

Notes

WITTE V. UNITED STATES: CONDUCT MAY BE CONSIDERED FOR MULTIPLE PUNISHMENTS WITHOUT VIOLATING DOUBLE JEOPARDY

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INTRODUCTION

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no one shall “be subject for the same offence to be twice put in jeopardy of life or limb.”¹ The clause prohibits both multiple prosecutions and multiple punishments for the same offense.² It guarantees that the government, with its superior resources, cannot repeatedly prosecute and punish the accused for an alleged offense.³

In 1987, Congress implemented its first set of federal guidelines to provide for uniform and proportionate sentences for offenders of federal criminal laws.⁴ As part of the sentencing formulae, the Sentencing Guidelines factor in an offender’s “relevant conduct” in calculating the offender’s base offense level. Relevant conduct consists of acts and omissions that are related to the charged offense but not proved at trial.⁵ This factor determines the length of punishment.⁶ As a result, conduct that has not been proved at trial only requires a preponderance of proof at sentencing for use in enhancing the offender’s prison term.⁷

Problems with double jeopardy occur when the government decides to prosecute an offender for conduct that has already been used to enhance a previous sentence for a separate offense. In a number of recent decisions, the Circuit Courts of Appeals have expressly debated this issue, and have emerged on opposite sides, some finding this action to be a violation of double jeopardy,

1. U.S. CONST. amend. V.

2. See *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

3. See *Green v. United States*, 355 U.S. 184, 187–88 (1957).

4. United States Sentencing Guidelines (“U.S.S.G.”), 18 U.S.C. (1994); see also *infra* notes 16–48 and accompanying text.

5. See *infra* notes 44–48 and accompanying text.

6. See *infra* notes 44–48 and accompanying text.

7. See U.S.S.G. § 1B1.3.

and some not.⁸ In June 1995, the United States Supreme Court resolved the conflict in *Witte v. United States*.⁹

Part I of this Note examines the development and application of the United States Sentencing Guidelines, with an emphasis on the use of relevant conduct to enhance offender sentences.¹⁰ Part II highlights the cases that set the stage for the Supreme Court's review of the double jeopardy issue.¹¹ Part III narrates the story of Steven Kurt Witte, summarizes the decisions of the lower courts, and discusses the arguments of Witte and the government before the Supreme Court.¹² Part III also explains the holding of the Court: sentence enhancement for relevant conduct does not constitute punishment for that conduct, and therefore duplicitous consideration of the same conduct does not violate double jeopardy in this context.¹³ Part IV questions this holding and the Supreme Court's reasoning behind it, finding that the Court ignored a vital distinction in its analysis of prior case law.¹⁴ Finally, Part V concludes that, though the question has been answered, the debate is not over, and the attacks on the constitutionality of the relevant conduct provisions of the Sentencing Guidelines will probably continue.¹⁵

I. THE UNITED STATES SENTENCING GUIDELINES

A. Purpose.

The Sentencing Reform Act of 1984¹⁶ ("Act") provides for the development of detailed guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment and rehabilitation.¹⁷ The Act delegates broad authority to the United States Sentencing Commission¹⁸ ("Commission") to review and rationalize the federal sentencing process.¹⁹ The principal purpose of the Commission is to assure the ends of justice by creating Sentencing Guidelines that prescribe the appropriate sentences for offenders convicted of federal crimes.²⁰ The Act directs the Commission to create categories of offense behavior and offender characteristics.²¹ The Act also requires the Commission to prescribe guideline ranges that specify an appropriate sentence based on a combination of offense behavior categories and offender characteristic categories.²²

8. See *infra* notes 49–150 and accompanying text.

9. 115 S. Ct. 2199 (1995).

10. See *infra* notes 16–48 and accompanying text.

11. See *infra* notes 49–150 and accompanying text.

12. See *infra* notes 151–230 and accompanying text.

13. See *infra* notes 231–76 and accompanying text.

14. See *infra* notes 277–322 and accompanying text.

15. See *infra* notes 323–26 and accompanying text.

16. Pub. L. No. 98–473, tit. II, § 211, 98 Stat. 1987 (1984).

17. U.S.S.G. § 1A2.

18. The United States Sentencing Commission, an independent agency of the judicial branch of the United States, was established pursuant to 28 U.S.C. § 991 (1994).

19. 28 U.S.C. § 994 (1994).

20. U.S.S.G. § 1A1 (1994); 28 U.S.C. § 991(b). The Commission promulgated its initial version of the Sentencing Guidelines in 1987, and has made various changes each year thereafter.

21. 28 U.S.C. § 994(c) and (d).

22. *Id.* § 994(e).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range set by the Commission.²³ If a particular case presents atypical features, the Act allows the sentencing court to depart from the prescribed guidelines range.²⁴ In addition, the Act abolishes parole and substantially restructures the good behavior adjustments.²⁵

B. The Commission's Policy Approach.

The Sentencing Reform Act's basic objective is to enhance the ability of the criminal justice system to combat crime through the use of an effective, fair sentencing system.²⁶ Congress sought to achieve this objective utilizing three approaches: honesty, uniformity, and proportionality.²⁷

First, Congress sought honesty in sentencing. It attempted to avoid the confusion and deception that arose out of the prior sentencing system that required a sentencing court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of that sentence the offender would actually serve.²⁸ This practice typically resulted in a significant reduction in the length of an imposed sentence.²⁹

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in the sentences imposed for similar crimes committed by similar offenders.³⁰ Third, Congress sought proportionality in sentencing through the creation of a system that would impose appropriately different sentences for criminal conduct of differing severity.³¹

In drafting the Sentencing Guidelines, the Commission attempted to resolve "a host of important policy questions" involving competing considerations.³² One of the key policy questions was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constituted the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing).³³ The Commission initially sought to develop a system based entirely on a real offense scheme.³⁴ This distinction between real and charged offense schemes proved unproductive, however, and subsequently the Commission moved closer to a charge offense system, while retaining a number of real offense elements.³⁵ The current Sentencing Guidelines are a charge

23. *Id.* § 994(a).

24. *Id.* § 994(t). The sentencing court must specify reasons for departure. 18 U.S.C. § 3553(b) (1994). *See, e.g., infra* note 180 and accompanying text.

25. U.S.S.G. ch. 1, pt. A.2.

26. *Id.* pt. A.3; Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest*, 17 HOFSTRA L. REV. 1, 4-6 (1988).

27. U.S.S.G. ch. 1, pt. A.3.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* pt. A.4; *see also* Breyer, *supra* note 26, at 8-31 (discussing six kinds of compromises forced upon the Commission).

33. U.S.S.G. ch. 1, pt. A.4(a); *see also* Breyer, *supra* note 26, at 8-12.

34. U.S.S.G. ch. 1, pt. A.4(a).

35. *Id.*

offense system to the extent that they look "to the offense charged to secure the 'base offense level.'"³⁶

The Commission recognized that the system has drawbacks, including "the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment."³⁷ This same concern about charge manipulation also is reflected in the Commission's attempt to deal with the issue of multi-count convictions in which conduct causes several harms.³⁸

The modified real offense system adopted by the Commission distinguishes the Sentencing Guidelines from prior sentencing practices, both federal and state. The Commission's decision to employ a strong version of mandatory real-offense sentencing, particularly its inclusion of alleged related-offense sentencing, was unprecedented in the history of American sentencing systems.³⁹ Although judges in the former system exercised the discretion to consider real-offense elements in sentencing, they were not required to take into account any real-offense behavior, as they would have in the case of binding sentencing guidelines incorporating real offense sentencing.⁴⁰ Under the old system, real offense sentencing was sporadic and unpredictable.⁴¹ These characteristics motivated the creation of the Sentencing Guidelines.⁴² Thus, the Sentencing Guidelines' version attempts to promote uniformity and proportionality and protect against count manipulation.⁴³

C. General Application Principles.

The Sentencing Guidelines specifically implement a strong version of real-offense sentencing. Generally, the Sentencing Guidelines direct a judge to take the following steps in imposing a federal sentence: (1) find the statute of conviction in the statutory index; (2) determine the base offense level; (3) add specific characteristics; (4) add adjustments; (5) calculate a criminal history score; (6) refer to the Sentencing Table to determine the sentence; and (7) impose a guideline sentence, or, if the court finds unusual factors, depart and impose a non-guideline sentence.⁴⁴ The commentary to the application instructions explicitly states that "[o]ffense means the offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct)⁴⁵ unless a different

36. Breyer, *supra* note 26, at 11–12 (footnote omitted).

37. U.S.S.G. ch. 1, pt. A.4(a).

38. *Id.* pt. A.4(e).

39. See David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 404–05 (1993).

40. *Id.* at 418.

41. *Id.*

42. *Id.* at 419; see also Breyer, *supra* note 26, at 11.

43. U.S.S.G. ch. 1, pt. A.4(a).

44. U.S.S.G. § 1B1.1; Breyer, *supra* note 26, at 6–7.

45. U.S.S.G. § 1B1.3(a) mandates the consideration of relevant conduct:

Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

meaning is specified or is otherwise clear from the context."⁴⁶ After determining the appropriate offense guideline section, the judge must then determine the applicable guideline range in accordance with § 1B1.3 (Relevant Conduct).⁴⁷ The relevant conduct section thus "forms the cornerstone of the federal sentencing guideline system."⁴⁸

II. SETTING THE STAGE: CIRCUIT DECISIONS

Since the enactment of the Sentencing Reform Act and the promulgation of the Sentencing Guidelines, the question has arisen as to whether the Sentencing Guidelines subject an offender to multiple punishments in violation of the Double Jeopardy Clause. The Courts of Appeals that have addressed the issue have, on several occasions, expressly disagreed with one another, as set forth in the following case summaries.

A. *United States v. Koonce.*

In *United States v. Koonce*,⁴⁹ the Tenth Circuit first decided the precise issue of whether duplicitous consideration of conduct for two punishments would violate double jeopardy. In that case, the defendant-appellant, Stephen Koonce, ran a methamphetamine distribution operation out of his residence in Monticello, Utah.⁵⁰ In 1987, Darryl Petschen, a customer of Koonce, pled guilty to charges of illegal methamphetamine distribution.⁵¹ Petschen named Koonce as his supplier and agreed to help Minnesota and South Dakota authorities apprehend Koonce.⁵² Subsequently, Petschen made a number of tape recorded telephone calls to Koonce in Monticello requesting that Koonce sell him some methamphetamine.⁵³ Petschen then sent a letter to Koonce requesting Koonce to mail a quantity of methamphetamine to a designated post office box in Sioux Falls, South Dakota.⁵⁴

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

46. *Id.* § 1B1.1, cmt. n.1(l).

47. *Id.* § 1B1.2(b).

48. William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 496 (1990).

49. 945 F.2d 1145 (10th Cir. 1991), *cert. denied*, 503 U.S. 994 (1992).

50. *Id.* at 1147.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

The package that arrived at the post office box some time later contained 443 grams of methamphetamine.⁵⁵ Koonce's fingerprints were found on the package.⁵⁶ Law enforcement officials sought and obtained a search warrant for Koonce's residence.⁵⁷ The subsequent search of the residence turned up Petschen's letter to Koonce, a large number of firearms, and 963 grams of methamphetamine stored in Koonce's freezer.⁵⁸

Koonce was prosecuted in the United States District Court for the District of South Dakota for distributing a quantity of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846 (1988).⁵⁹ The jury ultimately found Koonce guilty of distributing the 443 grams found in the package in the Sioux Falls post office box.⁶⁰ However, when the district court calculated his sentence under the United States Sentencing Guidelines, it considered two other quantities of methamphetamine: (1) the 963 grams discovered in his Monticello residence, and (2) 6,463 grams that Petschen testified he had purchased from Koonce during the year prior to Koonce's apprehension.⁶¹ Thus, the district court sentenced Koonce based upon his distributing a total of 7,869 grams of methamphetamine.⁶² The Eighth Circuit affirmed Koonce's conviction and sentence on appeal.⁶³

The government then decided to prosecute Koonce in the United States District Court for the District of Utah for possession with intent to distribute the 963 grams found in his residence in Monticello in violation of 21 U.S.C. § 841(a) (1988).⁶⁴ Koonce immediately objected, arguing that his rights under the Double Jeopardy Clause had been violated.⁶⁵ The district court refused to dismiss the indictment, and the Tenth Circuit affirmed.⁶⁶ The court convicted Koonce and imposed a sentence specified to run concurrently with the previous sentence.⁶⁷ He again appealed on double jeopardy grounds.⁶⁸

The Tenth Circuit applied a three-part test to determine whether a multiple punishment violation of double jeopardy had occurred.⁶⁹ First, the court determined whether the enhancement by consideration of the additional quantity of drugs constituted punishment.⁷⁰ The court found that Koonce had been punished for the additional quantity of drugs because his base offense level

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 1147-48.

62. *Id.* at 1148.

63. *See* United States v. Koonce, 884 F.2d 349 (8th Cir. 1989).

64. 945 F.2d at 1148.

65. *Id.*

66. *Id.* (citing United States v. Koonce, 885 F.2d 720, 722 (10th Cir. 1989)). The court found that the multiple prosecution component of the Double Jeopardy Clause had not yet been implicated, and that a claim based on the multiple punishment component of the Double Jeopardy Clause was not yet ripe for review. 885 F.2d at 722.

67. 945 F.2d at 1148.

68. *Id.*

69. *Id.* at 1149.

70. *Id.* at 1149-50.

was higher than what it would have been had the additional drugs not been included via the relevant conduct provisions of the Guidelines.⁷¹

Second, the court questioned the Congressional intent behind the Guidelines.⁷² The court determined that in the absence of evidence to the contrary, “Congress ordinarily does not intend to punish the same offense under two different statutes.”⁷³ “[O]nce Congress has determined the appropriate punishment for an offense, the government is prohibited from imposing the penalty on the accused more than once.”⁷⁴ The court relied on the grouping requirement of Guideline § 3D1.2, mandating that a sentencing court determine the base offense level by aggregating drug quantities from multiple counts in a single proceeding,⁷⁵ and the Sentencing Commission’s announced goal of preventing charge manipulation,⁷⁶ to determine that Congress intended only one punishment.⁷⁷

Third, the court evaluated the imposition of concurrent sentences as a possible “cure” for the double jeopardy violation.⁷⁸ The court found that a second sentence would violate double jeopardy even if specified to run totally concurrent with the first.⁷⁹ The court relied on *Ball v. United States*,⁸⁰ noting that a separate conviction, apart from the concurrent sentence, has adverse collateral consequences, “including the potential for an increased sentence under a recidivist statute, possible delays in parole eligibility and the societal stigma that results from the conviction itself.”⁸¹

In the end, the Tenth Circuit decided that the subsequent punishment for possession of the 963 grams of methamphetamine violated the multiple punishment component of the Double Jeopardy Clause.⁸² It ordered that the second conviction and sentence be vacated.⁸³

71. *Id.* at 1150. The court noted that

[t]he South Dakota district court in punishing Koonce for the Utah methamphetamine was simply following the mandate of the United States Sentencing Guidelines, which requires that an accused be punished for “all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense on conviction.”

Id. (citing U.S.S.G. § 1B1.3(a)(2)).

72. 945 F.2d at 1150–53.

73. *Id.* at 1151 (quoting *Ball v. United States*, 470 U.S. 856, 861 (1985)).

74. *Id.* (citing *Brown v. Ohio*, 432 U.S. 161, 165 (1977)).

75. U.S.S.G. § 3D1.1(a) states “[w]hen a defendant has been convicted of more than one count, the court shall...[g]roup the counts resulting in conviction into distinct Groups of Closely-Related Counts by applying the rules specified in § 3D1.2.” *Koonce*, 945 F.2d at 1151 (citing U.S.S.G. § 3D1.1(a)). Under U.S.S.G. § 3D1.2(d), counts are grouped together “[w]hen the offense level is determined largely on the basis of...the quantity of a substance involved....” *Koonce*, 945 F.2d at 1151 (citing U.S.S.G. § 3D1.2(d)). Finally, U.S.S.G. § 3D1.3(b) states that in cases where the counts are grouped together pursuant to U.S.S.G. § 3D1.2(d), “the offense level applicable to a group is the offense level corresponding to the aggregated quantity....” *Koonce*, 945 F.2d at 1151 (citing U.S.S.G. § 3D1.3(b)).

76. 945 F.2d at 1151.

77. *Id.* at 1151–52.

78. *Id.* at 1153–54.

79. *Id.*

80. 470 U.S. 856 (1985).

81. *Koonce*, 945 F.2d at 1153 (citing *Ball*, 470 U.S. at 865).

82. 945 F.2d at 1155.

83. *Id.*

B. United States v. McCormick.

The next court to take up this issue was the Court of Appeals for the Second Circuit in *United States v. McCormick*.⁸⁴ In this case, the government indicted John McCormick in the United States District Court for the District of Connecticut for bank fraud and related crimes.⁸⁵ Losses resulting from these crimes totaled approximately \$75,000.⁸⁶ A few months later, the government indicted McCormick in the United States District Court for the District of Vermont for bank fraud, mail fraud, and related crimes.⁸⁷ The losses from these offenses exceeded \$4 million.⁸⁸

A jury found McCormick guilty on all counts of the Connecticut indictment.⁸⁹ At sentencing, the government described not only McCormick's conduct in Connecticut but also relevant conduct that took place in other states, including Vermont.⁹⁰ The government argued that the losses resulting from McCormick's conduct fell between the \$2.5 million to \$5 million range, calling for an increase of the base offense level from six to nineteen.⁹¹ Had the court excluded the Vermont conduct, McCormick's base offense level would have only been eleven.⁹² The court accepted the base offense level of nineteen and added two more points for "more than minimal planning,"⁹³ creating a total level of twenty-one.⁹⁴ The district court sentenced McCormick to the top of the Sentencing Guidelines range for his offense (forty-six months)⁹⁵ and added a three-year term of supervised release and restitution.⁹⁶ The Second Circuit affirmed McCormick's sentence by the Connecticut District Court.⁹⁷

Following the sentencing by the Connecticut court, McCormick sought dismissal of the Vermont indictment on the grounds that prosecution of the indicted offenses would violate the Double Jeopardy Clause.⁹⁸ The Vermont District Court found that double jeopardy prohibited further prosecution on those counts of the Vermont indictment that the Connecticut court had used in sentencing McCormick.⁹⁹

The Court of Appeals for the Second Circuit affirmed.¹⁰⁰ Both the district court and the Second Circuit agreed with the reasoning of the Tenth

84. 992 F.2d 437 (2d Cir. 1993); see also Phyllis M. Parker, *Second Circuit Extends Double Jeopardy Clause to Prohibit Prosecution of Criminal Conduct Used Previously to Enhance Sentence*—*United States v. McCormick*, 67 TEMP. L.Q. 1387 (1994).

85. 992 F.2d at 438.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* The conduct was offered as relevant conduct pursuant to U.S.S.G. § 1B1.3(a)(2). *Id.*

91. 992 F.2d at 438 (citing U.S.S.G. § 2F1.1(b)(1)(N)).

92. *Id.* at 438 n.1 (citing U.S.S.G. § 2F1.1(b)(1)(F)).

93. *Id.* at 438 (citing U.S.S.G. § 2F1.1(b)(2)).

94. *Id.*

95. The sentencing range based on an offense level of 21 and a criminal history category of I was 37 to 46 months. U.S.S.G. ch. 5, pt. A.

96. 992 F.2d at 438.

97. *United States v. McCormick*, 969 F.2d 1042 (2d Cir. 1992) (Table).

98. 992 F.2d at 439.

99. *United States v. McCormick*, 798 F. Supp. 203 (D. Vt. 1992).

100. 992 F.2d at 439.

Circuit in *Koonce*.¹⁰¹ The court recognized that at sentencing “justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.”¹⁰² Accordingly, the court noted a number of decisions which had upheld a conviction and punishment for conduct that another court used to enhance a defendant’s sentence for other conduct.¹⁰³ However, the Second Circuit made a distinction between these other cases and McCormick’s case based on its analysis of Congressional intent.¹⁰⁴ After some discussion, the court concluded “there is much evidence to suggest that Congress intended to consolidate the punishment for certain conduct, such as fraud, when it created the Guidelines scheme that allows for changes to a defendant’s offense level based on related acts.”¹⁰⁵ The court found that the prosecution in Vermont could subject McCormick to impermissible multiple punishments for the same conduct, and therefore violated the Double Jeopardy Clause.¹⁰⁶ Accordingly, it affirmed the dismissal of those counts of the indictment used by the Connecticut court in raising the offense level.¹⁰⁷

Judge Mahoney, in his partial dissent, disagreed with the majority’s conclusion.¹⁰⁸ He found that the Sentencing Guidelines § 5G1.3 specifically addressed the situation that this case presented.¹⁰⁹ That section directs that when the government institutes two criminal proceedings, the sentencing court should impose a term of imprisonment equal to the term the court would have imposed as a result of a single prosecution.¹¹⁰ Judge Mahoney noted that in contrast to the Tenth Circuit’s conclusion regarding concurrent sentences as an inadequate “cure” for the double jeopardy violation,¹¹¹ the result in McCormick’s case should have been to allow dual prosecutions and require concurrent or incremental sentences as the Sentencing Guidelines § 5G1.3 mandates.¹¹²

C. *United States v. Cruce*.

The Fifth Circuit first addressed the double jeopardy issue in *United States v. Cruce*.¹¹³ James Cruce was the president and director of Peoples

101. *Id.*; see also Parker, *supra* note 84, at 1408–09.

102. 992 F.2d at 441 (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51 (1937)).

103. *Id.* at 441 n.5 (citing *Williams v. Oklahoma*, 358 U.S. 576 (1959) (no double jeopardy bar to considering at sentencing for one offense criminal conduct that was the subject of a separate offense); *United States v. Carey*, 943 F.2d 44 (11th Cir. 1991) (two-level increase in base offense level for obstruction of justice based on defendant’s failure to appear does not preclude later prosecution for this conduct), *cert. denied*, 112 S. Ct. 1676 (1992); *United States v. Williams*, 935 F.2d 1531, 1539 (8th Cir. 1991) (enhancement of defendant’s criminal history category and imposition of a sentence based on the same conduct not barred by double jeopardy), *cert. denied*, 112 S. Ct. 1189 (1992)).

104. 992 F.2d at 442.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 442–44 (Mahoney, J., dissenting).

109. *Id.* at 442 (Mahoney, J., dissenting).

110. *Id.* (Mahoney, J., dissenting) (citing U.S.S.G. § 5G1.3).

111. *Id.* (Mahoney, J., dissenting); see also *Koonce*, 945 F.2d at 1153–54; *supra* notes 49–83 and accompanying text.

112. See 992 F.2d at 444 (Mahoney, J., dissenting); Parker, *supra* note 84, at 1409–10.

113. 21 F.3d 70 (5th Cir.), *cert. denied*, 115 S. Ct. 174 (1994).

Heritage Federal Savings and Loan Association ("PHFSLA").¹¹⁴ Thomas Burger was the executive vice-president, chief lending officer, and director of PHFSLA.¹¹⁵ Cruce and Burger engaged in various fraudulent schemes at the expense of PHFSLA and its federal insurer, the Federal Home Loan Bank Board ("FHLBB").¹¹⁶ In January 1991, a federal grand jury in Kansas returned two indictments against Cruce and Burger for various crimes concerning their interactions with PHFSLA and FHLBB between 1984 and 1990.¹¹⁷ The first indictment charged Cruce, Burger, and others with bank fraud conspiracy in violation of 18 U.S.C. §§ 371 and 1344, and with making false statements to the government in violation of 18 U.S.C. § 1001.¹¹⁸ The second indictment charged Cruce, Burger, and others with conspiracy to commit bank fraud, bank fraud, aiding and abetting, and with making false statements to the government in violation of 18 U.S.C. §§ 2, 371, 1001, and 1344.¹¹⁹ Cruce and Burger pled guilty to the conspiracy and bank fraud counts charged in the second indictment, and the government dropped all counts in the first indictment and the remaining counts in the second indictment.¹²⁰

The presentence report submitted by the United States Probation Office to the court included, *inter alia*, a \$6.5 million transaction known as the "Flower Mound Loan," which had occurred in Texas and had not been listed in the Kansas indictments.¹²¹ The district court adopted the presentence report, and sentenced Cruce and Burger to prison terms of 168 and 144 months, respectively, and also fined them \$8 million and \$6 million, respectively.¹²²

In December 1991, a federal grand jury in Dallas, Texas returned an indictment against Cruce and Burger charging them with conspiracy, unlawful receipt, bank fraud, wire fraud, and misapplication of funds in violation of 18 U.S.C. §§ 371, 215(a), 1344, 1343, and 657, respectively.¹²³ Cruce and Burger sought dismissal of this indictment, arguing that the Texas proceedings would result in a second punishment for the conspiracy encompassing the Flower Mound Loan and therefore violate their rights under the Double Jeopardy Clause.¹²⁴ The district court refused to dismiss the indictment, and Cruce and Burger appealed to the Fifth Circuit.¹²⁵

The Court of Appeals for the Fifth Circuit first noted an important distinction revealed by the double jeopardy review: "the traditional focal point in double jeopardy analysis has been the 'offense' for which the defendant is prosecuted and punished—not the conduct criminalized by, or related to, that offense."¹²⁶ In this regard, the court disagreed with the findings of the *Koonce* and *McCormick* courts that the Double Jeopardy Clause bars multiple

114. *Id.* at 71.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 71–72.

120. *Id.* at 72.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* (citing *Gavieres v. United States*, 220 U.S. 338, 345 (1911); *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

punishment for the same conduct.¹²⁷ It maintained that the Double Jeopardy Clause prohibited multiple punishments for the offense of conviction, not for conduct that was the basis of such offense, despite holdings by the Tenth and Second Circuits to the contrary.¹²⁸ The court also disagreed outright with the conclusions of the *Koonce* and *McCormick* courts regarding Congressional intent.¹²⁹ It was not convinced that Congress intended to mandate the "radical change" of precluding all future punishment of offenses that encompass conduct that was previously used to enhance the sentence for a previous offense.¹³⁰ The Fifth Circuit found that the offenses charged by the Texas court were separate and distinct from those sentenced by the Kansas court. Accordingly, the court found no double jeopardy violation.¹³¹

D. *United States v. Brown.*

In *United States v. Brown*,¹³² a district court in Illinois convicted the defendants, Michael Brown and John Clague, of bank fraud, money laundering, and conspiracy to commit bank fraud and money laundering, in violation of 18 U.S.C. §§ 1344, 1956, and 371.¹³³ Defendant Brown¹³⁴ argued on appeal that the district court violated his rights under the Double Jeopardy Clause by sentencing him based in part upon conduct that a district court in Texas had relied upon in a prior sentencing.¹³⁵ The conviction and sentencing in Texas was for conspiracy to commit wire fraud and bank fraud and for aiding and abetting similar conduct.¹³⁶

The Seventh Circuit, noting that the Supreme Court had yet to squarely decide the issue of whether double jeopardy bars prosecution or sentencing for conduct previously used to enhance a sentence in an earlier case, evaluated the reasonings of the Tenth, Second, and Fifth Circuits.¹³⁷ The Seventh Circuit rejected *Koonce* and *McCormick*.¹³⁸ Instead, it followed the Fifth Circuit's reasoning in *Cruce*, and noted that this approach was in accord with decisions of other courts of appeals which generally have rejected double jeopardy challenges to sentence enhancements.¹³⁹ Accordingly, the Seventh Circuit determined that no double jeopardy violation had occurred.¹⁴⁰

127. 21 F.3d at 75 n.8.

128. *Id.*

129. *Id.* at 76-77.

130. *Id.*

131. *Id.*

132. 31 F.3d 484 (7th Cir. 1994).

133. *Id.* at 488.

134. Defendant Clague did not join in this argument. *Id.* at 494.

135. *Id.*

136. *Id.*

137. *Id.* at 494-96.

138. *Id.* at 496 n.19.

139. *Id.* at 495 (citing *United States v. Mack*, 938 F.2d 678, 681 (6th Cir. 1991) (imposition of enhanced sentence under Guidelines for related conduct did not constitute subsequent punishment for double jeopardy purposes, so sentence was not barred); *United States v. Thomas*, 895 F.2d 1198, 1201 (8th Cir. 1990) (enhanced sentence under Guidelines was not second punishment for earlier crime but more severe punishment for later crime, so sentence was not barred); and *United States v. Wright*, 891 F.2d 209, 212 (9th Cir. 1989) (enhanced sentence under Guidelines did not exceed punishment intended by legislature, so sentence was not barred)).

140. 31 F.3d at 496.

E. United States v. McKinley.

The Ninth Circuit came very close to choosing a side in *United States v. McKinley*.¹⁴¹ In this case, the government indicted defendants in Arizona on charges relating to their alleged acquisition and shipment of explosive detonators.¹⁴² The defendants sought dismissal of the indictment on the grounds that: (1) the substantive offenses with which they were charged in Arizona formed the basis for one of the objects of a multiple-object conspiracy for which they were convicted and sentenced in a prior prosecution in Florida; and (2) the sentencing court in Florida considered evidence of the conduct underlying the Arizona charges to enhance the defendants' sentences there.¹⁴³ The defendants aimed their argument for dismissal at the multiple punishment component of double jeopardy and not at multiple prosecution.¹⁴⁴ The Ninth Circuit majority determined that the defendants' double jeopardy claim based on double punishment was not yet ripe for review, as the Florida court had not yet completed sentencing.¹⁴⁵ However, Judge Schroeder, in her partial dissent, analyzed the Second, Fifth, Seventh, and Tenth Circuits' views on the issue of whether a defendant could be tried and sentenced on conduct that had already been considered in an earlier prosecution and deemed "relevant conduct" in a sentence under the Guidelines.¹⁴⁶ Judge Schroeder appeared to accept the Second Circuit's approach in *McCormick*, intimating that Congress had not intended to allow multiple punishments for the same conduct.¹⁴⁷ It is unclear which view the majority would have followed had it decided the issue.

F. Summary of Circuit Court Decisions.

The first two circuits to decide this issue, the Tenth and the Second, held that duplicitous consideration of relevant conduct for sentence enhancement purposes was a violation of the Double Jeopardy Clause's prohibition on multiple punishments.¹⁴⁸ The next two circuits to take up this debate, the Fifth and the Seventh, rejected the double jeopardy challenges.¹⁴⁹ Finally, a Ninth Circuit minority stated in dicta that the Second Circuit approach appeared to be the correct one.¹⁵⁰

This conflict and confusion begged resolution by the United States Supreme Court. Without delay, the Court granted certiorari to a case from the Fifth Circuit in order to decide this issue.

III. STEVEN KURT WITTE V. UNITED STATES

A. Background Facts.

In June 1990, Steven Kurt Witte and several co-conspirators, including Tom Pokorny and Dennis Mason, arranged with Roger Norman, an undercover

141. 38 F.3d 428 (9th Cir. 1994).

142. *Id.* at 429.

143. *Id.* at 429-30.

144. *Id.* at 430.

145. *Id.* at 430-31.

146. *Id.* at 432.

147. *Id.*

148. See *supra* notes 49-112 and accompanying text.

149. See *supra* notes 113-40 and accompanying text.

150. See *supra* notes 141-47 and accompanying text.

DEA agent, to import large quantities of marijuana from Mexico and cocaine from Guatemala.¹⁵¹ Agent Norman was to fly the contraband into the United States, and Witte would provide ground transportation for the drugs once they had been imported.¹⁵² In July, a Mexican drug source advised the conspirators that cocaine might be included with the first shipment of marijuana.¹⁵³ In August, the source informed Agent Norman that it was prepared to deliver 4,400 pounds of marijuana.¹⁵⁴ Once Agent Norman learned the location of the airstrip in Mexico from which the drugs would be transported, he arranged to have the conspirators apprehended there.¹⁵⁵ Mexican authorities arrested Mason and four others on August 12 and seized 591 kilograms of cocaine, but no marijuana.¹⁵⁶ Agent Norman met Witte the next day to explain to him that the pilots had been unable to land in Mexico because police had raided the airstrip.¹⁵⁷ Witte was not arrested at that time, and the activities relating to the conspiracy lapsed for the remainder of the year.¹⁵⁸

Agent Norman next spoke with Witte in January 1991 and asked Witte if he would be interested in purchasing 1000 pounds of marijuana.¹⁵⁹ Witte agreed and promised to obtain a \$50,000 down payment for the shipment.¹⁶⁰ Witte told Agent Norman that he would transport the contraband in a horse trailer he had purchased for the original 1990 transaction and in a motor home owned by an acquaintance, Sam Kelly.¹⁶¹ On February 7, Witte, Kelly, and Agent Norman met in Houston.¹⁶² Agent Norman agreed to give the marijuana to Witte in exchange for \$25,000 in cash that Witte secured and a promise by Witte to pay the balance of the down payment in three days.¹⁶³ Undercover agents took the motor home and trailer away to load the marijuana, and Witte took Agent Norman back to Witte's hotel room to view the money.¹⁶⁴ The next morning agents returned the vehicles loaded with 375 pounds of marijuana, and arrested Witte and Kelly when the two men took possession of the contraband.¹⁶⁵

B. Lower Court Actions.

In March 1991, a federal grand jury in the Southern District of Texas returned an indictment against Witte and Kelly for conspiring and attempting to possess with the intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a) and 846 ("Case No. 91-033").¹⁶⁶ The indictment was limited to conduct occurring on or about January 25 through February 8, 1991, thus covering

151. Witte v. United States, 115 S. Ct. 2199, 2202 (1995).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 2202-03.

only the later marijuana transaction.¹⁶⁷ Witte pled guilty to the attempted possession count and agreed to cooperate with the government by providing information about this offense and others to law enforcement officials and by testifying if requested to do so.¹⁶⁸ In exchange, the government agreed to dismiss the conspiracy count and, if Witte's cooperation proved to be of substantial assistance, to seek downward departure under the Sentencing Guidelines § 5K1.1.¹⁶⁹

The United States Probation Office, in its presentencing report, considered the total quantity of drugs involved in all of the transactions contemplated by Witte and his co-conspirators when it calculated Witte's base offense level under the Sentencing Guidelines.¹⁷⁰ This included the planned 1990 shipments of both marijuana and cocaine.¹⁷¹ The presentencing report suggested that Witte was accountable for the 1000 pounds of marijuana involved in the attempted possession offense to which he pled guilty, fifteen tons of marijuana that Witte, Mason, and Pokorny had planned to import from Mexico in 1990, 500 kilograms of cocaine that the conspirators originally proposed to import from Guatemala, and the 591 kilograms of cocaine seized at the Mexican airstrip in August 1990.¹⁷²

At Witte's sentencing hearing, both he and the government urged the district court to hold that the 1990 activities were not part of the same course of conduct as the 1991 marijuana offense to which Witte had pled guilty, and therefore should not be considered in sentencing for the 1991 offense.¹⁷³ The district court concluded, however, that because the 1990 importation offenses were part of the same continuing conspiracy, they were "relevant conduct" under Sentencing Guidelines § 1B1.3.¹⁷⁴ Thus, the court found, they should be utilized in calculating Witte's base offense level.¹⁷⁵ The court accepted the presentence report's aggregation of the quantities of drugs involved in the 1990 and 1991 transactions.¹⁷⁶ The resulting base offense level was forty, which translated to a sentencing range of 292 to 365 months imprisonment.¹⁷⁷ From that base level, the court ordered a two-level increase for his aggravating role in the offense pursuant to U.S.S.G. § 3B1.1.¹⁷⁸ This increase was offset by a two-level decrease for acceptance of responsibility pursuant to § 3E1.1.¹⁷⁹ The district court then granted the government's request for downward departure

167. *Id.*

168. *Id.*

169. *Id.* See also U.S.S.G. § 5K1.1 ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.")

170. *Witte*, 115 S. Ct. at 2203.

171. *Id.*

172. *Id.*

173. *Id.* Witte objected to the inclusion of the cocaine because he hoped for a shorter sentence. If only the marijuana was considered, his Sentencing Guidelines range would be considerably less than if both the marijuana and the cocaine were considered. See *United States v. Wittie* [sic], 25 F.3d 250, 253 (5th Cir. 1994). On the other hand, the government argued against inclusion of the cocaine because it planned to indict Witte for the cocaine offense. *Id.* See also *Witte*, 1995 WL 243456, at *26-*29 (transcript of oral argument Apr. 17, 1995).

174. 115 S. Ct. at 2203.

175. *Id.*

176. *Id.*

177. *Id.* See also U.S.S.G. § 2D1.1.

178. 115 S. Ct. at 2203; U.S.S.G. § 3B1.1.

179. 115 S. Ct. at 2203; U.S.S.G. § 3E1.1.

based on Witte's substantial assistance.¹⁸⁰ In the end, the district court sentenced Witte to 144 months in prison.¹⁸¹

In September 1992, another grand jury in the Southern District of Texas indicted Witte and Pokorny for conspiring and attempting to import cocaine in violation of 21 U.S.C. §§ 952(a) and 963 ("Case No. 92-207").¹⁸² The indictment alleged that Witte attempted to import 1091 kilograms of cocaine from Central America between August 1989 and August 1990.¹⁸³ Witte sought dismissal of the indictment, arguing that a court had already punished him for the cocaine offenses because, in his previous case, the judge had considered the cocaine involved in the 1990 episodes as "relevant conduct" at sentencing for the 1991 marijuana offense.¹⁸⁴ The district court dismissed the indictment in February 1993 on the grounds that prosecution could subject Witte to multiple punishments in violation of the Double Jeopardy Clause.¹⁸⁵

The Court of Appeals for the Fifth Circuit reversed the dismissal.¹⁸⁶ It cited *Williams v. Oklahoma*¹⁸⁷ for the proposition that using prior crimes to enhance a sentence does not result in double jeopardy.¹⁸⁸ The court explained that "the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct."¹⁸⁹ The court concluded that although the district court considered the cocaine involved in the 1990 episode when it determined the sentence for Witte's 1991 marijuana offense, Witte had not been punished for the cocaine offense in the first prosecution, and therefore the Double Jeopardy Clause did not bar the second action.¹⁹⁰

In reaching its conclusion, the Fifth Circuit expressly disagreed with contrary holdings in *Koonce*¹⁹¹ and *McCormick*¹⁹². The court noted that the Tenth Circuit in *Koonce* did not have the benefit of Guidelines § 5G1.3(b) and its commentary, which clearly permit a defendant to be prosecuted and sentenced for different criminal offenses that were part of the same course of conduct.¹⁹³ Furthermore, the court found that the Second Circuit in *McCormick*, though it had the benefit of § 5G1.3(b), had erred in its analysis on multiple occasions.¹⁹⁴

180. 115 S. Ct. at 2203; U.S.S.G. § 5K1.1.

181. 115 S. Ct. at 2203; *United States v. Wittie* [sic], 25 F.3d 250, 254 (5th Cir. 1994). Witte appealed, but the Fifth Circuit dismissed the case due to Witte's failure to write a brief. *Id.*

182. 115 S. Ct. at 2203.

183. *Id.*

184. *Id.* at 2203-04.

185. *Id.*

186. *United States v. Wittie* [sic], 25 F.3d 250, 263 (5th Cir. 1994).

187. 358 U.S. 576 (1959).

188. 25 F.3d at 258.

189. *Id.*

190. *Id.* at 258-59, 263.

191. 945 F.2d 1145 (10th Cir. 1991), *cert. denied*, 503 U.S. 994 (1992). *See also supra* notes 49-83 and accompanying text.

192. 992 F.2d 437 (2d Cir. 1993). *See also supra* notes 84-112 and accompanying text.

193. 25 F.3d at 259. U.S.S.G. § 5G1.3(b), which provides for the imposition of concurrent or consecutive sentences when the defendant is currently serving a term of imprisonment for a separate offense that encompassed the same conduct as the instant offense, had not yet been enacted when *Koonce* and *McCormick* were decided.

194. 25 F.3d at 260.

The United States Supreme Court granted certiorari in order to resolve the conflict among the circuits.¹⁹⁵ The Court took into consideration both written and oral arguments made by petitioner Witte and respondent United States before issuing its opinion.¹⁹⁶

C. *Witte's Argument.*

The issue as presented by Petitioner Witte was as follows: "Does a government prosecution and punishment for an offense violate the Double Jeopardy Clause if the offense already was included in relevant conduct for sentencing under the United States Sentencing Guidelines in a different and final prosecution?"¹⁹⁷

Witte made two main arguments in his brief. The first was that the Sentencing Guidelines mandate the punishment of drug offenders for all offenses in one proceeding, and that Witte was punished for all real offenses in Case No. 91-033.¹⁹⁸ The second was that the Double Jeopardy Clause bars punishment of Witte for offenses for which he has already been punished.¹⁹⁹

Under the first argument, Witte asserted that the Sentencing Guidelines implement mandatory modified real offense sentencing to effectuate the goals of uniformity and proportionality and to preclude the danger of charge manipulation.²⁰⁰ Furthermore, he argued that the relevant conduct provisions of the Sentencing Guidelines expressly implement the intent to hold offenders accountable for all charged and uncharged real offenses in one proceeding.²⁰¹ Finally, Witte insisted that the Sentencing Guidelines and the commentary regarding drug offenses mandate the punishment of drug offenders for all real offenses in one proceeding and protect against double counting.²⁰² Witte then concluded that, pursuant to the Sentencing Guidelines, he had been punished for all real offenses in Case No. 91-033²⁰³ and had received a procedurally complete and final sentence for those offenses.²⁰⁴

Witte argued this conclusion based on four points.²⁰⁵ First, he claimed that his base offense level was pegged to a violation of 21 U.S.C. § 846, a drug conspiracy offense, not to a violation of 21 U.S.C. § 841(a)(1), a possession with intent to distribute offense to which he had pled guilty.²⁰⁶ Therefore, he contended, the calculation of punishment did not even begin with the offense to which he pled guilty.²⁰⁷

Second, he maintained that all real offenses had been grouped together because the real offenses were all part of his "jointly undertaken activity."²⁰⁸

195. *Witte v. United States*, 115 S. Ct. 715 (1995).

196. *See* Petitioner's Brief, 1995 WL 89283; Respondent's Brief, 1995 WL 130559; Petitioner's Reply Brief, 1995 WL 217628; and Oral Argument Transcript, 1995 WL 243456.

197. *Witte v. United States*, Petitioner's Brief, 1995 WL 89283, at *1 (1995).

198. *Id.* at *14; *see also supra* notes 166-81 and accompanying text.

199. 1995 WL 89283 at *32.

200. *Id.* at *14-*18.

201. *Id.* at *18-*20.

202. *Id.* at *20-*23.

203. *See supra* notes 166-81 and accompanying text.

204. 1995 WL 89283 at *23-*31.

205. *Id.* at *27-*28.

206. *Id.* at *27.

207. *Id.*

208. *Id.*

The district court sentenced Witte for all offenses, having found that they were jointly undertaken and part of the same course of conduct.²⁰⁹ Therefore, Witte concluded, the charged offense was not distinguished.²¹⁰

Third, Witte asserted that he would have faced the same base offense level or range of punishment had he been charged with and pled guilty to all the offenses considered at sentencing.²¹¹ He argued that both the express language and the intent of the Sentencing Guidelines rebutted any suggested distinction between a charged drug offense and other drug offenses used to calculate the base offense level.²¹²

Finally, Witte argued that, although his final sentence of 144 months did not include all punishment that he might have received for the cocaine transactions, the sentence did not result from any failure to hold him accountable for all drug transactions or to subject him to punishment for them.²¹³

Thus, Witte concluded, he was punished in Case No. 91-033²¹⁴ for the cocaine offenses in accordance with the substantive and procedural requirements of the Sentencing Guidelines.²¹⁵ The language, purposes, and function of the Sentencing Guidelines left no room for the argument that he was not punished for the cocaine offenses used to “enhance” his sentence in that case.²¹⁶

The second argument submitted by Witte focused on the Double Jeopardy Clause itself.²¹⁷ Witte first insisted that Congress could not authorize the imposition of cumulative punishment for one offense in two criminal proceedings.²¹⁸ Additionally, he maintained that Congress incorporated the Sentencing Guidelines into the federal criminal code, and that a federal court could not ignore the mandate of Congress and the express language of the Sentencing Guidelines in determining whether a defendant is being twice punished in separate proceedings for the same offense.²¹⁹ Finally, Witte argued that punishing him again in Case No. 92-207²²⁰ is punishing him twice for the same offenses in violation of the Double Jeopardy Clause.²²¹

D. The Government's Argument.

The issue as presented by the Respondent United States was as follows: “Whether the Double Jeopardy Clause bars a court from convicting and sentencing a defendant for an offense solely because the conduct underlying that offense was previously considered, under the Sentencing Guidelines, in

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at *27–*28.

213. *Id.* at *28.

214. *See supra* notes 166–81 and accompanying text.

215. 1995 WL 89283 at *28.

216. *Id.*

217. *Id.* at *32–*50.

218. *Id.* at *32–*41.

219. *Id.* at *41–*47.

220. *See supra* notes 182–94 and accompanying text.

221. 1995 WL 89283 at *49–*50.

determining the defendant's sentence for a separate offense."²²² The government made a two-pronged argument in response to Witte's brief. First, the government submitted that the indictment in this case did not charge Witte with the same offense to which he previously pled guilty.²²³ Second, the government maintained that the Double Jeopardy Clause does not bar prosecution and punishment for criminal conduct previously taken into account in determining the defendant's sentence for a different offense.²²⁴ The government balanced this latter argument on two legs: (1) consideration of uncharged conduct in sentencing a defendant for one offense would not constitute "punishment" for any other offense under the Double Jeopardy Clause;²²⁵ and (2) nothing in the Sentencing Reform Act or the Sentencing Guidelines changes this constitutional principle.²²⁶

The government sought to point out that "[a]lthough the Court has recognized that sentencing courts routinely consider uncharged conduct in sentencing for the offense of conviction, it has never held that the defendant is thereby 'punished' for that uncharged conduct as if it were an independent offense."²²⁷ The government criticized Witte's theory:

Petitioner's theory—that consideration in criminal sentencing of uncharged conduct amounts to "punishment" for that conduct—would have far-reaching and untenable implications. [footnote omitted.] Under petitioner's logic, for example, common sentence enhancements based on prior convictions would impermissibly "punish" the defendant again for the conduct underlying those convictions. This Court, however, has repeatedly held that recidivism statutes do not impose additional punishment for prior offenses in any way that violates the Double Jeopardy Clause.²²⁸

The government went on to argue that Witte's theory would prevent most prosecutions for conspiracy after a defendant had previously been convicted of a substantive offense based on the same conduct, and would prevent courts from enhancing sentences based on conduct that had never resulted in a conviction.²²⁹ In the end, the government requested that the indictment against Witte be reinstated and his case be remanded for trial.²³⁰

E. Supreme Court Majority Opinion.

Justice O'Connor delivered the opinion of the Court.²³¹ She first addressed the Double Jeopardy Clause itself. She noted that the Court has held

222. *Witte v. United States*, Respondent's Brief to United States Supreme Court, 1995 WL 130559, at *1 (1995).

223. *Id.* at *10-13.

224. *Id.* at *13-30.

225. *Id.* at *14-20.

226. *Id.* at *20-30.

227. *Id.* at *15.

228. *Id.* at *16-17 (citations omitted). The Court has explained that the enhanced punishment imposed under recidivist statutes "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes," but instead as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Id.* at *18 (citations omitted).

229. *Id.* at *18.

230. *Id.* at *29.

231. *Witte v. United States*, 115 S. Ct. 2199, 2202 (1995). Chief Justice Rehnquist and Justices Kennedy, Souter, Ginsburg, and Breyer joined in Parts I, II, and IV of the opinion. *Id.* at 2202. Justices Stevens, Souter, Ginsburg, and Breyer joined in Part III. *Id.* Justice Scalia

the "Clause to serve 'the function of preventing both successive punishment and successive prosecution,'"²³² and that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it."²³³

The Court noted that Witte was neither prosecuted for nor convicted of the cocaine offenses during the first proceeding.²³⁴ The offense to which Witte pled guilty and for which the district court sentenced him in Case No. 91-033²³⁵ was attempted possession with intent to distribute marijuana.²³⁶ On the other hand, the crimes charged in Case No. 92-207²³⁷ were conspiracy to import cocaine and attempted importation of the same.²³⁸ The Court cited *Blockburger v. United States*²³⁹ for the proposition that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."²⁴⁰ Applying this test, the Court found that the offenses charged in Case No. 92-207 were separate and distinct from that offense to which Witte pled guilty in Case No. 91-033.²⁴¹

The Court went into a thorough discussion of the traditional approach to this type of problem.²⁴² The Court observed that sentencing courts traditionally "have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior."²⁴³ The Court took notice of the long practice of sentencing judges exercising a wide discretion in the sources and types of evidence used to assist them in determining the kind and extent of punishment that they would impose.²⁴⁴ It decided that as a general rule, a sentencing judge may appropriately conduct a broad inquiry that is limited neither by the kind of information or the source from which it comes.²⁴⁵

Justice O'Connor devoted a significant portion of the opinion to an analysis of and comparison of Witte's case to *Williams v. Oklahoma*.²⁴⁶ In that case, the defendant kidnapped and murdered a man while fleeing from police after a robbery.²⁴⁷ Following his arrest, Williams pled guilty to murder, and

filed an opinion concurring in the judgment, in which Justice Thomas joined. *See infra* notes 277-79 and accompanying text. Justice Stevens filed an opinion concurring in part and dissenting in part. *See infra* notes 280-318 and accompanying text.

232. 115 S. Ct. at 2204 (quoting *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993) (citing *North Carolina v. Pearce*, 395 U.S. 711 (1969))).

233. *Id.* (quoting *Ex parte Lange*, 18 Wall 163, 173 (1874); also citing *Schiro v. Farley*, 114 S. Ct. 783 (1994); *United States v. Halper*, 490 U.S. 435, 440, 451 n.10 (1989)).

234. 115 S. Ct. at 2204.

235. *See supra* notes 166-81 and accompanying text.

236. 115 S. Ct. at 2204.

237. *See supra* notes 182-94 and accompanying text.

238. 115 S. Ct. at 2204.

239. 284 U.S. 299 (1932).

240. *Witte*, 115 S. Ct. at 2204 (quoting *Blockburger*, 284 U.S. at 304).

241. 115 S. Ct. at 2204.

242. *Id.* at 2205-07.

243. *Id.* at 2205 (quoting *Nichols v. United States*, 114 S. Ct. 1921, 1928 (1994)).

244. *Id.* (citing *Williams v. New York*, 337 U.S. 241, 246, 250-51 (1949)).

245. *Id.* (citing *Nichols*, 114 S. Ct. at 1927-28; *United States v. Tucker*, 404 U.S. 443, 446 (1972); *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993)).

246. 358 U.S. 576 (1959).

247. *Id.* at 577-78.

the court sentenced him to life in prison.²⁴⁸ He was later convicted of kidnaping, which at the time was a capital offense in Oklahoma.²⁴⁹ The sentencing court took into account, in assessing the death penalty, the fact that Williams had also murdered the kidnaping victim.²⁵⁰ The Court in that case rejected Williams' argument that this use of the conduct that had given rise to the prior conviction violated his rights under the Double Jeopardy Clause.²⁵¹ It emphasized that "the exercise of a sound discretion in such a case required consideration of all the circumstances of the crime, for '[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment.'"²⁵²

The Court explained that "one of the aggravating circumstances involved in this kidnaping crime was the fact that petitioner shot and killed the victim in the course of its commission."²⁵³ It rejected the claim that "the sentencing judge was not entitled to consider that circumstance, along with all other circumstances involved, in determining the proper sentence to be imposed for the kidnaping crime."²⁵⁴ The Court held in the end that "in view of the obvious fact that, under the law of Oklahoma, kidnaping is a separate crime, entirely distinct from the crime of murder, the court's consideration of the murder as a circumstance involved in the kidnaping crime cannot be said to have resulted in punishing petitioner a second time for the same offense."²⁵⁵ The Court in *Witte* concluded that *Williams* made clear that the use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause.²⁵⁶

The Court then found that *Williams* was controlling in this case, and that it did not matter whether the enhancement occurred in the first or the second sentencing proceeding.²⁵⁷ The Court gave notice to the fact that in Case No. 91-033, *Witte* pled guilty to attempted possession with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a) and 846, which carried a statutory penalty of five to forty years in prison for a crime involving 100 kilograms or more of marijuana.²⁵⁸ The Sentencing Guidelines range for *Witte*'s offense, not taking into consideration the cocaine, was seventy-eight to ninety-seven months.²⁵⁹ Including the cocaine, the offense level rose, increasing the range dramatically to 292 to 365 months.²⁶⁰ The Court observed that both Sentencing Guidelines ranges fell within the statutory five- to forty-year range.²⁶¹ It compared this finding to the sentence enhancement in *Williams* to determine that

248. *Id.* at 578.

249. *Id.* at 578 n.2.

250. *Id.* at 581.

251. *Id.* at 584-85.

252. *Id.* at 585 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

253. *Id.* at 586.

254. *Id.*

255. *Id.*

256. *Witte v. United States*, 115 S. Ct. 2199, 2206 (1995).

257. *Id.*

258. *Id.* (citing 21 U.S.C. § 841(b)(1)(B)).

259. *Id.* at 2210.

260. *Id.*

261. *Id.* at 2206.

[i]f use of the murder to justify the death sentence for the kidnaping conviction was not “punishment” for the murder in *Williams*, it is *impossible* to conclude that taking account of petitioner’s plans to import cocaine in fixing the sentence for the marijuana conviction constituted “punishment” for the cocaine offenses.²⁶²

The *Witte* majority conducted a thorough analysis of pre-Sentencing Guidelines treatment of relevant conduct.²⁶³ It noted that recidivist statutes and enhancement statutes have been repeatedly upheld in the face of double jeopardy challenges because the enhanced punishment imposed for the later offense “is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,” but instead as a stiffened penalty for the recent crime, which is more severe due to its repetition.²⁶⁴ Furthermore, the Court stated that “by authorizing the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial, our cases *necessarily imply* that such consideration does not result in ‘punishment’ for such conduct.”²⁶⁵

Witte’s argument that the Sentencing Guidelines alter this constitutional principle did not persuade the majority.²⁶⁶ According to the majority, “[a] defendant has not been ‘punished’ any more for double jeopardy purposes when relevant conduct is included in the calculation of his offense level under the Guidelines than when a pre-Guidelines court, in its discretion, took similar uncharged conduct into account.”²⁶⁷ The majority of the Court found the relevant conduct provisions of the Sentencing Guidelines to be designed to “channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional.”²⁶⁸

In response to Witte’s argument that the Sentencing Guidelines require that drug offenders be sentenced in a single proceeding for all related offenses, whether charged or uncharged,²⁶⁹ the Court found that the Guidelines also “explicitly contemplate the possibility of separate prosecutions involving the same or overlapping ‘relevant conduct.’”²⁷⁰ The Court ascertained that

[t]here are often valid reasons why related crimes committed by the same defendant are not prosecuted in the same proceeding, and § 5G1.3 of the Guidelines attempts to achieve some coordination of sentences imposed in such situations with an eye toward having such punishments

262. *Id.* (emphasis added).

263. *Id.* at 2206–09.

264. *Id.* at 2206 (citing *Nichols v. United States*, 114 S. Ct. 1921, 1927 (1994); *Spencer v. Texas*, 385 U.S. 554, 560 (1967); *Oyler v. Boles*, 368 U.S. 448, 451 (1962); *Gryger v. Burke*, 334 U.S. 728, 732 (1948); *Moore v. Missouri*, 159 U.S. 673, 677 (1895)).

265. *Id.* at 2206 (emphasis added). The Court cited *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) for this proposition, explaining how it upheld Pennsylvania’s Mandatory Minimum Sentencing Act against a due process challenge. *See* 115 S. Ct. at 2206–07.

266. 115 S. Ct. at 2207.

267. *Id.*

268. *Id.* (citing *Burns v. United States*, 501 U.S. 129, 133 (1991); *Mistretta v. United States*, 488 U.S. 361, 363–367 (1989); *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989)).

269. *See supra* notes 208–13 and accompanying text.

270. 115 S. Ct. at 2208 (quoting U.S.S.G. § 5G1.3, cmt., n.2 (addressing cases in which “a defendant is prosecuted in...two or more federal jurisdictions, for the same conduct or for different criminal transactions that were part of the same course of conduct.”)).

approximate the total penalty that would have been imposed had the sentences for the different offenses been imposed at the same time.²⁷¹

The Court found the Sentencing Guidelines to contain "significant safeguards" to protect Witte against having the length of his sentence multiplied by duplicative consideration of the same criminal conduct.²⁷² It also determined that a sentencing court maintains enough flexibility to take into account the fact that another court may have considered conduct underlying the offense at issue in sentencing for another offense.²⁷³

In the end, the majority held that the consideration of relevant conduct in determining a defendant's sentence within the legislatively authorized punishment range does not constitute punishment for that conduct.²⁷⁴ Consequently, the government's second prosecution of Witte for his conduct does not violate the Double Jeopardy Clause's prohibition against the imposition of multiple punishments for the same offense.²⁷⁵ Accordingly, the Court affirmed the judgment of the Fifth Circuit Court of Appeals.²⁷⁶

IV. CRITICAL ANALYSIS

The decision in *Witte v. United States* was not unanimous. Justice Scalia filed his own opinion, concurring in the judgment.²⁷⁷ Scalia, treating the issue in a much simpler manner, adhered to his view that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment."²⁷⁸ Therefore, Scalia easily concluded that because the government did not prosecute Witte twice for the same offense, it did not violate his double jeopardy rights.²⁷⁹

Justice Stevens also filed his own opinion, dissenting from the judgment of the Court.²⁸⁰ Stevens conducted a thorough analysis of the majority's reasoning over the backdrop of the history and purpose of the Sentencing Guidelines, and insightfully concluded that the majority had erred in its reasoning, leading to an "incorrect and unprecedented" holding.²⁸¹

Stevens felt the majority erred because it overlooked the critical distinction between offense character and offender character.²⁸² Traditional sentencing practices recognize that just sentences incorporate both concepts.²⁸³ The introduction of evidence of an offender's past convictions reflects a long-

271. *Id.*

272. *Id.* at 2208-09 (discussing U.S.S.G. §§ 5G1.3(b) and (c), which provide for concurrent or consecutive sentences to the prior undischarged term "to the extent necessary to achieve a reasonable incremental punishment for the instant offense." *Id.* (quoting U.S.S.G. § 5G1.3 (policy statement))).

273. *Id.* at 2209.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* at 2202, 2209.

278. *Id.* at 2210 (quoting *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1959 (1994) (Scalia, J., dissenting)).

279. *Id.* at 2210.

280. *Id.* at 2202, 2210-14. Stevens concurred with Part III of the Court's opinion. *See id.* at 2214, and *infra* notes 281-318 and accompanying text.

281. 115 S. Ct. at 2210-14 (Stevens, J., dissenting).

282. *Id.* at 2210-12 (Stevens, J., dissenting).

283. *Id.* at 2211 (Stevens, J., dissenting).

standing notion that one's prior record is strong evidence of one's character.²⁸⁴ The significant role played by past conduct in jurisdictions that punish "habitual offenders" more harshly reflects the importance of this factor.²⁸⁵ The Court has previously noted that "'the punishment for the second offense is increased, because by his persistence in the perpetration of crime, the defendant has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense.'"²⁸⁶

Therefore, a judge reviewing an offender's prior convictions at sentencing is not punishing that offender a second time for his past offenses, but instead is "evaluating the nature of his individual responsibility for past acts and the likelihood that he will engage in future conduct."²⁸⁷ Stevens noted that recidivist statutes are consistent with the Double Jeopardy Clause because they emphasize the importance of providing valuable evidence as to the offender's character.²⁸⁸

The Sentencing Guidelines alter this analysis. Conduct that is related to the offense for which a court has previously convicted the defendant is now linked both to the character of the offense and to the character of the offender.²⁸⁹ Under the Sentencing Guidelines, an individual who commits two crimes, even if he is not a recidivist, will be subject to more severe punishment than someone who commits only one.²⁹⁰ This is partly because the commission of multiple offenses provides important evidence of the offender's character, and partly because the character of the offense is aggravated by the commission of multiple offenses.²⁹¹ A court does not violate the Double Jeopardy Clause when it relies on offenses other than the offense for which it has just convicted the offender as evidence of the offender's character to enhance punishment.²⁹² However, when the sentencing court relies on other offenses to show aggravation of the underlying offense, the Clause is implicated.²⁹³ This is because the court is now punishing the offender for the other offenses, and not for what the commission of these offenses show about his character as an offender.²⁹⁴ In the latter case, the offender is "put in jeopardy" of punishment for the other offenses for which he has just been punished.²⁹⁵ The majority of the Court missed this critical distinction in concluding that sentence enhancement in this situation is not "punishment" for purposes of double jeopardy analysis.²⁹⁶

Stevens noted that under many sentencing regimes that do not incorporate the Sentencing Guidelines, "it is difficult if not impossible to determine whether

284. *Id.*; see also *Nichols v. United States*, 114 S. Ct. 1921, 1928 (1994); *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2199 (1993).

285. See 115 S. Ct. at 2211 (Stevens, J., dissenting); *Spencer v. Texas*, 385 U.S. 554 (1967); *Oyler v. Boles*, 368 U.S. 448 (1962); *Gryger v. Burke*, 334 U.S. 728 (1948); *Moore v. Missouri*, 159 U.S. 673 (1895).

286. 115 S. Ct. at 2211 (quoting *Moore v. Missouri*, 159 U.S. at 677).

287. *Id.*

288. *Id.*

289. *Id.*; U.S.S.G. §1B1.3; U.S.S.G. ch. 4.

290. 115 S. Ct. at 2211 (Stevens, J., dissenting).

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 2210 (Stevens, J., dissenting).

a given offense has affected the judge's assessment of the character of the offender, the character of the offense, or both."²⁹⁷ However, under the Sentencing Guidelines, specific sentencing adjustments provide for each concept.²⁹⁸ Offenses that a court considers as "relevant conduct" relate to the character of the offense, but not to the character of the offender, which is reflected by the criminal history factor.²⁹⁹

The effect of this calculus on drug crimes is strikingly illustrative of the implication of the Double Jeopardy Clause in situations such as Witte's. Under the Sentencing Guidelines, the court determines the base offense level by the total quantity of drugs under all offenses that constitute "relevant conduct," regardless of whether the government ever charged and proved those offenses beyond a reasonable doubt at trial.³⁰⁰ In Witte's case, the 1000 pounds of marijuana factored into a sentence range of seventy-eight to ninety-seven months.³⁰¹ The cocaine offenses which the court added in as "relevant conduct" resulted in a sentence range of 292 to 365 months—an increase of seventeen to twenty-two years.³⁰² As Stevens concluded, Witte had been sentenced for an offense that included the cocaine transactions that were the subject of the second indictment.³⁰³ The conduct played the exact same role in determining Witte's punishment as it would have had it been the subject of a separate formal charge and conviction.³⁰⁴ Therefore, Witte was "just as much in jeopardy for the offense as if he had been previously charged with it."³⁰⁵

Stevens accurately pointed out that the cases on which the majority relied did not compel the holding it reached in Witte's case.³⁰⁶ In *Williams v. New York*,³⁰⁷ the Court emphasized that the Due Process Clause did not prevent a sentencing judge from considering relevant information about the character of the defendant.³⁰⁸ However, as Stevens explained, the entire opinion focused on the significance of evidence that reveals the character of the offender. Nothing in that opinion even suggested that "if evidence adduced at sentencing were used to support a sentence for an offense more serious than the offense of conviction, the defendant would not have been placed in jeopardy for that more serious offense."³⁰⁹ Furthermore, though the majority relied on *McMillan v. Pennsylvania*³¹⁰ for the proposition that punishment under the Double Jeopardy Clause only occurs when a court imposes a sentence for an offense that is proven beyond a reasonable doubt at a criminal trial,³¹¹ *United States v.*

297. *Id.* at 2211 (Stevens, J., dissenting).

298. *See* U.S.S.G. §1B1.3; U.S.S.G. ch. 4.

299. *Id.*

300. *See* U.S.S.G. §§ 1B1.3, 2D1.1.

301. 115 S. Ct. at 2210 (Stevens, J., dissenting).

302. *Id.*

303. *Id.* at 2212 (Stevens, J., dissenting).

304. *Id.*

305. *Id.*

306. *Id.* at 2212–13 (Stevens, J., dissenting).

307. 337 U.S. 241 (1949).

308. *Id.*

309. 115 S. Ct. at 2212 (Stevens, J., dissenting).

310. 477 U.S. 79 (1986).

311. *See* 115 S. Ct. at 2206–07 (Stevens, J., dissenting).

*Halper*³¹² and *Department of Revenue of Montana v. Kurth Ranch*³¹³ emphatically rejected this resolution.³¹⁴

Finally, Stevens argued that the case on which the majority principally relied, *Williams v. Oklahoma*, is not controlling precedent. He pointed out that *Williams* was decided before the Court held in *Benton v. Maryland*³¹⁵ that the Double Jeopardy Clause should apply to the states, and therefore *Williams* had not even applied the Double Jeopardy Clause directly.³¹⁶ Furthermore, the state discretionary sentencing scheme employed in *Williams* was "entirely dissimilar" to the Sentencing Guidelines, which require that relevant conduct be punished as if it had been proved beyond a reasonable doubt.³¹⁷ Therefore, Stevens concluded, the majority was free to reject *Williams* as controlling precedent.³¹⁸

Stevens' arguments did not persuade the majority.³¹⁹ The Court seemed to ignore, rather than reason through, Stevens' contentions.³²⁰ The majority found that the criminal history section of the Sentencing Guidelines did not create a bright-line distinction between offense character and offender character as Stevens so claimed.³²¹ The majority dismissed Stevens' contentions on the basis that under the Sentencing Guidelines, "the offender is still punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment, not for a *different* offense (which that related conduct may or may not constitute)."³²²

V. CONCLUSION

The government may now prosecute Steven Kurt Witte for conspiracy and attempting to import cocaine in violation of 21 U.S.C. §§ 952(a) and 963.³²³ His current sentence of 144 months is forty-seven months longer than the *maximum* guideline range for the marijuana offense to which he pled guilty in 1992.³²⁴

As for others who unfortunately face a similar situation, the law is clear for now. Sentence enhancements for "relevant conduct," *i.e.*, offenses that relate to the character of the offense, but not to the character of the offender,

312. 490 U.S. 435, 448 (1989) (holding that a civil as well as a criminal sanction constitutes punishment when the sanction applied in the individual case serves the goals of punishment).

313. 114 S. Ct. 1937, 1945 (1994) (holding that criminal fines, civil penalties, civil forfeitures, and taxes are all sanctions subject to constitutional constraints).

314. 115 S. Ct. at 2213 (Stevens, J., dissenting).

315. 395 U.S. 784 (1969).

316. 115 S. Ct. at 2213 (Stevens, J., dissenting).

317. *Id.*

318. *Id.*

319. *Id.* at 2207-08.

320. *Id.* at 2208 ("Even under Justice Stevens' framework, the structure of the Guidelines should not affect the outcome of this case.").

321. *Id.* at 2207-08.

322. *Id.* (emphasis in original).

323. These offenses were listed in the September 1992 indictment. *See* 115 S. Ct. at 2203.

324. Had Witte been sentenced for only the marijuana offenses, the Sentencing Guidelines range maximum would have been 97 months. Witte was sentenced to 144 months, adjusted downward from the Sentencing Guidelines range minimum of 292 months, due to his "substantial assistance." 115 S. Ct. at 2203.

are not "punishment" for purposes of double jeopardy analysis.³²⁵ Therefore, defendants such as Witte will face multiple punishments for offenses that sentencing courts have classified and considered as "relevant conduct" without any protection from the Double Jeopardy Clause. As Justice Stevens stated in his partial dissent, "[t]he Court's holding is incorrect and unprecedented. More importantly, it weakens the fundamental protections the Double Jeopardy Clause was intended to provide."³²⁶

This is not likely to be the last opinion on this issue. Courts will continue to struggle with the Sentencing Guidelines and their infringement on an individual's double jeopardy rights under the Constitution. Until the Supreme Court recognizes its error and corrects it, justice cannot prevail.

325. See 115 S. Ct. at 2209; see also *supra* note 274 and accompanying text.

326. 115 S. Ct. at 2210.