OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1842

TITLE JONATHAN GARRETT, Petitioner v. UNITED STATES

PLACE Washington, D. C.

DATE January 16, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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JONATHAN GARRETT, :

Petitioner :

v. : No. 83-1842

UNITED STATES :

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Washington, D.C.

Wednesday, January 16, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 o'clock a.m.

APPEARANCES:

PHILIP A. DeMASSA, ESQ., San Diego, Calif.;
on behalf of Petitioner.

MARK I. LEVY ESQ., Asst. to the Sol. Gen.,
Dept. of Justice, Washington, D.C.;
on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. DeMassa, you may proceed whenever you are ready.

ORAL ARGUMENT BY MR. LEVY

ON BEHALF OF PETITIONER

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

This case involves whether a continuing criminal enterprise under Title 21, Section 848 of the United States Code is a substantive offense, and the relationship between it and its underlying predicate drug felonies, which are either part of the continuing criminal enterprise or were introduced by the government in the CCE prosecution.

To discuss the facts of Petitioner's case is to highlight the Double Jeopardy violations which Petitioner suffered due to the government's improper successive prosecution and cumulative punishment of him for the same conduct for the same offense.

Petitioner was indicted in March 1981 in the Western District of Washington with three of the four counts of that indictment. Count II charged Petitioner with causing an informant, Joseph Knowles, to travel in interstate commerce from Panama City, Florida, the ultimate place where Petitioner was then indicted in a

second indictment to go to Seattle, Washington, for the purposes of engaging in a marijuana offense.

Count III charged Petitioner with importing 12,000 pounds of marijuana into Neah Bay, Washington. That occurred in August of 1980.

Count IV charged Petitioner with possession with intent to distribute that same marijuana.

Petitioner was not charged in Count I of that indictment which alleged a conspiracy to import marijuana which occurred from September 1979 through August of 1980. He was, however, named as a co-conspirator involved in that activity which involved witnesses and evidence from the Northern District of Florida.

At one of Petitioner's first bail hearings in Washington State, the government prosecutor, the Assistant United States Attorney who was in charge of the prosecution of Petitioner, advised the District Court that the Department of Justice in Washington had originally authorized Petitioner's indictment in Washington State on a continuing criminal enterprise charge. However, he advised the court, instead that continuing criminal enterprise charge was being considered by the Northern District of Florida Grand Jury and not by his grand jury in Seattle.

Petitioner at that hearing on April 8th immediately asked that the continuing criminal enterprise charge be joined in Washington State to be tried with the other indictment then pending. The government attorney represented, as an officer of the court, that Petitioner had been responsible for a continuing criminal enterprise, and the grand jury -- presumably he meant the grand jury in Seattle Washington -- would have returned an indictment. The government told the court: This coordinated investigation from Washington, D.C., showed Petitioner's involvement in four or five "mother boat" operations from 1977 through 1980.

During the next two weeks after these statements from the government prosecutor, Petitioner filed two motions of note to this Court. First was a motion for bill of particulars, as Petitioner alleged in his moving papers, so that he could be protected against a second prosecution, and so that he might plead Double Jeopardy.

Petitioner, more importantly, filed a motion to compel consolidation of any continuing criminal enterprise charge so that that continuing criminal enterprise charge would be tried in Washington State. In Petitioner's motion, he alleged that the government

prosecutor had stated that his directives -- that is, the government prosecutor's directives -- from the Justice Department were to omit the continuing criminal enterprise charge in the Washington State indictment.

Petitioner alleged that the government was manipulating venue for the CCE prosecution where a more favorable prosecution and seeking to enhance any subsequent sentence. Petitioner alleged that the prosecutor had advised him -- that is, Petitioner's counsel -- that the prosecutor had been prepared to try the defendant for the continuing criminal enterprise charge, but was instructed by the Justice Department not to seek that indictment.

Petitioner moved in this motion, which is in the Joint Appendix, for a number of grounds. Number one, to defend all charges in the same trial. Number two, to have the case transferred to another district due to his financial hardship in defending in two separate courts. Three, to join the offenses in one proceeding; to seek a single trial of both indictments; that venue was proper on the CCE charge in Washington State; that the charges in Washington and Florida were the same offense.

The government's response was that since there were no other charges pending, there were no charges to

consolidate.

On May 18th of that year, Petitioner pleaded guilty in Washington to Count III, the importation of marijuana count. Sixty days later on July 16th, Petitioner was indicted in the Northern District of Florida for the continuing criminal enterprise, also a conspiracy ranging from January 1976 to July 16, 1981, to import marijuana and "Thai sticks," a conspiracy also on the same dates to possess with intent to distribute marijuana, and four telephone counts.

The Thai sticks, incidentally, do not occur except in the indictment with relation to the Neah Bay, Washington, episode. There are no Thai sticks alleged to have occurred in any other episode involving Petitioner except in the Neah Bay, Washington, episode.

On August 20, Petitioner was sentenced in Washington State on his importation plea to the maximum five years and $15,000 fine and a three-year special parole term.

In Florida -- back again -- on September 23rd, Petitioner moved to dismiss the CCE and the conspiracy counts, claiming he was being twice prosecuted for the same offense in violation of the Double Jeopardy clause. The District Court denied the motion to dismiss, holding that a conspiracy and a substantive

offense can be prosecuted separately since they are separate crimes.

Using some of the very same evidence it had used to convict Petitioner in Washington State, he was convicted of both conspiracies, a telephone count, and the continuing criminal enterprise charge.

QUESTION: Mr. DeMassa, may I inquire about the nature of the proof in Florida of the Washington offense? Was the evidence of the conviction in Washington introduced?

MR. DE MASSA: No.

QUESTION: And was it simply an introduction of the portion of the same evidence which had been introduced previously in Washington? Or what was done?

MR. DE MASSA: No evidence was introduced in Washington either. After discovery procedures, Petitioner plead guilty in Washington, so he never had a trial in Washington in any event. However, the evidence which was developed in Washington was certainly introduced -- 12,000 pounds' worth of photographs of Thai sticks on the beach. The other material, three or four witnesses from Seattle, Washington. They flew a chemist in from Honolulu specifically to identify a Thai stick as a form of marijuana. So there was substantial

evidence introduced the last two days of Petitioner's trial in Florida.

QUESTION: Well, was there other evidence limited just on the Florida charges?

MR. DE MASSA: Yes --

QUESTION: Limited to activity and conduct in Florida?

MR. DE MASSA: Yes.

QUESTION: Independently of the evidence that you tell us came from the Washington inquiry?

MR. DE MASSA: Yes, there was.

QUESTION: There could have been a conviction of these three without reference to the Washington material?

MR. DE MASSA: There might have been, Your Honor. However, it is impossible to say at this point what evidence the jury considered in arriving at the verdict on the CCE charge.

However, the jury is --

QUESTION: No, I am not talking about the CCE charge; the three independent -- the two conspiracies and the telephone counts. Was there evidence, independently of what went on in Washington, which would have supported those convictions?

MR. DE MASSA: There was evidence that

Petitioner was involved in other activity which could support the other three charges. However, as to the conspiracy to import charge, Count I, the jury's first note during deliberations was whether or not they could consider the Neah Bay incident as part of the conspiracy to import, since it wasn't alleged in the indictment. And the District Court sent a note back in the affirmative indicating that it could consider the Neah Bay information.

Our position is, as I will get to in a few minutes, is Petitioner was convicted of the conspiracy to import marijuana because of the importation of marijuana being introduced in this particular trial. When you get into a conspiracy charge, as two of these were, with evidence five or six years old, sometimes a jury can focus on the most recent evidence, the most tangible evidence as the evidence most persuasive to convict. But again, this is all speculation. We don't know what the jury did except from the notes that came out, the specific note asking about Neah Bay.

QUESTION: Well, did the government offer all this Washington State evidence affirmatively in support of the independent charges outside of the CCE?

MR. DE MASSA: I believe it was offered as to the conspiracy of the import count also.

QUESTION: Did they say it was?

MR. DE MASSA: No. As a matter of fact, the District Court Judge, when the Sun Chaser III testimony was introduced, indicated to the jury that that testimony regarding the Sun Chaser III and Seattle, et cetera, was only being introduced for the purposes of the continuing criminal enterprise charge itself, and was not related to the other defendant.

Now whether or not the jury listened to that evidence --

QUESTION: Well, would you agree, if none of the three charges was tainted by any of the Washington evidence, that they might support the conviction on the CCE count -- the conviction on the Florida three would be enough to support conviction on the CCE charge?

MR. DE MASSA: If there was evidence that the jury did not consider the Neah Bay evidence, I would agree that those three would be sufficient. However, the record is tainted because of the introduction of this evidence.

Petitioner was sentenced to 40 years enprisonment and a maximum $100,000 fine, both of which were to run consecutive to the Washington State sentence and fine that he had previously received.

Relying upon Fifth Circuit precedence, the

Eleventh Circuit Court of Appeals denied Petitioner's argument that the substantive offense of importation of marijuana was a lesser included offense and therefore barred the substantive offense of the continuing criminal enterprise.

It is our position in this Court, as it was in the Court of Appeals, that continuing criminal enterprise is a substantive offense which in Petitioner's case has been improperly segmented by the prosecution to impermissibly twice prosecute and punish Petitioner for the same conduct.

Although this Court in Jeffers and subsequently some Circuits have alluded to the fact that a continuing criminal enterprise is a conspiracy type offense, it cannot be a conspiracy offense because of its very elements. Those elements require prosecution and punishment of the completed criminal activity, which a conspiracy does not. A conspiracy is merely an agreement being an inchoate crime. And that agreement -- and the conspiracy is complete when the agreement is complete.

CCE necessarily includes as one of its definitional elements, however, the element of in-concert activity which this Court discussed in Jeffers. This connotes cooperative action. That

element is present whenever a CCE defendant combines with others in concert to commit a crime, those predicate violations.

In addition to the concerted activity element, Congress intended and did proscribe through the continuing criminal enterprise statute against the comprehensive and continuing business of drug activity, and not just a segment of that activity which is found in the other drug felonies in both subchapters.

Mr. Justice Brennan when you asked me your question regarding whether or not this evidence would be tainted without the Neah Bay prosecution, I gave you an answer which was wrong. The answer to your question is: The evidence would be tainted under my argument because the government has segmented a Petitioner's conduct. My argument is that there is a conspiracy from July -- or January 1976 until July 1981 in Florida which alleges to be the continuum of conduct that this defendant committed; and by segmenting part of that activity, by choosing to prosecute part of that substantive offense in Washington, is impermissible under the Double Jeopardy Clause.

QUESTION: Well, I come back then to the question I asked you earlier. Could not the government have prosecuted all four of the charges in Florida --

MR. DE MASSA: Yes.

QUESTION: -- without reference to what went on in the State of Washington?

MR. DE MASSA: My position would be that, since it is a substantive offense which is defined by the indictment, the answer would be no.

QUESTION: It could not?

MR. DE MASSA: Could not. For the very same reasons that this Court over a century has held in In re Nielsen, and In re Snow, and in other cases that it is a continuing offense -- the business of drug activity is a proscribed course of conduct. Segmenting up a part of that continuum is improper.

Congress has proscribed not against the individual drug felonies themselves --

QUESTION: Let's suppose what happened in Washington never happened --

MR. DE MASSA: If it never happened, then --

QUESTION: -- then would the charges made in Florida have sufficed?

MR. DE MASSA: Yes. Yes.

QUESTION: But because something did happen in Washington, they had to introduce all of that evidence to prove the continuum. Is that it?

MR. DE MASSA: They didn't have to introduce

the evidence, Your Honor. What they didn't have to do was to prosecute them twice. They prosecuted him once for the lesser included offense of importation of marijuana; then they prosecuted him a second time for the greater offense --

QUESTION: As I understand you, they could not have prosecuted him after they did in Washington, they could not prosecute him in Florida without introducing the Washington evidence.

MR. DE MASSA: Well, my position is that they could not prosecute him in either case because you are segmenting up a substantive violation into more than one unit of prosecution.

QUESTION: Now this you are applying only to the CCE count?

MR. DE MASSA: Yes, Your Honor. They could have prosecuted him for a conspiracy to import. They could have prosecuted him for a conspiracy to possess with intent to distribute. They could have prosecuted--

QUESTION: He was sentenced to 40 years on the CCE count?

MR. DE MASSA: Consecutive to the Washington importation. That gets to the cumulative punishment issue.

QUESTION: What did he plead guilty of in Washington?

MR. DE MASSA: He pled guilty in Washington to the importation of marijuana charge.

QUESTION: Do you say, then, that the next day in Washington they could have convicted him for a conspiring to import?

MR. DE MASSA: Yes. Under Albernaz they can convict him of conspiracy, and they can convict him of the substantive offense.

QUESTION: Separately?

MR. DE MASSA: Yes. That's clear from Albernaz and other cases that he can be indicted and convicted of the conspiracy and of the substantive offense.

QUESTION: And you say the CCE charge is not a conspiracy charge?

MR. DE MASSA: It is not a conspiracy charge.

QUESTION: But it takes an agreement, doesn't it?

MR. DE MASSA: It requires concerted activity, but if it takes an agreement, who is the CCE defendant conspiring with who has the same intent that he does? And if that person has that same intent, that makes that

person --

QUESTION: Well, he has to have concerted activity with five --

MR. DE MASSA: Five or more persons.

QUESTION: -- five or more persons. Now --

MR. DE MASSA: But those are not CCE defendants themselves.

QUESTION: Oh, I know. I know. I know. But a lot of times you just prosecute one of the conspirators.

MR. DE MASSA: Then he could be charged with conspiracy.

QUESTION: But what does "concerted activity" mean?

MR. DE MASSA: It means a continuum of activity. It means getting other people to aid you. In our opening brief we talked about aiders and abettors.

QUESTION: Well, so they all have agreed to work together.

MR. DE MASSA: Yes, but if they were all doing what a continuing enterprise defendant was doing, under the normal rules of a conspiracy they would be conspirators with a CCE defendant, and they cannot be guilty of conspiracy because they cannot have committed the same offense that a CCE defendant commits. That is,

supervising, organizing, substantial resources.

So if we're talking about conspiracy being a specific-intent offense, which it is, he cannot specifically intend to commit that offense with five underlings because they do not have the same specific intent to organize, supervise, obtain substantial resources in money, commit a continuing series of violations, as that continuing criminal enterprise defendant does.

QUESTION: Well, even if you can't call it a "conspiracy," why shouldn't the same consequence flow from this strange animal as flows from a conspiracy?

MR. DE MASSA: Because you would need an agreement between the CCE defendant and another to commit the CCE. And you can't have an agreement with the underlings to commit the CCE. You can have them aid you in part of that agreement. We cited United States vs. Tarr, a case which points out in our opening brief that perhaps an aider and abettor can aid and abet part of that continuing violation --

QUESTION: I suppose the real answer is that in this case you can prove all the agreements you want, but you can't prove the CCE offense without proving some predicate offenses.

MR. DE MASSA: You need to necessarily include

it.

QUESTION: You need three, or however many you need.

MR. DE MASSA: You need three completed crimes; and a conspiracy, by definition, is an inchoate--

QUESTION: And you don't need to prove those.

MR. DE MASSA: Yes.

QUESTION: You don't need to prove any act except an agreement.

MR. DE MASSA: All you need is an agreement with a conspiracy. That leads back to Mr. Justice Brennan's idea about whether or not these are sufficient in themselves to convict for the CCE. If the conspiracies are just agreements that don't by themselves culminate in the CCE defendant getting substantial resources, what difference does it make if they're just agreements. If the jury finds that he conspired but didn't make any money, that's not enough.

QUESTION: Tell me again, Mr. DeMassa, your answer to Justice White's question conceding that the CCE offense, because it involved underlings rather than conspirators, is not the same as a conspiracy. Why

can't it be treated the same for purposes of the legal arguments you're making?

MR. DE MASSA: Why can't the CCE be treated as a conspiracy?

QUESTION: Well, so far as the kind of arguments you're making.

MR. DE MASSA: Because you can't agree with the other five underlings to commit a CCE conspiracy.

QUESTION: That I realizes distinguishes it from a conspiracy, so it's A rather than B. But why can't both A and B be treated the same for purposes of the kind of Double Jeopardy legal argument you're making?

MR. DE MASSA: I think the ultimate answer is, it's both. It's fish and fowl at the same time.

QUESTION: I think the answer is that you still have to prove the predicate offenses.

MR. DE MASSA: Yes. That's correct, Your Honor, you do have to prove the predicate offenses and it makes it a completed offense. But because of the in-concert activity element, you have to do it with other people, which is what Jeffers basically discussed.

In order to commit this crime, you can't do it alone. And what Congress proscribed as the allowable unit of prosecution is the business of drug dealing.

Not an individual going out and smuggling or doing something else alone and making millions of dollars, but the business -- unlike Albernaz which the two conspiracies, the conspiracy to import and the conspiracy to possess with intent to distribute, are punishing two separate evils -- CCE is parsing the entirety of drug dealing.

QUESTION: But you also argue, do you, that the conspiracy counts here -- even if there were nothing about Washington involved in this case -- could not be predicate offenses for the CCE count?

MR. DE MASSA: My problem is it becomes --

QUESTION: Don't you argue that?

MR. DE MASSA: Yes.

QUESTION: You say, a conspiracy conviction is not a completed offense. Is that it?

MR. DE MASSA: It is an agreement; it is a completed offense once there's an agreement. The jury could have found that these two conspiracies were in effect existing, but then they would have to make --

QUESTION: Well, could they then be predicate offenses?

MR. DE MASSA: They could be predicate offenses.

QUESTION: All right.

MR. DE MASSA: But they have to find that there's substantial resources obtained; that he was an organizer in those conspiracies -- the problem is, there was a motion for bill of particulars in this case to find out what the particulars were about the government's theory. The government came back -- you'll look at the CCE indictment itself, and it basically only indicates that he is charged with a CCE. And the government said --

QUESTION: If all the jury used the Washington evidence for was to prove the conspiracy to import or to possess or whatever it is, there wouldn't be any Double Jeopardy problem there, would there?

MR. DE MASSA: There might not. However --

QUESTION: Well, might not? There wouldn't be. You've already agreed you can convict separately for the conspiracy.

MR. DE MASSA: Well, my argument basically --

QUESTION: Well, isn't that right?

MR. DE MASSA: No, Your Honor. You cannot just convict for that and make it admissible, if you're saying including the Neah Bay evidence --

QUESTION: I thought awhile ago you said that you could convict for the substantive offense, and then

you can convict separately for the conspiracy to --

MR. DE MASSA: Yes.

QUESTION: Albernaz.

MR. DE MASSA: But not under the CCE. You can charge him for separate offenses all over and cumulate the punishments. That's clear. But the CCE charge is meant to be a comprehensive statute.

QUESTION: But if there had only been one charge in this case -- forget the CCE for a minute -- if there had only been one charge, namely the conspiracy charge, they could have used the Washington evidence to prove the conspiracy.

MR. DE MASSA: Yes, because the conspiracy is different than the Washington evidence. But that's not the situation we had here.

I would like to reserve some minutes I have left for rebuttal.

CHIEF JUSTICE BURGER: Mr. Levy.

ORAL ARGUMENT BY MR. LEVY

ON BEHALF OF RESPONDENT

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

Let me begin by saying that in our view this case doesn't involve any segmenting or unit of prosecution issue. That issue would come up if the

government had sought to take a single continuing criminal enterprise and divide it for purposes of prosecution and sentence. That is not what is done here.

The unit of prosecution issue, first of all, would be an issue of statutory intent, not a Double Jeopardy issue at all, and the only issue that Petitioner has raised is a Double Jeopardy issue, not a unit of prosecution issue. So let me turn to the Double Jeopardy question.

The Double Jeopardy clause prohibits successive prosecutions for the same offense. Now under this principle, Petitioner does not dispute that he was subject to successive prosecutions for his various substantive drug offenses, no matter how many there were, no matter where around the country they were brought, no matter what the evidence might have been that the government actually used in each of those prosecutions; nor does he dispute that he was subject to successive prosecutions for substantive offenses and for conspiracy. So that, as he conceded just a moment ago, he could have been tried on substantive offenses and a conspiracy offense could later have been brought in Florida, and a conspiracy offense could have used much or all of the same evidence that the government had

previously relied on in the substantive prosecutions.

He also does not dispute that he was subject to a CCE prosecution in Florida following the Washington importation prosecution, provided only that the Washington importation was not used as part of the government's proof of the series of drug violations. So the issue in this case, therefore --

QUESTION: I thought he originally conceded that and then walked away from that concession.

MR. LEVY: Well, perhaps your understanding is better than mine, but my understanding is what I just stated.

QUESTION: I had thought that before argument, but I think he changed his position today.

MR. LEVY: But the central question here is whether importation of marijuana and continuing criminal enterprise become the same offense because that importation is used in a given case as one of the predicates for CCE.

Now we submit the Petitioner's importation of marijuana in Washington on August 26th, 1980, was not the same offense as his continuing criminal enterprise that occurred around the country in at least eight states that lasted for more than half a decade and that involved numerous criminal activities.

QUESTION: May I ask, Mr. Levy, just to get it out early, supposing -- unlike the facts of this case -- you had only two other substantive offenses that could be proved in Florida instead of the multiple group you have, would your position be the same?

MR. LEVY: Well, our principal position would be the same there --

QUESTION: In other words, you had only three predicate offenses, one of which was the Washington situation, would you still make the same argument?

MR. LEVY: Our principal argument would be the same. That is, that substantive predicates and CCE are not the same offense.

QUESTION: Well, if all three of the predicate offenses you sought to prove in Florida had been previously prosecuted, you would make the same argument?

MR. LEVY: Our argument would indeed be the same. But we also have an additional argument in this case. That is, whatever the general relationship between predicates and CCE, in this case Petitioner's conviction should not be reversed because of the presence of the three other convictions in Florida that suffice to sustain the CCE conviction. So we have two levels of argument.

But our principal argument, Justice Stevens and Justice White, would be the same.

QUESTION: And I gather that you'd argue there was absolutely no taint by the Washington evidence of the Florida substantive offense part of it.

QUESTION: That's his secondary -- that's your secondary.

MR. LEVY: That is secondary, but that is also part of our principal argument. There is indeed no taint. As Petitioner conceded, he could be prosecuted in Florida for conspiracy, and the Neah Bay evidence could be admitted. And the conspiracy, he also admits, could be used as one of the predicates. So we think there is no taint from the use of the Neah Bay evidence.

Now before turning to the analytical framework for resolving the Double Jeopardy issue, let me first discuss briefly some of the consequences of Petitioner's argument. Consider a defendant who is apprehended in the commission of a drug offense. Assume that he is prosecuted and convicted for that substantive drug offense, and that it later turns out that he was engaged in a continuing criminal enterprise.

Under Petitioner's theory, the government might not be able to bring a CCE case at all. And even

if it could, it would not be able to present its complete CCE case because the previously prosecuted offense would have to be excluded.

QUESTION: Mr. Levy, is that a valid argument? Didn't one of our opinions expressly make an exception for later discovered evidence and later transactions?

MR. LEVY: There is an exception for that, but we think this case goes well beyond that, and that that's appropriate in light of the nature of the CCE offense.

QUESTION: I thought your argument basically was, even if the government is aware of the whole panorama of activities, it can still divide up the prosecution in this way.

MR. LEVY: We take that position --

QUESTION: Yes.

MR. LEVY: -- but in most cases, it will in fact be the situation that the government is not aware of that situation. It is important for the Court to understand --

QUESTION: Well, in that case, our cases have suggested there's an exception to the rule.

MR. LEVY: There is, although that exception is exceedingly difficult to apply in practice. It is

one that we think is appropriately recognized and in suitable cases the government will apply it.

QUESTION: I'm surprised you start out with that argument.

MR. LEVY: Well, I just simply want to give the Court some idea of the practical dimensions of the Petitioner's argument. I think that it would have very unsound application in the criminal justice system.

Let me give another example. That is a case like the First Circuit's decision in Middleton upon which Petitioner relies, where the CCE prosecution is brought first and the defendant is acquitted. Suppose it is clear that the reason for the CCE acquittal is that five or more other people were involved but that the defendant did not obtain substantial income or resources.

Under Petitioner's theory, the defendant would be immune from a substantive prosecution even though the government's evidence was ample to show, as one of the CCE predicates, the defendant committed that offense. These would lead to very substantial windfalls for drug defendants.

Now what arguments have been advanced to support those windfalls? Basically there are two: the Blockburger test, and the same-facts test. Let me start

with Blockburger.

Blockburger was designed to determine whether violations of two statutory provisions arising from the same act or transaction are the same offense in the sense of having a certain logical and necessary relation to each other. That is, whether the elements of one are identical to or entirely subsumed in the elements of the other. So that whenever the government establishes one offense, it always necessarily and invariably establishes that other offense as well.

This Blockburger relation identifies the offenses as true greater and lesser included offenses, and thus has the same offense for Double Jeopardy purposes. Now Blockburger is simply unhelpful in analyzing the quite different issue of the relation between a compound offense such as CCE or RICO and its underlying predicate offenses.

The offenses used as the multiple predicates for CCE are not lesser included offenses, because no particular or specific offense is a necessary component of the compound CCE offense. Rather, any of a number of offenses can serve as predicates, and the actual predicates will vary from case to case.

Moreover, CCE and its predicates do not involve the same act or transaction; rather, they arise

from an extensive course of criminal conduct. In this case, for example, Petitioner's continuing criminal enterprise occurred over a five-year period. It extenied to at least eight different states. It included numerous participants, and involved myriad criminal activities.

Now in these circumstances, application of the Blockburger standard is irresolvably indeterminate. It tells us nothing about the relation between the compound offense and the predicate offense. We believe Blockburger is not an end in itself, but instead is a means of sound analysis for the same offense question, and it has no applicability --

QUESTION: May I ask, your hypothetical here is assuming many more than three predicate offenses. There there is no problem with Blockburger. It seems to me your argument has tc focus cn the question whether if you are required to prove three, and one of the three has already been proved.

MR. LEVY: All right, we would take the position that that does not violate Double Jeopardy.

QUESTION: Ycu see, your hypothetical is ycu say you've got myriad offenses, and obviously you have no problem in that case.

MR. LEVY: That wasn't a hypothetical; those

are the facts of this case: that the Petitioner engaged in myriad criminal activities. The reason I mentioned that was to show that it is not the same act or transaction.

QUESTION: Then under that argument, Blockburger is satisfied. That's not an argument against applying Blockburger.

MR. LEVY: We don't think it can be said in the area of compound and predicate offenses that Blockburger is either satisfied or not satisfied; or, alternatively, it is satisfied and not satisfied at the same time. We just don't think Blockburger can be applied in any meaningful way to compound and predicate offenses.

QUESTION: Well, you clearly would have avoided the problem with this case, would you not, if the trial judge had said: You must find three predicate offenses, but don't use the incident in Seattle as one of the three?

MR. LEVY: At a minimum, that would have avoided Double Jeopardy.

QUESTION: That clearly would have avoided the whole problem.

MR. LEVY: But the reason for that is--

QUESTION: And as I understand your argument,

you could easily have won the case under such an instruction.

MR. LEVY: We could have in this case, but we don't think it was necessary that such an instruction be given because the predicate offenses and CCE are the same. But to determine whether they're the same or not can't be done under the Blockburger test. If you're going to come to the conclusion that they are the same -- and we think they are not -- but if you come to the conclusion they are the same, you have to get there by some means other than Blockburger.

Applying the elements' test of Blockburger to compound and predicate offenses for any of a number of different offenses under the statute could serve as predicates. Under the CCE statute, importation can serve as a predicate, distribution, possession with intent to distribute, conspiracy, and a whole range of offenses can serve as predicates. Now in a particular case there may only be three predicates that the government chooses -- or is able to prove, but any of a number of offenses can be predicates. Different types of offenses can be predicates.

Therefore, it cannot be said in the Blockburger sense that any particular type of offense is necessarily included, is a lesser included offense of

CCE. In a murder and manslaughter cause, for example, it can always be said that manslaughter is a lesser included offense of murder. Whenever the government establishes murder, it will always necessarily and invariably establish manslaughter.

QUESTION: Well, isn't it true that whenever the government established the CCE it would necessarily establish three predicate offenses?

MR. LEVY: It would establish three predicates, but we wouldn't know which predicates, and they would be different for each case.

QUESTION: Well, but in murder and manslaughter, maybe the manslaughter charge was somebody else. Theoretically you can have a murder of A and a manslaughter of B.

MR. LEVY: You could, but if you have a murder of A, you will also necessarily have a manslaughter of A.

QUESTION: And if you have a CCE, you will necessarily have three predicate offenses.

MR. LEVY: You will have three predicates, but we don't think those predicates will be lesser included offenses in the same sense of murder and manslaughter, or armed bank robbery and bank robbery, and the other kinds of traditional lesser and greater offenses for

which Blockburger was designed to advance the Double Jeopardy analysis.

QUESTION: Well, Blockburger really didn't advance any Double Jeopardy analysis at all. It was a statutory case.

MR. LEVY: It relied on cases such as Gavayares. There was a Double Jeopardy issue, and the Court has subsequently relied on Blockburger in cases like Brown and Illinois vs. Vitalle. So we think that Blockburger has taken on at least some dimensions of a constitutional analysis here. But whatever its status, it is at most applicable in stituations where it makes sense to apply it, where it advances the analysis and where it can give meaningful results, and we simply don't think that is true in the area of compound and predicate offenses, especially offenses like CCE and RICO.

QUESTION: Mr. Levy, it sounds to me like you would say that a state could make a separate crime of being a repeat offender. You could have a criminal statute that said any time anybody has committed three felonies and has been convicted of them, you may then indict him and convict him of having committed three felonies. Is that right?

MR. LEVY: Let me say first that CCE is not

such a statute. And, second, if there is any --

QUESTION: Why isn't it like that?

MR. LEVY: Because you need to prove a great many other things than simply the series of offenses. You need to prove the in concert --

QUESTION: Oh, I understand that. I understand that. But why wouldn't -- Go ahead with your second answer. Would you sustain the statute in my example?

MR. LEVY: With respect to a Double Jeopardy objection, we would. There may be other problems such as due process.

QUESTION: Well, wouldn't you have to say that you would in order to succeed in your present argument?

MR. LEVY: Not in the present argument. We also have an alternative argument that CCE may be analagized to a recedivist or an habitual offender statute. But in the principal argument, I don't think that is necessary.

But we would take the position, just to be clear, that such a statute would not violate Double Jeopardy --

QUESTION: Just making a separate crime out of having committed three previous felonies, that would not

be subject to attack under the Double Jeopardy clause?

MR. LEVY: I believe that's correct. Now I don't know that some --

QUESTION: Do some states have such crimes on the books for habitual offenders?

MR. LEVY: I am not aware of them, but I can't give a conclusive answer to that.

QUESTION: Well, the usual one is they just enhance the penalty for the third --

MR. LEVY: That's correct, and the defendant would not have been previously prosecuted for the one that is at issue. That is the more traditional, more typical habitual offender statute.

QUESTION: But they nevertheless allow proof of the previous convictions.

MR. LEVY: Yes, they do, and this Court has long held that there is no Double Jeopardy problem with such a statute.

Now Petitioner also proposes the same facts test for Double Jeopardy analysis. That is, offenses are the same -- excuse me, where the facts in evidence underlying them are the same. But this Court's decisions make it clear that Double Jeopardy does not turn on the facts or the evidence actually involved in the particular prosecution.

If the rule were otherwise, conspiracy in a substantive offense, for example, would often be the same offense, which would be contrary to well settled Double Jeopardy principles. Or, the Court's analysis in Brown against Ohio would have been beside the point, because it was clear that the two offenses there involved the same facts.

Let me discuss for a moment Illinois against Vitalle. We believe that that decision does not establish the same-facts' test. Vitalle involves successive charges of failure to reduce speed and involuntary manslaughter arising out of a traffic accident. Because involuntary manslaughter with an automobile will always involve some underlying traffic offense -- whether driving while intoxicated, reckless driving, failure to slow, or something else -- the Court recognized that the manslaughter charge was a form of compound predicate offense.

QUESTION: Mr. Levy, manslaughter won't always involve an automobile.

MR. LEVY: No, but I think the Illinois charge in that case did involve manslaughter with an automobile.

QUESTION: The charge, or the statute?

MR. LEVY: I believe the statute had a

different section for manslaughter with an automobile and the charge was brought under that. That's my recollection.

But we think Vitalle can be seen to rest on the premise that manslaughter with an automobile may be an aggrevated form of the traffic offense where death ensues, and therefore the defendant's claim of Double Jeopardy was substantial. Indeed, Vitalle explained the felony murder decision --

QUESTION: What do you think the word "substantial" in that opinion means, Mr. Levy? Do you think "colorable," "proven"?

MR. LEVY: I'm not entirely sure, and the Court did not explain it, but I think the best reading is that the Court couldn't come to a conclusive determination of the Double Jeopardy claim, because that claim turned on the nature of the state law offenses. That is, whether manslaughter with an automobile was intended by the legislature to be an aggrevated form of the traffic offense where a death ensued.

If the Illinois legislature intended that manslaughter was an aggrevated form of failure to slow where death ensued, then a defendant would have not just a substantial claim of Double Jeopardy but a conclusive claim. But the Court was unable to determine that

because the issue hadn't been briefed and decided by the state courts.

So I think the Court's use of the word "substantial" indicated that there was a basis for the claim, but that the case in its present posture couldn't be finally resolved.

We think that is also clear from the Court's discussion of the felony murder decision -- the Court's discussion in Vitalle of the felony murder decision in Harris against Oklahoma. The Court in Vitalle stated that Harris had viewed the felony murder -- had viewed killing in the course of a robbery as a separate statutory offense, and that the robbery was a lesser included offense thereof.

In other words, the Court viewed the issue in Harris as felony murder being an aggrevated form of the underlying felony. That would make them the same offense for Double Jeopardy purposes, and the Court's view of the felony murder statute that we think underlies this decision in Harris is the same view it later took of the District of Columbia felony murder statute. That is, that is was an aggrevated form of the underlying felony.

Nothing in these decisions turns on the facts or evidence in a particular case. We think there is no

basis for Petitioner's advancing a same-facts' test for Double Jeopardy purposes.

Now if Blockburger and the same-facts' test are not the proper standards, what is the correct approach in this area for complex compound-predicate offenses like CCE and RICO?

We submit that the same-offense question can be answered only by a focused and concrete examination of the offenses that Congress has created. The Double Jeopardy clause recognizes that it is the province of Congress to prescribe criminal offenses, and it does not limit the offenses that Congress can define.

The decisive question, therefore, is did Congress create separate offenses? Now in effect, this is what the Blockburger test determines in the area in which it is applicable to true greater and lesser included offenses. Where Blockburger is not satisfied, not simply that it can't be applied, but where it can be applied and is not satisfied, it cannot be said that the offenses are different in any sense.

Blockburger thus serves as a shorthand or a proxy in some situations for evaluating whether the legislatively defined offenses are the same or different. Now the same fundamental inquiry applies for more complex statutory provisions that do not involve

true greater and lesser included offenses such as CCE or RICO. But there, the mechanistic Blockburger test cannot be used as a surrogate for a careful examination of the nature of the offenses defined by Congress.

This required examination turns on the text of the statutes, their legislative history, their common law or statutory background, the societal interests and legislative policies that underlie them, and any other considerations that inform the inquiry into the character and substance of the offenses that Congress has prescribed.

Now applying that standard here, we believe it is clear that Congress did not create CCE and the marijuana importation offense as the same offense.

QUESTION: Well, I suppose you could always say that when the first felony is committed, it's not a lesser included offense of anything, I suppose, and it certainly isn't a lesser included offense of a CCE when the first one happens. Neither is it when the second one happens.

MR. LEVY: That's correct. And, we submit, even when the third one happens it is not a lesser included offense. The substantive predicates in CCE are not in any circumstances the same offense.

QUESTION: Well, usually a lesser included

offense is always -- as soon as it happens, you know it's a lesser included offense with something else.

MR. LEVY: That's right. And that's the kind of situation that Blockburger was designed to deal with, we think, because it does turn on the nature of the same act or transaction, where that has occurred at that instant or at roughly the same time at least, it will be known whether the defendant has committed the greater offense, and also whether he's committed the truly lesser included offense. And we think that is much different than CCE or RICO.

QUESTION: Well, Mr. Levy, what if the defendant had gone to trial in Washington on the importation of marijuana offense and been acquitted? Could the government, nonetheless, introduce the same evidence later on in Florida in support of the CCE?

MR. LEVY: Let me start with an easier answer. That is, that we agree that the government would not be able to use that offense as one of the predicates for the CCE offense.

QUESTION: Why?

MR. LEVY: It would be collateral estoppel or res judicata in the truest sense. Now it is a more difficult question --

QUESTION: Nothing to do with Double

Jeopardy?

MR. LEVY: To the extent that those concepts are embraced in Double Jeopardy, it would have some constitutional basis; but it is not the same kind of Double Jeopardy issue that we're discussing in this case. It is a harder question whether the government--

QUESTION: Could you use the same evidence to support other aspects, such as the association with five or more people --

MR. LEVY: Our position is that we could.

QUESTION: -- or something of that sort?

QUESTION: Or, to prove conspiracy.

MR. LEVY: Certainly to prove conspiracy as a separate offense there would be no problem with that. The Double Jeopardy Clause doesn't turn on the evidence; it turns on the same offense.

QUESTION: Mr. Levy, can I go back to Justice White's hypothetical suggesting that you always look at the lesser included issue when the minor offense is committed. Suppose you go into a store and commit a robbery. You've committed the robbery. Then ten minutes later you kill the proprietor. Therefore, you have felony murder. Do you not have to look at it at the time that the greater offense is committed because

there's no lesser included offense when he first went in and held him up?

MR. LEVY: We don't think the same act or transaction requires that the offenses occur at the exact second, but we do think that they need to occur--

QUESTION: What I am suggesting is, in order to make the analysis all of the offenses that you are comparing have to have been committed at the time you make the comparison. And in this case, the three presumably predicate offenses would have taken place before he was indicted for CCE.

MR. LEVY: Presumably it would.

QUESTION: And the government would know it.

MR. LEVY: That it would have occurred, but we think it is fundamentally different to say that, in your hypothetical, Justice Stevens, the robbery and the murder occurred in the same course of criminal conduct. It's something else to say that a criminal act that may have occurred years earlier in an entirely different jurisdiction --

QUESTION: But what is the difference between using the unit of transaction, the whole event in the store robbery that I described, or the unit of transaction as three drug offenses followed by

everything else you need to commit the CCE?

MR. LEVY: We think that there is a much different --

QUESTION: What is the difference?

MR. LEVY: The difference is the nature of the offenses involved. We don't think that the same act or transaction test is the Double Jeopardy standard, but we think it has some role to play in defining what the appropriate standard should be.

QUESTION: Does it have a role -- well, go ahead. You finish.

MR. LEVY: The language of the Constitution is "same offense." It is one thing to say that two offenses that occur within ten minutes of each other in the same course of criminal conduct in the same episode--

QUESTION: And the greater is not completed until the ten-minute period has expired --

MR. LEVY: That may be --

QUESTION: -- and here with this offense it takes maybe six months instead of ten minutes.

MR. LEVY: Six months, or six years --

QUESTION: So is there a constitutional difference between six months and ten minutes?

MR. LEVY: Well, we think if you're looking at

what the language of the Constitution's "same offense" can mean, we think there is a difference between offenses that may occur in one episode ten minutes apart--

QUESTION: What about a kidnapping? You hold the person for six months and then kill him.

MR. LEVY: Well, the kidnapping is a continuing thing.

QUESTION: Yes, and I'm talking then it's a felony -- and it becomes a murder at the time of the felony murder at the time of the killing.

MR. LEVY: At the instant at which you kill him, you are still guilty of kidnapping.

QUESTION: But you don't have a lesser included offense until the end of the six months, is what I'm suggesting.

MR. LEVY: That's correct.

QUESTION: Why is it different?

MR. LEVY: It's different because in its nature CCE does not occur in the same time frame in the same place.

QUESTION: Six months, in both cases.

MR. LEVY: Well, in your hypothetical, let me go on to say, we don't think that murder and kidnapping would be the same offense either. We think those are,

under settled principles, different offenses. So perhaps I didn't fully understand the point.

QUESTION: Well, an accidental killing at the end of a six-month period of kidnapping someone would be a felony murder.

MR. LEVY: Yes, that --

QUESTION: -- might not be a murder without the kidnapping, and the greater offense is the murder, and the lesser included offense is the kidnapping. Am I incorrect?

MR. LEVY: Well, in our analysis we think you are incorrect, that the kidnapping would not be a lesser included offense as that term is used in the Double Jeopardy area. "Lesser included offenses," as we understand them, are offenses that always occur when the greater offense has occurred.

We the think the Court made that clear, for example, in Vitalle. Kidnapping and felony murder is not a greater and lesser included offense for which the Blockburger analysis was designed. It is a compound predicate offense, and we don't think it can be said, as Petitioner's position in essence comes down to, that all compound predicate offenses are the same offense regardless of their elements, regardless of what the legislature intended, and so on.

QUESTION: Your position really requires us to overrule the cases you discussed in that one footnote, Hayes, and one other.

MR. LEVY: I'm sorry? Harris?

QUESTION: Harris. Harris. Harris against Oklahoma. You would require overruling of that case.

MR. LEVY: I don't believe so, although those opinions were quite brief, and it is hard to know exactly the basis for the Court's decision, but we think they can be most sensibly read as resting on the premise that the felony -- that the felony murder was an aggrevated form of the underlying felony where death ensued, which is what the Court later actually held as to the D.C. felony murder statute in Whelan, and it is also the explanation that the Court gave in Vitalle for the Harris against Oklahoma decision. So we don't think our decision requires that those cases be overruled.

QUESTION: Well, they relied on Nielson, I think, didn't they?

MR. LEVY: They did rely on Nielson, that's correct, and Nielson is a case that's a bit hard to follow. But as we understand it, we think Nielson applied the Blockburger test to the elements of the offense, but that --

QUESTION: Well, Nielson antedated Blockburger

by decades, didn't it?

MR. LEVY: In its formal structure, but we think the approach they followed was similar to what was later adopted in Blockburger, and that the difficulty in Nielson is that the Court did not simply look at the elements on the face of the statute, but it looked at the statutory elements as it construed them. Those were federal statutes involving the federal territory of Utah, and so the Court was free to give a construction to the elements. And having given that construction, it came to the conclusion that one offense was a true lesser included offense of the other, and therefore under Double Jeopardy principles, and we agree, successive prosecutions were for the same offense and therefore barred.

But let me say in this case, CCE cannot be said to have been intended by Congress to be the same offense as the predicate.

QUESTION: May I ask right there, you're saying that it could not contend, for example in this case, that CCE is an aggrevated form of the offense committed in Seattle?

MR. LEVY: That depends on the statute that Congress passed. Congress could have passed a CCE-like offense that was nothing more than an aggrevated form of

the preceding felony; nothing to bar Congress from doing that. The question is whether this statute is like that; or whether, as we contend, it is not simply an aggrevated form of the predicate, but a different offense and different in a meaningful and substantial way that Congress intended at the time.

From its text, we can see that CCE is based on the new concept of an enterprise. This indicates that Congress envisions CCE to be a new form of offense. In addition, in the legislative history Congress made it clear that CCE was not meant to be the same offense. Congress distinguished CCE from provisions that merely enhanced the penalty for or aggrevate the degree of a basic offense. It emphasized repeatedly that CCE instead is a new and distinct offense.

Finally, the policies and purposes behind CCE also indicate that the offenses are not the same. CCE is the so-called "kingpin statute," and it was directed at large-scale and ongoing drug trafficking.

QUESTION: But Jeffers, the Jeffers vs. United States case, determined that Congress did not intend cumulative penalties to be --

MR. LEVY: We think Jeffers is fundamentally different. Let me briefly state why.

The conspiracy in Jeffers was not one of the

predicates for the prosecution. Rather, the Court, making its assumption about the in-concert element being conspiratorial agreement, essentially concluded that the conspiracy in Jeffers was a true lesser included offense. That is, whenever the government establishes CCE, it will always and necessarily establish that kind of a conspiracy.

Given that view, the Court came to the conclusion that successive prosecutions constituted Double Jeopardy for the same offense, and the Congress did not intend to authorize cumulative penalties for true greater and lesser included offenses.

Whatever the correctness of that decision, it simply does not apply to the fundamentally different issue in this case: whether CCE and substantive offenses are the same not because they are true greater and lesser included offenses, but because in a given case the substantive offense is used as a predicate for the compound CCE offense. We think that is a fundamentally different issue, and that in light of the language, the history, and importantly the purposes of the kingpin statute, CCE and the substantive of predicates are not the same offense.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. DeMassa?

MR. DE MASSA: Yes, Your Honor.

CHIEF JUSTICE BURGER: You do have six minutes remaining.

REBUTTAL ORAL ARGUMENT BY MR. DE MASSA

ON BEHALF OF PETITIONER

MR. DE MASSA: The Solicitor General indicates that Jeffers conspiracy is not one of the predicates of the prosecution in Jeffers. If that were so, then they would be separate offenses. If that were so, there would be no necessity to have a lesser included offense instruction as was indicated by Justice Blackmun in his decision that lesser included offenses instructions would be warranted in that case.

There was a citation of Kiebel, and there were other citations after Kiebel from Jeffers which indicate that you don't just look at the statutory elements of the crime to determine whether or not a lesser included offense instruction is warranted, but you look at whether or not the evidence warrants those instructions.

Two of those cases are Beck vs. Alabama, and Hopper vs. Evans. Those cases indicate that you look at the underlying facts to determine whether or not a lesser included offense instruction is warranted in a case. It's clear in this case that if the evidence is

relied upon by the prosecution to prove the greater offense, the continuing criminal enterprise charge, and it's warranted by the evidence, that if lesser included offense instructions are warranted, then they must be given. That does not make a CCE a separate offense.

You cannot have a CCE offense without having its necessarily included lesser offenses. Now those lesser offenses are felonies, that's to be sure, in this case; they're not misdemeanors as you normally find in statutes; but because of the punishment aspect of CCE, you get a tremendous lever with this type of punishment over a defendant. In this case, 40 years. No parole, no probation.

If Congress, as Congress intended and did, intended to proscribe against the business of drug dealing, then this type of statute with its underlying felonies is necessary in order to prove that greater statutory violation, you need to prove the lesser included offenses.

In this case, you can tell from just the initial indictment in Seattle when Petitioner was not charged with a conspiracy in Seattle, that the government clearly knew that it was one offense that they were prosecuting. He was not charged in Count I of that conspiracy because, frankly, the government read

Jeffers several years later after Jeffers came out and concluded that CCE was a conspiracy offense. And because other circuit courts have been stating that 846 and 963 are conspiracies, and therefore since Jeffers says 848 is a conspiracy offense, we're not going to allege conspiracies involving the same indictment for the same conduct because the defendant would plead to the conspiracy and buy the 848 charge.

QUESTION: Why isn't the CCE statute analogous to an habitual offender statute?

MR. DE MASSA: Because, in order to have an habitual offender statute or a recedivist statute, you are putting an offender who is offending more than once on notice by his prior convictions for nonrelated offenses that his subsequent act and subsequent conduct in a new offense unrelated to his prior offenses is going to cumulatively punish him, is going to greater punish him for the new offense.

QUESTION: Well, why doesn't this statute put a defendant on notice that if he continues to commit drug offenses, he might be charged with --

MR. DE MASSA: It does.

QUESTION: -- continuing criminal enterprise?

MR. DE MASSA: It does, Your Honor.

QUESTION: Well, notice is more of a due process concept. I never heard of notice associated with a Double Jeopardy argument.

MR. DE MASSA: Well, the cases cited by the government in the recidivist area clearly indicate that the purpose for recidivist statutes are, once a person has been burned once, he is on notice that he can't continue that conduct. But there's no burning once in a CCE indictment. There's no conviction -- three convictions, and then you're out of the ballgame; three convictions, and now you're a CCE defendant.

You've got to commit these over a continuing period of time, not just once. In any event, the habitual offenders I think are analogized the same way. There's just no comparison between those and a CCE offense.

By the way, if the government's impression regarding Jeffers and the lesser included offenses was correct, then Iannelli would control the case, as Mr. Justice White ruled or held in the Jeffers case, and that's clearly not the case here. You cannot make the greater offense without the lesser included offenses also being made. Therefore, they are necessarily included, and the evidence would warrant them being held that way.

The Illinois vs. Vitalle, the government argues that there is not a same-transaction test, but what happened in that case? The Court basically looked at the facts of the case to determine whether or not there was a substantial claim. It was remanded to the Illinois courts for a determination of whether or not failure to slow was a lesser included offense or necessarily required to prove the greater.

It's the same situation here. Again, you get back to the continuum of conduct. It's a continuing substantive violation. By segmenting out Petitioner's conduct in Washington when the government knew it was going to prosecute Petitioner in Florida for the same offense, they committed all those violations of the Double Jeopardy Clause which Petitioner had a right to be protected from, including a right to be protected from cumulative punishment for the same conduct.

CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

(Whereupon, at 12:01 p.m., the case in the above-entitled matter was submitted.)

* * *

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1842 - JONATHAN GARRETT, Petitioner v. UNITED STATES

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BY Paul A. Richardson

(REPORTER)