No. 14977.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ISAAC MORRIS SHERMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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HARRY MORRIS SHERMAN,

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APPELLEE'S BRIEF.

Jurisdiction.

The jurisdiction of the District Court in this case arose under Title 21 U. S. C. A. Section 174 as amended November 2, 1951, Ch. 666, Sec. 1, 5(1), 65 Stat. 767, and Title 18 U. S. C. A., Section 3231 (June 25, 1948, Ch. 645, 62 Stat. 826).

The jurisdiction of this Court was invoked under the provisions of Title 28 U. S. C. A., Section 1291 (June 25, 1948, Ch. 646, 62 Stat. 929) and Rules 37 and 39 of the Federal Rules of Criminal Procedure, Title 18 U. S. C. A. (as amended December 27, 1948, eff. January 1, 1949).

Statement of the Case.

Appellant Harry Morris Sherman and one Annabella Ellison were indicted by the Federal Grand Jury sitting at Los Angeles for violation of the federal law pertaining to narcotic drugs.

Count one of the indictment charged that:

> "On or about July 9, 1954, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants HARRY MORRIS SHERMAN and Annabella Ellison, after importation, did knowingly and unlawfully receive, conceal and facilitate the transportation of, a certain narcotic drug, namely; approximately 6 grains of heroin, which said heroin as the defendants then and there well knew, had been imported into the United States of America contrary to law, in violation of United States Code, Title 21, Section 174."

In addition appellant Sherman was indicted for the unlawful sale of heroin, the unlawful receipt and concealment of heroin, and conspiracy to sell heroin.

Count two of the indictment charged a violation of 21 U. S. C. 174, in that:

> "On or about July 10, 1954, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant HARRY MORRIS SHERMAN, after importation, did knowingly and unlawfully sell a certain narcotic drug, namely: approximately 333 grains of heroin, to Ralph M. Frias, which said heroin, as the defendant then and there well knew, had been imported into the United States contrary to law."

Count three charged that:

> "On or about July 20, 1954 in Los Angeles County, California, within the Central Division of the Southern District of California, defendant HARRY MORRIS SHERMAN did, after importation, knowingly and unlawfully receive, counceal, and facilitate the transportation of, a certain narcotic drug, namely: approximately 9 grains of heroin, which said heroin,

as the defendant then and there well knew, had been imported into the United States of America contrary to law, in violation of United States Code, Title 21 Section 174."

Count four charged a conspiracy to violate 21 U. S. C. 174.

After trial the jury returned a verdict of guilty as to Annabella Ellison on count one and as to Appellant Sherman on Counts one, two, and three. On October 11, 1954 Ellison was sentenced to 10 years imprisonment and to pay a $100.00 fine on count one while Sherman received 10 years imprisonment and a $100.00 fine on each of Counts one, two and three, sentences to be consecutive for a total of 30 years. On October 21, 1954 notice of the instant appeal was filed from the judgment of conviction of October 11.

The facts of the case which were evidently believed by the jury differ somewhat from the presentation made by appellant in his brief. In the following statement reference will be made to the Clerk's Transcript [Clk. Tr.], the Reporter's Transcript [R.] and to the Appellant's Brief (Br.).

Appellant Sherman along with his co-defendant Ellison had in 1947 been convicted on two counts of violation of the narcotic laws [Clk. Tr. 80]. From available information the narcotics agents also believed that Sherman's brother had been convicted on a narcotics charge in New York [R. 104]. Early in 1953 information reached the Federal Narcotics Agents through an informant, and from other sources, that appellant was buying and selling narcotics and was generally active in the narcotics traffic [R. 44, 45, 67, 93, 94, 102, 103]. Accordingly on April 1,

1953, Ralph M. Frias, a Federal Narcotics Agent, arranged through an informant to meet appellant at appellant's place of ostensible business, a barber shop at 2415 West Temple Street, Los Angeles [R. 13, 56]. Frias was introduced to appellant by the informant as his partner "Eddie" [R. 57, 116]. Frias took little part in the ensuing conversation which was between appellant and the informant relative to mutual friends in the New York narcotics traffic [R. 14, 49, 58] and the whereabouts of "action" in Los Angeles [R. 59-60].

On April 2, 1953 Frias returned to appellant's barber shop and had further conversation with appellant. At that time appellant Sherman stated that he was in the narcotic traffic but that he refused to do business in Los Angeles. He stated that he was willing to take anyone to New York for the purpose of establishing a connection. He stated that since he had been convicted once before he had to use extreme caution, and he accordingly preferred to do business outside Los Anegeles. He further stated that he would not do business in small quantities, stating that the chances of being caught were greater. However, he offered to take either Frias or the informant (who was also present) to New York for the purpose of purchasing heroin in kilo lots at $300.00 to $400.00 an ounce [R. 15, 62, 63, 95, 96, 97, 99, 100].

Agent Frias told appellant that he was unable to accept the offer at that time without conferring with some friends from whom he might procure the money to buy in such large quantities [R. 15, 16].

Due to another assignment and a shortage of the Narcotic Bureau's appropriated funds, which precluded any large scale purchases, Agent Frias was unable to immedi-

ately follow up appellant's offer to engage in narcotic traffic [R. 18, 67, 68, 69, 83, 98, 107, 108] but between April 2, 1953 and July 9, 1954 he did keep his contact with appellant by visiting his barber shop six or seven times [R. 16, 47, 48, 64].

On July 9, 1954 Frias was informed that he was to be transferred to another post of duty so in order to facilitate any future investigation of appellant, Frias undertook to introduce Narcotics Agent Michael C. Coster to appellant [R. 68]. Pursuant to this plan on July 9, 1954 Frias and Coster went to appellant's barbershop at the Temple Street address. The shop was closed and from a sign on the door they learned that appellant had moved his shop to 6622 Sunset Avenue in Hollywood [R. 17]. The two Agents proceeded to the Sunset Avenue shop where they arrived about 4:00 p. m. [R. 17, 71]. Coster was introduced to appellant as "Mike" [R. 71] and vouched for by Frias. In the ensuing conversation appellant told Frias that he was prepared to let him have 2 ounces of virgin heroin at $600.00 an ounce [R. 18, 19]. When Frias objected to the price appellant told him it was yellow virgin heroin of eastern origin [R. 19]. Frias told appellant that he did not have the funds with him to make the purchase and indicated his desire to obtain a sample of the heroin [R. 18, 19]. Thereafter at about 5:00 p. m. Frias and Coster left the shop [R. 19, 71].

At 8:00 p. m. the same night Frias received a telephone call from appellant Sherman in which Sherman stated that he had the merchandise and requested Frias to come to Cohen's Delicatessen at 1221 North Fairfax [R. 19, 72]. Frias in the company of Coster proceeded to the delicatessen where they found appellant and his co-de-

fendant Ellison sitting in a booth opposite each other [R. 19, 72]. Ellison was then introduced to Coster [R. 20, 72]. After the waitress had left menus, appellant reached over and picked up the sugar bowl revealing a small package wrapped in wax paper [R. 21, 74, 132, 162]. Addressing Frias appellant stated:

> "Here it is, Eddie. Be sure and tell the guy who tests the stuff for you that it is powerful stuff and to take it easy" [R. 21, 132].

Agent Coster inquired as to the quality of the heroin to which appellant answered:

> "It's really good. This is European stuff, and it is pure and you can cut it two or two and a half times" [R. 74].

Sherman replaced the sugar bowl and all parties ate dinner. After dinner Sherman took the package from under the sugar bowl and placed in under the horseradish bowl which was located next to Ellison [R. 21, 75]. Sherman then stated that he had two ounces to conform with the sample [R. 75]. Ellison stated that some of the heroin they had handled in the past had been of inferior quality and could not be cut but that this was the best "stuff" they had had and that because "Eddie" was such a good friend of long standing they were going to let him have it [R. 22, 75].

About 9:30 p. m. Ellison reached under the horseradish bowl, picked up the package and handed it to Frias under the table [R. 21]. Appellant eagerly pressed Frias to commit himself on the amount of heroin he would take [R. 22] but Frias told him he would have to have the sample tested as to quality before he would buy [R. 23]. Frias and Coster then left appellant and Ellison. Later

Frias placed the small package, he had received from Ellison, in an envelope and mailed it to the Government chemist in San Francisco [R. 24, 25]. Tests by the chemist revealed that this package received from Frias contained approximately six grains of heroin [R. 8]. As Government's Exhibit 1-A the contents of the package were admitted into evidence [R. 88].

The following day was July 10, 1954. At 2:00 p. m. of that day Frias and Coster visited appellant at his barber shop [R. 26, 76]. Frias told appellant that the quality of the heroin was good but that he thought it was of Mexican rather than European origin [R. 26, 77] and that it was not worth the $600.00 per ounce appellant was asking for it [R. 26, 77]. After some discussion as to the amount of the eventual purchase and the price, during which appellant offered to sell in amounts as great as one kilogram [R. 77, 78], the agents left promising to return later that afternoon.

At 4:00 p. m. that afternoon Frias and Coster returned to the barbershop. They parked in the driveway next to the shop and appellant came from the shop to meet them as they got out of the car [R. 27, 78]. Appellant asked if they had the "sheckles". Frias told him he had the required $600.00. Appellant asked Frias to sit in the car with him. Frias did and Coster stood next to the car while Frias counted out the $600.00 to the appellant [R. 27, 78]. After receiving the money Sherman left after instructing the agents to wait for him in the barbershop [R. 28, 79]. Approximately 45 minutes later, about 4:50 p. m., appellant returned to the shop, and reaching into his pocket brought forth a package which he handed to Frias [R. 28, 79]. The agents, thereupon, departed.

Frias then returned to the Federal Building where he weighed the contents of the package and forwarded them to the chemist in San Francisco [R. 30] who determined that the package contained approximately 330 grains of heroin [R. 8]. As Government's Exhibit 2 this was admitted in evidence [R. 88].

Various other visits by Frias to appellant resulted in propositions by appellant to sell heroin in a 32 ounce lot at $400.00 per ounce or $450.00 per ounce in 16 ounce lots [R. 32, 33].

On July 14, 1954 Frias visited Sherman accompanied by Agent Pocorobo an acquaintance of appellant. Sherman asked Pocorobo if he wouldn't finance Frias in a 32 ounce purchase. Pocorobo in return limited his agreement to 16 ounces [R. 33, 34].

On July 20, 1954 Frias drove by himself to the barber shop where he informed appellant that he needed a sample for Pocorobo. Appellant went into his shop only to return shortly with a small paper package which he handed to Frias [R. 35]. Frias returned to the Federal Building where he examined the package and mailed it to the chemist in San Francisco [R. 36]. Tests by the chemist proved this package, which was admitted as Government's Exhibit 3 [R. 88] contained approximately nine grains of heroin [R. 8]. Frias told appellant that after Pocorobo had tested the sample he (Frias) would contact him. At 1:30 p. m. that day Frias called Sherman to tell him Pocorobo was pleased with the sample and would finance him (Frias) for the sixteen ounces [R. 38]. Sherman said he would call Frias when the shipment came in [R. 38].

On July 23, 1954, Frias was informed by Agent in Charge Davis that Sherman had called him and left a

message to call back [R. 38, 39]. Frias returned the call and appellant told him the "car" for which they had been negotiating had arrived and that he wanted Frias to meet him at Cohen's Delicatessen [R. 39].

Pursuant to this phone conversation, Frias proceeded alone to the delicatessen where he found appellant and Ellison seated in a booth. As he entered they got up, paid their check and the three walked out [R. 39]. Appellant requested that their transaction be discussed in his car which was parked on Oakwood Drive just west of Fairfax [R. 40]. Appellant asked if Frias had the money. Frias had a paper bag with $3,000 or $4,000 in it but he told appellant that it contained the $7200 required for the purchase of 16 ounces of heroin [R. 40]. Appellant asked for the money and instructed Frias to wait with Ellison in the car until he returned with the heroin [R. 41]. Frias refused upon the grounds that he couldn't let him have that much money and that in order for the transaction to be consummated, he would have to go with the appellant and see the heroin [R. 41]. Appellant demurred but upon urging from Ellison he attempted to oblige [R. 41]. However, after a 15-minute absence he returned to say that his source would not meet Frias personally [R. 42]. Appellant said although the deal was off for the night perhaps they could arrange to deliver and pay for the heroin in five ounce lots [R. 42]. Frias was not willing to do this so appellant said the deal was off for the night [R. 43]. Frias said he would call Pocorobo to see if he was willing to let Frias give appellant the money [R. 43]. Frias then left appellant and Ellison and after a short discussion with other agents, the agents returned and placed Ellison and appellant under arrest [R. 43].

Statute Involved.

Appellant stands convicted on three counts of violation of 21 U. S. C. A. 174. This section as amended provides:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557 (b)(1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of De-

cember 17, 1914 (38 Stat. 789), as amended; sections 171, 173 and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision."

Summary of Argument.

I.

APPELLANT SHERMAN WAS NOT UNLAWFULLY ENTRAPPED.

II.

IT WAS NOT ERROR FOR THE DISTRICT COURT TO IMPOSE CONSECUTIVE SENTENCES.

A. SENTENCES IMPOSED BY THE DISTRICT COURT MAY BE MADE TO RUN CONSECUTIVELY.

B. APPELLANT WAS GUILTY OF THREE SEPARATE VIOLATIONS.

III.

NO MISCONDUCT WAS COMMITTED BY THE ASSISTANT UNITED STATES ATTORNEY.

IV.

APPELLANT WAS ADEQUATELY REPRESENTED BY COUNSEL.

A. THE DISTRICT COURT DID NOT ERR IN REFUSING TO GRANT A 45 DAY CONTINUANCE DEMANDED BY APPELLANT'S RETAINED COUNSEL AS A PRECONDITION TO HIS EMPLOYMENT.

B. APPELLANT WAS ABLY REPRESENTED BY DONALD C. KIMBER, ESQ., WHO WAS APPOINTED BY THE COURT.

V.

THE BOGGS ACT IS NOT UNCONSTITUTIONAL AS AN EX POST FACTO LAW.

ARGUMENT.

I.

Appellant Sherman Was Not Unlawfully Entrapped.

The principal contention relied upon by appellant is that the actions of the narcotics agents, in buying heroin from him, constituted unlawful entrapment.

He first raises the point that under *Sorrells v. United States* (1932), 287 U. S. 435, the defense of entrapment is available under a plea of not guilty and need not be pleaded in bar. This proposition has not been seriously questioned for years and has always been the law of this circuit. It is in nowise clear in just which way appellant claims this principle has been violated. In any event, for the purposes of this case, it is a distinction without a difference since the defense of entrapment was here raised, considered, and rejected.

The classic statement on the nature of entrapment is that of Judge Woods in *Newman v. United States,* 299 Fed. 128, viz:

> "It is well settled that decoys may be used to entrap criminals, *and to present opportunity to one intending or willing to commit crime.* But decoys are not permissible to ensnare the innocent and law abiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefore." (Emphasis added.)

See also:

Sorrells v. United States (1932), 287 U. S. 435, 445.

Various tests have been employed to test the legality of entrapments practiced by law enforcement officers. Prominently employed as a guage are those mentioned in *United States v. Becker* (2nd Cir., 1933), 62 F. 2d 1007, 1008, viz:

> "An existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes; his willingness to do so, as evinced by ready compliance."

A recent case in this circuit which realistically considers the problem is *Trice v. United States* (9th Cir., 1954), 211 F. 2d 513, in which the court stated at page 516:

> "The question is: Is it illegal entrapment and the answer to that question is to be found in the testimony of the narcotic agents on *whether they had reasonable grounds to believe that Trice was predisposed to engage in the illicit traffic.*" (Emphasis added.)

The court quoted with approval the statement of the government attorney that

> ". . . the government has the right where the defense of entrapment is raised to bring out through competent evidence the information, even hearsay, that they have concerning the defendant in order that they dispel any possible doubt as to whether they merely went out and tried to capture an innocent person."

This principle was further amplied by the statement of Judge Mathes that

> "As I understand it, under the issue as to entrapment, the defendant presents that issue and you may

> show not only information which the Government officials had which led them to believe that he was supposed to have committed the offense, but you may show anything you have about his past record or his past doings or his propensities which would tend to meet the issue whether or not he was a man predisposed to violation of the law."

The foregoing then accords with the generally held view that where an officer of the law has reasonable grounds to believe a crime is being committed he may lawfully proceed to ascertain whether those charged with the commission are actually so engaged without giving rise to the defense of entrapment.

Partan v. United States (9th Cir., 1919), 261 Fed. 515;

C. M. Spring Drug Co. v. United States (8th Cir., 1926), 12 F. 2d 852;

Price v. United States (1896), 165 U. S. 311;

Andrews v. United States (1895), 162 U. S. 420;

Grimm v. United States (1894), 156 U. S. 604;

Swallum v. United States (8th Cir., 1930), 39 F. 2d 390.

The record in the instant case is clear in its showing that the narcotics agents had reasonable grounds to believe that Sherman was predisposed to deal in heroin. Any doubt that the agents set out to lure an innocent man is dispelled by a consideration of the following facts bearing on the belief of the officers. In 1947, appellant Sherman had been convicted on two counts of violation of the narcotics laws [Clk. Tr. 80]. The narcotics agents were informed by their special informant, Fred Doors, that appellant was engaged in the narcotics traffic [R. 44, 45]. They had received information from other sources rela-

tive to appellant's activities [R. 44, 94]. They were cooperating with the Sheriff's Department which had appellant under surveillance relative to the narcotics trade [R. 103].

They were made aware of the fact that appellant's brother had been convicted of a narcotics violation in New York [R. 104]. And finally, prior to any actual negotiations, appellant admitted to Agent Frias that he was in the narcotic traffic [R. 15, 62, 63, 95, 96, 97, 99, 100]. Furthermore, it is important to note that Frias testified that the initial offer to deal in narcotics came not from the allegedly entrapping narcotics officers but from appellant Sherman himself [R. 18, 19].

The foregoing facts present a vastly stranger case against the possibility of illegal entrapment than was present in *United States v. Ginsburg* (7th Cir., 1938), 96 F. 2d 882, where the court said at page 885:

> "Appellant further contends that the evidence established that he was entrapped by the instigation of the Government's narcotics agents and its paid informer, hence he insists that the judgment is contrary to law. The following is a substantial statement of the evidence upon which the contention is based, as set forth in appellant's assignment of error: The District Attorney introduced evidence to show that McGovern informed the narcotics agents that he would be able to purchase narcotics from appellant, and they in turn furnished him with the money with which he went to appellant's office and asked him to sell him dope which appellant did; all of which acts of the informer were under the direction and at the instigation of the narcotics agents who had agreed to see to it that the informer would be compensated by the Government. *These facts do not constitute entrapment.*" (Emphasis added.)

But appellant argues that the agents wore him down by their importunings over a fifteen-month period. He points to the date of Frias' original contact, April 1, 1953, and claims that he resisted their repeated blandishments until July 9, 1954, at which time the combination of the wishes of a good customer, friendship and easy money, became overpowering. Agent Frias explained that the lag in prosecuting the investigation of the appellant was not caused by defendant's determined resistance to all improprious suggestions but rather was caused by a shortage of funds with which the Bureau of Narcotics could buy the heroin, plus another assignment of Frias' [R. 18, 67, 68, 69, 83, 98, 107, 108]. Frias further stated that during the period in question he saw appellant six or seven times rather than 30 times as appellant testified [R. 16, 47, 48, 64].

In any event, the defense of entrapment was presented to the jury [Clk. Tr. 77] and proved unavailing.

It is well settled that the defense of entrapment presents a question of fact for the jury in the presence of any supporting evidence. As stated in *United States v. Singleton* (D. C. W. D. Pa., 1953), 110 Fed. Supp. 634:

> "Under the rulings made by the Supreme Court of the United States in the case of *Sorrells v. United States* (1932), 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413 and that of the Third Circuit Court of Appeals in the case of *United States v. Brandenburg,* 162 F. 2d 980, the question of entrapment was one for the jury."

See also:

Yep v. United States (10th Cir., 1936), 83 F. 2d 41;

Lufty v. United States (9th Cir., 1952), 198 F. 2d 760;

United States v. Pisano (7th Cir., 1951), 193 F. 2d 355.

The verdict of the jury on the question of entrapment concludes the matter,

Rucker v. United States (C. A. D. C., 1953), 206 F. 2d 464;

since a verdict supported by sufficient evidence is binding on a reviewing court. (*United States v. Socony-Vacuum Oil Co., Inc.,* 310 U. S. 150; *Glasser v. United States,* 315 U. S. 60, 80, as follows):

> "It is not for us to weigh the evidence or to determine the credibility of witnesses. *The verdict of a jury must be sustained if there is substantial evidence taking the view most favorable to the Government, to support it.*" (Emphasis added.)

See also:

Abrams v. United States, 250 U. S. 616, 619.

Since the evidence was conflicting on the subject of entrapment, the question was properly submitted to the jury and since, as is apparent from the foregoing, there is substantial evidence to support its verdict, this Honorable Court should not now disturb that verdict. As stated in *Stillman v. United States* (9th Cir.), 177 F. 2d 607 at 616:

> ". . . The jury weighed the evidence and accepted it as true beyond a reasonable doubt, and since it is supported by sufficient evidence, the verdict binds us. *Hemphill v. United States,* 120 F. 2d 115 (C. A. 9), certiorari denied, 314 U. S. 627, 62 St. Ct. 111, 86 L. Ed. 503; *Henderson v. United States,* 143 F. 2d 681 (C. A. 9)."

II.

It Was Not Error for the District Court to Impose Consecutive Sentences.

A. Sentences Imposed by the District Court May Be Made to Run Consecutively.

In his subheading C. under "Errors Made in District Court" appellant seems to question the power of the Court to impose consecutive sentences. As appellant concedes however this power has long been exercised under 18 U. S. C. 3568. The practice long predates that section and is an inherent power in the Court where there are convictions of separate crimes.

See:

Ellerbrake v. King (8th Cir., 1940), 116 F. 2d 168;

Kirk v. United States (9th Cir., 1950), 185 F. 2d 185.

B. Appellant Was Guilty of Three Separate Violations.

Appellant's specification E appears to attempt the argument that only one crime is involved here. This view was further expressed by appellant during the trial when Mr. Sullivan asked:

"Q. After three transactions, is that not a business?"

Appellant replied:

"A. *I wouldn't call that three transactions. I would call it one transaction; operating as to just one sale.*" [R. 146; emphasis added.]

Of interest in this connection is the following language from *Reynolds v. United States* (6th Cir., 1922), 280 Fed. 1, wherein it was stated:

> "The sole contention of plaintiff in error here (although stated in two forms) is that she has been twice punished for a single offense, invoking in support of that contention divers holdings of state courts under what is called the 'same transaction' rule. This broad rule, however, does not prevail in the courts of the United States, wherein it is well settled that it is competent for Congress to create separate and distinct offenses growing out of the same transaction."

The "same transaction rule" above referred usually is invoked in cases where for instance a single act of transportation of narcotics is proved and there is an attempted prosecution for the possession incident to that transportation. No such fine line exists here. No matter how appellant conceives them in his own mind there were three distinct proscribed passages of heroin from appellant to Agent Frias viz.: July 9, 1954, July 10, 1954 and July 20, 1954. It is well settled that the test to be applied to determine whether there are two offenses or one, is whether each provision requires proof of a fact which the other does not.

Gavieres v. United States, 220 U. S. 338;

Morey v. Commonwealth, 108 Mass. 433;

Pereina v. United States (1954), 347 U. S. 1;

Mathews v. Swope (9th Cir., 1940), 111 F. 2d 697.

To mention the most obvious here the dates differ. Three distinct crimes were committed.

III.

No Misconduct Was Committed by the Assistant United States Attorney.

Appellant's specification D states (Br. 6):

> "The jury was influenced by the prosecuting attorney. By remarks as follows: while cross examining the defenses witness; 'did you know that the defendant was an ex convict, who served time in Sing Sing Prison, whom you are a witness for. The attorney did not confine himself to the case and undermined the jury."

Appellant's conception of what was actually said at the trial is erroneous. In Mr. Sullivan's cross-examination of defendant's character witnesses the following question was asked:

> "Q. Now, had you heard that Harry Sherman had pleaded guilty to a felony, possession of narcotics, in 1947?" [R. 184.]

* * * * * * * *

The further question was asked:

> "Q. Had you heard that Harry Sherman was sentenced to 15 to 30 years for armed robbery in 1928?"

An objection to this question was sustained [R. 184] but any prejudice was cured by the Court's instruction that the jury disregard the question [R. 184].

From the foregoing it cannot by any stretch of the imagination be said that Mr. Sullivan's conduct was prejudicial. The rule in this Circuit is trenchantly stated in *Iva Ikuku Toguri D'Aquino v. United States* (9th Cir., 1951), 192 F. 2d 338, 367:

> "Our system of jurisprudence properly makes it a matter primarily for the discretion of the trial

court to determine whether prejudicial misconduct has occurred. An Appellate Court will not review the exercise of the trial court's discretion in such a matter unless the misconduct and prejudice is so clear, that the trial judge has been guilty of an abuse of discretion."

Quoted also in *Brown v. United States* (9th Cir., 1955), 222 F. 2d 293, 298.

IV.

Appellant Was Adequately Represented by Counsel.

A. The District Court Did Not Err in Refusing to Grant a 45-day Continuance Demanded by Appellant's Retained Counsel as a Precondition to His Employment.

The gravamen of this contention—appellant's specification F (Br. 6, 8)—is that the Court erred in refusing to grant appellant's retained counsel a 45 day continuance in which to prepare his case. It is of course axiomatic that the granting of a continuance is discretionary with the Court and will not be reviewed upon appeal in absence of abuse.

Williams v. United States (8th Cir., 1953), 203 F. 2d 85;

United States v. Vrilium Products Co. (1950), 185 F. 2d 3;

As reflected by the record the facts briefly are these.

The defendants Sherman and Ellison being without funds Judge Mathes appointed counsel to represent them free of charge. With the case set for trial on September 21, 1954, on September 17, 1954, Attorney B. A. Minsky, being retained by defendants' relatives, moved

the Court for a substitution of attorneys so he could represent, of record, both defendants Ellison and Sherman [R. B]. Mr. Minsky then requested a 45 day continuance in which to prepare the case. This was denied and the Court offered variously a one week continuance or a two week continuance. At one time the Court was willing to continue the case until October 5 but Mr. Minsky attempted to coax two more days from the Court and the offer was withdrawn. Since by Mr. Minsky's own words his substitution was conditioned on the fact that he be granted a 45 day continuance, he withdrew his motion for a substitution. A reading of the proceedings of September 17, 1954 [R. A through P] is sufficient to show that Judge Mathes in no way abused his discretion in refusing the 45 day continuance Mr. Minsky sought to impose as a precondition to employment.

B. Appellant Was Ably Represented by Donald C. Kimber, Esq., Who Was Appointed by the Court.

Appellant complains that after the withdrawal of Mr. Minsky he was deprived of effective aid of counsel when he was represented by Mr. Kimber who was appointed by the Court. The record as a whole shows that Mr. Kimber and Mr. Hoffman (Ellison's Counsel) conducted an alert, energetic and able defense. It is clear that appellant received at least such effective assistance of counsel as is guaranteed him by the Constitution.

See:

Diggs v. Welch (C. A. D. C., 1945), 148 F. 2d 667.

V.

The Boggs Act Is Not Unconstitutional as an Ex Post Facto Law.

Lastly, appellant in specification H takes the position that the Boggs Act (see Appx. A) is unconstitutional as an *ex post facto* law. It is claimed that since his prior narcotics conviction occurred in 1947, any attempt to apply to him the sentencing provisions of the Boggs Act—effective November 2, 1951—would be in violation of his constitutional rights. This question was considered at some length in *United States v. Taylor* (D. C. S. D. N. Y., 1954), 123 Fed. Supp. 920, where it was resolved against appellant's position. The precise question was also considered and adversely determined by the Sixth Circuit in *Pettway v. United States* (6th Cir., 1954), 216 F. 2d 106, in which the Court said:

> "Appellant's contention that the statute hereinabove referred to as the Boggs Act is *ex post facto* litigation and unconstitutional is without merit. The statute was in effect prior to May 29, 1952, the date of the offenses charged in the indictment. The information, setting out the two prior convictions, did not charge appellant with any crime. It merely alleged facts, which if established, went solely to the question of punishment."

Conclusion.

In view of the premises the Judgment of Conviction of appellant Sherman should be affirmed.

Respectfully submitted,

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APPENDIX A.

Public Law 225 82d Congress 1st session popularly nown as the Boggs Act changed both 21 U. S. C. 174, ıe statute here in question, and its companion statute 26 J. S. C. 2557(b)(1). The Act provides:

"Public Law 255 Chapter 666

AN ACT

"To amend the penalty provisions applicable to persons convicted of violating certain narcotic laws, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2(c) of the Narcotic Drugs Import and Export Act, as amended (U. S. C., title 21, sec. 174), is amended to read as follows:

"(c) Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall

not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of the Internal Revenue Code, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202 of the Act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

" 'Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.'

"Sec. 2. Section 2557(b)(1) of the Internal Revenue Code is amended to read as follows:

"'(1) Whover commits an offense or conspires to commit an offense described in this subchapter, subchapter C of this chapter or parts V or VI of subchapter A of chapter 27, for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the oflender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this paragraph, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this paragraph or in section 2(c) of the Narcotic Drugs Import and Export Act, as amended (U. S. C., title 21, sec. 174), or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202, of the Act of May 26, 1922 (42 Stat. 596), as amended; section 12, Chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is

not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledged that he is such person, he shall be sentenced as prescribed in this paragraph.' "