Up 24 Ct anon
The
wjb
He
dist.

Nos. 09-1494 & 09-1606

DATE OF DECISION
JUN 29 2010

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

U.S.C.A. – 7th Circuit
RECEIVED
JUL 21 2010 LEJ
GINO J. AGNELLO
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

MICKEY LONIELLO, NATHANIEL AGUILAR, and WALTER THORNTON,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
The Honorable James B. Zagel, Presiding
Case Nos. 05 CR 813 & 07 CR 336

DEFENDANTS-APPELLEES' COMBINED PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

Steven Shobat
53 West Jackson Boulevard
Suite 1603
Chicago, Illinois 60604
(312) 353-2118 (telephone)

Beau Brindley
53 West Jackson Boulevard
Suite 1001
Chicago, Illinois 60604
(312) 782-4615 (telephone)

Sarah O. Schrup*
BLUHM LEGAL CLINIC
Northwestern University School of Law
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-0063 (telephone)

* *Counsel of Record*

DISTRIBUTED TO JUDGES:

X	EASTERBROOK	1 Copies
X	BAUER	1 Copies
□	CUDAHY	Copies
X	POSNER	1 Copies
□	COFFEY	Copies
X	FLAUM	2 Copies
□	RIPPLE	Copies
□	MANION	Copies
X	KANNE	2 Copies
X	ROVNER	2 Copies
X	WOOD, D.	2 Copies
X	EVANS	2 Copies
X	WILLIAMS	2 Copies
X	SYKES	1 Copies
X	TINDER	0 Copies
X	HAMILTON	0 Copies

U.S.C.A. – 7th Circuit
FILED
JUL 21 2010 SP
GINO J. AGNELLO
CLERK
Doc. #

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 09-1494, 09-1606

Short Caption: USA v. Thornton, USA v. Loniello & Aguilar (CONSOLIDATED)

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[✓] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Walter Thornton

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Sarah Schrup & Jeff Urdangen, Northwestern University School of Law

Luis Galvan, Carrie Manning, Federal Defender Program

Ellen Domph, Law Offices of Ellen Domph, Gerald Collins, Law Offices of Gerald Collins

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: Sarah Schrup Date: June 25, 2009

Attorney's Printed Name: Sarah Schrup

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [X] **No** [ ]

Address: Northwestern University School of Law, 375 E. Chicago Ave
Chicago, IL 60611

Phone Number: 312-503-0063 Fax Number: 312-503-8977

E-Mail Address: s-schrup@law.northwestern.ed

rev. 01/08 AK

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 09-1494, 09-1606

Short Caption: USA v. Thornton, USA v. Loniello & Aguilar (CONSOLIDATED)

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[✓] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Mickey Loniello

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Steven Shobat, Law Offices of Steven Shobat

Daniel J. Hesler, Federal Defender Program

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: _____ Date: June 25, 2009

Attorney's Printed Name: Steven Shobat

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [X] **No** [ ]

Address: 53 W. Jackson, Suite 1603
Chicago, IL 60604

Phone Number: 312-353-2118 Fax Number: 312-913-0382

E-Mail Address: steven.shobat@sbcglobal.net

rev. 01/08 AK

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 09-1494, 09-1606

Short Caption: USA v. Thornton, USA v. Loniello & Aguilar (CONSOLIDATED)

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[✓] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Nathaniel Aguilar

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Law Offices of Beau Brindley

Daniel J. Hessler, Federal Defender Program

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: _____ Date: June 25, 2009

Attorney's Printed Name: Beau Brindley

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [X] **No** [ ]

Address: 53 W. Jackson, Suite 1605
Chicago, IL 60604

Phone Number: 312-765-8878 Fax Number: 312-804-9882

E-Mail Address: bbrindley@brindleylaw.com

rev. 01/08 AK

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, RULES AND REGULATIONS

FEDERAL RULE OF APPELLATE PROCEDURE 35 STATEMENT REGARDING REASONS FOR REHEARING

The panel decision is in conflict with *Prince v. United States*, 352 U.S. 322 (1957), which found that the two paragraphs of 18 U.S.C. § 2113(a) define a single crime and a lesser-included offense, not two crimes. The panel's method of reaching this erroneous conclusion is also independently in conflict with the Supreme Court's holdings in *Blockburger v. United States*, 284 U.S. 299 (1932) and *Garrett v. United States*, 471 U.S. 773 (1985), as well as the doctrine of constitutional avoidance (*New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979)) and the Rule of Lenity (*Bell v. United States*, 349 U.S. 81 (1955)). The panel violated *Garrett*'s teaching that the tools of statutory interpretation should apply before the *Blockburger* test. The panel then applied the *Blockburger* elements test to a single statutory provision, contravening the plain terms of the test itself. Finally, the panel reaffirmed a long-standing circuit split, *United States v. Loniello*, Nos. 09-1494 & 09-1606, slip op. at 15 (7th Cir. June 29, 2010), but did not circulate the opinion under 7th Cir. R. 40(e), which is also grounds for *en banc* rehearing. Fed. R. App. P. 35(b)(1)(B). In short, the panel addressed and decided an issue of constitutional import that it did not need to reach (*Beazer*) and failed to interpret an ambiguous provision in favor of a criminal defendant (*Bell*).

INTRODUCTION

The panel decision reaches out beyond the confines of the case to clarify law that is not before the Court. It also reaches out beyond the text of the statute to resolve a constitutional issue that would never need to arise if the statute were properly interpreted in the first place. Both of these errors place the panel's opinion in conflict with binding Supreme Court precedent, as well other opinions of panels of this court and other circuits. This combination of errors warrants review by the full Seventh Circuit *en banc*.

Walter Thornton was convicted of bank robbery under 18 U.S.C. § 2113(a) para. 1, but his conviction was reversed by this Court on appeal, *United States v. Thornton*, 539 F.3d 741 (7th Cir. 2008). Mickey Loniello and Nathaniel Aguilar were acquitted of robbing a bank under 18 U.S.C. § 2113(a) para. 1 when *Thornton* was decided, and the prosecutor proceeded to charge all three with illegal entry of a bank under 18 U.S.C. § 2113(a) para. 2. A panel of this court declared that the two paragraphs defined separate crimes, even though they are enumerated without distinction in the same subsection and connected by the disjunctive "or." This holding directly contradicts the Supreme Court's holding in *Prince v. United States*, 352 U.S. 322 (1957), which found the two paragraphs of subsection (a) to define a single crime and a lesser-included offense, not two crimes. The panel's method of reaching this erroneous conclusion is also independently in conflict with the Supreme Court's holdings in *Blockburger v. United States*, 284 U.S. 299, 304 (1932) and *Garrett v. United States*, 471 U.S. 773 (1985), as well as the doctrine of constitutional avoidance (*New York Transit Auth. v. Beazer*, 440 U.S. 568

(1979)) and the Rule of Lenity (*Bell v. United States*, 349 U.S. 81, 83 (1955)). These compounded errors warrant *en banc* rehearing.

BACKGROUND

Mickey Loniello, Nathaniel Aguilar, and Walter Thornton were acquitted of violating 18 U.S.C. § 2113(a) para. 1, which criminalizes the taking of property from a bank by force, violence, or intimidation. *United States v. Loniello*, Nos. 09-1494 & 09-1606, slip op. at 3 (7th Cir. June 29, 2010). After acquittal, the prosecutor then obtained new indictments charging a violation of § 2113(a) para. 2, which criminalizes the entry into a bank with the intent of committing a felony affecting the bank.[1] The district court ruled that the two paragraphs of § 2113(a) defined a single offense with multiple methods of commission and dismissed the indictments under the Double Jeopardy Clause of the Fifth Amendment. *Loniello*, slip op. at 3. A panel of this court reversed, holding that the two paragraphs of § 2113(a) define separate offenses for which subsequent prosecutions are constitutionally permitted. *Id.* at 16.

---

[1] Broadly stated, the two paragraphs criminalize "robbery" and "illegal entry of a bank," respectively, but the Supreme Court has very strongly cautioned against reading too much into the common-law definitions of those categories. *Milanovich v. United States*, 365 U.S. 551, 554 (1961); *Prince*, 352 U.S. at 323 n.2. The panel rightly ignored the Government's repeated invocation of common-law categories in defining the statutory crimes. *See, e.g.*, Government Reply Br. at 5.

ARGUMENT

I. The Panel Decision Conflicts Directly With *Prince* And Widens An Existing Circuit Split

A. The Panel Decision Conflicts With *Prince*

The panel decision conflicts with the Supreme Court's holding in *Prince v. United States*, 352 U.S. 322 (1957). Applying the ordinary tools of statutory interpretation, *Prince* held that "it was manifestly the purpose of Congress to establish lesser offenses" in the two paragraphs of 18 U.S.C. § 2113(a), explicitly rejecting the Government's argument that they were "each a completely independent offense."[2] *Prince*, 352 U.S. at 327. The panel, however, concluded that "[p]aragraphs 1 and 2 of § 2113(a) create different offenses." *Loniello*, slip op. at 5. *En banc* rehearing is therefore "necessary to secure . . . th[is] [C]ourt's decisions." Fed. R. App. P. 35(a)(1).

The panel opinion incorrectly expands both Appellees' and *Prince*'s argument to cover all five sections of 18 U.S.C. § 2113. *Loniello*, slip op. at 10 ("Thus we arrive at [Appellees'] second line of argument: that *Prince* jettisoned *Blockburger* for § 2113 and establishes that all of its five substantive subsections create one offense."). To the contrary, *Prince*'s holding was explicitly constrained to "robbery or an entry for that

---

[2] The panel stated that Appellees did not argue that the second paragraph of § 2113(a) is a lesser-included offense of the first paragraph of § 2113(a). *Loniello*, slip op. at 8. Appellees, however, specifically raised this argument as an independent basis for affirmance if the court reached the *Blockburger* question. *See* Appellee Br. at 53 n.8. The panel therefore overlooked Appellees' argument that that § 2113(a) para. 2 is a lesser-included offense of § 2113(a) para. 1, which constitutes an independent reason to grant either panel or *en banc* rehearing. Fed. R. App. P. 35(b)(1)(A); 40(a)(2) (stating that rehearing is appropriate if the panel "overlooked or misapprehended" a "point of law or fact" and in so doing misapplied a binding precedent of the Supreme Court).

purpose," *Prince*, 352 U.S. at 329, as delineated in § 2113(a), and did not address the other sections of § 2113 except when analyzing the structure of the statute as a whole, *id.* at 324-27. The panel correctly observes that *dicta* in *Prince* describe multiple crimes codified in *§ 2113 as a whole*, *Loniello*, slip op. at 12, but incorrectly reads that as stating that *Prince* found multiple crimes in *§ 2113(a) alone*. *Prince* clearly rejected exactly that conclusion. *Prince*, 352 U.S. at 327. In short, the panel reached out to resolve a question that was not before the Court, and in so doing misapplied *Prince* to the case before it.

Moreover, this initial error led the panel to misapply other Supreme Court decisions that explicate other statutory provisions, not § 2113(a). *Heflin v. United States*, 358 U.S. 415 (1959), examined whether § 2113(c) (receiving stolen loot) merged into the § 2113(a) robbery offense itself and concluded that § 2113(c) was intended "to reach a new group of wrongdoers" with a set of separate crimes, *Heflin*, 358 U.S. at 420, that were unsurprisingly codified in a separate statutory subsection. *Heflin*'s holding is inapplicable to a case limited to two indictments under § 2113(a), which do not reach two different groups of wrongdoers. *Prince*'s description of the congressional intent in amending § 2113 in 1937 described a Congress determined to punish people who commit the same crime but who might not fulfill all of the elements of a common-law robbery. *Prince*, 352 U.S. at 325-28. The "heart of the crime" wording (which the Government impugns by association, Appellant Br. at 29 n.9, without analysis) demonstrates that Congress's amendment of § 2113 intended to catch the same group of

wrongdoers more effectively, not to catch a different group of wrongdoers.[3] The fact that *Heflin* focused on "a new group of wrongdoers" punished by a different statutory subsection strengthens the assertion from *Prince* that only one crime is described in § 2113(a). Congress intended to make the same net stronger, not to create a different net.

Along the way, however, the *Heflin* Court characterized its holding in *Prince* very clearly: "We held in *Prince* . . . that the crime of entry into a bank with intent to rob was not intended by Congress to be a separate offense from the consummated robbery." *Heflin*, 358 U.S. at 419 (citation omitted). The Court very clearly applied the Rule of Lenity: "We gave the Act that construction because we resolve an ambiguity in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act." *Id. Heflin*'s holding addresses a completely different statutory provision, enumerated in a separate subsection from the one before the panel, and independently reinforces the holding of *Prince* that the panel rejected. The panel's error in interpreting *Prince* led it to misapply other Supreme Court precedents to a factually and legally inapposite case.

---

[3] For similar reasons, the panel's application of the cases following *Prince* (*Milanovich*, 365 U.S. 551, *United States v. Gaddis*, 424 U.S. 544 (1976), and *Carter v. United States*, 530 U.S. 255 (2000)) is misguided. All of those cases are applicable, at best, to a completely different situation: the statutory construction of § 2113(c) in conjunction with § 2113(a) (or § 2113(a) and (c), in the case of *Carter*). The panel fails to explain why a statutory construction applicable to *two different subsections* could apply without change to *two undifferentiated paragraphs in the same subsection.* All *Milanovich, Gaddis,* and *Carter* confirm is that § 2113(a), (b), and (c) describe separate crimes, which is neither surprising nor relevant to an interpretation of § 2113(a) standing alone.

B. The Panel Decision Widens An Existing Circuit Split Regarding *Prince*

The panel takes as given that "the *Prince* line of decisions requires merger of sentences, not of offenses," *Loniello*, slip op. at 15, but this is an issue on which courts of appeals have split. The Sixth Circuit noted that some circuits have interpreted *Prince* as merging the whole offense (First and Second Circuits), while others interpret *Prince* as only sanctioning merger for the purposes of sentencing (Third and Fourth Circuits.) *Bryan v. United States*, 721 F.2d 572, 574-75 (6th Cir. 1983). The Eleventh Circuit has also noted the conflict, listing the Seventh Circuit alongside the First and Second Circuits, in opposition to the Third, Fourth, Sixth, and Eleventh Circuits. *United States v. Johnson*, 709 F.2d 639, 641 n.4 (11th Cir. 1983). The panel even acknowledged that some conflict among the circuits remains on this issue, *Loniello*, slip op. at 15, but did not circulate the opinion under 7th Cir. R. 40(e). The panel opinion took a side in a longstanding conflict among the circuits, which warrants *en banc* rehearing. Fed. R. App. P. 35(b)(1)(B).

The panel dismisses this conflict by noting that *Carter v. United States*, 530 U.S. 255 (2000), should override the reasoning of *Rutledge v. United States*, 517 U.S. 292 (1996), which reinforced a broader rule that convictions, and not only sentences, matter for double jeopardy purposes. *See also Ball v. United States*, 470 U.S. 856, 861, 864-65 (1985). *Carter*, as discussed *supra*, n.3, held that § 2113(a) and (b) create separate offenses. *Carter*, 530 U.S. at 259. The panel's confidence that, as a consequence of *Carter*, "the *Prince* line of decisions requires merger of sentences, not of offenses," *Loniello*, slip op. at 15, is misplaced, however. Circuit courts have split on precisely that point. Moreover, *Carter* addressed two separately enumerated subsections (§ 2113(a) and (b)), while

Prince addressed two paragraphs within the same subsection (§ 2113(a)). Reading *Prince* together with *Rutledge* and *Ball* does not at all "contradict *Carter*," *Loniello*, slip op. at 15, because *Prince* and *Carter* do not address the same statutory structure. Indeed, reading *Prince* together with *Rutledge* and *Ball* would suggest that the panel's expansive reading of *Prince* is inapplicable to this case and needlessly deepens a split among the circuits. The panel relies on later cases that expand *Prince* to address two separate statutory provisions (*Heflin*, *Milanovich*, *Gaddis*, and *Carter*) as a way to avoid application of the reasoning in *Rutledge* and *Ball* in this case. Such reliance would be appropriate in a different case involving two distinct statutory provisions, but is inappropriate in this case, where only one provision is at stake. By expanding the inquiry to address an issue not before the court, the panel has deepened a conflict with other circuit courts of appeals.

II. The Panel's Method Conflicts With *Blockburger* And *Garrett*

The panel's decision also violates the clear statement of the *Blockburger* test, which establishes as a threshold that it can only be applied to "violation[s] of two distinct statutory provisions." *Blockburger*, 284 U.S. at 304. Compounding this error, the panel also fails to apply the threshold established in *Garrett*, 471 U.S. 773 (1985): statutory construction and determination of legislative intent should apply before the *Blockburger* test is ever invoked. Notably, the *Prince* Court declined to apply the then-23-year-old *Blockburger* test to the statutory provision before it, preferring instead to apply the ordinary tools of statutory interpretation. *Prince*, 352 U.S. at 327-28. *Prince* applied the Rule of Lenity to resolve the statutory ambiguity in a manner that would punish

"multiple aspects of the same criminal act" only once. *Heflin*, 358 U.S. at 419. Between *Prince* and *Heflin*, the Supreme Court has clearly stated that *Blockburger* does not apply to § 2113(a) taken in isolation, and the proper statutory construction under the Rule of Lenity delineates only one offense. Defying that precedent, the panel incorrectly applies *Blockburger* to an inapposite case.

Garrett instructs courts to turn to ordinary methods of statutory interpretation before leaping to the constitutional ramifications of the *Blockburger* test. *Blockburger*, in turn, encourages the same judicial restraint by imposing, as a threshold inquiry, a limitation on its application to "violations of two distinct statutory provisions." By skipping past these thresholds, the panel implicitly excused a naked legal error by the Government. "The prosecutor's argument on appeal . . . starts with *Blockburger* . . . ." *Loniello*, slip op. at 4. Under *Garrett*, starting with *Blockburger* rather than statutory interpretation is legal error. *Garrett*, 471 U.S. at 778-79.[4] The panel erroneously viewed statutory interpretation and *Blockburger* as alternative approaches rather than a threshold and substantive pair. *See Loniello*, slip op. at 8 ("We think *Blockburger* much superior to making everything turn on how the subheadings of the United States Code are arranged."). Indeed, the panel never made any attempt to divine the intent of Congress: it never conducted any independent statutory construction at all, but rather

[4] Starting with *Blockburger* also violates this Court's command in *United States v. Makres*, 598 F.2d 1072, 1074 (7th Cir. 1979) ("Because applying the *Blockburger* test amounts to deciding a constitutional question, it is appropriate to decide the question of statutory construction first."). Such a violation is an independent reason for this Court to grant *en banc* rehearing, in order "to secure . . . the uniformity of the court's decisions." Fed. R. App. P. 35(b)(1)(A).

simply skipping Appellees' analysis in order to jump directly to *Blockburger*, *see Loniello*, slip op. at 5-10. This approach further violates the principle of constitutional avoidance: a court should refrain from deciding constitutional questions when the case before it could be resolved by statutory construction. *United States v. Neal*, No. 08-3611, ___ F.3d ___, slip op. at 6-7 (7th Cir. July 6, 2010) (Easterbrook, C.J.). The panel violates *Garrett*'s teaching by skipping construction of the statute and diving directly into a constitutional question.[5]

The panel incorrectly applied *Blockburger* to a single statutory provision, notwithstanding the Supreme Court's clear statement that it was only relevant when "violation[s] of two distinct statutory provisions" were being compared. *Blockburger*, 284 U.S. at 304. In every case in which the Supreme Court has applied *Blockburger*, two clearly separate provisions were involved, with a single exception. *See* Appellee Br. at 50 n.5 (collecting cases). The sole exception is *Brown v. Ohio*, 432 U.S. 161 (1977), which involved separately enumerated subsections of the Ohio Code (§ 4549.04(A) & (D)). In *Brown*, however, one subsection explicitly defined a felony while the other defined a misdemeanor, *Brown*, 432 U.S. at 162-63 & nn.1-2, and the distinction was reflected in the numbering structure of the statute, so the provisions were obviously "two distinct statutory provisions." Likewise, the Seventh Circuit has only ever applied *Blockburger* to

[5] *Carter* is instructive on this point as well. Although in a slightly different context, the Court explicitly reaffirmed its insistence that statutory interpretation must precede the application of an elements test. *Carter*, 530 U.S. at 262-63 (addressing the elements test for a lesser-included offense in *Schmuck v. United States*, 489 U.S. 705 (1989)). To the extent the panel wishes to rely on *Carter* as applicable regarding *Prince*, the case only proves its error regarding *Garrett*.

two separately enumerated provisions, *see* Appellee Br. at 51-52 & n.6 (collecting cases), with the sole exception of *United States v. Dennison*, 730 F.2d 1086 (7th Cir. 1984) (per curiam). Even in *Dennison*, however, this Court applied *Blockburger* to separately enumerated subsections (15 U.S.C. § 1644(a) & (b)) that described facially distinct crimes. *See Dennison*, 730 F.2d at 1087-88. The panel and the Government rely on *the only two potential exceptions in the jurisprudence of both this Court and the Supreme Court* (neither of which actually is a principled exception in the end) in order to evade the plain statement that *Blockburger* only applies to "two distinct statutory provisions." This *sui generis* reasoning places the panel in conflict with *Blockburger*.

Moreover, when the panel does turn to an analysis of whether the two paragraphs establish two separate crimes, it deliberately ignores textual cues that Congress and the Supreme Court use as a matter of course to aid in statutory construction. "Congress ordinarily adheres to a hierarchical scheme in subdividing statutory sections." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004). The Supreme Court has accorded a great deal of weight to the hierarchical numbering of crimes. *See, e.g., Kucana v. Holder*, 130 S. Ct. 827, 835-38, 560 U.S. ___ (2010) (interpreting "under this subsection"); *United States v. O'Brien*, No. 08-1569, 560 U.S. ___, slip op. at 5-16 (May 24, 2010) (focusing on subparagraph structure to identify an offense element or a sentencing enhancement); *United States v. Chambers*, 129 S. Ct. 687, 691, ___ U.S. ___ (2009) (turning to substructure of Illinois criminal statute in order to determine whether failure-to-report escape and escape should both be considered "crime[s] of violence"). Additionally, the paragraphs of § 2113(a) receive only one punishment, but the

paragraphs of § 2113(b) each have a separate punishment clause. To the extent the structure of the statute as a whole has bearing on the interpretation of the sole clause at stake in this case (§ 2113(a)), the structure militates toward finding a single offense in § 2113(a). *See U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("Statutory construction is a holistic endeavor . . . and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.") (internal quotation and citation omitted). Even seemingly formalistic textual cues such as statutory structure and word choice matter in conducting a full statutory analysis.

The panel states that Appellees "make[] too much," *Loniello*, slip op. at 5, of one of the ordinary tools of statutory interpretation, and the Government derides it as "excessively formalistic," Gov't Reply Br. at 4. Both the panel and the Government attempt to place an ironic twist on "the humane interests safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." *United States v. Halper*, 490 U.S. 435, 447 (1989) (Blackmun, J.) (internal quotation and citation omitted). In the ordinary double jeopardy context, a court is supposed to guard the defendant's humane interests when they conflict with the formalistic defenses advanced by the state. *Id.* Here, by contrast, where a *defendant* invokes formalistic arguments in defense of himself, the Government pleads "excessive formalism." "[T]he [D]ouble [J]eopardy Clause was written into the Fifth Amendment" to protect "humane interests," not governmental interests. *United States v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J.,

concurring). The "exaltation of form over substance" at stake in *Dennison*, 730 F.2d at 1089, is problematic when it is used *against* the defendant, not in his favor.

Protestations of "excessive formalism" are especially problematic when they are used as an excuse to forgo ordinary statutory interpretation. The numbering system that Appellees "make[] too much of," *Loniello*, slip op. at 5, was written and enacted by Congress, but the panel singlehandedly dismisses it as "the work of the Office of the Law Revision Counsel," *id.* at 5-6, insisting that form does not matter. The form of an order entered by a trial court matters—sometimes decisively—for double jeopardy purposes. *Sanabria v. United States*, 437 U.S. 54, 66 (1978) ("While form is not to be exalted over substance in determining the double jeopardy consequences of a ruling terminating a prosecution ... neither is it appropriate entirely to ignore the form of order entered by the trial court.") (internal citation omitted). No less is there a reason to ignore the form of statute described by Congress, especially if statutory construction is the primary method a court should apply in order to resolve the issue before it, *see Garrett*, 471 U.S. at 778-79; *United States v. Makres*, 598 F.2d 1072, 1074 (7th Cir. 1979). Nevertheless, the panel stated that starting from the text and structure of the statute "makes too much of the numbering system," *Loniello*, slip op. at 5, and writes off the statutory text as "the work of the Law Revision Counsel rather than the legislature," *id.* at 6, with no evidence of the latter claim. The panel relied on this unsupported assertion in order to discard the plain text and structure of the statute and downplay the fact that this statute was passed by both houses of Congress, signed by the President, and

codified as law. This approach violates the clear command of both *Garrett* and *Blockburger*.

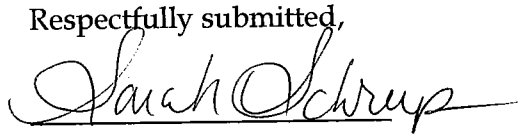
III. The Panel Fails to Apply The Rule of Lenity As Articulated By *Bell*

The panel also failed to apply the Rule of Lenity when faced with an instance of statutory ambiguity, in conflict with *Bell v. United States*, 349 U.S. 81, 83 (1955) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."). First, *Prince* itself found § 2113(a) in isolation sufficiently ambiguous that it decided the case under the Rule of Lenity without ever reaching *Blockburger*. *Heflin*, 358 U.S. at 419; *Prince*, 352 U.S. at 327-29. The panel erred in not doing likewise. Second, assuming *arguendo* that the panel is correct that *Blockburger* applies and also correctly applies *Garrett*'s prohibition against reaching *Blockburger* if the statute is clear—neither of which is the case, as discussed above—then the panel necessarily found that the statute was ambiguous. If the statute is ambiguous, then "doubt will be resolved against turning a single transaction into multiple offenses." *Bell*, 349 U.S. at 84. If indeed the panel committed no error in reaching *Blockburger* in the fashion it did, then it *did* commit error in failing to apply the Rule of Lenity to the interpretation of an ambiguous statute defining offenses. As with the other errors, this conflict with a binding Supreme Court precedent is sufficient reason to grant *en banc* rehearing. Fed. R. App. P. 35(b)(1)(A).

CONCLUSION

For all of the foregoing reasons, Defendants-Appellees respectfully request that the panel rehear this case or that the full Court rehear this appeal *en banc*.

Respectfully submitted,



Counsel of Record

Steven Shobat
53 West Jackson Boulevard
Suite 1603
Chicago, Illinois 60604
(312) 353-2118 (telephone)

Beau Brindley
53 West Jackson Boulevard
Suite 1001
Chicago, Illinois 60604
(312) 782-4615 (telephone)

Sarah O. Schrup
BLUHM LEGAL CLINIC
Northwestern University School of Law
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-0063 (telephone)

Dated: July 21, 2010

CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Defendant-Appellees, Mickey Loniello, Nathaniel Aguilar, and Walter Thornton, hereby certifies that on July 21, 2010, two copies of the Petition and a digital file containing the brief were sent to the following counsel for the United States:

Patrick J. Fitzgerald
Edmond E. Chang
Stuart D. Fullerton
219 South Dearborn Street
Chicago, Illinois 60604

Sarah O. Schrup

BLUHM LEGAL CLINIC
Northwestern University School of Law
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-0063 (telephone)

Attorney for Defendant-Appellee Walter Thornton and Counsel of Record

Dated: July 21, 2010