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Thrice in Jeopardy: The CCE Prosecution of Felix Mitchell

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I. INTRODUCTION

The early 1970's witnessed the Congressional adoption of numerous federal statutes aimed at combating major crimes. Two prominent statutory schemes, the Racketeer Influenced and Corrupt Organizations Act (RICO)\(^1\) and the Comprehensive Drug Abuse Prevention and Control Act (Controlled Substances Act), were enacted in 1970.\(^2\) The RICO Act was designed to halt organized crime infiltration into the American economy. The Controlled Substances Act, on the other hand, via its "Kingpin" provision,\(^3\) enables the United States Attorney to target the operators of continuing illegal drug enterprises.

The language and scope of these statutes is very broad. For instance, a defendant is guilty under the Kingpin statute (Section 848) if:

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter —
(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
(B) from which such person obtains substantial income or resources.\(^4\)

\(^4\) The applicable text of section 848 is as follows:
(a) Penalties; forfeitures
   (1) Any person who engages in a continuing criminal enterprise shall be
Severe penalties are imposed for a conviction under either of these two acts. For example, offenders are denied parole and may be sentenced for a minimum of ten years to life imprisonment for a first offense. Additionally, fines are originally set at $100,000 for first time offenders, $200,000 for recidivists and criminal forfeiture penalties may be imposed upon any proceeds or profits derived from the illegal enterprise. Consequently, this legislation must be recognized as one of the most dramatic penal weapons available to federal law enforcement officials in the “war on drugs.”

After nearly two decades in existence, section 848 (commonly referred to as “CCE”) has undergone extensive scrutiny and clarification. Section 848 was marginally altered under the Comprehensive Crime Control Act of 1984, which concentrated on closing enterprise profit loopholes. Seventeen years of litigation have defined many of the elements of a CCE violation, including substantive inquiries such as what constitutes a “series of violations.” Moreover, numerous constitutional issues have been fleshed-out, including those relating to vagueness and cruel and unusual punishment.

sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2): except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(b) Continuing Criminal Enterprise defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if —

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter —

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.


However, one critical constitutional issue remains unsettled. Recent proceedings demonstrate that federal prosecutors are willing to risk violating the double jeopardy clause of the fifth amendment in an effort to garner a CCE conviction. For instance, the fifth amendment states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb. . . ." In its simplest terms, the double jeopardy clause prohibits the prosecution and punishment of an individual for more than one offense arising from a single act. The case of the United States v. Felix Wayne Mitchell highlights the CCE double jeopardy issue.

Prior to Mitchell's indictment in February of 1983, prosecutors were warned that a conviction based on the drug conspiracy statute would result in a fifth amendment violation if the same conviction was also used to indict and convict Mitchell under the Kingpin statute. Prosecutors intended to use a single net to indict and convict Mitchell for a section 846 conspiracy and to prove the so-called "predicate" felony of subsection (b), paragraph (1) of section 848. To further aggravate the situation, three of the overt acts in furtherance of the conspiracy were to be used to prove the "series" violations required by (b)(2) of the Kingpin statute.

Felix Mitchell's case is worth examining for several reasons. First, it illustrates the willingness of government attorneys to prosecute major drug traffickers at any cost, including the high price of reversal mandated for violation of the fifth amendment. The hyperbole that accompanied the Mitchell case includes reports that the 69th Avenue Mob may have been "the best-organized drug dispensary in the west." Additionally, in East Oakland's "land of outcasts" it may have been no exaggeration to term Felix Mitchell's brand of free-market capitalism "a stunning example of modern-day corporate leadership . . . for much of his community, a symbol of entrepreneurial ingenuity, managerial expertise — and unparalleled

7. U.S. CONST. amend. V.
8. 572 F. Supp. 709 (N.D. Cal. 1983). The notoriety of the "69th Avenue Mob" case surfaced again during Mitchell's lavish Oakland funeral, receiving national news coverage. Mitchell, sentenced to a life term, was fatally stabbed in his cell at the United States Penitentiary, Leavenworth, Kansas, on August 22, 1986. His appeal had not reached decision at the time of his death and was dismissed January 7, 1987; prosecution abates ab initio upon death. See United States v. Oberlin, 718 F.2d 894, 896 (9th Cir. 1983).
9. The full text of 21 U.S.C. § 846 (1982) reads as follows: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."
success." As a result of Mitchell's success, overzealous prosecutors ran their own expensive form of self-destruction.

Second, the Mitchell prosecution represents an excellent example of using the CCE to create a double jeopardy violation. Circuits that have recognized the prospect for abridgement have been afforded the luxury of more than one substantive "predicate" felony conviction as a substitute for a section 846 conspiracy violation. In Mitchell, on the other hand, there was but one avenue for prosecution as Mitchell was charged solely with a section 846 "predicate." His is the only case where the 846 act was used to prove both the "predicate" and the "series" violations.

Third, the United States Supreme Court provided a virtual paint-by-numbers directive on how to avoid double jeopardy violations when prosecuting sections 846 and 848 in tandem. Unfortunately, one influential circuit court misread these outlines, and another ignored them. Those signals were in turn followed by other courts. This spawned confusion and internecine conflict. Other circuits remain undecided.

Finally, the implementation of the CCE must be closely examined in light of recent Congressional consideration (and rejection) of the death penalty and the prospect of mandatory life sentences with million-dollar fines. Examination is warranted for any legislation of such magnitude, especially with its impact upon the prosecution of Felix Mitchell, one of the most controversial "kingpins" in recent times.

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18. See cases, supra note 13.
II. LAYING THE FOUNDATION FOR DOUBLE JEOPARDY PROTECTION

The common moral sentiment that no person should suffer twice for a single act took a decidedly critical turn in this country after the Revolution. "The most important event in the development of double jeopardy was the occasion of its incorporation into the federal constitution. This occurrence represents the transformation of a general maxim of English criminal law into a general rule of public policy."\(^2\) Fifth amendment protection remains a guarantee against government harassment and it continues to play an important role in criminal jurisprudence:

In American criminal procedure, the outstanding fact is the predominant role of the public prosecutor. This has made the double jeopardy problem more acute in this country, raising some fundamental issues of civil liberties. The direct confrontation of a criminal defendant by the powerful office of the prosecutor requires the development of restraints upon the possible abuses of power. . . . With the increase in the number of criminal statutes, double jeopardy protection has become virtually indispensable.\(^2\)

The potential for abuse has also been discussed elsewhere, generating similar warnings:

Double jeopardy was designed to thwart government tyranny. A disgruntled prosecutor or an inflamed democracy can be just as tyrannical a monarch.

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The profusion of modern statutory offense categories has given the prosecutor vast discretion at every stage of the criminal process. He may characterize, at will, the same criminal behavior as one or many offenses.\(^2\)

It is argued that each generation must define the basis for such policy.\(^2\) However, most lawyers agree that a number of fundamental principles have completely unfolded. As Associate Justice Powell summarized for the Supreme Court a decade ago:

[t]he Fifth Amendment double jeopardy guarantee serves princi-
pally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

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If two offenses are the same . . . for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions. Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings.26

Determining what constitutes the "same" offense is perhaps the most difficult task confronting prosecutors and judges. Legal fictions abound for the purpose. Whether measured by the "same evidence," the "same transaction," or the "same act," reasonable minds differ in the concrete application of interpretive standards to vaguely worded statutes and complex factual issues.26 However, as pointed out in Brown v. Ohio, interpretive devices are not meant to create an identity crisis or to impose a judicial straight-jacket: "It has long been understood that separate statutory crimes need not be identical, in either constituent or in actual proof, in order to be the same within the meaning of the constitutional prohibition."27 Indeed, where legislation is unambiguous, interpretive guidelines have no force or effect and legislative intent provides a foundation for determining whether two offenses are the same for double jeopardy purposes.28

Moreover, whether applied to cumulative punishment of greater and lesser included offenses, or successive prosecutions for lesser and greater crimes:

Whatever the sequence may be, the fifth amendment forbids successive prosecution and cumulative punishment of a greater and lesser included offense.

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26. See Blockburger v. United States, 284 U.S. 299 (1932); J.A. Sigler, supra note 21, at 64; Comment, supra note 21, at 267-77.
27. Brown, 432 U.S. at 164 citing 1 J. Bishop, New Criminal Law § 1051 (8th ed. 1892); Comment, supra note 21, at 268-69.
28. See Jeffers, 432 U.S. at 155-57; Lurz, 666 F.2d at 76; United States v. Arbelaez, 812 F.2d 530, 533-34 (9th Cir. 1987).
The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.\(^{29}\)

Of particular interest is one commentator’s astute warning that we should be vigilant for double jeopardy violations where multiple conspiracies are alleged:

Although the drafting of the indictment is extremely important, it is especially significant when conspiracy charges are added to other substantive counts. Federal attorneys have been most adept in the use of conspiracy charges to secure more ease in utilizing evidence, to avoid the statute of limitations, to obtain more and easier double convictions, and to bolster their personal reputation for diligence.\(^{30}\)

This point requires special consideration. The \textit{Braverman} holding, cited in \textit{Brown}, emphasizes that:

Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the [conspiracy] statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.\(^{31}\)

Consequently, while the “great range of choices presented to the prosecution is due to the multiplication of legislatively created criminal categories,” double jeopardy violations are not lessened because they arise from this wellspring.\(^{32}\) The double jeopardy clause provides a judicial tool for restraining prosecutors from pursuing multiple punishments for the same offense. It particularly inhibits a prosecutor’s use of easier standards of proof under the CCE while restricting sentencing decisions in the trial court.\(^{33}\)

Specifically, double jeopardy problems arise when a prosecutor attempts to initially use a section 846 violation (conspiracy to distribute heroin) as the predicate felony required by section 848(b)(1) and then use the violation again as part of the continuing “series” of “violations” under section 848(b)(2). In Felix Mitchell’s case, fed-


\(^{30}\) J.A. Sigler, \textit{supra} note 21, at 171-72.

\(^{31}\) \textit{Braverman}, 317 U.S. at 53.

\(^{32}\) J.A. Sigler, \textit{supra} note 21, at 64.

eral attorneys alleged nearly two dozen overt acts in furtherance of a section 846 conspiracy to distribute heroin. Pursuing its theory of vicarious liability, the government alleged that the acts of any 69 Mob co-conspirator were also attributable to Mitchell.

Assuming arguendo that the general rule of vicarious conspiracy liability also applies to CCE litigation, and that a series of three or more violations need not be convictions, the government alleged that the identical overt acts of Mitchell’s lieutenants were attributable to him as the Kingpin. The acts of Mitchell’s lieutenants were then used to establish the predicate and series violations under sections 848(b)(1) and (b)(2). In other words, the overt acts of co-conspirators that furthered the 69 Mob’s distribution conspiracy were not only part of Mitchell’s section 848(b)(1) predicate offense, but were also used to establish his three violations for purposes of section 848(b)(2).

In point of fact, during the appeals of Mitchell’s co-defendants, the United States Attorney characterized the 69 Mob case as presenting “a single-continuous conspiracy.” If, as the government claimed in Mitchell’s own appeal, this single-continuous conspiracy “is the very essence of a section 848 predicate . . . , consistent with the general design of the statute,” then proof of the one conspiracy not only exposed Mitchell to double punishment for the same offense, but to multiple, successive prosecutions on the same elements of liability. The identical overt acts used to show a “single-continuous” section 846 conspiracy were subsumed in the predicate felony offense of section 848(b)(1) and then borrowed to establish the subsection (b)(2) “continuing series of violations.”

There is no doubt that proving overt acts in furtherance of an unlawful agreement may facilitate conspiracy convictions of drug-dealing lieutenants. On the other hand, unless the government charges and proves either individual substantive violations, or a separate conspiracy against the CCE Kingpin, the government may not rely upon the predicate conspiracy to establish CCE liability. In the absence of an independent substantive violation or a separate con-

34. See Pinkerton v. United States, 328 U.S. 640 (1946).
35. Losada, 674 F.2d at 174-75; United States v. Jones, 763 F.2d 518, 525 (2d Cir. 1985).
36. Valenzuela, 596 F.2d at 1364-67; Odonez, 722 F.2d at 537.
37. See Appellee’s (Consolidated) Brief at 49:10-11; U.S. v. Randy Lamont Patterson et al., (9th Cir. filed June 30, 1986) (No. 85-1236-85-1239).
sporadic charge, the government would be forced to: (1) refrain from charging a CCE violation; or (2) risk reversal due to a fifth amendment double jeopardy violation. It is important to note that "What lies at the heart of the Double Jeopardy Clause is the prohibition against multiple prosecutions for 'the same offense.'"\(^{39}\)

When the identical acts of a section 846 conspiracy are used to establish the predicate and series violations of a CCE conviction, the fifth amendment would appear to bar such overlapping legislative categories. Furthermore, manipulation of a section 846 conspiracy to prove a section 848 conspiracy violates the prohibitions against successive, multiple prosecution for the same offense.\(^{40}\) A "successive" prosecution for the same offense may occur in a single legal proceeding if, as in Mitchell's case, the second (848) conviction depends upon first establishing and then borrowing the contingent elements from the first (846) conviction.

As the following discussion demonstrates, there are well-established double jeopardy rules germane to all cases. These rules provide protection against multiple, successive prosecutions and cumulative punishments. They apply whether the abridgement occurs at a single trial or in multiple actions. In two recent CCE cases, the Supreme Court pointed out there are no exceptions to these rules for "complex statutory crimes."\(^{41}\)

III. Supreme Court Establishes the Ground Rules for CCE Prosecutions

In the first CCE case before the Supreme Court, Garland Jeffers was the alleged head of a drug organization in Gary, Indiana. The organization produced revenue of $5,000 a day and netted

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40. See id. at 153-54; Braverman, 317 U.S. at 53.
41. Jeffers, 432 U.S. at 150-51. It may be worthwhile to dispel doubts about the use of other separately proved substantive drug offenses under the Act. True substantive violations are not only cumulatively punishable to an 848, but the Supreme Court has also "caution[ed] against ready transposition of the 'lesser included offense' principles of double jeopardy ...," where the substantive offenses are not part of a single course of conduct, such as, part of the same 846 conspiracy charge. See Garrett, 471 U.S. at 778-86, 789-95. Similarly, independent conspiracy convictions are distinguishable violations and have been upheld as not abridging the double jeopardy clause when used to prove a section 848 violation, (Boldin, 772 F.2d at 730-32; But see Brantley, 733 F.2d at 1436 n.14 (wherein the prosecution proved two distinct conspiracies even though they involved some of the same participants); United States v. Guthrie, 789 F.2d 356, 358-60 (5th Cir. 1986); Lurz, 666 F.2d at 76; United States v. Crumpler, 636 F. Supp. 396, 410-12 (N.D. Ind. 1986)), because they are not part of a single course of conduct. See Garrett, 471 U.S. at 789-95.
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$1,000,000 over a two-year period, 1972-74.42 Two indictments were returned against Jeffers. The first indictment charged him with a section 846 conspiracy to distribute heroin and a section 841 substantive distribution offense. The second indictment charged him with operating a continuing criminal enterprise. The government moved to join the indictments at one trial under the Federal Rules of Criminal Procedure 8 and 13. They argued that the offenses were of the same or similar character, based upon the same acts or transactions and part of a common scheme or plan. Ironically, the government, as in Felix Mitchell’s case, also claimed that sections 846 and 848 are wholly separate offenses for double jeopardy purposes.48

Jeffers and his nine co-defendants initially objected to trying the section 846 case with the section 848 case because neither the parties nor the charges were the same. Of the seventeen overt acts charged in the conspiracy, Jeffers was involved in ten. Accordingly, Jeffers argued that much of the conspiracy evidence would not be admissible against him in the CCE case. The trial court denied the government’s joinder motion, setting the stage for Jeffers’ first trial on the conspiracy count. (Thus, unlike Mitchell’s case, there was no need for Jeffers’ co-defendants to move for severance to avoid prejudicial association with the Kingpin.) Prior to the second trial, Jeffers moved to dismiss the CCE case against him as violative of the double jeopardy clause. He anticipated a possible waiver argument by claiming his objection to joinder was based upon his sixth amendment right to a fair trial. He argued that a waiver “would amount to penalizing the exercise of one constitutional right by denying another.”44

The Jeffers Court did not decide whether the double jeopardy clause is violated by the use of identical facts to prove both a section 846 conspiracy and a section 848 conspiracy. The Jeffers Court refused to consider the point. Under vigorous protest, the plurality held Jeffers waived the argument by acceding to separate trials.48

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42. Government estimates of Oakland’s 69th Avenue Mob profits are as high as $25,000 a day, allegedly producing several millions of dollars in profits over a six-year period, 1976-1982. See Setterberg, Drugs and Justice in Oakland, CAL. LAW., May, 1986, at 36, 38; cf. Covino, How the 69th Avenue Mob Maximized Earnings in East Oakland, CAL. MAG., Nov. 1985, at 83, 85.
43. Jeffers, 432 U.S. at 144; Appellee’s Brief, supra note 37, at 23-26.
44. Jeffers, 432 U.S. at 144.
45. Id. at 153-54. This rare exception should be considered limited to the facts of the case; under other circumstances an appellate court may decide to review a double jeopardy argument raised for the first time on appeal. See, e.g., United States v. Gunter, 546 F.2d 861,
Consequently, the *Jeffers* waiver exception deterred the Supreme Court from fully addressing the specific issue presented by Felix Mitchell's case. Nevertheless, Justice White disagreed and dissented "because the conspiracy proved was not used to establish the continuing criminal enterprise. . . ."46 While the Supreme Court did not decide the propriety of using a section 846 conspiracy to prove a section 848 conspiracy, a number of their comments are worth noting. The United States Supreme Court's opinion strongly suggest that such use would violate the successive prosecution aspect of the fifth amendment.

First, the Court stated that *punishing* Jeffers for the section 846 and 848 conspiracies violated the prohibition against double punishment. The Court's rationale was premised upon their conclusion that the offenses were "the 'same offense' for double jeopardy purposes."47 The Supreme Court considered section 846 as being a lesser included offense of section 848. "As this discussion makes clear, the reason for separate penalties for conspiracies lies in the additional dangers posed by concerted activity. Section 848, however, already expressly prohibits this kind of conduct."48

The fact that the *Jeffers* court held that cumulative punishment violative of double jeopardy does not preclude consideration of persuasive dicta on CCE *proof* if such dicta helps to identify a multiple, successive prosecution violation. On the contrary, there may be situations where a lesser-included-offense instruction to the jury will obviate double jeopardy problems, or at least preserve violations for review.49

However, any palliative effects would have been useless in Mitchell's case. The *Mitchell* jury was instructed differently from the jury in *Jeffers*. After returning a guilty verdict on the 846 conspiracy, the *Mitchell* jury was specifically instructed to consider the conspiracy verdict as the predicate offense in its deliberations on proof of the 848(b)(1) elements. They were then instructed to rummage through the other overt acts to find the three additional violations required for proof of subsection (b)(2). A lesser-included-offense instruction was not given. In the words of the trial judge, "it seems to me this is all very confusing . . . [and] I think the better procedure, and practice, is just to set aside the conviction if they con-

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864-65 (10th Cir. 1977); *cf.* Fed. R. Crim. Proc., 52(b).

46. *Jeffers*, 432 U.S. at 158.

47. *Id.* at 155.

48. *Id.* at 157.

49. *See id.* at 154.
The trial judge’s reasoning was incorrect. Setting aside the conspiracy conviction admitted only the cumulative punishment violation; it did not account for the ‘confusing’ multiple-successive prosecution branch of double jeopardy protection. The error is critical because, unlike Garland Jeffers, Felix Mitchell was not charged and convicted of any other substantive offense that might have been used as an “alternative” predicate to affirm judgment on appeal.

At the very outset of the *Jeffers* opinion the Supreme Court flatly rejected the government’s argument that a section 846 conspiracy and a section 848 CCE violation “create two separate offenses under the ‘same evidence’ test of *Blockburger*.” The *Jeffers* Court stressed “this would be a simple case” if an agreement was not an essential element of both offenses. Eschewing analogy to a case relied on by the government and the court of appeals, wherein a purported equivalent statute used the word “involved,” the Supreme Court stated that such interpretive “flexibility does not exist with respect to the continuing criminal enterprise statute.” In fact, according to the Supreme Court, the CCE statute (848(b)(2)(A)) clearly requires that all violations must be undertaken “in concert with” five or more persons. Additionally, after closely examining the legislative history of the CCE statute and many other federal statutory schemes using the key phrase “in concert,” the Court concluded: “Since the word ‘concert’ commonly signifies agreement of two or more persons in a common plan or enterprise, a clearly articulated statement from Congress to the contrary would be necessary before that meaning would be abandoned.”

The Supreme Court assumed, for the sake of argument, that section 848 requires the same essential “agreement” as does 846 and is the “same” offense for double jeopardy purposes. The Court then noted how the Jeffers’ indictments actually compared: “[t]he two indictments in this case are remarkably similar in detail. It is clear that the identical agreement and transactions over the identical time period were involved in the two cases.”

52. *Id.* at 147, 149-50.
53. *Id.* at 147-48.
54. *Id.* at 148 n.14.
55. *Id.* at 150 n.16. Again, the United States claimed its prosecution of Mitchell did not violate double jeopardy, although it insisted it had proved a “single-continuous conspiracy,” also claiming “an underlying conspiracy is the very essence of a section 848 predicate.” *See*
Following the reasoning in Brown v. Ohio,66 referring to Braverman v. United States,67 decided the same day as Jeffers v. United States,68 and cited therein, it appears that as early as 1978 an indictment alleging "a single-continuous [846] conspiracy" should be considered the same offense as an 848 offense for all double jeopardy purposes. There are no exceptions to fundamental double jeopardy rules for complex statutory crimes and "agreement" is the essential component of both 846 and 848 enterprises. Therefore, Jeffers makes it clear that borrowing an 846 offense to convict an 848 Kingpin begs for double jeopardy reversal.69

A. Some Persuasive Dicta

Shoring up the analysis of double jeopardy problems presented by conspiracy/CCE prosecutions and following the reasoning in Jeffers, Maryland Circuit Judge Francis D. Murnaghan observed in United States v. Lurz:60

While prosecution for conspiracy to commit two crimes, based on proof of but a single conspiracy, infringes a defendant’s protection against being twice in jeopardy, the rule does not apply where there are two distinct conspiracies, even though they may involve some of the same participants.61

Raymond Lurz’s section 848 conviction was deemed valid. However, it was based upon a separately proved conspiracy, permissible to establish only one of the series violations needed for a 848 (b)(2) conviction. It was not based upon the crucial “predicate” federal felony of (b)(1).62 However, Judge Murnaghan concluded, consistent with Jeffers:

One may not first prove a conspiracy to distribute to establish a section 846 violation, and then move on to convict under section 848 as well, by using the very same conspiracy to distribute for the felony violation of the federal narcotics laws (item one in the

notes 37-38 and accompanying text. In less appealing terms, the United States regurgitated warmed-over Blockburger arguments, contending the two offenses were not the same for double jeopardy purposes. This proposition was explicitly rejected in the Jeffers case. See Jeffers, 432 U.S. at 147. See also Appellee’s (Consolidated) Brief, supra note 37.

57. Braverman, 317 U.S. at 52.
59. Id. at 155-57.
60. Lurz, 666 F.2d at 69 (4th Cir. 1981).
62. Lurz, 666 F.2d at 76; cf. supra note 41.
Shortly after Lurz, the Seventh Circuit accepted the reasoning of the Fourth Circuit opinion in its own dicta: "[S]ubstantive offenses may serve as predicate offenses for a conviction under section 848, while a conspiracy offense under section 846 may not."\(^6\)

However, it is interesting to note that the dicta in Jefferson, affirming the Lurz Court's analysis and implicitly relying on a fair reading of Jeffers,\(^5\) did not deter the court from writing: "A defendant can be jointly tried on multiple narcotics charges arising from the same act or acts without raising a double jeopardy question, even if some of the alleged felonies are lesser-included offenses of the others."\(^6\)

Thus, according to the Lurz and Jefferson Courts, there is a valid distinction to be drawn between one trial on several similar narcotics counts and an 846 to prove an 848. It was deemed acceptable to concurrently try a defendant for both 846 and 848 offenses with proper instructions. However, that did not mean that an 846 could be used either as the predicate to prove an 848, or to punish consecutively.\(^7\)

Similarly, at least two Fifth Circuit decisions recognized the import of the Jeffers dicta, noting, "Section 848 is a conspiracy-type statute."\(^6\) In United States v. Stricklin,\(^8\) the court went so far as to write:

A double jeopardy defense will lie where the government has previously prosecuted a defendant under either section 846 or section 848 and then seeks to prosecute him again on the basis of the same criminal agreement under the other statute. Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative penalties for a greater and lesser included offense.\(^9\)

However, each decision affirmed an 848 conviction based upon alternative substantive or separate conspiracy convictions which are

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63. 666 F.2d at 76.
64. United States v. Jefferson, 714 F.2d 689, 702 n.27 (7th Cir. 1983), cert. granted and judgment vacated on other grounds, 106 S. Ct. 41, opn. on remand, 782 F.2d 697 (1986); see Lurz, 666 F.2d at 69. But see Chiattello, 804 F.2d 415, 420 (7th Cir. 1986).
65. Jefferson, 714 F.2d at 703-05 n.29.
66. Id. at 703 (citations omitted).
67. See Jefferson, 714 F.2d at 703; Lurz, 666 F.2d at 76; see also Jeffers, 432 U.S. at 154, 157.
69. 591 F.2d 1112 (5th Cir. 1979).
70. Id. (citing Brown, 432 U.S. at 169).
supportive of the predicate offense.\textsuperscript{71}

Accordingly, the U.S. Supreme Court’s decision in \textit{Jeffers} led many lower courts to conclude that an 846 violation could not be punished cumulatively with an 848 violation. This key point was underplayed as “dicta” by one court of appeals.\textsuperscript{72} However, the point was again reiterated by then Associate Justice William Rehnquist who wrote in \textit{Garrett} that the \textit{Jeffers} “plurality reasonably concluded that the dangers posed by a conspiracy and a CCE were similar and thus there would be little purpose in cumulating the penalties.”\textsuperscript{73}

The Ninth Circuit accepted the same general view in two punishment cases, one preceding \textit{Garrett} and one following it:

Because the section 848 and section 846 conspiracy charge are the same offenses for double jeopardy purposes . . . we vacate the section 846 sentences for counts one and six, which run consecutively to the section 848 CCE sentence. However, we affirm the consecutive sentences for the violations of both section 848 and its predicate offense.\textsuperscript{74}

Moreover, in \textit{Garrett} the Supreme Court specifically held that all other so-called “substantive” felonies under the Controlled Substances Act can be punished consecutively to a CCE offense without violating the fifth amendment’s double jeopardy protection.\textsuperscript{75} Recalling that the principal focus of \textit{Jeffers} was the permissibility of cumulative punishment for an 846 and 848 conspiracy, the \textit{Garrett} Court once again concluded 846 and 848 are the same offenses for double jeopardy purposes. Therefore, cumulative punishment was prohibited.\textsuperscript{76}

The significance of \textit{Garrett} is that the Supreme Court delineated the other substantive offenses under the Act apart from conspiracy.\textsuperscript{77} The disjointed drug ventures of Jonathan Garrett could

\textsuperscript{71} \textit{Cf. Boldin}, 772 F.2d at 730-31 (Boldin attempted to persuade the court that his prior convictions were a bar based on the double jeopardy rule. The court of appeals restated their holding from the original \textit{Boldin}).

\textsuperscript{72} \textit{See Young}, 745 F.2d at 750. The “dicta” was explicitly affirmed by the Supreme Court in \textit{Garrett}, 471 U.S. at 786.

\textsuperscript{73} \textit{Garrett}, 727 F.2d 1003, \textit{aff'd}, 471 U.S. 773, 785.

\textsuperscript{74} United States v. Burt, 765 F.2d 1364, 1368 (9th Cir. 1985) (emphasis added); \textit{see also} United States v. Smith, 690 F.2d 748, 750 (9th Cir. 1982), \textit{cert. denied}, 460 U.S. 1041 (1983). \textit{See infra} note 77.

\textsuperscript{75} \textit{See supra} note 41.

\textsuperscript{76} \textit{Garrett}, 471 U.S. at 794.

\textsuperscript{77} The Ninth Circuit appears to have recognized the difference between a valid substantive offense for use as a “predicate” and the dubious use of section 846 violation. \textit{Burt}, 765 F.2d at 1369. Chief Judge Robert F. Peckham wrote that even though \textit{Young} appears to him
not be considered to form a single course of conduct for a lesser-included-offense argument. The Supreme Court concluded that even though conspiracy and CCE are the same for double jeopardy purposes:

The same is not true of the substantive offenses created by the Act and conspiracy, and by the same logic, it is not true of the substantive offenses and CCE. We have been required in the present case, as we were not in Jeffers, to consider the relationship between substantive predicate offenses and CCE. We think here logic supports the conclusion, also indicated by the legislative history, that Congress intended separate punishments for the underlying substantive predicates and for the CCE offense. Congress may, of course, so provide if it wishes.\(^78\)

For the six years after Jeffers was decided it was reasonable to assume the Supreme Court determined section 846 to be the same offense as section 848 for double jeopardy purposes. As Lurz, Jefferson and to a lesser extent Phillips and Stricklin demonstrate, the point was not lost on a number of appellate court judges. Although the lack of a direct holding on the issue in Jeffers appears to have caused many judges to balk at following suit, it has subsequently caused others to retreat from their positions.\(^79\) As noted in this article's Introduction, the double jeopardy question in the context of proving a section 848 violation with a section 846 predicate, has not been addressed by all circuits.\(^80\)

The Fifth and Ninth Circuits have recognized the problem, but they have found alternative resolutions.\(^81\) The Eleventh Circuit has its own conflict of decisions.\(^82\) The Fourth Circuit, sitting en banc, recently retracted its Lurz dicta, holding, without explication, "the government may rely on a section 846 violation to establish a section 848 offense..."\(^83\) The Fourth Circuit's decision followed the Second Circuit precedent that will be discussed in the next section.

A panel of the Fourth Circuit Court of Appeals had remanded to be the "better result," indications are that "the Ninth Circuit might not allow use of conspiracy as a predicate offense, if called upon to decide." United States v. Zavala, 622 F. Supp. 319, 327 (N.D. Cal. 1985).

78. Garrett, 471 U.S. at 794.
79. See Ricks II, 802 F.2d at 737.
80. See supra note 13.
81. See, e.g., Stricklin, 591 F.2d at 1123 (5th Cir.), reh'g denied, 598 F.2d 620 (5th Cir.), cert. denied, 444 U.S. 963 (1979); Phillips, 664 F.2d at 1008-13; Michel, 588 F.2d at 1000-01; United States v. Sterling, 742 F.2d 521 (1984); Zavala, 622 F.2d at 327.
82. Brantley, 733 F.2d at 1436 n.14; Boldin, 772 F.2d at 730-31.
83. Ricks II, 802 F.2d at 737.
previously, stating it would decide whether a double jeopardy violation occurred "if we were persuaded that the section 846 conspiracy conviction may not serve as one of the three requisite narcotics violations. . . ."\(^{84}\)

In a footnote to \textit{Ricks I}, the Court discussed \textit{Garrett} and emphasized that it believed there was a distinction between the use of a section 846 offense as one of the three "series" violations under section 848(b)(2) and using it as the (b)(1) predicate.\(^{85}\) In \textit{Ricks II} no such distinction was made, although it is worth noting that the appellant appears to have been \textit{convicted} of two substantive 841 counts of distribution.\(^{86}\)

Consequently, the Fourth Circuit must now be considered to have been "persuaded" to join the Second Circuit camp. Other courts have followed the Second Circuit's lead without discussion, contributing nothing to the understanding of how the Supreme Court's decisions in \textit{Jeffers}, \textit{Garrett}, \textit{Brown} and \textit{Braverman} can be so readily discarded.\(^{87}\)

\section*{B. None So Blind as Those Who Refuse to See}

Indeed, as if "hidden in the open," Professor Karl Llewellyn's observation on judicial myopia seems an apt prelude to consideration of the lead decision that obfuscated \textit{Jeffers} and caused CCE law to meander on its wayward course:

I suspect that eyes trained to read an opinion not for the how of the deciding but only for the last word of doctrine on a point may well slide over this type of revelation as merely obiter, as almost in the way ("obiter" will stand that rendering), at most as a sort of obligato which may add to the aesthetic quality but hardly to the firm stuff of the decision.\(^{88}\)

\textit{In United States v. Young},\(^{89}\) New York Circuit Judge George

\begin{footnotes}
\begin{itemize}
\item 84. \textit{United States v. Ricks}, 776 F.2d 455, 464 (5th Cir. 1985), \textit{cert. denied}, 107 S. Ct. 650 (1986) [hereinafter \textit{Ricks I}].
\item 85. \textit{Id.} at 464 n.16.
\item 86. \textit{See id.} at 458, 462; \textit{see Ricks II}, 802 F.2d at 732.
\item 87. \textit{See infra} notes 95-101 and accompanying text. \textit{Ricks II} also says other "sister circuits" (First and Eleventh) have followed suit (\textit{Ricks II}, 802 F.2d at 737), but clearly the First Circuit decision is without much weight, since it also neglected to consider \textit{Jeffers} and simply announced section 846 violation can be used to prove an 848 violation. \textit{United States v. Middleton}, 673 F.2d 31, 33 (1st Cir. 1982). Furthermore, as pointed out elsewhere in this article, the Eleventh Circuit is in the midst of its own internal conflict. \textit{Brantley}, 733 F.2d at 1436 n.14; \textit{Boldin}, 772 F.2d at 730-32; \textit{United States v. Rosenthal}, 793 F.2d 1214-26 (11th Cir. 1986).
\item 89. \textit{Young}, 745 F.2d at 733.
\end{itemize}
\end{footnotes}
C. Pratt conducted a review of relevant precedent, including Jeffers, Lurz and Jefferson. He decided that section 846 could be used as the predicate offense in proving the CCE. This decision gave very little credence to the “how” of the Jeffers decision90 and it is no surprise that the Young Court found its own inquiry of legislative intent to be convincing:

To begin with, the statutory language is unambiguous. Section 848(a)(1) provides that any felony violation of Subchapters I and II of Chapter 13 of Title 21 is an eligible predicate, and nothing in the text of either section 848 or section 846 suggests that although a section 846 conspiracy is such a felony it does not qualify as a predicate for a section 848 charge. The reference in section 848 to “any” felony violation of the narcotics laws does not mean “any felony violation except a section 846 conspiracy.”91

The very cursory treatment given the Lurz and Jefferson opinions, described as having “briefly touched on the question,” suggests there may have been something amiss in the reasoning of the Young Court.92 Ignoring Jeffers, the Young Court decided that a section 846 offense was a lesser included offense of section 848. However, this did not preclude the use of a section 846 offense as a predicate to prove a section 848 conspiracy.93 The Young Court analogized to RICO litigation and determined that the clear legislative intent was to allow “any” felony to act as a predicate, including conspiracy. The Court then reached the following conclusion:

In actuality, however, these elements [848(a)(1) and (a)(2)] overlap, since the (a)(1) felony violation must be part and parcel of the (a)(2) continuing series. The overlap may take on an added dimension when a section 846 conspiracy is used as one of the predicate felonies, but the fact that the entire series must be carried out “in concert” is no reason to prevent a section 846 violation from qualifying as one of the series.94

There are several reasons why this conclusion, which is accepted by the Sixth and Fourth Circuits, is faulty.95

90. Id. at 750.
91. Id. (emphasis original).
92. Id. at 749.
93. Id. at 750.
94. Id. at 751.
95. See supra text accompanying note 87 and infra text accompanying note 102; see also Jones, 763 F.2d at 524-25; Muhammed v. United States, 635 F. Supp. 1451, 1453 (S.D.N.Y. 1986).
The critical error in the Second Circuit's Young decision is that it does not account for the Supreme Court's own legislative analysis in Jeffers. Judge Pratt's casual reference to an "added dimension" caused by using a section 846 conspiracy to prove a section 848 offense earmarks an absence of recognition. The premise that a section 846 offense is legislatively like "any [other] felony," is followed by the conclusion it is not barred as a predicate simply because "the entire series must be carried out 'in concert'..." Thus, the Young Court's ruling was in error when viewed in light of the Supreme Court's statement about the overriding legislative intent in Jeffers (subsequently affirmed in Garrett). 97

Further, in Jeffers, the Supreme Court rejected reference to Blockburger double jeopardy guidelines, or comparative statutory methods, as in Ianelli v. United States. 98 A section 846 violation was declared the same offense as a section 848 violation for double jeopardy purposes, precisely because the Supreme Court found that Congress expressly intended that both crimes contain the same essential conspiracy components. Therefore, reference to other passages in section 848, equivalent statutes, or interpretive tests, was deemed unnecessary. 99

Moreover, the Garrett decision went beyond explicitly affirming the so-called Jeffers cumulative-punishment "dicta." Implicit in its discussion of the distinguishing features of all other true "substantive" offenses under the Act from a section 846 conspiracy is the logical assumption that section 846 is excluded from the "any felony" predicate category for purposes of subdivision (a)(1) of section 848. 100

Consequently, since the Young Court failed to account for what must be considered the superseding aspects of the legislature's "in concert" language, its own legislative inquiry is without persuasive effect. In point of fact, the Young Court's analysis of the purported legislative intent of section 848 (b)(1) and its comparison to RICO,
is problematical at best and illegitimate at worst. The decision, followed without comment in the Sixth Circuit,\footnote{Schuster, 769 F.2d at 345.} and now silently accepted as "persuasive" by the Fourth Circuit,\footnote{Ricks II, 802 F.2d at 737.} is wrong and has created a deep chasm, prompting a "split of authority."

However, since Young, the Seventh and Ninth Circuits have noted the decision with apparent consternation. The question of whether they should alter course was not reached because either the issue was not preserved for review,\footnote{United States v. Cerro, 775 F.2d 908, 911 (7th Cir. 1985); United States v. Markowski, 772 F.2d 358, 361 (7th Cir. 1985).} or multiple, "fall-back" felony convictions made reliance on section 846 unnecessary.\footnote{Chiattello, 804 F.2d at 420; Sterling, 742 F.2d at 526; Zavala, 622 F. Supp. at 326-27.}

C. The Government's Equivocal Positions

If the circuits can be considered divided at this time, the U.S. Attorney could well be diagnosed as suffering from a split personality.

For example, in United States v. Jones,\footnote{763 F.2d 518 (2d Cir. 1985).} apparently litigated in the lower courts prior to the Young case, the New York office of the U.S. Attorney "agreed that the section 846 count [could] not be used as a predicate. . . ."\footnote{See id. at 525.} In the Ninth Circuit, the year prior to return of the Mitchell indictment, the San Francisco office had "concede[d] that Smith's conviction for conspiracy under 21 U.S.C. section 846 and for continuing criminal enterprise under 21 U.S.C. section 848 violates the double jeopardy clause. . . ."\footnote{Smith, 690 F.2d at 750.} Similarly, in the Lurz case (Fourth Circuit), the government conceded the "well-settled principle," referred to in Brown v. Ohio.\footnote{432 U.S. at 169; cf. infra note 113 (the court denied double jeopardy bar when overlapping proof was required to show different crimes).} This principal is that the government could not try the greater section 848 offense after a conviction on the lesser included section 846 offense.\footnote{Lurz, 666 F.2d at 75 n.10.}

It is certainly arguable that the U.S. Attorney's office should have learned its lessons from the Supreme Court in Jeffers. This is particularly true since Jeffers rejected the Blockburger argument that section 846 and section 848 are separate offenses and revealed a clear

\begin{thebibliography}{9}
\bibitem{101} Schuster, 769 F.2d at 345.
\bibitem{102} Ricks II, 802 F.2d at 737.
\bibitem{103} United States v. Cerro, 775 F.2d 908, 911 (7th Cir. 1985); United States v. Markowski, 772 F.2d 358, 361 (7th Cir. 1985).
\bibitem{104} Chiattello, 804 F.2d at 420; Sterling, 742 F.2d at 526; Zavala, 622 F. Supp. at 326-27.
\bibitem{105} 763 F.2d 518 (2d Cir. 1985).
\bibitem{106} See id. at 525.
\bibitem{107} Smith, 690 F.2d at 750.
\bibitem{108} 432 U.S. at 169; cf. infra note 113 (the court denied double jeopardy bar when overlapping proof was required to show different crimes).
\bibitem{109} Lurz, 666 F.2d at 75 n.10.
\end{thebibliography}
legislative intent. Nonetheless, the Mitchell case proves that the government was either unaware of the import of Jeffers and carelessly prosecuted him, or persisted in believing the prosecution was valid. Young, Schuster and Ricks II, give the impression that the risk was indemnified, but those cases provide a false sense of security.

Indeed, in the Seventh Circuit where Jefferson was decided, the U.S. Attorney has recently allowed trial court dismissal of a CCE count which was alleged on a section 846 predicate, without challenge on appeal. Similarly, in United States v. Markowski, the Second Circuit stated that although the “prosecutor . . . changed his mind on appeal, arguing that a conviction for conspiracy under 21 U.S.C. section 846 also may be a predicate offense,” the government waived its argument by conceding at trial that three or more alternative substantive offenses must be proved in a CCE case.

In short, because the government has not presented a granite profile in this aspect of CCE litigation, it achieved a very vulnerable conviction in the Mitchell case.

IV. CONCLUSION

The purpose of this article is to unravel the origins of a “split authority” in the federal circuits regarding the use of section 846 as the predicate offense in proving a section 848 crime. The division is apocryphal. If nothing else, the Supreme Court’s legislative analysis in Jeffers, reaffirmed in Garrett, is convincing authority that using section 846 to prove a section 848 crime violates the double jeopardy clause of the fifth amendment. Bolstered by sound, direct follow-up dicta from Lurz in the Fourth Circuit and Stricklin and Phillips in the Fifth Circuit, federal review courts warned that a CCE prosecution based solely upon a “single-continuous conspiracy” would violate the double jeopardy clause at the time the Mitchell indictment was returned.

Indeed, it is worth reiterating that in Brown and Lurz, both courts noted the tendency for multiple, overlapping conspiracy

110. Jeffers, 432 U.S. at 144 n.9, 147-50; cf. Lurz, 666 F.2d at 76.
111. Cerro, 775 F.2d at 909-10.
112. 772 F.2d 358 (7th Cir. 1985).
113. Id. at 361 n.1.
114. The Mitchell jury was also instructed to find three or more “violations.” However, the Mitchell jury was instructed to find these additional violations from the overt acts within the predicate offense. See Michel, 588 F.2d at 1000 n.15.
115. 432 U.S. at 169.
116. 666 F.2d at 74.
counts to provoke remarkable double jeopardy flaws:

Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the [conspiracy] statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.117

Thus, assuming the government proved a single-continuous section 846 conspiracy against the 69 Mob, its seriatim use of the identical conspiracy to prove Mitchell's section 848 "conspiracy" violated fifth amendment double jeopardy protection. Review of the procedural postures of the Jeffers, Brown and Lurz cases supports the conclusion that a double jeopardy violation may occur at separate trials, or during one trial. The occurrence of "successive" prosecutions at the same trial does not alter the fact that the government first proved the section 846 conspiracy and then "move[d] on to convict under section 848 as well. . . ."118

The key to the Mitchell case and its interaction with double jeopardy protection is that the prosecution may not rely on one conspiracy to prove the existence of another.119

Moreover, it is instructive to recall that Felix Mitchell was convicted of the section 846 charge only. There was no net of alternative substantive convictions to rely upon as a predicate to prove the section 848 offense. Therefore, Mitchell's case is distinguishable from all other reported cases.120

Mitchell was not unlawfully sentenced to serve consecutive terms for section 846 and 848 convictions. However, the double jeopardy clause of the fifth amendment was violated by allowing successive use of a section 846 offense to establish the predicate offense of a section 848(b)(1) violation. The fifth amendment violation was further aggravated by instructing the jury to lift overt acts from the 846 conspiracy to prove the series of violations required by section 848(b)(2).

Indeed, it may be no exaggeration to say Felix Mitchell was not twice placed in jeopardy for the same offense, he was thrice placed in jeopardy.

118. Lurz, 666 F.2d at 76; cf. Boldin, 772 F.2d at 731.
119. See Braverman, 317 U.S. at 53.
120. See, e.g., Sterling, 742 F.2d at 523; Zavala, 622 F. Supp. at 326-27; Michel, 588 F.2d at 1003.