



United States v. Palafox

764 F.2d 558 (1985) | Cited 67 times | Ninth Circuit | June 24, 1985

Order

SCHROEDER, Circuit Judge.

Antonio Pino Palafox appeals from his conviction on one count of possession with intent to distribute a controlled substance and one count of distribution of a controlled substance under 21 U.S.C. § 841 (a) (1). The charges stem from a meeting in a parking lot where Palafox intended to sell a package of heroin to an undercover agent. The agent asked Palafox for a sample of the heroin, took a small quantity from the package and returned the package to Palafox. Almost immediately thereafter agents arrested Palafox. He was charged with distribution of the .12 gram sample and with possession of the remaining 124.58 grams with intent to distribute. Upon conviction, he was sentenced to concurrent terms of five years on each count.

Palafox argues in this appeal that because only one sale was contemplated and both the possession and the distribution were part of the same unconsummated transaction, he should not have been tried on both counts. He asks that we reverse his convictions and order the government to retry him only one of the charges.

Palafox relies on certain language in decisions of this and other circuits involving convictions for possession with intent to distribute and actual distribution of the same drugs in one transaction. See, e.g., *United States v. Oropeza*, 564 F.2d 316 (9th Cir. 1977), cert. denied, 434 U.S. 1080, 98 S. Ct. 1276, 55 L. Ed. 2d 788 (1978); *United States v. Olivas*, 558 F.2d 1366 (10th Cir.), cert. denied, 434 U.S. 866, 98 S. Ct. 203, 54 L. Ed. 2d 142 (1977). He recognizes, however, that none of these decisions compel adoption of his position. Rather, the cases upon which he relies approve of the prosecution for both possession with intent and distribution but hold that in the sentencing phase, the defendant should receive only one punishment. In the alternative, therefore, he argues that he should not have been sentenced on both counts.

The government relies upon our decision in *United States v. Mehrmanesh*, 682 F.2d 1303 (9th Cir. 1982). It argues that since the defendant completed the distribution of the sample and retained possession of the remainder with the intent to make a subsequent distribution, he committed two separately punishable offenses.

Mehrmanesh, however, involved two distributions. The first was the giving of a sample and the second was the delivery, several hours later, of the remainder to a different person at a different



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place. Mehrmanesh lived in Phoenix and arranged for the sale of a quantity of drugs in Tucson. One of Mehrmanesh's men and an undercover agent left Phoenix with the drugs to make the delivery to another undercover agent in Tucson. On the way, and unbeknownst to Mehrmanesh, the undercover agent asked Mehrmanesh's courier for a sample, and he complied with the request. That day they delivered the remainder in Tucson. Mehrmanesh was charged and convicted with aiding and abetting both the delivery in Tucson, which he helped plan, and the giving of the sample, about which he knew nothing.

On appeal, the panel majority rejected his argument that the only punishable offense was the aiding and abetting of the sale in Tucson. The majority held that the statute covers distributions and is not limited to sales *Id.* at 1305-07. The majority also rejected the contention that, because Mehrmanesh was not even aware of the sample distribution, there was insufficient evidence to convict him of aiding and abetting it. It went on to hold, in effect, that one who arranges a sale can be punished separately for the distribution of a sample which occurs after the sale is arranged and before it is consummated. *Id.* at 1307-09.

Because the government recognizes that Mehrmanesh is at the very least factually distinguishable, it takes an alternative position similar to that taken by the appellant. The government therefore argues that if there are not two separately punishable offenses, we should remand for resentencing.

The district court apparently wanted to impose only one punishment but felt bound by Mehrmanesh to impose punishments on each count. We granted en banc review in order to resolve the confusion. We hold, in line with the alternative arguments of both sides, that where the defendant distributes a sample and retains the remainder for the purpose of making an immediate distribution to the same recipients at the same place and at the same time, verdicts of guilty may be returned on both counts but the defendant may be punished on only one.¹

This conclusion flows from three sources of legal authority. The first is the statute under which the appellant was convicted, the Comprehensive Drug Abuse Preventive and Control Act of 1970 ("Drug Act"), and its legislative history. The second is the United States Supreme Court's interpretation of an analogous statute, the Federal Bank Robbery Act, 18 U.S.C. § 2113. The third is the line of Federal Court of Appeals decisions under the Drug Act in factual situations most analogous to this one.

Our examination of the statute and its history underscores the strong congressional intent to criminalize all aspects of drug trafficking, and it compels us to reject an approach which focuses on sales or commercial transactions. See Mehrmanesh, 682 F.2d at 1306-07; *United States v. Pruitt*, 487 F.2d 1241, 1245 (8th Cir. 1973). Palafox is charged with violating section 841 (a) (1) of the Drug Act. The section provides:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture,



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distribute, or dispense, a controlled substance;

21 U.S.C. § 841 (a) (1). Congress fixed the maximum punishment for conviction of possession with intent to distribute at fifteen years, with a possible fine of \$25,000, 21 U.S.C. § 841 (b) (1) (A).² It fixed the same maximum punishment for distribution. *Id.* Congress indicated thereby that the offenses were equally serious and should be treated with equal severity. The Drug Act attacks illegal drug traffic by making the price for drug participation in any aspect prohibitive. H.R.Rep. No. 91-1444, 91st Cong., 2d Sess., in [1970] U.S. Code Cong. & Ad. News 4566 passim; cf. *Pruitt*, 487 F.2d at 1245 ("Congress undoubtedly intended by this new Act to make an all-out attempt to combat illicit drugs by subjecting any individual who knowingly participates in the distribution to substantial, and in some cases severe, penalties . . .").

Congressional intent to penalize all aspects of the unauthorized use of controlled substances was emphasized by the Eighth Circuit in *Pruitt*, when it stated that the Drug Act is "no longer restricted to the narrower concepts of buy and sell, but all inclusive in covering the entire field of narcotics and dangerous drugs in all phases of their manufacturing, processing, distribution and use." 487 F.2d at 1245; see also *United States v. Gomez*, 593 F.2d 210, 213 (3d Cir.) (en banc) (Congress intended to proscribe all drug activity in enacting the Drug Act), cert. denied, 441 U.S. 948, 99 S. Ct. 2172, 60 L. Ed. 2d 1052 (1979).

Appellant's position that he could be prosecuted for only one offense and that the government must elect to prosecute either the distribution or the possession with intent to distribute, is contrary to this congressional intent. *Id.* For this reason, the circuits that have considered this contention have rejected it. *United States v. Gonzalez*, 715 F.2d 1411, 1412 (9th Cir. 1983) (the companion case to this one); *United States v. Cortes*, 606 F.2d 511, 512 (5th Cir. 1979); see also *United States v. Woods*, 568 F.2d 509, 511-12 (6th Cir.) (election not required), cert. denied, 435 U.S. 972, 98 S. Ct. 1614, 56 L. Ed. 2d 64 (1978). This appellant was therefore properly prosecuted for two component offenses of one intended sale.

The next issue is whether the appellant may be punished for two crimes after he has been found guilty of two such component offenses. We are guided here by the United States Supreme Court's interpretation in *Prince v. United States*, 352 U.S. 322, 77 S. Ct. 403, 1 L. Ed. 2d 370 (1957), of the Federal Bank Robbery Act, 18 U.S.C. § 2113.³ In the Federal Bank Robbery Act, as in the Drug Act, Congress created separate offenses, i.e., entry with intent to rob, and robbery, out of what could have been described as one criminal undertaking. See *Prince*, 352 U.S. at 323, 77 S. Ct. at 404, 1 L. Ed. 2d 370. The Supreme Court in *Prince* upheld prosecution and findings of guilt on multiple counts but permitted punishment for only one. *Id.* at 329, 77 S. Ct. at 407, 1 L. Ed. 2d 370.

Prince came to the Supreme Court because of a conflict among the circuits. The Fifth Circuit in *Prince* itself had held two sentences were appropriate, *Prince v. United States*, 230 F.2d 568 (5th Cir. 1956), rev'd, 352 U.S. 322, 77 S. Ct. 403, 1 L. Ed. 2d 370 (1957); other circuits had held only one was



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appropriate. Compare *Simunov v. United States*, 162 F.2d 314 (6th Cir. 1947) (statute permits only one sentence) with *Rawls v. United States*, 162 F.2d 798 (10th Cir. 1947) (multiple sentences allowed) and *Durrett v. United States*, 107 F.2d 438 (5th Cir. 1939) (same). See generally *Prince*, 352 U.S. at 324 n. 3, 77 S. Ct. at 405 n. 3, 1 L. Ed. 2d 370. No circuit had adopted the theory appellant urges in this case that the defendant could be prosecuted for only one offense. In *Prince*, the Supreme Court held that Congress created multiple offenses in connection with the same robbery, but that it did not intend to impose multiple punishments.

The Supreme Court reviewed the legislative history regarding the establishment of separate offenses -- robbery and acts which fall short of a completed robbery -- with the same maximum punishment for each offense. It held that in creating the offenses "there was no indication that Congress intended also to pyramid the penalties." 352 U.S. at 327, 77 S. Ct. at 406, 1 L. Ed. 2d 370. Hence, it reasoned that Congress did not intend, by making entry of the bank a separate offense, to multiply the maximum twenty-year sentence for robbery of the bank by another twenty years for the initial entry. The Court stressed in *Prince* that Congress's intent in criminalizing each step leading to a robbery was to punish, and punish severely, the person who embarks upon a robbery but is frustrated before completion. Congress did not intend to make "drastic changes in authorized punishments." *Id.* at 328, 77 S. Ct. at 407, 1 L. Ed. 2d 370. The Court went on to state:

We 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, but that, even if the culprit should fall short of accomplishing his purpose, he could be imprisoned for 20 years for entering with the felonious intent.

Id. at 329, 77 S. Ct. at 407, 1 L. Ed. 2d 370 (footnote omitted). The Court remanded for resentencing.

The Supreme Court followed *Prince* in *United States v. Gaddis*, 424 U.S. 544, 96 S. Ct. 1023, 47 L. Ed. 2d 222 (1976). There the Court, citing *Prince*, left standing only one of multiple sentences imposed in a prosecution for component offenses of bank robbery. *Gaddis*, 424 U.S. at 549 n. 12, 96 S. Ct. 1023 n. 12, 47 L. Ed. 2d 222.

In this case, as in *Prince*, the defendant committed and was charged and convicted of two criminalized steps of one transaction. We conclude that the Supreme Court's reasoning in *Prince* should apply, and the district court should have imposed only one punishment.

Our conclusion that *Prince* should apply and that the defendant may be subjected to only one punishment is supported by the Drug Act decisions in analogous situations. All six of the circuits that have considered multiple sentences for a distribution of a controlled substance and the possession of that substance with intent to distribute have viewed the *Prince* rationale as the controlling authority. All, including our own, have held that where a single act of distribution forms the basis for both the charge of distribution and the charge of possession with intent to distribute,



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the government may prosecute and the defendant may be found guilty of both charges, but the court may impose only one sentence. *United States v. Oropeza*, 564 F.2d 316 (9th Cir. 1977), cert. denied, 434 U.S. 1080, 98 S. Ct. 1276, 55 L. Ed. 2d 788 (1978); *United States v. Gomez*, 593 F.2d 210 (3d Cir.) (en banc), cert. denied, 441 U.S. 948, 99 S. Ct. 2172, 60 L. Ed. 2d 1052 (1979); *United States v. Hernandez*, 591 F.2d 1019 (5th Cir. 1979) (en banc); *United States v. Olivas*, 558 F.2d 1366 (10th Cir.), cert. denied, 434 U.S. 866, 98 S. Ct. 203, 54 L. Ed. 2d 142 (1977); *United States v. Stevens*, 521 F.2d 334 (6th Cir. 1975); *United States v. Curry*, 512 F.2d 1299 (4th Cir.), cert. denied, 423 U.S. 832, 96 S. Ct. 55, 46 L. Ed. 2d 50 (1975); *United States v. Atkinson*, 512 F.2d 1235 (4th Cir. 1975).

Following the Supreme Court's interpretation in *Prince* of the Federal Bank Robbery Act, the dominant theme in all of these federal Courts of Appeals' decisions under the Drug Act is a simple one: when more than one offense arises under § 841(a)(1) from a single criminal undertaking involving drugs, and each offense is committed at virtually the same time, in the same place, and with the same participants, the punishments should not be compounded. Thus, in *Gomez*, the Third Circuit declared that "sentences cannot be imposed for both the offense of distribution and the offense of possession with intent to distribute when both are charged and proved to have taken place at the same time." 593 F.2d at 217. The Sixth Circuit, in *Stevens*, emphasized that it was the single act of distribution that gave rise to prosecution for both the distribution and the possession with intent to distribute. 521 F.2d at 337. The Tenth Circuit in *Olivas* is in accord, 558 F.2d at 1368, and our own opinion in *Oropeza* stressed that "the circumstantial evidence on which their possession convictions rest was identical to the evidence supporting their distribution convictions." 564 F.2d at 324. The same theme sounds with equal clarity in this case.

This case, however, factually differs in one respect from the other cases of multiple prosecution for distribution and possession with intent. Here, the charge of distribution is based on the distribution of the sample, and the charge of possession is based on the possession of the remainder with intent to make the immediate sale. However, the meeting with the agent, the giving of the sample and the possession of the remainder were all directed toward consummation of one criminal undertaking. Since the possession and the distribution occurred at the same time, in the same place, and with the involvement of the same participants, there should, as in the other cases, be only one punishment.

We stress that the delivery of a sample may well be a separately punishable offense in different circumstances. For example, an individual on the street corner who hands a sample to a passerby and who possesses the remainder with the intent to distribute it to others should receive multiple punishments, just as an individual should be punished if he makes distributions, sample or otherwise, to two different individuals as part of two separate transactions. Insofar as *Mehrmanesh* held that one involved in an ultimate distribution is always separately punishable for a preceding sample distribution, however, it is overruled. The general rule under § 841(a)(1) is, consistent with *Prince*, that where the defendant is convicted of multiple criminal steps leading to the same criminal undertaking, only one punishment should be imposed.



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Permitting separate punishments in the present case could lead to potentially ludicrous results. Government agents, for example, could ask for repeated samples, and turn one intended delivery into a theoretically infinite number of crimes, each punishable with a maximum of fifteen years. Such results were not intended under a statute criminalizing the various steps involved in one criminal undertaking. See *Prince*, 352 U.S. at 328, 77 S. Ct. at 406-07, 1 L. Ed. 2d 370. The defendant in this case, therefore, should not receive multiple punishments for steps in what in fact amount to one frustrated delivery of drugs.

Manner of Sentencing

Since we hold that the district court should impose only one sentence based upon two offenses, we should give some guidance on the sentencing process in cases involving component offenses under the Drug Act. A problem could arise, for example, if the district court imposed a sentence on one count and dismissed the other at the time of sentencing or even earlier. The defendant then would escape punishment altogether if the sentenced count were subsequently reversed on appeal or collateral attack.

The State of California has given great attention to this and related problems which may arise in connection with the imposition of single punishments when a defendant has been found guilty of multiple offenses. California has enacted a statute which requires that a single punishment be imposed in every situation in which "an act or omission . . . is made punishable in different ways by different provisions of [the criminal] code" Cal. Penal Code § 654 (West 1970 § Supp. 1984). Because of the vast array of situations to which this statute might apply, see generally 2 B. Witkin, California Crimes §§ 948-964 (1963 § Supp. 1983), California has adopted a rule to ensure that the defendant receives an appropriate sentence. Rule 449 of California Rules of Court provides that the execution of sentence on all but one count be stayed pending appeal, with the stay becoming permanent when the sentence not stayed is completed. The rule is derived from the decision of the California Court of Appeal in *People v. Niles*, 227 Cal. App. 2d 749, 39 Cal. Rptr. 11 (1964), where the reasons for it are fully explained.

The California experience is instructive where, as here, implementation of congressional intent calls for imposition of one punishment in the context of two offenses. Staying execution of sentence on one count goes far toward ensuring that the defendant is punished, but punished only once, and for no more than the maximum set for that offense of which he is found guilty which carries the greatest maximum penalty.

If, however, as apparently contemplated under the California rule, judgment of conviction is entered on both offenses at the time of original sentencing, the defendant could at least arguably be subject to additional, collateral punitive effects of the second conviction. This problem can be avoided by staying both the sentence and entry of judgment of conviction on all but one count in prosecutions for component offenses under the Drug Act. Such a procedure follows the directive of *Prince* to avoid



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multiple punishments. It avoids both the punitive collateral effects of multiple convictions as well as the direct effects of multiple sentences. See *Ball v. United States*, 470 U.S. 856, 105 S. Ct. 1668, 1673-74, 84 L. Ed. 2d 740 (1985). Our conclusion is consistent with the Fifth Circuit's in *United States v. Phillips*, 664 F.2d. 971, 1039 (5th Cir. 1981), cert. denied, 457 U.S. 1136, 102 S. Ct. 2965, 73 L. Ed. 2d 1354 (1982), that component drug offenses constituted one, not two, predicate acts under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968. In prosecutions for component drug offenses, sentence and entry of judgment of conviction therefore should be stayed on all but one count.

Palafox's Other Contentions

Palafox contends that the use of the word conspiracy in the jury instructions, when no conspiracy was charged, was confusing. This claim is identical to that of appellant's co-defendant in *United States v. Gonzalez*, 715 F.2d 1411, 1412 (9th Cir. 1983). Our holding that, in the absence of any showing of prejudice, there was no reversible error is controlling. There was no showing of prejudice here or in *Gonzalez*.

Palafox also argues as a matter of law that he was entitled to an acquittal because he was entrapped. Palafox was required to present "'undisputed testimony making it patently clear' that he was an 'otherwise innocent' person in whom the government implanted the criminal design." *United States v. Abushi*, 682 F.2d 1289, 1297 (9th Cir. 1982) (quoting *United States v. Rangel*, 534 F.2d 147, 149 (9th Cir.), cert. denied, 429 U.S. 854, 97 S. Ct. 147, 50 L. Ed. 2d 129 (1976)). Appellant did not come close to meeting this standard.

We therefore remand with instructions to the district court to vacate and stay the entry of judgment and the imposition of sentence on one count. The stays are to become permanent upon service of the sentence on the remaining count. The judgment is otherwise affirmed.

POOLE, Circuit Judge, with whom Sneed, Circuit Judge, joins, dissenting.

The majority correctly holds that a defendant who distributes a sample of narcotics from a bulk amount which he retains intending to make a further distribution to the same recipients commits and may be convicted of two crime. I part company, however, with the majority's further conclusion that such a defendant may be sentenced on only one crime.

This was is a clear and relatively uncomplicated case to which the majority has applied convoluted and contradictory reasoning and from which it has distilled a rule that when Congress has created two distinct and separate criminal offenses -- possession with intent to distribute and distribution -- a defendant may be convicted of both but may be sentenced on only one.

Palafox was charged and convicted under an indictment alleging that he violated the Comprehensive



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Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841 (a) (1) (the Drug Act), in that he (1) possessed a controlled substance with intent to distribute it and (2) he did distribute a controlled substance. The section in question provides:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

In February, 1982, an agent of the Drug Enforcement Agency of the Department of Justice, Special Agent Edward Cazares, received an unexpected telephone call at his Sacramento office from an inmate at Terminal Island Federal Correction Institute in San Pedro, California who introduced the agent to appellant Palafox as a prospective heroin buyer. The agent gave Palafox the number of an undercover telephone at the Sacramento Regional Office of the Agency. From February through April Palafox initiated several collect telephone calls to Cazares. In late April 1982 Palafox and his wife (Gonzalez, who became a co-defendant with Palafox) continued communications with Cazares discussing the possible delivery of a quantity of heroin. In late July Palafox told Cazares that he was then out on parole and would soon arrange a delivery. On September 9 Palafox advised Cazares, again by telephone, that he would deliver a quantity of heroin and cocaine and that he was coming to Sacramento. On September 10 Palafox telephoned that he was in Los Angeles and that he and Gonzalez would arrive in Sacramento that night with 5 ounces of heroin. Three days later, on September 13, Palafox telephone Cazares that he and Gonzalez were at Fresno, had 5 ounces of heroin, and would arrive in Sacramento in the early afternoon. That afternoon Palafox called Cazares and said he was in Sacramento at a shopping center parking lot and had the contraband. He gave Cazares a description of himself and of his vehicle.

Cazares drove to the lot and recognized Palafox standing by a Ford Ranchero vehicle. Seated inside was Gonzalez. Cazares parked his government car a short distance away and Palafox came over to the agent and introduced himself. The agent then walked over to the Ranchero and negotiated with Palafox and Gonzalez for the purchase and delivery of the contraband. Palafox wanted the agent to go with him to a motel where the agent could get a small sample of the heroin. After further negotiations Palafox agreed to produce the heroin. Palafox removed from under the dashboard of his vehicle a baseball sized ball of masking tape from which he unsuccessfully attempted to remove a sample quantity. Gonzalez gave him a fork to open the tape and they went over to the government vehicle. There Palafox handed Cazares the ball, from which Cazares removed a sample of brown heroin. Palafox then returned to his Ford Ranchero and replaced the ball under the dashboard. On the pretense that he would have to call someone to test the sample and would return, Cazares walked away and shortly thereafter gave a prearranged arrest signal. Other officers appeared and Palafox and Gonzalez were taken into custody.



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Palafox was charged in a two-count indictment with two violations of 21 U.S.C. § 841 (a) (1). Count I charged distribution of the sample. Count II charged possession of the bulk (124.58 grams) of heroin with intent to distribute.

The majority concedes that § 841 (a) (1) creates two offenses and that possession with intent to distribute is a crime distinct and separate from distribution. The majority agrees that the government could properly charge, try and seek conviction of the defendant for the discrete offenses of distribution and possession, but the majority holds that the court, upon conviction, could sentence the defendant for only one offense.

Normally when Congress has created two offenses and a defendant is convicted of both, he would be subject to sentence on each, the sentence to run concurrently or cumulatively. The majority holds that only one may be imposed here. The question arises: Why? Because it is dictated by controlling precedent? Not so.

The controlling precedent in this circuit is *United States v. Mehrmanesh*, 682 F.2d 1303 (9th Cir. 1982), a decision by a panel of which the author of today's opinion was a member. It holds that each offense is properly subject to separate sentencing.

Mehrmanesh involved separate punishments for separate distributions of a sample and then of the remaining bulk of contraband. Mehrmanesh made a deal through an informant, Melchi, to sell 50 grams of heroin to Melchi's buyers. At a meeting between Melchi, Mehrmanesh and Mehrmanesh's associates, Napier and Reedy, Melchi asked for a sample to show to his principals. Mehrmanesh said that the heroin was elsewhere but he would have it delivered to the home of one of his associates the next morning. Reedy, who later gave evidence for the government, testified that Mehrmanesh arranged for Reedy to pickup the heroin and that he did so. Later, Mehrmanesh's associate, Napier, gave Melchi a 4 gram sample which apparently Melchi never delivered to his principal. Melchi later told Reedy and Napier that his principal wanted another sample. Reedy gave him 2.8 grams and this transfer became the basis of a count in the indictment which charged Mehrmanesh with aiding and abetting that distribution. When the balance of the heroin was delivered to the agent, approximately 594 grams, Reedy and Napier were arrested and that delivery was the basis of the second count against Mehrmanesh.

Mehrmanesh argued that there had only been one sale although there had been two distributions. The Mehrmanesh majority rejected this contention, noting that the 1970 Drug Act

on its face * * * proscribes each act of delivery, rather than each purchase or sale. [The Act is] extremely broad in scope, no longer restricted to the narrower concepts of buy and sell, but all inclusive in covering the entire field of narcotics and dangerous drugs * * * All distribution is controlled or prohibited, legitimate or illegitimate.



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Mehrmanesh, 682 F.2d at 1306, citing *United States v. Pruitt*, 487 F.2d 1241, 1245 (9th Cir. 1973). The court held that both distributions were separate offenses and subject to separate sentences. Today's author of *Palafox*, who dissented in *Mehrmanesh*, did not then take issue with that holding, but dissented only on the grounds that she believed the evidence did not show *Mehrmanesh*'s actual knowledge of and participation in the first delivery. Until today, *Mehrmanesh* has controlled this circuit's view.

As the majority recognizes, Congress intended to criminalize "all aspects of drug trafficking, and it compels us to reject an approach which focuses on sales or commercial transactions." Maj. op. at 5. When Congress fixed a 15 year maximum for possession with intent to distribute and a like penalty for distribution, "Congress indicated thereby that the offenses were equally serious and should be treated with equal severity. The Drug Act attacks illegal drug traffic by making the price for drug participation in any aspect prohibitive." *Id.* The majority agrees that *Palafox* may be charged and convicted of each offense and that the government need not declare an election between the crimes, citing cases from other circuits including *United States v. Gomez*, 593 F.2d 210, 213 (3d Cir.) (en banc), cert. denied, 441 U.S. 948, 99 S. Ct. 2172, 60 L. Ed. 2d 1052 (1979).

The majority says, however, that only one sentence may be imposed. The *Gomez* court, to whose analysis the majority looks, based this conclusion on divination that Congress did not intend to "pyramid" sentences when "two violations of the statute are proved by but one distribution." *Gomez*, 593 F.2d at 213. This is inconsistent with our circuit's decision in *Mehrmanesh* and is contrary to the majority's analysis in the instant case. The majority here does not agree that the two violations amount only to "one" crime.

Lacking any supporting precedent in rulings of the Supreme Court under the Drug Act, the majority has reached out to an entirely different statute and a single decision thereunder upon which to base today's holding. The majority argues that its single-sentence theory finds authority in *Prince v. United States*, 352 U.S. 322, 77 S. Ct. 403, 1 L. Ed. 2d 370 (1957), a decision interpreting the Federal Bank Robbery Act, 18 U.S.C. § 2113 et. seq. In the Bank Robbery Act, the majority says, "Congress created separate offenses, i.e., entry with intent to rob, and robbery, out of what could have been described as one criminal undertaking." Maj. op. at 7. The Supreme Court held that as amended in 1937, § 2113 (a) of that Act makes separately punishable bank robbery and larceny, but also the Act of entering a bank with intent to commit robbery and larceny; however, one may not be separately punished for both entry and successful ultimate robbery or larceny, because the history of the amendment convinced the Supreme Court that Congress intended no such discrete punishment. The majority tracks no such Congressional intent in the Drug Act.

As set forth hereafter, the Bank Robbery Act supplies no real analogue to treatment of the offenses of possession with intent to distribute and distribution. Although the Court in *Prince* held that a defendant could be convicted of both bank robbery and of entry with the intent to rob but could be sentenced to only be robbery itself, that conclusion does not illuminate the Drug Act which is an



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entirely different statutory provision and has an entirely different legislative history.

Robbery is an unlawful taking of personal property from the person or immediate presence of another accomplished variously by force, fear or intimidation. In the sense relevant here, bank robbery is "literally robbery committed in a bank." R. Perkins, *Criminal Law* 285 (1969). It is much like the common law crime of burglary. It cannot be committed without an entry of the premises. The federal act was passed in 1934, in the wake of gang robberies of banking institutions. At that time, the Act did not contain present section 2113 (a), which punishes entry with the intent to commit robbery, other felony, or larceny. Section 2113 (a) was added in 1937 at the urging of the Attorney General who cited to Congress "incongruous results" in which a thief walked out of a bank with \$11,000 he had slipped into his pocket during the brief absence of a teller. Under the 1934 statute he had committed no federally prosecutable offense. *Prince*, 352 U.S. at 325-27. Responding to this anomaly, Congress enacted the 1937 amendments which made punishable the entry with intent to "commit any felony or larceny," as well as the actual commission of those offenses. Later, the larceny provisions were segregated in § 2113 (b), leaving ("simple") robbery and entry in § 2113 (a). *Id.* at 326, n. 5.

Under today's Bank Robbery Act, entry is chargeable as a separate offense but punishable as such only if the intended crime does not succeed. The "gravamen of the offense" which Congress had in mind in 1937

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 in 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 we cannot do. If Congress had so intended, the result could have been accomplished easily with certainty rather than by indirection.

1. As explained more fully in our discussion of sentencing, we affirm the judgment of conviction on one count and direct the district court to vacate and stay both the imposition of sentence and entry of judgment of conviction on the other count. This is to ensure that appellant receives a single punishment without the direct or collateral consequences of conviction on a second count. Although Judge Poole's dissenting opinion characterizes our holding as permitting "two convictions," the appellant's record will reflect only one.

2. The penalty provisions applicable to this case are those which were in effect before the Controlled Substances Penalties Amendments Act of 1984, 98 Stat. 2068 (codified at 21 U.S.C. 841 (b)), increased the penalties.

3. 18 U.S.C. § 2113 provides in relevant part: (a) Whoever, by force and violence, or by intimidation, takes, or 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, credit union, or any savings and loan association; or



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Whoever enter 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 not more than \$5,000 or imprisoned not more than twenty years, or both.

1. Similarly, the facts surrounding Palafox's own embarrassing mischance have been inaccurately portrayed in the statement that upon the passing of the sample of the heroin, "almost immediately thereafter agents arrested Palafox." Maj. op. at 1. That is not the record either. There was an interval of time between delivery of the sample and the arrest of Palafox; how much is not clear. We know that the agent walked away, ostensibly to go to a telephone. Defense counsel described the interval as coming "within minutes," see Excerpts of Record at 11, but he did not say how many minutes. The money, the object of making the deal, had not passed, and Palafox certainly would not have given up possession before payment was made. Consequently, the crimes of possession before and afterwards, and of distribution, were distinctly separate. Whatever the time interval, the majority admits that two separate crimes were committed.

