In the

Supreme Court of the United States

THOMAS J. ALBERNAZ AND EDWARD RODRIGUEZ, PETITIONERS,	)	
V.	)	No. 79-1709
UNITED STATES OF AMERICA, RESPONDENT.	)	

Washington, D.C.
January 19, 1981

Pages 1 thru 49

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS J. ALBERNAZ AND EDWARD RODRIGUEZ, Petitioners, v. UNITED STATES OF AMERICA, Respondent. : No. 79-1709

Washington, D. C.

Monday, January 19, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:01 o'clock p.m.

APPEARANCES:

MISS JUDITH H. MIZNER, ESQ., 10 Post Office Square, Boston, Massachusetts 02109; on behalf of the Petitioners.

MARK I. LEVY, ESQ., Assistant to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; on behalf of the Respondent.

C O N T E N T S

- - -

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments now in Albernaz et al. v. United States.

Miss Mizner, you may proceed whenever you are ready.

ORAL ARGUMENT OF MISS JUDITH H. MIZNER, ESQ.,

ON BEHALF OF THE PETITIONERS

MS. MIZNER: Mr. Chief Justice, and may it please the Court:

This case presents the question of whether consecutive sentences can be imposed for separately charged violations of two conspiracy provisions of the 1970 Drug Abuse Prevention and Control Act, where those two provisions were violated by what the court below found as a matter of fact to be a single conspiracy with dual objectives.

The facts are briefly that following a seizure of a large quantity of marijuana from a freighter on the high seas, petitioners Albernaz and Rodriguez and 16 others were charged on a two-count indictment. Count one charged a conspiracy to import marijuana in violation of 21 U.S.C. Section 963. Count two charged a conspiracy to distribute marijuana in violation of Section 846.

Now, the two counts were absolutely identical as to the alleged conspirators, the alleged time and locus of the conspiracy, and the overt acts set forth in furtherance of each count. They differed only in the object of the

conspiracy alleged and in the statutory provision that was allegedly violated.

From the outset the prosecution treated the two statutory violations as a single conspiracy, stating in his opening that "the conspiracy charged in two counts is actually a single conspiracy," for at all times the planning was the same, to go find someone with a boat with reliable people to go out to sea and meet the freighter. And the Government's evidence focused on the petitioners' involvement in arranging to bring the marijuana from this freighter offshore to the United States. However, since petitioners had enlisted the aid of Drug Enforcement Administration agents to provide the boat to transport the marijuana, the plan never came to fruition. After some of the cargo was transferred, the Coast Guard moved in and seized the freighter and the petitioners and two others were arrested in Florida later that day.

QUESTION: The conspiracies here were conspiracy to import and conspiracy to distribute?

MS. MIZNER: Yes.

QUESTION: Nothing about simple possession?

MS. MIZNER: No. They were charged as simply a conspiracy to import and a separate count of conspiracy to distribute, but in fact they were based on the same facts and the court below found a single conspiracy.

QUESTION: Right. I understand that.

MS. MIZNER: And indeed the evidence that the court used to permit the finding of a plan to distribute is evidence that was also relevant to the plan to import, and it was evidence that the court found could be inferred a plan to distribute but not a separate, independent, distinct conspiracy to distribute. En banc the 5th Circuit reaffirmed this finding of a single conspiracy, but affirmed the imposition of the consecutive sentences on a finding of congressional intent to authorize; and a finding that there was no double jeopardy involved here.

In a number of recent opinions this Court has stated that in determining whether multiple punishment for separate statutory violations that arise out of the same transaction are permissible, the first and primary question is whether Congress intended to authorize such punishment. If Congress didn't intend to authorize multiple punishment, that's the end of the inquiry. The congressional intents must be clear and unambiguous, because criminal statutes must be strictly construed and the rule of lenity requires that ambiguity be resolved in favor of the defendant.

QUESTION: What do you have going for you here besides the rule of lenity?

MS. MIZNER: The legislative history provides an affirmative explanation for the existence of the two separate

conspiracy provisions that has nothing to do with any intent to impose multiple punishment for a single conspiracy that has two objectives that happened to fall on each side of the subchapter line, an artifically divided subchapter line.

QUESTION: That would not be an argument that relies on the Braverman case?

MS. MIZNER: No, this is a question of congressional intent, of using the legislative history to show that there is no affirmative congressional intent to impose multiple punishment or that at best it is so ambiguous that the rule of lenity must be applied to it.

QUESTION: Is the inquiry pretty much the same as in Simpson and Busic?

MS. MIZNER: Yes, Your Honor, it is.

QUESTION: Is the rule of lenity a discretionary concept, or how would you describe it?

MS. MIZNER: I suggest that it has constitutional overtones in terms of being based on a desire not to impose punishment, additional punishment, unless Congress has spoken clearly and unambiguously; unless Congress has provided fair and clear, adequate warning. Adequate warning and clarity is an integral part of due process of law.

QUESTION: But, of course, you don't impose punishment initially -- you don't impose punishment initially unless Congress has spoken clearly and unambiguously, so that there's

nothing different in the second sentence from the first sentence in that sense. If Congress has laid down a standard like in Lanzetta where it's difficult to figure out what it means, you apply the rule of lenity and say, we just don't know what it means and therefore we won't convict.

MS. MIZNER: But this goes beyond that to go beyond a situation where a statute is facially void for vagueness to a situation where it's the application of two statutes to a particular factual situation that --

QUESTION: Miss Mizner, the hypothesis for the application of the rule of lenity has to be that it's ambiguous, whether a course of conduct constitutes one offense or two. There has to be uncertainty about that particular problem, doesn't there?

MS. MIZNER: Well --

QUESTION: And if there is uncertainty, then the rule of lenity requires that a court find that the intent was to impose only one punishment. Isn't that it?

MS. MIZNER: Well it goes beyond that, because Congress may well have not intended to impose multiple punishment where two statutes that under a strict application may not be technically the same offense; when those two offenses occur in the same criminal episode or same criminal transaction, Congress might not have intended multiple punishment.

QUESTION: Well, exactly. And the rule of lenity

has nothing to do with double jeopardy, which is an absolute prohobition. But the rule of lenity simply says that when it's not clear that two offenses were intended, then it shall be presumed that there is only one. Isn't that it?

MS. MIZNER: Well, I think it's more than that, than a strict application of two offenses are one offense. It depends how you're defining that equation. The Government has argued that these are not the same offense under the Blockburger test.

QUESTION: Well, maybe they're not, but nevertheless Congress, if it's not clear that Congress intended that two separate punishments be imposed, then regardless of any Blockburger test, then the rule of lenity says only one shall be imposed. Isn't that correct?

MS. MIZNER: Only one test; that is our position. Yes.

QUESTION: Well, then, that is the rule of lenity, isn't it?

MS. MIZNER: Yes.

QUESTION: And its hypothesis is that there be an ambiguity as to whether one or two punishments are to be imposed?

MS. MIZNER: Yes.

QUESTION: And you say there's an obvious ambiguity here, because the courts that have construed it have come out in different ways.

MS. MIZNER: That's one indicium of ambiguity.

QUESTION: That's one clear indicium of ambiguity.

MS. MIZNER: And another indicium is the way that the Government has treated prosecutions that involve this type of conspiracy, charging them both in one count and in two counts.

QUESTION: Would you say that we begin to think about turning our minds to the rule of lenity, and about the same situation, if we turn to the legislative history, if we find ambiguity in the statute? But not otherwise?

MS. MIZNER: Well, I believe that you can look at the legislative history even if the language is clear on its face, but I believe that here --

QUESTION: We can, but do we? Is there a rule that we look to the --

MS. MIZNER: It's a discretionary.

QUESTION: If the statute is clear, isn't there the plain meaning rule?

MS. MIZNER: Well, but this is the kind of case where you're talking about the, not the plain meaning, not the facial clarity of the words themselves, but their joint and simultaneous application to a particular fact content.

QUESTION: Well, if the language of the statute -- to go back to Justice Stewart's discussion with you, if the plain meaning of the statute is apparent, do we look either

to the legislative history or can you give any thought about the rule of lenity?

MS. MIZNER: We don't have that situation here because the --

QUESTION: Well, I didn't ask you if we had it. I just said, if. If it's plain, because it might be plain to some and not very plain to others.

MS. MIZNER: Well, in that case I suggest that if it's plain to some and not to others, then there's an ambiguity that must be resolved by looking at the legislative history.

QUESTION: The people who think it's plain are not likely to believe there's an ambiguity.

QUESTION: Well, are you contending then that out of the 93 judicial districts in the United States, if you can find one district judge to say that it's ambiguous, the rule of lenity applies because we have one judge saying it's ambiguous, even though 92 others say it's not ambiguous?

MS. MIZNER: I'm saying that might be one indicia of ambiguity, but here we have more than that. We have statutes that on their face say nothing about how they are to be applied in the context of a single conspiracy that's charged as violating both provisions. It's like a situation in Whalen and Busic and Simpson and Jeffers where there are two separate statutes that are not void for vagueness but in terms

of how they are to be applied in a particular factual context where there's a single criminal episode, then there is some ambiguity that must be resolved by looking at legislative intent and other tools of --

QUESTION: When you say there's a single criminal episode, a person may be convicted for a conspiracy without more, is that not so?

MS. MIZNER: That's true.

QUESTION: And then if the conspiracy is executed, that's a separate crime, isn't it?

MS. MIZNER: Yes. This Court has over the past years -- conspiracy is a somewhat unique area, and this Court and other courts have drawn lines and have said that as a matter of history, tradition, and because you're penalizing different objectives, you can punish the conspiracy and the substantive offense, because the purpose of the conspiracy is to punish the agreement which is the evil, rather than the objective which forms the substantive offense.

But looking at the legislative history in this case, the Government has conceded that it's silent on the question of multiple punishments. I suggest it goes beyond silence and provides an affirmative explanation for the existence of the two provisions. It has nothing to do with the intent to impose multiple punishments for a single conspiracy. As proposed to the Congress by the Administration, the

legislation that turned out to be the 1970 Drug Act had one conspiracy provision that penalized all offenses. And that's the way it went through the Senate, as one conspiracy provision. In the House, because of the intricacies of committee jurisdiction, the House Ways and Means desired to retain control over import-export provisions, the legislation was divided between that committee and the Interstate and Foreign Commerce Committee. And --

QUESTION: Miss Mizner, doesn't that in itself suggest that the House perceived that importation and distribution posed distinct social evils?

MS. MIZNER: No, I think that what it suggests is a division according to whether these were domestic offenses or whether they were internal-external offenses, in some way to further congressional committee jurisdiction. If you look at Section 801 of the Act, which sets out the congressional findings as to what are the social dangers, we find that they list importation, manufacture, distribution, possession, all equally. There's no indication that importation is any more heinous than any of the others. Yet a conspiracy to manufacture and distribute is punishable under one conspiracy provision, 846. I suggest that manufacture is the functional equivalent of importation. It puts --

QUESTION: Well, you would explain it away, then, purely on the committee structure of the House of

Representatives?

MS. MIZNER: I'd suggest that that is an affirmative explanation as to why there are two separate provisions, as opposed to the one that is proposed by the Administration and that went through the Senate. And in addition, Senator Dodd said that he perceived no major difference between the House and the Senate legislation. And certainly if you're talking about the accumulation --

QUESTION: Well, could I interrupt you at that point? Do you have a copy of your brief in front of you? Would you turn to page 19, where you make reference --

MS. MIZNER: Right. The citation is missing and --

QUESTION: Indeed, it is, and I'd like you to give it to me.

MS. MIZNER: It is the October 6, 1970, Congressional Record.

QUESTION: You can do it afterwards, but I'd like you, if you would, write a letter to the Clerk and give us that specific citation.

MS. MIZNER: I shall.

QUESTION: I'll confess I tried to find it in a cursory examination and I would like it.

MS. MIZNER: I will provide that tomorrow.

Looking at the statutory structure as well as the legislative history also supports a conclusion that Congress

didn't really intend to impose multiple punishment for a single conspiracy because of the possibility that a conspiracy with two objectives that fall in one subchapter are penalized only under one statute, for example, the manufacture-distribution, which is analogous to the importation-distribution. And there's no rational basis for assuming that Congress would intend to punish those two types of conspiracies differently. And the Government has conceded in its brief --

QUESTION: Miss Mizner, let me pose a hypothetical. Suppose there were a statute that a conspiracy to import and distribute shall be punished twice as severely as a conspiracy to do either one alone. Would that in your estimation be violative of the Double Jeopardy Clause?

MS. MIZNER: Well, I suggest that because of the interplay of two factors, one of which is the unique, somewhat unique aspect of conspiracy law, and the other is the fact that importation and distribution are basically two integrally related and almost inseparable offenses in those circumstances.

QUESTION: Well, what if a person was importing for his own use?

MS. MIZNER: I suggest that that's a very rare circumstance.

QUESTION: Well, what difference does it make whether it's rare or common? Is it a crime to import for

your own use?

MS. MIZNER: Yes, it is a crime to import for your own use.

QUESTION: And if you sell some to some other people, that's a crime, isn't it?

MS. MIZNER: Yes. But we're talking about conspiracy which is simply the agreement.

QUESTION: Well, I was addressing myself to your thought that there is no difference between importing for your own personal use and importing for distribution to others.

MS. MIZNER: I'm not suggesting that there's no difference. I'm suggesting that they are kind of, in most contexts, very interrelated.

QUESTION: Of course they're related. You don't -- if you're going to distribute it, you've got to import it in some way. You're not suggesting they can't be made two separate crimes?

MS. MIZNER: Well -- oh, no; I'm not suggesting that the substantive offenses cannot be made separate, and I'm not suggesting that if you have two different agreements to do each of those objectives, you couldn't be punished separately. I'm saying that where you have one agreement that involves both of those objectives, then it raises questions as to whether this is the place where the Court should draw lines, as it has done in other areas of conspiracy law,

and say that you cannot -- that to subdivide a single agreement with two very closely related objectives simply in some fundamental sense does constitute multiple punishment for the same offense and cannot be imposed consonant with the protections of the Double Jeopardy Clause.

QUESTION: Well, then you would really require a metaphysical approach to the thing, that there is only a certain atom, or that you can't split atoms of crime, something to that effect?

MS. MIZNER: Well, I'm saying that conspiracy is kind of a different animal, particularly this kind of conspiracy where you don't need, under the drug statute, you don't even need an overt act, it's simply a crime of agreement. If you sit in a room with someone and agree to commit an offense, you are punishable at that stage. And say the room is bugged and some law enforcement officer overhears you, you are punishable at that stage, without anything more.

QUESTION: And you don't claim that there's anything wrong with that statute?

MS. MIZNER: No. I suggest that where one agreement has two objectives, particularly the two objectives of importation and distribution, that the offense is fundamentally singular and cannot be further subdivided.

In terms of the application of the Blockburger test to a determination of legislative intent, the Government

has argued that any ambiguity that exists can be resolved into a clear congressional intent by relying on the Blockburger test. And I suggest that it's not really a very good way of determining legislative intent. In a number of recent opinions this Court has not looked at Blockburger in determining congressional intent. It's a way of telling, one way of determining whether two statutory offenses constitute the same offense, but it's not determinative of legislative intent, because where the legislature may very well not intend to impose multiple punishment even for two statutes that are technically distinct under this test. And even, as Justice Rehnquist noted that where a test generally comes out only one way, it is particularly not a good tool for determining legislative intent which may be yes, may be no. But if the test always comes out one way, it really says nothing about what the Legislature intended.

And additionally, it can't be a presumptively determinative test, where it results in findings of separate offenses. But it means that if under the test you find that two statutory violations are the same offense, you can presume there's no congressional intent to multiple punish. And this is absent a clear congressional intent to the contrary.

This is consistent with other techniques of statutory construction, in resolving ambiguity in favor of the defendant strict construction. But it only works one way.

You can't simply invert it to say that where you have two statutory violations and they're not the same offense, you have a presumption of an intent to impose multiple punishment. It's like saying, here you've got a fruit that's a cherry. You presume it's not yellow. And then you invert that and you come up with a fruit that's not a cherry, you presume it is yellow. It doesn't work logically. You cannot simply --

QUESTION: I don't entirely follow that. You act as if the criminal justice system that we have carried over from our English system is a totally logical one that if there's a balance on one side there's a balance on another. Now, the defendant has a number of -- the presumption of innocence, proof beyond a reasonable doubt, things going from -- why can't you invert the presumption?

MS. MIZNER: I'm saying that the presumption as it stands is in accord with a number of those other protections afforded to a defendant such as --

QUESTION: Has this Court ever said so?

MS. MIZNER: Specifically?

QUESTION: Yes, that's the way we try to talk.

MS. MIZNER: I cannot recall any specific language but I suggest that it does work out to be that way. In a way, when this Court said that the test was that where two statutory violations are the same offense, you presume there's no congressional intent to multiple punish.

QUESTION: I must confess I'm not sure I follow your one-way argument. Any time you've got two different offenses, finding there are two different statutes or two sections of one statute, the presumption is that the prosecutor has the power to prosecute under either one, the second, or both.

MS. MIZNER: The prosecutor may have the power to prosecute under each.

QUESTION: You don't need affirmative evidence of an intent to allow him to do it, other than the fact that the Congress passed the statute. Why is it different from, say, speeding and throwing a bomb out the window? He does it in one transaction. You don't have to find Congress specifically thought about these two crimes being committed at the same time and wanted a multiple punishment. He just violated two laws.

MS. MIZNER: Well, I suggest that where you're talking about two offenses that are violated in one criminal episode, you may very well have to look at whether Congress intended, if the crimes are related in some sense, that they be punished consecutively. Not that he not be tried on both of those, for a jury may very well find it in one and not the other, or that he did both. But the question is whether you can be consecutively punished for both of those offenses.

QUESTION: Well, what difference would it make if

they punished him for both but they imposed concurrent sentences? They are nevertheless convicting them and punishing them for both offenses. So what difference would it make if they were consecutive or concurrent?

MS. MIZNER: Well, consecutive sentences have a very different import from concurrent sentences.

QUESTION: Oh, yes, but it's there for your purposes. I would think you would say you couldn't be tried on both of them at once. Or at least, you certainly wouldn't think that the judge could say, five to ten years on each count to run concurrently. Wouldn't you just pick one or the other?

MS. MIZNER: Well, you have to give the trier of fact the opportunity to determine which of those two offenses, if they are not the same --

QUESTION: Well, I know, but you seem to concede that he could impose punishments for both, as long as he made them concurrent?

MS. MIZNER: No, I'm not conceding that. I'm saying that you may be punished only once for that offense.

QUESTION: And I thought your further argument was, going back a little further, you can be convicted of only one or am I mistaken about that?

MS. MIZNER: I would -- the jury may come back with--

QUESTION: You can be tried on both --

MS. MIZNER: -- judgment to be imposed on only one.

QUESTION: Well, but the jury must be instructed that the conviction must be only one conviction on either, alternatively.

MS. MIZNER: Right. And the court --

QUESTION: Isn't that your argument?

MS. MIZNER: I don't believe that we have to go that far. We were simply saying that judgment should be imposed on only one and that sentence should be imposed on only one.

QUESTION: Even though the jury finds a violation of two separate criminal statutes?

MS. MIZNER: Even though the jury finds two separate statutory violations that are in fact one offense.

QUESTION: And brings in a verdict of convictions on both?

MS. MIZNER: And brings a verdict back of guilty on both counts.

QUESTION: On each of two counts?

MS. MIZNER: Right. The court can only impose sentence on one.

QUESTION: Well, that will be in effect then adoption of my brother Brennan's same transaction test, will it not?

MS. MIZNER: Well, it doesn't go as far.

QUESTION: You're just -- so far I've just heard you argue statutory construction.

MS. MIZNER: I believe that I did respond to your double jeopardy in one question there, and I would like to reserve the rest of my time and hopefully respond to that.

MR. CHIEF JUSTICE BURGER: Mr. Levy.

ORAL ARGUMENT OF MARK I. LEVY, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. LEVY: Mr. Chief Justice, and may it please the Court:

The Comprehensive Drug Abuse Prevention and Control Act of 1970 was designed, as this Court recognized in United States v. Moore, to strengthen existing law enforcement authority in the field of drug abuse. The Act contains two distinct conspiracy provisions in two distinct subchapters. One provision, Section 963, proscribes conspiracy to import a controlled substance. And it authorizes a sentence of imprisonment or a fine that does not exceed the penalty specified for the object offense of importation.

The other provision, Section 846, proscribes conspiracy to distribute a controlled substance. And it authorizes a sentence measured in terms of the object offense of distribution.

Thus a conspiracy having multiple objectives both to import and to distribute a controlled substance implicates

both subchapters, each of which authorizes a sentence based on the punishment provided for the underlying substantive offense. Notwithstanding the existence of distinct subchapters with distinct offense and penalty provisions, petitioners contend that a conspiracy involving importation and distribution of a controlled substance in violation of Section 963 and Section 846 can be punished under only one of these provisions and not both.

Surely nothing in the language or the structure of the Drug Control Act implies such a result. To the contrary, the Act on its face suggests that Sections 846 and 963 establish separate offenses that are subject to cumulative penalties. Moreover, our interpretation is also supported by the Blockburger rule. As recently as last term in Whalen, the Court stated that Blockburger is a rule of statutory construction that has been consistently relied on to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively.

Similarly, in Iannelli, the Court said that Blockburger serves the function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. Unquestionably, the Blockburger test is satisfied here. Conspiracy to import a controlled substance in violation of Section 963 and conspiracy to distribute a controlled

substance in violation of Section 846, each requires proof of a fact that the other does not.

QUESTION: What if it were not the case, then under Blockburger, I suppose, as a matter of statutory construction you would assume absent some clear indication to the contrary that Congress didn't intend double punishment?

MR. LEVY: I think one would assume or presume that.

QUESTION: That's been the rule, at least that's the way, that's the direction Blockburger looks in.

MR. LEVY: I think that's correct, but I think Blockburger --

QUESTION: And our other cases.

MR. LEVY: I think they would --

QUESTION: But if it's the other way, there are different punishments?

MR. LEVY: I think it works in both directions.

QUESTION: Yes; yes.

MR. LEVY: I agree. I think that's right.

QUESTION: And so part of this case is whether these are the same or different offenses?

MR. LEVY: Well, the question on the first part of the case is whether the statutes authorize consecutive sentences, which we submit is resolved in the first instance by application of the Blockburger rule.

QUESTION: Well, that's on the assumption that they

are separate offenses.

MR. LEVY: We think the Blockburger rule, in that terminology, is the means to determine whether they are separate offenses or the same offense. But we think it is --

QUESTION: Do you think your colleague agrees with that or not?

MR. LEVY: No, I believe not; as I read --

QUESTION: So part of this case, as I suggest again, is whether these are separate or the same offenses?

MR. LEVY: I will only take issue with the characterization of whether they are separate or same offenses. We think the question is whether the statute authorizes consecutive sentences rather than whether in any abstract sense these could be characterized as the same or different. But if that is the correct terminology, then we think Blockburger supplies the means to answer your question.

QUESTION: Well, I'll put it the other way, that part of this case is deciding in which direction do we follow Blockburger in this case?

MR. LEVY: That's right. We submit that Blockburger works in both directions, in that terminology. We think that that's expressed in the Court's recent decisions to understanding of the Blockburger rule in Whalen and Iannelli, and we think that that's absolutely supported by the Court's decisions in the Harris case, the Gore case, and the Blockburger

case itself, in which the Court relied on the rule to hold that consecutive sentences were permissible. So we think the Court has already answered the question, and held that Blockburger works in both directions.

QUESTION: Well, I suppose, even if it were decided that these were the same offenses, if they were tried together and sentences, consecutive sentences imposed in the same proceeding, the Government would suggest that there's no double jeopardy problem?

MR. LEVY: Certainly. I hope to get to that at the end of my argument, but we think, we agree with petitioners in the sense that the first issue in the case for the Court to resolve is whether the statutes authorize the consecutive sentences. We submit they do, and therefore the double jeopardy question will be presented here. But we agree that that's the first issue that the Court should pass upon.

To respond to Mr. Justice Brennan's question to my opposing counsel, we think this case is not like Simpson and Busic. First, after Whalen, it's not completely clear to us that the Blockburger rule applies to the type of compound and predicate offenses that were at issue in the case.

QUESTION: I think my question was, wasn't it, whether or not the same inquiries that were made in Simpson, Busic, and Whalen had to be made to resolve the question here?

MR. LEVY: Well, the question in the end was the

same, whether the statutes authorized consecutive sentences in Simpson.

QUESTION: I think that's all I said.

MR. LEVY: In that sense we agree with you but I think the analysis of the particular case here is much different than the one the Court employed in those cases. In particular the Court in Simpson and Busic did not employ the Blockburger test. It certainly didn't find that the test was met by the statutes at issue there, and the Court certainly did not suggest that if Blockburger had been met that it would not have given some guidance, indeed, a presumptive guidance, on the intent of Congress to authorize consecutive sentences.

Moreover, in those cases the Court found affirmative evidence, particularly the statement of Congressman Poff in the rejection of the Dominick Amendment, affirmative evidence to support the conclusion that consecutive sentences were not intended by Congress.

QUESTION: Mr. Levy, can I ask you a question about -- I want to be sure I understand what you're saying about the two-way use of Blockburger. You're saying that if two offenses satisfy the Blockburger test in the sense that each requires a proof of a fact that the other does not, then one should presume that Congress intended to authorize double prosecution and double punishment, or permit the possibility.

MR. LEVY: Exactly.

QUESTION: And do you also say the converse?

MR. LEVY: Yes.

QUESTION: That if there are two offenses that do not each, or are not mutually exclusive, that then the presumption is, Congress intended to authorize only one punishment?

MR. LEVY: We do, with the emphasis on the word presumption. It's a rebuttable presumption based on the specific legislative history and statute involved in the case.

QUESTION: Well, what would rebut such a presumption, something express in the Congress saying that even though it's a lesser included offense, we want multiple punishment to be permitted here?

MR. LEVY: That would be one illustration --

QUESTION: It would be a very clear evidence of legislative intent?

MR. LEVY: Right. I would cite, just as an illustration, the Gun Control Act, Section 924c, that makes it clear in terms that the sentences be imposed in addition to the sentence for the underlying federal felony.

QUESTION: Was that Simpson or -- ?

MR. LEVY: We think it's not because Simpson involved only a discrete class of felony as it contained their own enhancement of the provisions.

QUESTION: In other words, the provisions of 924?

MR. LEVY: Yes, it did. And either the assault statute or the bank robbery statute.

QUESTION: I believe in Busic it did too, did it not?

MR. LEVY: Yes. They were the same.

QUESTION: In other words, the clear enhancement provision would clearly be the evidence of an intent to --

MR. LEVY: For example, even though that might not pass the Blockburger rule, because one is a lesser included offense than the other, it still would be --

QUESTION: I understand. But that would be clear on the face of the statute?

MR. LEVY: Exactly. And that's one illustration of evidence that would rebut the inference that arises from Blockburger.

QUESTION: But in this case, you rely basically just on the Blockburger rule itself -- ?

MR. LEVY: That's our principal reliance here, and we think that's the first rule that should be applied --

QUESTION: Naturally.

MR. LEVY: -- in any case.

QUESTION: But that depends on your being able to convince us or somebody that these are separate offenses, in the Blockburger sense?

MR. LEVY: If they pass the Blockburger test;

that's correct. And we think there's no doubt here that they do and petitioners do not contend otherwise. So that's not an issue that's contested in this Court.

Petitioners do contend, however, that the Blockburger rule is inapplicable to conspiracy offenses. However, nothing in the formulation or the rationale of the rule indicates in any way that conspiracy is outside the scope of the rule. Moreover, in the American Tobacco case, this Court specifically applied the Blockburger test, to hold that a single conspiratorial agreement to violate Sections 1 and 2 of the Sherman Act was subject to cumulative penalties. Here analogously to American Tobacco, conspiracy to import a controlled substance, a conspiracy to distribute that substance, are separate statutory offenses under Sections 943 and 846. And the Blockburger rule indicates that these distinct statutory conspiracies are reciprocally distinguishable from and independent of each other.

Braverman v. United States, on which petitioners heavily rely in their brief, does not compel a different result. Quoting Braverman, "construe the general conspiracy statute not to authorize multiple convictions for a single agreement to commit several unlawful acts."

The Braverman decision itself makes clear as do the subsequent decisions in Pinkerton and American Tobacco that Braverman is confined to a situation in which the

conspiracy is alleged to violate but a single statute, and in particular the general conspiracy statute. In contrast, here as in American Tobacco conspiracy to accomplish multiple illegal objectives violates two distinct statutes, each of which provides for a separate penalty. Finally, our analysis under --

QUESTION: I suppose under your argument that these people could have been prosecuted for three crimes under one conspiracy, because I suppose they also violated the general conspiracy statute?

MR. LEVY: No, we don't take that position here and we think that question would raise different and more difficult questions than are presented in that case. There would be, I think, two levels of inquiry involving the general conspiracy statute. One would be whether Congress intended to preempt the general conspiracy statute by enacting specific conspiracy statutes, and if it didn't, then whether the conspiracy statutes would satisfy the Blockburger test and whether the Court's decision in Braverman would apply with a different result.

QUESTION: Do these statutes require proof of an overt act?

MR. LEVY: The lower courts consistently, as far as I know, have held that they do not.

QUESTION: Whereas, the general conspiracy

statute does.

MR. LEVY: That's correct.

QUESTION: And it would seem to me that the Blockburger test would allow all three, because that's a fact that you must prove under the general conspiracy statute, but would not have to prove under these.

MR. LEVY: Well, that's certainly one possible analysis and we don't disagree with that. I will say that the overt act is something of an unusual element in normal practice.

QUESTION: There is an element of the general conspiracy.

MR. LEVY: I believe that's correct. But one could also satisfy the Blockburger test simply without reference to the overt act requirement. In other words, if Congress didn't -- if Congress intended the general conspiracy statute to remain applicable where the object of the conspiracy was not subject to a specific conspiracy provision, then we think that even without reference to the overt act requirement it would also satisfy the Blockburger test. But I emphasize that the question of the relationship between 371 and the specific conspiracy provisions is not before the Court in this case.

QUESTION: And the first inquiry, if it were before the Court, would be, do these specific

conspiracy statutes displace the general conspiracy statutes, apart from any Blockburger test?

MR. LEVY: I believe that's correct. And the Court would look, among other things, to the specific history and provisions at issue and determine the question of congressional intent.

QUESTION: Right.

MR. LEVY: But that problem is not here today.

Our analysis under Blockburger and American Tobacco is reinforced by the fact that Sections 846 and 963 are directed at separate evils. In particular, and I think Mr. Justice Blackmun adverted to this same idea before, importation of a controlled substance not only poses a societal harm relating to drug trafficking and the increased availability of illegal drugs, but it also involves a breach of the sovereign borders of the United States and an interference with the Government's authority to regulate commerce across those borders, a wrong that occurs independently of either the contraband nature of the items brought into the country or the subsequent use or distribution that is made of them. Thus, Sections 846 and 963 serve to protect against different social dangers. A separate penalty for the violation of each provision is justified.

Petitioners offer two arguments to rebut the Blockburger presumption in this case. First, that the

legislative history of the Drug Control Act does not disclose a clear intention to allow cumulative penalties for a single unlawful agreement; and second, that the rule of lenity requires the construction that consecutive sentences are not permitted.

It is common ground between petitioners and ourselves that the legislative history is silent on the precise question of consecutive sentences for conspiracy to import and to distribute a controlled substance. However, it is unrealistic to demand, as Petitioners do, that Congress focus its attention on every conceivable issue of statutory interpretation and furnish an express and unambiguous answer to every potential question that might subsequently be litigated.

As recently noted in the Whalen opinion, both this Court and the Congress have recognized that the legislative process simply does not function in the manner envisioned by petitioners. Since Congress is predominantly a lawyers' body, it is presumably aware of familiar legal doctrines. It must be assumed to be cognizant of the federal Blockburger rule and at least in the absence of a specific contrary indication to contemplate that consecutive sentences may be imposed in cases such as the instant one where two distinct statutory provisions meet the Blockburger test.

QUESTION: Mr. Levy, do you have any comment on the opposition's reliance on Senator Dodd's statement?

MR. LEVY: We have a citation in our brief to a similar statement by a Representative saying that the bill that was enacted was essentially the House version rather than the Senate version, and I think that's supported by the conference report. But the honest answer, I think, is that Congress never specifically focused on the question of consecutive sentences, and therefore it was never confronted in an immediate way with any difference that might exist between the House version and the Senate version in that regard. The Congress did enact the House version, it did enact the statute that has two distinct conspiracy provisions that meet the Blockburger rule, and we think in those circumstances consecutive sentences are authorized.

QUESTION: Mr. Levy, do you see anything to the petitioners' position that this was argued as a one-conspiracy case?

MR. LEVY: No, I don't believe so. That, I think, poses the question in this case rather than answers it. There had been two separate conspiracies in the sense that I believe you're using the term, Mr. Justice Marshall.

QUESTION: Yes.

MR. LEVY: Then unquestionably there could be consecutive sentences. There could be consecutive sentences for two violations of the same statute, if there were two separate agreements. The problem only arises where as a

factual matter the unlawful agreement is singular rather than plural. And it's on that basis that the Court of Appeals decided the legal question and it was on that basis that the question was presented to the Court.

QUESTION: So that if Congress passed a bill that if you bought a gun for the purpose of shooting somebody, and then shot somebody, you wouldn't have to shoot him, you still could be convicted of both assault and purchase of the gun. I guess Congress could do that.

MR. LEVY: I believe it could. Because there are two separate evils and Congress has the right, particularly in the area of gun control, to enact stiff sentences, stiff provisions.

Petitioners contend that the existence of two conspiracy provisions is purely adventitious and merely reflects the fortuity that two different committees considered the bill in the House. However, the history they emphasize is not inconsistent with and does not foreclose consecutive sentences pursuant to Sections 846 and 963. Rather than ineluctably confirming petitioners' construction, this history is equally consistent, we believe, with the inference that the House committees focusing on two distinct governmental interests concluded that a conspiracy encompassing importation and distribution comprised dual evils that should be subject to enhanced penalties.

More specifically, the legislative development of the Act is fully compatible with the view that the House Ways and Means Committee which has general jurisdiction over customs and import matters, deemed importation offenses to present not only a drug problem but also a discrete harm involving the territorial sovereignty of the nation, and the Government's ability to controll ingress from foreign shores.

QUESTION: On the other hand, the bill that came over from the Administration to the Congress had merely one conspiracy provision in it, didn't it?

MR. LEVY: That is correct.

QUESTION: And isn't it surprising for it to end up with two penalties, that there isn't something positive in the legislative history?

MR. LEVY: No. One would hope that Congress would address the question. Our lives would certainly be simpler if it had, but I don't think, particularly as this Court noted in Whalen, I don't think it's surprising that there is no discussion of this in the Act. Congress rarely, specifically and expressly indicates its intent to allow consecutive sentences. Congress did enact a bill that has two separate conspiracy provisions. Those provisions do pass the Blockburger test. In those circumstances, the question is whether there's anything in the legislative history that defeats the presumption flowing from Blockburger.

We think that the legislative history, in particular the events in the House that petitioners so heavily rely on, are fully consistent with the position we take here and the resolution suggested by Blockburger. The bills that were originally introduced in two committees were substantively identical and each applied to both domestic and international drug offenses. The only difference between the bills concerned the type of drugs covered, the Ways and Means bill was applicable to narcotics and marijuana, which historically have been regulated under the Internal Revenue Code and other statutes within the jurisdiction of that committee; while the Interstate and Foreign Commerce Committee bill was limited to depressant and stimulant drugs, which previously had been regulated under the Federal Food Drug and Cosmetic Act, and thus was within the authority of the Commerce Committee.

Later however, and importantly, this division of responsibilities was deliberately altered in such a fashion that the Ways and Means Committee, which, as I noted before, has general jurisdiction over customs and import matters, focused its attention on the international aspects of the bill. At the same time the Commerce Committee addressed the domestic side of the bill. Thus the ultimate relationship between the committees expressly and purposely emphasize the distinction between the domestic and international facets of

the legislation. In these circumstances we believe that it accords with the usual presumption of rationality and regularity of congressional actions and is not contradicted by anything in the legislative history to believe that the Ways and Means Committee was naturally aware of and concerned with not only the particular menace of drug trafficking but also with the Government's general interest in maintaining the integrity of its borders and in policing its boundaries against unauthorized entries into the United States.

From the outset, the legislation in the House consisted of two bills, each containing its own conspiracy provision, and Congress in passing the Comprehensive Drug Control Act was unquestionably aware of the separate conspiracy sections. Accordingly, the most likely congressional understanding was that under the well-established Blockburger doctrine cumulative penalties would be available for the distinct conspiracy offenses defined in Sections 846 and 963. At the least, it cannot be unfailingly supposed, as petitioners suggest, that the existence of separate conspiracy provisions was a mere accident of the legislative process, and that Congress never intended to authorize consecutive sentences.

QUESTION: Mr. Levy, do I correctly understand that if this statute in Section 1, it said importing is bad, Section 2 said distribution is bad, and Section 3 said a

conspiracy to do any of the foregoing is bad -- try it the other way. In other words, if you had one conspiracy, one prohibition against conspiracies, then you'd follow Braverman, and if you have two separate conspiracy prohibitions, you'd follow Blockburger.

MR. LEVY: I think one would have to follow a different analysis on that. I believe that Braverman likely would certainly be highly illuminating if not controlling in those circumstances. It is conceivable, however, in the legislative history in some other way Congress would have indicated an intent to authorize consecutive sentences. In that situation, by analogy --

QUESTION: Suppose you didn't have anything besides the face of the statute to decide on?

MR. LEVY: That's right. But that situation arose, for example, in the Callanan case where the Hobbs Act, in a single section, proscribes both conspiracy and substantive offenses. And this Court held that even though there was but a single provision, both the conspiracy and the substantive offense could be cumulatively punished.

QUESTION: Now, my question is whether you could punish the conspiracy twice because it had two separate objects in that situation I gave you? I think you'd say no.

MR. LEVY: My assumption is that one could not.

QUESTION: Yes, because there's only one prohibition

against conspiracy?

MR. LEVY: That's correct. That was essentially the analysis that was followed in Braverman. But that is not a constitutional requirement.

QUESTION: I understand.

QUESTION: You mean unless Congress said so?

MR. LEVY: Exactly. But after some specific indication, I think the strong inference would be that the single conspiracy provision could only give rise to one sentence.

Petitioners' second argument to rebut the Blockburger rule, their rule of lenity analysis, is also unavailing. As this Court has recognized in such cases as Busic and in Callanan, the notion of lenity is one guide to be used in discerning legislative intent where an ambiguity otherwise is present. In the words of Mr. Justice Frankfurter writing for the Court in Callanan, "The rule is a guide to statutory construction and comes into operation at the end of the process of construing what Congress has intended, not at the beginning as an overriding consideration of being lenient to wrongdoers."

In our view, the Blockburger doctrine renders it unnecessary to resort to the rule of lenity. If, as in this case, two distinct statutory provisions satisfy the Blockburger tests, it is to be presumed that offenses under those provisions are subject to cumulative penalties.

Indeed, the very purpose of a Blockburger standard is to answer the question of consecutive sentences in the absence of a specific indication of congressional intent. And therefore Blockburger serves to resolve any ambiguity that might otherwise call for application of the rule of lenity.

Lenity cannot, by itself, be used to defeat the Blockburger doctrine, and we are unaware of any decision in which this Court has found the Blockburger test to be satisfied and yet nonetheless relied on the rule of lenity to prohibit the imposition of cumulative penalties.

Petitioners' counsel also relied on the fact that there are divergent authorities among the courts of appeals on the proper construction of these conspiracy provisions. We don't think --

QUESTION: And I suppose you would say, if it satisfied the Blockburger test, you could try them separately too?

MR. LEVY: I'm not sure -- you mean, try them in separate prosecutions? I think that raises an entirely distinct question.

QUESTION: Well, it may be, but if each requires proof of a fact that the other one doesn't, they can be tried separately, can't they?

MR. LEVY: The statute would allow them to be tried separately.

QUESTION: Well, how about the double jeopardy?

MR. LEVY: Well, it would be an additional question, one that isn't present here, whether successive prosecutions --

QUESTION: What question would it be?

MR. LEVY: Whether successive prosecutions rather than --

QUESTION: For different offenses?

MR. LEVY: Yes. That would be the question, whether the offenses are the same or different offenses, and even if they were different offenses, as the Court held, for example, in Harris v. Oklahoma and In Re: Nielsen, the double jeopardy clause might still bar successive prosecutions. That would rest, I suppose, on some notion of finality for the defendant's benefit, of an interest that simply was not presented in the context of multiple punishments following a single trial and a single sentencing proceeding.

QUESTION: Although I recognize you are stressing the use of Blockburger as a statutory construction aid, you don't deny that it has some relevance to the Constitutional inquiry, do you?

MR. LEVY: No. The Court has on occasion indicated that Blockburger has some --

QUESTION: A lot of us thought for many years that was the constitutional standard. You don't deny that, do you?

MR. LEVY: I don't deny that for many years that it was thought to --

QUESTION: So it might still have some relevance to the constitutional question?

MR. LEVY: It might still have some relevance, although as the Court well knows from our brief in Whalen, we believe that the double jeopardy issue in that context is no different from the question of whether the legislature has authorized multiple punishments.

QUESTION: Blockburger at any rate did not originate as a constitutional doctrine?

MR. LEVY: It did not. The Blockburger case itself was a question of statutory construction, as were the succeeding cases in Gore and Harris, among others.

Petitioners' counsel seeks to find an ambiguity in the statute because courts of appeals have diverged on a proper construction of the conspiracy provisions. I would only point out, as Mr. Justice Rehnquist suggested, that virtually every federal criminal case heard by this Court involves a conflict in the circuits, including those cases in which the Court applies, finds that the meaning of the statute is plain on its face, or declines to apply the rule of lenity. And I would cite the Court, as illustration, to the Lewis case in 445 U.S., the Culbert decision in 435 U.S., and the Scarborough decision in 431 U.S.

Moreover, since the rule of lenity is merely a device to ascertain congressional intent, it is not applicable, we believe, whereas in the drug area Congress intends to deal severely with serious criminal violations like those of petitioners. In Gore this Court declined to expand the rule of lenity to federal drug laws because Congress had manifested an attitude not of lenity but of severity towards such offenses.

As the Court recognized in Moore, Congress did not follow a different course in enacting the Drug Control Act of 1970. If as we urge, the Court concludes that Sections 846 and 963 authorize consecutive sentences, the imposition of such sentences on petitioners does not contravene the Double Jeopardy Clause of the Fifth Amendment.

First, it is our belief that the Court in its recent decision in Whalen did adopt the view that the Double Jeopardy Clause does not bar consecutive sentences that are authorized by the legislature and imposed at a single sentencing proceeding following single trial. Since Congress did authorize cumulative punishments here, the Double Jeopardy Clause is no more offended than if Congress had enacted an equivalent statute, as Mr. Justice Blackmun mentioned, which expressly provided a maximum term of imprisonment of ten years for conspiracy both to import and and to distribute a controlled substance, and five years for conspiracy to engage

in only one of the proscribed objectives.

But in any event, even if it is assumed that there are some circumstances in which multiple punishments authorized by Congress could be unconstitutional under the Double Jeopardy Clause, petitioners' sentences in this case would nonetheless be valid. To the extent that the Clause is applicable here at all, the Blockburger test would, as Mr. Justice Stevens suggested, furnish the standard for determining whether separately defined crimes constitute the same offense, for purposes of double jeopardy. And I think that's the phrasing that Mr. Justice White referred to before.

Here, these statutes clearly satisfy the Blockburger test, as we discussed previously. In terms of double jeopardy this case is no different from one in which, for example, the defendants conspired to import goods without paying the customs duty in order to obtain an unfair competitive advantage and attain a monopoly. Surely, such an unlawful agreement could be punished, if Congress saw fit, as a violation of both the smuggling and the antitrust laws. Contrary to petitioners' basic premise, nothing in the Double Jeopardy Clause forbids Congress to conclude that an agreement to commit two offenses is more pernicious and should be more severely punished than an agreement to commit one offense.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. You have

just one moment, one minute remaining, counsel.

ORAL ARGUMENT OF MISS JUDITH H. MIZNER, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MS. MIZNER: In that one minute I would just simply like to say that we do contest the applicability of Blockburger (a) to the conspiracy situation in general, and (b) to this particular conspiracy situation where each one does not require proof of the fact that the other does not, since you can infer the objective of distribution from the same facts that prove the importation. And I suggest that American Tobacco which is the only case the Government has cited as applying, this is distinguishable on the grounds that (a) it was dicta, the portion discussing the consecutive sentences for Section 1 and 2 violations; and (b) that Sections 1 and 2 of that Act are very different from the conspiracy provisions here.

Section 1 of the Sherman Antitrust Act is in a sense almost a substantive provision. It prohibits a conspiracy in restraint of trade and makes engaging in that an offense, while Section 2 is conspiracy to monopolize. So there might be different reasons for saying that under those circumstances consecutive sentences might be permissible.

And in addition, it's the Antitrust Act which this Court has recognized and commentators as well, has not been construed in the same manner that normal criminal statutes

have.

QUESTION: Do you think that anti-criminal, anti-trust statutes are to be construed much more strictly than drug statutes?

MS. MIZNER: No, the same would -- the antitrust statute has been given a much broader construction, a looser construction in terms of effectuating its goal as a "competitive control" under the statute, and that this Court has, I believe in the United States Gypsum, recognized that it has not construed the Sherman Antitrust Act and other antitrust acts in the same manner that it construes penal statutes such as the drug statute, has given it much more broader construction.

QUESTION: I'm not sure I follow you. Do you mean that society's view is that it is not as serious to commit antitrust violations as it is to import drugs or vice versa?

MS. MIZNER: No, I'm suggesting --

QUESTION: Which is the more offensive to society?

MS. MIZNER: Well, it's not a question --

QUESTION: Or is there no difference?

MS. MIZNER: -- of which is more offensive to society. It's a question of this Court's having throughout its history construed the Sherman Antitrust Act differently. And in addition, at the time of the American Tobacco, these were misdemeanor offenses. The civil sanctions were much more

compelling than the criminal misdemeanor penalties. I'm just saying that relying on that decision to -- as a general proposition, that Blockburger has been applied to other criminal conspiracy counts, is inappropriate.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 2:03 o'clock p.m. the case in the above-entitled case was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1709

ALBERNAZ AND RODRIGUEZ

V.

UNITED STATES OF AMERICA

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Gill J. Wilson