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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Case Nos. 07 CR 336, 05 CR 813

Hon. James B. Zagel,
Presiding Judge

BRIEF OF DEFENDANTS-APPELLEES

Steven Shobat
53 West Jackson Boulevard
Suite 1603
Chicago, IL 60604
Phone: (312) 353-2118
Counsel for Defendant-Appellee, MICKEY LONIELLO

Beau Brindley
53 West Jackson Boulevard
Suite 1001
Chicago, IL 60604
Phone: (312) 782-4615
Counsel for Defendant-Appellee, NATHANIEL AGUILAR

Sarah O. Schrup
BLUHM LEGAL CLINIC
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063
Counsel for Defendant-Appellee, WALTER THORNTON

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 09-1494, 09-1606

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

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Walter Thornton

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

Sarah Schrup & Jeff Urdangen, Northwestern University School of Law

Luis Galvan, Carrie Manning, Federal Defender Program

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

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

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

n/a

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

n/a

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

Attorney's Printed Name: Sarah Schrup

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

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

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

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

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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

Mickey Loniello

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

Steven Shobat, Law Offices of Steven Shobat

Daniel J. Hesler, Federal Defender Program

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

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

n/a

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

n/a

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

Attorney's Printed Name: Steven Shobat

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

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

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

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

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

Nathaniel Aguilar

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

Law Offices of Beau Brindley

Daniel J. Hessler, Federal Defender Program

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

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

n/a

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

n/a

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

Attorney's Printed Name: Beau Brindley

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

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

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

E-Mail Address: bbrindley@brindleylaw.com

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STATEMENT OF JURISDICTION

The government's statement of jurisdiction is complete and correct.

STATEMENT OF THE ISSUE

Whether the district court correctly held that the language, structure, and history of 18 U.S.C. § 2113(a) establish that it is but one offense, thus barring the government from bringing a successive prosecution under that section following an earlier acquittal?

STATEMENT OF THE CASE

Thornton

On September 27, 2005, the government filed a criminal complaint charging that Walter Thornton attempted to enter a federally insured Bank One in Berwyn, Illinois, with the intent to commit a robbery in violation of 18 U.S.C. § 2113(a). (Thornton R. 1, Complaint.) On January 25, 2006, a grand jury returned a two-count indictment against Thornton. (Thornton R. 10, Indictment.) Count One alleged that Thornton attempted to take money belonging to Bank One by force and violence or intimidation in violation of 18 U.S.C. § 2113(a). Count Two alleged a firearms charge pursuant to 18 U.S.C. §§ 924(c)(1)(A) and 2. (Thornton R. 10, Indictment.) The case proceeded to trial and the jury ultimately convicted Thornton on both counts. (Thornton R. 71, Jury Verdict.)

The district court sentenced Thornton to one hundred thirty-two months of imprisonment. (Thornton R. 89, Judgment.) Thornton timely appealed, (Thornton R. 84, Notice of Appeal), raising four arguments: (1) the district court erroneously instructed the jury; (2) attempted intimidation is not a violent crime for purposes of the firearm

conviction; (3) the evidence was insufficient to support the convictions; and (4) the court improperly admitted certain pieces of evidence, *United States v. Thornton*, 539 F.3d 741, 745 (2008).

This Court held that to be convicted of a § 2113(a) ¶ 1 violation, a jury must find that there was actual intimidation beyond a reasonable doubt. *Id.* at 748. Finding that the evidence presented at trial was insufficient to support the § 2113 charge, the Court vacated his § 2113(a) conviction as well as the 18 U.S.C. § 924(c) charge that was predicated on the bank robbery charge and instructed the district court to enter orders of acquittal on both counts. *Id.*

Just two days after this Court's decision, the government filed its superseding indictment against Thornton, this time charging him with: (1) conspiracy under 18 U.S.C. § 371 to commit a § 2113(a) ¶ 1 bank robbery; (2) attempted bank robbery under ¶ 2 of § 2113(a); and (3) a 18 U.S.C. § 924(c) charge predicated on the conspiracy charge. (Thornton R. 111, Superseding Indictment.) Thornton moved to dismiss. The district court dismissed the § 2113(a) count as barred by double jeopardy and the § 924(c) count for lack of a violent-felony predicate and held that collateral estoppel applied in part to the conspiracy charge.

(Thornton R. 140, Opinion.) This appeal followed. (Thornton R. 146, Notice of Appeal.)

Loniello and Aguilar

On May 25, 2005, defendants Mickey Loniello and Nathaniel Aguilar were arrested and charged in a criminal complaint with attempting to rob the Chase Bank in Oak Park in violation of 18 U.S.C. § 2113(a). (Loniello and Aguilar R. 1, Criminal Complaint.) Six days later, the two were charged with the same offense in an indictment. (Loniello and Aguilar R. 3, Indictment.) Following the filing of motions to dismiss the indictment based in part on governmental misconduct and to suppress evidence obtained involuntarily, (Loniello and Aguilar R. 43, Motion), the government superseded the indictment adding a second count of using a firearm during and in relation to a crime of violence, (Loniello and Aguilar R. 53, Minute Order). Following a defense motion, the firearms count was dismissed on the ground that the defendants were entrapped as a matter of law. (Loniello and Aguilar R. 77, Minute Order.)

The remaining attempted bank robbery count proceeded to trial between July 14, 2008 and July 23, 2008. (Loniello and Aguilar R. 110-

16, 132-38, Minute Entries.) The defendants were both found guilty. (Loniello and Aguilar R. 117, 139, Jury Verdict and Judgment.) The defendants filed post-trial motions arguing that this Court's decision in *United States v. Thornton*, 539 F.3d 741 (7th Cir. 2008), which had just been decided, required entry of a judgment of acquittal because neither defendant had entered the bank and neither had attempted to use force or intimidation against any teller or bank employee. The district court agreed and acquitted both defendants.

On the same day the district court entered the decision finding defendants Loniello and Aguilar not guilty of the charge in the indictment, the government re-indicted both defendants in a second superseding indictment, this time charging the defendants with attempting to rob the same bank in violation of 18 U.S.C. § 2113(a) ¶ 2 and with conspiring to violate the attempted bank robbery statute in violation of 18 U.S.C. § 371. The defendants moved to dismiss the second superseding indictment on double jeopardy grounds and the district court granted the motion as to the attempted bank robbery charge but not the conspiracy charge. (Loniello and Aguilar R. 176, Order.)

STATEMENT OF THE FACTS

Thornton

This is the government's second attempt to convict Thornton for the same underlying conduct relating to an attempted robbery of a Bank One on September 26, 2005. *United States v. Thornton*, 539 F.3d 741, 745 (7th Cir. 2008). On that day, a disguised man walked up to the bank, placed his hand on the exterior set of doors but did not open them, and then, after a moment's pause, turned and abandoned the crime. *Id*. at 743. He was spotted by a teller from a neighboring bank who, suspecting that a potential bank robbery was in progress, followed the man and his driver back to a local business, which was the store where Thornton worked. (Tr. 46:8-9, 49:14, 52:11-12, 57:11-18.) The teller called the police and when they arrived they found Thornton, Tremain Moore, and a duffel bag with various items of clothing and make-up as well as a gun. *Thornton,* 539 F.3d at 744. Notably, however, no witnesses saw a gun at the scene of the crime and Thornton's fingerprints were not recovered from the gun. (Tr. 320:14-17.) Thornton and Moore were arrested and Moore began cooperating with the government and agreed to testify against Thornton.

The government initially filed a criminal complaint on September 27, 2005, alleging a violation of 18 U.S.C. § 2113(a) ¶ 2. (Thornton R. 1, Criminal Complaint.) But the government ultimately charged Thornton with: (1) attempting to commit bank robbery by force, violence, or intimidation in violation of 18 U.S.C. § 2113(a) ¶ 1; and (2) possessing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c). *Thornton*, 539 F.3d at 745. The case proceeded to trial where the government presented no evidence that the bank robber used force and violence in attempting the robbery. Although the government claimed to be relying on an intimidation theory, *id.* at 748, the government's proof of this element likewise was virtually non-existent. Thornton nevertheless was convicted on both counts.

On appeal, this Court held that the government had failed to establish the essential element of force and violence or intimidation under § 2113(a) ¶ 1, and directed an acquittal. *Id.* at 751. This Court likewise directed an acquittal on the firearms count because of the absence of a predicate crime of violence. *Id.* This Court noted that the government was trying to "stretch federal law to cover an act that is not criminalized by the statute," *id.* at 747, and that the government failed

to prosecute Thornton under the second paragraph of § 2113(a) and instead overreached in its "zeal to obtain stiffer penalties," *id.*

Two days after this Court's opinion, the government filed a superseding indictment, now raising four counts against Thornton: (1) conspiracy under 18 U.S.C. § 371 to commit a § 2113(a) ¶ 1 bank robbery; (2) attempted bank robbery under of § 2113(a) ¶ 2; (3) § 924(c) predicated on the conspiracy charge; and (4) forfeiture. (Thornton R. 111, Superseding Indictment.) The new charges arose from the exact underlying conduct and the government produced to the grand jury no new facts to support them. (Thornton R. 111, Superseding Indictment.) Thornton moved to dismiss the superseding indictment. (Thornton R. 125, Motion to Dismiss.) The district court dismissed the § 2113(a) count as barred by double jeopardy and the § 924(c) count for lack of a violent-felony predicate and held that collateral estoppel applied in part to the conspiracy charge. (Thornton R. 140, Opinion.) With respect to the § 2113(a) charge, the district court held:

> [T]he 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.

(Thornton R. 140, Opinion.)

Loniello and Aguilar

Defendants Mickey Loniello and Nathaniel Aguilar are heroin addicts. (Loniello and Aguilar R. 43, Motion.)[1] On May 22, 2007, a cooperating individual, who was aware that Loniello's vehicle had recently been impounded by the police, approached defendant Loniello and offered to drive him to his regular drug location so that he could get heroin and get high. (Loniello and Aguilar R. 43, Motion.) On each of the following days, May 23, May 24, and May 25, 2007, the cooperating individual drove defendant Loniello to the same spot on the west side of Chicago, acquired heroin for Loniello and Aguilar, and observed him ingest it on multiple occasions. (Loniello and Aguilar R. 43, Motion.) On each occasion, the cooperating individual acquired six doses of heroin from a drug dealer and passed the drugs onto Loniello. (Loniello and Aguilar R. 43, Motion.) The first time, Loniello snorted the heroin procured by the cooperating individual immediately, and the subsequent times, Loniello injected himself with heroin procured for

[1] The facts of the case are detailed in the defendants' motions to dismiss the indictment and were subsequently established at the trial in the matter. The government has not made the transcript of the trial part of the appellate record.

him by the cooperating individual. (Loniello and Aguilar R. 43, Motion.) On May 25, 2007, both Loniello and codefendant Aguilar were present and both injected themselves with heroin immediately upon receiving the heroin from the cooperating individual and then again a second time, approximately forty minutes prior to their eventual arrest in this case. (Loniello and Aguilar R. 43, Motion.) Thus, at all times in which the cooperating individual worked with and met with either of the two defendants, they were under the influence of heroin provided by the cooperating individual or suffering from withdrawal effects of not having heroin. (Loniello and Aguilar R. 43, Motion.)

During these three trips to obtain heroin, the cooperating individual brought up the idea of robbing a bank, engaged in conversations and discussions about robbing a bank, and encouraged defendant Loniello and later Aguilar to rob a bank so that all three of them could get money and "get away." (Loniello and Aguilar R. 43, Motion.) The cooperating individual at all times worked within the authority and knowledge of her controlling agent; she was not a rogue and wayward informant engaging in the illegal distribution of heroin on her own devices. On each of the occasions that she drove to obtain

heroin for defendant Loniello, the FBI not only was aware of the illegal conduct but also was monitoring the activity, both through visual surveillance and while listening in on a transmitting device. (Loniello and Aguilar R. 43, Motion.) On May 23, 2007, on their way to obtain heroin for Loniello, surveillance agents even observed Loniello throwing up out the window of the passenger seat of the cooperating individual's vehicle as he was suffering from withdrawal symptoms from the deprivation of heroin. (Loniello and Aguilar R. 43, Motion.)

Not only did the government agents in this case keep Loniello and Aguilar in a drug-induced state throughout the three days in which the cooperating individual met with the defendants, but the cooperating individual continually insisted to Loniello that he should try to rob a bank. (Loniello and Aguilar R. 43, Motion.) All of the conversations and movements made during these three days were directed by the cooperating individual as she alone provided her truck for transportation. (Loniello and Aguilar R. 43, Motion.) The cooperating individual alone drove defendants Loniello and Aguilar to the drug spots, to the TCF Bank on May 23, 2007 (which according to the government's theory was for the purpose of casing out that bank), and

to the Chase Bank in Oak Park. (Loniello and Aguilar R. 43, Motion.) She picked up defendants Loniello and Aguilar up from their residences, she provided a firearm that she gave to Aguilar moments before the alleged attempted robbery, she provided the latex gloves that she wanted the defendants to use in the robbery, and she selected the bank that they allegedly were to rob. (Loniello and Aguilar R. 43, Motion.) After three days of talking, on May 25, 2007, the cooperating individual drove the defendants to the Chase Bank in Oak Park, handed the firearm to Aguilar, Aguilar and Loniello emerged from the cooperating individual's truck, and the two defendants were arrested steps from the truck in the bank parking lot. (Loniello and Aguilar R. 43, Motion.)

SUMMARY OF ARGUMENT

This Court should affirm the district court's decision to dismiss the attempted bank robbery charges under 18 U.S.C. § 2113(a) ¶ 2. Paragraphs 1 and 2 of § 2113(a) are alternate means of committing a single offense and, as such, the double jeopardy clause prohibits successive prosecution of the defendants. This holding is confirmed by the express language and structure of § 2113(a), which creates through a disjunctive and single-punishment provision the two means to commit the same offense. Both prongs of § 2113(a) are directed toward a common evil, are derived from the same legislative purpose, and are part of a single statutory subsection; all of these are overwhelming indications of Congress's intent to create a single offense. Moreover, the legislative history further confirms that § 2113(a) constitutes a single offense, particularly when considering that Congress combined these two offenses together in a single section and kept them together even after removing and setting apart in a separate subsection the larceny offenses.

Moreover, the parties and this Court are not called to answer the interpretative question raised in this appeal on a blank slate; the

United States Supreme Court in *Prince v. United States*, 352 U.S. 322 (1957) interpreted the exact same two subparagraphs and determined that the two provisions did not allow for cumulative punishment. *Prince's* reasoning and holding control the analysis here. This Court is simply not free to accept the government's invitation to reach a contrary result to Supreme Court precedent that has stood for over fifty years.

Finally, to the extent that there is any ambiguity in what Congress intended, the Rule of Lenity requires this Court to interpret the two subparagraphs as providing for a single offense. Nor should this Court follow the government's suggestion to employ the *Blockburger v. United States*, 284 U.S. 299 (1932), separate-elements test. To do so would be to engage in a statutory analysis that was specifically eschewed by the Supreme Court in analyzing these very subparagraphs in *Prince*, and would be contrary to a long line of cases of both this Court and the Supreme Court holding that the same-elements test does not apply when analyzing a single statutory provision and where legislative intent is clear, as it is in this case.

ARGUMENT

I. The plain language, structure, and legislative history of § 2113 establish that each paragraph of § 2113(a) constitutes an alternate means of committing a single offense.

The district court correctly held that the proper construction of 18 U.S.C. § 2113(a) showed that it was but one offense, that the Supreme Court's decision in *Blockburger* simply does not apply in this case, and that multiple punishment and successive prosecution under this statute is forbidden under the double jeopardy clause. *Green v. United States*, 355 U.S. 184, 187-88 (1957) (stating that fundamental protection underlying the double jeopardy clause "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity"); *see also Brown v. Ohio*, 432 U.S. 161, 165 (1977) (noting that the "Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors"); *United States v. Calabrese*, 490 F.3d 575, 577 (7th Cir. 2007) (stating that the double jeopardy clause's purpose "is most strongly engaged when the prior prosecution resulted in an acquittal;

for then, were it not for the double jeopardy defense, the government could keep retrying the defendant until a jury convicted him—with enough throws of a pair of dice the desired combination is bound to appear eventually"). This Court reviews the district court's ruling on a motion to dismiss an indictment *de novo*, *see United States v. Greve*, 490 F.3d 556, 570 (7th Cir. 2007), and, for the reasons stated below, this Court should affirm that decision.

Answering the question of whether § 2113(a)'s two paragraphs permit successive prosecution requires a three-step approach. The first step is to ascertain legislative intent to determine whether Congress intended to create one offense or two in a given statutory scheme. *Simpson v. United States*, 435 U.S. 6, 11-12 (1977); *United States v. Makres*, 598 F.2d 1072, 1074 (7th Cir. 1979) (stating that "[b]ecause applying the *Blockburger* test amounts to deciding a constitutional question, it is appropriate to decide the question of statutory construction first"). Where there is but only one statutory provision involved, as in this case, the presumption is that Congress did not intend multiple punishment or prosecution. *Makres*, 598 F.2d at 1075 (stating that "[w]hen two crimes are defined in a single section of the

code, . . . 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"). *See also United States v. Fountain*, 642 F.2d 1083, 1093-94 (7th Cir. 1981) (citing *Makres* and stating that when considering legislative intent under a single section of the code there is a "presumption against cumulative punishment"); *United States v. Langdon-Bey*, 739 F.2d 1285, 1286 (7th Cir. 1984) (stating that "[w]hen multiple convictions are based on a single section of the code, courts rely on an absence of legislative history indicating an intent to punish the accused twice for a single criminal transaction in holding that such convictions are prohibited"). If it is clear that Congress did not intend multiple punishment or conviction to arise from the statute or statutes, the single-or-multiple-offense inquiry ends. If, after resort to these textual and legislative sources it is unclear what Congress intended, then the Court should apply the Rule of Lenity in the defendants' favor and bar multiple punishment and conviction. *See, e.g., Simpson,* 435 U.S. at 15; *Ladner v. United States*, 358 U.S. 169, 177-78 (1958).

Only if it is clear after this initial statutory construction that Congress intended to permit multiple punishment or conviction does

the Court move onto the second step: the question whether this arrangement violates the double jeopardy clause. *Garrett v. United States*, 471 U.S. 773, 786 (1985) (stating that "the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history."); *United States v. Podell,* 869 F.2d 328 (7th Cir. 1989) (stating that the *Blockburger* test is only to be employed when all other methods of statutory construction have proved to be inconclusive); *Makres*, 598 F.2d at 1074 (framing the inquiry as "first, whether Congress intended that the crimes should be prosecuted and punished cumulatively; and, second, if so, whether the double jeopardy clause of the Fifth Amendment is violated by the cumulative punishment" and applying *Blockburger* only to this second question). Although the government is correct that the *Blockburger* test is the traditional rule for ascertaining double-jeopardy implications once it is determined to apply, *Blockburger* simply does not apply in this case. *Blockburger* typically does not control the double-jeopardy inquiry when the Supreme Court has already spoken on the issue, when only one statutory provision is involved, or when application of *Blockburger*

would lead to an overly formalistic reading of the statute. *See infra,* Section I.A.

Third, even if the Court resorts to the *Blockburger* test and applies it, the Court nonetheless must weigh this conclusion against the legislative history to confirm that Congress, in fact, intended to punish these violations cumulatively. *Albernaz v. United States*, 450 U.S. 333, 340 (1981) (stating that nothing "in the legislative history which has been brought to our attention discloses an intent contrary to the presumption which should be accorded to these statutes *after* application of the *Blockburger* test") (emphasis added).

Reduced to its essential point, the legal issue for this Court is whether Congress intended ¶¶ 1 and 2 of § 2113(a) to be merely alternate means of violating a single offense, or whether Congress intended them to be two separate offenses, which provide for separate and cumulative conviction and punishment. *Sanabria v. United States*, 437 U.S. 54, 56 (1978) (stating that government erred in charging "horse betting" and "numbers betting" as two separate offenses under 18 U.S.C. § 1955 because that statute simply provides for two means of violating a single offense). In determining what Congress intended,

courts look to the plain language of the statute, its overall structure and purpose, and its legislative history. *Rutledge v. United States*, 517 U.S. 292, 297 (1996). Each of these sources in this case confirms the district court was correct in concluding that Congress intended § 2113(a) ¶¶ 1 and 2 to be alternate means of committing a single offense and not multiple offenses.

A. The plain language and structure of § 2113 confirm that § 2113(a) contains only one offense.

As an initial matter, where two subsections of a statute proscribe an overlap of the same conduct, have a similarity in intent, and are directed against the same evil, the presumption is that Congress intended only a single punishment. *Rutledge*, 517 U.S. at 297-98. Stated another way, the Congressional presumption when Congress proscribes similar conduct in two provisions, or a single section of the code, is that the provisions define a single offense and not multiple offenses. *Id.*; *Makres*, 598 F.2d at 1075. Section 2113(a) reads in full as follows:

> 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) ¶¶ 1 and 2 (emphasis added).

As the plain language of these two subparagraphs shows, ¶¶ 1 and 2 of § 2113(a) are part of a single statutory provision, are directed toward preventing the same evil, have an overlap in conduct, and have the same general criminal intent. Thus, any analysis of the two paragraphs of § 2113(a) begins with the strong presumption that they constitute a single offense.

This presumption is confirmed by the structure and plain language based on three textual references. First, Congress's use of the disjunctive term "or" between the two means of committing an offense (between ¶1 and¶ 2 in bold) under § 2113(a), signals that Congress

intended there to be two ways or means of committing a single offense and not multiple offenses. *E.g.*, *Sanabria*, 437 U.S. at 65 (implying that the presence of disjunctive "or" between differing means of "gambling" in statute supported conclusion that each was a means of violating gambling statute (18 U.S.C. § 1955) and not separate offenses); *United States v. Marbella*, 73 F.3d 1508, 1514 (9th Cir. 1996) (relying on disjunctive language in separate mental states to support conclusion that promotion or concealment are two different means of violating a single offense of money laundering under 18 U.S.C. § 1956 and not two separate offenses); *United States v. Kimbrough*, 69 F.3d 723, 729 (5th Cir. 1995) (finding two violations of 18 U.S.C. § 2252(a)(4)(B) were two different means of committing the same offense and not two offenses where disjunctive was used). Here the two means of violating § 2113(a) are separated by a single "or"; one can either use force or intimidation in robbing a bank to violate the statute "or," alternatively, one can enter the bank with intent to commit a felony therein (usually, as is the case in the two cases consolidated herein, to rob the bank) to violate the same, single statutory provision.

The government claims that the district court's reliance on the presence of the disjunctive "or" does not signal alternate means of committing an offense, but rather is meant to signal "congressional intent to create two distinct offenses." (Gov't Br. 19.) The sole support for its position is this Court's decision in *United States v. Dennison*, 730 F.3d 1086 (7th Cir. 1984) (per curiam), for the proposition that the use of the disjunctive "or" can signal Congress's intent to punish cumulatively. But as the district court recognized, and as the government fails to acknowledge on appeal, the "or" this Court was referring to in *Dennison* was the disjunctive *between separately enumerated subsections* of the statute and not the "or" contained within a single subsection. *Id.* at 1088-89. Unlike *Dennison*, the use of the disjunctive "or" *within a single subsection* does not identify different offenses, it merely describes alternate means of committing the single offense. Thus, as a matter of pure statutory interpretation, *Dennison* actually supports the defendants' reading of the statute and not the government's because the Court held in *Dennison* that the use of the disjunctive "or" *within* a single section did not create multiple offenses

within that section, just as the use of the disjunctive "or" *within* § 2113(a) does not create separate offenses. *Id.*

Second, Congress placed both means of committing the single offense in a single statutory subsection, here subsection (a), and not across several subsections. Congress's placement of separate means of violating a single proscription within a single statutory subsection often indicates a clear intent to define and circumscribe a single offense and not multiple offenses. *United States v. Munoz-Romo*, 989 F.2d 757, 759 (5th Cir. 1993) (noting "Congress, by rooting all the [firearm possession] offenses in a single legislative enactment and including all the offenses in subsections of the same statute, signaled that it did not intend multiple punishments for the possession of a single weapon"); *United States v. McLaughlin*, 164 F.3d 1, 15-16 (D.C. Cir. 1998) (expressing reluctance to find multiple offenses and multiple punishments in "situations involving provisions within a single statutory scheme").

Third, this understanding is further confirmed by the structure of punishments set forth in § 2113. Both paragraphs of subsection (a) contain a single punishment for commission of the single offense: *i.e.*, a fine and imprisonment of not more than twenty years in prison, or both.

The presence of a single punishment for multiple means of committing a single offense often signals Congress's clear desire to treat these variations as multiple means of committing a single offense and not multiple offenses. *E.g.*, *Garrett v. United States*, 471 U.S. 773, 781 (1985) (holding the offense of a continuing criminal enterprise and its predicate offenses constitute separate offenses, in significant part, because Congress provided for a wholly "separate penalty . . . rather than a multiplier of the penalty for the other offense"); *United States v. Johnson*, 130 F.3d 1420, 1426 (10th Cir. 1997) (stating it would be an "anomalous and draconian result" to permit multiple punishments under the firearms statute based on different prohibited statuses which contain the same punishment).

The government again resorts to *Dennison* to support its argument that the presence of a single punishment can actually signal Congress's intent for multiple and cumulative punishment. (Gov't Br. 19.) But again, the statute analyzed in *Dennison* did not provide a single punishment for each of the violations; it provided the *same* punishment for each of the violations and repeated that punishment one time at the end of all the subsections. *Dennison*, 730 F.3d at 1088-

89. Thus, a person who violated subsection 15 U.S.C. § 1644(a) was subject to ten years imprisonment as was a person who violated subsections (b) and (d). In contrast to the structure of the credit card statute in *Dennison*, Congress devised § 2113's punishments in a completely different manner. A person convicted of either prong of § 2113(a) is subject to a maximum of twenty years; a person convicted of subsections (b), (c), (d,), or (e), however, are all subject to a maximum specially provided for a proved violation of its own subsection. Congress knew how to provide for separate punishments and could have signaled its desire to do so by providing for separate punishments for each paragraph in § 2113 or by moving the two paragraphs into different subsections. The only reasonable conclusion from the overall construction of the statute is, as the district court rightly concluded, that Congress did not intend the subparagraphs of § 2113(a) to be two offenses; it intended them to be alternate means of committing a single offense.

B. The legislative history of § 2113(a) confirms Congress's intent to create a single offense and not multiple offenses.

Buttressing the conclusion derived from the text and structure of

§ 2113 is its legislative history. Prior to 1934, federal law did not criminalize bank robbery or larceny; these crimes were punishable only as state offenses. Congress enacted the precursor to § 2113(a) in response to an outbreak of bank robberies committed by John Dillinger and others who evaded capture by state authorities by moving from state to state. *See Jerome v. United States*, 318 U.S. 101, 102 (1943) (stating 1934 Act aimed at "interstate operations by gangsters against banks—activities with which local authorities were frequently unable to cope"). In bringing federal law into this area, Congress modeled the bank robbery statute on the definition of robbery contained in Blackstone's Commentaries:

> Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Act of May 18, 1934, ch. 304, § 2(a), 48 Stat. 783.

Congress shortly thereafter recognized that this federal definition of the offense of robbery left open conduct that fell short of common law robbery but nonetheless was obnoxious and threatened the bank's

assets; for example, it did not reach the thief who intentionally, though not violently, entered a bank and stole money. In an effort to close this gap, at the suggestion of the executive branch, Congress amended the statute. In a letter to the Speaker of the House, the Attorney General conveyed the executive branch's official position: "The fact that the statute is limited to robbery and does not include larceny and burglary has led to some incongruous results." *See* H.R. Rep. No. 75-732, at 1 (1937) (reprinting letter). In particular, the Attorney General cited the example of a thief apprehended after taking $11,000 from a bank while a teller was temporarily absent. *Id*. at 1-2. He therefore asked Congress to amend the federal bank robbery statute, specifically to add a larceny provision short of any force, violence, or fear requirement. *Id.* at 2. Congress responded by passing an Act "[t]o amend the bank robbery statute to include burglary and larceny." Act of Aug. 24, 1937, ch. 747, 50 Stat. 749.

Most significantly, for purposes of this case, Congress placed the 1937 Act's new larceny and unlawful-entry provisions in the very same section as the robbery provision, and punished "whoever shall take and carry away, with intent to steal or purloin," property, money, or

anything of value from a bank, as well as any persons who "enter or attempt to enter any bank with intent to commit in such bank or building, or part thereof, so used, any felony or larceny." *Id.* The 1937 Act left in place the 1934 Act's original definition of bank robbery. 50 Stat. 749. Not only were these three types of conduct prohibited by a single statutory provision, but the unlawful entry provisions and the bank robbery provisions carried the identical punishments, while larceny was treated separately depending on the value of the goods stolen.[1] Thus, as of 1937, a person could violate a single section of the criminal code by three alternate means. This version of the bank robbery statue remained largely intact for ten years.

In 1948, Congress recodified federal crimes. In doing so, Congress kept intact within subsection (a) the bank robbery and unlawful-entry provisions, which carried one identical punishment, and separated out into subsection (b) the larceny provisions, which carried two potential punishments. Act of June 25, 1948, § 2113, 62 Stat. 796. In this

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[1] The 1937 amendments were codified at 12 U.S.C. § 588b(c) (1946 ed.). There they remained for ten years until Congress separated the larceny provisions into a new section and placed the robbery and unlawful entry provisions into a single section in Title 18, as it currently stands. 18 U.S.C. §§ 2113(a)(robbery and unlawful entry provisions) and 2113(b) (larceny provisions).

codification, Congress also deleted the word "feloniously" from the robbery provision, leaving the statute in substantially its present form.

The unmistakable inference to be drawn from this history is that Congress has clearly indicated that the two paragraphs of § 2113(a) are viewed as alternate means of committing a single offense, have been treated as equals with regard to the evil Congress sought to eliminate, and have been part of a single statutory provision ever since both were enacted. The unlawful entry provision came into being solely for the purpose of filling a gap in the coverage of the robbery statute, and not to create some wholly new federal offense. Just as criminal statutes frequently list classes of conduct proscribed in order to reach a broader range of conduct than might be thought with the use of single term—*e.g.*, "abstract, embezzle, and purloin," "possess with intent to distribute and to distribute," and "use, carry, and transport,"—by amending the original bank robbery statute, Congress intended to broaden its coverage of prohibited conduct which might have otherwise fallen through the cracks of the initial enactment's literal language, but not to create a new offense. This intent is confirmed by its placement of the new language in a single section carrying the same penalty. As this

Court made plain in *Makres*, if Congress intended to secure multiple punishments, one would have expected that the legislative history would reflect the imposition of additional punishments for illegal entry into a bank. *Makres*, 598 F.2d at 1075. But this history makes clear that when Congress first created the offense of illegal entry in 1937 and again amended the robbery statute in 1948, not only did it give no indication of its intent to afford multiple punishment for robbery and unlawful entry, but it also signaled its unmistakable intention to impose no greater punishment for illegal entry.

This intent was further made plain in the 1948 amendments when Congress wholly removed the bank larceny provisions with its differing punishments into an entirely new section, leaving in place the alternate means of violating § 2113(a) through robbery or unlawful entry. These two provisions contain the same mental state requirement, *i.e.*, an intent to steal, were derived from the same impulse to punish the same evil, and proscribe overlapping conduct. As such they can only be viewed as intending to proscribe a single punishment and a single offense.

In construing this legislative history, the government suggests that "it is more plausible that Congress intended that the two paragraphs constitute separate offenses" because the amendments expanded the reach of the robbery statute. (Gov't Br. 21.) Putting aside the fact that "plausibility" means ambiguity, which is construed under the Rule of Lenity in the defendants' favor, *see infra,* Section I.D., there are two other problems with this argument. First, it is wrong. Simply because Congress expands the scope of an existing prohibition does not mean that it intends to create separate offenses. Indeed, the easiest way of expanding the reach of a criminal statute is simply to modify existing offenses—as Congress did here—without creating new offenses. It would be strange indeed for Congress to have created a wholly new offense in 1937 but to place that new offense within the body of an existing offense. It would be stranger still for Congress to have intended in 1948 to create a new offenses for larceny and for illegal-entry but to have placed only one of those provisions in a wholly new subsection (larceny) and to have left the other (illegal entry into a bank) within its original subsection. The government does not offer any explanation why Congress would remove only one provision to a new

subsection, with its own penalty provision no less, but keep the other in place. Different treatment of the sections clearly signals different intent. The district court was correct in concluding Congress's intent in keeping the illegal entry provisions within the bank robbery section was to treat it as an alternate means of violating § 2113(a) and not as a separate offense.

The second problem with the government's "plausibility" argument, discussed in more detail in the following section, is that the Supreme Court has already rejected it in *Prince*. The *Prince* Court canvassed the legislative history of § 2113(a)'s enactment, held that a defendant may not be cumulatively punished for violations of both subparagraphs of § 2113(a), and thus definitively resolved the question of whether the two provisions are merely one offense. Finally, it should be noted that the Supreme Court's decision in *Prince* was handed down in 1957. If the Court's reading of congressional intent was erroneous or "implausible" as the government suggests, one would have thought that in the fifty years since that interpretation, Congress would have changed the structure of § 2113(a) to correct the Court's alleged misinterpretation. Section 2113 has been amended on not fewer than

seven occasions since the Supreme Court's decision in *Prince*; on two occasions, specific changes have been enacted to the language of § 2113(a). *See* 18 U.S.C. § 2113, Historical and Statutory Notes (in 1986 § 2113(a) was enlarged to encompass extortionate threats, and in 1970, statute's coverage extended to include "credit unions"). Yet Congress has not disturbed the conclusion reached in *Prince* that § 2113(a) amounts to a single offense. *Merrill Lynch v. Curran*, 456 U.S. 353, 381-82 & n.6 (1982) (stating that Congress is presumed to be aware of the judicial interpretations given to statutes and to adopt those interpretations when it reenacts the statute without changes to that interpretation). Thus, the government is simply wrong in its attempt to characterize § 2113(a) as creating more than one offense.

C. The Supreme Court has already ascertained Congress's intent to create only one offense in § 2113(a), a position that this Court has consistently followed.

That the proper construction of § 2113(a) requires a finding that Congress intended to create but a single offense is buttressed by the fact that both this Court and the Supreme Court have so held. This Court need go no further than the Supreme Court's decision in *Prince* to affirm the district court's decision. *Nat'l Rifle Ass'n of Am., Inc., v. City*

of Chicago, Nos. 08-4241, 08-4243, 08-4244, 2009 WL 1515443, at *1 (7th Cir. June 2, 2009) (confirming principle that "[i]f a precedent of the Supreme Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving the Supreme Court to the prerogative of overruling its own decisions.").

In *Prince* the government indicted the defendant on separate counts for committing bank robbery and for entering a bank with intent to commit a robbery under paragraphs one and two of § 2113(a), respectively. *Prince,* 352 U.S. at 324. The jury convicted Prince on both counts and he then received separate consecutive sentences. *Id.* Several years later Prince appealed, arguing that § 2113(a) constituted only a single offense and, therefore, his sentence ran afoul of double jeopardy. *Id.* at 325 & n.4. The Supreme Court examined the statute's language and legislative history and ultimately concluded that "[i]t was manifestly the purpose of Congress to establish lesser offenses," *id.* at 327, and that the gravamen of the § 2113(a) offense is "not in the act of entering . . . [but rather] the intent to steal," *id.* at 328. The Court ultimately held that when Congress criminalized these various

activities in § 2113(a), it did so intending that the defendant could be penalized only once for them. *Id.* at 329 (stating "[w]e hold, therefore, that when Congress made either robbery or an entry for that purpose a crime it intended that the maximum punishment for robbery should remain at 20 years . . . ."). In reaching this conclusion, the Court pointed to the same legislative history of § 2113(a) described above and concluded that both means of committing the offense "were all placed in one paragraph of the 1937 Act" and that "[n]o separate penalty was provided for the crime of unlawfully entering. It was simply incorporated into the robbery provision." *Id.* at 326-27. The result of this textual analysis persuaded the Court that the defendant could not be sentenced to more than twenty years punishment for both entering the bank and robbing the bank. *Id.* In short, the Supreme Court has held that Congress did not intend multiple punishments for violation of the two prongs of § 2113(a).

The government claims that *Prince* does not apply in this case and raises two equally unavailing arguments in support. (Gov't Br. 29) (stating that the "district court's analysis reads too much into *Prince*"). First, the government argues that *Prince*'s reasoning cannot be applied

to bar multiple or successive prosecutions because it never mentions the double jeopardy clause. Significantly, the *Blockburger* decision itself never mentions the double jeopardy clause, but, as the government points out, (Gov't Br. 15), *Blockburger* has been held to be the predominant test for constitutionality under that clause.

Second, the government reads *Prince* as a sentencing-merger case that does nothing more than prohibit a court from imposing consecutive punishments on a defendant after multiple convictions under § 2113(a). (Gov't Br. 29.) The government offers as proof the fact that the Court made no mention of the defendant's underlying convictions in its ruling. (Gov't Br. 28-29.) But the Court's focus on sentencing rather than the underlying convictions is easily explained by the procedural posture under which the case arose—namely, in a collateral attack pursuant to Federal Rule of Criminal Procedure 35, which was raised several years after Prince's conviction and sentence. *Prince*, 352 U.S. at 324. At that point and given the state of the law at the time, Prince could only raise a challenge to his sentence and incarceration, but not his underlying conviction. Fed. R. Crim. P. 35 (1944) (stating "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in

an illegal manner within the time provided herein for the reduction of sentence."); *Heflin v. United States*, 358 U.S. 415, 418 (1959) (noting that habeas corpus relief is available only to attack a sentence under which a prisoner is in custody and cannot be used to question a sentence which the prisoner has not begun to serve, but relief under Rule 35 providing for correction of illegal sentence is available.)[2]

Moreover, to the extent that *Prince* could be construed, at least in part, as a sentencing-merger case as the government claims,[3] this interpretation could not insulate from challenge the underlying convictions, as Supreme Court precedent makes clear. *See Rutledge*, 517 U.S. at 302; *see also Ball v. United States*, 470 U.S. 856, 861 (1985)

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[2] *See also McNally v. Hill,* 293 U.S. 131, 138 (1934) (holding with respect to the habeas corpus statute in effect at the time that the statute does not authorize attacks upon future consecutive sentences). *But see CC Peyton v. Rowe*, 391 U.S. 54 (1968) (reversing *McNally* and holding that a prisoner incarcerated under consecutive sentences who claims the sentence that he is scheduled to serve in the future is constitutionally invalid may seek habeas relief).

[3] Although the government does not cite any of these cases in its opening brief, several courts have construed *Prince* as a merger case, while others have declined to do so. *Bryan v. United States*, 721 F.2d 572, 574 (6th Cir. 1983) (noting split and finding that the 3rd, 4th, and 8th circuits disagreed with the 1st and 2nd circuits); *United States v. Fried,* 436 F.2d 784, 786 (6th Cir. 1971) (same but with a different circuit-split configuration); *United States v. Johnson*, 709 F.2d 639,640 (11th Cir. 1983) (same). To the extent that the circuit courts historically disagreed about how to implement *Prince* and its prohibition on "pyramiding penalties," *Prince*, 352 U.S. at 325, there can be little doubt after the Supreme Court's decisions in *Ball* and *Rutledge* that when a statute is construed as prohibiting multiple punishments, it also must be read as invalidating the underlying convictions.

("For purposes of applying the *Blockburger* test in this setting as a means of ascertaining congressional intent, 'punishment' must be the equivalent of a criminal conviction and not simply the imposition of sentence. Congress could not have intended to allow two convictions for the same conduct, even if sentenced under only one; Congress does not create criminal offenses having no sentencing component.")

In any event, under the first prong of the three-prong test, which requires nothing more than an examination of legislative intent, the Supreme Court in *Prince* spoke to the issue and held that Congress intended § 2113(a) to create but one offense. That is, *Prince*'s holding did not turn on the facts of the case, but rather on an analysis of the statute, its structure, and the legislative history. *Prince,* 352 U.S. at 328. It would be anomalous to claim that *Prince*'s interpretation of the statute and its explicit holding that the statute consisted of one offense applied only to punishment generally or only to multiple-punishment situations within a single trial, but not to the underlying convictions or to successive prosecutions. *See Ball,* 470 U.S. at 864-65 (stating that "the only remedy consistent with the congressional intent is for the District Court . . . to exercise its discretion to vacate one of the

underlying convictions" because "[o]ne of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense . . . . The separate *conviction,* apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored.") (internal citations and quotations omitted) (emphasis in original); *see also Brown v. Ohio*, 432 U.S. at 166 (stating "[w]here the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings."); Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. Colo. L. Rev. 595, 619 (2006) (commenting that "[s]uccessive prosecution often goes hand-in-hand with the threat of additional punishment . . . . Consequently, discussion of successive prosecution often focuses not only on the successive trials, but also on the additional multiple punishment that would be imposed if each trial ended in conviction") Indeed, the government concedes as much in its brief. (Gov't Br. 30) (acknowledging "[w]hile it is true that if 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.") (internal citations, quotations and brackets omitted). Thus, *Prince*'s unequivocal determination that § 2113(a) constituted a single offense governs this Court's inquiry here.

In fact, this Court, when applying *Prince* in past cases, likewise has repeatedly held that § 2113(a) constitutes only one offense. *See United States v. Drake*, 250 F.2d 216, 217 (7th Cir. 1957) (noting "[w]e believe it to be now settled that Section 2113 of Title 18 U.S.C.A. creates a single offense with various degrees of aggravation permitting sentences of increasing severity. The Supreme Court in *Prince* has, for all practical purposes, so decided . . . .") (citation omitted); *see also Makres*, 598 F.2d at 1074-75 (citing *Prince* as holding that a bank robber could not be punished cumulatively for two offenses defined in 18 U.S.C. § 2113(a) entering a bank with intent to commit a felony and robbery); *Wright v. United States*, 519 F.2d 13, 15 (7th Cir. 1975) (stating that it was well-settled that § 2113(a) "did not create separate crimes but merely prescribed alternative sentences for the same crime").

The government's efforts to distinguish these cases are illogical and, ultimately, unavailing. According to the government, the district court erred in relying on *Drake*, *Leather,* and *Wright* because those cases involved convictions under § 2113(d) or (e), which are "sections that explicitly incorporate the lesser-included offenses in § 2113(a) and (b)." (Gov't Br. 30.) That is, because this appeal is confined to § 2113(a), these cases do not apply. But in each of these cases this Court explicitly relied on *Prince* and its reasoning, which of course construed § 2113(a)—the statute at issue in this case—as one offense, and then *extended* that reasoning to other sections within § 2113. *Drake*, 250 F.2d at 217; *United States v. Leather*, 271 F.2d 80 (7th Cir. 1959); *Wright*, 519 F.2d at 15. Putting aside this Court's explicit reliance on *Prince*, it defies logic and all sound statutory-construction principles to argue that subsections (b), (c), (d), and (e) of § 2113 should be construed as a single offense for double jeopardy purposes, but the single provision in § 2113(a) should be deemed two separately prosecutable offenses.[4] Thus, this Court should follow both the

[4] Finally, the government's suggestion that "[a]t least one other circuit has indicated that the two paragraphs of 2113(a) should be considered separate offenses" (Gov't Br. 31 n.10) is incorrect because the Fifth Circuit never so held in

Supreme Court's decision in *Prince* and its prior caselaw to hold that § 2113(a) is a single offense that may not be the subject of multiple punishments or prosecutions.

D. To the extent that this Court finds Congressional intent unclear, the Rule of Lenity requires § 2113(a) to be construed in the defendants' favor and to bar re-prosecution.

Although Congress's intent to create a single offense in § 2113(a) seems clear from the legislative history, as well as the context and structure of § 2113 as a whole, to the extent that there is any ambiguity in its construction the Rule of Lenity requires that the statute be construed against the harsher punishment and in favor of the defendants. The Supreme Court has consistently held that "doubt will be resolved against turning a single transaction into multiple offenses." *Bell v. United States*, 349 U.S. 81, 84 (1955); *Ladner*, 358 U.S. at 178.

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the context of a double-jeopardy challenge to multiple punishments or successive prosecutions. In both *McGhee* and *Dentler* the issue was whether the indictment was fatally defective for failing to allege certain elements of § 2113(a). *United States v. McGhee*, 488 F.2d 781, 783 (5th Cir. 1974); *United States v. Dentler*, 492 F.3d 306, 309 (5th Cir. 2007). And although double jeopardy concerns are an underlying rationale for ensuring the adequacy of an indictment, *Dentler*, 492 F.2d at 308; *McGhee*, 488 F.2d at 784 n.5, the Fifth Circuit never engaged in a double-jeopardy analysis under either *Prince* or *Blockburger*. Thus, no conflict of authority exists here.

"This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner*, 358 U.S. at 178; *see also Simpson,* 435 U.S. at 15. Indeed, *Prince* itself is a decision that invoked the Rule of Lenity in the construction of § 2113(a):

> 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. To go beyond this reasoning would compel us to find that Congress intended, by the 1937 amendment, to make drastic changes in authorized punishments. This was cannot do. If Congress had so intended, the result could have been accomplished easily with certainty rather than by indirection.

Prince, 352 U.S. at 328. This Court, too, has relied on the rule when faced with ambiguities in a criminal statute. *United States v. Thompson*, 484 F.3d 877, 881 (7th Cir. 2007) (noting that the Rule of Lenity "insists that ambiguity in criminal legislation be read against the prosecutor, lest the judiciary create, in common-law fashion, offenses that have never received legislative approbation, and about which adequate notice has not been given to those who might be

ensnared.") (citation omitted). Thus, even if this Court finds any remaining ambiguity in the wake of *Prince* as to how § 2113(a) should be applied in this case, it should construe it in the defendants' favor as barring a successive prosecution.

II. *Blockburger v. United States* Does Not Compel A Different Outcome.

The government's brief essentially claims that the Supreme Court's decision in *Blockburger*, and its same-elements test, warrant reversal of the district court's ruling. The government is simply wrong in its understanding of *Blockburger* and its application to this case.

A. The *Blockburger* rule is merely a rule of statutory construction that gives way to a contrary intent of Congress, especially when congressional intent has been definitively resolved, as it has in this case.

The government is initially wrong because it fails to recognize that the elements test in *Blockburger* is merely a rule of statutory construction created in an effort to divine legislative intent in cases where that intent eludes a fair-minded interpreter. *Missouri v. Hunter*, 459 U.S. 359, 368 (1983). "We have recently indicated that the *Blockburger* test is not controlling when the legislative intent is clear from the face of the statute or the legislative history. Indeed, it would

be difficult to contend otherwise without converting what is essentially a factual inquiry as to legislative intent into a conclusive presumption of law." *Garrett*, 471 U.S. at 779 (citations omitted). The government engages in precisely the error described by the Court in *Garrett*—concluding from the presence of separate elements a conclusive presumption that is directly contrary to the legislative intent in enacting § 2113(a)'s two paragraphs. As demonstrated above, the intent to create a single offense is manifestly clear. Therefore, even if resort to *Blockburger* were made, and it indicated a contrary result, it would have to give way to that legislative intent.

But the government is wrong for a second, more fundamental reason: the Court in *Prince* has already ruled on the intent of Congress in enacting ¶¶ one and two of § 2113(a) and has already concluded it did not need to resort to the statutory construction test set forth in *Blockburger*. Because the *Prince* Court found congressional intent clear in enacting § 2113(a), it expressly disavowed the need to rely on *Blockburger*. *Prince*, 352 U.S. at 325 n.4 (distinguishing *Blockburger* as inapplicable to the question before the Court). Thus, on this matter as

well, the *Prince* decision controls and this Court need not delve into a *Blockburger* analysis.

B. The district court correctly held that *Blockburger* does not require a contrary result because *Blockburger* applies only when two distinct statutory provisions are involved.

Blockburger itself sets forth the threshold inquiry in deciding whether it applies:

> The applicable rule is 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 that the other does not.

Blockburger, 284 U.S. at 304 (emphasis added). Thus, courts have repeatedly declined to apply *Blockburger* in cases where this threshold requirement of two separate statutes has not been fulfilled. *See Sanabria*, 437 U.S. at 70 n.24 ("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") (emphasis added); *Braverman v. United States*, 317 U.S. 49, 54 (1942) (stating a § 371 conspiracy is but one

offense under the general conspiracy statute no matter how many illegal objects; it "differs from…a single act which violates two statutes. The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute") (internal citations omitted); *Milanovich v. United States*, 365 U.S. 551, 554 (1961) (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 without applying *Blockburger*); *Heflin*, 358 U.S. at 419–20 (holding that Congress did not intend multiple punishments for taking bank property under subsections (c) and (d) of § 2113 without applying *Blockburger*); *Prince*, 352 U.S. at 324-25 & n.4 (explicitly citing *Blockburger* as "unhelpful," and not applying it to § 2113(a), a single statutory section and a "unique statute of limited purpose"); *United States v. Evans*, 854 F.2d 56, 58 (5th Cir. 1988) (stating the Supreme Court "since *Blockburger* has indicated that its test does not suffice to show separate offenses when but a single act or transaction and a single statutory provision are involved"); *United States v. Winchester*, 916 F.2d 601, 606 (11th Cir. 1990) (rejecting application of the *Blockburger* test for offenses arising out of a single statutory provision); *Munoz-Romo*,

989 F.2d at 759 (accepting Solicitor General's confession of error and rejecting *Blockburger* test for multiple violations of single statutory section, stating "Congress, by rooting all the offenses in a single legislative enactment and including all the offenses in subsections of the same statute, signaled that it did not intend multiple punishments for the possession of a single weapon"); *United States v. Johnson*, 130 F.3d 1420, 1426 (10th Cir. 1997) (same); *United States v. Dunford*, 148 F.3d 385, 390 (4th Cir. 1998) (same); *United States v. Hernandez*, 591 F.2d 1019, 1022 n.9 (5th Cir. 1970) (noting the case did not deal with the violation of separate statutes, but rather the issue involved in [*Blockburger* and *Gore*] and relying on *Prince* and *Bell* to assist in construing a single statutory provision). *Cf. Albernaz*, 450 U.S. at 336 (applying *Blockburger* where there were "separate offenses with separate penalty provisions that are contained in distinct Subchapters of the Act").

In fact, in nearly every case in which the Supreme Court has applied *Blockburger,* two separate statutory provisions were involved.[5]

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[5] *Texas v. Cobb*, 532 U.S. 162 (2001) (Tex. Penal Code Ann. §§ 30.02(a) and 19.03(a)(7)(A)); *Lewis v. United States,* 523 U.S. 155 (1998) (18 U.S.C. §§ 1111 and 13(a)); *Hudson v. United States,* 522 U.S. 93 (1997) (12 U.S.C. §§ 84(a)(1) and 375b);

The government latches on to the only exception among relevant Supreme Court cases in *Brown v. Ohio,* 432 U.S. 161, which involved subsections (D) and (A) of Ohio Code § 4549.04. But in *Brown* the statutory language clearly established two separate offenses because subsection (D) for joyriding was punishable as a misdemeanor, while subsection (A) for car theft was deemed a felony. *Brown,* 432 U.S. at 162-63 nn.1-2. *Blockburger's* applicability was thus evident from the plain language of the statute, which comports with the three-prong framework set forth above, *see supra,* p.17-19. Similarly, nearly every relevant case in this Court that applied *Blockburger* did so to two

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Rutledge v. United States, 517 U.S. 292 (1996) (21 U.S.C. §§ 846 and 848.); *United States v. Ursery*, 518 U.S. 267 (1996) (21 U.S.C. §§ 881(a)(6) and (a)(7), 841(a)(1), 981(a)(1)(A), 846, and 18 U.S.C. §§ 371 and 1956.); *United States v. Dixon*, 509 U.S. 688 (1993) (D.C. Code 1981, §§ 22-504, 22-501, 22-2307, 23-1329 and 33-541(a)); *Ball v. United States,* 470 U.S. 856 (1985) (18 U.S.C. §§ 922(h)(1), 924(a), and 18 U.S.C.App. § 1202(a)(1)); *Garrett v. United States*, 471 U.S. 773 (1985) (21 U.S.C. § 848 and 21 U.S.C. §§ 952, 960(a)(1), 960(b)(2)); *Missouri v. Hunter,* 459 U.S. 359 (1983) (Mo. Ann. Stat. App §§ 560.135 and 559.225); *Illinois v. Zegart,* 452 U.S. 948 (1981) (Ill. Rev. Stat., ch. 95 ½, § 11-708(d) and ch. 38, § 9-3(a)); *Albernaz v. United States,* 450 U.S. 333 (1981) (21 U.S.C. §§ 963 and 846); *Illinois v. Vitale*, 447 U.S. 410 (1980) (Ill. Rev. Stat., ch. 38, § 9-3(b) and ch. 95 ½, § (a)); *Whalen v. United States,* 445 U.S. 684 (1980) (D.C.Code §§ 22-2401, 22-2404, 22-2801 and 23-112.); *Simpson v. United States,* 435 U.S. 6 (1978) (18 U.S.C. §§ 2113(a) and (d), and 924(c)); *Brown v. Ohio*, 432 U.S. 161 (1977) (Ohio Rev. Code Ann. s 4549.04(D) and (A)); *Dorszynski v. United States,* 418 U.S. 424 (1974) (18 U.S.C.A. §§ 5005 et seq., 5010(b-d)); *Gore v. United States,* 357 U.S. 386 (1958) (26 U.S.C.A. §§ 4704(a), 4705(a) and 21 U.S.C.A. § 174); *United States v. Universal C.I.T. Credit Corp*, 344 U.S. 218 (1952) (18 U.S.C.A. § 3731 and 29 U.S.C. §§ 215 and 216(a)).

separate statutory provisions.[6] The only case that the defendants found where this Court applied *Blockburger* to a single statute was the *Dennison* decision, on which the government heavily relies. *United States v. Dennison*, 730 F.2d 1086 (7th Cir. 1984) (per curiam). And

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[6] *United States v. Starks*, 472 F.3d 466 (7th Cir. 2006) (18 U.S.C. §§ 111(a) and 1505); *McCloud v. Deppisch*, 409 F.3d 869 (7th Cir. 2005) (Wis. Stat. §§ 943.23(2) and 943.32(1)(a)); *United States v. Hatchett*, 245 F.3d 625 (7th Cir. 2001) (21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2); *Blacharski v. United States*, 215 F.3d 792 (7th Cir. 2000) (26 U.S.C. § 5841 and 18 U.S.C. §§ 844(i) and (h)); *United States v. Zendeli*, 180 F.3d 879 (7th Cir. 1999) (18 U.S.C. §§ 844(i), 371(h), and 1341); *Kurzawa v. Jordan*, 146 F.3d 435 (7th Cir. 1998) (Wis. Stats. §§ 943.20(1)(b) and (3)(c), 943.20(1)(d) and (3)(c), and 943.38(1)(a)); *United States v. Muhammad*, 120 F.3d 688 (7th Cir. 1997) (18 U.S.C. § 201 and 18 U.S.C. § 1503); *United States v. Asher*, 96 F.3d 270 (7th Cir. 1996) (multiple 18 U.S.C. § 371 conspiracies); *Jacobs v. Marathon County, Wis.*, 73 F.3d 164 (7th Cir. 1996) (Wis. Stat. §§ 940.01 and 939.05); *United States v. Handford*, 39 F.3d 731 (7th Cir. 1994) (18 U.S.C. §§ 111 and 924(c)); *United States v. Brown*, 31 F.3d 484 (7th Cir. 1994) (18 U.S.C. §§ 371, 1344 and 1956); *United States v. Church*, 970 F.2d 401 (7th Cir. 1992) (21 U.S.C. §§ 846, 841(a)(1) and 856(a)(1)); *United States v. Henderson*, 968 F.2d 1219 (7th Cir. 1992) (18 U.S.C. §§ 1341, 1342, and 1014); *White v. Clark*, 958 F.2d 375 (7th Cir. 1992) (Ind. Code §§ 35-42-3-3, 35-42-4-1 and 35-42-4-2); *United States v. Fox*, 941 F.2d 480 (7th Cir. 1991) (18 U.S.C. §§ 371, 2113(a) and (d), 924(c), 922(g), and 924(e)(1)); *United States v. Auerbach*, 913 F.2d 407 (7th Cir. 1990) (18 U.S.C. § 1952, 21 U.S.C. §§ 846 and 841(a)); *United States v. Garrett*, 903 F.2d 1105 (7th Cir. 1990) (18 U.S.C. §§ 924(c)(1) and § 922(g)(1)); *United States v. McKinney*, 919 F.2d 405 (7th Cir. 1990) (18 U.S.C. §§ 924(c)(1) and 922(g)(1)); *United States v. Powell*, 894 F.2d 895 (7th Cir. 1990) (18 U.S.C. § 924(c)(1), 21 U.S.C. §§ 841(a)(1) and 846); *United States v. Marren*, 890 F.2d 924 (7th Cir. 1989) (18 U.S.C. §§ 371 and 1962(d)); *United States v. DeCorte*, 851 F.2d 948 (7th Cir. 1988) (18 U.S.C. §§ 659 and 2314); *United States v. Foster*, 789 F.2d 457 (7th Cir. 1986) (26 U.S.C. §§ 7203 and 7201); *United States. v. Kimberlin*, 781 F.2d 1247 (7th Cir. 1985) (18 U.S.C. §§ 701 and 912); *United States v. Dennison*, 730 F.2d 1086 (7th Cir. 1984) (15 U.S.C § 1644(a), (b) and (d)); *United States v. Filipponio,* 702 F.2d 664 (7th Cir. 1983) (21 U.S.C. § 841(a)(1) and 18 U.S.C.A. § 1202(a)(1)); *United States v. Makres*, 598 F.2d 1072 (7th Cir. 1979) (18 U.S.C. §§ 1708 and 495); *United States v. Jeffers*, 532 F.2d 1101 (7th Cir. 1976) (21 U.S.C. §§ 848 and 846); *United States v. Hunter*, 478 F.2d 1019 (7th Cir. 1973) (18 U.S.C. §§ 371 and 1955);

although *Dennison* did apply the *Blockburger* test to one statute, 15 U.S.C. § 1644, it did so to distinctly separate subsections of that statute, subsections that clearly on their face established separate crimes. *See* 15 U.S.C. § 1644 (a) and (b) (prohibiting in subsection (a) use of a stolen or counterfeit credit card and in subsection (b) transport of same with unlawful or fraudulent intent).[7] Appellees have uncovered no case where *Blockburger* was applied to two unenumerated paragraphs in a single statutory provision.[8]

The government's remaining arguments merit little discussion. First, the government claims that the district court was merely elevating form over substance in drawing the line at a single statutory

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[7] Thus, to that end, *Dennison* is analogous to *Brown v. Ohio*, which shuttles provisions that clearly demonstrate an intent to create separate offenses down into the constitutional inquiry and the application of *Blockburger*. *See supra* pp. 18-19, ("Only if it is clear after this initial statutory construction that Congress intended to permit multiple punishment or conviction, does one move onto the Constitutional question whether this arrangement violates the double jeopardy clause"). To the extent that this Court rejects this distinction, *Dennison* must be recognized as an outlier in both this Court's and the Supreme Court's jurisprudence, and as contrary to *Blockburger's* plain language.

[8] Even if this Court were to apply *Blockburger,* however, it should find that paragraph two is a lesser included offense of paragraph 1. In *Prince* the Supreme Court concluded "[i]t was manifestly the purpose of Congress to establish lesser offenses." *Prince,* 352 U.S. at 327, and that the "gravamen of the offense" in § 2113(a) was not the act of entering, but rather the intent to steal, *id.* at 328. Under this formulation, § 2113(a)'s second paragraph contains no elements beyond those required under the statute's first paragraph and, consequently, is a lesser-included offense.

section. (Gov't Br. 24.) But this ignores *Blockburger's* plain language as well as all the cases that have held that it applies only when two separate statutory provisions are involved. Second, the government further contends that there is "nothing about the text or structure of § 2113(a) that precludes application of *Blockburger*." (Gov't Br. 24.) But this ignores the fact that the Supreme Court in *Prince* engaged in a statutory analysis of § 2113(a) and explicitly found that *Blockburger* did not apply. *Prince*, 352 U.S. at 322. Third, in attempting to distinguish *Makres* as inconsistent with *Albernaz*, the government has misconstrued the role of Congressional silence in ascertaining legislative intent. (Gov't Br. 25) (arguing that *Albernaz* overruled contrary language regarding congressional silence in this Court's *Makres* decision). In fact, *Makres* and *Albernaz* are wholly consistent; they just define the different roles congressional silence plays depending on where it arises in the analysis. *Makres* teaches that Congressional silence in the initial statutory construction stage should be construed against finding separate offenses when dealing with a single section of the code. *Makres*, 598 F.2d at 1074. *Albernaz's* presumption about congressional silence that accords presumptive

weight to *Blockburger* arises only after deciding the constitutional double-jeopardy issue and finding that *Blockburger* applied to two separate statutes. *Albernaz*, 450 U.S. at 340-42.

Finally, the government makes a half-hearted effort to distinguish *Sanabria*, which as noted above explicitly declined to apply *Blockburger* to a single statutory provision under 18 U.S.C. § 1955. *Sanabria*, 437 U.S. at 70. The government claims that "*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." (Gov't Br. 27.) But that is precisely what the government is doing here: it brought a second charge for the single crime under § 2113(a) by merely proposing an alternate way of proving it. The government cannot avoid the precedential effect of *Sanabria*, and that Court's rejection of *Blockburger* in the single-statute context, based on such a facile distinction.

C. Even if this Court were to apply *Blockburger* and permit re-prosecution of the defendants, the doctrine of collateral estoppel likewise would bar the government's successive indictment.

Even if this Court were to decide that § 2113(a) consists of two offenses, that the *Blockburger* test applied, and that § 2113(a) created two separately punishable and prosecutable offenses, the government nevertheless would be collaterally estopped from re-prosecuting the defendants. This doctrine of criminal collateral estoppel has constitutional roots in the double jeopardy clause of the Fifth Amendment, *Ashe v. Swenson*, 397 U.S. 436, 441-43 (1970), and means in the criminal context that "when an issue of ultimate fact has once been determined by a valid and final judgment [i.e., an acquittal], that issue cannot again be litigated between the same parties in any future lawsuit [i.e., a prosecution]." *United States v. Bailin*, 977 F.2d 270, 274 (7th Cir. 1992). *See also United States v. Dixon*, 509 U.S. 688, 705 (1993) (recognizing that collateral-estoppel "may bar a later prosecution for a separate offense where the Government has *lost* an earlier prosecution involving the same facts") (emphasis in original); *Brown,* 432 U.S. at 166 n.6 (stating that "[e]ven if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second

prosecution requires the relitigation of factual issues already resolved by the first.").

In deciding what constitutes the "same issue" for collateral-estoppel purposes, commentators have suggested that courts consider the following factors: "the existence of substantial overlap between evidence and argument, whether the new evidence or argument involves application of the same rules of law, whether pretrial preparation and discovery reasonably could have been expected to cover the new matters in the prior action, and the closeness of the relationship between the claims involved in the two proceedings." 18 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4417 (2009) (citing Restatement 2d of Judgments, § 27, comment c (1981)).

Applying these principles to the present cases shows that the government should be barred from re-litigating a § 2113(a) ¶ 2 bank robbery because the "ultimate issue" of what felony the defendants intended to commit in the banks, *i.e.,* a violent bank robbery, was fully litigated and decided in the defendants' favor in the original prosecution. In Thornton's case, on which the district court also relied

in overturning Loniello's and Aguilar's convictions, this Court held the evidence presented in the earlier proceeding was insufficient to prove bank robbery by force and violence or intimidation. *United States v. Thornton*, 539 F.3d 741, 749 (7th Cir. 2008). The government's allegations in the superseding indictments track its intent to use the ¶ 1 bank robbery as the predicate element and proof in the new ¶ 2 charge,[9] and the government has alleged no new facts. *See United States v. Fusco*, 427 F.2d 361, 363 (7th Cir. 1970) (applying collateral estoppel where the ultimate fact had been determined in earlier proceeding and where "[t]he Government did not put on any additional evidence in the second trial" to support the new charges) Thus, it is clear that the government is wholly relying on the facts decided in defendants' favor in the earlier proceeding and that the government cannot meet its burden of proving defendants guilty beyond reasonable doubt without relying on those facts because the record and pleadings

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[9] In Thornton's superseding indictment, the government alleged that Thornton "attempted to enter a bank, namely Bank One at 6532 West Cermak Road, Berwyn, Illinois, with intent to commit in such bank any felony affecting such bank, namely, bank robbery by force and violence and by intimidation, in violation of Title 18 United States Code, Section 2113(a) U.S.C. ¶ 1, and any larceny; All in violation of Title 18, United States Code, Section 2113(a) ¶ 2." (Thornton R. 111, Superseding Indictment.)

demonstrate that it has no other basis on which to establish the underlying felony element of a ¶ 2 bank robbery. *See Ashe*, 397 U.S. at 444 (noting that the approach in analyzing collateral estoppel claims is to "examine the record of a prior proceeding taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration") (internal citations omitted); *United States v. Salerno*, 108 F.3d 730, 741 (7th Cir. 1997).

The government has engaged in prosecutorial gamesmanship, has dragged defendants through the anguish of several years of litigation, and, in the process, has wasted judicial time and resources. It should not be allowed to take another bite at the apple by relitigating the same claims with the same evidence.

CONCLUSION

For the foregoing reasons, the appellees respectfully request that the Court affirm the district court's decisions in both cases.

Respectfully Submitted,

Defendants-Appellees

By: _____

SARAH O'ROURKE SCHRUP
Northwestern University School of Law
357 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063
Counsel for Defendant-Appellee,
WALTER THORNTON

STEVEN SHOBAT
53 West Jackson Boulevard
Suite 1603
Chicago, IL 60604
Phone: (312) 353-2118
Counsel for Defendant-Appellee,
MICKEY LONIELLO

BEAU BRINDLEY
53 West Jackson Boulevard
Suite 1001
Chicago, IL 60604
Phone: (312) 782-4615
Counsel for Defendant-Appellee,
NATHANIEL AGUILAR

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Case Nos. 07 CR 336, 05 CR 813

Hon. James B. Zagel,
Presiding Judge

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellee, WALTER THORNTON, hereby certify that I served two copies of this brief and one digital copy of the brief by placing them in an envelope with sufficient postage affixed and directed to the person named below at the address indicated, and depositing that envelope in the United States mail box located at 375 East Chicago Ave., Chicago, Illinois on June 25, 2009

Stuart Fullerton
Assistant United States Attorney
219 South Dearborn Street
Chicago, IL 60604

SARAH O'ROURKE SCHRUP
Attorney
BLUHM LEGAL CLINIC
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-006

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CIRCUIT RULE 31(e) CERTIFICATION

I, the undersigned, counsel for the Defendant-Appellee, WALTER THORNTON, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief in non-scanned PDF format.

SARAH O'ROURKE SCHRUP
BLUHM LEGAL CLINIC
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I, the undersigned, counsel for the Defendant-Appellee, WALTER THORNTON, hereby certify that this brief conforms to the rules contained in Fed. R. App. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 12,471 words.

SARAH O'ROURKE SCHRUP
BLUHM LEGAL CLINIC
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Dated: June 25, 2009