

Winter 1-1-1993

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Recommended Citation

Case Comments H. Double Jeopardy United States V. Council, 50 Wash. & Lee L. Rev. 322 (1993), <https://scholarlycommons.law.wlu.edu/wlulr/vol50/iss1/19>

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H. DOUBLE JEOPARDY

United States v. Council

973 F.2d 251 (4th Cir. 1992)

The Double Jeopardy Clause of the Fifth Amendment prevents a person from being tried for the same crime twice.³⁶² While a defendant may not be retried at all after being acquitted by a jury,³⁶³ the government may appeal a judicially-delivered acquittal under U.S.C. section 3731.³⁶⁴ If a reviewing court determines that the acquittal functions as a dismissal, then double jeopardy does not bar the reprosecution of the defendant on the same counts.³⁶⁵ Similarly, a mistrial may bar a subsequent retrial on the charges, depending on which party requested the mistrial and whether the mistrial was manifestly necessary.³⁶⁶

In *United States v. Council*,³⁶⁷ the United States Court of Appeals for the Fourth Circuit considered the issue of whether a defendant may be retried after a trial court entered a judgment of acquittal as a sanction for a prosecutorial Rule 16 violation. The Fourth Circuit also decided whether a mistrial, urged by the prosecutor, bars the retrial of the defendant on those counts. Finally, in an order entered after a rehearing of the case, the Fourth Circuit stated that the government must preserve an objection to the District Court's acquittal in order to appeal and reprosecute a defendant.

In *Council*, federal agents arrested the defendant, Robert Council, Jr., on federal weapons charges. Council had learned that his brother-in-law, Clarence, had been arrested for a crime involving hand grenades. Council asked Clarence's wife if Clarence had any other weapons at Clarence's house, and then Council removed the ones that he found. Council told Clarence's wife that he was moving the weapons, which included hand grenades and a mine, for the protection of Council's grandchildren who lived in the area. Council placed the weapons behind his house and attempted to call a deputy sheriff to remove the weapons

362. See U.S. CONST. amend. V (stating that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb").

363. See *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) (stating that acquittals are given special weight in double jeopardy jurisprudence); *Ball v. United States* 163 U.S. 662 (1896) (stating that defendant may not be retried after jury acquittal).

364. See 18 U.S.C. § 3731 (1988). The section states that the United States may appeal a final decision of a district court dismissing an indictment or information except where the Double Jeopardy Clause bars a retrial of the defendant. *Id.*

365. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (stating that acquittals and dismissals are not to be determined by their label, but by their substance).

366. See *Green v. United States*, 355 U.S. 184, 188 (1957) (stating that defendant should not be subjected to reprosecution if prosecutor or judge discontinues trial, but double jeopardy does not bar reprosecution if trial's completion is impossible).

367. 973 F.2d 251, *amended*, 1992 U.S. App LEXIS 28890 (4th Cir. 1992).

from his house. Before the deputy sheriff could pick up the weapons, federal agents came to Council's house and he showed the agents where he had placed the weapons.

Both Council and Clarence were indicted by a grand jury. Council was indicted on five counts: one count of receiving with intent to convert stolen property belonging to the United States, three counts of knowingly receiving and possessing unregistered firearms, and one count of being an accessory after the fact to Clarence's crimes. Council pled not guilty to all of the counts and requested a jury trial.

During the trial, the government introduced evidence through a government witness that Council had stated that he had taken the weapons in order to assist Clarence. The government had not provided this statement to the defendant as required by Rule 16 of the Federal Rules of Criminal Procedure.³⁶⁸ The court ruled that the statement was relevant to the counts of knowingly receiving stolen property and accessory after the fact, counts eight and twelve. The court suggested a mistrial as to those two counts. The government, however, felt that a mistrial would bar a reprosecution of the counts due to double jeopardy and offered to dismiss counts eight and twelve. The district court, using the discretion given to the court as a remedy for Rule 16 violations,³⁶⁹ decided that it would grant the defendant's motion for judgment of acquittal at the end of the government's case on counts eight and twelve. The government did not protest or note an exception to the entry of the acquittal.

The court dismissed one count because of multiplicity and submitted two counts, counts nine and eleven, to the jury. Both of the counts dealt with the knowing possession of unregistered weapons. The government did not need to show that Council knew that the weapons were unregistered, but only that Council knew that he possessed the weapons. The court accordingly instructed the jury that an action done "knowingly" was an action done voluntarily and intentionally. In neither the court's instructions to the jury nor the parties' closing arguments was motive mentioned as to counts nine and eleven.

Nevertheless, during deliberations the jury foreman sent a note to the court asking a definition of "knowingly." The court repeated the definition given in the jury instructions. Later, the jury foreman sent another note which seemed to indicate that the jury had confused the issue of Council's motive in moving the weapons with the issue of Council's knowledge that he had possessed the weapons. The court noted that motive was irrelevant

368. FED. R. CRIM. P. 16(a)(1)(a). The rule states that: "The government shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial." *Id.*

369. FED. R. CRIM. P. 16(d)(2). The rule states that: "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may . . . enter such other order as it deems just under the circumstances." *Id.*

to counts nine and eleven, and suggested that a new instruction explaining the issue of volition would enable the jury to deliberate correctly. The prosecutor suggested that the court should declare a mistrial. Over Council's objections, the court declared a mistrial as to counts nine and eleven. The court stated that it had granted the mistrial in fairness to both sides because the court had precluded the development of the trial and created a manifest necessity for the mistrial.

The government sought to re prosecute on counts eight, nine, eleven, and twelve. Council moved to dismiss all of the counts on double jeopardy grounds. The court determined that double jeopardy did not bar the re prosecution of Council on any of the counts. Council then appealed the decision to the Fourth Circuit.

In deciding Council's appeal, the Fourth Circuit first analyzed counts eight and twelve, the counts on which the district court entered a judgment of acquittal because of the Rule 16 violations. The majority began by determining whether the judgment of acquittal was, in fact, an acquittal, or if it was a dismissal. The government conceded that if Council actually had been acquitted double jeopardy would bar his re prosecution. However, the government contended that the judgment of acquittal functioned as a dismissal, and therefore Council could be retried on the counts. The Supreme Court propounded this theory in *United States v. Martin Linen Supply Co.*,³⁷⁰ in which the Court stated that any decision, whether called a dismissal or an acquittal, could be an acquittal for double jeopardy purposes if and only if the decision represented a resolution of the factual elements of the crime.³⁷¹ Consequently, the substance of a court's decision, and not the label attached to the decision, will determine whether the government may retry a defendant on the same charge. The Fourth Circuit majority noted that, in applying this doctrine, the circuits have found that actions called "dismissals" were in fact acquittals,³⁷² and that actions styled "acquittals" were actually dismissals.³⁷³

Based on the *Martin Linen* test, the majority in *Council* held that the trial court's judgment was actually a dismissal. The majority based this decision on the trial judge's use of the acquittal as a sanction for the Rule 16 violation, instead of basing the acquittal on the facts as developed at trial. Consequently, there was no resolution of the factual elements of the charged offense, and the acquittal functioned as a dismissal.

After determining that there had been no acquittal of Council, the majority determined that the government could re prosecute Council on

370. 430 U.S. 564 (1977).

371. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

372. *See United States v. Hospital Monteflores, Inc.*, 575 F.2d 332, 333 n.1 (1st Cir. 1978) (holding that "dismissal" was acquittal because district court resolved factual elements of case).

373. *See United States v. Appawoo*, 553 F.2d 1242, 1245-46 (10th Cir. 1977) (holding that "acquittal" was dismissal because district court made decision based on information not developed at trial, therefore there was no resolution of factual elements of case).

counts eight and twelve. Basing its decision on *Lee v. United States*,³⁷⁴ the majority noted that in both *Lee* and *Council* the prosecutor's misconduct, which caused the mistrial, was simply from negligence and not from purposeful overreaching. The majority noted that in *Oregon v. Kennedy*,³⁷⁵ the Supreme Court held that double jeopardy only could be a bar to retrial in dismissals that resulted from governmental conduct meant to provoke the defendant into seeking a mistrial.³⁷⁶ The majority concluded that the trial court's reinstatement of counts eight and twelve showed that the prosecution had no malicious intent in the Rule 16 violation, and therefore double jeopardy did not bar Council's re prosecution.

Judge Hall, dissenting, analyzed counts eight and twelve differently, concluding that Council could not constitutionally be retried. The dissent noted that trial courts have discretion as to the sanction for Rule 16 violations. The trial court has the ability to enter a dismissal with prejudice, which, like an acquittal, will bar a subsequent re prosecution. The dissent first took issue with the majority's characterization of the acquittal as a dismissal, then disagreed with the majority's determination of the double jeopardy issue, noting that the cases relied upon by the majority did not support the position for which the majority used them.

Section 3731 of the United States Code allows the government to appeal the dismissal of an indictment, except when double jeopardy bars a re prosecution.³⁷⁷ The dissent stated that the cases relied upon by the majority only addressed the issue of appealability of an acquittal or a dismissal. The cases did not support the majority's position that an acquittal which is not appealed can be considered to be a dismissal and thus re prosecuted. The dissent pointed out that the government never appealed the trial judge's determination that the judgment of acquittal should be entered. In fact, the government supported the court's decision. Consequently, the dissent rejected the majority's reliance on *Martin Linen* and *Lee*, and held that the final acquittal on the books in the trial court barred the re prosecution of Council.

Both the majority and dissent held that double jeopardy barred the re prosecution of Council on counts nine and eleven. The trial court initiated the mistrial because of the jury's improper consideration of motive. The trial court stated that the mistrial was manifestly necessary, and was granted in fairness to both the defendant and the prosecution. The Fourth Circuit disagreed.

If a trial judge declares a mistrial, the government may not re prosecute unless the mistrial was manifestly necessary. Although Council objected to the court's evidentiary rulings, Council never claimed that the court's decisions amounted to reversible error or that the mistrial was necessary.

374. 432 U.S. 23 (1977).

375. 456 U.S. 667 (1982).

376. *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982).

377. 18 U.S.C. § 3731 (1988).

The government could not claim that the jury instructions were in error because the government had submitted the instructions which were used in the trial. Consequently, the Fourth Circuit determined that the trial court's mere statement that fairness to the defendant was a consideration in the mistrial was not a sufficient showing that the mistrial was a manifest necessity. As a result, double jeopardy precluded Council from being retried on counts nine and eleven.

After the *Council* decision was handed down by the Fourth Circuit, Council petitioned for rehearing, asserting that the district court lacked jurisdiction to reinstate counts eight and twelve. Council stated that the district court lacked jurisdiction because the government did not appeal from the entry of judgments of acquittal on the two counts. However, Council had not raised this aspect of the case in the original proceeding before the Fourth Circuit.

The Fourth Circuit requested supplemental briefs from the parties for the rehearing. In the government's brief, the government acknowledged that its failure to preserve an objection to the trial court's entry of an acquittal to the two counts barred further prosecution of Council on those counts. Consequently, the Fourth Circuit entered an order remanding the case to the district court with instructions to dismiss the prosecution against Council on all counts.

The majority in *Council* applied the section 3731 appealability test to a situation in which appealability was not an issue. Courts have allowed substantial leeway to government appeals of decisions of acquittal, especially if the trial court will not have to engage in further factfinding.³⁷⁸ However, the Supreme Court has granted this leeway only for appeals of judgments of acquittals, not for the reprosecution of defendants after acquittals. As the dissent in *Council* noted, if the government had appealed Council's acquittal, double jeopardy would not have barred the review of the court's decision.³⁷⁹ However, the majority's use of precedent which was based on section 3731 permitted the Fourth Circuit to allow Council's reprosecution, even though a correct application of double jeopardy case law would not have produced this result.

Fortunately, the Fourth Circuit appears to have acknowledged this mistake and rectified it by granting a rehearing and entering an order dismissing the prosecution against Council. By barring reprosecution of a judicially-acquitted defendant in the absence of an appeal by the government, the Fourth Circuit maintained the necessity of a government appeal under section 3731 in order to retry a defendant. However, the majority opinion in *Council* must still be read carefully, as it incorrectly analyzes the double jeopardy issues involved in the case.

378. See *United States v. Ceccolini*, 435 U.S. 268, 270-71 (1978) (allowing government to appeal decision where judgment of acquittal follows guilty verdict because no further factual proceedings will be needed, as finding of guilt may be reinstated).

379. *United States v. Council*, 973 F.2d 251, 258, *amended*, 1992 U.S. App. LEXIS 28890 (4th Cir. 1992).

United States v. McHan

966 F.2d 134 (4th Cir. 1992)

One of the protections that the Double Jeopardy Clause of the Fifth Amendment provides to criminal defendants is the right not to be prosecuted twice for the same offense.³⁸⁰ Courts have held that this protection prohibits prosecutors from dividing one offense into two charges³⁸¹ and from prosecuting defendants for both greater and lesser included offenses in consecutive trials.³⁸² In most cases, the Double Jeopardy Clause also prohibits the government from using conduct for which the government already has prosecuted the defendant as a necessary element of a second criminal prosecution.³⁸³

Despite these general rules, double jeopardy jurisprudence is riddled with exceptions and complexities.³⁸⁴ In recent years, the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit have struggled in applying the Double Jeopardy Clause to prosecutions for "multilayered" criminal conduct. Multilayered conduct is conduct composed of multiple acts that are distant from one another in space and/or time. Multilayered criminal conduct often underlies prosecutions for conspiracies, continuing criminal enterprise (CCE) offenses, and Racketeer Influenced and Corrupt Organizations (RICO) offenses.³⁸⁵

In the context of prosecutions for multilayered criminal conduct, the Supreme Court and the Fourth Circuit already have recognized some exceptions to traditional judicial rules concerning double jeopardy. For example, in a 1991 RICO prosecution case, *United States v. Arnoldt*,³⁸⁶ the Fourth Circuit carved out an exception to the general bar against subsequent prosecutions for greater and lesser included offenses.³⁸⁷ In RICO cases, the prosecutor must prove that the defendant committed two or more acts constituting a pattern of racketeering.³⁸⁸ The Fourth Circuit

380. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

381. *See United States v. MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986) (holding that Double Jeopardy Clause forbids division of single conspiracy into multiple violations of conspiracy statute).

382. *See Brown v. Ohio*, 432 U.S. 161, 169-70 (1977) (holding that conviction for joyriding, lesser included offense, barred prosecution for auto theft based on same incident).

383. *See Grady v. Corbin*, 495 U.S. 508, 521 (1990) (holding that Fifth Amendment barred prosecution for manslaughter because manslaughter case would necessarily include proof of conduct for which government already had prosecuted defendant).

384. *See Jeffers v. United States*, 432 U.S. 137, 151-52 (1977) (plurality opinion) (discussing recognized exceptions to rigid double jeopardy protection).

385. *See United States v. Arnoldt*, 947 F.2d 1120, 1126 (4th Cir. 1991) (stating that RICO and CCE statutes are targeted at multilayered criminal conduct), *cert. denied*, 112 S. Ct. 1666 (1992).

386. 947 F.2d 1120 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1666 (1992).

387. *See Arnoldt*, 947 F.2d at 1127 (holding that Double Jeopardy Clause does not foreclose successive prosecutions for predicate offense and RICO violation).

388. 18 U.S.C. § 1962(c) (1988).

concluded in *Arnoldt* that the defendant's prior convictions for some predicate acts did not bar the RICO prosecution.³⁸⁹

Recently, in *United States v. McHan*,³⁹⁰ the Fourth Circuit addressed two double jeopardy issues. The first issue the court examined was whether the conspiracy charge against the defendant, McHan, was the "same offense" for double jeopardy purposes as a conspiracy to which the defendant had pled guilty in a prior prosecution. The Fourth Circuit then considered whether the Fifth Amendment permitted the government to use the conspiracy to which the defendant had pled guilty as an element of a CCE charge.

In *McHan*, the United States charged Charles William McHan with various substantive drug offenses, tax evasion, conspiracy to distribute cocaine in violation of 21 U.S.C. section 846, and a CCE offense in violation of 21 U.S.C. section 848. The government based the CCE charge on allegations of marijuana importation, possession, and distribution from 1984-1988. McHan and the government formulated a plea agreement, but the parties never finalized the bargain because the government insisted that McHan's wife forfeit certain property and she refused to do so. McHan's attorneys then moved to dismiss the conspiracy and CCE counts on the grounds that these charges violated the Double Jeopardy Clause of the Fifth Amendment. McHan moved *pro se* to dismiss the entire indictment on the same grounds.

McHan's claim of a double jeopardy violation stemmed from the fact that he had pled guilty, in an earlier prosecution, to a drug conspiracy occurring from March to May of 1988. McHan argued that the 1988 conspiracy to which he had pled guilty was really part of the 1984-1986 conspiracy charged in the case at bar. Thus, the conspiracy count exposed McHan to a second prosecution for a single conspiracy offense.

McHan also argued that if the government were to prosecute him for the CCE offense after having already prosecuted him for the 1988 conspiracy, the CCE prosecution would violate the Double Jeopardy Clause. McHan pointed out that the Supreme Court already had decided, in *Jeffers v. United States*,³⁹¹ that 21 U.S.C. section 846 is a lesser included offense of 21 U.S.C. section 848.³⁹² Because the government had already prosecuted McHan under 21 U.S.C. section 846 for the 1988 conspiracy, McHan argued that the government could not prosecute him for the CCE under 21 U.S.C. section 848 because that would expose him to subsequent prosecutions for greater and lesser included offenses in violation of the Double Jeopardy Clause.

389. *Arnoldt*, 947 F.2d at 1127 (permitting government to prosecute defendant although prima facie case included as element of proof some racketeering offenses for which government had already convicted defendant).

390. 966 F.2d 134 (4th Cir. 1992).

391. 432 U.S. 137, *reh'g denied*, 434 U.S. 880 (1977).

392. *Jeffers v. United States*, 432 U.S. 137, 146 (1977).

Alternatively, McHan argued that the 1988 conspiracy would constitute one of the predicate acts that the government must prove to demonstrate a continuing course of conduct—an essential element of a CCE offense. Because the government already had convicted McHan for the 1988 conspiracy, conduct for which the government already had prosecuted McHan would constitute one of the predicate acts of the CCE charge. Therefore, McHan argued that the court should dismiss the CCE charge.

The United States District Court for the Western District North Carolina denied McHan's motion to dismiss. The district court heard testimony from McHan's alleged co-conspirators and concluded, based on evidence concerning the nature, scope, and time frames of the 1988 and 1984-1986 conspiracies, that the conspiracies were separate offenses. The district court also held that the use of the 1988 conspiracy as an element of the CCE charge did not constitute double jeopardy.

The defendant filed an interlocutory appeal from the district court's denial of his motion to dismiss the conspiracy and CCE counts. On appeal, the Fourth Circuit first considered McHan's claim that the 1988 and 1984-1986 conspiracies were one continuing conspiracy. The Fourth Circuit noted that according to *North Carolina v. Pearce* and *United States v. MacDougall*, the division of a single conspiracy into multiple counts violates the Double Jeopardy Clause.³⁹³

The Fourth Circuit relied on *United States v. Ragins*³⁹⁴ in determining whether or not the conspiracies were separate offenses. *Ragins* states that courts should examine the degree of overlap in the alleged conspiracies' time periods, locations, participants, and activities (nature and scope), as well as which statutes the conspiracies violated.³⁹⁵ The Fourth Circuit in *McHan* noted that triers of fact should apply these factors flexibly. The Fourth Circuit in *McHan* also stated that courts may consider other factors and that the law does not require any specific level of overlap to support a finding that two charges constitute one offense.

Based on the trial testimony and the indictments, the Fourth Circuit determined that the conspiracies did involve several of the same participants and that both conspiracies concerned drug activities in Texas and North Carolina. However, the earlier conspiracy involved more participants and concerned activities in a broader geographic area. The court also construed the testimony of McHan's co-conspirators to mean that there had been a true break in activities between 1986 and 1988. Based on these findings, the Fourth Circuit held that the district court's finding that there were two separate conspiracies was not clearly erroneous. Accordingly, the Fourth Circuit upheld the district court's denial of the motion to dismiss the conspiracy count.

393. See 395 U.S. 711, 717 (1969) (forbidding division of single conspiracy into multiple violations of conspiracy statute); 790 F.2d 1135, 1144 (4th Cir. 1986) (holding that government may not divide one conspiracy into multiple counts).

394. 840 F.2d 1184 (4th Cir. 1988).

395. *United States v. Ragins*, 840 F.2d 1184, 1189 (4th Cir. 1988).

The Fourth Circuit next considered the defendant's contention that the CCE count violated his constitutional protection against double jeopardy. The court began by stating that double jeopardy does not present a rigid, clear bar to certain kinds of prosecutions. Rather, governmental interest in effective prosecutions is an important factor in double jeopardy law and has contributed to the creation of various exceptions to general rules in the area. The Fourth Circuit noted that the government has a strong interest in prosecuting repeat offenders under the CCE statute and similar provisions.

The Fourth Circuit then examined pertinent precedent and recognized the existence of two lines of double jeopardy cases. The first line of cases, upon which the defendant primarily relied, includes cases wherein the government based charges for multiple offenses on a single course of criminal conduct. For example, in *Brown v. Ohio*³⁹⁶ the defendant faced prosecution for auto theft and joyriding based on a single incident of taking a car and driving it.³⁹⁷ In *Grady v. Corbin*³⁹⁸ a New York trial court fined the defendant for two misdemeanor traffic violations and later indicted the defendant for manslaughter because he killed another motorist in a traffic accident.³⁹⁹ The United States Supreme Court held in both *Brown* and *Grady* that the government's charging violated the Double Jeopardy Clause.⁴⁰⁰

The second line of cases includes those in which the prosecutions focused on multilayered conduct. These cases include *United States v. Felix*⁴⁰¹ and *Garrett v. United States*.⁴⁰² In *Felix*, the United States Supreme Court held that subsequent prosecutions for a conspiracy and an overt act in furtherance of the conspiracy did not violate the Double Jeopardy Clause.⁴⁰³ While the *Felix* Court based its decision on the traditional concept that conspiracies and underlying crimes are separate offenses, the *Felix* Court stated in dicta that the rule in *Brown* does not apply to multilayered conduct cases.⁴⁰⁴ The *Garrett* Court held that subsequent prosecutions for a CCE offense and a predicate act did not violate the Double Jeopardy Clause because essential evidence supporting the second prosecution did not develop until after the first prosecution.⁴⁰⁵ As in *Felix*,

396. 432 U.S. 161 (1977).

397. *Brown v. Ohio*, 432 U.S. 161, 162 (1977).

398. 495 U.S. 508 (1990).

399. *Grady v. Corbin*, 495 U.S. 508, 511, 513 (1990).

400. *See id.* at 521 (holding that Fifth Amendment barred prosecution for manslaughter because manslaughter case would necessarily include proof of conduct for which government already had prosecuted defendant); *Brown*, 432 U.S. at 169-70 (holding that conviction for joyriding, lesser included offense, barred prosecution for auto theft based on same incident).

401. 112 S. Ct. 1377 (1992).

402. 471 U.S. 773, *reh'g denied*, 473 U.S. 927 (1985).

403. *United States v. Felix*, 112 S. Ct. 1377, 1379-80 (1992).

404. *Id.* at 1385.

405. *Garrett v. United States*, 471 U.S. 773, 791 (1985).

the Court in *Garrett* suggested in dicta that the *Brown* rule does not apply to multilayered conduct cases.⁴⁰⁶

In the Fourth Circuit's *McHan* analysis, the legal test that courts should apply to determine whether there is a double jeopardy violation in a particular case depends on whether that case more closely resembles *Brown* and *Grady* or *Felix* and *Garrett*. Refusing to view the rules of *Brown* and *Grady* as absolutes, the Fourth Circuit stated that the rules in those cases apply only to similar "single course of action" cases. In cases involving multilayered conduct, courts must apply a different legal test to determine whether proceeding to trial on the charging document would violate the Fifth Amendment. The Fourth Circuit based this decision on the dicta in *Garrett* and *Felix* which suggest that the analysis of *Brown* is not a useful tool in cases of multilayered conduct.

In multilayered conduct cases, the Fourth Circuit concluded, the government is permitted to prosecute the defendant for both a predicate offense and a multilayered crime provided that the offenses meet the two-prong test of *Garrett*. The *Garrett* test requires that the government prove that the legislature intended for the two offenses to be separate criminal offenses that are punishable cumulatively. The *Garrett* test also requires that the offenses do not have identical elements.⁴⁰⁷

The Fourth Circuit concluded that the case at bar clearly involved multilayered conduct because the government based the CCE charge on conspiracies that occurred years apart. The court then applied the *Garrett* test. The Fourth Circuit relied entirely on the decision of the *Garrett* case to conclude that Congress intended CCE offenses to be separate from the predicate offenses. Turning to the question of identical elements, the Fourth Circuit reasoned that the CCE and the embedded conspiracy did not have identical elements because the government would need to prove more than one conspiracy to support a CCE charge. The Fourth Circuit, therefore, upheld the district court's decision to deny McHan's motion to dismiss the CCE count.

Circuit Judge Hall wrote a brief concurrence. He expressed distaste for the manner in which the government handled the aborted plea agreement with the defendant. Judge Hall stated that the government should not demand the release of property by a prisoner's loved ones as a condition of a plea agreement, even if the government has a legitimate forfeiture claim to the property.

The *McHan* decision is a natural outgrowth of a trend in the Supreme Court's reasoning manifested in *Felix* and *Garrett*, but the Fourth Circuit went a step farther than existing Supreme Court precedent. *Felix* and *Garrett* certainly suggest that the *Brown* analysis is not applicable in cases

406. See *id.* at 789 (suggesting that *Brown* analysis is not useful tool in multilayered conduct cases).

407. See *id.* at 786 (setting out test for whether successive prosecutions in multilayered conduct cases violate Double Jeopardy Clause).