ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: TOMMY L. RUTLEDGE, Petitioner v. UNITED STATES

CASE NO: No. 94-8769

PLACE: Washington, D.C.

DATE: Monday, November 27, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

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TOMMY L. RUTLEDGE, :

Petitioner :

v. : No. 94-8769

UNITED STATES :

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Washington, D.C.

Monday, November 27, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

BARRY LEVENSTAM, ESQ., Chicago, Illinois; on behalf of the Petitioner.

JAMES A. FELDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 94-8769, Tommy L. Rutledge v. United States.

Mr. Levenstam.

ORAL ARGUMENT OF BARRY LEVENSTAM

ON BEHALF OF THE PETITIONER

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

This case presents the question of what limits the Double Jeopardy Clause places upon the punishment to be imposed upon a defendant found guilty of violating 21 U.S.C. section 848, the continuing criminal enterprise statute, and section 846, the drug conspiracy statute, where the same conduct constitutes the conspiracy and the in concert element of section 848.

QUESTION: Is it the Double Jeopardy Clause in the constitutional sense, or simply a concept that's somewhat like Double Jeopardy when we're interpreting congressional intent?

MR. LEVENSTAM: The Court's analysis has incorporated the Double Jeopardy Clause of the Constitution historically. There have been cases decided without reference to that, and then there have been a number of cases which rely on the Double Jeopardy Clause.

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QUESTION: But do all parties concede, or at least do you agree that if Congress wanted multiple or cumulative punishments set for the two crimes, that they could constitutionally enact a provision that would secure that objective?

MR. LEVENSTAM: Yes, Your Honor. Under Missouri v. Hunter and a long line of cases from this Court, that is clearly the case.

QUESTION: So then we're really talking about what Congress intended, rather than double jeopardy, are we not?

MR. LEVENSTAM: Well, the -- what Congress intended in the multiple punishments context defines the parameters of the double jeopardy protection.

QUESTION: Which really means there isn't any constitutional question involved, if Congress can provide whatever it wants, and double jeopardy accordingly recedes whatever Congress has provided.

MR. LEVENSTAM: Well, double jeopardy does not impose limitations on Congress, it's true. It's been analyzed to impose limitations upon the courts in imposing Congress' will.

Whether it's actually necessary, given the presence of the Due Process Clause, or even the body of the Constitution, relative authority granted under Article

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I or Article III, insofar as my client is concerned, he would be as happy to have one of these convictions vacated under any of those rubrics, but historically, looking at the cases, they have analyzed these situations under the double Jeopardy Clause.

QUESTION: But then if we're concerned with Congress' intent --

MR. LEVENSTAM: Yes.

QUESTION: -- as you agree, then why would Congress intend to put the prosecutor at risk of having no conviction -- let's say the CCE conviction gets wiped out on appeal -- if the conspiracy conviction has not been entered?

Why would we attribute such a will to Congress?

MR. LEVENSTAM: I don't think you should attribute such a will to Congress, and I don't believe that that is what would happen.

Our suggestion as to what should happen in a situation, it's clear under this Court's decision in Ball that the prosecutor is entitled to charge both, to present evidence as to both, to put both before the jury, and the Court is entitled to accept a verdict back from the jury with respect to both.

If the jury comes back and enters guilty verdicts with respect to both, our position is that it

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would be incumbent upon the district court to enter a vacatur with respect to one or the other in that court's discretion, and then when the entire case goes up on appeal, and we would assume that the defendant, having been found guilty, would take an appeal, both the guilty verdict, the judgment entered upon the conviction -- for instance, the CCE -- and the vacatur that the district court entered on the conspiracy would be before the appellate court.

It would be incumbent upon the defendant to argue with respect to both of those counts everything that he has, because the appellate court, having jurisdiction over the entire case and all the orders therein because the appeal is from a final appeal, if it determined that the CCE count should be reversed based on some element of CCE or some aspect of the case pertaining to an element that distinguishes it from the underlying conspiracy, the appellate court would have the authority to reverse the vacatur on double jeopardy grounds at the same time.

QUESTION: How would that work if there is no judgment entered on the conspiracy count?

MR. LEVENSTAM: Well, there would be a final judgment entered in the case, and in the line on the judgment form it would say, jury verdict vacated with respect to the conspiracy, and then the court, the

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appellate court could simply reverse the vacation of that, and remand to the district court.

QUESTION: The Government would have to appeal that, though, to get the vacatur reversed, wouldn't it? I mean, the defendant isn't going to say, reverse the vacatur.

MR. LEVENSTAM: Well, the defendant won't say that. It's my understanding that a final appeal, because all orders merge in the final judgment order, the court would have the authority to --

QUESTION: Well, merge -- you've just used a word that the Second Circuit -- what you describe seems to be what the Second Circuit's position is, and yet in your brief you reject that.

MR. LEVENSTAM: Well, I reject that because the Second Circuit's approach involves entering judgments of conviction on two counts when we believe under the Ball decision that judgments of conviction should be entered under only one of the counts. That, we believe, is Congress' intent, and that, we believe, is backed up by the force of the Double Jeopardy Clause.

QUESTION: But isn't this all just formalism if your end result is that the court on appeal could reinstate the verdict on the conspiracy count in the event that the CCE conviction were reversed on a ground peculiar

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to that charge?

MR. LEVENSTAM: Perhaps it may appear to be formalism from the standpoint of the court, but from the standpoint of the defendant who has a double jeopardy interest here, he will have stood trial in public, perhaps in his community, and under the Second Circuit means of addressing this issue, he will have the additional stigma which the Court mentioned in Ball of having two judgments of conviction entered, really upon one offense.

QUESTION: Why is --

QUESTION: And you think the vacatur erases, washes off that stigma? This is not formalism?

MR. LEVENSTAM: Yes.

QUESTION: He's walking around in the community with two convictions instead of one conviction and a conviction plus vacatur. That's the difference.

MR. LEVENSTAM: Right. He'll --

QUESTION: And that's not formalism.

MR. LEVENSTAM: No.

QUESTION: Why is there any additional stigma when the second offense is essentially a lesser included -- I mean, he's already got all the stigma he can get from the first one. The second is stigmatically redundant, isn't it?

(Laughter.)

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MR. LEVENSTAM: No, Your Honor, we don't think so. I think --

QUESTION: No, but why not?

MR. LEVENSTAM: Because --

QUESTION: What do they know about him as a result of the second conviction that they don't know about him as a result of the first?

MR. LEVENSTAM: That he's been convicted on two significant drug offenses, which are in fact one and the same, that he has received two life sentences, and the newspaper reports at the time of the sentencing noted the number, the conviction total with respect to my client, and it seems to me, although I've been involved in the legal system nearly 20 years now, that for people who are not, when they read the papers and see that someone has received not one but two life sentences, they glean from that that he committed not one but two exceptionally heinous crimes, and under a --

QUESTION: And he -- I'm sorry.

MR. LEVENSTAM: I'm sorry.

QUESTION: No, go ahead.

MR. LEVENSTAM: I was simply going to say, under Congress' definition, based on our position, there has been only one offense here. The lesser included is not to be punished separately. It's not to be taken as a

separate offense.

QUESTION: A district court order that the lesser offense be simply suspended, he would suspend entering judgment, I don't think that would work, because then you couldn't have both appeals.

MR. LEVENSTAM: My concern with the suspension, and why I respectfully suggest that the vacatur is a more satisfactory solution, is because suspending the count sort of leaves it out somewhere in Never Never Land.

QUESTION: Sort of like a springing use.

MR. LEVENSTAM: Something I never really understood in law school myself.

(Laughter.)

QUESTION: Well, what do we do in the present case?

MR. LEVENSTAM: Our request with respect to this would be that you remand to the district court with the direction that one of the two convictions be vacated.

QUESTION: Be vacated.

QUESTION: Which one?

MR. LEVENSTAM: That would be up to the district court.

QUESTION: But what -- I mean, how is it supposed to work? That's what I can't figure out in this case.

The judge gets a piece of paper, and the piece of paper says, judgment on 846, then there's a blank or something. I mean, normally he'd fill in, convicted, all right. Then 848, he'd fill in judgment of conviction. It's this piece of paper called a judgment, and in your opinion, how should it read?

After all, I mean, it sounds very technical and very formal. If he puts the wrong one and then on appeal the other one's reversed, or something, you know, and what happens when one party thinks that they are lesser included and the other doesn't?

I mean, isn't the simplest thing just say, judge, fill in both, convicted. Do that. Just fill it both in, convicted --

MR. LEVENSTAM: Well, both --

QUESTION: -- and the collateral consequences will take care of themselves. You say -- you wouldn't be able to count it twice, like recidivism statutes, et cetera.

MR. LEVENSTAM: But -- that might be the simplest approach, but I --

QUESTION: All right, so now what is your approach? How would you -- how would you --

MR. LEVENSTAM: My approach, which is suggested, I believe, by Ball, is that the district court exercise

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its discretion.

QUESTION: But you say that. I'm the district judge, pretend, and I would say, since I haven't that much experience, I'd ask you, what do you want me to do?

MR. LEVENSTAM: In the normal course I believe you would enter judgment on the greater offense --

QUESTION: All right.

MR. LEVENSTAM: -- and vacate the lesser included.

QUESTION: Fine, so I'd enter judgment, 848 convicted, okay, and I enter judgment on 846, I say, strike it out. Do I say, acquitted? What do I -- I don't put acquitted.

MR. LEVENSTAM: No.

QUESTION: I just cross it out, okay.

Now what happens is that you appeal, and lo and behold you discover that the money wasn't used in an enterprise or something, and so that's reversed. Now what happens?

MR. LEVENSTAM: Well, the appellate court then would say that because the Government did not satisfy the requirements to establish a CCE, and there is no CCE conviction --

QUESTION: Right.

MR. LEVENSTAM: -- the vacatur entered on the

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conspiracy conviction --

QUESTION: There was no vacatur. No judgment was ever entered on it. That's what you say was the appropriate thing. You said the district judge should convict on only one count.

MR. LEVENSTAM: And vacate the jury's verdict on the other.

QUESTION: You don't vacate it -- the jury's verdict. You just don't enter judgment on it, right?

MR. LEVENSTAM: Well, I believe the jury's verdict is, as a matter of course, entered on the docket, and the docket entry would then be vacated.

QUESTION: Right, so now what's supposed to happen, in your opinion?

MR. LEVENSTAM: Then the court of appeals can say the decision, given that there is no longer a conviction under the continuing criminal enterprise statute, there is no longer a double jeopardy bar, and so we reverse the vacatur order, and we remand to the --

QUESTION: We reverse the -- in other words, the Government had to file a piece of paper called cross-appeal?

MR. LEVENSTAM: Well --

QUESTION: Because you won't care. I mean, as far as you're concerned, you're representing your client.

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You won't care. So what they were supposed to do is, they're supposed to file a cross-appeal from the vacatur order, and so that then they're protected?

MR. LEVENSTAM: I don't believe that would be necessary, but --

QUESTION: All right, what if -- no, but I want to know what's supposed to happen, so let me leave you alone and you'll tell me.

MR. LEVENSTAM: Okay.

QUESTION: All right.

MR. LEVENSTAM: I don't believe that because, typically, from a final judgment order, all orders entered in the case are brought before the court of appeals, I don't believe that the Government would have to file a notice of appeal.

QUESTION: I'm now an appellate court judge, and I've just reversed the 848 conviction because of the lack of that final element, and now I say to you, now please tell me, what do I do now? I'm new at this. I want to know how to do it.

MR. LEVENSTAM: Well, the vacatur is no longer valid because there's no longer a double jeopardy bar to the entry of a judgment of conviction on the conspiracy, the lesser included, and so you reverse the vacatur and you remand to the district court with instructions to

enter judgment, assuming that there is no prejudice, say, here as a result of the --

QUESTION: And they don't have to have appealed.

MR. LEVENSTAM: They don't have to have --

QUESTION: But --

MR. LEVENSTAM: They do have the authority to do that.

QUESTION: But then does your client appeal again from the second judgment, so that can be reviewed for possible error?

MR. LEVENSTAM: The -- in the typical case, and this has happened, in 25 years, so infrequently that it's -- that it -- there aren't a lot of examples to cite to, but in the typical case, the only thing that the district court would do would be to enter judgment and then issue a sentence and the only question really left for appeal would be the propriety of the sentence.

QUESTION: Well, but doesn't -- wouldn't your client have a right to claim some sort of error, perhaps in the instructions, in the case of the judgment that's now been entered against him? You wouldn't have been able to argue that on the previous appeal.

MR. LEVENSTAM: I believe we -- yes. Not only would we have, but it would have been incumbent upon us to argue all error.

QUESTION: Yes, but the -- not all of the errors might have been the basis for the decision. Let's assume that on the continuing criminal enterprise count some element other than the conspiracy element was found to be insufficiently supported by evidence, and the court says, that's enough, we reverse.

Then we get back to the position that you posit. The other conviction, the conspiracy conviction is brought forward. I presume at that point you would say, oh, well, I now want to appeal this because there was insufficient evidence of conspiracy.

MR. LEVENSTAM: Well, I don't think it's that complicated, because you have to --

QUESTION: Well, no, but just tell me, why won't you -- I mean, you're not going to concede that on behalf of your client --

MR. LEVENSTAM: Oh, no.

QUESTION: -- and if, in fact, it was not reached by the appellate court as the grounds of its decision in the first appeal, you're going to want to reach it in the second one, because if you do, you're client will walk, so of course you're going to want to appeal it, aren't you?

MR. LEVENSTAM: Well, that's true, but I will want to appeal because the conspiracy claim is a true,

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lesser-included offense. I will want to raise every issue with respect to that, too, because every --

QUESTION: And you will raise every issue, but in my example the appellate court says, we find one ground of error. We don't have to get into the question of the sufficiency of evidence on conspiracy. That's difficult.

So we're going to decide it on the ground of the clear error, and so you will have done everything you're supposed to do, but because the court decided on the ground that it did, you will still have the conspiracy issue before you, and you're going to appeal it, aren't you?

MR. LEVENSTAM: Yes, although I would say --

QUESTION: So there will be -- I mean, we've got to assume that the price to be paid here is a second appeal.

MR. LEVENSTAM: Well, yes. At some level -- I don't think it will be that complicated, a second appeal, because the same court that you're talking about will have --

QUESTION: But what sense does it make? If you say that it doesn't have to be a retrial on the conspiracy, why have two appeals instead of just one? As long as there's not going to be additional collateral consequences, as Justice Breyer indicated, doesn't it make

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entire sense to let the whole case go up to the court of appeals and just ensure that there will be no more than one punishment?

MR. LEVENSTAM: Well, again, I guess I don't agree with the underlying premise that there are no collateral consequences, because Ball clearly recognized the social stigma --

QUESTION: But if you lose on the stigma point, there are none, isn't that fair to say? If we say, look, there is no cognizable extra stigma when you have a mere lesser included offense, then you really wouldn't have an answer to Justice Ginsburg's question, would you?

MR. LEVENSTAM: Justice Souter, you're absolutely correct with respect to a situation other than the one that is in our case, where the Seventh Circuit has affirmed concurrent sentences -- concurrent judgments, separate judgments and separate concurrent sentences.

In our case, there was never a vacation of either offense, and so the argument to this point has been talking about preferred approach to take, but has not really addressed what's happened in our case. In our case, the Seventh Circuit affirmed separate convictions and affirmed concurrent sentences. I will --

QUESTION: But if it's so that under that Seventh Circuit judgment there is no greater exposure to

recidivist charges because under the guidelines they would be treated the same as if there'd been only a CCE conviction, so that there is no recidivist consequence, then under the Seventh Circuit decision, when there's no longer a prison term, the only consequence is the extra stigma.

MR. LEVENSTAM: No, I disagree.

QUESTION: Fifty dollars.

MR. LEVENSTAM: Excuse me?

QUESTION: Fifty dollars.

MR. LEVENSTAM: Well, there is -- yes, there is the assessment of $50, there is in addition -- there are certainly other collateral consequences that may adhere. First of all, there is the question of potential future impeachment, and the fact that my client may be imprisoned does not mean that he will not --

QUESTION: Or a three-strikes-and-you're-out law in a State.

MR. LEVENSTAM: Yes.

QUESTION: I assume if there are two convictions, rather than a merged one it would count for two, is that right?

MR. LEVENSTAM: Yes, that is also a possibility. There's also a --

QUESTION: Can you raise that in connection with

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your client? How many convictions does your client have?

MR. LEVENSTAM: Well, depending on whether you count both, it would be five or six in this case.

QUESTION: And there were, indeed, three life sentences, were there not?

MR. LEVENSTAM: Yes.

QUESTION: So does -- the way this particular case is decided, does it have any practical consequences, given that your client has not two, but three life sentences at the moment?

MR. LEVENSTAM: Well, I think the answer to that, Justice Ginsburg, is that I don't know. I mean, and nobody sitting here today can project that far into the future.

QUESTION: May I ask kind of a basic question that will reveal my ignorance? This lesser included offense situation, where a person is charged with a greater offense and a lesser in the same proceeding, that must happen quite frequently in the State courts, doesn't it?

MR. LEVENSTAM: Well, generally in the State courts, at least in Illinois, charges aren't made on a separate basis. You're charged for an aggravated battery, for instance, and the question would come up at the end of the case whether to submit jury instructions on the lesser

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includeds of battery and assault.

QUESTION: Supposing you do have jury instructions for a greater and a lesser included offense in the same case, what does the judge do? Does he enter two judg -- I mean, what does the --

MR. LEVENSTAM: I think the jury -- I believe that the jury, at least in my State, is instructed to do one or the other, so the problem does not come up.

QUESTION: Well, why wouldn't the proper solution here be the same, have him do one or the other?

MR. LEVENSTAM: Well, it would make sense to me, but I believe that the Ball case said that a jury verdict, that you can bring back -- return a jury verdict on both.

QUESTION: I mean, it seems sort of strange to have a very special rule with lesser included offenses in the Federal court that's different from what's applied all over the country in State courts.

MR. LEVENSTAM: Well, I don't --

QUESTION: But -- but --

MR. LEVENSTAM: I don't disagree that this creates the problem, is the situation of the Government charging both the lesser and the greater.

QUESTION: But is this a lesser included offense case? Is this a lesser included offense case?

MR. LEVENSTAM: Yes.

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QUESTION: I thought the position was that there were two different acts. One was a conspiracy, the other was a very successful conspiracy.

MR. LEVENSTAM: Well, but --

QUESTION: It's not necessary -- the only reason it's lesser included is because there's a lesser punishment --

MR. LEVENSTAM: No, Your Honor --

QUESTION: Not a lesser -- not a --

MR. LEVENSTAM: The -- I think it's important to point out that every continuing criminal enterprise will have embedded within it a conspiracy, because one of the statutory elements, without looking to the facts of the case or anything, a pure Blackburger analysis, is in concert, the conduct has to be in concert, and so there will always be a conspiracy buried in a continuing criminal enterprise.

QUESTION: Well, yes, but we've conceded at the outset -- I thought we conceded that they could be punished separately and cumulatively if Congress so intended.

MR. LEVENSTAM: That's true, and our position --

QUESTION: And that is not a paradigmatic lesser included offense.

MR. LEVENSTAM: I'm sorry, I didn't hear the

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last thing you said.

QUESTION: In that situation you do not have a paradigmatic lesser included offense.

MR. LEVENSTAM: That's true, but Congress did not intend for pyramiding sentences here. The Government agrees that Congress did not intend for pyramiding sentences. The Government's position is --

QUESTION: Well, but wouldn't you agree that Congress could pyramid sentences with lesser included and greater offenses?

MR. LEVENSTAM: Yes.

QUESTION: Sure.

QUESTION: So why isn't this a para -- why -- I don't understand why this is not a parad -- whatever the word is --

MR. LEVENSTAM: A para --

(Laughter.)

QUESTION: A case of -- a conspiracy is always a lesser included offense of the CCE.

MR. LEVENSTAM: Well, I guess in my waning moments perhaps I sort of leapfrogged to an issue I was hoping to get to address, which is Congress' intent.

QUESTION: Well, before you do that --

MR. LEVENSTAM: Yes.

(Laughter.)

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QUESTION: I don't understand what you said about the State case. Why is it okay to send it to the jury? You say no harm is done if you -- so long as there's an instruction at the end.

What if, in fact, you know, the jury convicts of aggravated assault, and it turns out, on appeal, that there's not enough evidence to support the aggravation part? If the lesser included offenses have not been submitted to the jury, he walks, I assume, right?

MR. LEVENSTAM: My understanding is that -- and I have seen cases in which there were reversals in remand for trial on the lesser included.

QUESTION: Oh, before retrial, I'm sure -- he can be retried.

MR. LEVENSTAM: Yes.

QUESTION: But why wouldn't it be better to submit both to the jury so that if the one conviction is reversed, the other one would stand, as your argument would be the case here?

MR. LEVENSTAM: To be honest with you, I don't know.

QUESTION: Okay.

MR. LEVENSTAM: It's not how the Illinois law has evolved.

QUESTION: In the State court case you

hypothesized, that you explained, the jury returns a verdict on only one of the two charges, not both.

MR. LEVENSTAM: Yes.

QUESTION: But here they do both, so that's different from the standard lesser included offense, now. The lesser included offense, the jury has a choice of one or the other. Here, the Government is entitled to require a jury verdict on both.

MR. LEVENSTAM: The same was true with respect to the -- I -- with respect to the two firearms statutes involved.

They were separate offenses. They were both submitted. This Court held specifically that both could be submitted to the jury. The verdicts could be returned. Nevertheless, it was clear that the possession statute was a lesser included of the receipt statute, and this Court, in examining the statutory history, the legislative -- the statutory structure and the legislative history, came to the conclusion that Congress did not intend to cumulate punishment, and based upon that conclusion said, because of the collateral consequences issue, that you could not enter cumulative sentences even if they're concurrent.

The same situation presented itself in United States v. Gattis, which is -- was a bank robbery case, and the jury returned verdicts under 2113(a), 2113(b), and

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2113(d), and this Court, in its footnote, said, well, obviously, you're going to have to vacate the separate convictions and the concurrent sentences for all but the 2113(d).

So I think within the Federal system -- perhaps it was unfortunate I even interjected my State, but within the Federal system, it is not unusual to submit lesser included and the greater offense at the same time.

QUESTION: In -- Ball you say was lesser included? I thought that they were so close to the same offense, why would -- why do you characterize those as lesser, possession as lesser included?

MR. LEVENSTAM: Because in order to receive you have to possess, but in order to possess, you do not have to receive, and the -- Chief Justice Burger in writing that case noted in a footnote that one way of doing that would be to -- for the person who possesses the gun to manufacture it. You know, the zap gun situation.

But there is a much more frequent occurrence that distinguishes those two statutes, and that is, somebody who is not a felon goes out, buys a gun -- it happens all the time -- commits a felony, is convicted, and upon his release returns home to his gun collection.

Now, every one of those guns is illegally possessed, but not one of them was illegally received, and

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so there you have -- that is the situation. It's a virtually identical situation here where there is a lesser included offense.

QUESTION: What actually is your objection to what I take is the SG's position on our piece of paper called judgment in the district court? The district court would write, 846, conviction, 848, conviction, and then between the two he'd write the words, 846 is included as part of the, or something like that.

Now, that's -- or merged into, I don't know. He writes some extra words between those two pieces of paper, and that would signal to everybody -- lawyers see the word conviction, they know they have to appeal, so they'd have a signal, appeal both, and the words in between those two things would apparently make clear to everybody, we'd hope, with an opinion of this Court, that the collateral consequences don't apply.

Do you have an objection to that approach?

MR. LEVENSTAM: I -- well, I would certainly prefer it to the approach taken by the Seventh Circuit in this case, okay.

QUESTION: That's true.

MR. LEVENSTAM: Beyond that, I still believe, as I started out the morning, that the vacatur approach is better because that way there is no question but that

there is only one conviction for one offense.

If there are no further questions, I'd like to reserve the remaining time for rebuttal.

QUESTION: Very well, Mr. Levenstam.

Mr. Feldman, we'll hear from you.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE RESPONDENT

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

It is a consequence of petitioner's position that a defendant who is validly found guilty by a jury of two very serious Federal offenses, drug conspiracy and CCE, should have the opportunity, under some circumstances, to gain a windfall.

If he's able to have the CCE conviction -- since the district court under petitioner's position may only enter judgment on the CCE offense, if, on appeal, he's able to have that conviction overturned, the defendant will obtain the possibility of going free notwithstanding that he's committed the drug conspiracy offense, that he's been validly charged of that offense before a jury --

QUESTION: Mr. Feldman, is that any different from any normal lesser included offense situation in which the Government gets the verdict on the greater offense and the defendant appeals and has it set aside? He walks on

the entire transaction.

MR. FELDMAN: I -- well, actually, I guess I have two answers to that. First, I don't think that is the ordinary case. In the ordinary case of a simple or greater and lesser included offense, where they're defined in a single statutory section and there are increasing aggravating factors of the same series of offenses, in that situation, the normal practice is, you can -- if the greater offense is overturned, the court can enter a judgment on the lesser offense, assuming -- the court can enter judgment on the lesser offense, assuming the reason for overturning the greater doesn't cast any doubt on the jury's finding that the defendant committed all of the elements of the lesser.

QUESTION: Do you have at hand authority that I could look at?

MR. FELDMAN: Yes. One -- there's the case we actually cited in our brief, the case from this Court that, it's a little bit obscure, but actually it's normally cited for that proposition. It's Tinder v. United States.

QUESTION: Oh, Tinder.

MR. FELDMAN: Actually, a commonly cited case from the D.C. Circuit that lays that out is Allison v. United States at 409 F.2d 445. There's a recent Second

Circuit case, U.S. v. Buossono at 926 F.2d 230, and there are some others.

QUESTION: Well, if that's the general rule, why wouldn't that rule apply here?

MR. FELDMAN: Well, in --

QUESTION: Just enter judgment on the greater offense.

MR. FELDMAN: Well, that ordinarily is what happened when -- is what the normal Federal practice is where, as I said where separate offenses are defined in distinct sections of a single statute with aggravating factors.

QUESTION: Let me back up just a second. Is it correct that it's common ground here that the conspiracy offense is a lesser included offense in this case?

MR. FELDMAN: We're willing to assume that for purposes of this case. If it were necessary --

QUESTION: Then --

MR. FELDMAN: -- for the Court's decisions, we don't agree with that proposition.

QUESTION: But if that were true, then why wouldn't -- shouldn't this be treated just like any other lesser included offense situation?

MR. FELDMAN: Well, it's not the way it's ordinarily done when the statutes -- where statutes have

as complex a relationship as the two statutes --

QUESTION: No, but maybe it would simplify things to do it that way. That's the question I'm asking. I realize there's been a lot of confusion --

MR. FELDMAN: Right, well --

QUESTION: -- with these two statutes --

MR. FELDMAN: The basic --

QUESTION: But if we made it clear that one is a lesser included of the other, wouldn't that solve everything?

MR. FELDMAN: Well, that -- it would be one way of addressing the problem, I'd agree with that.

QUESTION: What would be wrong with it? Just put it in harmony with all our other lesser included offense law.

MR. FELDMAN: The basis of the normal way of treating things, as you mentioned, is that it's assumed that when Congress puts aggravating factors of a given offense in this particular statute, that Congress only wants one conviction, and in fact the way it's normally submitted to the jury.

The jury's told to first consider the greater, and then only if it finds the defendant not guilty of that should it go down and consider each of the others, and that, due to long practice, and the way things have been

done, it's assumed that when Congress defines --

QUESTION: But the reason it hasn't been done here is, there's been a debate of very realistic arguments on both sides as to whether these are, in fact, entirely separate offenses, what did Congress intend, that if we assume what everybody's been assuming in the argument up to now, that you lose on that issue, then wouldn't it make sense to just put it in the same pattern?

Of course, I understand you don't want to concede that, but --

MR. FELDMAN: Well, I mean, I don't think so, because I think that the question is what Congress intended, and where Congress defined statutes in two distinct sections of statutes, and moreover, where it takes an offense like CCE, which is really dramatically different from an underlying conspiracy, which involves the defendant obtaining substantial income, acting in concert with five or more people, and committing a series of violations, when it takes that kind of statute --

QUESTION: Yes, because that's just like a murder is more serious than an assault, too.

MR. FELDMAN: It's true, and Congress could -- could, if Congress' intent were not to -- were to treat murder and assault the same way, then that would be a reasonable way --

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QUESTION: Isn't it first up to us to decide what Congress' intent was, and if we agree with you, why, then they're totally separate, but if we disagree with you, then why does it make any difference that they're in separate statutes rather than in one?

MR. FELDMAN: If --

QUESTION: You see, if we agree with you that Congress intended two separate proceedings entirely, then you win, period. But if we disagree, and think that they did intend one to be a lesser included offense of the other, even though they're in separate provisions of the code, then why shouldn't they be treated just like a normal lesser included offense?

MR. FELDMAN: If it were -- if they were treated like normal lesser included offenses, and if it were made clear that the procedure whereby you -- if the greater one were reversed that the court could just enter judgment on the lesser one, so long as the reason for the reversal didn't cast any doubt on the jury's finding of guilty of the lesser one, I mean, that would --

QUESTION: Well, what did this Court say in Ball that sheds light on this, do you think?

MR. FELDMAN: I think the Ball court had two holdings, both of which we agree with. The first holding was that the entry of a conviction and the entry of a

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concurrent sentence does in itself constitute some modicum of punishment, albeit perhaps not as much punishment as a longer prison term, or a substantially larger fine, but some modicum of punishment.

QUESTION: Did Ball indicate that the conspiracy is a lesser included offense of CCE, in your view?

MR. FELDMAN: No. I -- maybe -- Your Honor, maybe you're referring to the Jeffers case. Ball did not deal -- I was going to get -- the other holding in Ball was that the two offenses at issue there, receipt of a firearm by a felon and possession --

QUESTION: Oh, that's right.

MR. FELDMAN: -- of a firearm by a felon --

QUESTION: Right.

MR. FELDMAN: -- were essentially to be treated as directed at a single evil and as the same offense, and again, that --

QUESTION: Was it Jeffers where we discussed --

MR. FELDMAN: Yes. Jeffers was the previous case that involved --

QUESTION: Yes, right.

MR. FELDMAN: -- CCE and conspiracy.

QUESTION: Right.

MR. FELDMAN: The plurality in that case stated that Congress didn't intend a greater prison term to be

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imposed or a greater fine. They didn't intend that kind of pyramiding of punishments, or consecutive punishments to be imposed on the defendant.

QUESTION: And the plurality in Jeffers assumed without deciding that there was a lesser included offense.

MR. FELDMAN: That's correct, but they still went on, and we're basic -- we are submitting this case to the Court, and willing to accept the same assumption that the Court adopted in Jeffers, and that is, we can assume they are a greater and lesser included offense, but there still remains the question of what Congress intended.

Jeffers stands for the proposition -- at least, the plurality opinion in Jeffers -- that Congress intended not to impose a greater prison term or a more substantial fine, but Jeffers didn't address the question of whether this modicum of additional punishment that's caused merely by the entry of a judgment and a concurrent sentence, whether that was something that Congress would have imposed.

QUESTION: -- we should decide whether this is a lesser included offense or not.

MR. FELDMAN: The Court could decide that in this case. It would be our submission that it's not a lesser included offense because the CCE offense doesn't require -- although it may be satisfied by proof of a

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classic conspiracy, the in concert with element doesn't require proof of a conspiracy.

It only requires that the defendant act together with a number of other people to organize an enterprise, but it doesn't require that the other people who are involved with the defendant necessarily know the criminal goals, or the full criminal goals, of the enterprise.

If a defendant, for example, organizes a business to transport merchandise from some country where drugs are prevalent to the United States, and does so in a fairly -- a shady and unusual way, there may be other people who join with him possibly even thinking it's an innocent enterprise, or possibly not, but who don't know that in every one of those shipments is a large amount of cocaine.

In that kind of a case, we think it's reasonable to say that the defendant acted in concert with the other five individuals even though they may -- they couldn't all be found guilty of conspiracy.

For that reason -- and this was an argument also that we submitted in Jefferson the Court didn't reach. For that reason, we don't think that it's a classic relationship of greater and lesser included offenses.

QUESTION: No, but in that case that you give, you wouldn't have a conspiracy indictment.

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MR. FELDMAN: Right. In that case --

QUESTION: Sure. I mean, you can have --

MR. FELDMAN: In that case, you wouldn't.

QUESTION: Every assault isn't a lesser included offense of every murder. It depends on the facts of the case.

MR. FELDMAN: That's correct, and in that case --

QUESTION: But if the conspiracy is an element of the CCE, then it's always a lesser included offense.

MR. FELDMAN: No, I don't think that's the analysis to --

QUESTION: Your example doesn't disagree with that.

MR. FELDMAN: No, I don't think that's right. You don't look at whether, on the facts of a particular case, whether the defendant was not only guilty of the conspiracy but also the CCE, just -- what you look at is whether under the statute it's possible to be guilty of the CCE without being guilty of the conspiracy, and it's our position, because of the example I just gave, that that is possible, that if the court had to reach the question --

QUESTION: But we deal with cases in which -- the only cases we're concerned with are those in which the

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government has made both a conspiracy charge and a CCE charge, so it doesn't help the analysis to hypothesize CCE cases that don't involve conspiracy.

MR. FELDMAN: I think I agree with you in the following sense. I think what my example showed was that they are, in fact, distinct offenses, but in any event, the question is what Congress intended for defendants in the position of petitioner here.

QUESTION: How could we resolve Jeffers the way we did against the Government and not reach this issue, as you say?

MR. FELDMAN: Because Congress -- because the Court in Jeffers held that in any event what you have to do is look at Congress' intent with respect to --

QUESTION: Well, isn't it very relevant to Congress' intent whether the two -- whether one crime is a lesser included offense or not?

MR. FELDMAN: I think actually in many cases it is, although the Court frequently, when it deals with that question, looks not only at what -- at the relation of lesser -- and greater included offenses, but also looks at what -- the direct indications of what Congress, how Congress intended --

QUESTION: Did we say in Jeffers that we were not reaching this question?

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MR. FELDMAN: Yes. The Court specifically said it I think two or three times in the course of its opinion, and -- actually, the Court didn't have an opinion in Jeffers. I should correct myself. There was only the plurality opinion that even proceeded along this line of reasoning.

Justice White wrote an opinion in which he said they were not greater or lesser included offenses, and therefore any kind of accumulation of punishment would have been permissible in his view, and I --

QUESTION: It seems to me it's a very, very fine congressional intent you're asking us to posit. I don't like talking about congressional intent anyway. It seems to me you look at the statute and see what the statute reasonably means, but you say there's one class -- we can discern a congressional intent not to pyramid punishments, however, to cumulate convictions.

So there are three categories of statutes. You can cumulate both, and then, category two, you can pyramid punishments but not convictions, and category three, you can't pyramid either one, and we're to discern this refined congressional intent statute by statute.

MR. FELDMAN: Well, I think --

QUESTION: It's a real difficult task, don't you think?

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MR. FELDMAN: Well, that is what the Court -- I think that's what the Court did in Ball. It looked at those two particular statutes in that case to determine what Congress intended with respect to --

QUESTION: Well, I think the one goes with the other. I think when Congress doesn't intend to pyramid punishments, it doesn't intend to pyramid convictions, either. That's my point. I think it's a very refined congressional intent to allow the double punishment but not allow the double conviction, or vice versa.

MR. FELDMAN: Well, I think to be fair, it's also --

QUESTION: I guess there are even more than three categories. Maybe sometimes they want to allow two convictions but not two punishments. Sometimes they want to allow two punishments but not two convictions. We're going to have to go through the whole list, aren't we?

MR. FELDMAN: Well, I mean, I think as a logical matter it's possible Congress could have had any kind of intent with respect to punishment, because the Constitution doesn't impose limits in that respect.

QUESTION: Life is too short. We can't figure all of this out. I mean, if it's -- the two are cumulated or not, and if they're cumulated, you can neither punish twice nor you can convict twice. That makes a lot of

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sense to me.

MR. FELDMAN: Well, as a practical matter, the notion of punishment that's involved here is a fairly involved, refined notion of punishment.

I mean, merely having the piece of paper say that you got convicted of both crimes and concurrent sentences, in this case concurrent life sentences, don't really impose the kind of disability on a defendant that the separate -- that an additional term of years in prison, or an additional fine would have imposed.

And when you're working with such refined notions of punishment, I think it's important to also try to figure out how -- whether the Congress wouldn't have wanted that kind of refined notion of punishment to get in the way of what is truly one of its primary goals, which is seeing to it that a defendant who is -- who commits and is convicted of both section 846 conspiracy and a section 848 CCE, that that defendant receives the punishment that Congress intended for both offenses, regardless of some fluke of later judicial procedure.

QUESTION: What's the source of this refined concept of punishment that you were just talking about? Are there cases from this Court that suggest it?

MR. FELDMAN: The only case that I'm aware of is Ball. The only case is United States v. Ball.

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QUESTION: It isn't entirely consistent with some of our other cases, is it?

MR. FELDMAN: Ball was -- is in some tension with a number of cases.

QUESTION: Yes.

MR. FELDMAN: But the -- Ball had a fairly unique circumstance, which was, you had two statutes of receiving and possessing a firearm by a felon. The Court basically treated them as if they were really two ways of committing the same offense.

As the Court said in its opinion, there's one evil that Congress was legislating against there and, in fact, a year after the decision in Ball, Congress in fact took the two statutes, which really by happenstance were just codified separately, and combined them into what -- what's now 18 U.S.C. 922(h).

QUESTION: But Mr. Feldman, Chief Justice Burger said, twice in that opinion said the criminal conviction itself, and not just the sentence, is punishment, and he stated that -- I'm sure you're familiar with the decision -- twice as a perfectly general proposition not tied to this peculiar receipt possession.

MR. FELDMAN: I agree, and again we don't disagree, or we're not asking the Court to -- our position doesn't require disagreeing with that holding.

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It's only that it does perhaps suggest that there should be a recognition that the kind of punishment that's imposed merely -- especially in a case like this merely by the entry of an extra judgment and a concurrent sentence is not the kind of punishment is not -- is one that Congress would have intended to avoid the problem that was being addressed during petitioner's argument, which is the possibility that defendant is going to gain a windfall and not receive a prison sentence for a drug conspiracy that he committed.

I would also add that it's even less of a punishment than it was in Ball.

Now, at the time of Ball, there was parole in the Federal system. There is no parole, and one of the things that Chief Justice Burger referred to was the possibility that the extra conviction could have an effect on a parole decision.

Well, in fact, under CCE there never has been parole, so that --

QUESTION: But if the Tinder case that you cited, if that's the model, then the Government is protected against what you said at the outset of your argument was your real concern.

MR. FELDMAN: That's correct.

QUESTION: That you'd be stuck without any

conviction.

MR. FELDMAN: That's correct. If --

QUESTION: I'm not sure that's so, because in Tinder what happened -- I've just read it -- the court gave a sentence that was in excess of the authorized sentence unless they showed that the value of the items stolen from the mail had been more than $5,000.

The court just made a mistake. There had been no proof the value was over $5,000, so this Court said, well, you just have to sentence for the lesser amount because it wasn't shown. That's all that was.

The offense was the same. The question was whether or not the sentence could stand.

MR. FELDMAN: Well, I --

QUESTION: The offense was the same offense.

MR. FELDMAN: The way Tinder has been read by the lower courts, and the Court didn't -- this Court did not discuss this issue in any detail, as you know, but the way it's been read by the lower courts as whereas the greater offense required proof of over, whatever it was, over $5,000 of merchandise stolen, and that was an element of the greater offense, there was a -- that was a felony, there was also a misdemeanor offense that didn't require proof of that element, and therefore the relationship between the two offenses was a greater and lesser included

offense.

But if it were clear that Tinder would apply in that situation, the Government's primary interest here is in seeing to it that a defendant who's convicted of both, under both statutes receives the punishment that Congress intended for both.

QUESTION: A lot of that has to be implied from Tinder, doesn't it, since it really goes from a long recitation of the facts to saying, reversed.

MR. FELDMAN: That's correct, but it's -- the disposition of -- it's not just reversed, it's also the disposition of the case, which was entry --

QUESTION: Yes.

MR. FELDMAN: -- of judgment on the misdemeanor, but I agree.

Nonetheless, Tinder has been taken by the lower courts to mean that.

I think the Seventh Circuit's approach is the simplest way of achieving the result of making sure that the defendant who commits both offenses receives the punishment that Congress intended for both.

Now, the Second Circuit's approach is another way of encompassing the same objective, and although it's -- the Seventh -- under the Second, if the Court disagrees with our submission that Congress didn't intend,

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and believes that Congress didn't intend separate convictions and concurrent sentences, the appropriate thing to do would be to deal with the case like the Second Circuit does, which is to enter one judgment of conviction, and make it clear on the judgment that a single conviction is being entered for violation of the two statutes, and a single sentence is being entered.

QUESTION: Mr. Feldman, what light do you think that Garrett v. The United States sheds on this problem? There, the Court dealt with what, a CCE offense and a predicate offense?

MR. FELDMAN: That's correct, and the Court stated that the relationship between those two offenses is a very complex relationship, and it cannot be simply analogized to the greater -- that of greater and lesser included offenses.

Near the end of its opinion, it cited the Jeffers case once, but the point of that citation and what it said about Jeffers was simply, we are not dealing today with an issue of dealing with a conspiracy offense based on the same agreement. We're dealing with the relationship between an individual criminal predicate offense, which can be one of any number that can be a predicate for CCE and the CCE offense itself, and the Court held in that case that not only could defendant be

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separately punished, defendant could be separately prosecuted for those two.

But I don't -- I think really the only relevance of Garrett is that it recognized that that wasn't the issue that it was dealing with in that -- the Court was dealing with in that case.

As I was saying, the Second Circuit's approach doesn't -- has no possible consequences that would enure to the defendant's detriment. There's only one conviction. There's only one sentence, and under this Court's decision in Ball, there's nothing wrong with a judgment of conviction that was entered the way the Second Circuit does.

Since that -- the Second Circuit's approach would also make it clear that the defendant has to bring all of his issues to the appellate court in the very first appeal of the conviction, and since --

QUESTION: You think it's a lesser punishment to say I was -- I have two convictions of two crimes, than to say I have one conviction of two crimes? I mean, it seems to me the court that said in Ball that two convictions are punishment, you know, is cumulative punishment would also say that a conviction of two crimes is cumulative punishment, don't you?

MR. FELDMAN: I don't think so, because I think

that Ball was concerned not just with the very abstract question of counting of crimes, but the possible consequences that could flow to the defendant from two convictions, and those consequences can't flow.

In other words, Ball can't flow from merely the entry of a single conviction. Ball didn't hold that the entry of two convictions, if it had no collateral consequences whatsoever, would still, just as a matter of stigma, constitute punishment that has to be dealt with.

QUESTION: You think it's stigmatically neutral, is that it?

MR. FELDMAN: Yes, I guess I would think it's stigmatically neutral, I think, and particularly in the context of these statutes, where the CCE offense is really one of the most serious ones in the Federal criminal law. the fact that a defendant was also -- was convicted of a single conviction, convicted once of violating CCE and a drug conspiracy statute I don't think carries any additional stigma.

QUESTION: Could you help me with something very, very basic? Assume no knowledge on my part -- very basic. What happens in the absolute ordinary case in the Federal courts where you have crime A, and everyone agrees that crime A is a lesser included offense of crime B? Now, how do you instruct the jury? You instruct the

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jury -- you instruct the jury in the ordinary Hornbook basic case that they can convict of both, or do you tell the jury you can convict of A only if you acquit of B?

MR. FELDMAN: It's -- the latter is the ordinary way of doing it. Where the two --

QUESTION: The latter is the ordinary way.

MR. FELDMAN: Where the two bear the simple --

QUESTION: So ordinarily, the basic Hornbook thing is that you'll end up with one conviction, and if that conviction is reversed on appeal, you'll have to have a new trial.

MR. FELDMAN: No, I don't think that's correct. I think if that --

QUESTION: If that's --

MR. FELDMAN: Well, it depends, but if the conviction is for the greater offense --

QUESTION: Yes, they convict for the greater offense.

MR. FELDMAN: -- and if he's convicted for a reason that's unrelated to the lesser offense --

QUESTION: Yes, that's right.

MR. FELDMAN: Then you can just enter a conviction on the lesser offense.

QUESTION: How could you if the jury never came in with a conviction?

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MR. FELDMAN: I beg your pardon?

QUESTION: Sorry. If you instruct the jury, jury, convict of B, if you convict of B you can't convict of A --

MR. FELDMAN: Right. In ordinary --

QUESTION: It's just lesser included.

MR. FELDMAN: That's correct.

QUESTION: And now they do convict of B. On appeal, reversed. You have to have a new trial, don't you?

MR. FELDMAN: No, I don't think that that's correct. I think under the Tinder case and at least the way -- and the way the Tinder case has been understood by the lower courts, the court can simply go back and enter judgment, and in fact should just enter judgment on the lesser included offense.

QUESTION: I see, okay.

MR. FELDMAN: The jury has found the defendant guilty of all of the elements --

QUESTION: All right. If that's so, fine. If that's so, why does the Government care if we adopt their position? That is, if it's a lesser-included offense, then we'd simply behave as normal. The Government must care because you're trying to save the possibility -- what is it -- I don't understand why --

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MR. FELDMAN: The Government's -- I would say our primary interest in this case is making sure that whatever mechanism is involved, the defendant, who has committed both the 846 and 848 offenses --

QUESTION: Yes.

MR. FELDMAN: -- gets -- and can't, through some fluke on collateral attack or appeal, by getting one of those overturned, for a reason unrelated to the other, doesn't therefore end up scott-free.

QUESTION: You've just explained to me how that's impossible. You've just explained it to me. You said --

MR. FELDMAN: In the normal -- the normal course, in the normal course of a statute that defines greater and lesser degrees of a single offense, committing an offense and then committing the same offense with a gun, or something like that, I think that that's the way Congress intended things to work. I do think thaT where Congress defined the statutes entirely independently and included --

QUESTION: But that's a legal argument. I'm interested in why you care about it. That is, from what you just said, if I were to write down your very words, and it turned out you're right about how this is normally so, and it also turned out that this is a less included

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offense of a normal sort, you would therefore, if I wrote down your very words you just told me, have what you want, isn't that so?

MR. FELDMAN: I think, actually, yes. Yes, in the sense that if it were clear that that was a procedure that would work in these kinds of cases --

QUESTION: Yes.

MR. FELDMAN: That would protect the interest that the Government is seeking here.

QUESTION: So then what we should say, in your view, is almost, I think, identical to what your opponent told us. We should say, this is a lesser included offense. This is how the lesser included offense works, and then say what you said.

MR. FELDMAN: We do -- well -- we do disagree that it is a lesser included --

QUESTION: No, but if we say that it's a lesser included offense, you get everything you want, don't you?

MR. FELDMAN: If it's clear that that procedure would work, at least in terms of our -- again, I don't think this is what Congress intended here, but in terms of our interest --

QUESTION: No, but let's -- all right, let's assume we'll commit that error, and we'll say that Congress did intend these to be treated as greater and

lesser included, then there's nothing else that you're worried about, is there? There's no broader point that you're concerned --

MR. FELDMAN: So long as it was clear, again, that the defendant who somehow managed to get the CCE conviction overturned on direct or on collateral attack, the judgment could still be entered on the lesser -- on the conspiracy offense.

QUESTION: Well, I think that was Justice Breyer's --

MR. FELDMAN: Right, so -- and I just want to be sure that that is our primary interest. As long as that was clear, then that would be -- that would accommodate that interest.

QUESTION: And you recognize --

QUESTION: But the precedent --

MR. FELDMAN: But for the reasons I said before, I really do want to add that we don't view them as greater or lesser included offenses, and in our view --

QUESTION: No, but you're basically making the argument that Justice White accepted in Jeffers now, and eight members of the Court made the assumption to the contrary. They didn't rule it, but if we took the suggestion Justice Breyer made, we'd really have the precedent of the assumption made by eight members of the

Court in Jeffers.

MR. FELDMAN: Well, you -- I think actually you'd have four -- there were four members of the Court who I think accepted the assumption. It didn't make merely the assumption, but would have held that. There were another four members who did assume it, but I don't think that you can take much weight from the fact that four members of the court were willing to assume that, since they found it didn't make any difference for that case.

QUESTION: No, but if Justice White was right, his is a much simply disposition of the case than the rather convoluted position of the majority.

MR. FELDMAN: Well, I think that the four -- the plurality of the Court in that case was -- it's true they didn't accept Justice White's view. They also didn't accept the view of the concurring opinion, either.

QUESTION: But all of this is --

QUESTION: As one who joined the convoluted --

(Laughter.)

QUESTION: -- I must say, when I -- when the opinion says we assume something, I don't figure we're deciding it, I figure we're reserving it.

MR. FELDMAN: Right. I think it was because the Court believed it was -- because the plurality believed it

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was a difficult question that it did assume it, and it found that in that case it could resolve the question simply by referring to congressional --

QUESTION: But if we were to decide the case that way, we would have -- in order to reach this happy result that's been suggested to you, I think we would have to confirm the correctness of the D.C. Circuit's opinion in the Allison case, which said that without a jury verdict on the lesser included offense, the Court could order a judgment on that defense, and that that seems --

MR. FELDMAN: That's correct.

QUESTION: -- to me to be something we have not yet decided.

MR. FELDMAN: Again, I do -- it has been taken to be -- and I've been cautious in how I word this throughout. That's been taken to be the holding of Tinder, and I don't really think that Tinder can be read to mean anything else. It is the general practice of the courts of appeals. I can't say that it's totally secure --

QUESTION: To say that the court of appeals enters judgment in the court of appeals on an offense which the defendant was not convicted of by the jury because the jury very likely would have convicted him on --

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MR. FELDMAN: It's really more than that. It's that the defendant -- the jury necessarily found that the defendant committed all of the elements of that offense, and then what the issue in the court of appeals is, some element that doesn't have to do with that offense, so in a very real sense, the jury has convicted him of a crime and the jury has found him guilty of all of the elements of the offense, and I think the proposition is that having done that, there's no reason why the court of appeals -- generally what's done is in orders, it remands in orders to the district court to enter judgment on the lesser included offense.

QUESTION: Mr. Feldman, if we don't make what you regard as the error of treating this -- these two offenses as greater and lesser, then, in fact, there would, I suppose be a further stigmatic element quite apart from the $50 in the conviction for conspiracy, since that need not be on your view assumed under CCC, and so if we read the law right, why shouldn't you lose just on straightforward analysis of cumulative effect?

MR. FELDMAN: I guess this Court has never gone so far as to hold that that level of effect really constitutes a punishment that in any real sense should determine to guide the analysis or in particular should stand in the way of reaching what I think is a logical

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Seventh Circuit --

QUESTION: I see.

MR. FELDMAN: -- result here.

QUESTION: Let me --

QUESTION: Ball could be read to say just that.

MR. FELDMAN: I beg your pardon?

QUESTION: Ball could be read to say just that.

MR. FELDMAN: I --

QUESTION: That the very conviction is --

MR. FELDMAN: It said --

QUESTION: -- an additional punishment, and one of the reasons is the stigma.

MR. FELDMAN: Right, but they only -- but Ball said that only after going -- it said there is some modicum of additional punishment that attaches to -- that attaches to a conviction in the circumstance where both -- there was both adverse -- the possibility of adverse collateral effects and this kind of stigmatic injury, but Ball -- but then Ball said that in this case we're only holding that the conviction has to be reversed, and we're only holding that the -- and the sentence can't be entered because of the particular relationship between the two statutes here. It requires that the --

QUESTION: Thank you. Thank you, Mr. Feldman.

MR. FELDMAN: Thank you.

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QUESTION: Mr. Levenstam, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF BARRY LEVENSTAM

ON BEHALF OF THE PETITIONER

MR. LEVENSTAM: Thank you.

With respect to the Jeffers --

QUESTION: Mr. Levenstam, may I -- I'm sorry, but would you address -- I was going to ask Mr. Feldman this. What's the significance of the $50 here?

MR. LEVENSTAM: Well, under this Court's per curiam decision in Ray, there really are no longer concurrent sentences in the Federal system, because each judgment of conviction carries with it a separate $50 assessment.

QUESTION: So the $50, at least in your view, is punishment. It's not some administratively neutral user fee for being sentenced, or something like that?

MR. LEVENSTAM: Yes. Statute 3013 says it's to be collected as if it were a criminal fine, and this Court's decision in Ray clearly indicated that this was not a -- there were no longer concurrent sentences in the Federal system.

With respect to Jeffers, while the Court was willing to assume for that cases the status of the conspiracy as a lesser included, what it did not assume,

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and the question it specifically answered was, would it call the critical inquiry whether Congress intended to punish these two statutes separately, and the answer there was no, and that answer was not only shared by the four members of the plurality, but I believe my reading, if you look at footnote 5 of Justice Stevens' concurrence, he said there were two punishments imposed unconstitutionally as well, so eight justices there, regardless of the lesser included issue, said specifically Congress did not intend to punish violations of 846 and 848 separately.

QUESTION: Mr. Levenstam, what is your position on the Tinder approach? That is, CCE, only conviction, appellate court can remand with instructions to enter a conviction on the conspiracy count?

MR. LEVENSTAM: Assuming that you can interject the Morris v. Mathews analysis, which is, if there has been some prejudice to the defendant as a result of the charging of the greater offense, then we would agree with that, with the Tinder approach.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Levenstam. The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

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CASE NO.: 94-8769

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BY Ann Marie Federico

(REPORTER)