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WITTE V. UNITED STATES: DOUBLE JEOPARDY AND THE UNITED STATES SENTENCING GUIDELINES

I. INTRODUCTION

In *Witte v. United States*,¹ the Supreme Court held that where the legislature has authorized a particular punishment range for a given crime, a sentence within that range constitutes punishment only for the convicted offense for purposes of the Double Jeopardy Clause.² In this case, the United States Sentencing Guidelines required sentencing courts to consider relevant conduct when computing a sentence within a particular range.³ The Court held that a defendant could be convicted and sentenced for an offense that a sentencing court had considered as relevant conduct in a previous sentencing.⁴

This Note concludes that the majority correctly ruled that subsequent conviction of "relevant conduct" does not result in double punishment for the same crimes under the Double Jeopardy Clause. First, this Note contends that the Sentencing Guidelines require the same Double Jeopardy analysis as the one used traditionally. Second, this Note argues that the majority's decision was consistent with congressional intent regarding "relevant conduct" and multiple convictions. Finally, this Note rejects Justice Stevens' dissenting argument⁵ that the distinction between the character of the defendant and the character of the offense barred a second sentence for actions considered as "relevant conduct" for a previous offense. This Note asserts that Justice Stevens' distinction is unworkable for federal sentencing courts.

II. BACKGROUND

A. OVERVIEW OF THE DOUBLE JEOPARDY CLAUSE

The Double Jeopardy Clause provides that no one shall "be subject for the same offense to be twice put in jeopardy of life or limb."⁶

¹ 115 S. Ct. 2199 (1995).

² *Witte*, 115 S. Ct. at 2208.

³ *Id.* at 2203 (citing U.S.S.G. § 1B1.3).

⁴ *Id.* at 2208.

⁵ *Id.* at 2218 (Stevens, J., concurring in part and dissenting in part).

⁶ U.S. CONST. amend. V.

The Double Jeopardy Clause protects against both a subsequent prosecution for the same offense after acquittal or conviction⁷ and multiple punishments for the same offense.⁸ The Double Jeopardy Clause principally restrains courts and prosecutors, while leaving the legislature free to define crimes and fix punishments.⁹ Once the legislature has defined crimes and fixed punishments, courts cannot impose more than one punishment for the same offense and, ordinarily, prosecutors cannot attempt to secure that punishment in more than one trial.¹⁰ Courts must assume, absent evidence to the contrary, that Congress did not intend to punish the same offense under two different statutes.¹¹

1. *Evolution of the Double Jeopardy Clause Analysis.*

In 1932, the Supreme Court, in *Blockburger v. United States*,¹² set forth a test to determine whether the Double Jeopardy Clause was violated where a defendant was subject to multiple convictions.¹³ The defendant in *Blockburger* was convicted of violating certain provisions of the Harrison Narcotic Act,¹⁴ including three counts in relation to selling morphine hydrochloride to the same purchaser.¹⁵ Two of these counts charged two separate sale transactions of the drug not in its original stamped package.¹⁶ The third count charged the second sale as having been made not in pursuance of a written order of the purchaser as required by statute.¹⁷ The defendant argued that second and third counts constituted one offense, for which only a single pen-

⁷ See *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

⁸ *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (Double Jeopardy Clause did not bar imposition of a more severe sentence upon reconviction of defendant who had original conviction set aside at his own behest); see also *Ex parte Lange*, 85 U.S. 163, 173 (1873) ("[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.").

⁹ *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (where defendant was convicted of auto theft following prior conviction of joyriding, test applied for determining whether there were two offenses or one for Double Jeopardy purposes was whether one statute requires proof of fact which other does not).

¹⁰ *Id.* at 165. *Witte* did not concern those Double Jeopardy questions that may arise when a defendant is retried on the same charge after a mistrial or dismissal of the indictment or information, or after a conviction is reversed on appeal.

¹¹ *Ball v. United States*, 470 U.S. 856 (1985) (defendant could not suffer two convictions or sentences on multicount conviction where he was convicted of receipt of firearm by a convicted felon and of possession of firearm by a convicted felon).

¹² 284 U.S. 299 (1932).

¹³ *Id.* at 304.

¹⁴ *Id.* at 300 (citing 26 U.S.C. §§ 692 & 696 (1928)).

¹⁵ *Id.* at 301.

¹⁶ *Id.*

¹⁷ *Id.*

alty could be imposed.¹⁸ The Court held 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."¹⁹ Thus, under the *Blockburger* test, the Double Jeopardy Clause is violated where the defendant is prosecuted under two statutes that require proof of the same elements.²⁰

The Supreme Court constructed a different Double Jeopardy test forty years later. In *Ashe v. Swenson*,²¹ the defendant was retried following an initial acquittal for robbing participants in a poker game.²² The Court held that collateral estoppel was part of the Fifth Amendment guarantee against Double Jeopardy.²³ Writing for the majority, Justice Stewart argued that when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot be relitigated.²⁴ Under the majority's "same evidence" test, when there is a general verdict of acquittal, a court must look at the prior proceedings and conclude whether the jury grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.²⁵ Justice Brennan concurred with the *Ashe* majority's²⁶ holding that the Double Jeopardy Clause includes collateral estoppel.²⁷ However, he advocated the "same transaction" test, where the Double Jeopardy Clause requires the prosecution to join at one trial all the charges against the defendant which "grow out of a single criminal act, occurrence, episode, or transaction."²⁸ Thus, *Ashe* offered the "same evidence" test and the "same transaction" test to determine a Double Jeopardy Clause violation.

*Grady v. Corbin*²⁹ introduced the "same conduct" test to determine Double Jeopardy violations.³⁰ In *Grady*, the defendant pleaded guilty to driving while intoxicated, then was later charged with reckless manslaughter and criminally negligent homicide based on the same incident that gave rise to the misdemeanor charges.³¹ The

¹⁸ *Id.* at 301-02.

¹⁹ *Id.* at 304.

²⁰ *Id.*

²¹ 397 U.S. 436 (1970).

²² *Id.* at 439-40.

²³ *Id.* at 443-45.

²⁴ *Id.* at 443.

²⁵ *Id.* at 444.

²⁶ *Id.* at 448 (Brennan, J., concurring).

²⁷ *Id.* (Brennan, J., concurring).

²⁸ *Id.* at 453-54 (Brennan, J., concurring).

²⁹ 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993).

³⁰ *Id.* at 522.

³¹ *Id.* at 511-13.

Court emphasized that the *Blockburger* "same elements" test did not sufficiently protect the defendant against subsequent prosecution,³² and consequently, supplanted the *Blockburger* test.³³ According to the *Grady* Court, the Double Jeopardy Clause bars subsequent prosecutions if the government will prove the defendant's conduct from a previously prosecuted offense in order to establish an essential element of an offense.³⁴

The Supreme Court overruled *Grady*'s "same conduct" test three years later in *United States v. Dixon*.³⁵ In *Dixon*, two defendants were tried for criminal contempt of court for violating court orders that prohibited them from engaging in conduct that was later the subject of criminal prosecutions.³⁶ The Court reaffirmed *Blockburger*'s "same element" test for Double Jeopardy violations,³⁷ and emphasized that the Double Jeopardy protections do not require that a subsequent prosecution satisfy a "same conduct" test.³⁸ The *Blockburger* "same element" test is the current test used to determine Double Jeopardy violations.

2. *Enhancement Statutes and the Double Jeopardy Clause.*

Recidivist statutes and other enhanced-sentence laws have been sustained by the Supreme Court against the contention that they violate the Double Jeopardy Clause.³⁹ These statutes are directed at defendants who are convicted of criminal offenses following at least one previous conviction.⁴⁰ The statutes usually include sentence enhancement, parole preclusion, or delayed parole eligibility based on a prior conviction.⁴¹

The Supreme Court rationalized that a sentencing court punishes the last offense committed more severely due to the consequence which the party had previously brought himself.⁴² A recidivist statute imposes a higher punishment for the same offense upon a person

³² *Id.* at 518-21.

³³ *Id.* at 521.

³⁴ *Id.* at 510.

³⁵ 113 S. Ct. 2849 (1993).

³⁶ *Id.* at 2853.

³⁷ *Id.* at 2856.

³⁸ *Id.* at 2860.

³⁹ *Moore v. Missouri*, 159 U.S. 673 (1895) (state statute providing that person who has been convicted previously of crime shall suffer more severe punishment for subsequent offense than for the first offense does not violate Double Jeopardy Clause).

⁴⁰ Christine S. May, Note, *Uncounseled Misdemeanor Convictions and Their Unreliability for Sentence Enhancement under the United States Federal Sentencing Guidelines: Nichols v. United States*, 18 HAMLINE L. REV. 231, 247 (1994).

⁴¹ *Id.*

⁴² *Moore*, 159 U.S. at 677.

who proves, by a second or third conviction, that the former punishment has been ineffective in reforming him.⁴³ Thus, enhanced punishment imposed for a later offense is not a new jeopardy or additional penalty for the earlier crime.⁴⁴ Rather, the enhancement is "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one."⁴⁵

B. SENTENCING BEFORE THE PROMULGATION OF THE SENTENCING GUIDELINES.

Even before the promulgation of the Sentencing Guidelines, judges had the discretion to take into account circumstances surrounding a criminal's offense at sentencing. In *Williams v. New York*,⁴⁶ the defendant was convicted of murder, and the jury recommended life imprisonment.⁴⁷ The trial judge imposed the death sentence after considering additional information from the court's "Probation Department and . . . other sources."⁴⁸ The Supreme Court held that a New York judge, charged with the responsibility of determining a sentence under a New York statute with a broad sentencing range, was not restricted to the information received in open court.⁴⁹ Rather, the judge was allowed discretion in fixing the punishment.⁵⁰ The *Williams* Court noted that a sentencing judge may exercise wide discretion in the sources and types of evidence he uses when determining the punishment to be imposed within limits fixed by law.⁵¹ A sentencing judge's task, within statutory and constitutional limits, is to assess the type and extent of punishment after guilt has been determined.⁵² Thus, the Court held "highly relevant—if not essential—to [a judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."⁵³

⁴³ *Id.*

⁴⁴ *Gryger v. Burke*, 334 U.S. 728, 732 (1948) (sentence as fourth offender under Pennsylvania Habitual Criminal Act was not viewed as either new jeopardy or additional penalty for earlier crimes).

⁴⁵ *Id.*

⁴⁶ 337 U.S. 241 (1949).

⁴⁷ *Id.* at 242.

⁴⁸ *Id.*

⁴⁹ *Id.* at 246.

⁵⁰ *Id.* at 249.

⁵¹ *Id.* at 246.

⁵² *Id.* at 247.

⁵³ *Id.* See *id.* at 248 n.10 (quoting *Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, 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.")).

In *Williams v. Oklahoma*,⁵⁴ the defendant pleaded guilty to a murder charge and received a sentence of life in prison.⁵⁵ Subsequently, he pleaded guilty to kidnapping the murder victim and received the death penalty.⁵⁶ The defendant challenged the death penalty sentence, claiming that the court punished him twice for the same offense when the judge took the murder of his victim into consideration.⁵⁷ The Supreme Court held that the sentencing judge could consider the defendant's murder of a kidnapping victim as an aggravating circumstance in determining the kidnapping sentence.⁵⁸ The Court reasoned that this would not punish the defendant a second time for the same offense because though the defendant had previously been convicted of the murder, kidnapping was a separate and distinct crime from murder under Oklahoma law.⁵⁹ The Oklahoma statute required the imposition of a sentence within a particular range, as determined by the sentencing judge.⁶⁰ Once guilt was established, the sentencing judge could consider responsible "out-of-court" information relative to the circumstances of the crime and to the convicted person's life and characteristics in order to determine the proper sentence within a particular range.⁶¹ The Court held that "[i]n discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime."⁶²

In *McMillan v. Pennsylvania*,⁶³ the defendants were convicted of one of the Pennsylvania Mandatory Minimum Sentencing Act's enumerated felonies, and the Commonwealth sought sentences according to the Act.⁶⁴ Pennsylvania's Mandatory Minimum Sentencing Act treated visible possession of a firearm as a sentencing factor, and required a five year minimum sentence for certain enumerated felonies involving visible possession.⁶⁵ At each defendant's sentencing, the

⁵⁴ 358 U.S. 576 (1959).

⁵⁵ *Id.* at 578.

⁵⁶ *Id.* at 578-81.

⁵⁷ *Id.* at 581.

⁵⁸ *Id.* at 586.

⁵⁹ *Id.*

⁶⁰ The Oklahoma statute at issue deemed that:

Every person who . . . kidnaps another, for the purpose of extorting money, property or thing of value or advantage from the person so seized . . . or in any manner threatens (the person so seized) shall be guilty of a felony, and upon conviction shall suffer death or imprisonment in the penitentiary, not less than ten years.

OKLA. STAT. tit. 21, § 745 (1951), cited in *Williams*, 358 U.S. at 578 n.2.

⁶¹ *Williams*, 355 U.S. at 584 (citing *Williams v. New York*, 337 U.S. 247 (1949)).

⁶² *Id.* at 585.

⁶³ 477 U.S. 79 (1986).

⁶⁴ *Id.* at 82.

⁶⁵ *Id.* at 81.

judge found the Act unconstitutional and imposed a lesser sentence than that required by the Act.⁶⁶ The Pennsylvania Supreme Court consolidated the Commonwealth's appeals, vacated the defendants' sentences, and remanded for sentencing pursuant to the Act.⁶⁷

The defendants argued that visible possession of a firearm was an element of the crimes for which they were sentenced and thus had to be proved beyond a reasonable doubt.⁶⁸ The United States Supreme Court disagreed with the defendants and upheld the Act.⁶⁹ The Court found the Act constitutional, reasoning that it did not alter the maximum sentence for the offenses of aggravated assault and voluntary manslaughter or create separate offenses with separate penalties.⁷⁰ Rather, the Act only limited the sentencing court's discretion in selecting a minimum punishment within the given range.⁷¹ According to the *McMillan* Court, the Act was not fashioned to allow the surrounding circumstance of the visible possession to be "a tail which wags the dog of the substantive offense."⁷² Rather the Court thought that the Act selected one factor that sentencing courts traditionally considered as affecting the punishment and specified the exact weight to be given to that factor.⁷³

Williams v. New York, *Williams v. Oklahoma*, and *McMillan* demonstrate the Supreme Court's acceptance and approval of judicial discretion within legislative sentencing guidelines well before the promulgation of the Federal Sentencing Guidelines. Moreover, the Supreme Court upheld the constitutionality of taking into account surrounding circumstances when sentencing a defendant.

C. THE SENTENCING GUIDELINES

1. *Background*

In response to the lack of consistency in sentences imposed by federal courts and supervised by the Parole Commission, Congress created the Sentencing Reform Act of 1984.⁷⁴ Congress sought to

⁶⁶ *Id.* at 82.

⁶⁷ *Id.* at 83.

⁶⁸ *Id.* at 84.

⁶⁹ *Id.* at 91-92.

⁷⁰ *Id.* at 87-88. The *McMillan* Court also noted that the Due Process calculus did not change simply because the Pennsylvania legislature decided to provide the sentencing courts with more guidance. *Id.* at 92.

⁷¹ *Id.* at 88.

⁷² *Id.*

⁷³ *Id.* at 89.

⁷⁴ See UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL ch. 1, pt. A(3), cmt. 3 (1994) [hereinafter U.S.S.G.] ("Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed

"enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system."⁷⁵ To accomplish this goal, Congress set forth three objectives: (1) honesty in sentencing; (2) reasonable uniformity in sentencing; and (3) proportionality in sentencing.⁷⁶

The Sentencing Reform Act of 1984 revised the old sentencing process in several ways. First, it rejected imprisonment as a means of promoting rehabilitation⁷⁷ in favor of imprisonment as fulfilling retributive, deterrent, and incapacitative goals.⁷⁸ Second, the Act consolidated the power that had been exercised by the sentencing judge and the Parole Commission by creating the United States Sentencing Commission. The Act directed the Commission to devise the Sentencing Guidelines, and prospectively abolish the Parole Commission.⁷⁹ Third, the Act made sentences, for the most part, determinate, because a prisoner's sentence can only be reduced by credit earned for good behavior.⁸⁰ Fourth, the Act made the Sentencing Commission's Sentencing Guidelines binding on the courts, although it reserved some discretion for judges to depart from the Sentencing Guidelines for mitigating or aggravating circumstances not adequately considered by the Commission.⁸¹ Finally, the Act authorized appellate review of the sentence, permitting a defendant to appeal a sentence that is above a defined range, and the Government the right to appeal a sentence that is below that range.⁸² Thus, the Sentencing Guidelines were meant to establish a range of determinate sentences for categories of offenses and defendants according to various specified factors.⁸³

Pursuant to the Act, the Sentencing Commission promulgated the United States Sentencing Guidelines.⁸⁴ The Sentencing Guidelines outline general application principles and set forth numerical

by similar offenders."); see generally Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 *HOFSTRA L. REV.* 1 (1988).

⁷⁵ U.S.S.G., *supra* note 74, at ch. 1, pt. A, cmt. 3.

⁷⁶ *Id.*

⁷⁷ 28 U.S.C. § 994(k) (1994).

⁷⁸ 18 U.S.C. § 3553(a)(2) (1994).

⁷⁹ 28 U.S.C. §§ 991, 994, 995(a)(1) (1994).

⁸⁰ 18 U.S.C. § 3624(a), (b) (1994).

⁸¹ 18 U.S.C. § 3553(a), (b). The Act also required the court to state "the specific reason" for imposing a sentence different from the one described in the guideline. 18 U.S.C. § 3553(c).

⁸² 18 U.S.C. § 3742(a), (b) (1994).

⁸³ 28 U.S.C. § 994(b)-(d).

⁸⁴ 28 U.S.C. § 994(a). The United States Sentencing Guidelines were held constitutional in *Mistretta v. United States*, 488 U.S. 361 (1989).

base offense levels for various offenses in particular guidelines.⁸⁵ Depending on the crime and the related circumstances, a particular guideline provides instructions for selecting and adjusting offense levels.⁸⁶ The base offense level is on an axis on the guideline table which specifies an appropriate punishment range.⁸⁷ The other axis reflects the defendant's criminal history category.⁸⁸ The point at which the offense level and criminal history category intersect on the sentencing table determines an offender's guideline range.⁸⁹

For example, if a defendant pleads guilty to a drug-related offense, such as possession with the intent to distribute two kilograms of powder cocaine, the sentencing court begins with the guideline entitled "Offense Involving Drugs."⁹⁰ The most important elements in setting the base offense level are the type and quantity of drugs involved.⁹¹ Because the hypothetical defendant's offense involved two kilograms of powder cocaine, he would receive a base offense level of 26.⁹² The base offense level is adjusted upward by a predetermined amount for drug offenses that have "specific offense characteristics," such as possession of a dangerous weapon.⁹³ The court then considers other general offense level adjustments, including aggravating or mitigating circumstances in the guideline, and adjusts the sentence accordingly.⁹⁴ By pleading guilty to the offense, the hypothetical defendant would receive a two level decrease reflecting his acceptance of responsibility.⁹⁵ Finally, the court considers the defendant's prior criminal involvement within the criminal history category.⁹⁶ In this example, the defendant receives a sentence of imprisonment of two years, which places him in category III.⁹⁷ The guideline table specifies

⁸⁵ U.S.S.G., *supra* note 74, § 1B1.1. The sentencing procedure is as follows: the judge determines the base offense level and applies any specific offense characteristics contained in the particular guideline; next the judge adjusts the offense level as appropriate related to the victim, role in the offense, and obstruction of justice; if there are multiple counts, the judge groups the various counts and adjusts the offense level; the judge then adjusts the offense level for acceptance of responsibility; finally, the judge determines the guideline range corresponding to the offense level and defendant criminal history category, and determines the sentencing requirements by referring to Specific Offender Characteristics and Departures. *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at ch. 5, pt. A.

⁹⁰ *Id.* at ch. 2, pt. D.

⁹¹ *Id.*

⁹² *See id.*

⁹³ *Id.* § 2D1.1(d)(1).

⁹⁴ *See generally id.* at ch. 3.

⁹⁵ *See id.* at ch. 3, pt. E.

⁹⁶ *Id.* § 4A1.1.

⁹⁷ *See id.*

a particular punishment range corresponding to the defendant's offense level and criminal history category.⁹⁸ This defendant would receive a punishment of imprisonment between sixty-three and seventy-eight months.⁹⁹

The Sentencing Guidelines give the sentencing courts wide discretion to take into account past criminal behavior, even where there is no conviction.¹⁰⁰ Two topics relevant to the determination of a defendant's sentence in this type of case are "relevant conduct" and the procedural safeguards regarding multiple convictions.

2. "Relevant Conduct"

Under the Sentencing Guidelines, the sentencing range for a particular offense is determined on the basis of all "relevant conduct" in which the defendant engaged and not just on the basis of the underlying offense of the conviction.¹⁰¹ Section 1B1.3(a)(2) directs the sentencing court to consider acts "that were part of the same course of conduct or common scheme or plan as the offense of conviction."¹⁰² Offenses qualify as part of the same course of conduct if they are adequately related to each other as to assure the conclusion that they are part of a single episode or pattern of offenses.¹⁰³

3. Procedural Safeguards Regarding Multiple Convictions

The Sentencing Guidelines contemplate the possibility of separate prosecutions involving the same or overlapping conduct.¹⁰⁴

⁹⁸ *Id.* at ch. 5, pt. A.

⁹⁹ *See id.*

¹⁰⁰ *Nichols v. United States*, 114 S. Ct. 1921, 1928 (1994).

¹⁰¹ U.S.S.G., *supra* note 74, § 1B1.1. *See id.* § 1B1.3 ("Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable sentencing guideline range.").

¹⁰² *Id.* § 1B1.3(a)(2). In order to prevent multiple punishments for substantially identical offense conduct and to achieve consistency in sentencing, the Guidelines provide rules for grouping "counts involving substantially the same harm" together. *Id.* at ch. 3, pt. D, intro. cmt.; *see id.* § 3D1.2 ("Counts involve substantially the same harm . . . when the offense level is determined largely on the basis of . . . the quantity of a substance involved.").

¹⁰³ *Id.* § 1B1.3, cmt. 9 (factors demonstrating "same course of conduct" include: degree of similarity of offenses, repetition of offenses, and time interval between offenses). The Sentencing Commission noted that, "[w]ith respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook." *Id.* § 1B1.3, cmt. 2.

¹⁰⁴ *Id.* § 5G1.3, cmt. 2 ("Subsection (b) . . . addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under § 1B1.3 (Relevant Conduct) in determining the offense level for the instant offense. This can occur . . . where a defendant is prosecuted in . . . two or more federal jurisdictions, for

When related crimes committed by the same defendant are not prosecuted in the same proceeding, § 5G1.3 attempts to coordinate sentences by having the punishments approximate the total penalty that the court would have imposed if the sentences had been imposed at the same time.¹⁰⁵ If an offender is serving an undischarged prison term for offenses that the sentencing court took into account when determining the offense level for the instant offense, § 5G1.3(b) provides that "the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment."¹⁰⁶ Where § 5G1.3(b) does not apply, the sentencing court must impose a sentence that will run consecutively to the prior undischarged prison term for as long as necessary to achieve a reasonable incremental punishment.¹⁰⁷

The Sentencing Guidelines also provide some flexibility in sentencing by allowing, under certain circumstances, the sentencing court to depart from the guideline range.¹⁰⁸ Further, an offender may protect his interests through an appropriate appeal if a sentencing court misapplies the Sentencing Guidelines.¹⁰⁹

D. THE SENTENCING GUIDELINES AND THE CIRCUIT COURTS

Prior to *United States v. Witte*,¹¹⁰ the Second and Tenth Circuits addressed the relationship between the Sentencing Guidelines' "relevant conduct" and the Double Jeopardy Clause. Both circuits held that separate punishment for an offense taken into account as "relevant conduct" when sentencing the offender for a prior conviction violated the Double Jeopardy Clause.

In *United States v. Koonce*,¹¹¹ the defendant was found guilty of distributing methamphetamine in the United States District Court of the

the same criminal conduct or for different criminal transactions that were part of the same course of conduct.").

¹⁰⁵ *Id.* § 5G1.3, cmt. 3.

¹⁰⁶ *Id.* § 5G1.3(b).

¹⁰⁷ *Id.* § 5G1.3(c).

¹⁰⁸ *Id.* § 5K2.0 ("Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'").

¹⁰⁹ FED. R. CRIM. P. 35(a) ("The court shall correct a sentence that is determined on appeal under 18 U.S.C. § 3742 to have been imposed . . . as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court . . . for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.").

¹¹⁰ 115 S. Ct. 2199 (1995).

¹¹¹ 945 F.2d 1145 (10th Cir. 1991).

District of South Dakota.¹¹² At sentencing, the court took into account methamphetamine found in the defendant's Utah home.¹¹³ Subsequently, in the United States District Court of the District of Utah, the defendant was convicted of possession with intent to distribute the methamphetamine discovered at his house in Utah.¹¹⁴ The Tenth Circuit held that the Double Jeopardy Clause prohibited the defendant's prosecution for narcotics possession in the District of Utah, because the narcotics possession had been used to increase the defendant's offense level in sentencing for a separate offense in the District of South Dakota.¹¹⁵

The Tenth Circuit considered three issues in deciding whether the second prosecution violated the Double Jeopardy Clause's protection against multiple punishment.¹¹⁶ First, the court found that increasing the offense level in light of the defendant's related conduct was punishment for purposes of the Double Jeopardy Clause.¹¹⁷ Second, the court decided that Congress did not intend the defendant to be subjected to two punishments for the related conduct.¹¹⁸ Finally, the court held that imposing concurrent rather than consecutive sentences did not avoid Double Jeopardy issues.¹¹⁹

The Tenth Circuit noted that, absent evidence to the contrary, the court should assume that Congress did not intend to punish the same offense under two different statutes.¹²⁰ The *Koonce* court did not believe that Congress wanted the Sentencing Guidelines' punishment to be larger if the government chose to prosecute in two proceedings rather than consolidate all counts in one proceeding.¹²¹ According to

¹¹² *Id.* at 1147.

¹¹³ *Id.*

¹¹⁴ *Id.* at 1148.

¹¹⁵ *Id.* at 1154.

¹¹⁶ *Id.* at 1149.

¹¹⁷ *Id.* at 1150.

¹¹⁸ *Id.* at 1153. The Tenth Circuit considered congressional intent "critical because the punishment component of the Double Jeopardy Clause is driven by legislative intent. If Congress did intend multiple punishments for a single act, then for purposes of Double Jeopardy analysis the combined punishment would be viewed as the appropriate punishment determined by Congress to represent the gravity of the offense and it would be upheld." *Id.* at 1150. See also *Garrett v. United States*, 471 U.S. 773, 779 (1985).

¹¹⁹ *Koonce*, 945 F.2d at 1153 (citing *Ball v. United States*, 470 U.S. 856, 865 (1985)). In *Ball*, the Court held that punishment includes all consequences flowing from conviction without limiting punishment to incarceration time, fines, and other penalties explicitly ordered. 470 U.S. at 865. Thus, the absence of an additional prison sentence did not render the second conviction constitutional. *Id.*

¹²⁰ *Koonce*, 945 F.2d at 1151 (citing *Ball*, 470 U.S. at 861).

¹²¹ *Id.* (citing U.S.S.G., *supra* note 74, § 1B1.3 (Guidelines provide for grouping of narcotic violations into single punishment)). The court found that the Sentencing Guidelines intended for quantities of narcotics to be aggregated into one punishment, rather than punished separately. See *id.* at 1152 (Congress intended to protect against prosecutorial

the Tenth Circuit, substantial evidence showed that Congress intended to prevent this type of double punishment using the Sentencing Guidelines procedure for aggregating fungible criminal conduct.¹²²

In *United States v. McCormick*,¹²³ the defendant had been charged with and convicted for bank fraud and related crimes in the District of Connecticut.¹²⁴ Meanwhile, the defendant had also been charged with bank fraud, mail fraud, and related crimes in the District of Vermont.¹²⁵ Pursuant to the Sentencing Guidelines, the Connecticut sentencing court took into account the defendant's "relevant conduct" in Vermont, and increased his offense level.¹²⁶ Following this sentencing, the Vermont district court found that further prosecution of the defendant was barred by the Double Jeopardy Clause.¹²⁷

The Second Circuit held that the prosecution of the defendant for fraud-related conduct, used by the sentencing court to determine the defendant's offense level in a prior conviction, violated the Double Jeopardy Clause.¹²⁸ Using the *Koonce* three-issue analysis, the Second Circuit decided that further prosecution of the defendant for conduct already used in sentencing would subject him to the possibility of multiple punishments for the same conduct.¹²⁹ The court found that the possibility of concurrent sentences did not eliminate the possibility of increased sentences under recidivist statutes or the additional societal stigma that comes from the conviction.¹³⁰

In sum, when the Supreme Court granted certiorari for *Witte v. United States*,¹³¹ the Second and Tenth Circuits had held that subsequent prosecution for relevant conduct previously taken into account in sentencing constituted a Double Jeopardy violation.¹³²

charge manipulation by grouping offenses together).

¹²² *Id.* at 1153.

¹²³ 992 F.2d 437 (2d Cir. 1993).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 438.

¹²⁷ *Id.* at 439.

¹²⁸ *Id.* at 439; see generally Elizabeth T. Lear, *Double Jeopardy, the Federal Sentencing Guidelines, and the Subsequent-Prosecution Dilemma*, 60 BROOK. L. REV. 725 (1994) (analyzing *McCormick*, and advocating using the Due Process Clause rather than the Double Jeopardy Clause to address the subsequent-prosecution problem in sentencing).

¹²⁹ The Second Circuit believed that U.S.S.G. § 5G1.3(b) did not apply where the offense level of the first conviction took into account conduct that was later the subject of a second prosecution. *McCormick*, 992 F.2d at 441 n.3. Rather, § 5G1.3(b) applied only where the defendant's offense level in a second prosecution took into account conduct that had been the subject of a conviction and a sentencing. *Id.*

¹³⁰ *Id.* at 439.

¹³¹ 115 S. Ct. 715 (1995).

¹³² *McCormick*, 992 F.2d at 439; *United States v. Koonce*, 945 F.2d 1145, 1153 (10th Cir.

III. FACTS AND PROCEDURAL HISTORY

In June 1990, undercover Drug Enforcement Administration (DEA) Agent Roger Norman negotiated with Steven Kurt Witte, Dennis Mason, and Tom Pokorny to import large amounts of marijuana from Mexico and cocaine from Guatemala.¹³³ Agent Norman was to fly the contraband into the United States, and Witte was to provide the ground transportation for the drugs once they were brought into the country.¹³⁴ In July 1990, the Mexican marijuana source advised the conspiracy participants that cocaine might be added to the first shipment if there was room on the plane or if marijuana was not available.¹³⁵ One month later, Witte told Norman that he was prepared to deliver 4,400 pounds of marijuana.¹³⁶ Once Norman learned the coordinates of the Mexican airstrip where the drugs were to be delivered from Guatemala, arrangements were made to apprehend the participants.¹³⁷ On August 12, 1990, the local authorities arrested Mason and four others, and seized 591 kilograms of cocaine.¹³⁸ Norman, remaining undercover, met Witte the next day and explained that the pilots had been unable to land in Mexico because police had raided the airstrip.¹³⁹

Norman next contacted Witte in January 1991 and asked if Witte was interested in purchasing 1,000 pounds of marijuana.¹⁴⁰ Witte agreed to make the purchase and promised to give a \$50,000 down payment.¹⁴¹ Witte also indicated he would transport the marijuana in his horse trailer and a motor home owned by an acquaintance, Sam Kelly.¹⁴² On February 7, 1991, Witte and Kelly met Norman in Houston.¹⁴³ Norman agreed to give Witte 1,000 pounds of marijuana in exchange for half of the money up front and agreed to allow Witte three days to obtain the balance.¹⁴⁴ Undercover officers took the motor home and trailer to load the marijuana, at which time Witte took Norman to Witte's hotel room to see the money.¹⁴⁵ After the two vehicles returned loaded with approximately 375 pounds of marijuana,

1991).

¹³³ *Witte v. United States*, 25 F.3d 250, 252 (5th Cir. 1994).

¹³⁴ *Witte v. United States*, 115 S. Ct. 2199, 2202 (1995).

¹³⁵ *Witte*, 25 F.3d at 252.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Witte*, 115 S. Ct. at 2202.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

Witte and Kelly were promptly arrested upon taking possession of the contraband.¹⁴⁶

A federal grand jury indicted Witte for (1) conspiring and attempting to possess more than 100 kilograms of marijuana with the intent to distribute in violation of 21 U.S.C. §§ 841(a)¹⁴⁷ and 846¹⁴⁸ and (2) aiding and abetting possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)¹⁴⁹ and 18 U.S.C. § 2¹⁵⁰. The charges, limited to the conduct occurring between January and February 1991, covered only the "reverse-buy" of marijuana—the later marijuana transaction.¹⁵¹ On February 21, 1992, Witte pleaded guilty to the attempted possession count and agreed to cooperate with the Government by providing "truthful and complete information" concerning the charged offense as well as any other offenses about which he might be questioned, and by testifying if requested to do so.¹⁵² As a result of Witte's cooperation, the Government agreed to dismiss the conspiracy count of the indictment and to file a motion for downward departure¹⁵³ under the United States Sentencing Guidelines if Witte's cooperation amounted to substantial assistance.¹⁵⁴

In calculating Witte's base offense level under the Sentencing Guidelines, the presentence report prepared by the United States Probation Office considered the total quantity of drugs involved in all of the transactions contemplated by the conspirators, including the planned 1990 shipments of both marijuana and cocaine.¹⁵⁵ The presentence report suggested that Witte was accountable for (1) the 1,000 pounds of marijuana in the attempted possession offense to which he plead guilty, (2) the fifteen tons of marijuana that Witte, Mason, and Pokorny had planned to import from Mexico in 1990, (3) the 500 kilograms of cocaine that the conspirators originally proposed to import from Guatemala, and (4) the 591 kilograms of cocaine seized at the Mexican airstrip in August 1990.¹⁵⁶

At Witte's sentencing, both the petitioner and the Government urged the court to hold that the 1990 activities concerning importa-

¹⁴⁶ *Id.*

¹⁴⁷ 21 U.S.C. § 841(a) (1994).

¹⁴⁸ 21 U.S.C. § 846 (1994).

¹⁴⁹ 21 U.S.C. § 841(a).

¹⁵⁰ 18 U.S.C. § 2 (1994); *Witte*, 115 S.Ct. at 2202-03.

¹⁵¹ *Id.* at 2022.

¹⁵² *Id.*

¹⁵³ A sentencing court gives downward departure for mitigating sentence factors. The Sentencing Guidelines give the court latitude to reduce a sentence based upon variable relevant factors. See U.S.S.G. § 5K1.1, comment (background).

¹⁵⁴ *Witte*, 115 S. Ct. at 2203 (citing U.S.S.G. § 5K1.1).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

tion of cocaine and marijuana were not part of the same course of conduct as the 1991 marijuana offense to which Witte plead guilty, and, therefore, should not be considered in sentencing Witte for the 1991 offense.¹⁵⁷ The district court, however, found that the marijuana and cocaine offenses were "relevant conduct" under § 1B1.3 of the Sentencing Guidelines and should be taken into account because they were part of the same continuing conspiracy.¹⁵⁸

The court, therefore, adopted the presentence report's aggregation of drug quantities involved in the 1990 and 1991 episodes, resulting in a base offense level of 40, which has a Guideline range of 292 to 365 months' imprisonment.¹⁵⁹ Witte received a two-level increase for his aggravating role in the offense and an offsetting two-level decrease for acceptance of responsibility.¹⁶⁰ Based on Witte's substantial assistance, the court granted the Government's § 5K1.1 motion for downward departure.¹⁶¹ The court sentenced Witte to 144 months in prison in light of that departure.¹⁶² The sentence was 148 months below the minimum sentence of 292 months under the pre-departure Guideline range.¹⁶³ Witte appealed, but the Court of Appeals dismissed the case because Witte failed to file a brief.¹⁶⁴

In September 1992, another federal grand jury indicted Witte and Pokorny on two counts: conspiring and attempting to import cocaine in violation of 21 U.S.C. §§ 952(a) and 963, respectively.¹⁶⁵ The indictment alleged that, between August 1989 and August 1990, Witte tried to import approximately 1,091 kilograms of cocaine from Central America.¹⁶⁶ Witte moved to dismiss the indictment, arguing that he had already been punished for the cocaine offenses because the cocaine involved in the 1990 transactions had been included as "relevant conduct" in his 1991 marijuana offense sentencing.¹⁶⁷ The United States District Court for the Southern District of Texas dismissed the indictment.¹⁶⁸ The court found that punishing Witte for the indicted offense would constitute a violation of the Double Jeopardy Clause of the Fifth Amendment because Witte's conduct had already been considered to determine Witte's base offense level at

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* (citing U.S.S.G., *supra* note 74, § 2D1.1).

¹⁶⁰ *Id.* (citing U.S.S.G., *supra* note 74, § 3E1.1).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 2203-04.

¹⁶⁸ *See* *Witte v. United States*, 25 F.3d 250, 253 (5th Cir. 1994).

sentencing for the 1991 marijuana offense.¹⁶⁹

The Court of Appeals for the Fifth Circuit reversed and remanded the case to the district court, holding that "the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct" and thus does not violate the Double Jeopardy Clause of the Fifth Amendment.¹⁷⁰ In reaching this result, the Fifth Circuit expressly disagreed with contrary holdings in the Second and Tenth Circuits.¹⁷¹

Seeking to resolve the conflict among the circuits, the Supreme Court of the United States granted certiorari¹⁷² to determine whether a court violates the Double Jeopardy Clause of the Fifth Amendment by convicting and sentencing a defendant for a crime when the conduct underlying the offense has been considered in determining his sentence for a previous conviction.¹⁷³

IV. SUMMARY OF THE OPINIONS

A. THE MAJORITY OPINION

Writing for the Court,¹⁷⁴ Justice O'Connor affirmed the decision of the Fifth Circuit, holding that

where the legislature has authorized such a particular punishment range for a given crime, the resulting sentence within that range constitutes punishment only for the offense of conviction for purposes of the double jeopardy inquiry.¹⁷⁵

Accordingly, the Court found that the prosecution for the cocaine offenses was not barred by the Double Jeopardy Clause as a second attempt to punish Witte for the same crime.¹⁷⁶

Justice O'Connor began her analysis by addressing the function of the Double Jeopardy Clause, which is to prevent both successive prosecution and successive punishment.¹⁷⁷ Specifically, the Double

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 258.

¹⁷¹ See *United States v. McCormick*, 992 F.2d 437 (2d Cir. 1993); *United States v. Koonce*, 945 F.2d 1145 (10th Cir. 1991).

¹⁷² *Witte v. United States*, 115 S. Ct. 715 (1995).

¹⁷³ *Witte v. United States*, 115 S. Ct. 2199, 2202 (1995).

¹⁷⁴ Chief Justice Rehnquist, and Justices Kennedy, Souter, Ginsburg, and Breyer joined in Parts I, II, and IV. Justices Stevens, Souter, Ginsburg, and Breyer joined in Part III. Part I of the opinion contained the facts and procedural history of *Witte*. In Part II of the opinion, Justice O'Connor traced the history of Double Jeopardy and argued that the traditional Double Jeopardy analysis applies to the Sentencing Guidelines. Part III interpreted the Sentencing Guidelines as containing procedural safeguards. Part IV stated the decision of the majority.

¹⁷⁵ *Witte*, 115 S. Ct. at 2208.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 2204 (quoting *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993)).

Jeopardy Clause protects against more than just the imposition of a punishment for the same offense—it protects a criminal defendant from being twice put in jeopardy of punishment for the same offense.¹⁷⁸ The Court cited *Blockburger v. United States*,¹⁷⁹ which held 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.”¹⁸⁰ Applying the *Blockburger* test, Justice O'Connor concluded that Witte was not prosecuted for, or convicted of the cocaine offenses at the first criminal proceeding because the indictment in this case did not charge the same offense to which Witte formerly plead guilty.¹⁸¹

Justice O'Connor, nevertheless, went on to address Witte's argument that he was officially punished for the cocaine charges in the first proceeding because the sentencing court took them into account during the first sentencing.¹⁸² Justice O'Connor rejected this argument, emphasizing that Supreme Court precedent makes clear “that a defendant in that situation is punished, for double jeopardy purposes, only for the offense of which the defendant is convicted.”¹⁸³ Moreover, Justice O'Connor noted that the sentencing court may consider a defendant's prior convictions as well as past criminal behavior that did not result in convictions.¹⁸⁴ The sentencing court's inquiry is largely unlimited as to the type or the source of the information.¹⁸⁵

Justice O'Connor found this case to be governed by *Williams v. Oklahoma*.¹⁸⁶ In *Williams*, the Supreme Court held that the Double Jeopardy Clause does not bar later prosecution or punishment for a criminal offense that was considered previously at sentencing for a separate crime.¹⁸⁷ Using related criminal conduct to enhance the defendant's sentence for a separate crime within the statutory limits does not constitute punishment for that conduct for the purposes of the Double Jeopardy Clause.¹⁸⁸ Based on *Williams*, Justice O'Connor

¹⁷⁸ *Id.* (quoting *Price v. Georgia*, 398 U.S. 323, 326 (1970)).

¹⁷⁹ 284 U.S. 299 (1932).

¹⁸⁰ *Blockburger*, 284 U.S. at 304.

¹⁸¹ *Witte*, 115 S. Ct. at 2204.

¹⁸² *Id.* at 2204-05 (quoting *Brown v. Ohio*, 432 U.S. 161, 165 (1977)).

¹⁸³ *Id.*

¹⁸⁴ *Id.* See *Williams v. New York*, 337 U.S. 241, 250-51 (1949) (holding that Due Process Clause does not require “courts throughout the Nation [to] abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence”).

¹⁸⁵ *Witte*, 115 S. Ct. at 2205.

¹⁸⁶ *Id.* at 2206.

¹⁸⁷ *Williams*, 337 U.S. at 241.

¹⁸⁸ *Witte*, 115 S. Ct. at 2206.

concluded that it made no difference whether the enhancement occurred in the first or the second sentencing proceeding.¹⁸⁹ In both Williams' case and Witte's case, the sentencing courts used uncharged criminal conduct to increase the petitioners' sentences within the ranges of the violated statutes.¹⁹⁰ Justice O'Connor likened the enhanced punishment to recidivist statutes, noting that the Court has rejected Double Jeopardy challenges in the case of recidivist statutes.¹⁹¹ Under recidivist statutes, the enhanced punishment imposed for a later offense is not an additional penalty for previous crimes, but rather, it is "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one."¹⁹²

Justice O'Connor also rejected Witte's argument that the Sentencing Guidelines warrant a special Double Jeopardy analysis.¹⁹³ According to Justice O'Connor, the defendant is not punished more under the Sentencing Guidelines' "relevant conduct" than he would have been under a pre-Guidelines sentencing court that could choose to take into account the uncharged conduct.¹⁹⁴ Rather, Justice O'Connor explained that the "relevant conduct" provisions are "designed to channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional."¹⁹⁵ Thus, the defendant is punished only for the convicted offense, regardless of whether a certain act is taken into account by statute or as an act of discretion.¹⁹⁶

Justice O'Connor then went on to address Justice Stevens' contention¹⁹⁷ that under the Sentencing Guidelines "an offense that is included as 'relevant conduct' does not relate to the character of the

¹⁸⁹ *Id.* In other cases involving a defendant's background and conduct not arising out of the same criminal offense of which the defendant was convicted, enhancement statutes "do not change the penalty imposed for the earlier conviction." *Id.* (quoting *Nichols v. United States*, 114 S. Ct. 1921, 1927 (1994)).

¹⁹⁰ *Witte*, 115 S. Ct. at 2206.

¹⁹¹ *Id.* Enhanced punishment of the Sentencing Guidelines is similar to recidivist statutes because, in both cases, sentencing courts consider a defendant's criminal history and his conduct surrounding the instant conviction in determining his punishment. *Id.*

¹⁹² *Id.* at 2206 (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948)). Justice O'Connor also argued that authorizing consideration of offender-specific information at sentencing without the procedural protections of a criminal trial, does not result in punishment for such conduct. *Id.* (citing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (sentencing statute limited sentencing court's discretion in selecting penalty within range already available to it without special finding as to other evidence)). See also *Patterson v. New York*, 432 U.S. 197, 214 (1977).

¹⁹³ *Witte*, 115 S. Ct. at 2207.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 2211 (Stevens, J., concurring in part and dissenting in part).

offender (which is instead reflected by criminal history), but rather measures only the character of the offense.”¹⁹⁸ Justice O’Connor responded that the difference between “criminal history” and “relevant conduct” in the Sentencing Guidelines is “more temporal than qualitative.”¹⁹⁹ She maintained that under the Sentencing Guidelines, “criminal history”²⁰⁰ referred to a defendant’s past criminal conduct,²⁰¹ while “relevant conduct”²⁰² referred only to those activities that arose out of the same criminal conduct as the instant offense.²⁰³ The Sentencing Guidelines aggravate punishment, not for a different offense, but for a related crime to the extent that the present offense was carried out in a way warranting increased punishment.²⁰⁴ Accordingly, Justice O’Connor concluded that while relevant conduct “may relate to the severity of the particular crime, the commission of multiple offenses in the same course of conduct also necessarily provides important evidence that the character of the offender requires special punishment.”²⁰⁵ Justice O’Connor also noted that because nothing controls how the sentencing judges use the extraneous information, under Justice Stevens’ framework, the Sentencing Guidelines’ structure would not affect the outcome of the case.²⁰⁶

Finally, in addressing Witte’s fear of potential unfairness the Court pointed to procedural safeguards built into the Sentencing Guidelines.²⁰⁷ The Sentencing Guidelines specifically address the possibility of separate prosecutions involving the same or overlapping “relevant conduct.”²⁰⁸ The Sentencing Guidelines attempt to coordinate sentences in this situation, so that the punishment imposed approximates the total penalty that would have resulted had the sentences for the different offenses been imposed at the same time.²⁰⁹ Thus, Justice O’Connor pointed out that the offenses run concurrently.²¹⁰ Moreover, the sentencing court may impose a sentence outside the given range if it finds aggravating or mitigating circum-

¹⁹⁸ *Id.* at 2207.

¹⁹⁹ *Id.*

²⁰⁰ See U.S.S.G., *supra* note 74, § 4A1.1.

²⁰¹ *Witte*, 115 S. Ct. at 2207.

²⁰² See U.S.S.G. § 1B1.3.

²⁰³ *Witte*, 115 S. Ct. at 2207.

²⁰⁴ *Id.* at 2207-08.

²⁰⁵ *Id.* at 2208-09.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* (citing U.S.S.G., *supra* note 74, § 5G1.3(b), cmt. 2)) (considering cases where “a defendant is prosecuted . . . for different criminal transactions that were a part of the same course of conduct”).

²⁰⁹ *Id.* (citing U.S.S.G., *supra* note 74, § 5G1.3, cmt. 3).

²¹⁰ *Id.* (citing U.S.S.G., *supra* note 74, §§ 5G1.3(b), 5G1.3(c) (policy statement)).

stances not considered by the Sentencing Commission.²¹¹ Therefore, if Witte was convicted of the cocaine charges, he could argue that the unusual facts of the case warrant a sentence outside the range established by the applicable guideline.²¹²

B. JUSTICE SCALIA'S OPINION CONCURRING IN THE JUDGMENT

Justice Scalia concurred in the judgment,²¹³ agreeing that Witte had not been prosecuted twice for the same offense.²¹⁴ He asserted that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment."²¹⁵ Justice Scalia admonished the majority for departing from the text of the Double Jeopardy Clause, which protects a criminal defendant from being twice prosecuted for the same offense.²¹⁶ According to Justice Scalia, the Court created and reaffirmed the right to be free from multiple punishments, and then destroyed that right by punishing Witte "twice as much for one offense solely because [he] also committed another offense, for which [the government] will punish [him] (only once) later on."²¹⁷

C. JUSTICE STEVENS' OPINION CONCURRING IN PART AND DISSENTING IN PART

Justice Stevens dissented from the judgment,²¹⁸ concluding that the Double Jeopardy Clause should preclude any subsequent proceeding for the cocaine offense.²¹⁹ Justice Stevens argued that the majority's decision weakened the fundamental protections provided by the Double Jeopardy Clause.²²⁰ Witte was put in jeopardy of punishment for the cocaine transactions when he was punished for those offenses at the marijuana sentencing.²²¹

Justice Stevens conceded that, traditionally, prior convictions are important factors in calculating a sentence.²²² He argued, however, that when a sentencing judge reviews the defendant's prior convictions, the judge does not punish the defendant twice for the same

²¹¹ *Id.* (citing U.S.S.G., *supra* note 74, § 5K2.0 (policy statement)).

²¹² *Id.*

²¹³ Justice Thomas joined Justice Scalia's opinion concurring in the judgment.

²¹⁴ *Witte*, 115 S. Ct. at 2210 (Scalia, J., concurring).

²¹⁵ *Id.* (Scalia, J., concurring).

²¹⁶ *Witte*, 115 S. Ct. at 2209 (Scalia, J., concurring); *see* U.S. CONST. amend. V.

²¹⁷ *Id.* at 2210 (Scalia, J., concurring) (emphasis omitted).

²¹⁸ Justice Stevens concurred with Part III of the Court's opinion, the Court's statutory analysis of the United States Sentencing Guidelines, but dissented from the judgment.

²¹⁹ *Witte*, 115 S. Ct. at 2210 (Stevens, J., concurring in part and dissenting in part).

²²⁰ *Id.* (Stevens, J., concurring in part and dissenting in part).

²²¹ *Id.* (Stevens, J., concurring in part and dissenting in part).

²²² *Id.* (Stevens, J., concurring in part and dissenting in part) (citing *Nichols v. United States*, 114 S. Ct. 1921, 1928 (1994)).

crimes.²²³ Rather, the judge evaluates the nature of the defendant's responsibility for past acts and the likelihood of future misconduct.²²⁴ Thus, recidivist statutes are consistent with the Double Jeopardy Clause only because the defendant's prior conduct is evidence of the defendant's character.²²⁵

Justice Stevens suggested that offenses considered at sentencing that are somehow linked to the offense require a different analysis.²²⁶ Offenses that are linked to the previous conviction may affect both the character of the offense and the character of the defendant.²²⁷ The Double Jeopardy Clause is not implicated if a sentence relies on an offense as evidence of the defendant's character.²²⁸ However, where the sentence relies on the offense as an aggravation of the underlying offense, the Double Jeopardy Clause is implicated because the defendant is punished for committing the offense, not for what the offense discloses about his character.²²⁹

Justice Stevens argued that the Sentencing Guidelines distinguish between "relevant conduct" and the defendant's criminal history.²³⁰ According to Justice Stevens, "relevant conduct" clearly refers to the character of the offense,²³¹ while criminal history refers to the character of the defendant.²³²

Using the example of multiple drug crimes, Justice Stevens illustrated the Double Jeopardy violation that occurs by the mandatory consideration of "relevant conduct."²³³ The severity of a drug offense is based on the total quantity of drugs from all offenses constituting "relevant conduct," regardless of whether the offenses were charged or proved at sentencing.²³⁴ Thus, the defendant is sentenced for an offense that may be the subject of a second indictment.²³⁵ The transactions fix his punishment just as if he were convicted of it.²³⁶ The imposition of punishment demonstrates that the defendant was "just as much in jeopardy for the offense as if he had been previously

²²³ *Id.* at 2211 (Stevens, J., concurring in part and dissenting in part).

²²⁴ *Id.* (Stevens, J., concurring in part and dissenting in part).

²²⁵ *Id.* (Stevens, J., concurring in part and dissenting in part) (citing *Moore v. Missouri*, 159 U.S. 673, 677 (1895)).

²²⁶ *Id.* (Stevens, J., concurring in part and dissenting in part).

²²⁷ *Id.* (Stevens, J., concurring in part and dissenting in part).

²²⁸ *Id.* (Stevens, J., concurring in part and dissenting in part).

²²⁹ *Id.* (Stevens, J., concurring in part and dissenting in part).

²³⁰ *Id.* (Stevens, J., concurring in part and dissenting in part).

²³¹ *Id.* (Stevens, J., concurring in part and dissenting in part).

²³² *Id.* (Stevens, J., concurring in part and dissenting in part).

²³³ *Id.* at 2212 (Stevens, J., concurring in part and dissenting in part).

²³⁴ *Id.* (Stevens, J., concurring in part and dissenting in part).

²³⁵ *Id.* (Stevens, J., concurring in part and dissenting in part).

²³⁶ *Id.* (Stevens, J., concurring in part and dissenting in part).

charged for it."²³⁷

Based on this conclusion, Justice Stevens argued that none of the cases relied upon by the majority compel the Court's holding.²³⁸ In *Williams v. New York*,²³⁹ the evidence of the defendant's previous criminal conduct was important because it revealed the defendant's character.²⁴⁰ Justice Stevens noted that the opinion did not suggest that if the sentencing court used evidence to determine a sentence for an offense more serious than the convicted offense, the defendant would not have been placed in jeopardy for that more serious offense.²⁴¹

Justice Stevens also rejected the majority's reliance on *Williams v. Oklahoma* because the *Williams* Court applied a weak version of due process rather than the Double Jeopardy Clause.²⁴² Justice Stevens distinguished *Williams* from *Witte* because *Williams* focused on the use of a prior conviction in a subsequent sentencing proceeding.²⁴³ He emphasized that the *Williams* Court did not address whether the second prosecution was barred because the defendant had already been punished for the instant offense.²⁴⁴

Justice Stevens concluded that due to the lack of precedent supporting the majority's decision, the Court should have looked to the text and purpose of the Double Jeopardy Clause.²⁴⁵ *Witte* received a punishment that included the cocaine offense.²⁴⁶ Because he was in jeopardy of a second punishment for the cocaine offense, standing trial for the offense should have been barred by the Double Jeopardy Clause.²⁴⁷

Finally, Justice Stevens summarized the protections available for *Witte* through the Sentencing Guidelines.²⁴⁸ He noted that departure power is available to protect against unwarranted double punishment

²³⁷ *Id.* (Stevens, J., concurring in part and dissenting in part).

²³⁸ *Id.* (Stevens, J., concurring in part and dissenting in part).

²³⁹ 337 U.S. 241 (1949).

²⁴⁰ *Witte*, 115 S. Ct. at 2212 (Stevens, J., concurring in part and dissenting in part). See *Williams v. New York*, 337 U.S. at 252 (Due Process Clause not violated where sentencing judge considered information in presentence report).

²⁴¹ *Witte*, 115 S. Ct. at 2212 (Stevens, J., concurring in part and dissenting in part).

²⁴² *Id.* at 2213 (Stevens, J., concurring in part and dissenting in part) (citing *Williams v. Oklahoma*, 358 U.S. 576 (1959)). Stevens also noted that the State's discretionary sentencing scheme in *Williams* was vastly different from the United States Sentencing Guidelines. *Id.* (Stevens, J., concurring in part and dissenting in part). Thus, the Court was free to accept or reject the reasoning in *Williams*. *Id.* (Stevens, J., concurring in part and dissenting in part).

²⁴³ *Id.* at 2213 n.3 (Stevens, J., concurring in part and dissenting in part).

²⁴⁴ *Id.* (Stevens, J., concurring in part and dissenting in part).

²⁴⁵ *Id.* at 2213 (Stevens, J., concurring in part and dissenting in part).

²⁴⁶ *Id.* (Stevens, J., concurring in part and dissenting in part).

²⁴⁷ *Id.* (Stevens, J., concurring in part and dissenting in part).

²⁴⁸ *Id.* at 2213-14 (Stevens, J., concurring in part and dissenting in part).

and to prevent the possibility of depriving Witte of the effect of downward departure.²⁴⁹ Thus, Justice Stevens joined the majority's statutory holding in part III of its opinion, which interpreted the Sentencing Guidelines as containing procedural safeguards, because it mitigated the possibility of an unfair result.²⁵⁰

V. ANALYSIS

This Note argues that the majority correctly held that, where the Sentencing Guidelines have authorized a punishment range for a particular crime, the resulting sentence within that range constitutes punishment only for the convicted offense for purposes of the Double Jeopardy Clause.²⁵¹ In part A, this Note asserts that the Sentencing Guidelines require the same Double Jeopardy analysis as that traditionally used for sentencing. In part B, this Note contends that although the Court did not explicitly address congressional intent regarding multiple convictions and "relevant conduct," its ruling is consistent with congressional intent. In part C, this Note explains why Justice Stevens' distinction between the character of the defendant and the character of the offense is flawed.

A. TRADITIONAL DOUBLE JEOPARDY ANALYSIS AND THE SENTENCING GUIDELINES

Contrary to Justice Stevens' dissent,²⁵² neither the Sentencing Reform Act of 1984²⁵³ nor the Sentencing Guidelines changed the traditional Double Jeopardy analysis of sentencing. While the Act revolutionized the manner in which federal courts sentence offenders,²⁵⁴ it only modified sentencing goals, determinacy, and consistency, not offense definitions or relevant constitutional theory.²⁵⁵ Traditionally, the federal courts exercised substantial discretion in imposing sentences within the broad statutory limits defined by Congress for particular offenses.²⁵⁶ The Act created the Sentencing Commis-

²⁴⁹ *Id.* (Stevens, J., concurring in part and dissenting in part). See U.S.S.G., *supra* note 74, § 5K1.1.

²⁵⁰ *Witte*, 115 S. Ct. at 2214 (Stevens, J., concurring in part and dissenting in part).

²⁵¹ See *id.* at 2208.

²⁵² *Cf. id.* at 2210 (Stevens, J., concurring in part and dissenting in part).

²⁵³ 18 U.S.C. §§ 3551-3742 (1994) and 28 U.S.C. §§ 991-998 (1994).

²⁵⁴ *Burns v. United States*, 501 U.S. 129, 132 (1991) (district court may not depart upward from sentencing range established by Sentencing Guidelines without first notifying parties that it intends to depart).

²⁵⁵ See U.S.S.G., *supra* note 74, ch. 1, pt. A, n.3 (policy statement).

²⁵⁶ See *United States v. Grayson*, 438 U.S. 41, 52-53 (1978) (taking defendant's false testimony into account did not violate due process by punishing defendant for crime of perjury for which he had not been indicted, tried, or convicted).

sion in order to channel this discretion through comprehensive guidelines.²⁵⁷ The purpose of the reform was "to eliminate the 'unwarranted disparit[ies] and . . . uncertainty' associated with indeterminate sentencing."²⁵⁸

The Sentencing Commission adopted a "charge offense" system that contains several real offense elements, rather than a pure "real offense" system.²⁵⁹ Under the Sentencing Guidelines, the offense of conviction determines to which offense guideline the sentencing court refers.²⁶⁰ Depending on the quantity of narcotics involved in a defendant's narcotic offenses, the applicable offense guideline designates a base offense level.²⁶¹ The sentencing court must base the quantity of narcotics on the defendant's "relevant conduct."²⁶² Where the offenses require grouping of multiple counts, "relevant conduct" includes all acts that were "part of the same course of conduct or common scheme or plan at the offense of conviction" for which the defendant could be held accountable.²⁶³ Thus, the defendant's base level indicates the composite quantity of narcotics involved in any "relevant conduct" as well as in the offense of conviction.²⁶⁴

Nothing in the Sentencing Guidelines suggests that a court will punish a defendant more by considering "relevant conduct" in the calculation of his offense level than a pre-Guidelines court would by exercising its discretion in selecting a punishment within the statutory limits.²⁶⁵ By recognizing that any convicted offense is more serious if it exemplifies a pattern of criminal conduct, "relevant conduct" merely demonstrates custom and directs future discretion.²⁶⁶ The mandatory nature of the consideration of "relevant conduct" does not

²⁵⁷ See *Burns*, 501 U.S. at 132-33; *Mistretta v. United States*, 488 U.S. 361, 363-67 (1989).

²⁵⁸ *Burns*, 501 U.S. at 133 (quoting S. REP. NO. 225, 98th Cong., 1st Sess. 49 (1983)) (alterations in original).

²⁵⁹ U.S.S.G., *supra* note 74, ch. 1, pt. A, n.4(b). A pure "real offense" system bases the sentence on all related conduct in which the defendant engaged, regardless of the elements of the offense of conviction. *Id.* A pure "charge offense" system bases the defendant's sentence solely on the conduct satisfying the elements of the offense of which the defendant was convicted. *Id.*

²⁶⁰ *Id.* §§ 1B1.1(a), 1B1.2(a). For further discussion on "real" versus "charge" offense systems, compare William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990) with David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 428-31 (1993).

²⁶¹ U.S.S.G., *supra* note 74, § 2D1.1.

²⁶² *Id.* §§ 1B1.2(b), 1B1.3.

²⁶³ *Id.* § 1B1.3(a)(2).

²⁶⁴ See *id.* § 2D1.1.

²⁶⁵ Brief for the Respondent at 22, *Witte v. United States*, 115 S. Ct. 2199 (1995) (No. 94-6187).

²⁶⁶ *Id.*

change the decision of whether the defendant is being punished for that conduct.²⁶⁷ Moreover, the increased clarity of the Sentencing Guidelines' sentencing process does not result in punishment for uncharged "relevant conduct" as if it were a distinct criminal offense.²⁶⁸ As occurred before the Sentencing Guidelines were enacted, the sentencing court punishes a defendant solely for the convicted offense.²⁶⁹

Historically, the Double Jeopardy Clause allowed prosecution and punishment for previously uncharged criminal conduct, even if a sentencing court considered that conduct in sentencing for a different offense.²⁷⁰ Whether the earlier consideration influenced the defendant's sentence within a Sentencing Guidelines range, or constituted the court's discretionary enhancement as in pre-Guidelines cases, is unimportant.²⁷¹ This conclusion is reasonable because the Sentencing Guidelines merely provide a formula for what was once left to the sentencing judges' discretion.²⁷² Hence, the traditional Double Jeopardy analysis of sentencing applies to the Sentencing Guidelines.²⁷³ As a result, the Court applied the proper test to find that taking into account "relevant conduct" in sentencing does not violate the Double Jeopardy Clause in a subsequent prosecution for that conduct.

B. CONGRESSIONAL INTENT REGARDING MULTIPLE CONVICTIONS AND
"RELEVANT CONDUCT"

The Supreme Court decided *Witte* without addressing congressional intent regarding multiple convictions and "relevant conduct."²⁷⁴ However, the majority's decision does comply with congressional intent.²⁷⁵ First, the majority applied the *Blockburger* "same elements" test in accordance with congressional intent. Second, the majority recognized that the Sentencing Commission anticipated situations similar to *Witte*'s and provided safeguards for them.²⁷⁶ Finally, the majority abrogated two federal appellate court

²⁶⁷ *Id.* at 23. See *United States v. Dunningan*, 113 S. Ct. 1111, 1117-18 (1993) (rejecting view that mandatory character of Sentencing Guidelines enhancement changes applicable constitutional test).

²⁶⁸ Respondent's Brief at 23, *Witte* (No. 94-6187); *Witte v. United States*, 115 S. Ct. 2199, 2207 (1995).

²⁶⁹ *Witte*, 115 S. Ct. at 2207.

²⁷⁰ See, e.g., *Williams v. Oklahoma*, 358 U.S. 576 (1959).

²⁷¹ See *Witte*, 115 S. Ct. at 2206.

²⁷² *United States v. Witte*, 25 F.3d 250, 258 (5th Cir. 1994). Cf. *McMillan v. Pennsylvania*, 477 U.S. 79, 92 (1986) (due process calculus does not change simply because legislature made a sentencing factor mandatory).

²⁷³ See *Witte*, 115 S. Ct. at 2211 (Stevens, J., concurring in part and dissenting in part).

²⁷⁴ See *id.* at 2204-09.

²⁷⁵ See *id.* at 2204.

²⁷⁶ See *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (legislature is free to define

decisions that incorrectly interpreted congressional intent regarding subsequent conviction for an offense that was considered as "relevant conduct" in a previous sentencing.²⁷⁷

In addressing multiple punishments, "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense."²⁷⁸ Courts enforcing the federal guarantee against multiple punishment must examine the various offenses for which a person is being punished to determine whether, as defined by the legislature, any two or more of them are the same offense: "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 that the other does not."²⁷⁹

In *Witte*, the defendant was neither prosecuted nor convicted of the cocaine offenses during the first criminal proceeding. The defendant pled guilty to and was sentenced for attempted possession of marijuana with the intent to distribute it.²⁸⁰ In the second indictment, the defendant was charged with conspiracy to import cocaine and attempted importation of cocaine.²⁸¹ According to the *Blockburger* "same elements" test,²⁸² the second indictment did not charge the same offense to which the defendant formerly had pled guilty.²⁸³ Following the rationale of *Blockburger*, Congress intended the two offenses to be punished separately, and the Court properly treated the subsequent proceeding as constitutional for purposes of the Double Jeopardy Clause.

The Sentencing Commission anticipated situations similar to *Witte*'s and adopted § 5G1.3 to address them. If the Sentencing Commission had intended to preclude the subsequent proceeding, it could have forbidden the prosecution of offenses where the "relevant conduct" was already considered in sentencing for a different offense.²⁸⁴ However, neither the Sentencing Reform Act nor the Sen-

punishments).

²⁷⁷ Compare *Witte*, 115 S. Ct. at 2204, with *United States v. Koonce*, 945 F.2d 1145, 1153 (10th Cir. 1991) and *United States v. McCormick*, 992 F.2d 437, 439 (2d Cir. 1993) (Congress did not intend to allow multiple punishments for offenses considered "relevant conduct").

²⁷⁸ *Brown*, 432 U.S. at 165.

²⁷⁹ *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

²⁸⁰ See 21 U.S.C. §§ 841(a)(1), (b)(1)(B) (1994); 21 U.S.C. § 846 (1994).

²⁸¹ See 21 U.S.C. §§ 841(a)(1), (b)(1)(B); 18 U.S.C. § 2 (1994).

²⁸² *Blockburger*, 284 U.S. at 304.

²⁸³ *Witte v. United States*, 115 S. Ct. 2199, 2204 (1995).

²⁸⁴ See *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (while Double Jeopardy Clause limits prosecutorial and judicial action, it does not prevent legislature from assigning multiple

tencing Guidelines impose such a restriction.²⁸⁵ Rather, § 5G1.3(b) implicitly contemplates the possibility of separate prosecutions involving relevant conduct.²⁸⁶

When a court sentences an imprisoned defendant for a second offense committed before his imprisonment began, § 5G1.3(b) may apply. Section 5G1.3(b) is relevant where the defendant has an undischarged prison term resulting from offenses considered in the first conviction's sentence.²⁸⁷ The sentencing court takes into account the offenses underlying the first conviction to determine the second conviction's offense level only if it is relevant conduct with respect to the second conviction.²⁸⁸ Section 5G1.3(b) applies when the sentencing court considers the offenses underlying the second conviction as "relevant conduct" in determining the first conviction's sentence because "relevant conduct" is reciprocal.²⁸⁹ Section 5G1.3(b) addresses cases where a defendant is prosecuted "for different criminal transactions that were part of the same course of conduct."²⁹⁰ Thus, the Sentencing Commission did not contemplate that consecutive prosecutions would be prohibited by considering "relevant conduct" in determining the first sentence.²⁹¹ Moreover, neither the Sentencing Reform Act nor the Sentencing Guidelines prevent prosecutions involving the same course of conduct.²⁹² In conclusion, because the Sentencing Guidelines contemplate sentencing multiple offenses separately, the majority properly determined that there was no Double Jeopardy violation in *Witte*.

Although in *Witte* the Court did not explicitly discuss congressional intent, it complied with congressional intent when it discussed the Sentencing Guidelines' procedural safeguards. The majority argued that "the Guidelines take into account the potential unfairness" in § 5G1.3.²⁹³ According to the majority, the Sentencing Guidelines leave some discretion with the sentencing court in order to protect the offender's rights.²⁹⁴ Moreover, *Witte* could "vindicate his interests through appropriate appeals" if the sentencing court misapplies the

punishments for same action).

²⁸⁵ See U.S.S.G., *supra* note 74, § 1B1.3.

²⁸⁶ See *id.* § 5G1.3(b).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ See *Witte v. United States*, 115 S. Ct. 2199, 2206 (1995) ("it makes no difference . . . whether the enhancement occurred in the first or second sentencing proceeding").

²⁹⁰ U.S.S.G., *supra* note 74, § 5G1.3(b) cmt.

²⁹¹ See *id.* § 5G1.3(b).

²⁹² *Id.*

²⁹³ *Witte*, 115 S. Ct. at 2208 (discussing the coordination of sentences).

²⁹⁴ *Id.* at 2209.

Sentencing Guidelines.²⁹⁵

In *United States v. Koonce* and *United States v. McCormick*, the Second and Tenth Circuits found that Congress did not intend to subject defendants to multiple punishments for drug offenses.²⁹⁶ However, the *Koonce* court did not have the benefit of the current § 5G1.3(b), which states that if the previous undischarged prison term resulted from conduct taken into account in the determination of the instant conviction's offense level, the instant conviction's sentence will run concurrently to the previous undischarged prison term.²⁹⁷ Section 5G1.3 permits a defendant to be prosecuted and sentenced in more than one federal proceeding for different criminal offenses that were part of the same course of conduct.²⁹⁸ Section 5G1.3 reflects Congress' intent to prevent punishment from being more severe if the government chooses to prosecute the defendant at two different proceedings, instead of only one proceeding.²⁹⁹ Congress accomplished this goal not by barring a second prosecution, but rather by mandating that the resulting prison term's length not be longer than that which would have resulted from conviction on both counts at a single proceeding.³⁰⁰

Though the Second Circuit had the benefit of § 5G1.3, it incorrectly distinguished § 5G1.3 from the situation in *McCormick*.³⁰¹ In considering whether § 5G1.3 applied to the facts of the case, the *McCormick* court found that the protections of § 5G1.3(b) apply where punishment for a current offense is determined by taking into account conduct for which the defendant has previously been convicted and sentenced; conversely, the court found that § 5G1.3(b) does not apply to the situation that the Second Circuit faced, where sentencing for a defendant's past conviction was based on conduct that is currently the subject of a second prosecution.³⁰² The *McCormick* court incorrectly assessed § 5G1.3(b) because it ignored the application of "relevant conduct" to sentencing for the first offense, and overlooked

²⁹⁵ *Id.* See FED. R. CRIM. P. 35(a) (stating that court must correct sentence that is determined to have been imposed through incorrect application of Sentencing Guidelines).

²⁹⁶ *United States v. McCormick*, 992 F.2d 437, 442 n.1 (2d Cir. 1993) (Mahoney, J., dissenting) (noting that majority properly recognized that "in the sentencing area, congressional intent is reflected in the Sentencing Guidelines"); *United States v. Koonce*, 945 F.2d 1145, 1153 (10th Cir. 1991).

²⁹⁷ U.S.S.G., *supra* note 74, § 5G1.3(b).

²⁹⁸ *Id.* § 5G1.3 cmt. 2 ("Subsection (b) . . . addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under § 1B1.3 ("relevant conduct") in determining the offense level for the instant offense.").

²⁹⁹ See *id.* § 5G1.3 cmt. 2.

³⁰⁰ *Id.* § 5G1.3(b).

³⁰¹ *United States v. McCormick*, 992 F.2d 437, 441 n.3 (2d Cir. 1993).

³⁰² *Id.*

the possibility that the defendant could have been punished in the second proceeding for his "relevant conduct."³⁰³

In sum, the *Witte* majority followed congressional intent by finding that Witte could be sentenced for an offense considered "relevant conduct" in his previous sentencing. First, the majority employed the *Blockburger* "same elements" test, which reflects legislative intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. Second, the majority considered § 5G1.3 and other procedural safeguards found in the Sentencing Guidelines which demonstrate congressional intent to punish crimes such as Witte's separately. Finally, the majority abrogated two appellate decisions that misinterpreted congressional intent.

C. THE INADEQUACIES OF JUSTICE STEVENS' DISTINCTION BETWEEN THE CHARACTER OF THE DEFENDANT AND THE CHARACTER OF THE OFFENSE

Justice Stevens' distinction between the character of the defendant and the character of the offense is unworkable. According to Justice Stevens, the cases that do not implicate the Double Jeopardy Clause are those that only consider conduct as evidence of the defendant's character, including criminal history unrelated to the instant offense.³⁰⁴ On the other hand, Justice Stevens contended, the Double Jeopardy Clause is implicated where the sentencing court considers the character of other offenses, which occurs when the conduct is linked to the offense considered at sentencing.³⁰⁵ Justice Stevens believed that the Sentencing Guidelines separate the character of the defendant and the character of the offense into "criminal history" and "relevant conduct," respectively.³⁰⁶ If taken into account as "relevant conduct" in determining the sentence for an offense, Justice Stevens argued that such conduct should not be tried and sentenced separately because the sentencing court incorporated punishment for that conduct in the first sentence.³⁰⁷

Justice Stevens pointed to the Sentencing Guidelines "criminal history" section³⁰⁸ to assert that a defendant is punished twice for an offense when that offense was considered "relevant conduct" in a pre-

³⁰³ *Id.* at 441 n.4.

³⁰⁴ *Witte v. United States*, 115 S. Ct. 2199, 2211 (1995) (Stevens, J., concurring in part and dissenting in part).

³⁰⁵ *Id.* (Stevens, J., concurring in part and dissenting in part).

³⁰⁶ *Id.* (Stevens, J., concurring in part and dissenting in part).

³⁰⁷ *Id.* (Stevens, J., concurring in part and dissenting in part).

³⁰⁸ U.S.S.G., *supra* note 74, ch. 4, pt. A.

vious sentencing.³⁰⁹ The "criminal history" section only accounts for criminal actions by the defendant if he was under any criminal justice sentence before or during his conviction.³¹⁰ Therefore, if left with only "criminal history" as a reflection of the character of the defendant when sentencing him, those offenses that were committed in the same course of conduct as the offense for which the defendant was convicted would never be considered.³¹¹ Justice Stevens' exclusion of "relevant conduct" conflicts with the judges' traditional consideration of these surrounding circumstances when sentencing a defendant.

Federal courts should consider a defendant's conduct surrounding an offense because it reflects the character of that defendant. Traditionally, sentencing courts have considered circumstances surrounding an offense, other than the elements of the offense, where the defendant who commits a crime reflects a need for increased punishment.³¹² Moreover, recidivist statutes have been declared constitutional because a defendant's repetition of crime demonstrates that his character requires more severe punishment.³¹³

Without giving any guidance as to how the character of the defendant and the character of the offense should be used by the lower courts in sentencing, Justice Stevens insisted that they should be assessed differently.³¹⁴ Justice Stevens admitted that it is almost impossible to determine whether a sentencing court used an offense to assess the character of the defendant or the character of the offense.³¹⁵ Consequently, differentiating between the character of the offense and the character of the defendant serves no practical purpose.

VI. CONCLUSION

The majority correctly decided that there was no violation of the Double Jeopardy Clause in *Witte*. The role of the Double Jeopardy

³⁰⁹ *Witte*, 115 S. Ct. at 2211 (Stevens, J., concurring in part and dissenting in part). Stevens argued that the character of the defendant was taken into account in the "Criminal History" section, and that "relevant conduct" concerns only the character of the offense. See *supra* text accompanying note 303.

³¹⁰ See U.S.S.G., *supra* note 74, § 4A1.1.

³¹¹ See *id.* § 4A1.3 (policy statement). The sentencing court may depart from the Guideline range if reasonable information indicates that criminal history does not adequately reflect the seriousness of the defendant's past criminal conduct, including "whether the defendant was pending trial or sentencing on another charge at the time of the instant offense."

³¹² *Williams v. Oklahoma*, 358 U.S. 576, 584-86 (1959) (sentencing court considered murder of kidnapping victim, which increased defendant's sentence for kidnapping).

³¹³ *Gryger v. Burke*, 334 U.S. 728, 732 (1948) (a crime committed by someone with a prior conviction "is considered an aggravated one because a repetitive one").

³¹⁴ See *Witte v. United States*, 115 S. Ct. 2199, 2208 (1995).

³¹⁵ *Id.* at 2211 (Stevens, J., concurring in part and dissenting in part).

Clause is limited to insuring that the court does not surpass its legislative authorization. The Court appropriately applied the traditional Double Jeopardy analysis to the Sentencing Guidelines to find that the subsequent prosecution of Witte was not a Double Jeopardy violation. The Court's decision complies with congressional intent, as evidenced by its proper application of the *Blockburger* "same elements" test and its discussion of § 5G1.3 and other procedural safeguards. Finally, Justice Stevens' distinction between the character of the defendant and the character of the offense is inadequate because labeling these categories separately does not aid a sentencing court in its duty to take into account circumstances surrounding the offense. Therefore, the majority made the proper and most effective decision by holding that prosecuting "relevant conduct" does not violate the Double Jeopardy Clause.

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