APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT

No. 19-1529

UNITED STATES OF AMERICA,

Appellee,

v.

RAYMOND RODRÍGUEZ-RIVERA,

Defendant, Appellant.

March 4, 2021

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Carmen Consuelo Cerezo, U.S. District Judge]

Kevin Lerman, Research & Writing Specialist, with whom Eric Alexander Vos, Federal Public Defender, and Franco L. Pérez-Redondo, Assistant Federal Public Defender, Supervisor, Appeals Division, were on brief, for appellant.

Julia M. Meconiates, Assistant United States Attorney, with whom W. Stephen Muldrow, United States Attorney, and Mariana E. Bauzá-Almonte,

Assistant United States Attorney, Chief, Appellate Division, were on brief, for appellee.

Before HOWARD, Chief Judge, KAYATTA, Circuit Judge, and CASPER,[*] District Judge.

KAYATTA, Circuit Judge.

Once again, we are called upon to consider the circumstances in which a sentencing enhancement for prior involvement with controlled substances is appropriate. Section 2K2.1(a) of the United States Sentencing Guidelines provides for certain sentencing enhancements in situations where, among other conditions, the defendant previously has been convicted of controlled substance offenses. See U.S.S.G. § 2K2.1(a); see also § 4B1.1. Section 4B1.2(b), in turn, defines "controlled substance offense[s]." Application Note 1 to section 4B1.2 further explains that conspiring to commit a controlled substance offense is itself a controlled substance offense.

In United States v. Lewis, we rejected as contrary to binding circuit precedent the contention that Application Note 1 overreached by adding "conspiring" to the list of offenses contained in the Guideline text itself. 963 F.3d 16, 21–23 (1st Cir. 2020). In so doing, we set aside as unpreserved a narrower contention: That the term "conspiring," as used in Application Note 1, includes only a so-called generic form of conspiracy that has as an element an

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[*] Of the District of Massachusetts, sitting by designation.

overt act in furtherance of the conspiracy, and therefore does not include a conspiracy charged under 21 U.S.C. § 846, which admittedly has no such overt act element. Id. at 21, 26–27 (finding only no clear error in light of circuit split).

This appeal now requires that we address that narrower contention head-on without the leeway afforded by plain error review. Our answer matters because the classification of an offense as a controlled substance offense often results in longer recommended sentences by raising base offense levels, see, e.g., U.S.S.G. § 21(2.1(a), and section 846 most commonly serves as the vehicle for charging conspiracy offenses in federal drug cases. To date, the six circuits that have addressed this issue have split four to two[1] in deciding whether the absence of an

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[1] Compare United States v. Tabb, 949 F.3d 81, 87–89 (2d Cir. 2020) (holding that a conviction for conspiracy to commit a controlled substance offense under section 846 qualifies as a conviction for a controlled substance offense under U.S.S.G. § 4B1.2(b) and Application Note 1), United States v. Rivera-Constantino, 798 F.3d 900, 903 (9th Cir. 2015) (same in the context of U.S.S.G. § 2L1.2(b)), United States v. Sanbria-Bueno, 549 F. App'x 434, 438–39 (6th Cir. 2013) (unpublished) (collecting cases and reaching the same conclusion under U.S.S.G. § 2L1.2(b)), and United States v. Rodríguez-Escareno, 700 F.3d 751, 753–54 (5th Cir. 2012) (same), with United States v. McCollum, 885 F.3d 300, 309 (4th Cir. 2018) (holding that conviction under another federal conspiracy statute that does not require an overt act, 18 U.S.C. § 1959(a)(5), does not qualify as a conspiracy for the purposes of Application Note 1 to section 4B1.2), United States v. Whitley, 737 F. App'x 147, 149 (4th Cir. 2018) (unpublished) (holding that section 846 is a categorical mismatch with generic conspiracy and therefore the enhancement does not apply for a section 846 conviction), and United States v. Martinez-Cruz, 836 F.3d 1305, 1314 (10th Cir.

overt act requirement precludes section 846 conspiracies from qualifying as conspiracies under either section 21K2.1(a) or section 2L1.2(b) of the Guidelines.[2]

For the following reasons, we join the growing majority of circuits and hold that a conviction under 21 U.S.C. § 846 for conspiring to commit a controlled substance offense qualifies as a conviction for a controlled substance offense under section 4B1.2(b) of the Guidelines, even though section 846 does not require proof of an overt act.

I.

On June 14, 2018, officers of the Puerto Rico Police Department served a state-issued search warrant at an apartment in San Juan, Puerto Rico. Rodríguez-Rivera was inside the apartment at the time, along with a woman and children. While conducting a search of the apartment, police discovered a Glock

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2016) (holding in the context of U.S.S.G. § 2L1.2(b) that section 846 is a categorical mismatch with generic conspiracy and that therefore the enhancement did not apply).

[2] Section 2L1.2(b)(2)(e) provides for a sentencing enhancement for individuals who unlawfully entered or returned to the United States if they have been convicted of three or more "drug trafficking offenses," i.e., "offense[s] under federal, state, or local law that prohibit[ ] the manufacture, import, export, distribution, or dispensing of . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 2L1.2 cmt. n.2. Prior to 2016, Application Note 5 to that guideline stated that drug trafficking offenses "include the offenses of aiding and abetting, conspiring, and attempting[to commit such offenses." See U.S.S.G. App. C, Amend. 802 (effective Nov. 1, 2016). This Application Note was deleted in the 2016 amendments to section 2L1.2. See id.

pistol that had been modified to shoot automatically, two bulletproof vests, and several dozen rounds of ammunition. Rodríguez-Rivera took responsibility for the contraband and was arrested. Later, during an interview with federal agents, he provided a written statement acknowledging possession of the firearm.

A federal grand jury returned an indictment charging Rodríguez-Rivera with unlawful possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and unlawful possession of a machine gun, in violation of 18 U.S.C. § 922(*o*). He pled guilty to both charges.

Rodríguez-Rivera had been previously convicted of conspiracy to distribute cocaine, cocaine base, and heroin, in violation of 21 U.S.C. § 846, and was sentenced to 24 months' imprisonment for that offense. The Probation Office's presentence investigation report (PSR) for the instant offense consequently recommended that the district court apply a controlled substance enhancement, pursuant to section 2K2.1(a), and assigned Rodríguez-Rivera a base offense level of 22. Rodríguez-Rivera objected, citing an unpublished Fourth Circuit ruling, United States v. Whitley, 737 F. App'x 147 (4th Cir. 2018), in support of his argument that a conviction under section 846 is not a controlled substance offense under the Guidelines and that therefore, his base offense level should be 20, rather than 22.

The district court agreed with Probation and applied the enhancement, which added six and eight months of imprisonment, respectively, to the bottom and top of the Guidelines sentencing range. The district court sentenced Rodríguez-Rivera to thirty-eight months'

imprisonment and a three-year term of supervised release. This appeal followed.

II.

We review de novo the district court's interpretation and application of the Sentencing Guidelines. United States v. Lewis, 963 F.3d 16, 20 (1st Cir. 2020). In this case, the district court applied section 2K2.1(a)(3), which provides that the base offense level will be 22 if:

> (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense[.]

U.S.S.G. § 2K2.1(a)(3). The existence of a qualifying firearm is not in contention in this case, nor is there any claim that Rodríguez-Rivera was not convicted in 2005 of conspiring to possess with intent to distribute cocaine, cocaine base, and heroin, in violation of 21 U.S.C. § 846. Instead, the parties dispute whether a section 846 conspiracy qualifies as the type of conspiracy that constitutes a controlled substance offense.

The term "controlled substance offense," as used in section 2K2.1(a), is defined in section 4B1.2(b) as follows:

> an offense under federal or state law, punishable by imprisonment for a term

> exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Application Note 1 to that provision adds that a "controlled substance offense" "include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2 cmt. n.1. And our controlling circuit precedent deems that interpretation to be authoritative. See United States v. Lewis, 963 F.3d at 21–22 (relying on United States v. Piper, 35 F.3d 611, 617 (1st Cir. 1994) and United States v. Fiore, 983 F.2d 1, 3–4 (1st Cir. 1992), abrogated on other grounds by United States v. Giggey, 551 F.3d 27, 28 (1st Cir. 2008) (en banc)).

In view of this precedent, Rodríguez-Rivera trains his argument on the definition of the term "conspiring" as used in Application Note 1. He defines the term in three steps: First, in deciding what "conspiring" means in this context, he says we should ascertain the "generic" form of conspiracy offenses. He then says that the generic form includes as an element the commission of an overt act in furtherance of the conspiracy. Finally, because a conviction under section 846 admittedly does not have as an element the commission of an overt act, he concludes that his prior conviction does not qualify as a conspiracy offense for purposes of Guidelines section 2K2.1. Two circuits have more or less accepted this argument. See United States v. Martinez-Cruz, 836 F.3d 1305,

1309, 1314 (10th Cir. 2016); United States v. McCollum, 885 F.3d 300, 307–09 (4th Cir. 2018).

Our skepticism focuses on the first step in Rodríguez-Rivera's argument: We see little sense in identifying and adopting a generic version of the conspiracy offense as the benchmark against which to compare a violation of section 846. Rather, it seems apparent that the Guidelines (especially as interpreted in Application Note 1) tell us what type of conspiracy offense to look for: One "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of [the same]." U.S.S.G. § 4B1.2(b). Section 846, as applied to a controlled substance offense, would seem to qualify: By barring two or more people from agreeing to manufacture controlled substances, for example, it would seem to prohibit at least one common means of drug manufacturing. 21 U.S.C. §§ 846, 841(a).

More generally, and significantly, section 846 is part of the Controlled Substances Act, and section 846 is the only part of that Act that specifically makes any form of conspiring a crime. Given our circuit precedent -- that a controlled substance offense includes at least some types of conspiracy -- it would be odd indeed if the definition of a controlled substance offense excluded the only form of conspiracy prohibited by the Controlled Substances Act itself. "Ultimately, context determines meaning, and we 'do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense.' " Johnson v. United States, 559 U.S. 133, 139–40, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) (citation omitted) (quoting Gonzales v. Oregon,

546 U.S. 243, 282, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006) (Scalia, J., dissenting)).

Resisting this common-sense notion that a conspiracy under the Controlled Substances Act is a controlled substance offense, Rodríguez-Rivera argues that United States v. Taylor, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), and its progeny require us to apply the so-called "generic" definition of conspiracy. In Taylor, the Court did indeed adopt the generic definition of "burglary" as used in 18 U.S.C. § 924(e). 495 U.S. at 598–99, 110 S.Ct. 2143. But the Court did so only after first determining that Congress's intended understanding of the term was "not readily apparent," id. at 580, 110 S.Ct. 2143, and that the legislative history suggested "Congress, at least at that time, had in mind a modern 'generic' view of burglary," id. at 589, 110 S.Ct. 2143. Adoption of that view broadened, rather than narrowed, the scope of encompassed crimes, in keeping with the intended overall purpose of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). See Taylor, 495 U.S. at 581–84, 598, 110 S.Ct. 2143. Here, section 846's inclusion within the Controlled Substances Act and the lack of any reference to any generic alternative in the Act counsel against the need to search elsewhere to know what a controlled substances conspiracy is. Neither party has pointed to any legislative history that would advise to the contrary.

We recognize that since Taylor, the Supreme Court has, in the context of immigration violations, referred to adopting the generic view of "illicit trafficking in a controlled substance," see Moncrieffe v. Holder, 569 U.S. 184, 192, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013) (quoting Nijhawan v. Holder, 557 U.S. 29, 37,

129 S.Ct. 2294, 174 L.Ed.2d 22 (2009)) (employing the categorical approach to determine whether marijuana possession always qualifies as "illicit trafficking in a controlled substance" under the Immigration and Nationality Act), and, in dicta, referred to adopting the generic view of various offenses listed as crimes of violence, see Mathis v. United States, — U.S. —, 136 S. Ct. 2243, 2248, 195 L.Ed.2d 604 (2016) (burglary, arson, extortion). In Descamps v. United States, too, the Supreme Court looked immediately to the generic versions of ACCA's enumerated offenses as the benchmark against which a predicate offense is to be compared. 570 U.S. 254, 257, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013) ("To determine whether a past conviction is for [an ACCA crime], courts use what has become known as the 'categorical approach': They compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime -- i.e., the offense as commonly understood."). And in United States v. Capelton, we (and the parties) assumed without discussion that we should do the same in defining "aiding and abetting" under Application Note 1. United States v. Capelton, 966 F.3d 1, 6–7 (1st Cir. 2020). But neither the Supreme Court nor this court has instructed that all terms in statutes or the Guidelines must be understood to refer to generic versions of an offense.

To the contrary, before applying the categorical approach in Johnson, the Court first determined what the term "physical force" meant as used in ACCA, without needing to search for any generic meaning. With that definition of force in hand, the Court then applied the categorical approach to determine

whether a state offense matched that benchmark. 559 U.S. at 140–42, 130 S.Ct. 1265.

The Supreme Court's recent decision in Shular v. United States confirms that we are on the right track in rejecting a generic version of conspiracy as the benchmark against which to compare a violation of section 846. — U.S. —, 140 S. Ct. 779, 782, 206 L.Ed.2d 81 (2020). At issue in Shular was whether a prior conviction under Florida law for possessing with intent to distribute cocaine was a "serious drug offense" under ACCA, 18 U.S.C. § 924(e)(2)(A)(ii). ACCA defines a serious drug offense as including "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." Shular, 140 S. Ct. at 784 (quoting 18 U.S.C. § 924(e)(2)(A)(ii)). The defendant argued that the gerunds "manufacturing, distributing, or possessing" need be defined by reference to analog generic offenses. The Court disagreed on the ground that the relevant ACCA provisions described conduct rather than offenses with elements. The Court reached this conclusion for two reasons.

First, the terms themselves were "unlikely names for generic offenses," Shular, 140 S. Ct. at 785, in contrast with, for example, "burglary, arson or extortion." Rather, the ACCA terms are more readily viewed as descriptions of conduct. Id. Second, while section 924(e)(2)(B)(ii) uses the formulation X is Y, (e.g., a crime that "is burglary, arson, or extortion"), section 924(e)(2)(A)(ii) uses the formulation X involves Y (i.e., "an offense . . . involving manufacturing, distributing or possessing . . . a controlled substance"). This, too, reinforces the understanding that "the

descriptive terms immediately following the word 'involving' identify conduct." 140 S. Ct. at 785.

For those reasons, the Court eschewed ascertaining the "generic" meaning of those terms before determining whether the state law offenses were within ACCA's scope. Id. at 787. Instead, the Court simply affirmed the Eleventh Circuit's ruling that in classifying a state offense as a controlled substance offense it "need not search for the elements of 'generic' definitions"; rather, it need only ask whether the state offense involves the requisite conduct. Id. at 784 (quoting United States v. Smith, 775 F.3d 1262, 1267 (11th Cir. 2014)).

The guideline at issue in this case -- U.S.S.G. § 4B1.2(b), by way of § 2K2.1 -- uses neither the X is Y formulation nor the X involves Y formulation. Nonetheless, it tracks the latter formulation in relevant respects, forgoing any attempt to list generally recognizable offenses in favor of describing conduct that the offense need "prohibit" ("manufacture, import, export, distribution, or dispensing"). This conduct is, in relevant respects, indistinguishable from the conduct at issue in Shular. U.S.S.G. § 4B1.2(b). So our charge under the Guidelines is not to define or identify any generic offense as the measure of a categorical test, but instead to ask whether the predicate offense "prohibits" the specified conduct.

Application Note 1 admittedly veers closer to the "X is Y" formulation (a " 'controlled substance offense' include[s] the offense[ ] of . . . conspiring"). U.S.S.G. § 4B1.2 cmt. n.1. However, it uses the gerund "conspiring," which naturally refers to conduct, rather

than the offense of "conspiracy." And "include[s]" is not so far from "involv[es]." The Guideline itself then makes clear that the key test is whether the aim of the "conspiring" is certain prohibited conduct. See Piper, 35 F.3d at 19. Section 846 passes this test as well as any generic conspiracy offense does. U.S.S.G. § 4B1.2(b). All in all, we see nothing sufficient to overpower the strong sense that conspiring under section 846 of the Controlled Substances Act was one of many offenses the Sentencing Commission had in mind when stating, in Application Note 1, that the offense of conspiring to commit a controlled substance offense is a controlled substance offense.[3]

Having thus concluded that determining whether an offense is a controlled substance offense under section 2K2.1 requires only that we determine whether the offense prohibits the conduct specified in section

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[3] Rodríguez-Rivera contends that we should be guided by United States v. Benítez-Beltrán, in which this court assessed whether Benítez-Beltrán's prior conviction for attempted murder under Puerto Rico law qualifies as a "crime of violence" under the Guidelines. 892 F.3d 462, 465 (1st Cir. 2018). This court applied the categorical approach, as laid out in Taylor, to both the inchoate offense -- attempt -- and the underlying crime of conviction -- murder. Id. at 466. However, Rodríguez-Rivera's comparison to Benítez-Beltrán fails to surmount our Shular analysis. Section 4B1.2(a) defines a "crime of violence" as any offense punishable by more than one year of imprisonment that either "has as an element the use, attempted use, or threatened use of physical force against the person of another" or is one of several enumerated crimes, including "murder." Id. (citing U.S.S.G. § 4B1.2(a) (2016)). As discussed above, section 4B1.2(a) describes offenses with elements, lending itself to the Taylor approach, while section 4B1.2(b) describes conduct, as analyzed above.

4B1.2, our work is done without any need to identify the elements of any "generic" conspiracy offense.

III.

As we said at the outset, we confirmed in Lewis that circuit precedent regards an offense of conspiracy, within the meaning of Application Note 1 to section 4B1.2 of the Guidelines, to be a controlled substance offense under that section. On plain error review, we left unresolved only whether conspiring under section 846 is "conspiring" within the meaning of Application Note 1. For the foregoing reasons, we conclude that it is. We therefore affirm Rodríguez-Rivera's sentence.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAYMOND RODRÍGUEZ RIVERA,

Defendant.

CRIMINAL 18-0402CCC

April 30, 2019

ORDER

Defendant Raymond Rodríguez Rivera filed an objection to his Pre-Sentence Report on March 5, 2019 (**d.e. 41**)[1] claiming that his base offense level (BOL) should be 20 and not 22, as determined therein. The U.S. Probation Officer applied that BOL of 22 pursuant to U.S.S.G. § 2K2.1(a)(3) after concluding that defendant possessed the machinegun involved in this case subsequent to a conviction for a controlled

[1] In his Motion, defendant also requested a myriad of corrections to factual information included in the PSR (see d.e. 41, pp. 3-4). It appears that these were all corrected in the amended Pre-Sentence Report filed on March 28, 2019 (d.e. 46), so we do not address them here.

substances offense. Defendant contends, however, that he does not have a prior conviction for a controlled substance offense as defined by the U.S. Sentencing Guidelines. The United States responded to defendant's objection on March 27, 2019 (d.e. 45), agreeing with the PSR's BOL calculation.

There is no quarrel that the offense of conviction involves a machinegun. It is also an established fact that in 2005 defendant was convicted in Criminal No. 03-316(HL) of conspiring to possess with the intent to distribute cocaine, cocaine base and heroin in violation of 21 U.S.C. § 846, for which he was sentenced to serve a term of imprisonment of 24 months. See PSR (d.e. 46), at p. 8, paragraph 35. Pursuant to U.S.S.G. section 2K2.1(a)(3), a BOL of 22 is applicable if the offense involved a "firearm that is described in 26 U.S.C. § 5845(a); [i.e., a machinegun] and . . . the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of . . . a controlled substance offense." The Guidelines, in turn, define a "controlled substance offense" in its section 4B1.2(b) as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." Application Note 1 to said Guideline section clarifies that the definition of "controlled substance offense" includes "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."

Defendant, however, posits that section 2K2.1(a)(3) if inapplicable for he claims that his section 846 conspiracy conviction does not satisfy the Guidelines' definition of a controlled substance offense "because its elements do not track the generic definition of conspiracy." Objections, at p. 2. In making this assertion, he relies in the unpublished opinion of the Court of Appeals for the Fourth Circuit in United States v. Whitley, 737 Fed. Appx. 147 (4th Cir. 2018). There, the Court held:

> Because the Guidelines do not define "conspiracy," the term "should be understood to refer to the generic, contemporary meaning of the crime." [United States v. McCollum, 885 F.3d 300, 307 (4th Cir. 2018)] (internal quotation marks omitted). An overt act is an element of the generic definition of conspiracy. Id. at 308. Comparing the elements of conspiracy under 21 U.S.C. § 846 to this generic definition, it is clear that they do not correspond to generic conspiracy. The elements of conspiracy under § 846 require the Government to prove only that: "(1) an agreement to [distribute and] possess cocaine [base] with intent to distribute existed between two or more persons; (2) the defendant knew of the conspiracy; and (3) the defendant knowingly and voluntarily became a part of th[e] conspiracy." United States v. Burgos, 94 F.3d 849, 857 (4th Cir. 1996) (en banc). Unlike generic conspiracy, a conviction under § 846 does not require the Government to prove any overt act. United States v. Shabani, 513 U.S. 10, 11, 115 S.Ct. 382, 130 L.Ed. 2d 225 (1994);

> United States v. Min, 704 F.3d 314, 321 (4th Cir. 2013). Instead, the "gravamen" of the crime is "an agreement to effectuate a criminal act." Burgos, 94 F.3d at 857 (internal quotation marks omitted). Finally, because § 846 does not require an overt act, "it criminalizes a broader range of conduct than that covered by generic conspiracy." McCollum, 885 F.3d at 309. Accordingly, Whitley's prior § 846 conspiracy convictions cannot support his enhanced sentencing as a career offender because they are not categorically controlled substance offenses.

Defendant's argument, however, clashes with precedent from the Court of Appeals for the First Circuit. In United States v. Piper, 35 F.3d 611 (1st Cir. 1994), the Court validated the district court's ruling that defendant's conspiracy conviction under 21 U.S.C. § 846 qualified as a controlled substance offense under Section 4B1.2 and its Application Note 1 for purposes of applying the career offender guideline, Section 4B1.1. And in its footnote 3, it further observed that while "the lower court ruled that the conspiracy conviction constituted a triggering offense . . . the relevant definitions are substantially identical, and, therefore, answering the question of whether a conspiracy charge can constitute a triggering offense for purposes of the career offender guideline necessarily answers the analogous question of whether a conspiracy conviction can constitute a predicate offense for such purposes." Unless and until the holding of Piper is revisited

by the Court of Appeals, we cannot follow the ruling of the Fourth Circuit in Whitley.

Applying the holding of Piper to this case, there is no logical reason why we should not consider defendant's Section 846 conspiracy conviction as a controlled substance offense under Section 4B1.2 and its Application Note 1 for purposes of applying Section 2K2.1(a)(3). Thus, we find that defendant's BOL was correctly determined under Section 2K2.1(a)(3) and his objection to its application is hereby OVERRULED.

SO ORDERED.

At San Juan, Puerto Rico, on April 30, 2019.

S/CARMEN CONSUELO CEREZO
United States District Judge

APPENDIX C

STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED

1. **18 U.S.C. § 371 provides:**

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2. **21 U.S.C. § 841 provides in pertinent part:**

(a) Unlawful acts

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

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

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

* * * * *

3. **21 U.S.C. § 846 provides:**

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

4. **U.S.S.G. § 4B1.1 provides:**

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum	**Offense Level**
(1) Life	37
(2) 25 years or more	34
(3) 20 years or more, but less than 24 years	32

(4)	15 years or more, but less than 20 years	29
(5)	10 years or more, but less than 15 years	24
(6)	5 years or more, but less than 10 years	17
(7)	More than 1 year, but less than 5 years	12.

(c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

(1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).

(2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of--

(A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and

(B) the guideline range determined using the table in subsection (c)(3).

(3) Career Offender Table for 18 U.S.C. § 924(c) or § 929(a) Offenders

§ 3E1.1 Reduction	Guideline Range for the 18 U.S.C. § 924(c) or § 929(a) Counts
No reduction	360-life
2-level reduction	292-365
3-level reduction	262-327.

5. **U.S.S.G. § 4B1.2 provides in pertinent part:**

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a

controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

COMMENTARY

<Application Notes:>

<1. Definitions.--For purposes of this guideline-- >

<"Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.>

<"Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an

offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.>

<"Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.>

<Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense.">

<Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense.">

<Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense.">

<Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense.">

<A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a

"controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under § 4A1.2 (Definitions and Instructions for Computing Criminal History).)>

<"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).>

* * * * *

6. **U.S.S.G. § 2K2.1 provides in pertinent part:**

(a) Base Offense Level (Apply the Greatest):

(1) 26, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at

least two felony convictions of either a crime of violence or a controlled substance offense;

(2) 24, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) 22, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) 20, if--

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

* * * * *

<Application Notes:>

<**1. Definitions.**--For purposes of this guideline:>

* * * * *

<"Controlled substance offense" has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1).>

<"Crime of violence" has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2.>

* * * * *

APPENDIX D

[N.B.: the following opinion was subsequently withdrawn on October 29, 2012, but is publicly available at Appendix A to Petition for Rehearing En Banc, *United States* v. *Rodriguez-Escareno*, 700 F.3d 751 (5th Cir. 2012) (No. 11-41063)]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-41063

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JESUS RODRIGUEZ-ESCARENO,
Defendant-Appellant.

Filed October 23, 2012

Appeal from the United States District Court
for the Southern District of Texas

Before WIENER, ELROD, and SOUTHWICK, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

The defendant pled guilty to illegal reentry following a deportation. He had earlier been convicted of a conspiracy to distribute methamphetamine. At his

sentencing for illegal reentry, the district court increased his sentence because it considered his earlier crime to be a "drug trafficking offense" as that term is defined by the Sentencing Guidelines. *See* U.S.S.G. § 2L1.2(b)(1)(A)(i). The defendant did not object. On appeal, he argues the enhancement was improper. Under plain-error review, we agree. We VACATE and REMAND.

FACTUAL & PROCEDURAL HISTORY

In April 2011, Texas authorities stopped a vehicle for exceeding the speed limit. One of the passengers was Jesus Rodriguez-Escareno, who was in the United States illegally after having been deported in 2006. He was detained. Subsequently, a grand jury in the United States District Court for the Southern District of Texas returned a one-count indictment against him for being found in the United States illegally following a deportation. *See* 8 U.S.C. § 1326. He pled guilty.

A Presentence Investigation Report ("PSR") was prepared. Using the Sentencing Guidelines, the PSR calculated that the base offense level was 8. The criminal history section of the PSR listed a 2001 conviction in the United States District Court for the Southern District of Iowa of conspiracy to distribute methamphetamine. The judgment stated that Rodriguez-Escareno had been charged under 21 U.S.C. §§ 846 and 841(b)(1)(B). Section 846 provides the same penalty for a conspiracy to commit one of the drug offenses listed in that chapter as for the underlying offense. The PSR determined that Rodriguez-Escareno's previous crime was a "drug trafficking offense," which permitted the application of the 16-level enhancement under U.S.S.G.

§ 2L1.2(b)(1)(A)(i). The offense level was reduced because he accepted responsibility for his illegal reentry. The PSR calculated a sentencing range of 41 to 51 months of imprisonment. Rodriguez-Escareno did not object to these calculations, and the district court adopted the PSR. Rodriguez-Escareno received a 48-month prison sentence. On appeal, he challenges only his sentence.

DISCUSSION

Rodriguez-Escareno did not object to the application of the Sentencing Guidelines. Consequently, we review only for plain error. *United States v. Gonzales*, 642 F.3d 504, 505 (5th Cir. 2011). Plain error exists when "(1) there was an error; (2) the error was clear and obvious; and (3) the error affected the defendant's substantial rights." *United States v. Guerrero-Robledo*, 565 F.3d 940, 942 (5th Cir. 2009) (quotation marks and citation omitted). If all three elements are proved, we have "the *discretion* to remedy the error – discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Escalante-Reyes*, 689 F.3d 415, 419 (5th Cir. 2012) (en banc) (quotation and citation omitted).

The issue in this case is whether a conspiracy conviction under 21 U.S.C. § 846 satisfies the requirements for the 16-level enhancement. The enhancement is for "conspiring" to commit an offense, but we must decide whether the elements of a Section 846 conspiracy are consistent with the meaning of "conspiring" in Application Note 5 of U.S.S.G. § 2L1.2(b)(1)(A)(i). This question has not been squarely decided in this circuit.

The district court implicitly held there was a sufficient similarity when it applied the 16-level enhancement. Rodriguez-Escareno argues that was plainly erroneous because a violation of Section 846 does not require the government to prove that an overt act occurred in furtherance of the conspiracy, but the general usage of the word "conspiracy" carries that requirement. We look for meaning in two sources: definitions contained within the Guidelines itself and the word's "generic, contemporary meaning." *See United States v. Sanchez*, 667 F.3d 555, 560 (5th Cir. 2012); *see also United States v. Vargas-Duran*, 356 F.3d 598, 602 (5th Cir. 2004) (en banc).

Because the Guidelines do not define "conspiracy," we seek the term's generic, contemporary meaning. *Sanchez*, 667 F.3d at 560. That meaning can be revealed by "the Model Penal Code, treatises, federal and state law, dictionaries, and the Uniform Code of Military Justice." *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 379 (5th Cir. 2006). The meaning "generally corresponds to the definition in a majority of the States' criminal codes." *United States v. Tellez-Martinez*, 517 F.3d 813, 815 (5th Cir. 2008).

A leading legal dictionary defines "conspiracy" to require "(in most states) action or conduct that furthers the agreement." *Black's Law Dictionary* 329 (9th ed. 2009). A leading legal treatise agrees that is the majority view. 2 Walter R. LaFave, *Substantive Criminal Law* § 12.2 (2d ed. 2003). We too have found that "most jurisdictions" require proof of an overt act to establish a conspiracy. *United States v. Mendez-Casarez*, 624 F.3d 233, 240 (5th Cir. 2010). In a concurring opinion, Judge Higginbotham explained that the weight of authority shows the general

meaning "includes a requirement that at least one of the conspirators take an overt act in furtherance of the agreement." *United States v. Gore*, 636 F.3d 728, 745 (5th Cir. 2011) (Higginbotham, J., concurring).

We conclude from these sources that the generic, contemporary meaning of the word "conspiracy" contains an overt-act requirement. It has been settled since 1994 that Section 846 does not require that an overt act occur. *United States v. Shabani*, 513 U.S. 10, 13-14 (1994). It follows that the "conspiring" in Application Note 5 of Section 2L1.2(b)(1)(A)(i) of the Guidelines does not reach judgments of conviction of a conspiracy under Section 846.

The government concedes that a Section 846 conspiracy is not one that fits the generic, contemporary meaning of a conspiracy. It nonetheless argues that use of the enhancement was not erroneous. Its novel argument is that the meaning of a statutory term in a defendant's prior conviction under a *federal* criminal statute – or at least under Section 846 – should be deemed to be consistent with the meaning of the same term in the federal Guidelines. A term's generic, contemporary meaning should not matter when we are concerned with a prior federal conviction of the relevant crime. It is true that the caselaw in this area is primarily concerned with matching terms in state criminal statutes to the relevant term in the Guidelines. Still, there is no hint in the caselaw that different rules apply when the prior conviction is a federal one. Our conclusion remains that the enhancement was error.

We have found an erroneous application of the Guidelines. It must then also be shown that the error

was obvious. *Guerrero-Robledo*, 565 F.3d at 942. For an error to be of that character, its existence cannot be subject to reasonable dispute. *Puckett v. United States*, 556 U.S. 129, 135 (2009). Although many issues of first impression can be reasonably debated, decisions on issues of first impression may be clearly wrong. *United States v. Spruill*, 292 F.3d 207, 215 n.10 (5th Cir. 2002); *accord United States v. Burroughs*, 613 F.3d 233, 244 (D.C. Cir. 2010). A sentencing question of first impression may have an answer that "clearly and plainly follows from the terms of [the Guidelines], the wording of the . . . statute and the indictment, and our jurisprudence." *United States v. Insaulgarat*, 378 F.3d 456, 471 (5th Cir. 2004).

By following the proper analytical path of examining a legal dictionary or leading treatise and applying our precedents, the error here clearly appears. *Cf. United States v. Blocker*, 612 F.3d 413, 416 (5th Cir. 2010). The government has not even argued that the generic, contemporary meaning of conspiracy omits an overt-act requirement. No precedent supports the district court's interpretation of "conspiracy" as not requiring an overt act. The error was plain.

We next consider whether this obvious error affected Rodriguez-Escareno's substantial rights. Rodriguez-Escareno must "demonstrate that the error affected the outcome of the district court proceedings." *Escalante-Reyes*, 689 F.3d at 424 (quotation marks and citation omitted). We examine "whether the error increased the term of a sentence, such that there is a reasonable probability of a lower sentence on remand." *Id.* (quotation marks and citation omitted). That standard has been met here.

Properly calculated under the Guidelines, the sentencing range should have been 15 to 21 months. This is a substantial difference from the 41 to 51 months determined by the district court. There is a reasonable probability that because of the erroneous 16-level enhancement, Rodriguez-Escareno received a sentence of 48 months, well above the correct Guidelines range. Similar circumstances have been found to affect a defendant's substantial rights. *E.g.*, *United States v. Garza-Lopez*, 410 F.3d 268, 273, 275 (5th Cir. 2005). As in this case, the district court in *Garza-Lopez* improperly applied a 16-level enhancement for a drug trafficking offense. We held that the error affected his substantial rights. *Id.* at 275. Rodriguez-Escareno's substantial rights also were affected by this plain error.

Because the three requirements to establish plain error have been met, we have discretion to reverse if the error affected "the fairness, integrity or public reputation of his sentencing proceedings." *Escalante-Reyes*, 689 F.3d at 425.

The plain error in applying the "drug trafficking offense" enhancement resulted in a Guidelines range of 41 to 51 months and an actual sentence of 48 months. The correctly calculated Guidelines range was 15 to 21 months. We have previously exercised our discretion to vacate a sentence when the error in the application of the Guidelines resulted in a range that was significantly higher than the correctly calculated Guidelines range. *See, e.g.*, *United States v. Gonzales*, 484 F.3d 712, 716 (5th Cir. 2007) (per curiam). We are convinced here that this error, which caused a sentence to be more than three times the low end of the Guideline range, "seriously affects the

fairness, integrity, or public reputation of his sentencing proceedings."

Accordingly, we VACATE the sentence and REMAND for re-sentencing.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-41063

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESUS RODRIGUEZ-ESCARENO,

Defendant-Appellant.

Filed October 29, 2012

Appeal from the United States District Court
for the Southern District of Texas

Before WIENER, ELROD, and SOUTHWICK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the opinion filed in this case on October 23, 2012 is WITHDRAWN. A subsequent opinion will issue at a later date.