In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

Nos. 09-1494, 09-1606 (consolidated)

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

MICKEY LONIELLO and NATHANIEL AGUILAR,

Defendants-Appellees.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

WALTER THORNTON,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 07 CR 336, 05 CR 813 — James B. Zagel, *Judge*.

BRIEF AND APPENDIX OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

No. 09-1494 On October 18, 2007, defendants Loniello and Aguilar were charged in a superseding indictment with attempted bank robbery in violation of 18 U.S.C. § 2113(a), ¶ 1 (Count One), and with carrying a firearm during the commission of the attempted bank robbery in violation of 18 U.S.C. § 924(c) (Count Two). 07 CR 336 R. 53. The district court had jurisdiction under 18 U.S.C. § 3231.[1] Aguilar tried his case to a jury, which convicted him of Count One on July 22, 2008; Loniello was simultaneously tried by the district court, and he was convicted of Count One on July 23, 2008. 07 CR 336 R.116, 139.[2]

On August 28, 2008, following this Court's opinion in *United States v. Thornton*, 539 F.3d 741 (7th Cir. 2008), a federal grand jury returned a second superseding indictment, charging defendants with a violation of: (a) 18 U.S.C. § 2113(a), ¶ 2—attempting to enter a bank with the intent to commit a felony, namely, a bank robbery (Count One); and (b) 18 U.S.C. § 371—conspiracy to commit bank robbery, in violation of 18 U.S.C. § 2113(a), ¶ 1 (Count Two). 07 CR 336 R.140. The district court had jurisdiction under 18 U.S.C. § 3231.

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[1]Citation formats are as follows: (a) docket entries are "07 CR 336 R." or "05 CR 813 R." followed by the entry number and (b) the government's appendix is "App." followed by the page number.

[2]On May 2, 2008, before the trials, the district court dismissed Count Two of the superseding indictment. 07 CR 336 R.77.

On August 29, 2008, the district court granted defendants' "*Thornton*" motions for acquittal on Count One of the superseding indictment without objection from the government. 07 CR 336 R.178 at 5 (App. 5). Defendants then sought to dismiss Count One of the second superseding indictment on double jeopardy grounds and to dismiss Count Two of the second superseding indictment on grounds of issue preclusion. On January 28, 2009, the district court granted defendants' double-jeopardy motions, but denied the motions to dismiss Count Two of the second superseding indictment. 07 CR 336 R.178 at 12, 14 (App. 12, 14). This order was entered on the docket on January 29, 2009. 07 CR 336 R.178 (App. 1).

The government timely filed a notice of appeal on February 24, 2009. 07 CR 336 R.180. This Court has jurisdiction over the government's appeal pursuant to 18 U.S.C. § 3731.

No. 09-1606 On January 25, 2006, defendant Thornton was charged in an indictment with attempted bank robbery in violation of 18 U.S.C. § 2113(a), ¶ 1, and with carrying a firearm during the commission of that crime in violation of 18 U.S.C. § 924(c). 05 CR 813 R.10. The district court had jurisdiction under 18 U.S.C. § 3231.

Following a trial, defendant was convicted of both counts in the indictment and sentenced to 132 months' imprisonment. 05 CR 813 R.89. Following the

reversal of his convictions in *United States v. Thornton*, 539 F.3d 741 (7th Cir. 2008), Thornton was charged in a superseding indictment with conspiracy to commit bank robbery, in violation of 18 U.S.C. § 371 (Count One); attempted entry into a bank with intent to commit a felony affecting the bank, in violation of 18 U.S.C. § 2113(a),¶1 (Count Two); and possession of a firearm in furtherance of the bank robbery conspiracy, in violation of 18 U.S.C. § 924(c) (Count Three). 05 CR 813 R.111. The district court had jurisdiction under 18 U.S.C. § 3231.

On February 12, 2009, the district court granted Thornton's motion to dismiss Count Two on double-jeopardy grounds, adopting the reasoning of its earlier decision in *United States v. Loniello, et al.*, 07 CR 336. 05 CR 813 R.140 at 2-3 (App. 16-17). This order was entered on the docket on February 13, 2009. R. 140. On March 4, 2009, the government filed a timely notice of appeal from this dismissal, 05 CR 813 R.146, and this Court has jurisdiction over the appeal pursuant to 18 U.S.C. § 3731.[3] By order dated May 4, 2009, this Court granted the government's request to consolidate these appeals for briefing and disposition.

[3] The district court also dismissed the § 924(c) count against Thornton, 05 CR 813 R.140 at 7-8 (App. 21-22), but the government is not appealing from this dismissal.

ISSUES PRESENTED FOR REVIEW

The district court dismissed the § 2113(a), ¶ 2 counts on grounds of double jeopardy. Did the district court err in doing so where the first and second paragraphs of § 2113(a) satisfy the *Blockburger* test for two distinct offenses, since each provision requires proof of a fact which the other does not: evidence that a defendant attempted to enter a bank with the intent to commit a bank robbery in violation of § 2113(a), ¶ 2 (which requires proof of attempted entry), will not support an indictment under § 2113(a), ¶ 1, where the government must prove the use of actual force and violence or intimidation (but not necessarily attempted entry)?

STATEMENT OF THE CASE

No. 09-1494 On October 18, 2007, Mickey Loniello and Nathaniel Aguilar were charged in a superseding indictment with attempted bank robbery in violation of 18 U.S.C. § 2113(a), ¶ 1 (Count One), and with carrying a firearm during the commission of the attempted bank robbery in violation of 18 U.S.C. § 924(c) (Count Two). 07 CR 336 R.53. The district court had jurisdiction under 18 U.S.C. § 3231. Aguilar tried his case to a jury, which convicted him of Count One on July 22, 2008; Loniello was simultaneously tried by the district court, and he was convicted of Count One on July 23, 2008. 07 CR 336 R.116, 139. (On May 2, 2008, the district court dismissed Count Two of the superseding

indictment, finding that defendants had been entrapped as a matter of law as to that count. 07 CR 336 R.77.)

On August 26, 2008, this Court issued its opinion in *United States v. Thornton*, 539 F.3d 741 (7th Cir. 2008). In *Thornton*, the Court held that in order for a defendant to be convicted under the first paragraph of 18 U.S.C. § 2113(a), there must be "actual force and violence or intimidation," regardless of whether the defendant is charged with committing the substantive crime or simply attempting to commit the crime. *Id.* at 748.

On August 27, 2008, Loniello filed an amended post-trial motion seeking a judgment of acquittal based on *Thornton*. 07 CR 336 R.125. That is, Loniello argued that a judgment of acquittal should be entered because the government failed to offer evidence of force and violence or intimidation in connection with the attempted bank robbery. *Id.* On August 28, 2008, Aguilar filed his post trial motions for a judgment of acquittal and a new trial. 07 CR 336 R.128. Aguilar's post-trial motions sought a judgment of acquittal based on the *Thornton* opinion and other reasons. *Id.*

On August 28, 2008, a federal grand jury returned a second superseding indictment, charging defendants with a violation of: (a) 18 U.S.C. § 2113(a), ¶ 2 —attempting to enter a bank with the intent to commit a felony, namely, a bank

robbery (Count One); and (b) 18 U.S.C. § 371—conspiracy to commit bank robbery, in violation of 18 U.S.C. § 2113(a), ¶ 1 (Count Two). 07 CR 336 R.140.

On August 29, 2008, the district court granted the "*Thornton*" motions for acquittal on Count One of the superseding indictment without objection from the government. 07 CR 336 R.178 at 5 (App. 5). Defendants then sought to dismiss Count One of the second superseding indictment on double jeopardy grounds and to dismiss Count Two of the second superseding indictment on grounds of issue preclusion.

The district court granted defendants' double-jeopardy motions on January 28, 2009. 07 CR 336 R.178 at 12 (App. 12). The district court denied the motions to dismiss Count Two of the second superseding indictment. 07 CR 336 R.178 at 14 (App. 14). The government timely filed a notice of appeal on February 24, 2009. 07 CR 336 R.180.

No. 09-1606 On January 25, 2006, a federal grand jury returned an indictment charging Thornton with attempting to rob a Bank One, in violation of the first paragraph of 18 U.S.C. § 2113(a) and in violation of 18 U.S.C. § 924(c). 05 CR 813 R.10. Following a trial, defendant was convicted of both counts in the indictment and sentenced to 132 months' imprisonment.

Thornton's convictions were overturned on appeal in *United States v. Thornton*, 539 F.3d 741 (7th Cir. 2008), because the government failed to prove

that the defendant used actual force and violence or intimidation in carrying out the attempted bank robbery. *Id.* at 743-44. Following the Seventh Circuit's opinion, the government obtained a superseding indictment charging Thornton with conspiracy to commit bank robbery, in violation of 18 U.S.C. § 371 (Count One); attempted entry into a bank with intent to commit a felony affecting the bank, in violation of 18 U.S.C. § 2113(a),¶1 (Count Two); and possession of a firearm in furtherance of the bank robbery conspiracy, in violation of 18 U.S.C. § 924(c) (Count Three). 05 CR 813 R.111.

On February 12, 2009, the district court granted Thornton's motion to dismiss Count Two on double-jeopardy grounds, adopting the reasoning of its earlier decision in *United States v. Loniello, et al.*, 07 CR 336. 05 CR 813 R.140 at 2-3 (App. 16-17). On March 4, 2009, The government filed a timely notice of appeal from this dismissal. 05 CR 813 R.146.[4]

STATEMENT OF FACTS

United States v. Thornton

The facts underlying the prosecution are set forth in the opinion in *Thornton*. 539 F.3d at 743-44. In brief, in September 2005, Thornton and a friend named Moore planned to rob a bank. *Id.* at 743. On September 26,

[4] The district court also dismissed the § 924(c) count, 05 CR 813 R.140 at 7-8 (App. 21-22), but the government is not appealing from this dismissal.

Thornton asked Moore to be his getaway driver for a bank robbery that day; Thornton disguised himself, and with Moore waiting in the getaway car, Thornton approached the bank's front doors. *Id.* Before Thornton could enter the bank, however, he was interrupted by a passerby. *Id.* at 743-44. Thornton left the bank without entering it; shortly afterward, he was apprehended with (among other things) elements of his disguise and a sketch of the layout of another bank he planned to rob. *Id.* at 744. Police officers searching the area where Thornton was arrested also found a gun that he had apparently hidden after fleeing from the bank. *Id.*

Based on these facts, Thornton was convicted at his 2007 trial of attempted bank robbery in violation of 18 U.S.C. § 2113(a), ¶ 1, and carrying a firearm during that crime in violation of 18 U.S.C. § 924(c). Thornton appealed his convictions.

United States v. Loniello and Aguilar

While Thornton's convictions were on appeal, the government prosecuted Loniello and Aguilar for attempted bank robbery in violation of 18 U.S.C. § 2113(a), ¶ 1, and carrying a firearm during that crime in violation of 18 U.S.C. § 924(c). 07 CR 336 R.53. The facts underlying this prosecution are summarized in the affidavit in support of the criminal complaint, 07 CR 336 R.1 at 3-6, and in the government's response to defendants' post-trial motions for acquittal. 07

CR 336 R.122 at 2-5. The government's evidence at trial consisted primarily of excerpts of recorded conversations between Loniello, Aguilar and a government confidential witness (the "CW"), as well as the testimony of FBI Special Agent Carrie Landau.

In brief, on multiple occasions, the CW recorded Loniello discussing plans to rob banks with Aguilar. 07 CR 336 R.122 at 2-5. The CW even recorded his trip with Loniello on one occasion to case a bank for a potential robbery, and also recorded Aguilar and Loniello discussing plans to steal a car to use during the bank robbery. *Id.* at 3-4. Ultimately Loniello and Aguilar were unsuccessful in stealing a car, but nevertheless decided to go ahead with their plans to rob a bank. *Id.* at 4. With the CW acting as the getaway driver (and with the CW tipping off the FBI unbeknownst to the defendants), the would-be bank robbers drove to their chosen victim bank. *Id.* As Loniello and Aguilar got within approximately a car's length of the bank's entrance, FBI agents arrested both of them. *Id.* at 5. At trial, Loniello admitted on direct examination that he was going to rob the Chase Bank on May 25, 2007. *Id.* Loniello further admitted that he was the one who brought Aguilar into the plan to rob the bank. *Id.*

Based on this evidence, defendants were convicted at trial in 2008 of attempted bank robbery in violation of 18 U.S.C. § 2113(a), ¶ 1.

This Court's Opinion In Thornton

About a month after the verdicts against Loniello and Aguilar, this Court issued its opinion in *United States v. Thornton*, 539 F.3d 741 (7th Cir. 2008). Thornton had challenged his conviction on the grounds that the government failed to prove that the defendant used actual force and violence or intimidation in carrying out the attempted bank robbery since he had never entered the bank he was charged with attempting to rob. *Id.* at 743-44. The Court held that in order for a defendant to be convicted under the first paragraph of 18 U.S.C. § 2113(a), there must be "actual force and violence or intimidation," regardless of whether the defendant is charged with committing the substantive crime or attempting to commit the crime. *Id.* at 748. The Court vacated Thornton's convictions and sentences and instructed the district court to enter judgments of acquittal on both counts of the indictment against him. *Id.* at 751.

On August 27, 2008, Loniello filed an amended post-trial motion seeking a judgment of acquittal based on *Thornton*. 07 CR 336 R.125. Loniello argued that a judgment of acquittal should be entered because the government failed to offer evidence of force and violence or intimidation in connection with the attempted bank robbery. On August 28, 2008, Aguilar joined the motion. 07 CR 336 R.128.

On August 28, 2008, a federal grand jury returned a second superseding indictment, charging Loniello and Aguilar with a violation of: (a) 18 U.S.C. § 2113(a), ¶ 2—attempting to enter a bank with the intent to commit a felony, namely, a bank robbery (Count One); and (b) 18 U.S.C. § 371—conspiracy to commit bank robbery, in violation of 18 U.S.C. § 2113(a), ¶ 1 (Count Two). 07 CR 336 R.140. On August 29, 2008, the district court granted defendants' motions for acquittal as to the count on which they had already been tried, without objection from the government. 07 CR 336 R.178 at 5 (App. 5).

Meanwhile, Thornton, too, had been reindicted—he was charged in a superseding indictment with conspiracy to commit bank robbery, in violation of 18 U.S.C. § 371 (Count One); attempted entry into a bank with intent to commit a felony affecting the bank, in violation of 18 U.S.C. § 2113(a),¶ 2 (Count Two); and possession of a firearm in furtherance of the bank robbery conspiracy, in violation of 18 U.S.C. § 924(c) (Count Three). 05 CR 813 R.111.

The Double Jeopardy Ruling

Loniello and Aguilar took the lead in seeking dismissal of the new charges on double jeopardy grounds. 07 CR 336 R.163, 166. After briefing, on January

28, 2009, the district court granted their double-jeopardy motions.[5] 07 CR 336 R.178 at 5-12 (App. 5-12).

In its order granting the motions to dismiss Count One of the second superseding indictment against Loniello and Aguilar, the district court ruled that double jeopardy barred the prosecution because the two paragraphs of § 2113(a) "are alternate means of committing a single offense." 07 CR 336 R.178 at 12 (App. 12). The court explained that *Blockburger v. United States*, 284 U.S. 299 (1932), did not apply here because the two paragraphs of § 2113(a) did not state separate offenses.

According to the district court, *Blockburger* is only applicable to situations in which the same act or transaction gave rise to violations of two distinct statutory provisions. 07 CR 336 R.178 at 6-7 (App. 6-7). The district court found in the legislative history of § 2113(a) "no intent on the part of Congress to create separate offenses in paragraphs one and two," 07 CR 336 R.178 at 9 (App. 9), and instead found that Congress intended the two paragraphs to be alternate means of committing a single offense:

> The paragraphs are a single sentence joined by the disjunctive term "or" and appended by a single penalty clause. The use of he word

[5]Loniello and Aguilar had also sought dismissal of the conspiracy count in the second superseding indictment on grounds of issue preclusion stemming from their acquittals after the *Thornton* opinion came out. The district court denied their motions to dismiss the conspiracy count. 07 CR 336 R.178 at 14 (App. 14).

> "or" within a single subsection of a statute signals Congress' intent that there be two ways or means of committing a single offense and not multiple offenses. In the context of the subsection, the ordinary and common sense meaning of the word "or" indicates alternative courses of conduct that could accomplish a single offense. In addition, in the context of the overall structure of the statute, the inclusion of a single penalty clause after the two paragraphs [of] § 2113(a) further signals Congress' intent to treat the subsection as a whole as a single offense that can be carried out in two separate ways.

07 CR 336 R.178 at 10-11 (citations omitted) (App. 10-11).

The district court also relied on *Prince v. United States*, 352 U.S. 322 (1957), finding that the Supreme Court "engaged in the same Congressional-intent analysis and held that § 2113(a) creates a single offense." 07 CR 336 R.178 at 11 (App. 11). The district court cited three cases, two from the late 1950s, to the effect that § 2113(a) "creates a single offense with various degrees of aggravation permitting sentences of increasing severity," and that it is well-settled law "that § 2113 does not create separate crimes but merely proscribes alternative sentences for the same crime depending on the manner in which the crime was perpetrated." 07 CR 336 R.178 at 11-12 (App. 11-12).

These appeals, now consolidated, timely followed.

SUMMARY OF THE ARGUMENT

The district court erroneously concluded that the two separate paragraphs of § 2113(a) constitute one offense and that therefore the prosecution under ¶ 2

of that subsection was barred by the earlier prosecution under ¶ 1. The two paragraphs under 18 U.S.C. § 2113(a) constitute separate offenses, as is clear from the text and legislative history of the statute. The two paragraphs describe different crimes, each of which requires an element of proof that the other does not.

The district court further erroneously relied on a Supreme Court decision from 1957, *Prince v. United States*, to conclude that a successive prosecution was barred here. Not once did *Prince* mention the Double Jeopardy Clause. The Supreme Court itself characterized *Prince*'s holding as narrow, and because it did not discuss double jeopardy issues, *Prince* should be understood only to preclude cumulative punishment where a defendant has been convicted of the completed offenses of unlawful entry and bank robbery.

ARGUMENT

I. The District Court Erred In Dismissing The § 2113(a), ¶ 2 Counts On Double Jeopardy Grounds.

A. Standard of Review

A district court's ruling on a motion to dismiss an indictment for double jeopardy reasons is reviewed *de novo*. *See United States v. Moses*, 513 F.3d 727, 731 (7th Cir. 2008).

B. Analysis

The district court erroneously concluded that the two paragraphs of § 2113(a) constitute one offense and that therefore the prosecution under ¶ 2 of that subsection was barred by the earlier prosecution under ¶ 1. The two paragraphs under 18 U.S.C. § 2113(a) constitute separate offenses.[6]

In deciding whether two statutory violations do, in fact, constitute separate offenses for double jeopardy purposes, the first step is to determine from the text and legislative history of the statute "whether Congress intended that each violation be a separate offense." *Garrett v. United States*, 471 U.S. 773, 778 (1985). "If Congress intended that there be only one offense—that is, a defendant could be convicted under either statutory provision for a single act, but not under both—there would be no statutory authorization for a subsequent prosecution . . . and that would end" the matter. *Id.* at 778, 786.

If, however, Congress intended the offenses to be considered separate, the second step is to decide whether that arrangement is "constitutional under the Double Jeopardy Clause of the Fifth Amendment." *Id.* at 778, 786. *See also Albernaz v. United States*, 450 U.S. 333, 340-41 (1981); *Simpson v. United States*, 435 U.S. 6, 11-12 (1978). As was made clear by the Supreme Court in *United States v. Dixon*, 509 U.S. 688, 697-711 (1993), the constitutional test for Double

[6] Although the district court correctly left the conspiracy count intact, the § 371 conspiracy offense has a five-year statutory maximum, as compared to the twenty-year maximum in § 2113(a).

Jeopardy inquiries is the standard announced in *Blockburger v. United States*, 284 U.S. 299 (1932): "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." *Id.* at 304.

Here, the text, structure, and legislative history of Section 2113(a) make clear that Congress intended to create two separate offenses in that subsection. And the two offenses—attempted bank robbery and attempting to enter a bank with the intent to commit a felony—handily satisfy the *Blockburger* test. Attempted bank robbery requires proof of the use of "force and violence, or . . . intimidation," which is not an element of the attempted entry charge, and attempted entry requires proof of the attempted entry with the specific intent to commit a felony therein, which is not required for attempted bank robbery.

1. The Text of the Statute

The text of the statute provides:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings

> and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a).[7]

Thus, on its face, subsection (a) appears to cover two separate offenses, but provides the same penalty for each. The second paragraph of subsection (a) does not refer to any provision in the first paragraph, nor does the first paragraph refer to the second paragraph. Aside from the penalty provision, the two paragraphs share nothing in common, and each states as a whole the elements of an offense: whoever does x shall be penalized. An indictment alleging only the elements contained in the first paragraph would therefore be complete, as would be an indictment alleging only the elements contained in the second paragraph. This reading of the text, as covering two separate and distinct offenses, is consistent with the legislative history of the statute, as we demonstrate in the next section.

The district court erroneously concluded that the "two-paragraph structure and plain language of § 2113(a) . . . support the conclusion that Congress

[7]Subsection (b) of the statute prohibits bank larceny, and subsections (c), (d), and (e) prohibit, respectively, receipt of stolen bank property, assault in commission of bank robbery or larceny, and homicide in connection with these offenses.

intended the actions described therein to be alternate means of committing a single offense." 07 CR 336 R.178 at 10 (App. 10). As support for its textual analysis, the district court cited the use of the word "or" to separate the two paragraphs: "the use of the word 'or' within a single subsection of a statute signals Congress' intent that there be two ways or means of committing a single offense and not multiple offenses." 07 CR 336 R.178 at 10 (App. 10).

The district court relied on two cases *United States v. Turcotte*, 405 F.3d 515 (7th Cir. 2005), and *United States v. Marbella*, 73 F.3d 1508 (9th Cir. 1996), to support this conclusion, but neither case is from the double-jeopardy context and neither case supports the district court's analysis. In *Turcotte*, 405 F.3d at 523, this Court reviewed jury instructions defining a controlled substance analogue. The Court declined to read the word "or" in its context there as unambiguously disjunctive—it would have led to an absurd result—and instead "heed[ed] the call of both accumulated precedent and common sense" in reading the statutory definition otherwise. *Id.* at 523.

In *Marbella*, 73 F.3d at 1514, the Ninth Circuit, in reviewing the sufficiency of evidence to support a money-laundering conviction under 18 U.S.C. § 1956(a)(1), held that the intent requirements of the statute were stated in the disjunctive—the government was required to prove *either* that the defendant engaged in a financial transaction to promote the underlying illegal activity *or*

to conceal the nature of the source of the illegal proceeds, but not both—and that the government's proof of promotion was sufficient to support the conviction.

In fact, the use of the term "or" to separate the two paragraphs of § 2113(a) is more accurately read as signaling congressional intent to create two distinct offenses. In *United States v. Dennison*, 730 F.2d 1086 (7th Cir. 1984), a double-jeopardy case involving a statute with subsections separated by "or" and with each subsection referring to a single penalty clause. In that case, the defendant was convicted of violating three different subsections of 15 U.S.C. § 1644, which proscribed various actions in numerous subsections, each subsection joined to the next with "or," and all subsections sharing the same penalty clause. The Seventh Circuit held that the separate subsections of § 1644 constituted separate offenses for double jeopardy purposes, notwithstanding the fact that they were all stated in the same section of the criminal code and shared the same penalty provision. The Court rejected the notion that the use of one penalty provision for all subsections meant there was only one offense, calling it a "formalistic argument"; instead, the penalty provision was stated only once "as a matter of legislative efficiency and to avoid redundancy." 730 F.2d at 1089. The Court also found that the use of the term "or" indicated "that each subparagraph, standing alone, states a separate and separately punishable violation, even where, as here, several separate offenses occur in the same course

of conduct." *Id.* The Court held that the history of the statute, namely its expansion to include additional subsections, "indicates that Congress' purpose was to 'crack down' on credit card misuse. Separate sentencing for each offense arising in the same course of conduct promotes this purpose and is not . . . in violation of the double jeopardy clause." *Id.*

Dennison thus is on point with the provisions of § 2113(a), which has two subsections, separated by "or," each stating an offense complete in itself and both sharing the penalty provision. The district court distinguished *Dennison*, opining that the difference lies in the use of "separately enumerated subsections" of the statute at issue there. 07 CR 336 R.178 at 10 n.4 (App. 10). According to the district court, when "or" is used to join two subsections *with separate numbering or lettering*, the two provisions state separate offenses for double jeopardy purposes, but when "or" joins two subsections *not separately enumerated*, the double jeopardy clause is given effect. *Id.* This analysis, however, is excessively formalistic, a characteristic disfavored by double jeopardy cases. *Dennison*, 730 F.2d at 1089; *United States v. DiFrancesco*, 449 U.S. 117, 142 (1980) (in double-jeopardy context, "exaltation of form over substance is to be avoided").

2. The Legislative History of the Statute

The original bank robbery statute, enacted in 1934, covered only robbery, robbery accompanied by aggravated assault, and homicide committed during a robbery. *Prince*, 352 U.S. at 325. In 1937, Congress amended the robbery statute to cover unlawful entering and larceny. *Id.* at 326. The Act was amended in 1937 (five years after *Blockburger* was decided) at the request of the Attorney General; in a letter to Congress, the Attorney General lamented the fact that persons who stole from a federal bank "without displaying any force or violence and without putting anyone in fear" could not be prosecuted for bank robbery. *Prince*, 352 U.S. at 326, 327 (noting that the Attorney General "stressed" the "possibility that a thief might not commit all the elements of the crime of robbery"). As a result, Congress amended the statute and included the entering provision, as well as a larceny provision. The prohibitions on robbery, entering, and larceny were all placed in the same paragraph. In 1948, the provision was altered to its current form, as robbery and entering were kept in the same subsection (Section 2113(a)) but moved to separate paragraphs, while larceny was moved to a new subsection (Section 2113(b)). 62 Stat. 796 (1948).

Although the legislative history of Section 2113(a) is "meager," *Prince*, 352 U.S. at 328, it is more plausible that Congress intended that the two paragraphs constitute separate offenses than that there was "no intent on the part of Congress to create separate offenses in paragraphs one and two," as the district

court concluded. 07 CR 336 R.178 at 9-10 (App. 9-10). First, Congress found it necessary to expand the coverage of § 2113(a) to include conduct that had not previously violated a federal statute—conduct that to be penalized had to be defined as an additional offense. Second, Congress could not have intended the two paragraphs of § 2113(a) as alternate means of committing the same offense—since the text of the statute does not support such a reading. After all, the district court's opinion did not describe the *nature* of the "same offense" for which the two paragraphs of § 2113(a) are alternate means. The same offense cannot be "robbery," since the second paragraph does not require it; nor can the offense be "unlawful entry," since the first paragraph does not require that. The only thing the two paragraphs share, beside their common penalty, is a guilty intent regarding a bank.

The district court's conclusion from the legislative history was that Congress did not intend to create two separately punishable offenses in § 2113(a), even though, as the district court recognized, "Congress wanted to expand the scope of the statute to cover criminal activity less serious than robbery that had previously violated no federal statute." 07 CR 336 R.178 at 9-10 (App. 9-10). According to the district court, Congress' failure to *separately enumerate* the offense of unlawful entry into a bank meant it regarded the two

paragraphs as alternate means of committing the same offense. 07 CR 336 R.178 at 10, 10 n.4 (App. 10).

But as we have seen, the text and legislative history show that Congress intended that the two paragraphs to constitute separate offenses, and the district court's emphasis on the failure to separately enumerate the two subsections again impermissibly elevates form over substance. *See Dennison*, 730 F.2d 1089.

3. The *Blockburger* Rule

To the extent that the text and legislative history of § 2113(a) leave any question whether Congress intended to create two separate offenses for double jeopardy purposes, this Court should rely on the long-standing "rule of statutory construction" stated in *Blockburger* and apply it for the purposes of "discerning congressional purpose." *Albernaz*, 450 U.S. at 340; *Garrett*, 471 U.S. at 779.

Blockburger provides 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." *Id.* at 304. Here, the first and second paragraphs of subsection (a) satisfy the *Blockburger* test for two offenses. The offense elements are so distinct that evidence of one will not necessarily support an indictment for the other. Specifically, evidence that a defendant

attempted to enter a bank with the intent to commit a bank robbery (a violation of 18 U.S.C. § 2113(a), ¶ 2) will not support an indictment under 18 U.S.C. § 2113(a), ¶ 1, where the government must prove the use of actual force and violence or intimidation.

The district court found that *Blockburger* does not apply here because the offenses at issue are located under the same statutory heading (§ 2113(a)), and thus do not meet *Blockburger*'s "threshold requirement" of having "two distinct statutory provisions." 07 CR 336 R.178 at 6-7 (App. 6-7). But that analysis' insistence that the two distinct paragraphs of § 2113(a) need separate numerical subheadings in order for *Blockburger* to apply is yet another instance of elevating form over substance. There is nothing about the text or structure of § 2113(a) that precludes application of *Blockburger*. The separate paragraphs of § 2113(a) are clearly distinct in that they describe different, non-overlapping offenses, and thus fall within the "distinct statutory provisions" language of *Blockburger*.

The district court relied on *United States v. Makres*, 598 F.2d 1072 (7th Cir. 1979), to support its conclusion that the location of the two paragraphs in the same subsection of § 2113(a) precluded the application of *Blockburger*. In *Makres*, this Court stated that:

> When two crimes are defined in a single section of the code, usually their interrelationship will have been considered by Congress, and therefore the legislative intent is more readily assessed than it is when two separate sections are involved. When both are found in the same section, it is not unreasonable to expect to find in the legislative history some affirmative expression of an intent to punish for both if such an intent exists.

Id. at 1075.

But *Makres* expressed a presumption about congressional intent— that in the absence of an affirmative expression of intent to allow multiple punishments for two offenses we should presume Congress did not intend to authorize it—that was later rejected in *Albernaz*. In that case, the Supreme Court specifically stated that the *Blockburger* test should apply absent a clear indication that Congress intended otherwise: "if anything is to be assumed from the congressional silence on this point [whether *Blockburger* applies], it is that Congress was aware of the *Blockburger* rule and legislated with it in mind." 450 U.S. at 340-41. *Makres* predates *Albernaz*'s discussion of the meaning to be afforded congressional silence, and is also at odds with the result in *Dennison*, where multiple violations all stemmed from a single section of the criminal code.[8]

While it is true that *Albernaz* was concerned with two *separately*

[8]Two other cases from this Circuit, *United States v. Fountain*, 642 F.2d 1083, 1094 (7th Cir. 1981), and *United States v. Langdon-Bey*, 739 F.2d 1285, 1286 (7th Cir. 1984), adhere to the *Makres* rule. *Fountain*, however, predates *Albernaz*, and *Langdon-Bey* does not discuss it.

enumerated statutory provisions, its reasoning applies with equal force here, where Congress added a paragraph to an already existing statutory subsection:

> [I]f anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the *Blockburger* rule and legislated with it in mind. It is not a function of this Court to presume that "Congress was unaware of what it accomplished . . . .

Albernaz, 450 U.S. at 341 (citations omitted). Nothing in this discussion would indicate that a contrary presumption should apply in the case of a single section of the criminal code or a different analysis should follow from the legislature's use of such denominators as "(a)(1)" and "(a)(2)" before separate paragraphs describing different types of crimes.

Moreover, the Supreme Court has applied *Blockburger* in determining whether two subsections of a criminal statute were sufficiently distinct for double jeopardy purposes. In *Brown v. Ohio*, 432 U.S. 161 (1977), the Court used the *Blockburger* test in deciding that the petitioner's successive prosecutions for violations of Ohio law, namely, § 4549.04(D) (joyriding) and § 4549.04(A) (car theft), were barred by the Double Jeopardy Clause. *See* 432 U.S. at 166 ("established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger*"). Nothing in *Brown* suggests that the Court's use of *Blockburger* to reach this result was anything other than routine—or that it depended on the

Ohio legislature's designation of joyriding and car theft under separately lettered subparagraphs of the statute.

This is not a case like *Sanabria v. United States*, 437 U.S. 54 (1978), where the defendant was charged with conducting an illegal gambling business in violation of 18 U.S.C. § 1955(b)(1). The government charged that defendant's gambling business included both a numbers racket and betting on horse races and thus violated the single statutory section in two ways. 437 U.S. at 57-58. Defendant was acquitted after a trial in which the evidence of the numbers racket was erroneously excluded. The Supreme Court held that a retrial of the same charge on the numbers evidence was prohibited by double jeopardy, since defendant had already acquitted of the single charge in the indictment. *Sanabria* did not apply the *Blockburger* test because the government sought to try the defendant again for precisely the same violation as was at issue in the earlier trial. 437 U.S. at 70 n.24.

We concede that if a defendant were acquitted of an indictment alleging he had robbed a bank by force and violence, he could not be reprosecuted for robbing that same bank by intimidation. That much was decided by *Sanabria*, and it is entirely consistent with *Blockburger*, since the *one* crime described in ¶ 1 may be committed in different ways. But in this case, the two charges depend on self-sufficient, independent bases of liability that satisfy the

Blockburger test, despite their location under the single subsection of § 2113(a).

4. *Prince* Makes No Mention of Double Jeopardy

In addition to its analysis of § 2113(a)'s text and legislative history, the district court relied on *Prince v. United States*, 352 U.S. 322 (1957). In that case, the Supreme Court held that the maximum penalty for a defendant convicted of both bank robbery and unlawful entry as a result of the same event was twenty years. The petitioner had been convicted of two counts, each charging a different paragraph of § 2113(a), and sentenced to twenty years on one count and fifteen years consecutive on the other count. The Supreme Court reversed for resentencing.

The question in *Prince* was "a narrow one, and our decision should be correspondingly narrow." *Id.* at 325. Citing the legislative history of the bank robbery statute, the Court stated that there was no reason to suppose that the proponent of the legislation would have "wished to have the maximum penalty for robbery doubled by the imposition of 20 years for the robbery to which could be added 20 years for entering the bank." 352 U.S. at 327. According to the Court: "The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is

consummated." *Id.* at 328. The Court therefore held that Congress had not intended to authorize consecutive punishments for violations of the two paragraphs of § 2113(a). *Id.* at 329. The Court said nothing about the fact that the defendant had been convicted of both crimes.

The district court's analysis reads too much into *Prince*. The decision did not even once mention the Double Jeopardy Clause, even though the defendant was convicted of violating *both* paragraphs of § 2113(a) for the same robbery incident, a result that would not be permitted under the district court's analysis here. *Prince* did not discuss *Blockburger*, but instead divined what the legislation intended to authorize with regard to imprisonment sentences as to each count.[9]

In the end, *Prince* did *not* decide that the two paragraphs of § 2113(a) are alternate means of committing the same offense, which would have required reversing one of the defendant's convictions. Instead, the Court held only that successive punishment is not authorized "consistent with our policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history." 352 U.S. at 329. Given *Prince*'s description of

[9]*Prince* also relied on the idea of "the heart of the crime," 352 U.S. at 407, (akin to the "same-conduct" rule overruled *United States v. Dixon*, 509 U.S. 688 (1993)) in finding that Congress had not authorized cumulative punishments.

its holding as narrow and the absence of any double jeopardy discussion, *Prince*'s holding was not based on the Double Jeopardy Clause; instead, its precise holding is that cumulative punishment is not available where a defendant has been convicted of the completed offenses of unlawful entry and bank robbery.

While it is true that "[i]f two offenses are the same under [the *Blockburger*] test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions." *Brown*, 432 U.S. at 166, *Prince* did not proscribe consecutive sentences for § 2113(a) violations on *Blockburger* grounds and thus should not be read as forbidding successive prosecutions. Of course, had *Prince* employed the *Blockburger* analysis, it would not have concluded that the two offenses are the same. But *Prince* did not employ *Blockburger* because *Prince* was not based on the Double Jeopardy Clause.

Finally, the district court's analysis also mistakenly relied on three Seventh Circuit cases. 07 CR 336 R.178 at 11-12 (App. 11-12). In each of those three cases, this Court held that there could not be cumulative punishments for bank robbery offenses – but those holdings were not surprising because each case involved a conviction for either § 2113(d) or § 2113(e), which are sub-sections that explicitly incorporate the lesser-included offenses in § 2113(a) and (b). *United States v. Drake*, 250 F.2d 216, 217 (7th Cir. 1957); *United States v.*

Leather, 271 F.2d 80, 86 (7th Cir. 1959); *Wright v. United States*, 519 F.2d 13 (7th Cir. 1975). For example, in *Drake*, the defendant was convicted of multiple § 2113 counts, including § 2113(e), which prohibits kidnaping persons in the course of "committing any offense defined in this section." 250 F.2d at 217-18. And in *Leather* and *Wright*, the defendants were convicted of § 2113(d), which prohibits assaults and endangering the lives of persons with a dangerous weapon "in committing . . . any offense defined in subsections (a) and (b) of this section." *Leather*, 271 F.2d at 80-81; *Wright*, 519 F.2d at 14.

Thus, the defendants in those other cases were convicted of crimes that were completely incorporated into either § 2113(d) or § 2113(e) (in other words, lesser-included offenses), whereas in this appeal, the relevant comparison is between the two separate paragraphs of § 2113(a) to each other (not to § 2113(d) or § 2113(e)).[10] As explained above, the two paragraphs describe different offenses that each have an element not required by the other, and *Blockburger*

[10]At least one other circuit has indicated that the two paragraphs of 2113(a) should be considered separate offenses. In *United States v. McGhee*, 488 F.2d 781 (5th Cir. 1974), the Fifth Circuit found that the two parts of subsection (a) are "separable. The first criminalizes the usual gun and mask form of bank robbery, while the second covers, for example, nighttime bank break-ins not involving danger to employees or customers." *Id.* at 784. *See also United States v. Dentler*, 492 F.3d 306, 309 (5th Cir. 2007) ("The statute at issue in this case, 18 U.S.C. 2113(a), describes two separate offenses.").

instructs that there is no double jeopardy obstacle in prosecuting the crimes separately.

CONCLUSION

For the reasons discussed above, the government respectfully asks this Court to reverse the orders dismissing the § 2113(a), ¶ 2 counts against defendants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

Pursuant to Circuit Rule 30(d), I, counsel for Plaintiff-Appellant, UNITED STATES OF AMERICA, state that the appendix included with this brief on appeal incorporates the materials required under Circuit Rule 30(a) and (b).

_____

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CIRCUIT RULE 31(e) CERTIFICATION

Pursuant to Circuit Rule 31(e), I hereby certify that I have filed electronically versions of our brief and all available appendix items in nonscanned PDF format.

EDMOND E. CHANG
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RULE 32 CERTIFICATION

I hereby certify that:

1. This brief complies with the type volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 7,517 words.

2. This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and Circuit Rule 32(b), because it has been prepared using the WordPerfect X3 proportionally-spaced typeface of Century Schoolbook with 13-point font in the text and 12-point font in the footnotes.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 09-1494
	)	
Plaintiff-Appellant,	)	Appeal from the United States
	)	District Court for the
v.	)	Northern District of Illinois,
	)	Eastern Division
MICKEY LONIELLO and	)	07 CR 336
NATHANIEL AGUILAR,	)	
	)	
Defendants-Appellees.	)	Honorable James B. Zagel

UNITED STATES OF AMERICA,	)	No. 09-1606
	)	
Plaintiff-Appellant,	)	Appeal from the United States
	)	District Court for the
v.	)	Northern District of Illinois,
	)	Eastern Division
WALTER THORNTON,	)	05 CR 813
	)	
Defendant-Appellee.	)	Honorable James B. Zagel

CERTIFICATE OF SERVICE

I, STUART D. FULLERTON, hereby certify that on May 15, 2009, I caused two copies and a digital version of the foregoing BRIEF AND APPENDIX OF THE UNITED STATES, to be served upon the following by first-class, postage-paid mail:

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, v. MICKEY LONIELLO and NATHANIEL AGUILAR.	No. 07 CR 336 Judge James B. Zagel

MEMORANDUM OPINION AND ORDER

On November 18, 2008, Defendant Mickey Loniello filed a motion to dismiss the second superseding indictment in this case on the basis of double jeopardy. Defendant Nathanial Aguilar joined in Loniello's motion on November 21, 2008. The second superseding indictment charges Defendants with violations of 18 U.S.C. § 2113(a), ¶2 – attempting to enter a bank with the intent to commit a bank robbery (Count I); and 18 U.S.C. § 371 – conspiracy to commit bank robbery, in violation of 18 U.S.C. § 2113(a), ¶ 1 (Count II). Defendants seek dismissal of Count I pursuant to the double jeopardy clause in light of the fact that Defendants were previously acquitted of violating paragraph one of 18 U.S.C. § 2113(a). Defendants further move to dismiss Count II, arguing that the ultimate issue of intent has already been decided in their favor. The government opposes Defendants' motion on the basis that paragraphs one and two under 18 U.S.C. § 2113(a) constitute separate offenses and because the government contends Defendants cannot meet their burden of proving that the issue of intent was necessarily decided in their favor. For the foregoing reasons, Defendants' motion to dismiss is granted with respect to Count I and denied with respect to Count II.

I. BACKGROUND

On May 31, 2007, a federal grand jury returned an indictment charging Loniello and Aguilar with attempting to rob a Chase Bank in Oak Park, Illinois, in violation of the first paragraph of 18 U.S.C. § 2113(a).[1] Defendants pleaded not guilty to the charge. On October 18,

[1] Although the indictment did not specifically reference the first paragraph of the statute, the parties are in agreement that the language of the indictment expressly tracked the language of § 2113(a), ¶1. Section 2113 reads, in part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or
>
> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than one year, or both.

2007, a federal grand jury returned a superseding indictment charging Loniello and Aguilar with attempted bank robbery, in violation of 18 U.S.C. § 2113(a), ¶ 1 (Count I) and carrying and possessing a firearm in furtherance of and during and in relation to a crime of violation, in violation of 18 U.S.C. § 924(c) (Count II). I dismissed Count II of the superseding indictment on the basis that Defendants had been entrapped as a matter of law.

On July 14, 2008, Defendants simultaneously proceeded to trial. Loniello was tried before me in a bench trial, and Aguilar was tried before a jury. On July 22 and 23, 2008, respectively, the jury and I found Defendants guilty of attempting to rob the Chase Bank in Oak Park in violation of § 2113(a), ¶ 1.

On July 30, 2008, Loniello timely filed motions for judgment of acquittal and for a new trial and the government filed its opposition.

> (c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.
>
> (e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

On August 26, 2008, the Seventh Circuit issued its opinion in *United States v. Thornton*, 539 F.3d 741 (7th Cir. 2008), an attempted bank robbery case in which the defendant appealed his conviction on the ground, *inter alia*, that the government failed to prove that he used actual force and violence, or intimidation, in carrying out the attempted bank robbery. The Court of Appeals reversed Thornton's conviction, holding that a guilty verdict under the first paragraph of 18 U.S.C. § 2113(a) requires a showing of "actual force and violence or intimidation," regardless of whether the defendant is charged with the substantive offense or mere attempt. *Thornton*, 539 F.3d at 748. As in this case, the defendant in *Thornton* never entered the bank he was charged with attempting to rob. *Id.* at 743-44.

On August 27, 2008, Loniello filed an amended post-trial motion seeking a judgment of acquittal in light of the *Thornton* decision. Loniello argued that a judgment of acquittal should be entered because, as in *Thornton*, the government in this case failed to offer evidence of force and violence or intimidation in connection with the attempted bank robbery of the Chase Bank. On August 28, 2008, Aguilar filed a post-trial motion for a judgment of acquittal and a new trial based on *Thornton* and a myriad of other reasons.[2]

On August 28, 2008, a federal grand jury returned a second superseding indictment, charging Defendants with attempt to commit bank robbery in violation of 18 U.S.C. § 2113(a),

[2] Aguilar's other arguments, not germane to the discussion here, were based on (1) several of my rulings relating to jury instructions on the entrapment defense, (2) a reference made by the government during closing argument to a question that was withdrawn from the record during the course of the trial, (3) the government's inaccurate statement during closing that the CI was only pretending when she told the agent she wanted to work until five, (4) insufficient evidence of intent because Aguilar made a statement about jumping over the counters at the bank when in fact this would have been impossible because the bank had counter-to-ceiling bulletproof glass barriers, and (5) insufficient evidence of predisposition to commit the crime of bank robbery.

¶ 2 (Count I) and conspiracy to commit bank robbery as prohibited by 18 U.S.C. § 2113(a), ¶ 1, in violation of 18 U.S.C. § 71 (Count II).

On August 29, 2008, I granted Defendants' motions for acquittal based on *Thornton*, without objection from the government.

Defendants' motion seeks (1) dismissal of Count I on the basis that it violates the Fifth Amendment's double jeopardy clause, and (2) dismissal of Count II based on principles of issue preclusion related to the element of criminal intent.

II. COUNT I

"The purpose of the Fifth Amendment's double jeopardy clause is to prevent the government from harassing people by prosecuting them for the same conduct that was the subject of a prior prosecution." *United States v. Calabrese*, 490 F.3d 575, 577 (7th Cir. 2007); *see* U.S. Const. art. I, § 8, cl. 5 ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"). Accordingly, a verdict of acquittal is a bar to a subsequent prosecution for the same offense. *Ball v. United States*, 163 U.S. 662, 671 (1896); *Brown v. Ohio*, 432 U.S. 161, 165 (1977). The question presented by Defendants' motion to dismiss Count I of the government's second superseding indictment on the basis of double jeopardy therefore calls for interpretation of the Federal Bank Robbery Act, 18 U.S.C. § 2113: whether paragraphs one and two of § 2113(a) are alternate means of committing a single offense or whether they constitute two separate offenses. If paragraphs one and two are the same offense, then double jeopardy bars the government from re-prosecuting Defendants for a violation of paragraph two following an acquittal under paragraph one. On the other hand, if the two paragraphs describe separate offenses, then the government may permissibly prosecute one offense in one indictment and the

other offense in a second indictment, or may obtain multiple convictions for both paragraphs in a single indictment, and may also seek cumulative punishments for both offenses. *See North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). These are well settled principles on which the parties agree.

Defendants argue that the proper approach to determine whether paragraphs one and two of § 2113(a) constitute the "same offense" is to ascertain Congressional intent via the statute's plain language, its structure and context, and its legislative history. In support, Defendants rely on *Prince*, in which the Supreme Court conducted such an inquiry in analyzing § 2113(a) and determined that Congress intended that section to comprise only one offense. *Prince v. United States*, 352 U.S. 322 (1957). Thus, according to Defendants, *Prince* and its progeny require dismissal of Count I.

The government responds that the applicable test for determining whether paragraphs one and two of § 2113(a) constitute the "same offense" is the separate-elements test as set forth in *Blockburger v. United States*, 284 U.S. 299 (1932). In *Blockburger*, the Supreme Court ruled 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." *Id*. at 304. In support of its argument that the *Blockburger* test governs the analysis, the government relies on *United States v. Dixon*, 509 U.S. 688 (1993) and *Albernaz v. United States*, 450 U.S. 333 (1981).

The government's argument ignores *Blockburger's* own threshold inquiry in deciding whether to apply its test of statutory construction: namely "where the same act or transaction constitute a violation of *two distinct statutory provisions* . . . " 284 U.S. at 304. (emphasis

added). Where this threshold requirement of two separate statutes has not been met, courts have declined to apply the *Blockburger* test, distinguishing prosecutions arising from multiple offenses captured under the same statutory heading from those prosecutions that involve multiple offenses arising out of completely separate statutes. For example, in *Sanabria v. United States*, which presented the issue of double jeopardy in the context of two alleged violations of a single statute (18 U.S.C. § 1955), the Court rejected the government's argument that the *Blockburger* test should apply and held that two alleged violations (numbers betting and horse betting) of running an illegal gambling business were two separate means of violating a single offense and not two separate offenses. 437 U.S. 54, 69-70 (1978). "Because only a single violation of a single statute is at issue here, we do not analyze this case under the so-called 'same evidence' test, which is frequently used to determine whether a single transaction may give rise to separate prosecutions . . . under *separate* statutes." *Id*. at 70 n.24 (emphasis added). *See also Milanovich v. United States*, 365 U.S. 551, 554 (1961) (in holding that Congress did not intend multiple punishments for theft of government property under 18 U.S.C. § 641, ¶ 1 and receipt of that same property under ¶ 2 the Court relied on statutory construction without applying *Blockburger*); *United States v. Podell*, 869 F.2d 328, 332 n.5 (7th Cir. 1989) (in the context of evaluating defendant's double jeopardy argument aimed at multiple charges arising out of 18 U.S.C. § 511(a), the Seventh Circuit noted that the *Blockburger* test "is only to be employed when other methods of statutory construction have proved to be inconclusive."); *United States v. Winchester*, 916 F.2d 757 (11th Cir. 1990) (refusing to apply *Blockburger* test for offenses arising out of a single statutory provision).[3]

[3] Even in cases where the same conduct violates two distinct statutory provisions, the Supreme Court has made clear that "the first step in the double jeopardy analysis is to determine

In addition, both *Dixon* and *Albernaz*, on which the government relies, are readily distinguishable from the facts presented here. Neither case involved a single criminal transaction that resulted in multiple violations of different portions of a single statutory provision. *Dixon* presented the question of whether prosecution for criminal contempt based on violation of a criminal law incorporated into a conditional release order barred a subsequent prosecution for the same criminal offense. *Dixon*, 509 U.S. at 695. *Albernaz* involved the applicability of the double jeopardy clause to a conviction under two separate federal conspiracy statutes, 21 U.S.C. § 963 (conspiracy to import marijuana) and 21 U.S.C. § 846 (conspiracy to distribute marijuana). *Albernaz*, 450 U.S. at 334.

The *Blockburger* test does not answer the question of whether a second prosecution under a different paragraph of the same subsection of a single statute constitutes a second prosecution for the "same offense." *See United States v. Kimbrough*, 69 F.3d 723, 729 n.5 (5th Cir. 1995) (declining to apply *Blockburger* test to two violations of the same statute because that test only applies to determinations of whether Congress intended the same conduct to be punishable under two separate criminal provisions).

The answer instead lies in Congress' intent. *See Prince*, 352 U.S. 322; *Heflin v. United States*, 358 U.S. 415, 419 (1959) (Court looked to Congressional intent in holding petitioner could not be convicted under both subsections (c) and (d) of § 2113). Indeed, whether a particular course of conduct involves one or more distinct "offenses" under a statute depends on

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whether the legislature . . . intended that each violation be a separate offense," for "[i]f Congress intended that there be only one offense . . . there would be no statutory authorization for a subsequent prosecution after conviction of one of the two provisions, and that would end the double jeopardy analysis." *Garrett v. United States*, 471 U.S. 773, 778 (1985). "The rule stated in *Blockburger* was applied as a rule of statutory construction to help determine legislative intent." *Id*. at 778-79.

congressional choice and legislative power to define offenses. *Ball v. United States*, 163 U.S. at 69-70. I proceed with an analysis of congressional intent, keeping in mind the established rule of construction that ambiguity in a criminal statute is to be construed in favor of lenity. *Simpson v. United States*, 435 U.S. 6, 14 (1978).

To begin:

> When two crimes are defined in a single section of the code, usually their interrelationship will have been considered by Congress, and therefore the legislative intent is more readily assessed than it is when two separate sections are involved. When two crimes are found in the same section, it is not unreasonable to expect to find in the legislative history some affirmative expression of an intent to punish for both if such an intent exists.

United States v. Makres, 598 F.2d 1072, 1075 (1979). Thus, unless the legislative history gives some affirmative indication that Congress intended to punish two provisions within the same statute as two separate offenses, the default assumption must be that Congress did not. *See Prince*, 352 U.S. at 328 (if Congress had intended through its amendments to make drastic changes in the punishment schemes, "the result could have been accomplished easily with certainty rather than by indirection.").

The legislative history of § 2113 reveals no intent on the part of Congress to create separate offenses in paragraphs one and two. The original Bank Robbery Act, passed in 1934, covered only robbery, robbery accompanied by an aggravated assault, and homicide perpetrated in committing a robbery or escaping thereafter. 48 Stat. 783 (1934). Congress added prohibitions against entering a bank with intent to commit a felony and taking bank property with intent to steal in 1937, 50 Stat. 749 (1937), because Congress wanted to expand the scope of the statute to cover criminal activity less serious than robbery that had previously violated no federal

statute. S. Rep. No. 75-1259 (1937); *Prince*, 352 U.S. at 326. Initially, when Congress added the provisions for illegal entry and larceny in 1937 it placed them alongside robbery in subsection (a) in a single, disjunctive sentence. 50 Stat. 749 (1937). In 1948, however, Congress amended the statute and moved larceny to its own separate subsection. At the same time, Congress did not move the illegal entry provision to its own subsection, but rather adopted the current two-paragraph structure of § 2113(a). 62 Stat. 796 (1948).

This two-paragraph structure and plain language of § 2113(a) also support the conclusion that Congress intended the actions described therein to be alternate means of committing a single offense. The paragraphs are a single sentence joined by the disjunctive term "or" and appended by a single penalty clause. The use of the word "or" within a single subsection of a statute signals Congress' intent that there be two ways or means of committing a single offense and not multiple offenses. In the context of the subsection, the ordinary and common sense meaning of the word "or" indicates alternative courses of conduct that could accomplish a single offense. *See United States v. Turcotte*, 405 F.3d 515, 523 (7th Cir. 2005) (subsections of 21 U.S.C. § 802(9) are separated by the word "or" to indicate Congress' clear disjunctive intent); *United States v. Marbella*, 73 F.3d 1508, 1514 (9th Cir. 1996) (relying on disjunctive "or" separating subsections of 18 U.S.C. § 1956(a)(1) to support conclusion that each subsection is an alternate means of proving a single element of the crime of money laundering); *but cf. United States v. Dennison*, 730 F.2d 1086, 1089 (7th Cir. 1984) (subparagraphs of 15 U.S.C. § 1644 joined by disjunctive "or" indicate that each subparagraph "states a separate and separately punishable violation, even where . . . several separate offenses occur in the same course of conduct.")[4] In

[4] The analysis in *Dennison* is distinguishable in that the disjunctive "or" appears between separately enumerated subsections of § 1644 and not between paragraphs contained within a single subsection, as in § 2113(a). Each subsection (a) through (f) of § 1644 states a separate

addition, in the context of the overall structure of the statute, the inclusion of a single penalty clause after the two paragraphs § 2113(a) further signals Congress' intent to treat the subsection as a whole as a single offense that can be carried out in two separate ways.

In addition to the textual and legislative history support for the conclusion that the two paragraphs of § 2113(a) proscribe two means of violating a single offense, the *Prince* decision governs the analysis here. The Court in that case engaged in the same Congressional-intent analysis and held that § 2113(a) creates a single offense. *Prince*, 352 U.S. 322; *see also Helflin*, 358 U.S. at 419 ("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."). *Prince* is particularly instructive because it dealt with precisely the same "unique statute of limited purpose and . . . inconclusive legislative history." *Prince*, 352 U.S. at 325.[5] The Court's analysis concluded that the second paragraph "was inserted [in § 2113(a)] to cover the situation where a person enters a bank for the purpose of committing a crime but is frustrated for some reason." *Id.* at 328.

Subsequent cases have reinforced and applied the holding in *Prince*. "We believe it to be now settled that [§ 2113] creates a single offense with various degrees of aggravation permitting

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offense, but when the disjunctive "or" is used *within* a single subsection, such as in § 1644(a), it signals an alternate means of committing the single offense described therein. Therefore, the statutory construction applied in *Dennison* actually supports the conclusion that the subparagraphs of § 2113(a) state alternate means of committing a single offense.

[5] The government's response brief in opposition to the motion omits any reference to the Supreme Court ruling in *Prince*. I note, however, that any attempt to factually distinguish *Prince* would be unavailing. The holding in *Prince* turns on the Court's analysis of the same statute, including its structure and legislative history, that is in issue here. The precise question presented in *Prince* was whether Congress intended the maximum punishment for robbery to remain at 20 years when it added the illegal entry (second paragraph) to subsection (a). While the precise question presented in our case differs, both cases depend on whether the two paragraphs of § 2113(a) constitute a single offense, and *Prince* answers that question in the affirmative.

sentences of increasing severity." *United States v. Drake*, 250 F.2d 216, 217 (7th Cir. 1957). "*Prince* has, for all practical purposes, so decided." *Id.* *See also Wright v. United States*, 519 F.2d 13, 15 (7th Cir. 1975) (acknowledging well settled law that § 2113 does not create separate crimes but merely prescribes alternative sentences for the same crime depending on the manner in which the crime was perpetrated); *United States v. Leather*, 271 F.2d 80, 86 (7th Cir. 1959) (same).

I find that paragraphs one and two of § 2113(a) are alternate means of committing a single offense. Accordingly, double jeopardy bars the government from re-prosecuting Defendants for a violation of paragraph two following their acquittal of paragraph one. Defendants' motion to dismiss Count I of the second superseding indictment is granted.

III. COUNT II

Defendants further seek dismissal of Count II – conspiring to violate 18 U.S.C. § 2113(a), ¶ 1 – on the basis that it violates Defendants' double jeopardy rights through application of the ancillary doctrine of issue preclusion. Defendants concede that strict application of double jeopardy via the *Blockburger* separate-elements test (applicable here because the original robbery charge and the present conspiracy charge are two distinct statutory provisions) would not prohibit the government from now pursuing the conspiracy charge. However, Defendants seek to invoke the doctrine of issue preclusion, which prohibits the recharging and retrial of Defendants because I already determined the issue of Defendants' mental state in favor of Defendants. *See Ashe v. Swenson*, 379 U.S. 436, 443 (1970) ("when an issue of ultimate fact has once been determined by a valid and final judgement, that issue cannot again be litigated between the parties in any future lawsuit.").

Three procedural rules govern the application of issue preclusion in criminal cases. *United States v. Salerno*, 108 F.3d 730, 741 (7th Cir. 1997). First, I am not to apply the issue preclusion rules in a hypertechnical manner, but rather I should examine the pleadings, evidence, charge, and other relevant materials to determine "whether a rational jury could have based its verdict on an issue other than the one the defendant seeks to foreclose from consideration. *Id.* Second, "issue preclusion only applies when a relevant issue in a subsequent prosecution is an 'ultimate issue,' *i.e.*, an issue that must be proven beyond a reasonable doubt." *Id.* Third, the defendant bears the burden of proving the prior jury necessarily determined the "ultimate issue." *Id.*

However, based on the judgments of acquittal I entered, Defendants cannot satisfy their burden of demonstrating that the essential element of intent for the conspiracy charge was clearly established against the government. *See United States v. Balin*, 977 F.2d 270, 281 (7th Cir. 1992). The sole basis upon which I entered the judgments of acquittal was the Seventh Circuit's ruling in *Thornton*, as discussed, *supra*. I made no finding that Defendants lacked the requisite intent to commit the attempted bank robbery charged in the superseding indictment that could have any preclusive effect on the conspiracy charged in the second superseding indictment. In fact, prior to the judgments of acquittal, the jury and I separately determined beyond a reasonable doubt that Defendants did in fact possess the requisite intent to commit a bank robbery under § 2113(a).

Because Defendants fail to satisfy their burden of showing that their acquittals necessarily determined the issue of intent in the pending conspiracy charge contained in Count II, I deny Defendants' motion to dismiss Count II of the superseding indictment.

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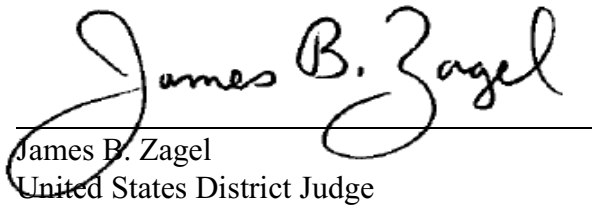

James B. Zagel
United States District Judge

DATE: January 28, 2009

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

v.

WALTER THORNTON.

No. 05 CR 813
Judge James B. Zagel

MEMORANDUM OPINION AND ORDER

I. BACKGROUND

The facts in this case have been well-recited elsewhere, and I need not repeat the exercise here. *See United States v. Thornton*, 539 F.3d 741, 742-45 (7th Cir. 2008).

A jury found Walter Thornton guilty of attempted robbery in violation of 18 U.S.C. § 2113(a)[1] and possessing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c). Thornton moved for a judgment of acquittal under Federal Rule of Civil

[1] 18 U.S.C. § 2113(a) reads:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny--
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

Procedure 29(a) and (c) and moved for a new trial pursuant to Rule 33. I denied his motions, entered judgment on the verdict, and sentenced Thornton to a total of 132 months' imprisonment on both counts. Thornton appealed, and on August 26, 2008, after determining that the jury instructions "did not require the jury to find actual intimidation, thus omitting an essential element necessary for a conviction[,]" the Court of Appeals reversed the conviction on both counts and instructed that a judgment of acquittal be entered.

On August 28, 2008, the government filed a superseding indictment charging Thornton with: (1) conspiracy under 18 U.S.C. § 371 to commit a § 2113(a) ¶ 1 bank robbery; (2) attempted bank robbery under paragraph two of § 2113(a); (3) possession of a firearm in furtherance of a conspiracy to commit bank robbery, in violation of § 924(c); and (4) forfeiture. Thornton now moves to dismiss the superseding indictment.

II. DISCUSSION

Thornton asserts the following: (1) Count II fails on double jeopardy grounds because the § 2113(a) paragraph two charge is a lesser-included offense of the paragraph one charge on which Thornton was acquitted; (2) Count I fails based on the factual insufficiency of the indictment and fundamental fairness; and (3) Count III fails because it is predicated on Count I, a conspiracy charge, which is not a "violent crime" for the purposes of a § 924(c) weapons enhancement. I will address each of these claims in turn.

A. Count II - Attempted Robbery Under § 2113(a) Paragraph Two

Thornton maintains that the first and second paragraphs of § 2113(a) constitute a single offense, and that because Thornton was acquitted on the § 2113(a) paragraph one charge, the government's attempt to re-prosecute him under paragraph two violates the double jeopardy

clause of the Fifth Amendment. In its response, the government argues that the two paragraphs constitute separate offenses, and therefore Count II of the superseding indictment does not violate the double jeopardy clause. This precise issue was before me in *United States v. Loniello*, No. 07 CR 336, 2009 WL 212124, at *2-6 (N.D. Ill. Jan. 28, 2009). Based on the reasoning applied in that case, I reach the same conclusion that the two paragraphs of § 2113(a) constitute a single offense. Because Thornton has already been acquitted on the § 2113(a) paragraph one charge, the government's indictment under § 2113(a) paragraph two is barred by double jeopardy. Therefore, Count II of the superseding indictment is dismissed.

B. Count I - Conspiracy Under 18 U.S.C. § 371 To Commit A § 2113(a) ¶ 1 Robbery

In order to sustain a conspiracy charge under § 371, the government must allege facts sufficient to show (1) an agreement between two or more persons to commit an unlawful act, (2) that the defendant was a party to the agreement, and (3) an overt act by one of the co-conspirators in furtherance of the conspiracy. *United States v. Jones*, 950 F.2d 1309, 1313 (7th Cir. 1991). In this case, the unlawful act alleged by the government is a bank robbery by force and violence or intimidation, in violation of § 2113(a) paragraph one. Thornton argues that Count I should be dismissed because although the grand jury transcripts reveal conversations about bank robbery in general, there is no evidence of agreement and certainly not of any agreement to commit the robbery by force and violence or intimidation.[2] However, "the government need not establish

[2] Thornton also argues in a footnote that the indictment should be dismissed because it is procedurally defective for failing to allege an overt act in furtherance of the conspiracy. "[T]he indictment standing alone must contain the elements of the offense intended to be charged, and it must be sufficient to apprise the accused of the nature of the offense." *Collins v. Markley*, 346 F.2d 230, 232 (7th Cir. 1965). However, "[t]he sufficiency of an indictment should be determined by practical rather than technical considerations." *Id.* While in this case an overt act is not alleged in the conspiracy count, the attempt count can itself be construed as an overt act in furtherance of the conspiracy, thus putting Thornton on notice as to the nature of the overt act the government is charging.

that there existed a formal agreement to conspire; circumstantial evidence and reasonable inferences drawn therefrom concerning the relationship between the parties, their overt acts, and the totality of their conduct may serve as proof." *Id.* The government presented to the grand jury testimony regarding Thornton's express agreement with Moore to rob the bank, the detailed plans of how they would accomplish the robbery, and Moore's knowledge that Thornton had purchased a gun. The government need not show a formal agreement with regard to the gun itself. The circumstantial evidence is sufficient to warrant the inference that Moore knew Thornton planned to use the gun and that Thornton had it with him on the day of the attempted robbery.

Thornton further argues that Count I should be dismissed because the re-prosecution violates principles of due process and sound public policy. He argues that a re-prosecution for conspiracy runs afoul of the "community's sense of fair play" inherent within the Double Jeopardy Clause, and that due process mandates that a defendant should not be subjected to "repeated risks of conviction for the same conduct…" *United States v. Bailin*, 977 F.2d 270, 277 (7th Cir. 1992) (discussing the policy reasons underlying the double jeopardy clause). However, the law is well-settled that re-prosecution for conspiracy violates neither the double jeopardy clause, nor the principles underlying it. "[A] conspiracy to commit a crime is a separate offense from the crime itself." *U.S. v. Felix*, 503 U.S. 378, 391 (1992). Double jeopardy does not bar re-prosecution for conspiracy based on the same underlying incident as a previous prosecution for the substantive crime. *Id.* at 389-90. Nor does a subsequent prosecution for conspiracy pose a "repeated risk[] of conviction for the same conduct." *Bailin*, 977 F.2d at 277. "[T]he same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself." *Felix*, 503 U.S. at 390 (defendant's

prosecution for conspiracy in connection with his operation of a drug manufacturing facility was not barred by double jeopardy where he was previously tried for attempt to manufacture illegal drugs); *see also United States v. James*, 109 F.3d 597, 600-01 (9th Cir. 1997) (upholding defendant's indictment for conspiracy to commit bank robbery after he was previously acquitted on three bank robbery charges); *United States v. Felix*, 503 U.S. 378, (1992).

Although double jeopardy does not bar the conspiracy indictment in this case, collateral estoppel does apply. *See Bailin*, 977 F.2d at 276 (noting that where double jeopardy does not apply to bar successive prosecution for a related but different offense, collateral estoppel may apply where the second prosecution requires the relitigation of facts already determined by the first prosecution); *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) ("when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."). Thornton was acquitted of the previous robbery charge against him because the government failed to prove that Thornton used actual force and violence or intimidation. *Thornton*, 539 F.3d at 751. I agree with Thornton that the government is barred from relitigating facts used at trial to establish force and violence or intimidation. *See United States v. James*, 109 F.3d 597, 601 (defendant's "acquittals in three prior bank robbery counts preclude their subsequent use as overt acts of a related conspiracy charge[,]" where "acquittals involve ultimate issues that have already been conclusively determined adversely to the Government."). However, at this time, I leave undecided what facts are barred.

Finally, Thornton argues the re-prosecution should be barred on policy grounds. He accuses the government of gamesmanship and overreaching, alleging that it should have initially

charged Thornton with a violation of paragraph two, rather than charging him under paragraph one in an attempt to garner a conviction to which a firearm count, and enhanced sentence, could be added. While it is true that the Seventh Circuit has determined that a proper reading of the first paragraph of § 2113(a) requires actual force and violence or intimidation even where attempt is charged, the Circuit Courts are split on the issue. *Thornton*, 539 F.3d at 747. As noted in the appellate opinion, the Second, Fourth, Sixth, and Ninth Circuits "have concluded that an attempt to use force and violence or intimidate is sufficient" under § 2113(a) ¶ 1. *Id.* The government's reading of the statute, and the subsequent jury instructions, do not appear to be a blatant effort at gaming the system, but rather support what four other circuits maintain to be a plausible application of the statute. The government could not have known with certainty at the time of the indictment that its interpretation would be rejected by the Seventh Circuit. Thornton's suggestion that without some consequence the government will continue to stretch statutory language to suit itself is unduly harsh.

Thornton further submits that sanctioning the government's decision to bring a second prosecution for a conspiracy charge encourages the waste of judicial resources. Although it might have been more expedient to charge conspiracy in the original indictment, it was not inappropriate for the government to bring the charge in the superseding indictment. Collateral estoppel "may bar a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts. But this does not establish that the Government must... bring its prosecutions... together. It is entirely free to bring them separately, and can win convictions in both." *United States v. Dixon*, 509 U.S. 688, 705 (1993) (citation omitted). It is therefore unnecessary to dismiss the indictment on this ground.

C. Count III - Possession of a Firearm in Furtherance of a Conspiracy to Commit Bank Robbery, in Violation of 18 U.S.C. § 924(c)

Thornton seeks dismissal of Count III on the grounds that a § 371 conspiracy is not a crime of violence for purposes of § 924(c).[3] A sentence enhancement under § 924(c) must be predicated on a "crime of violence," defined by the statute as an offense that is a felony and

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

"When defining 'crime of violence' under § 924(c)(3) . . ., courts consistently look to the acts that constituted the crime of conviction and not to the underlying conduct." *Bush v. Pitzer*, 133 F.3d 455, 457 (7th Cir. 1997). "An offense such as conspiracy neither has the use of physical force as an element, § 924(c)(3)(A), nor 'by its nature' creates a substantive risk that physical

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[3] 18 U.S.C. § 924(c) states in pertinent part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
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> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

force will be used, § 924(c)(3)(B)." *Id.* The government argues that when a conspiracy exists to commit a crime of violence, the conspiracy itself poses a substantial risk of violence, qualifying it as a crime of violence under § 924(c)(3)(B). However, in support of this proposition, the government cites cases involving a Hobbs Act conspiracy, which explicitly requires violence,[4] and cases where the issue was whether the defendant could be guilty of a § 924(c) violation under a *Pinkerton* theory.[5] None of these cases addresses the issue involved here, and I find the government's argument unpersuasive.[6]

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[4] The government cites *United States v. Elder*, 88 F.3d 127 (2nd Cir. 1996). That case involves a conspiracy under 18 U.S.C. § 1951, not § 371. 18 U.S.C. § 1951 (Hobbs Act) states, in part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

[5] The government cites *United States v. Graziano*, 2008 WL 4190957, at *13 n.12 (E.D.N.Y. Sept. 10, 2008) and *United States v. Hodges*, 2008 WL 2436150, at *2 (7th Cir. June 17, 2008).

[6] The government also points to Eighth and Ninth Circuit cases holding that conspiracy to commit bank robbery satisfies the crime of violence requirement under § 924(c). *See United States v. Johnson*, 962 F.2d 1308, 1311-12 (8th Cir. 1992) *and United States v. Harper*, 33 F.3d 1143, 1149 n.5 (9th Cir. 1994). However, in *Bush*, the Seventh Circuit instructs us to look to the acts constituting the crime, and not to the underlying conduct. *Bush*, 133 F.3d at 457. It is worth noting that *Bush* predates *James v. United States*, 550 U.S. 192 (2007), 127 S.Ct. 1586, 1594-1598, where the Court determined that attempted burglary under Florida law does qualify as a "crime of violence." Florida law requires "an overt act directed toward entry of a structure," and the Court found that the risk of physical injury presented by burglary and attempted burglary is comparable where such an overt act is required, since both crimes involve "the possibility that an innocent person might appear while the crime is in progress." *Id.* at 1595-96. However, an application of this analysis to the crime of conspiracy to commit bank robbery yields a different result. The overt act required under § 371 need simply be one in furtherance of the conspiracy, a broader requirement than that under Florida law for attempted burglary. In applying the Supreme Court's categorical approach in *James* to the crime of conspiracy, the Tenth Circuit reasoned that

V. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is denied as to Count I of the superseding indictment, and granted as to Counts II and III.

ENTER:

James B. Zagel
United States District Judge

DATE: February 12, 2009

"many overt acts sufficient to sustain a [] conspiracy conviction create no risk of a violent confrontation between the defendant and an individual interacting with the co-conspirator while the overt act is being committed," thus holding that conspiracy to commit burglary under state law is not a violent felony for the purposes of § 924(e)(2)(B). *United States v. Fell*, 511 F.3d 1035, 1044 (10th Cir. 2007). I find this reasoning persuasive and do not believe that *James* affects the outcome in this case.