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MARITIME DRUG SMUGGLING CONSPIRACIES: CRIMINAL LIABILITY FOR IMPORTATION AND DISTRIBUTION

Federal prosecutors frequently use conspiracy charges to prosecute participants in drug smuggling operations because these charges avoid deficiencies in statutory schemes and afford the prosecution significant procedural and evidentiary advantages. Recently, the United States Courts of Appeals for the Fourth and Fifth Circuits have conflicted concerning the evidence necessary to convict the crew of a marijuana-laden vessel of conspiracy to possess marijuana with the intent to distribute when the crew also has been charged with conspiracy to import the marijuana.

In United States v. Michelena-Orovio, the Fifth Circuit held that a jury may infer knowledge of and participation in a conspiracy to possess marijuana with intent to distribute from a crew member's participation in an operation to import a large quantity of marijuana. The courts have conflicting views on the necessary evidence to convict a crew member of conspiracy to possess marijuana with intent to distribute when the crew member also has been charged with conspiracy to import the drug.

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2. For example, one commentator noted that by using conspiracy charges in drug smuggling cases "the defendant may be tried jointly with his criminal partners, the joint trial may be held in a venue he never entered, and hearsay statements of other alleged conspirators may be used to prove his guilt." Johnson, The Unnecessary Crime of Conspiracy, 61 CALIF. L. REV. 1137, 1140 (1973). A survey of prosecutors revealed that evidentiary advantages often were the primary motivation for charging conspiracy when the substantive offense had been attempted or completed. Prosecutors cited plea bargaining, the possibility of longer sentences, and venue considerations as secondary motivations for charging conspiracy. Marcus, Conspiracy: The Criminal Agreement in Theory and in Practice, 65 GEO. L.J. 925, 942 (1977).


of marijuana. Because the quantity involved obviously was more than Michelena-Orovio and his fellow crew members could have consumed themselves, the court reasoned that the crew members knew the marijuana would be distributed after importation. In addition, the crew members' knowledge of the conspiracy to distribute the marijuana followed from their understanding that the economic success of importation depended on distribution of the contraband. The crew's involvement in the act of importation itself also supported the inference because the importation furthered the conspiracy to possess with intent to distribute.

In United States v. Manbeck, the United States Court of Appeals for the Fourth Circuit expressly rejected the Fifth Circuit's reasoning in Michelena-Orovio. Although the court recognized that the presence of a large quantity of marijuana indicated that someone intended to distribute it, the court refused to allow the jury to infer involvement in the distribution conspiracy without evidence identifying the crew as the "someone" who intended to distribute the contraband. The Fourth Circuit reversed convictions for conspiracy to possess with intent to distribute because the crew members' interest in and responsibility for the contraband terminated when they completed the importation operation.

This split in interpretation means that identical conduct may violate the federal statute in one circuit but not the other. Because drug smuggling organizations respond to changes in the law that minimize the risk of conviction, the differing standards of proof for conspiracy to possess with intent to distribute may encourage smugglers to ply their trade in the area where the risks are less
severe.15 The liberal attitude reflected in Manbeck could cause smugglers to shift their activities to areas within the jurisdiction of the Fourth Circuit.

This Note examines and compares the approaches of the Fourth and Fifth Circuits. The analysis includes pertinent statutes, legislative histories, and relevant case law from not only the Fourth and Fifth Circuits but also other circuits that have addressed the issue. The Note concludes that the Fifth Circuit's approach is superior because it gives effect both to the plain meaning of the statutory language and to the legislative intent.

THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970

The defendants in both Michelena-Orovio and Manbeck were charged with violations of the Comprehensive Drug Abuse Prevention and Control Act of 1970,16 which was enacted in response to a growing concern in the late 1960's with drug abuse and trafficking.17 The Act was a modification and consolidation of more than fifty drug control laws into a comprehensive regulatory scheme.18 The Act created a "closed system," which requires importers to

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15. The legislative history of the 1980 amendments to the drug control laws, for example, reveals that the amendments were enacted to halt successful dismissals at preliminary hearings by smugglers who rapidly had become aware of a loophole in the law. See H.R. Rep. No. 323, supra note 1, at 5. The loophole resulted when Congress inadvertently repealed the law which prohibited possession of illegal drugs on the high seas. Because prosecutors could charge high seas drug traffickers only with conspiracy to import, and they had difficulty proving this charge, many cases were dismissed at the preliminary hearing stage. Id. at 4-5. The loophole was closed in 1980. See Act of Sept. 15, 1980, Pub. L. No. 96-350, 94 Stat. 1159 (codified as amended at 21 U.S.C. §§ 881, 955a-955d, 960, 962 (1982)); supra note 1 and accompanying text; infra notes 130-31 and accompanying text.


18. H.R. Rep. No. 1444, supra note 17, at 6, reprinted in 1970 U.S. CODE CONG. & AD. NEWS at 4571. The House Interstate and Foreign Commerce Committee drafted Titles I and II of the Act, which include general domestic drug offenses such as the possession offenses. See id. Title II is codified at 21 U.S.C. §§ 801-904 (1982). The Senate Ways and Means Committee drafted Title III, which regulates the importation and exportation of controlled
register, at the time of importation, all controlled substances and the ingredients necessary for their manufacture. After importation, each transfer of controlled substances must be documented to facilitate monitoring of their movement. Because unauthorized and undocumented importation and distribution undermine the control system, the success of the Act depends on the integrity of the "closed system."

In both Michelena-Orovio and Manbeck, the defendants were charged with two major violations of the Act. First, they were charged with conspiracy to import a controlled substance into the United States, which is punishable by a maximum of fifteen years imprisonment, a fine of up to $25,000, or both. Second, they were charged with conspiracy to possess marijuana with the intent to distribute, which is punishable by a maximum of fifteen years imprisonment, a fine of up to $125,000, or both, in cases like Michelena-Orovio and Manbeck that involve more than 1,000 pounds of marijuana. The relationship between these two charges constitutes the heart of the conflict between the two circuits.

The Conflict

The Fifth Circuit Approach

The United States Court of Appeals for the Fifth Circuit decided in Michelena-Orovio that a factfinder could infer from the quantity of contraband that a defendant was guilty of conspiracy substances. See id. Title III is codified at 21 U.S.C. §§ 951-966 (1982). Because of this organizational set-up, the prohibitions of importation and distribution and the related conspiracy provisions appear in scattered sections of the Act. See supra notes 4-5.

20. Id.
21. Manbeck, 744 F.2d at 366; Michelena-Orovio, 719 F.2d at 741.
23. The punishment for importation of a controlled substance is set out in id. § 960(b). A conspiracy to import a controlled substance is punishable by the same penalty. See id. § 963.
24. Possession with intent to distribute is prohibited by id. § 841(a)(1).
25. The punishment for possession of more than 1,000 pounds of marijuana with intent to distribute is set out in id. § 841(b)(6). A conspiracy to possess with intent to distribute is punishable by the same penalty. See id. § 846.

The defendants in Manbeck also were charged with actual importation of marijuana in violation of 21 U.S.C. §§ 952, 960 (1982). 744 F.2d at 366.
to possess contraband with the intent to distribute. In *Micheleno-Orovio*, federal agents infiltrated a drug smuggling operation and learned of a planned high seas transfer of marijuana from the defendant's vessel to vessels that would bring the marijuana ashore in Louisiana. Alerted to a description of this "mother ship," the United States Coast Guard intercepted and boarded the vessel approximately fifty miles south of the planned high seas rendezvous point. Finding twelve tons of marijuana aboard, the Coast Guard arrested the crew, including the defendant, a Colombian national. The small size of the vessel, the large amount of marijuana aboard, and the marijuana's strong odor indicated that the defendant knew marijuana was aboard. The Fifth Circuit affirmed Michelena-Orovio's conviction for conspiracy to import marijuana based not only on his knowledge that marijuana was aboard, but also on the vessel's evasive tactics upon discovery, the lack of fishing gear on what was purportedly a fishing vessel, and the vessel's proximity to the rendezvous position at the time of its interception by the Coast Guard. The court also upheld Michelena-Orovio's conviction for conspiracy to possess marijuana with the intent to distribute based on inferences drawn from the nature and quantity of the cargo.

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26. 719 F.2d at 756-57. In coming to this conclusion, the court expressly overruled a conflicting line of authority. Id. at 743-46, 757. In United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978), and United States v. Rodriguez, 585 F.2d 1234 (5th Cir. 1978), aff'd on reh'g en banc, 612 F.2d 906 (5th Cir. 1980), aff'd sub nom. Albernaz v. United States, 450 U.S. 333 (1981), the Fifth Circuit had refused to permit juries to infer intent to distribute from the defendants' participation in conspiracies to import large quantities of marijuana. Cadena, 585 F.2d at 1266; Rodriguez, 585 F.2d at 1247, aff'd in pertinent part, 612 F.2d at 908-09 n.3. In Cadena, the defendant had transferred marijuana to another vessel 200 miles south of the Florida coast. The court held that the defendant had no interest in the marijuana after he transferred it, and could not be held criminally liable for incidentally aiding the distribution operation. Cadena, 585 F.2d at 1266. In Rodriguez, the defendants were crew members on a vessel that contained contraband destined for the United States. The court held that two of the crew members' peripheral participation in the importation scheme did not establish that they intended to participate in the distribution operation. Rodriguez, 585 F.2d at 1247, aff'd in pertinent part, 612 F.2d at 908-09 n.3.

27. 719 F.2d at 741, 743. The defendant's vessel initially attempted to evade the Coast Guard vessel, but eventually submitted to boarding and seizure. Id.

28. Id.

29. Id. at 743.

30. Id. at 752.
The court initially used these inferences to establish that a conspiracy to distribute must have existed. The Fifth Circuit noted that drug distribution conspiracies generally are considered prime examples of "chain conspiracies" because each participant depends on the others for the venture's success. Both the illegal nature of the goods and the crewman's role as a supplier implied that others were involved in the scheme and thus that a conspiracy to distribute existed. In addition, the only rational purpose for importing such a large quantity of marijuana could be distribution.

Having found that a conspiracy to distribute existed, the court turned to the central issue of whether a jury could infer a specific defendant's participation in that conspiracy from his participation in the accompanying conspiracy to import. The court refused to rule out such an inference merely because Congress had enacted two separate conspiracy statutes instead of one. The Fifth Circuit noted that conviction under only one of the two separate conspiracy statutes, conspiracy to import, would result in less severe punishment for the defendant than conviction under the old single conspiracy statute. This result would conflict with Congress' intent in the 1970 comprehensive revision to the nation's drug laws to make the "price for participation in this traffic... prohibitive." The court also found that the defendant's participation in a conspiracy to import marijuana, an illegal substance for which no legal market exists, made him an actual participant in a segment of

31. Id. at 746. Chain conspiracy theory provides an analytical framework to determine whether groups of persons engaged in related criminal activities may be found to have engaged in a single continuous conspiracy or in several separate conspiracies. See United States v. Bruno, 105 F.2d 921 (2d Cir. 1939), rev'd on other grounds, 308 U.S. 287 (1939). If a single conspiracy is found, a defendant's potential criminal liability is increased significantly because the "acts of any conspirators in furtherance of the conspiracy may be attributed to all participants." Manbeck, 744 F.2d at 393 (Russell, J., concurring in part and dissenting in part) (citing Pinkerton v. United States, 328 U.S. 640, 646-47 (1946)); see infra note 70 and accompanying text. The procedural and evidentiary advantages that accrue to the prosecution from conspiracy charges also are enhanced by the additional array of defendants that results from a single chain conspiracy. Johnson, supra note 2, at 1140. Perhaps the most significant advantage to the prosecution of a single conspiracy charge, however, is that the hearsay statements of all other conspirators may be used to prove the defendant's guilt. Id.

32. Michelena-Orovio, 719 F.2d at 748-49.
33. Id. at 748.
the distribution scheme. Citing United States v. Falcone, and Direct Sales Co. v. United States, the court reasoned that the defendant obviously would not have imported the marijuana unless plans existed for its distribution. The lack of a legal distribution system meant that the defendant must have had knowledge of the conspiracy to distribute the contraband illegally. The defendant’s role in importing the marijuana thus established participation in the conspiracy to distribute.

The court rejected a contention that Direct Sales required prolonged buyer-seller cooperation to demonstrate a defendant’s joiner in a conspiracy. It discounted dicta in Direct Sales that a “single or casual transaction” may fail to demonstrate that a supplier had a tacit agreement with a buyer to whom he delivered contraband, stating that Direct Sales should not be read so narrowly.

35. 719 F.2d at 749.
36. 311 U.S. 205 (1940). In Falcone, the United States Supreme Court held that an individual who knowingly had supplied legal items such as cans, sugar, and yeast to an individual who was making illicit distilled spirits had not conspired with others to distill the spirits illegally. The Court held that the jury could not infer from the evidence that the defendant knew a conspiracy existed, so the defendant could not have joined the conspiracy. Id. at 210. The Court later interpreted Falcone as holding that an individual cannot become a party to a conspiracy unless he knows of the conspiracy. Knowledge of the conspiracy in Falcone, according to this interpretation, could not be inferred merely because the seller knew that the buyer planned to use the goods for an illegal purpose. Direct Sales Co. v. United States, 319 U.S. 703, 709 (1943).
37. 319 U.S. 703 (1943). In Direct Sales, a registered drug manufacturer and wholesaler supplied large quantities of regulated drugs to a registered physician. The wholesaler encouraged sales by offering volume discounts. For several years, the physician illegally distributed the drugs he obtained from the wholesaler. Id. at 704-07. The United States Supreme Court held that during this prolonged course of conduct, the two parties had agreed tacitly to conduct an illegal drug distribution scheme. Id. at 714. Because the item supplied was a regulated substance, the Court concluded that the wholesaler knew of the physician’s illegal purpose. Id. at 711. The Court distinguished Falcone because the seller in that case dealt in legal goods, and because a conspiracy between the buyer and seller was not charged in Falcone. Id. at 709-11.
38. Michelena-Orovio, 719 F.2d at 750-51. The presence of more contraband than the parties could consume allowed the court to infer an intent to distribute. Id. at 752.
39. Id. at 751-52.
40. Direct Sales, 319 U.S. at 712 n.8. In Direct Sales, the parties had transacted their business regularly for more than seven years. Id. at 705-06. The Court noted that, in certain circumstances, a jury still cannot infer the intent necessary to support a conspiracy charge even though the seller knew of the buyer’s illegal purpose for buying restricted goods. An example of such circumstances, according to the Court, would be single or casual transactions, not amounting to a course of business, regular, sustained and prolonged, and involving nothing more on the seller’s part than
The Fifth Circuit justified its interpretation by relying on a “single act” theory, under which a single act can support an inference that a defendant knew of and participated in a conspiracy if the act’s magnitude objectively demonstrated that the defendant knew he was involved in a broad criminal enterprise. In Michelena-Orovio, the defendant’s participation in a plan to import twelve tons of marijuana into the country clearly met the “single act” test, and justified both the inference that the defendant knew of the broader distribution plan and that he joined the plan by attempting the importation.

With this inference established, the court only had to dispose of the defendant’s claim that he was a “lowly non-English speaking seaman” who neither knew nor cared what happened to the marijuana once it reached the United States. The court dealt with this claim by noting that the statute prohibits not just distribution to the ultimate consumer, but any distribution, including distribution by actual delivery, constructive delivery, or attempted transfer. Under this definition, any relocation of contraband from one place to another is distribution. Congress defined distribution broadly because Congress desired to monitor movement of controlled substances. Following the statutory language, Congressional intent, and previous cases in which similar arguments were rejected, the Court held that Michelena-Orovio’s status as a mere

indifference to the buyer’s illegal purpose and passive acquiescence in his desire to purchase, for whatever end. A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy.

Id. at 712 n.8.
41. 719 F.2d at 750.
42. See id.
43. Id. at 751.
44. Id. at 752.
45. Id.
46. Id. at 753-54.
48. See 719 F.2d at 754.
employee did not weaken the inference that he participated in the distribution conspiracy.\textsuperscript{50}

The dissenting judge argued that the majority, by failing to consider the element of intent necessary to prove distribution, effectively destroyed the distinction between the separate statutory offenses of importation and distribution.\textsuperscript{51} According to the dissent, the evidence did not indicate that the crew had a stake in the distribution scheme. To the contrary, the fact that the crew intended to transfer the cargo on the high seas supported an inference that the crew’s involvement and interest was to end before distribution commenced.\textsuperscript{52} According to the dissent, the jury could infer that the defendant joined in the conspiracy to distribute under the Direct Sales doctrine only if the defendant had cooperated on a prolonged, informed, and interested basis with a buyer.\textsuperscript{53}

\textit{The Fourth Circuit Approach}

In \textit{United States v. Manbeck},\textsuperscript{54} the United States Court of Appeals for the Fourth Circuit upheld conspiracy convictions for importation but dismissed the conspiracy convictions of the crews of two shrimping vessels for possession of marijuana with the intent to distribute.\textsuperscript{55} The crew members were arrested at a port in South Carolina after United States Customs agents intercepted their vessels and escorted them to shore. The evidence at trial established that, before the agents had intercepted the vessels, the crews had navigated into United States territorial waters and had unloaded twenty-five tons of marijuana, with the aid of a land-based crew,

\textsuperscript{50} 719 F.2d at 755.
\textsuperscript{51} \textit{See id.} at 757 (Wisdom, J., dissenting).
\textsuperscript{52} \textit{Id.} at 758 (Wisdom, J., dissenting).
\textsuperscript{53} \textit{See id.} at 758-59 (Wisdom, J., dissenting). The dissenting judge stated that the use of “one dubious inference to do double duty for two different crimes undermines the presumption of innocence due an accused and interferes with the factfinding process.” \textit{Id.} at 759.
\textsuperscript{54} 744 F.2d 360 (4th Cir. 1984).
\textsuperscript{55} \textit{Id.} at 390-91. Besides the crews of the shrimping vessels, \textit{Manbeck} also involved a land-based crew of truckers and loaders. The court affirmed the convictions of the land-based crew on all counts, including participation in the conspiracy to distribute. \textit{Id.} at 385 \& n.38.
into several trucks parked at the pier. The court upheld the crew members' convictions for conspiracy to import. The Fourth Circuit found that the jury could infer that the crews knew marijuana was aboard their vessels because of the enormous amount of marijuana involved. The court also was willing to allow the jury to infer that the crews participated in the conspiracy because of their involvement in the operation and unloading of the vessels and the unrebutted presumption that they knew their point of origin and destination. The court, however, dismissed the convictions for conspiracy to possess with intent to distribute. The court reasoned that the large quantity of marijuana supported the inference that someone planned to distribute it, but not that the crew was the "someone." According to the court, the act of unloading marijuana into waiting trucks did not constitute participation in distribution of the marijuana; it merely completed the importation conspiracy.

The scope of the inferences which a jury can draw from possession of a large quantity of contraband constituted the heart of the Fourth Circuit's opinion, and its conflict with the Fifth Circuit. In

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56. Id. at 386. The principal evidence of importation included a navigational chart found aboard one vessel, the lack of fishing gear aboard either vessel, and expert testimony regarding the source of the contraband. The navigational chart was found near the steering wheel of one vessel, and it bore ink dots and lines which indicated a path of travel from the Atlantic Ocean into United States customs waters. Id. at 386; United States v. Manbeck, 526 F. Supp. 1091, 1112 & n.26 (D.S.C. 1981). The opinion does not explain why an absence of rigged fishing gear aboard a fishing vessel indicates importation, but not distribution. See 744 F.2d at 386. One possible explanation, however, is that the court viewed the evidence as supporting an overall implication of criminal activity. The expert testimony indicated that all waterborne smuggling into the coastal counties of South Carolina since 1975 involved marijuana shipped out of Colombia. 526 F. Supp. at 1112.

57. 744 F.2d at 386-87.
58. Id. at 386.
59. Id. at 386-87. One co-conspirator testified that all of the crew members manned the vessels and helped unload the marijuana. The co-conspirator also testified that each crewman on the vessel received a sum of money during the unloading, and that the entire crew helped wash the vessel and rig the fishing gear after the unloading. Id.
60. Id. at 391.
61. Id. at 389.
62. Id. at 390.
examining these inferences, the Fourth Circuit distinguished an individual's personal possession from a crew's possession in an importation scheme. The court recognized that when an individual possesses more marijuana than he can consume, and he claims it is for personal use, the fact finder may infer an intent to distribute. According to the court, however, mere possession by a crew of a large quantity of marijuana is insufficient to prove whether the purpose of the conspiracy was mere importation or importation and distribution combined. The crew members could have intended to terminate their involvement after they completed importation. According to the Fourth Circuit, a court which presumes that one who conspires to import a large quantity of contraband also conspires to distribute it engages in circular reasoning because the court presumes the ultimate fact in question.

One judge dissented. The crucial issue, according to the dissent, was whether the defendants intended to distribute the large quantity of marijuana they possessed. The dissenting judge said that because the defendants clearly had possessed the marijuana, and because such a large quantity of marijuana had to be distributed, a rational trier of fact could have concluded that the defendants also intended to distribute the marijuana. According to the dissent, the majority erred by assuming that the defendants must have intended to take a personal role in the distribution to justify a conspiracy conviction. The dissenting judge emphasized that, on the contrary, the Supreme Court's ruling in Pinkerton v. United

63. Id. at 389-90.
64. Id. at 389.
65. Id. at 389-90. The court conceded that its decision would have been different if the crew members had possessed their own cache of contraband. Id.
66. Id. at 392 (Russell, J., concurring in part and dissenting in part).
67. Id. at 392-93 (Russell, J., concurring in part and dissenting in part).
68. Id. at 392 (Russell, J., concurring in part and dissenting in part). The dissenting judge implicitly rejected the majority's distinction between the facts of the case and a situation in which the crew members had possessed their own cache of marijuana. See id. at 386. The interpretation criticized by the dissenting judge is considered infra notes 89-100 and accompanying text.
States\textsuperscript{69} that "acts of any conspirators in furtherance of the conspiracy may be attributed to all participants\textsuperscript{70} firmly established that the defendants should be criminally liable for the distribution segment of the conspiracy if their intent to distribute can be established at any point.\textsuperscript{71} The defendants' intent to distribute was evidenced by their knowledge of the distribution scheme, which could be inferred from the size of the load, and the defendants' facilitation of the scheme through importation and transfer of the marijuana.\textsuperscript{72} The dissenting judge expressly agreed with the Fifth Circuit's decision in Michelena-Orovio, but he also asserted that the facts in Manbeck established an even more compelling case for connecting the distribution scheme to the importation because the defendants were not foreigners and because they actually brought the marijuana to the shores of the United States.\textsuperscript{73}

THE ISSUES

Conspiracy to Import

The Fifth Circuit in Michelena-Orovio and the Fourth Circuit in Manbeck agreed that the evidence in those cases was sufficient to support the convictions for conspiracy to import.\textsuperscript{74} Both courts

\textsuperscript{69} 328 U.S. 640 (1946).
\textsuperscript{70} Id. at 646-47 (quoted in Manbeck, 744 F.2d at 393 (Russell, J., concurring in part and dissenting in part)). In Pinkerton, two brothers, Walter and Daniel, were charged with violating the Internal Revenue Code. 328 U.S. at 641. The indictment contained several substantive counts and a conspiracy count. Both brothers were convicted on all counts, although no evidence indicated that Daniel had participated directly in any of the substantive offenses. Id. at 641, 645. Walter had committed the substantive offenses in furtherance of the conspiracy. Id. The Court found that a continuous conspiracy had existed, and held that "so long as the partnership in crime continues, the partners act for each other in carrying it forward." Id. at 646. The Court explained that liability would not extend to all co-conspirators if the substantive offense of one co-conspirator was not committed in furtherance of the conspiracy or was not reasonably foreseeable as a necessary or natural consequence of the unlawful agreement. Id. at 647-48.
\textsuperscript{71} Manbeck, 744 F.2d at 393 (Russell, J., concurring in part and dissenting in part).
\textsuperscript{72} See id.
\textsuperscript{73} Id.
\textsuperscript{74} Manbeck, 744 F.2d at 386-87; Michelena-Orovio, 719 F.2d at 743. Both courts applied the general standard which requires the government to prove that a conspiracy existed, that the defendant knew of the conspiracy, and that he joined it, to sustain a conspiracy conviction. See United States v. Laughman, 618 F.2d 1067, 1074 n.4 (4th Cir.), cert. denied, 447 U.S. 925 (1980) (cited in Manbeck, 744 F.2d at 386, 387, 390); United States v. Rodriguez, 585 F.2d 1234, 1245 (5th Cir. 1978), aff'd on reh'g en banc, 612 F.2d 906 (5th Cir. 1980),
held that the enormous amount of marijuana on the vessels, twelve tons in *Michelena-Orovio* and twenty-five tons in *Manbeck*, supported the inference that the crew members knew they were transporting marijuana.  

In *Michelena-Orovio*, the Fifth Circuit also noted that the defendant was arrested on a small vessel which was reeking with the odor of marijuana. The vessel just had completed

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75. *Manbeck*, 744 F.2d at 386; *Michelena-Orovio*, 719 F.2d at 743. The size of the load was one of the three factors established by the Fifth Circuit in United States v. Alfrey, 620 F. 2d 551 (5th Cir.), *cert. denied*, 449 U.S. 938 (1980), to determine whether a crew had a relationship to the contraband sufficient to support a conviction when a possessory relationship and mere presence on the scene was a prerequisite to conviction. See id. at 556. The other two factors in *Alfrey* were the length of the voyage and the closeness of the relationship between the crew and its captain. Id. Both the Fifth Circuit and the Fourth Circuit cited *Alfrey* when they discussed the conspiracy to import issue, and both concluded that the load size factor alone adequately supported the conclusion that the crew had a sufficient relationship to the contraband to sustain a conviction for conspiracy to import. See *Manbeck*, 744 F.2d at 386; *Michelena-Orovio*, 719 F.2d at 743.

The lower court in *Manbeck* had termed the relationship between the crews and the contraband "constructive possession" because "each defendant exercised, or had the power to exercise, dominion and control" over the marijuana and because "possession of a large amount of marijuana among several people working together may be sufficient to show that each has constructive possession." United States v. Manbeck, 526 F. Supp. 1091, 1113 (D.S.C. 1981), aff'd in part, rev'd in part, vacated in part, 744 F.2d 360 (4th Cir. 1984) (footnote omitted) (quoting United States v. Watkins, 662 F.2d 1090, 1097 (4th Cir. 1981)). Courts sometimes use the constructive possession label when they want to hold an individual responsible for possession, but actual possession cannot be established. See Whitebread & Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 Va. L. Rev. 751, 761-62 (1972). The constructive possession theory is problematic, however, because courts sometimes substitute the conclusory label for meaningful analysis. See id. at 758, 765. The theory is even more problematic in the context of a maritime drug smuggling operation, as opposed to a land-based operation, because the necessarily close relationship between all participants in a maritime operation supports the notion of a joint venture, in which the entire crew's relationship to the contraband is the important factor rather than any one particular crew member's dominion and control over it. See United States v. Soto, 716 F.2d 989, 992 (2d Cir. 1983).

The Fourth Circuit's appellate consideration of *Manbeck*, as well as the Fifth Circuit's consideration of *Michelena-Orovio*, circumvented the problems of constructive possession by avoiding the issue entirely and focusing instead on the *Alfrey* factors. See *Manbeck*, 744 F.2d at 386; *Michelena-Orovio*, 719 F.2d at 743. The reliance on *Alfrey* and its emphasis on the crew's knowledge of and interest in the contraband is entirely consistent with the suggestion in *Soto* that the relationship between crew and contraband, rather than the extent of the crew's dominion and control, is the appropriate focus. See *Soto*, 716 F.2d at 992.
a lengthy voyage from Colombia and its sole cargo, marijuana, was stowed in an unsecured hold.\textsuperscript{76}

Additionally, neither court had difficulty concluding that the defendants knew they were going to import the cargo into the United States. In \textit{Manbeck}, the Fourth Circuit relied on an inference that the crew knew the vessels’ point of origin and destination.\textsuperscript{77} In \textit{Michelena-Orovio}, the Fifth Circuit noted that the vessel’s navigation lights had been reversed, apparently to trick the Coast Guard into thinking that the vessel was traveling away from the United States instead of toward it.\textsuperscript{78} The vessel abruptly changed course after its crew became aware of the Coast Guard vessel’s presence.\textsuperscript{79}

Both courts also relied on the crews’ behavior during apprehension as evidence of their participation in the conspiracies to import. Besides the reversal of navigation lights and abrupt course change in \textit{Michelena-Orovio}, the crew’s resistance to repeated Coast Guard attempts to board the vessel tended to show its participation.\textsuperscript{80} The Fifth Circuit also noted that when the Coast Guard officials ultimately came aboard, the crew members were waiting on the vessel’s deck with their suitcases packed as if they anticipated arrest.\textsuperscript{81} The crew members each insisted that the vessel had no captain,\textsuperscript{82} indicating either that they knew of the captain’s greater criminal liability and sought to protect him or that they all had an equal interest in the contraband. The Fourth Circuit in \textit{Manbeck} also had no trouble establishing the crews’ participation in the conspiracy to import. In \textit{Manbeck}, the crews had navigated their vessels to a clandestine spot where they unloaded the contraband.\textsuperscript{83} When the Customs agents boarded the vessels,

\begin{itemize}
  \item \textsuperscript{76} Michelena-Orovio, 719 F.2d at 743.
  \item \textsuperscript{77} Manbeck, 744 F.2d at 386. In its consideration of the related charge of actual importation, see supra note 25, the court also noted that Customs agents searching one of the vessels had found “a navigational chart . . . marked so as to indicate a path of travel extending deep into Customs waters.” 744 F.2d at 386; see supra note 56.
  \item \textsuperscript{78} Michelena-Orovio, 719 F.2d at 743.
  \item \textsuperscript{79} Id.
  \item \textsuperscript{80} Id. In fact, the crew refused to stop until the Coast Guard ship disabled the vessel. \textit{Id.} at 741.
  \item \textsuperscript{81} Id.
  \item \textsuperscript{82} Id.
  \item \textsuperscript{83} Manbeck, 744 F.2d at 367, 386.
\end{itemize}
they found that the decks recently had been washed down to remove the marijuana residue. This evidence, according to the court, was sufficient to establish the crews' participation in the conspiracy to import.

**Conspiracy to Distribute**

The Fifth and Fourth Circuits disagreed strongly, however, concerning whether a jury can infer a crew's criminal liability for distribution of the marijuana solely from the quantity of marijuana imported. Without evidence of the crew's specific intent to distribute the contraband, the Fourth Circuit characterized the unloading of the cargo from the vessels into the waiting land vehicles only as completion of importation, regardless of the size of the shipment. The Fifth Circuit, however, treated the loading from one vessel to another as part of the distribution scheme, ruling that a jury could infer an intent to distribute because the size of the shipment was more than the crew could consume. Measured by the language of the governing statutes, their legislative histories, and relevant case law, the Fifth Circuit approach is vastly superior.

**Application of Statutory Definitions**

The language of the distribution conspiracy statute favors the Fifth Circuit's approach, whether the crew unloads the contraband into waiting land vehicles, as in Manbeck, or it unloads the contraband onto another vessel, as in Michelena-Orovio. The statute states that "it shall be unlawful . . . to . . . possess with intent to . . . distribute . . . a controlled substance" such as marijuana.

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84. Id.
85. Id.
86. Compare Manbeck, 744 F.2d at 390 (rejecting contention in Michelena-Orovio that participation in conspiracy to distribute can be inferred from large quantity imported), with Michelena-Orovio, 719 F.2d at 752 (involvement in conspiracy to import large quantity of marijuana permits inference of conspiracy to distribute). See supra notes 30-44, 60-62 and accompanying text.
87. See Manbeck, 744 F.2d at 390; supra notes 60-62 and accompanying text.
88. See Michelena-Orovio, 719 F.2d at 749-52; supra notes 35-39 and accompanying text.
89. 21 U.S.C. § 841(a)(1) (1982). Commonly, drug statutes are drafted to punish mere possession because possession is easier to prove than distribution. See Whitebread & Stevens, supra note 75, at 754. The federal statute proscribes both possession, 21 U.S.C. § 844
The standard of proof required to establish the intent to distribute must be examined in light of two statutory definitions. To "distribute" means "to deliver . . . a controlled substance."90 "Delivery," in turn, means "the actual, constructive, or attempted transfer of a controlled substance."91

When the Fifth Circuit applied these definitions, it concluded that the unloading of marijuana from one vessel to another constituted distribution because it was "delivery" of a controlled substance. To support this interpretation, the Fifth Circuit relied on its decision in United States v. Pool.92 In Pool, the court held that the planned transfer of marijuana from the mother ship to off-load boats 250 miles east-southeast of Jacksonville, Florida constituted "distribution as contemplated by 21 U.S.C. § 802(11)."93 Similarly, the court reasoned that by unloading the marijuana from a vessel into waiting trucks, the crews in Manbeck transferred a controlled substance, thus "delivering" it within the statutory meaning of "distribution."

At least four circuits adhere to the Fifth Circuit's literal statutory interpretation. The United States Court of Appeals for the Eighth Circuit has stated that a person "makes a knowing and intelligent distribution . . . when he knowingly transfers the controlled substance."94 The United States Court of Appeals for the Tenth Circuit agreed, noting that "the Controlled Substances Act . . . contains no sale or buying requirement to support a conviction; there is now an offense of participation in the transaction viewed as a whole. . . . Activities in furtherance of the ultimate sale—such as vouching for the quality of the drugs, negotiating for or receiving the price, and supplying or delivering the drug—are

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91. Id. § 802(8).
92. 660 F.2d 547 (5th Cir. 1981).
93. Id. at 560 (quoted in Michelena-Orovio, 719 F.2d at 754).
94. United States v. King, 567 F.2d 785, 791 (8th Cir. 1977), cert. denied sub. nom. Lewis v. United States, 435 U.S. 945 (1978). The Eighth Circuit in King explicitly noted that "[a] controlled substance is delivered when it is 'transferred,' whether the transfer is actual, constructive, or attempted." Id. at 790-91.
sufficient to establish distribution. The Ninth Circuit and the D.C. Circuit also have followed the Fifth Circuit's statutory interpretation, at least by implication. If the Fourth Circuit had followed the Fifth Circuit's statutory approach, it would have found that the crews' furtherance of the actual distribution in Manbeck established the intent to distribute.

The Fourth Circuit reached a conflicting conclusion in Manbeck not because it rejected the Fifth Circuit's interpretation, but because it read an ownership requirement into the statute. The Fourth Circuit conceded that it would have found an intent to distribute if a particular crew member had possessed his own cache of marijuana. This reasoning ignores not only the statutory language, but also the clear legislative intent to prohibit possession of contraband regardless of any ownership interest. Although the charge of distribution might require proof that the crew member personally made the physical transfer, the charge of possession with the intent to distribute requires proof only that the crew member intended, planned, or anticipated that someone would transfer the marijuana from his possession and into that of another. Congress did not intend to allow a smuggler who instructed others to handle marijuana but did not assert ownership rights over it to avoid penalties designed to punish and discourage the unauthorized movement of marijuana. By reading an ownership requirement into the statute, the Fourth Circuit diluted Congress' specific intent to prosecute individuals who possess contraband for illegal purposes.

95. United States v. Wigley, 627 F.2d 224, 226 (10th Cir. 1980) (citations omitted) (quoting United States v. Pruitt, 487 F.2d 1241, 1245 (8th Cir. 1973)).
96. See United States v. Mehrmanesh, 682 F.2d 1303, 1306 (9th Cir. 1982) ("By punishing deliveries rather than transactions, Congress has made it unnecessary to establish that a defendant participated in a transaction as either a buyer or a seller, thus expanding the scope of the Act to parties who act merely as agent for the buyer or seller."); United States v. Bass, 535 F.2d 110 (D.C. Cir. 1976) (by implication; see United States v. Pool, 660 F.2d 547, 561 (5th Cir. 1981)).
97. See United States v. Wigley, 627 F.2d 224, 226 (10th Cir. 1980).
98. Manbeck, 744 F.2d at 390.
99. See supra notes 89-97 and accompanying text.
100. See H.R. REP. No. 1444, supra note 17, at 12, reprinted in 1970 U.S. CODE CONG. & AD. NEWS at 4577 (stating that the "quantity of a drug found in the possession of a person" bears on the issue of whether the purpose of possession is personal use or illicit transactions (emphasis added)). Because the statute focuses on possession, the report did not discuss the...
The Fourth Circuit also misapplied the statutory definition of "importation" when it characterized the unloading of the cargo as only the completion of importation and not as participation in the distribution.101 The statute defines "importation" as "any bringing in or introducing of such article into any area."102 The United States, including the customs territory, is the area into which importation of controlled substances is prohibited.103 Under this definition, importation occurred in Manbeck when the crews sailed the vessels into United States waters. When the crews later sailed into the inland waterways and rivers, importation was a completed accomplishment, and distribution became the immediate objective. Any movement of the marijuana within the territory of the United States constituted preparation for distribution rather than completion of importation because once "in the area" the marijuana could not later be "imported." The Fourth Circuit's assertion to the contrary was erroneous.

With respect to the crew members who helped unload marijuana onto conveyors and into trucks, the fact that the distribution statute forbids "transfer" also supports a conclusion that the crew members were distributing the marijuana, and not merely completing importation as the Fourth Circuit asserted. With the exception of two Fifth Circuit cases decided before Michelena-Orovio,104 the courts never have required proof that crew members were involved in further sale or transport of the contraband to land-based retailers and users to support a conviction for conspiracy to distribute.

concept of ownership. This focus is consistent with the way drug statutes usually are drafted. Drug statutes generally focus on possession because possession is easier to prove than distribution. See Whitebread & Stevens, supra note 75, at 754; supra note 89.

The Fourth Circuit's departure from the emphasis on possession in the statute and in the Fifth Circuit cases starkly contrasts with its treatment of the possession issue in the conspiracy to import charge. In considering that charge, the Fourth Circuit followed the Fifth Circuit's conclusion in Michelena-Orovio and in United States v. Alfrey that the mere size of the load was adequate evidence of a relationship between the crew and the contraband sufficient to support a conviction. See supra note 75.

101. See Manbeck, 744 F.2d at 390.
103. Id. § 952. Customs waters are defined as waters within four leagues (twelve nautical miles) of the United States. 19 U.S.C. § 1401(j) (1982).
Recognizing that the narrow definition of "distribution" which this view implies was not supported by the statute, the Fifth Circuit in *Michelena-Orovio* overruled both contrary cases.\(^\text{105}\)

**Inferences Possible From the Amount of Contraband**

A primary indicator of a crew's intent to distribute contraband is the quantity of the contraband. In drug cases, courts generally permit juries to infer intent to distribute if the defendant possessed more marijuana than he could consume.\(^\text{106}\) In maritime drug smuggling cases, three other circuits have followed the Fifth Circuit's lead in *Michelena-Orovio* by allowing a jury to infer a crew's intent to distribute solely from the size of the load.\(^\text{107}\) The Fourth Circuit, on the other hand, has refused to permit a jury to infer intent to distribute from the load size alone.\(^\text{108}\)

In refusing to permit an inference of intent to distribute from the size of the load, the Fourth Circuit stated that courts originally developed an inference based on quantity to distinguish simple possession from possession with intent to distribute in domestic drug trafficking cases.\(^\text{109}\) According to the Fourth Circuit, quantity is irrelevant in maritime trafficking cases because courts are attempting to distinguish between importation and distribution.\(^\text{110}\) The Fourth Circuit's characterization of this distinction, however,

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105. *See Michelena-Orovio*, 719 F.2d at 757.

106. *See*, e.g., *United States v. Moore*, 452 F.2d 569, 573 (6th Cir. 1971), cert. denied, 407 U.S. 910 (1972) ("The large quantity of material in the can considered together with the expert testimony concerning the methods of ingesting hallucinogens . . . warranted an inference of an intent to sell."); *United States v. Ortiz*, 445 F.2d 1100, 1104-05 (10th Cir.), cert. denied, 404 U.S. 993 (1971) ("We hold that the quantity of drugs found in Ortiz's possession established his purpose to sell, deliver or otherwise dispose of the drugs."); *United States v. Cerrito*, 413 F.2d 1270, 1273 (7th Cir. 1969), cert. denied, 396 U.S. 1004 (1970) ("We think the evidence as to quantity of tablets possessed and sold is sufficient to justify the inference that the tablets were neither for personal use of, or for administering to a dog owned by Cerrito.").


109. *Id.* at 389.

110. *Id.*
is erroneous. In maritime cases, courts are not attempting to distinguish importation from distribution but rather personal use from distribution,\(^{111}\) because the amount of contraband a crew member possesses is irrelevant to a charge of importation. The amount imported can be an ounce or a ton.\(^{112}\)

In finding the crew members in *Manbeck* guilty of a conspiracy to import, the Fourth Circuit necessarily concluded that the crews had knowledge of and interest in the marijuana that they intended to bring into the United States.\(^{113}\) With this interest established, the court should have asked whether the crew members intended to exercise their interest in the marijuana for personal use or for distribution. At this point in the analysis, the importation issue becomes irrelevant.

Viewed from this perspective, a land-based defendant who possesses a large quantity of marijuana in a container is no different from a crew member on a marijuana-laden boat floating on United States waters. If a land-based defendant possesses more marijuana than he personally could use, common sense and case law dictate that the only possible intention he could have for such a large quantity would be distribution of at least a portion. A crew member who sails on a vessel loaded with more marijuana than the crew could consume is no different, because the crew must intend to transfer at least some of the marijuana to others. The Fourth Circuit, therefore, should have concentrated on the amount of marijuana involved, not the importation/distribution distinction.

The Fourth Circuit’s position in *Manbeck* also is inconsistent with its own decisions involving crews that did not actually import contraband. In *United States v. Watkins*,\(^{114}\) for example, a federal agent discovered a fishing vessel navigating in United States waters near the site of a recent drug transfer. The vessel aroused the agent’s suspicion because it was running at night without lights, it

\(^{111}\) See, e.g., *United States v. Mann*, 615 F.2d 668, 670 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981) (noting that “[t]he very size of a . . . cache can be sufficient to show intent to distribute” and that the 22,500 pounds of marijuana found in the possession of the defendants was “far too much for the personal consumption of four individuals.”).

\(^{112}\) See 21 U.S.C. § 960(b)(2) (1982); *infra* note 124 and accompanying text.

\(^{113}\) The Court, however, stopped short of terming that interest either actual or constructive possession. See *supra* note 75.

sped up when ordered to stop, and it had no fishing gear aboard. The crew also was washing marijuana residue off the deck.\textsuperscript{115} Although the evidence was insufficient to support a finding of importation, the Fourth Circuit affirmed a conviction of conspiracy to possess marijuana with intent to distribute.\textsuperscript{116} Similarly, in \textit{United States v. Laughman},\textsuperscript{117} a crew unloaded marijuana from its vessel into smaller vessels under cover of night and within United States territorial waters.\textsuperscript{118} No evidence indicated that the crew actually had imported the contraband.\textsuperscript{119} The Fourth Circuit nevertheless affirmed the crew members' convictions for possession of marijuana with intent to distribute.\textsuperscript{120} Objectively, the crews' actions in \textit{Manbeck} cannot be distinguished from the actions in \textit{Watkins} and \textit{Laughman}. In \textit{Manbeck}, however, the court required stronger evidence of intent to distribute only because proof was available that the crew actually had imported the marijuana.\textsuperscript{121} This additional requirement cannot be supported by prior case law or by reasoning. The Fourth Circuit should have permitted the jury to infer intent to distribute solely from the size of the load, as the Fifth Circuit did in \textit{Michelena-Orovio}.

\textbf{Legislative History}

The legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970\textsuperscript{122} also supports the Fifth Circuit's interpretation. For example, the importation statute prohibits illegal importation regardless of the quantity of contraband involved.\textsuperscript{123} The maximum punishment for importation varies with the type of controlled substance involved, not the quantity.\textsuperscript{124} In

\begin{itemize}
    \item \textsuperscript{115} Id. at 1097.
    \item \textsuperscript{116} Id. at 1096-98.
    \item \textsuperscript{117} 618 F.2d 1067 (4th Cir.), cert. denied, 447 U.S. 925 (1980).
    \item \textsuperscript{118} Id. at 1074-75.
    \item \textsuperscript{119} See id. at 1072 n.2.
    \item \textsuperscript{120} Id. at 1078.
    \item \textsuperscript{121} See supra notes 108-10 and accompanying text.
    \item \textsuperscript{122} Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801-969 (1982)).
    \item \textsuperscript{123} See 21 U.S.C. § 960(b)(2) (1982); supra note 112 and accompanying text.
    \item \textsuperscript{124} See 21 U.S.C. § 960(b)(2) (1982). For example, if the importation involved a narcotic drug listed in schedule I or II, the maximum punishment is fifteen years in jail and a $25,000 fine. If the importation involved a controlled substance other than a narcotic drug
\end{itemize}
contrast, the punishment in the statute prohibiting possession with intent to distribute varies according to the quantity of contraband possessed.\textsuperscript{125} This penalty structure indicates that Congress did not intend punishment for importation to preclude punishment for distribution. After importation is established, the Court must inquire whether the purpose of the importation was personal use or distribution.\textsuperscript{126} Each purpose may be punished to a different degree of severity, with the punishment for importation determined by the type of contraband imported and the punishment for distribution determined by the amount involved.\textsuperscript{127}

The Fifth Circuit, however, relied not on the legislative history accompanying the penalty structure but on Congress' general intent to tighten the screws on drug smuggling by making it too risky.\textsuperscript{128} Based on this legislative history, the court concluded that Congress must have intended the defendants to be prosecuted for both conspiracy to import and conspiracy to possess with intent to distribute.\textsuperscript{129} Congress' inadvertent repeal of the provision which prohibited possession of contraband on United States vessels on the high seas,\textsuperscript{130} which required prosecutors to prove that crew

\textsuperscript{125} See id. § 841(b)(1)(B), (b)(6). For example, a court can impose the maximum penalty of fifteen years in jail and a $15,000 fine only if the defendant possessed more than 1000 pounds of marijuana. Id. § 841(b)(6). If 1000 pounds or less were involved, the maximum punishment is five years in jail and a $15,000 fine. See id. § 841(b)(1)(B).

\textsuperscript{126} The legislative history of the statute specifically indicates that Congress intended the quantity of the drug found in the defendant's possession to bear on the question of whether the possession was for personal use or for distribution. H.R. Rep. No. 1444, supra note 17, at 12, reprinted in 1970 U.S. Code Cong. & Ad. News at 4577; see supra note 100.

\textsuperscript{127} See supra notes 124-25 and accompanying text. One commentator, however, has suggested that when Congress set the punishment for smuggling drugs, it was aware that smugglers encourage retail sales of the drugs they smuggle. Based on this theory, this commentator asserted that the punishment for importation probably incorporates the punishment for facilitating distribution. Johnson, supra note 2, at 1150.


\textsuperscript{129} See Michelen-Orovio, 719 F.2d at 754.

\textsuperscript{130} See H.R. Rep. No. 323, supra note 1, at 4-5; supra notes 1, 15 and accompanying text.
members not only possessed marijuana but also intended to distribute it in the United States, created some doubt as to the seriousness of Congress’ intent to crack down on drug smuggling. In the 1980 amendments to the drug laws, however, Congress reaffirmed its intent by prohibiting possession on the high seas and imposing a maximum penalty of fifteen years imprisonment, which is identical to the penalty imposed for importation.\textsuperscript{131} Given Congress’ reaffirmed intent, according to the Fifth Circuit, separation of the importation and distribution offenses in a manner which causes foreign nationals caught smuggling drugs on the high seas to be punished less severely than they would have been punished before Congress separated the offenses cannot be justified.\textsuperscript{132}

The Fourth Circuit conceded that the combination of conspiracy to import and conspiracy to distribute convictions for the same defendant does not raise the specter of double jeopardy.\textsuperscript{133} The Fourth Circuit cited the United States Supreme Court’s ruling in \textit{Albernaz v. United States}\textsuperscript{134} that a conviction for conspiracy to distribute requires the proof of a fact that a conviction for conspiracy to import does not, and vice versa.\textsuperscript{135} Based on \textit{Albernaz}, the Fourth Circuit characterized the drug smuggling operation as “a single conspiracy with dual criminal objectives.”\textsuperscript{136}

In its subsequent analysis, however, the Fourth Circuit lost sight both of the “proof of fact” identified in \textit{Albernaz} as distinguishing importation from distribution and of its characterization of the \textit{Manbeck} drug smuggling conspiracy as unitary in nature. The


\textsuperscript{132} \textit{See Michelena-Orovio}, 719 F.2d at 754.

\textsuperscript{133} \textit{Manbeck}, 744 F.2d at 388.

\textsuperscript{134} 450 U.S. 333 (1981).

\textsuperscript{135} \textit{Id.} at 339 (cited in \textit{Manbeck}, 744 F.2d at 388).

\textsuperscript{136} \textit{Manbeck}, 744 F.2d at 387.
Fourth Circuit characterized as "circular" the Fifth Circuit's reasoning that a crew member who imported a large quantity of marijuana must have intended to distribute it,\textsuperscript{137} even though it recognized that the Fifth Circuit had not held that participation in an importation conspiracy makes one automatically guilty of participation in a distribution conspiracy.\textsuperscript{138} The Fourth Circuit could not have characterized the Fifth Circuit's reasoning in this way if it had heeded its own citation of the holding in \textit{Albernaz} that conviction for conspiracy to distribute requires proof of a fact that a conviction for conspiracy to import does not.\textsuperscript{139} The presence of a quantity of marijuana too large for the crew to consume is the one fact necessary to prove conspiracy to distribute that is not necessary to prove conspiracy to import.\textsuperscript{140} The Fourth Circuit should have inquired, as the Fifth Circuit did, whether the crew members' intent to distribute could have been inferred from their possession of a large quantity of marijuana. Their prior participation in the conspiracy to import was relevant only because it demonstrated the crew members' interest in and relationship to the marijuana.

The Fourth Circuit's unwillingness to rely on the crews' participation in the operation of the vessels to demonstrate the crews' joinder in the distribution conspiracy\textsuperscript{141} as well as the importation conspiracy also conflicts with its characterization of the operation as "a single conspiracy with dual criminal objectives," based on language from \textit{Albernaz}.\textsuperscript{142} Apparently, the Fourth Circuit requires

\begin{itemize}
\item \textsuperscript{137} \textit{Id.} at 390.
\item \textsuperscript{138} See \textit{id.} at 388.
\item \textsuperscript{139} See supra note 135.
\item \textsuperscript{140} See supra notes 106-07, 111-21 and accompanying text. A crew member can be convicted of participation in a conspiracy to import simply by proof that he sailed on a vessel which crossed into the United States bearing marijuana and that he knew the marijuana was on board, regardless of the quantity involved. See 21 U.S.C. § 960(b)(2) (1982); supra notes 112, 124 and accompanying text. Although the presence of a large quantity of marijuana may be helpful in proving that a crew member knew the marijuana was on board, see \textit{Manbeck}, 744 F.2d at 386; \textit{Michelena-Orovio}, 719 F.2d at 743; supra note 75, the large quantity is not essential to prove the conspiracy to import. The fact that the penalty for distribution varies with the quantity involved, see 21 U.S.C. § 841(b)(6), but the penalty for importation does not, see \textit{id.} § 960(b), also indicates the centrality of the amount involved to the distribution charge but not the importation charge. See supra notes 124-25 and accompanying text.
\item \textsuperscript{141} See \textit{Manbeck}, 744 F.2d at 390; supra notes 101-03 and accompanying text.
\item \textsuperscript{142} \textit{Manbeck}, 744 F.2d at 387; see supra note 136 and accompanying text.
\end{itemize}
that the importation conspiracy end before the distribution conspiracy can begin. Under this interpretation, the crew members must participate in activities subsequent to sailing the vessel or unloading the cargo before they can be guilty of a conspiracy to distribute. If the conspiracy in Manbeck was a single agreement with dual criminal objectives, as the Fourth Circuit characterized it, the defendants should have had to join the conspiracy only once. They should not have had to complete the entire importation operation before they could agree to enter the distribution conspiracy, as the Fourth Circuit's interpretation would require.

**FITTING THE PUNISHMENT TO THE CRIME**

In maritime drug smuggling operations, some members play a greater role and consequently share greater profits. Crew members who are paid upon delivery do not share in profits from distribution of marijuana on the streets, and clearly have a lesser stake in the overall operation. Manbeck can be viewed as an attempt to respond to this problem by distinguishing between the various members of the operation and punishing the less serious offenders for only one statutory violation rather than two.

Congress clearly intended that both the "lowly Columbian seaman" and the mastermind of the operation should be held liable

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143. Even if the transaction is analyzed as two separate conspiracies, the crew members likely assented to both conspiracies simultaneously by boarding a ship destined for the United States and loaded with more marijuana than was necessary for the personal consumption of the crew. See supra notes 75, 106-07, 111-21 and accompanying text.

144. Viewed in this manner, the apparent conflict between Manbeck and other Fourth Circuit cases such as United States v. Laughman, 618 F.2d 1067 (4th Cir.), cert. denied, 447 U.S. 925 (1980); see supra notes 114-121 and accompanying text, can be explained. In Laughman, the evidence was insufficient to convict the defendants for conspiracy to import. See 618 F.2d at 1072 n.2; supra note 119 and accompanying text. The conviction for conspiracy to distribute, see 618 F.2d at 1078; supra note 120 and accompanying text, was the only way to punish the defendants for their drug smuggling activities. In Manbeck, on the other hand, the evidence of conspiracy to import was sufficient to support conviction. See Manbeck, 744 F.2d at 386-87. Conspiracy to import and conspiracy to possess with intent to distribute both are punishable by fifteen years in jail. See supra notes 22-25 and accompanying text. If the Fourth Circuit had upheld both convictions, the defendants would have been subject to up to thirty years in jail for conduct which was not serious as the conduct of the land-based leaders of the operation and was more closely analogous to the conduct of the defendants in Laughman.

145. See Michelena-Orovio, 719 F.2d at 752.
for both importation and distribution.\textsuperscript{146} Congress may not have intended, however, to make both classes of conspirators serve identical sentences. Both the Fourth and Fifth Circuits recognized that some defendants have had no contact with the United States and have participated no further than unloading the boat.\textsuperscript{147} These defendants certainly are not as culpable as a "kingpin" who arranged an operation from the United States. These differences in culpability, however, should affect only the severity of the sentence, not the determination of criminal liability.

Courts legitimately can differentiate between members of a conspiracy by exercising their discretion to impose less than the maximum sentence upon certain defendants, to impose concurrent rather than consecutive sentences, to suspend sentences, and to impose probation. Congress also could revise the penalty structure to allow the courts to respond more accurately to varying degrees of culpability among different members of a conspiracy.\textsuperscript{148} The courts, however, should not use findings concerning criminal liability to respond to perceived differences in culpability, as the Fourth Circuit did in \textit{Manbeck}.

\textbf{CONCLUSION}

The Fourth and Fifth Circuits apply the same analysis in maritime drug smuggling cases to determine whether a conspiracy to import existed. Their approach to whether a conspiracy to distribute also existed, however, differs considerably. The Fifth Circuit's approach in \textit{Michelena-Orovio} is vastly superior.

The Fifth Circuit, along with four other circuits, has applied the statutory language faithfully—especially the definition of "distribution" as any "transfer." The Fourth Circuit in \textit{Manbeck} misapplied the statute by adding an ownership element to the possession

\textsuperscript{146} See id. at 752-54.

\textsuperscript{147} See \textit{Manbeck}, 744 F.2d at 387-88; \textit{Michelena-Orovio}, 719 F.2d at 752.

\textsuperscript{148} For example, Congress could add a new section to the possession with intent to distribute statute to impose a much stiffer penalty if the marijuana is imported. This new provision would focus the most severe punishments upon those involved in the later stages of the distribution scheme.
offense and by considering the delivery of contraband as completion of importation, not distribution, even though statutory importation occurred when the contraband entered United States territory. The Fifth Circuit approach also is superior because it allows a jury to infer an intent to distribute solely from the size of the cache, in conformity with six other circuits. The Fourth Circuit's requirement of other evidence to establish an intent to distribute in importation cases is inconsistent with its own decisions in other waterborne distribution cases, in which no additional evidence was required simply because importation could not be proved. The statutory penalty structure and the legislative history also demonstrate a congressional intent supporting the Fifth Circuit's approach. Because Congress provided penalties for importation that do not vary with load size; and penalties for possession with intent to distribute that do, it probably intended that after a conspiracy to import has been punished, the associated conspiracy to possess with the intent to distribute also should be punished according to the size of the load. The legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970 also indicates that Congress intended to make penalties for participation in drug trafficking prohibitive. The Fifth Circuit approach is consistent with that purpose because it upholds the plain meaning of the statutory language by maximizing the maritime drug smuggler's exposure to criminal liability.

If the Fourth Circuit wanted to adjust the punishments of the defendants in Manbeck, it should have done so through other available devices such as discretionary sentencing. Its use of determinations of criminal liability, however, conflicts with the statutory language, the legislative history, and the Fourth Circuit's own case law. The Fourth Circuit should abandon this approach and follow the Fifth Circuit's ruling in Michelena-Orovio allowing a jury to infer an intent to distribute merely from the size of the cache.

Michael J. Gardner