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*.

REPLY BRIEF OF THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

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

We explained in our opening brief how 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 previous prosecution under ¶ 1. G. Br. 14-31. As we demonstrated based on the text and legislative history of the statute, G. Br. 16-23, the two paragraphs of § 2113(a) constitute separate offenses and describe different crimes (robbery versus burglary), each of which requires an element of proof that the other does not. We also showed that the district court erroneously relied on *Prince v. United States*, a case which the Supreme Court itself characterized as narrow and which did not discuss double jeopardy issues. G. Br. 27-30. Since the two paragraphs of § 2113(a) satisfy the *Blockburger* test, Double Jeopardy does not bar successive prosecution of defendants for ¶ 2 of that section.

A. Defendants' Arguments Based On The Text Of The Statute

In response, defendants first argue that in the two paragraphs of § 2113(a), Congress constituted only a single offense capable of being violated in alternate ways. Br. 22-23. Defendants claim support for this argument in the legislature's use of the term "or" between the two paragraphs of § 2113(a), citing *Sanabria v. United States*, 457 U.S. 54, 65 (1978), *United States v. Marbella*, 73

F.3d 1508, 1514 (9th Cir. 1996), and *United States v. Kimbrough*, 69 F.3d 723, 729 (5th Cir. 1995). Br. 22-23. But in our opening brief (G. Br. 26-27) we distinguished *Sanabria*. There the defendant was charged with conducting an illegal gambling business in violation of 18 U.S.C. § 1955(b)(1), including both a numbers racket and betting on horse races. 437 U.S. at 57-58. Defendant was acquitted after a trial on only the horse-betting violation, and the Supreme Court precluded a retrial on the alternate definition of gambling. *Id.*

Sanabria's outcome is hardly remarkable, and it sheds no light on this case. In fact, we conceded that a defendant who was acquitted of an indictment charging bank robbery by force and violence—both in ¶ 1 of § 2113(a)—could not be reprosecuted for robbing that same bank by intimidation. G. Br. 27. The use of "or" in the statute in *Sanabria*—contained within one paragraph defining an element of the violation—is far afield from the manner in which "or" is used in § 2113(a), where it separates two paragraphs defining offenses complete in themselves and each requiring very different elements.

Nor does *Kimbrough*, 69 F.3d at 729, aid defendants' argument regarding the use of "or" here. In that case, the government had charged defendant in a multiplicitous indictment—one that made two counts out of what should have been one crime of a single possession of child pornography. *Id.* The Fifth Circuit stated: "Both Counts 3 and 4 charge violations of the same statute on or about

the same date and both involve possession of three or more items. The only difference . . . is the jurisdictional element—whether the pictures or the materials used to produce them traveled in commerce. We find this distinction to be artificial and an unlawful attempt to divide a single offense into multiple offenses." This does not support defendants here, since the use of the term "or" between the different means of satisfying the interstate commerce element in the statute in *Kimbrough* is entirely unlike Congress' use of the term "or" in § 2113(a), where it separates two paragraphs, each defining a complete offense in itself without reference to the other.[1]

Defendants' argument regarding "or" attempts to distinguish *United States v. Dennison*, 730 F.2d 1086 (7th Cir. 1984). Br. 24-25. The crux of their argument regarding *Dennison* is that "or" there "was the disjunctive *between separately enumerated subsections* of the statute and not the 'or' contained within a single subsection." Br. 24 (emphasis in original). Thus, according to defendants, the absence of separate enumeration of the two paragraphs in § 2113(a) takes on a constitutional dimension. As we previously showed, G. Br.

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[1] Defendants also rely on *United States v. Marbella*, 73 F.3d 1508 (9th Cir. 1996). As we pointed out in our opening brief, however, G. Br. 18, *Marbella* stands for nothing more than that 18 U.S.C. § 1956(a)(1) requires the government 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, and that in that case the government's proof of promotion supported the conviction.

20, this argument is excessively formalistic, a characteristic disfavored by double jeopardy cases, including *Dennison* itself. *Dennison*, 730 F.2d at 1089; *United States v. DiFrancesco*, 449 U.S. 117, 142 (1980) ("exaltation of form over substance is to be avoided").

Defendants further argue that Congress' placement of both ¶ 1 and ¶ 2 in § 2113(a) "indicates a clear intent to define and circumscribe a single offense and not multiple offenses." Br. 25. For this proposition, defendants cite *United States v. Munoz-Romo*, 989 F.2d 757 (5th Cir. 1993). There, defendant had been sentenced twice for unlawful possession of firearms in violation of § 922(g), once for being a felon in possession and once for being an illegal alien; both violations involved the same possession of the same firearms. *Id.* at 758. The Fifth Circuit concluded: "we are not persuaded that Congress in § 922 intended to authorize multiple punishments for a single act of possession of a firearm. Otherwise, as the Eleventh Circuit persuasively asserted, a person fitting into five of the seven listed categories could be subject to five consecutive terms of imprisonment for a single act of possessing a firearm." *Id.* at 759. But here, of course, unlike the structure of § 922(g), the two subparagraphs of § 2113(a) do not criminalize the

same conduct (*e.g.*, possession of a firearm) and do not have the same potential for multiplication of offenses depending on various classes of defendant.[2]

In fact, defendants have never defined the singular offense they claim that § 2113(a) covers. It is not "bank robbery," which ¶ 2 is not. It is not "bank burglary," which ¶ 1 is not. The fact that defendants have not defined the offense powerfully suggests that the section defines two distinct offenses. As we pointed out, G. Br. 17, the second paragraph of subsection (a) refers to nothing in the first paragraph, nor does the first paragraph refer to any provision of the second. Aside from the penalty provision, the two paragraphs share nothing in

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[2] Defendants also cite *United States v. McLaughlin*, 164 F.3d 1, 15-16 (D.C. Cir. 1998), for the proposition that courts are reluctant "to find multiple offenses and multiple punishments in 'situations involving provisions within a single statutory scheme.'" Br. 25. *McLaughlin* involved a defendant who had been convicted of both "assault with intent to kill while armed . . . and aggravated assault while armed." 164 F.3d at 13 (citations omitted). The court there looked to the nature of the crime and the structure of the statutory scheme and concluded that "despite the outcome of a *Blockburger* analysis, we are skeptical as to whether Congress intended a single assault to lead to convictions for both assault with intent to kill while armed and aggravated assault." *Id.* at 16.

The similarity of the violations in *McLaughlin* explains the result there. The violations came exceptionally close to being greater and lesser-included offenses, and proof that one commits an aggravated assault leading to serious bodily injury nearly always supplies proof of assault with intent to kill. In contrast, in our case, there is a marked disjunction between the conduct proscribed as bank robbery and the conduct proscribed as unlawful entry.

In any event, the District of Columbia Court of Appeals has rejected *McLauglin*, holding that the *Blockburger* analysis is determinative and allows for multiple convictions on these statutes arising from the same occurrence. *Nixon v. United States*, 730 A.2d 145, 152 (D.C. App. 1999); *Ginyard v. United States*, 816 A.2d 21, 34-35 (D.C. App. 2003).

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.

B. Defendants' Arguments From The Legislative History

Our reading of the text of the two paragraphs of § 2113(a)—that the two paragraphs each constitute a separate and distinct offense—is confirmed by the legislative history of the statute; defendants' alternate reading of the legislative history is unpersuasive.

Defendants concede, as they must, that the original bank robbery statute, enacted in 1934, covered only robberies and did not cover larceny or burglary. Br. 28-29. Thus, as defendants note, the statute was amended to cover burglary (unlawful entering) and larceny. Br. 29. Defendants claim, however, that the amendment of the statute to prohibit what was not previously unlawful did not create a new offense, likening the new provision against unlawful entry to gap-filling language such as "abstract, embezzle, and purloin," or "possess with intent to distribute and to distribute," or "use, carry and transport." Br. 31.

This argument, though, overlooks the obvious distinction between such gap-fillers and the second paragraph of § 2113(a): the second paragraph was enacted to prohibit conduct wholly unreached by the first paragraph of the

subsection, and therefore, standing alone, defines an offense complete in itself. The fact that it shares the same penalty provision as the first paragraph of § 2113(a) is simply a matter of convenience, similar to that noted in *Dennison*. 730 F.2d at 1089.

Defendants rely heavily on the fact that in 1948 Congress moved the larceny provision to a separate subsection, § 2113(b). Br. 31-34. But there was a good reason for bank larceny to have its own subsection, entirely aside from its being an offense distinct from bank robbery or bank burglary: Congress had determined that bank larceny would not share the same penalties as robbery and burglary. Section 2113(b) has a ten-year maximum penalty for larcenies over $1000 in value and a one-year maximum for larcenies under that amount. Thus the fact that Congress placed larceny in its own separately enumerated subsection says less about its intent to treat bank robbery and unlawful entry as the same offense than it does about Congress' desire to enact lesser penalties for bank larceny. Given that the legislative history of the statute is "meager" to begin with, *Prince*, 352 U.S. at 328, defendants' argument about Congress' intent concerning § 2113(a) based on its treatment of § 2113(b) is a weak brew indeed.

C. Defendants' Reliance on *Prince*

Defendants of course rely heavily on *Prince* for the argument that the two paragraphs of § 2113(a) constitute alternate means of committing one offense.

Br. 35-42. They fail to respond to our argument that *Prince*'s holding is not grounded in the Double Jeopardy Clause other than to point out that *Blockburger* itself does not mention double jeopardy. Br. 37-38. But the analysis in *Blockburger* has gone on to become central in the Double Jeopardy field despite this omission, while the analysis in *Prince*, bound up as it is with the idea of "the heart of the crime," 352 U.S. at 407 (akin to the "same-conduct" rule overruled in *United States v. Dixon*, 509 U.S. 688 (1993)), and focused as it is on congressional *intent* (not double jeopardy) has had little additional application.

In our opening brief, G. Br. 28-30, we also pointed out that *Prince*, far from holding that the two paragraphs of § 2113(a) are alternate means of committing the same offense, held only that successive punishment was 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. Defendants argue that given the posture of the case, "Prince could only raise a challenge to his sentence and incarceration, but not his underlying conviction." Br. 38. That may be, but it does not change the fact that the Supreme Court *did not question* the validity of Prince's two convictions. Thus our point remains: that Prince was not a case about whether the two

paragraphs of § 2113 were the same offense for purposes of double jeopardy but was rather concerned with pyramiding of penalties.

D. The Two Paragraphs of § 2113(a) Meet The Blockburger Test

At this point in their argument, Br. 40-41, defendants breeze over the gap between *Prince*'s failure to hold that § 2113(a)'s subparagraphs are the same offense for double jeopardy purposes and our acknowledgment, taken from *Brown v. Ohio*, 432 U.S. 161, 166 (1977), 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." But, as we have seen, *Prince* did not proscribe consecutive sentences for § 2113(a) violations on *Blockburger* grounds and thus should not be read as forbidding successive prosecutions.

Defendants continue to rely on three cases relied on by the district court that we distinguished in our opening brief. Br. 43. *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). But defendants fail to answer our point that the holdings in these cases were unsurprising since each involved a conviction for either § 2113(d) or § 2113(e), subsections explicitly incorporating lesser-included offenses of § 2113(a) and (b). *Drake*, 250 F.2d at 217; *Leather*, 271 F.2d at 86; *Wright*, 519 F.2d at 14. In this appeal, on the other

hand, the relevant comparison is between the two separate paragraphs of § 2113(a) to each other and not to § 2113(d) or § 2113(e).

As we demonstrated in our opening brief, G. Br. 23-27, the first and second paragraphs of § 2113(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 felony therein (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 a robbery with the use of actual force and violence or intimidation.

Defendants have compiled a string of cases to the effect that *Blockburger* has been traditionally been applied to separately designated statutory provisions and report that they have found no case in which *Blockburger* was applied to unenumerated paragraphs of a single statutory provision. Br. 51-53. This is hardly unusual, since criminal statutes with separate unlabeled paragraphs are not common.[3]

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[3] Title 18, United States Code, Sections 474(a) and 659 are two examples of criminal statutes with unenumerated subparagraphs defining distinct offenses. Section 659, in one paragraph for example, proscribes theft from an interstate shipment; in another paragraph, it proscribes the purchase of goods stolen from an interstate shipment. Each offense defined in § 659, separated from the next by the term "or," shares a common penalty. Section 474, in one paragraph, proscribes unauthorized printing of currency from genuine U.S. printing plates; in another

To the extent that defendants' point is that *Blockburger* is not *applicable at all* to offenses defined in one section of the criminal code, we know they are wrong: the Supreme Court itself applied *Blockburger* in *Brown v. Ohio*, 432 U.S. 161 (1977), to determine whether two subsections of a criminal statute were sufficiently distinct for double jeopardy purposes. And of course, this Court applied *Blockburger* in *Dennison* to separate subsections of the same criminal statute. 730 F.2d at 1089.

Defendants claim that even if this Court were to apply *Blockburger* here, it should find that § 2113(a), ¶ 2 is a lesser included offense of ¶ 1. Br. 53 n.8. With a nod to *Prince*'s observation that "[i]t was manifestly the purpose of Congress to establish lesser offenses," 352 U.S. at 327, defendants assert that the second paragraph of § 2113(a) "contains no elements beyond those required under the statute's first paragraph and, consequently, is a lesser-included offense." Br. 53 n.8. *Prince*, however, did not hold that unlawful entry was a lesser-included offense of bank robbery, nor could it have. A lesser-included

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paragraph, it proscribes possession of an electronic image of U.S. currency with the intent to defraud. Again, each paragraph of § 474 is separated by "or," and each shares a common penalty provision. Under defendants' separate-enumeration theory, a fence acquitted of actual theft from an interstate shipment could not subsequently be prosecuted for buying the stolen goods, nor could a counterfeiter acquitted of printing from unlawfully possessed genuine plates subsequently be prosecuted for possession of computer scans of currency with intent to defraud—results that are at odds with *Blockburger* and common sense.

offense is one whose elements are a subset of the greater offense. *Schmuck v. United States*, 489 U.S. 705, 716 (1989). The elements of unlawful entry into a bank are not a subset of bank robbery: one of the required elements of unlawful entry is an actual entry or attempted entry into a bank or financial institution, whereas bank robbery has no such requirement. Therefore, these do not constitute greater and lesser-included crimes.

E. The Rule Of Lenity Does Not Apply Here

Defendants argue that to the extent that ambiguity exists about congressional intent to create a single offense in § 2113(a), the Rule of Lenity should operate to resolve the ambiguity in their favor. Br. 44-46. But defendants misunderstand the trigger for the rule of lenity. The rule does not apply simply because there is "some statutory ambiguity." *Muscarello v. United States*, 524 U.S. 125, 138 (1998). Resort to the rule of lenity is appropriate only when there is a "grievous ambiguity" in the statutory text, such that, "after seizing every thing from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Muscarello*, 524 U.S. at 138-139 (citation omitted).

In determining whether that standard is satisfied, the Supreme Court has stated that it is appropriate to consider "the language and structure, legislative history, and motivating policies of the statute," *Moskal v. United States*, 498 U.S.

103, 108 (1990) (internal quotation marks and citation omitted), and it has refused to apply the rule where a defendant's interpretation rested on "an implausible reading of the congressional purpose,"*Caron* v. *United States*, 524 U.S. 308, 316 (1998).

There is no "grievous ambiguity" in this case, and we are not reduced to guessing at what Congress intended. As we explained in our opening brief, an examination of statutory text, history, and purpose demonstrates that the two subparagraphs of § 2113(a) constitute two distinct and separate offenses such that an acquittal on one charge does not bar reprosecution on the other charge. This is "not a case of guesswork reaching out for lenity," *United States v. Wells*, 519 U.S.482, 499 (1997), such that the Court need resort to the Rule of Lenity.

F. The Unlawful Entry Charges Are Not Barred By Issue Preclusion

Defendants' final argument is that the doctrine of issue preclusion, or collateral estoppel, bars their prosecution on the attempted unlawful entry charges under paragraph 2 of § 2113(a) because of the earlier acquittal on the attempted bank robbery charges under paragraph 1. Br. 55-59. Defendants are incorrect.

Issue preclusion in the criminal context means that once an issue of ultimate fact has been determined by a valid and final judgment, the same parties cannot again litigate that issue in any future proceeding. *United States*

v. Salerno, 108 F.3d 730, 741 (7th Cir. 1997); *United States v. Bailin*, 977 F.2d 270, 281 (7th Cir. 1992). This principle, as applied to criminal cases, is rooted in the Fifth Amendment's guarantee against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970).

Defendants, however, cannot establish that the ultimate issue of their intent to commit bank robbery was established in their favor. As the district court said in *Loniello* in ruling on issue-preclusion as it applied to the conspiracy count of the second superseding indictment:

> Defendants cannot satisfy their burden of demonstrating that the essential element of intent . . . was clearly established against the government. The sole basis on which I entered the judgments of acquittal was the Seventh Circuit's ruling in *Thornton* . . . . 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).

07 CR 336 R. 178 at 13 (citations omitted; emphasis added); App. 13. Thus, in *Loniello* the district court explicitly found that the issue of defendants' intent had not been decided in their favor. In *Thornton*, on the other hand, the district court did find that Thornton's acquittal of attempted bank robbery meant that the issue of his actual use of force and violence and intimidation had been decided against the government. 05 CR 813 R. 140 at 5; App. 19. The district

court did not dismiss the conspiracy count in its entirety, though, as would have been required if the issue of Thornton's criminal intent had been decided in his favor. That was correct because the absence of actual use of force, violence and intimidation is *not* dispositive of *intent* to commit a felony.

The district court's rulings in *Loniello* and *Thornton* make clear that the issue of defendants' intent was not decided in their favor in either case, and therefore the doctrine of issue preclusion does not bar their prosecution on the § 2113(a), ¶ 2 charges.

CONCLUSION

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

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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.

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RULE 32 CERTIFICATION

I hereby certify that 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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	)	
Defendant-Appellee.	)	Honorable James B. Zagel

CERTIFICATE OF SERVICE

I, STUART D. FULLERTON, hereby certify that on July 13, 2009, I caused two copies and a digital version of the foregoing REPLY BRIEF OF THE UNITED STATES, to be served upon the following by first-class, postage-paid mail:

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