given concurrent sentences. Finding no error warranting reversals of one of the convictions, the D.C. Circuit elected, in the interest of judicial economy, to simply vacate the other conviction, rather than engaging in a lengthy and needless analysis of the legal challenge raised by appellant with respect to that conviction. In so holding, the court noted:

> The D.C. Circuit has continued to follow the approach set forth in Hooper. *See* United States v. Wood, 279 U.S. App. D.C. 81, 879 F.2d 927, 938 (D.C.Cir. 1989). The Fifth and Eleventh Circuits have adopted this doctrine as well, and in so doing, have explicitly recognized that a vacated conviction may be reimposed in the interests of justice. *See* United States v. Cardona, 650 F.2d 54, 58 (5th Cir. 1981) ("We deem the Hooper approach to be appropriate in this case. Accordingly, we vacate the convictions of [the appellants] on count III. If the government subsequently determines that the interests of justice require reimposition of the sentences, then it may interpose its objections and these vacated convictions would then be open to appellate review."); United States v. Butera, 677 F.2d 1376, 1386 (11th Cir. 1982) ("The [Hooper] procedure is appropriate here . . . . If the government subsequently determines that the interests of justice require reimposition of the sentence, it may renew its response to Denoma's challenge and the conviction in count one would be open to**{1998 U.S. Dist. LEXIS 23}** full appellate review."), *cert. denied*, 459 U.S. 1108, 103 S. Ct. 735, 74 L. Ed. 2d 958 (1983). [Footnote omitted].
>
> * * *Having considered the above authorities, the court is of the view that defendant's conviction may be reimposed. As the Fourth Circuit has recognized, vacating a lesser included offense is "nothing more than a technicality" that is done purely for the defendant's benefit so as to insure that he is not punished, either directly or collaterally, for both the lesser and greater offense. United States v. Reavis, 48 F.3d 763, 773 (4th Cir. 1995). The vacation of the defendant's conviction was not a rejection of the jury's verdict, but rather was equivalent in practical effect to a "suspension of the imposition of sentence." United States v. Hooper, 432 F.2d at 606 n. 4. Now that defendant's CCE conviction has been reversed, there is no justification for defendant to escape punishment for his major role in a far-reaching conspiracy for which he was properly convicted. To hold otherwise, would indeed be to exalt form over substance. Accordingly, defendant's conspiracy conviction will be reinstated and a hearing held for sentencing on that conviction. **{1998 U.S. Dist. LEXIS 24}** [Footnote omitted].
>
> The vacation of the judgment does not destroy the jury verdict, but is rather equivalent in practical effect to a suspension of the imposition of sentence. If it later develops that the interest of justice so requires, the sentence can be reimposed on a concurrent basis. The**{1998 U.S. Dist. LEXIS 22}** conviction could then be subject to appellate review. 432 F.2d at 606 n. 8. Silvers, 888 F. Supp. at 1306-09.

This Court finds Silvers to be very persuasive in light of the fact that it is cited favorably in the opinion resulting from Rutledge's appeal to the Supreme Court, Rutledge v. United States, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996). The Rutledge court noted:

> Finally, the Government argues that Congress must have intended to allow multiple convictions because doing so would provide a "back up" conviction, preventing a defendant **{22 F. Supp. 2d 880}** who later successfully challenges his greater offense from escaping punishment altogether -- even if the basis for the reversal does not affect his conviction under the lesser. Brief for United States 20-22. We find the argument unpersuasive, for there is no reason why this pair of greater and lesser offenses should present any novel problem beyond that posed by any other greater and lesser included offenses, for which the courts have already developed rules to avoid

the perceived danger.In Tinder v. United States, 345 U.S. 565, 570, 73 S. Ct. 911, 913, 97 L. Ed. 1250 (1953), the defendant had been convicted of theft from a mailbox and improperly sentenced**{1998 U.S. Dist. LEXIS 25}** to prison for more than one year even though the evidence only supported a misdemeanor conviction. Exercising our "power to do justice as the case requires" pursuant to 28 U.S.C. § 2106, we ordered the District Court to correct the sentence without vacating the underlying conviction. Relying on Tinder and the practice in "state courts, including courts governed by statutes virtually the same as Section 2106," the Court of Appeals for the District of Columbia Circuit later decided that its "power to modify erroneous judgments authorizes reduction to a lesser included offense where the evidence is insufficient to support an element of the [greater] offense stated in the verdict." Austin v. United States, 127 U.S. App. D.C. 180, 382 F.2d 129, 141-143 (1967). [Footnote omitted].Consistent with the views expressed by the D.C. Circuit, federal appellate courts appear to have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense. See 8A J. Moore, Federal Practice P 31.03[5], and n. 54 (2d ed. 1995); United States v. Ward, 37 F.3d**{1998 U.S. Dist. LEXIS 26}** 243, 251 (C.A.6 1994) (after finding insufficient evidence to support CCE count, Court of Appeals vacated CCE conviction and sentence and remanded for entry of conspiracy conviction, which District Court had previously vacated as lesser included offense of CCE), *cert. denied*, 514 U.S. 1030, 115 S. Ct. 1388, 131 L. Ed. 2d 240 (1995); United States v. Silvers, 888 F. Supp. 1289, 1306-1309 (D.Md. 1995) (reinstating conspiracy conviction previously vacated after granting motion for new trial on CCE conviction). This Court has noted the use of such a practice with approval. Morris v. Mathews, 475 U.S. 237, 246-247, 106 S. Ct. 1032, 1037-1038, 89 L. Ed. 2d 187 (1986) (approving process of reducing erroneous greater offense to lesser included offense as long as the defendant is not able to demonstrate that "but for the improper inclusion of the [erroneous] charge, the result of the proceeding probably would have been different"). *See also* Jones v. Thomas, 491 U.S. 376, 384-385, n. 3, 109 S. Ct. 2522, 2527-2528, n. 3, 105 L. Ed. 2d 322 (1989) (citing Morris).

There is no need for us now to consider the precise limits on the appellate courts' power to substitute**{1998 U.S. Dist. LEXIS 27}** a conviction on a lesser offense for an erroneous conviction of a greater offense. [Footnote omitted]. We need only note that the concern motivating the Government in asking us to endorse either the Seventh Circuit's practice of entering concurrent sentences on CCE and conspiracy counts, or the Second Circuit's practice of entering concurrent judgments, is no different from the problem that arises whenever a defendant is tried for greater and lesser offenses in the same proceeding. In such instances, neither legislatures nor courts have found it necessary to impose multiple convictions, and we see no reason why Congress, faced with the same problem, would consider it necessary to deviate from the traditional rule. [Footnote omitted]. Rutledge, 116 S. Ct. at 1249-50.

Rutledge's sole argument is that the conspiracy count cannot be reinstated because his sentence was greater on that count than the sentence imposed for the CCE count. For the conspiracy count he was sentenced to life *without parole*, and for the CCE count he was sentenced to life. While at present this is a somewhat academic distinction given that federal parole no longer exists, Rutledge argues, and**{1998 U.S. Dist. LEXIS 28}** cites case law for the proposition, that as a matter of law a life sentence is less than a sentence of life without parole. Rutledge **{22 F. Supp. 2d 881}** points out that someday parole may be a possibility and that he is therefore prejudiced by such a reinstatement.

This Court finds Rutledge's argument flawed. While true that the reinstatement of his conspiracy conviction will result in a sentence of life without parole rather than merely life, this distinction is irrelevant for several reasons. First, as explained above, on remand from the Supreme Court, this

Court was given the option of vacating *either* the CCE count or the conspiracy count. As a jury reached a guilty verdict on the conspiracy count, it would be manifestly unfair not to effectuate this verdict only because this Court chose to vacate the conspiracy conviction instead of what turns out today to be a impermissible conviction. Second, Rutledge's concern that he will be prejudiced by the reinstatement of a conviction of life without parole is untenable. This Court cannot agree with Rutledge that a reinstatement of his conspiracy conviction upsets his expectation in the sentence when it is he who is attacking the CCE conviction which**{1998 U.S. Dist. LEXIS 29}** was preserved only because the conspiracy conviction was vacated. 1 The Seventh Circuit has held that a defendant who challenges of one of several interdependent sentences has no legitimate expectation of finality in any discrete portion of the sentencing package. United States v. Shue, 825 F.2d 1111, 1115 (7th Cir. 1987). Accordingly, in light of the case law, this Court hereby reinstates Rutledge's conspiracy conviction.

4. **Restoration of Civil Rights**

Rutledge was convicted of Count IV (felon in possession of a firearm) in violation of 18 U.S.C. § 922(g)(1). He now argues that this count must be vacated since his civil rights were restored**{1998 U.S. Dist. LEXIS 30}** and that his trial counsel was ineffective because he failed to have the count dismissed. The predicate conviction was a 1984 conviction from Fulton County, Illinois Circuit Court. In a letter dated November 12, 1987, the Illinois Department of Corrections informed Rutledge that he owed no further obligation to that department. Moreover, attached to the letter was a memorandum which states in relevant part:

> We are pleased to inform you of the restoration of your right to vote and to hold offices created under the Constitution of the State of Illinois. You also have the right to restoration of licenses granted to you under the authority of the State of Illinois if such license was revoked solely as a result of your conviction, unless the licensing authority determines that such restoration would not be in the public interest.Exhibit 2 to original petition.

Rutledge argues that this letter purges the conviction so that it may not be utilized to invoke § 922(g). Specifically, Rutledge seeks shelter under 18 U.S.C. § 921(a)(20), which provides in part:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction**{1998 U.S. Dist. LEXIS 31}** in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

This Court is of the opinion that Rutledge procedurally defaulted this issue. Rutledge did not raise this issue on direct appeal. Before this Court can reach the merits of this issue, Rutledge must demonstrate "cause" and "actual prejudice" for his failure to raise the ineffective assistance of trial counsel issue in his direct appeal. Belford v. United States, 975 F.2d 310, 313 (7th Cir. 1992). Rutledge has indicated that he communicated to his trial attorney that his civil rights had been restored by the State of Illinois. Since Rutledge's trial counsel was different than his appellate counsel, he cannot establish a "cause" for the procedural default. Nowhere does Petitioner allege constitutionally **{22 F. Supp. 2d 882}** ineffectiveness on appeal with respect to Count IV. In other words, Rutledge cannot claim that his**{1998 U.S. Dist. LEXIS 32}** appellate counsel could not have known of this issue at the time of his direct appeal, nor has he claimed that his appellate counsel was ineffective with respect to this issue.

Even if Rutledge had shown cause and prejudice, his claim is without merit. Rutledge places much

reliance on United States v. Glaser, 14 F.3d 1213 (7th Cir. 1994). In Glaser, the defendant, following a term of incarceration, was sent a letter stating:

> This is to certify that Richard Raymond Glaser, who was on the 20th day of May 1983, sentenced to the Commissioner of Corrections by the District Court of Washington; Washington County, has completed such sentence and is hereby discharged this 17th day of June, 1986; and that pursuant to Minnesota Statutes, Section 609.165 the said Richard Raymond Glaser is hereby restored to all civil right and to full citizenship, with full right to vote and hold public office, the same as if such conviction had not taken place.*NOTE: Be advised that this certificate does not relieve you of disabilities imposed by the Federal Gun Control Act. Id. at 1215.

The Seventh Circuit agreed with the defendant that this letter was sufficiently broad**{1998 U.S. Dist. LEXIS 33}** that it invoked the shelter principle of § 921(a)(20). The Court stated:

> The notice rule is designed not for statutes . . . that return the right to vote and cut hair but for communications that seem to have broader import. If, for example, the governor issues a pardon that by virtue of state law, does not restore the right to carry guns, then unless the state tells the felon this the federal government will not treat him as convicted. The second sentence of § 921(a)(20) is an anti-mouse-trapping rule. If the state sends the felon a piece of paper implying that he is no longer "convicted" and that *all* civil rights have been restored, a reservation in a corner of the state's penal code cannot be the basis for federal prosecution. A state must tell the felon point blank that weapons are not kosher. The final sentence of § 921(a)(20) cannot logically mean that the state may dole out an apparently-unconditional restoration of rights yet be silent so long as a musty statute withholds the right to carry guns. Then the state never would need to say a peep about guns; the statute would self destruct. It must mean, therefore, that the state sometimes must tell the felon that**{1998 U.S. Dist. LEXIS 34}** under state law he is not entitled to carry guns, else § 922(g) does not apply.Id., *quoting* United States v. Erwin, 902 F.2d 510, 512 (7th Cir. 1990) (emphasis in original).

The Glaser court concluded that where a letter gave back *all* rights, a felon must be *expressly* warned that involvement with guns may cause his former conviction to be used as a predicate for a future conviction. Moreover, the Glaser court was careful to point out that the final sentence of § 921(a)(20) instructs courts to look, not at the contents of the state statute books, but at the contents of the document. 14 F.3d at 1218.

In the case at hand, the letter Rutledge received differs in a crucial respect from the letter Glaser received. Quite simply, the letter does not restore *all* of Rutledge's civil rights. The letter merely addresses the restoration of his right to vote, hold offices and have licenses restored. This restoration, unlike the sweeping language used in the letter Glaser received, only represents a few of the civil rights which are guaranteed to citizens. For example, the letter does not attempt to restore Rutledge's right to sit on a jury. Thus, Rutledge**{1998 U.S. Dist. LEXIS 35}** cannot reasonably assert that he thought *all* his rights were restored by the letter.

This conclusion is further bolstered by the Seventh Circuit's decision of Roehl v. United States, 977 F.2d 375 (7th Cir. 1992), which, compared to Glaser, is clearly more factually apposite to the case *sub judica*. There, a § 2255 petitioner produced a sample (the original having been destroyed) of the "discharge" letter that was issued to him. The letter stated, "any civil rights lost as result of conviction herein described, are restored by virtue of the discharge, under the provisions of section 57.078 of the Statutes of the State of Wisconsin." Roehl, 977 F.2d at 378.

{22 F. Supp. 2d 883} Roehl, like Rutledge, argued that his discharge fulfilled the dictum in Erwin which stated, "if the state sends the felon a piece of paper implying that he is no longer 'convicted'

and that *all* civil rights have been restored," § 921(a)(20) prevents counting the conviction unless the paper expressly provides that the person may not ship, transport, possess, or receive firearms. Id. The Court rejected Roehl's theory and held:

> Erwin aside, we think it arguable, at least, that the restoration**{1998 U.S. Dist. LEXIS 36}** of civil rights intended under 18 U.S.C. § 921(a)20 must be an individualized decision, as the expungement, setting aside, or pardon, also enumerated would be. *Noscitur a sociis*.
>
> In any event, the . . . "Discharge" form was routinely issued upon satisfaction of sentence. It referred to Wis.Stat. § 57.078 which, although using general language, has been construed to deal primarily with the right to vote and not to restore the right to hold office. Applying the Erwin language, we find no reasonable implication that one who receives such a "Discharge" will be treated as if no longer convicted, even if the language "any civil rights lost as a result" of the conviction can be construed to mean "all civil rights."

Id.

In the case at hand, the letter Rutledge received was less expansive than the one Roehl received. Roehl was given back all civil rights lost as a result of his conviction. On the contrary, Rutledge's restoration of rights was limited. Thus, Roehl, in fact, had a better argument than Rutledge does, and the Seventh Circuit nevertheless rejected it. Moreover, an important similarity exists between the Rutledge situation and Roehl's situation. Rutledge's**{1998 U.S. Dist. LEXIS 37}** letter essentially followed the Illinois Statute which automatically restores rights after serving a sentence and was not individually tailored, which the Roehl court seemed to find important. The relevant Illinois statute states:

> A person convicted of a felony shall be ineligible to hold an office created by the Constitution of this State until the completion of his sentence. 730 ILCS 5/5-5-5(b).
>
> A person sentenced to imprisonment shall lose his right to vote until his release from imprisonment. 730 ILCS 5/5-5-5(c).
>
> On completion of sentence of imprisonment or upon discharge from probation, conditional discharge or periodic imprisonment, or at any time thereafter, all license rights and privileges granted under the authority of this State which have been revoked or suspended because of the conviction of an offense shall be restored unless the authority having jurisdiction of such license rights finds after investigation and hearing that restoration is not in the public interest. 730 ILCS 5/5-5-5(d).

The letter Rutledge received was not sufficiently individualized to trigger the "anti-mouse trapping" rule of § 921(a)(20).

While the approach used in Roehl**{1998 U.S. Dist. LEXIS 38}** was criticized in Glaser, it was not rejected outright. And even if it is held that Roehl is deemed to no longer be good law, it is of no import because Rutledge's claim fails under either approach. First, under Glaser, it is patently clear that the letter Rutledge received did not restore *all* his civil rights. Second, under Roehl, Rutledge's letter is a mere recitation of the statutory scheme enacted in Illinois and is not an individualized determination. For the above reasons, this Court concludes that Count IV should stand.

5. **Trial Counsel Ineffectiveness with Respect to Count III**

Rutledge argues that his counsel was constitutionally ineffective for failing to investigate his case, interview witnesses, and present an alibi defense with respect to Count III (distribution). The main thrust of Rutledge's argument is that his trial counsel failed to interview Kim Mummert, who would

establish that he was elsewhere at the time of the alleged drug sale to Michael Wright, despite Wright's specific testimony that he had purchased a quantity of cocaine from Rutledge.

The Government responds that, at minimum, Rutledge must produce an affidavit stating the**{1998 U.S. Dist. LEXIS 39}** testimony each witness would have given at trial. Wright v. Gramley, 125 F.3d 1038, 1044 (7th Cir. 1997). In the present case, Rutledge has not produced affidavits, **{22 F. Supp. 2d 884}** despite having Mummert interviewed by a private detective, having another inmate telephone her and having sent a prepared affidavit for her to execute. In fact, the Government points out that Mummert in an affidavit has indicated that it was completely possible Rutledge sold cocaine during the month of January, 1989 and that it would have been possible for him to have distributed cocaine to Wright during that time.

Moreover, the Government argues that Rutledge's trial counsel attempted to discredit the testimony of Mummert in order to mitigate its damage. Mummert offered much evidence which incriminated Rutledge with respect to the continuing criminal enterprise and conspiracy drug charges. She was a main witness for the Government. Mummert was Rutledge's live-in girlfriend and gave a great deal of testimony which illustrated the scope of Rutledge's dealings in drugs. Defense counsel's strategy was to characterize her as an untrustworthy witness. This was a reasonable defense strategy. The continuing criminal enterprise**{1998 U.S. Dist. LEXIS 40}** charge and the conspiracy charge both potentially carry stiffer penalties than the mere distribution charge standing alone (as discussed below). Therefore, it would have been inconsistent to ask a jury to believe her testimony with respect to the alibi for Count III (distribution) while at the same time attempting to discredit her testimony which pertained to the more serious counts (CCE and conspiracy). It was in Rutledge's interest to try to discredit her rather than to formulate a defense strategy, the effectiveness of which would turn on her credibility. This Court "will not question counsel's choices among an array of reasonable trial strategies." United States v. Moutry, 46 F.3d 598, 605 (7th Cir. 1995). This was a reasonable trial strategy.

The defendant must show that his trial counsel's performance fell below an objective standard of reasonableness and that but for the professional errors of his trial counsel, the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052. This Court must "indulge in a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance**{1998 U.S. Dist. LEXIS 41}** . . . ." Id. at 689. The tactic Rutledge's trial counsel used was reasonable albeit ultimately unsuccessful.

6. **Defendant Argues His Sentence Exceeds Maximum Sentence Proscribed Under 21 U.S.C. § 841(b)(1)(C)**

Rutledge was sentenced to life without the possibility of release on Count III. Rutledge argues that under the statute he can only be sentenced to a term of imprisonment of not more than 30 years. 21 U.S.C. § 841. The Court agrees.

The Government indicates that there is a split of authority among the circuits as to whether a sentencing court can only consider the quantity of drugs found to be involved in the offense of conviction (*see* United States v. Darmand, 3 F.3d 1578, 1581 (2nd Cir. 1993)) or whether a court could consider "relevant conduct cocaine" and not just the amount of cocaine recovered at the defendant's arrest and alleged in the indictment (*see* United States v. Reyes, 40 F.3d 1148 (10th Cir. 1994)).

The Government concedes that the Seventh Circuit favorably cited cases which relied on the Second Circuit's view and concedes that:

> For purposes of determining the defendant's sentence range under the guidelines, the Court

should{1998 U.S. Dist. LEXIS 42} consider the entire five kilograms of cocaine the Court found attributable to the defendant. But for purposes of determining the defendant's statutory maximum sentence, the Court should not consider the relevant conduct quantity, only the quantity found to be involved in the offense of conviction for Count Three.Government's Response to Petitioner's Supplemental Motion at 24.

Accordingly, Rutledge should be sentenced to the maximum of 30 years for Count III. The Government is ordered that this change appear in the proposed sentencing order.

7. **Ineffective Assistance of Trial and Appellate Counsel**

Rutledge makes many claims of ineffective assistance of counsel at both the trial and appellate level. The Court has carefully reviewed **{22 F. Supp. 2d 885}** his claims. Except to the extent indicated above, the Court adopts the Government's position with respect to these issues.

Conclusion

In conclusion, Count I (CCE) is vacated. Count II (conspiracy to distribute) is reinstated. Count III (distribution) remains viable, but the sentence imposed should be reduced to 30 years. Count IV (felon in possession of a firearm) remains. Count V (armed drug trafficker) is vacated but can retried. Count**{1998 U.S. Dist. LEXIS 43}** VI (armed drug trafficker) is vacated.

Accordingly, Rutledge's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255 [# 1] is GRANTED IN PART and DENIED IN PART. The Clerk is directed to prepare a new Sentencing Order which reflects the determinations made within this Order. Rutledge's Motion for Production of Telephone Recording [# 14] is DENIED. His Motion for Evidentiary Hearing [# 15] is DENIED. His Motion to Produce Statements by Michael Wright [# 21] is DENIED, and his Motion to Produce Statements by Kim Mummert [# 22] is DENIED. Respondent's Motion for Reconsideration of Court's June 18, 1998 prospective ruling [# 38] is DENIED. The Court will hold a telephone status call with counsel within 14 days to determine whether the United States wishes to pursue the retrial of Count V.

ENTERED this 25th day of September, 1998.

Michael M. Mihm

Chief United States District Judge

Footnotes

1

At oral argument Rutledge moved to be able to file another § 2255 petition attacking the conspiracy count if it were reinstated. The Court agrees that it is appropriate. Rutledge has 90 days from this Order to file such petition. Rutledge is cautioned, however, that the Petition is only to address matters which affect the legality of the conspiracy count.

EXHIBITS

EXHIBITS

EX. 1

B.

39

COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF ILLINOIS

AT ROCK ISLAND

FILED

DEC - 4 1991

JOHN M. WATERS, Clerk
U. S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

v.

TOMMY LEE RUTLEDGE,
SHELLY HENSON,
RICHARD HAGEMASTER,
STAN WINTERS, and
DONALD TAYLOR,

Defendants.

Criminal No. 91-40009

VIO: Title 18, United States Code, Sections 2, 922(g) and 924(c); Title 21, United States Code, Sections 841(a)(1), 846 and 848

SECOND SUPERSEDING INDICTMENT

The Grand Jury charges:

COUNT 1

Beginning in or about early 1988 and continuing at least until in or about late 1990, in Warren County, Illinois, within the Central District of Illinois, and elsewhere,

TOMMY LEE RUTLEDGE,

the defendant herein, knowingly and intentionally did engage in a continuing criminal enterprise, namely a series of violations of Title 21, United States Code, Sections 841(a)(1) and 846 by repeatedly distributing and possessing with intent to distribute quantities of cocaine, which continuing series of violations were undertaken by

TOMMY LEE RUTLEDGE

in concert with at least five (5) other persons with respect to whom

TOMMY LEE RUTLEDGE

occupied positions of organizer, supervisor, and other positions of management, and from which continuing series of violations

TOMMY LEE RUTLEDGE

obtained substantial income and resources.

2. As part of this continuing criminal enterprise, the defendant,

TOMMY LEE RUTLEDGE,

committed and caused to be committed numerous acts, including but not limited to the acts set forth hereinafter in Counts 3, 4 and 5, which counts are incorporated by reference as if fully set forth here.

In violation of Title 21, United States Code, Section 848.

COUNT 2

1. Beginning in or about early 1988, and continuing until in or about late 1990, in Warren County, within the Central District of Illinois and elsewhere,

TOMMY LEE RUTLEDGE,
SHELLY HENSON,
RICHARD HAGEMASTER,
STAN WINTERS, and
DONALD TAYLOR,

the defendants herein, did knowingly combine, conspire and agree with each other and both with persons known and with persons unknown to the grand jury to commit certain acts in violation of the laws of the United States, to-wit: (a) to knowingly possess with intent to distribute cocaine, a Schedule II controlled substance; and (b) to knowingly distribute cocaine, a Schedule II controlled substance, both in violation of Title 21, United States Code, Section 841(a)(1).

2. Over the course of the conspiracy that the defendants distributed and caused to be distributed in excess of 5 kilograms of cocaine.

OVERT ACTS

3. In furtherance of the conspiracy and to accomplish its objects of possessing with intent to distribute and distributing cocaine, the defendants and other persons both known and unknown to the grand jury did commit overt acts, including but not limited to the following:

1. In late 1988, Richard Hagemaster delivered cocaine to an individual for Tommy Lee Rutledge;

2. In early 1989, Tommy Lee Rutledge and Donald Taylor travelled to Iowa to purchase cocaine;

3. In January, 1989, Tommy Lee Rutledge and Shelly Henson distributed cocaine to an individual;

4. In mid-1990, Stan Winters delivered cocaine to an individual for Tommy Lee Rutledge.

All in violation of Title 21, United States Code, Section 846.

COUNT 3

In or about January, 1989, in Warren County, within the Central District of Illinois,

TOMMY L. RUTLEDGE, and
SHELLY HENSON,

the defendants herein, did knowingly distribute cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18,

United States Code, Section 2.

COUNT 4

On or about July 14, 1989, in Warren County, within the Central District of Illinois,

TOMMY L. RUTLEDGE,

the defendant herein, did knowingly possess a firearm which had previously travelled in interstate or foreign commerce, to-wit: numerous shotguns, rifles and pistols, the defendant having been previously convicted under the laws of the State of Illinois of a crime punishable by imprisonment for a term exceeding one year.

In violation of Title 18, United States Code, Section 922(g).

COUNT 5

In or about July, 1989, in Warren County, within the Central District of Illinois,

TOMMY LEE RUTLEDGE,

the defendant herein, did knowingly use and carry a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States, that is the distribution of cocaine, in violation of Title 21, United States Code, Section 841.

In violation of Title 18, United States Code, Section 924(c).

COUNT 6

On or about July 14, 1989, in Warren County, within the Central District of Illinois,

TOMMY LEE RUTLEDGE,

the defendant herein, did knowingly use and carry a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States,

that is, the distribution of controlled substances and the possession of controlled substances with intent to distribute, in violation of Title 21, United States Code, Section 841.

In violation of Title 18, United States Code, Section 924(c).

A True Bill,

Mary E. Carnes
Foreperson

J. William Roberts by Byron Cutshaw
J. WILLIAM ROBERTS
UNITED STATES ATTORNEY

EX. 2

AO 245C (Rev. 3/95) Sheet 1 - Amended Judgment in a Criminal Case (NOTE: Identify Changes with Asterisks (*))

United States District Court

Central District of Illinois

UNITED STATES OF AMERICA
v.
Tommy L Rutledge

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: **4:91CR40009-001**

Jacob Corre
Defendant's Attorney

Date of Original Judgment: 12/29/1992
(or Date of Last Amended Judgment)

Reason for Amendment:

- ☒ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(c))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36))
- ☐ Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant to ☐ 28 U.S.C. § 2255, ☐ 18 U.S.C. § 3559(c)(7), or ☐ Modification of Restitution Order

THE DEFENDANT:

- ☐ pleaded guilty to count(s)
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☒ was found guilty on count(s) 1SS, 3SS, 4SS, 5SS & 6SS after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 848	Continuing Criminal Enterprise	12/01/1990	1SS
21 U.S.C. § 841 (a)(1)	Distribution of Cocaine	12/01/1990	3SS
18 U.S.C. § 922 (g)	Felon in Possession of a Firearm	12/01/1990	4SS
18 U.S.C. § 924 (c)	Armed Drug Trafficker	12/01/1990	5SS& 6SS

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U.S. MARSHAL'S OFFICE
CENTRAL ILLINOIS

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) * Per remand, conviction on Count 2SS is vacated at this time.

☒ Count(s) 1-3, and 1S-3S is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 361-38-1590
Defendant's Date of Birth: 06/11/1947
Defendant's USM No.: 08829-026
Defendant's Residence Address:
*R.R. 1

Adair IL 61411

Defendant's Mailing Address:
*R.R. 1

Adair IL 61411

FILED
JUN 10 1996
JOHN M. WATERS, Clerk
U.S. DISTRICT COURT

05/29/1996
Date of Imposition of Judgment

Michael M. Mihm
Signature of Judicial Officer

Michael M. Mihm
Chief U.S. District Judge
Name & Title of Judicial Officer

6/10/96
Date

TRUE COPY
ATTEST:
JOHN M. WATERS, CLERK
BY: L Morrow
DEPUTY CLERK
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
DATE: 6-10-96

DEFENDANT: **Tommy L Rutledge**

CASE NUMBER: **4:91CR40009-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of life.

Said term of imprisonment consists of life on Count 1SS, life without possilble release on Count 3SS to run concuurent to Count 1SS, 10 years on Count 4SS to run concurrent with Counts 1SS and 3SS, 60 months on Count 5SS to run consecutive to counts 1SS,3SS,4SS & 6SS, 120 months on Count 6SS to run consecutive to Counts 1SS,3SS,4SS & 5SS.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ a.m./p.m. on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

EX. 3

AO 245C (Rev. 3/95) Sheet 1 - Amended Judgment in a Criminal Case (NOTE: Identify Changes with Asterisks (*)) 24.

Russ

United States District Court
Central District of Illinois

UNITED STATES OF AMERICA
v.
Tommy L Rutledge

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

FILED
OCT -1 1998
JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case Number: 4:91CR40009-001

Date of Original Judgment: 05/29/1996
(or Date of Last Amended Judgment)

Harold Jennings
Defendant's Attorney

Reason for Amendment:

- ☐ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(c))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36))
- ☐ Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☒ Direct Motion to District Court Pursuant to ☒ 28 U.S.C. § 2255, ☐ 18 U.S.C. § 3559(c)(7), or ☐ Modification of Restitution Order

THE DEFENDANT:

- ☐ pleaded guilty to count(s)
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☒ was found guilty on count(s) after a plea of not guilty. * 2SS, 3SS, 4SS

	Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
*	21 U.S.C. § 846	Conspiracy to Possess with Intent to Distribute Cocaine	12/01/1990	2SS
*	21 U.S.C. § 841(a)(1)	Distribution of Cocaine	12/01/1990	3SS
*	18 U.S.C. § 922 (g)	Felon in Possession of a Firearm	12/01/1990	4SS

The defendant is sentenced as provided in pages 2 through 2 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
- ☒ Count(s) 1-3, and 1S-3S is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 361-38-1590
Defendant's Date of Birth: 06/11/1947
Defendant's USM No.: 08829-026
Defendant's Residence Address:
*R.R. 1
Adair IL 61411
Defendant's Mailing Address:
*R.R. 1
Adair IL 61411

09/25/1998
Date of Imposition of Judgment

Michael M. Mihm
Signature of Judicial Officer

Michael M. Mihm
Chief U.S. District Judge
Name & Title of Judicial Officer

10-1-98
Date

304

10.

25,

DEFENDANT: Tommy L Rutledge

CASE NUMBER: 4:91CR40009-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of life.

Said term of imprisonment consists of life without possible release on Count 2SS , 360 months on Count 3SS, 120 months on Count 4SS all to run concurrent. Count 2SS is reinstated and Counts 1SS, 5SS and 6SS are vacated by the Court Order in Civil Case # 97-4054 dated 9/25/98.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ a.m./p.m. on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal