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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (MARCH 22, 2021)

PUBLISHED

991 F.3d 652 (5th Cir. 2021)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BUCK GENE BRUNE,

Defendant-Appellant.

No. 19-11360

Appeal from the United States District Court for the Northern District of Texas No. 4:19-CR-159-1

Before: JONES, SMITH, and ELROD, Circuit Judges.

JERRY E. SMITH, *Circuit Judge*:

Buck Brune is a methamphetamine ("meth") dealer. In charging him, the government accidentally cited the wrong statutory subparagraph. After Brune had pleaded guilty, the court copied that error into

its order accepting his plea but later corrected it. The court applied a sentencing enhancement on the ground that some of Brune's meth was imported. Brune contends that the court's correction of the erroneous citation amounted to double jeopardy and that the enhancement was erroneous. We find no error and affirm.

I.

Brune distributed at least 50-75 pounds of meth over nine months. For five months, he sold half a pound of meth to one coconspirator each day. His supplier was "a member of the Michoacán Cartel based in Dallas, Texas."[1] Brune concedes that that cartel "borrow[s] its name from a state in Mexico."

The government filed a one-count information based on the conspiracy provision of 21 U.S.C. § 846, charging Brune with conspiracy to violate "21 U.S.C[.] §§ 841(a)(l) and (b)(l)(C), namely to possess with intent to distribute a mixture and substance containing more than 50 grams of methamphetamine." But the information cited the wrong part of § 841(b)(1): Subparagraph B—not C—criminalizes possession of a substance containing more than 50 grams of meth. In contrast, subparagraph C provides "the baseline statutory penalty for <u>any quantity</u> of methamphetamine." *United States P. Doggett*, 230 F.3d 160, 166 (5th Cir. 2000) (emphasis added). Subparagraph B's penalty range is 5 to 40 years, § 841(b)(1)(B); subparagraph C's is 20 years or less, § 841(b)(1)(C). The parties

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[1] Although that statement makes it unclear whether the cartel or the member is based in Dallas, Brune agrees that "his source was [*sic*] Michoacán cartel member based in Dallas, Texas."

agree that subparagraph C is a lesser-included offense of subparagraph B.

Despite that initial error and without any plea agreement, Brune pleaded guilty to subparagraph B,[2] referencing it nine times. For instance, Brune's factual resume cited subparagraph B, twice indicated that Brune was subject to its penalty range, and twice parroted its 50-gram threshold. Brune's waiver of indictment also cited subparagraph B. At arraignment, Brune admitted he understood its elements and penalty range. His lawyer admitted that "the intention of the parties was for Mr. Brune to enter a guilty plea to that offense, which was in the factual resume, and that would be a five to 40 count"—namely subparagraph B.

In recommending that the district court accept Brune's guilty plea, however, the magistrate judge copied the information's erroneous citation. The district court adopted that recommendation, accepted the plea, and adjudged Brune guilty. Thus, the presentence investigation report came back with subparagraph C's "maximum term of imprisonment," namely "20 years," even though it should have been 40 years under subparagraph B. The government raised two objections.

First, the government noted that Brune pleaded guilty to subparagraph B—not C. Brune countered, contending, *inter alia*, that modification of the court's order accepting his plea would violate the prohibition against double jeopardy. The district court rejected

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[2] We use "pleaded guilty to subparagraph B" as a shorthand way of denoting his guilty plea of conspiracy to violate that provision.

Brune's contentions and amended its order to reflect that it was accepting Brune's guilty plea to subparagraph B.

Second, the government requested a sentencing enhancement for an offense involving "importation of . . . methamphetamine," which would raise Brune's offense level by two.[3] Brune countered that there was insufficient evidence for that enhancement, because Brune's supplier was "based in Dallas." The court found there was sufficient evidence that Brune conspired to possess meth that "originated in . . . Mexico."

II.

The government contends that jeopardy never attached.[4] Our review is *de novo*. *United States v. Dugue*, 690 F.3d 636, 637-38 (5th Cir. 2012) (per curiam). We (A) determine that jeopardy does not always attach upon acceptance of a guilty plea, (B) explain the framework for analyzing attachment under *Ohio v. Johnson*, 467 U.S. 493 (1984), and (C) apply that framework. There was no double-jeopardy violation.

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[3] U.S.S.G. § 2D1.1(b)(5). With that enhancement, the recommended sentence was 360 to 480 months. Without it, the recommended sentence would have been 292 to 365 months.

[4] At oral argument, the government also said that "[t]his is not a case involving successive prosecutions." We do not decide whether modification of an order accepting a guilty plea, which contains a clerical error, constitutes a successive prosecution, because Brune's double-jeopardy theory fails in any event.

A.

"No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. To violate that clause, the initial prosecution must have "put [the defendant] in jeopardy." *Id.* That inquiry becomes important where the initial prosecution gets derailed.

If a trial gets derailed, it still puts the defendant in jeopardy if jeopardy (1) attached and (2) terminated.[5] Attachment refers to the "point in criminal proceedings at which [double-jeopardy] purposes and policies are implicated." *Serfass v. United States*, 420 U.S. 377, 388 (1975). For instance, in a jury trial, attachment occurs "when the jury is empaneled and sworn." *Crist v. Bretz*, 437 U.S. 28, 38 (1978). Termination means that double jeopardy does not bar a second prosecution where "criminal proceedings against an accused have not run their full course." *Justs. of Bos. Mun. Ct. v. Lydon*, 466 U.S. 294, 308 (1984) (quotation marks and citation omitted). For instance, a mistrial for a deadlocked jury does not terminate jeopardy, *see Richardson v. United States*, 468 U.S. 317, 323-24 (1984), but an acquittal does, *see Lydon*, 466 U.S. at 308.

Where a guilty plea gets derailed, the Supreme Court has neither identified a precise moment of attachment[6] nor applied the concept of termination.[7]

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[5] *See Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003); 6 Wayne R. Lafave et al., Criminal Procedure § 25.1(d)-(e) (4th ed. 2020).

[6] "[J]eopardy attache[s] at least when [a defendant] [is] sentenced." *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987).

[7] We found only one state court that has applied termination to guilty pleas. *See People v. Cabrera*, 932 N.E.2d 528, 538–39 (Ill.

That reticence left lower courts to fill in the gaps. Because acceptance of a guilty plea is arguably analogous to a jury verdict, courts initially intuited that jeopardy attaches upon acceptance of a guilty plea.[8] For instance, in our first foray into the issue, in *United States v. Sanchez*, 609 F.2d 761, 762 (5th Cir. 1980), we agreed that "[j]eopardy attaches with the acceptance of a guilty plea." Relying solely on a now-abrogated, out-of-circuit case,[9] we provided no reasoning for that conclusion.

It is no surprise, then, that four years later, the Supreme Court "effectively reject[ed] the double jeopardy concerns expressed . . . in *Sanchez*."[10] In *Johnson*, 467 U.S. at 494, the government charged the defendant with two sets of greater and lesser-included offenses. Johnson pleaded guilty—over the government's objection—of the two lesser-included offenses, then moved to dismiss the greater offenses on double-jeopardy grounds. *Id.* In rejecting that claim,

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App. Ct. 2010). We know of no federal court that expressly applied termination to plea proceedings. And, as noted below, *Johnson*'s test does not resemble the test for termination. *See* Part II.A.2.b, *infra*. Moreover, neither party asks us to apply termination, so we decline to invoke that concept here.

8 *See, e.g.*, *United States v. Jerry*, 487 F.2d 600, 606 (3d Cir. 1973) ("Jerry must be considered to have been convicted by the entry of his plea of guilty just as if a jury had found a verdict of guilty against him.").

9 *See Sanchez*, 609 F.2d at 762 (citing *Jerry*, 487 F.2d at 606); *see also Gilmore v. Zimmerman*, 793 F.2d 564, 571 (3d Cir. 1986) (concluding that *Jerry* "is inconsistent with . . . *Johnson*").

10 *United States v. Foy*, 28 F.3d 464, 471 n.13 (5th Cir. 1994). The government acknowledges that that statement is *dictum*.

the Court applied two concepts that relate to attachment and termination.

First, although attachment occurs where double-jeopardy "purposes and policies are implicated," *Serfass*, 420 U.S. at 388, *Johnson*, 467 U.S. at 501, concluded that no double-jeopardy interest "is implicated" in the "acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending." Thus, although *Sanchez* had suggested the opposite,[11] double jeopardy did not bar prosecution of a greater offense after a plea of a lesser-included offense.

Second, the Court applied a rationale reminiscent of termination's requirement that proceedings "run their full course" before a defendant can successfully invoke double jeopardy. *Lydon*, 466 U.S. at 308 (quotation marks and citation omitted). Specifically, in *Johnson*, 467 U.S. at 502, the Court sought to ensure that the government has "one full and fair opportunity to convict those who have violated its laws."

Thus, instead of expressly determining whether jeopardy attached and terminated, the Court analyzed (1) "finality" and (2) "prevention of prosecutorial overreaching," concluding that "[n]o interest . . . protected by the Double Jeopardy Clause [was] implicated" in that situation. *Id.* at 501. Although that framework differs from the attachment and termination bookends that the Court employs when examining a trial, *Johnson* recognized differences between guilty pleas

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11 *See Sanchez*, 609 F.2d at 762 ("[A]cceptance of a guilty plea to [a lesser-included] charge would bar later prosecution on the [greater] charge.").

and trials.[12] Specifically, guilty pleas provide prosecutors no "opportunity to marshal [their] evidence and resources." *Id.* A defendant can plead guilty even over the government's objection. *Id.* at 494. That distinction undermines the assumption of lower courts—which infected *Sanchez*—that guilty pleas are relevantly analogous to jury verdicts and that jeopardy, therefore, attaches upon acceptance of a guilty plea.

Nonetheless, our opinions have continued to recite *Sanchez*'s rule that jeopardy attaches upon acceptance of a guilty plea.[13] We must decide whether *Johnson* abrogated that statement. Brune contends that, under *Sanchez*, jeopardy attaches upon acceptance of a guilty plea. The government contends that *Johnson* rejected *Sanchez*'s double-jeopardy concerns, so jeopardy does not always attach upon acceptance of a guilty plea. We agree because (1) *Johnson* abrogated *Sanchez*'s statement about attachment, (2) Brune's counterarguments are not persuasive, and (3) the rule of orderliness does not preclude that conclusion.

1.

Johnson abrogated *Sanchez*'s statement regarding attachment. The First[14] and Third[15] Circuits agree

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[12] *Cf. Johnson*, 467 U.S. at 500 n.9 (concluding, in the context of a collateral-estoppel claim based on the Double Jeopardy Clause, that guilty pleas are "not the same as . . . adjudication[s] on the merits after full trial")

[13] *See, e.g.*, *United States v. Jones*, 733 F.3d 574, 580 (5th Cir. 2013); *see also* Part II.A.3.b, *infra*.

[14] *See United States v. Santiago Soto*, 825 F.2d 616, 619 (1st Cir. 1987).

that, under *Johnson*, jeopardy does not always attach upon acceptance of a guilty plea. The Second Circuit implies that jeopardy attaches upon acceptance of a guilty plea[16] and treats *Johnson* as an exception to that rule, which applies only where (1) the prosecutor objects to a plea of a lesser-included offense and (2) and the charge on the greater offense remains pending.[17] The Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits either largely ignore *Johnson*[18] or skirt the issue.[19]

We conclude that jeopardy does not always attach upon acceptance of a guilty plea. Two lines of reasoning support that conclusion.

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15 *See Gilmore*, 793 F.2d at 571.

16 *See Morris v. Reynolds*, 264 F.3d 38, 49 (2d Cir. 2001) ("[T]he Supreme Court has established that, after a court accepts defendant's guilty plea to a lesser included offense, prosecution for the greater offense violates the Double Jeopardy Clause.").

17 *See Morris*, 264 F.3d at 49 ("In contrast, the Double Jeopardy Clause is not offended when the greater offenses charged in the indictment remain 'pending' at the time of a guilty plea, and when the prosecution objects to the plea to a lesser included offense.").

18 *See United States v. Bearden*, 274 F.3d 1031, 1037–38 (6th Cir. 2001); *United States v. Baggett*, 901 F.2d 1546, 1548 (11th Cir. 1990); *United States v. Patterson*, 381 F.3d 859, 864 (9th Cir. 2004); *but see United States v. Patterson*, 406 F.3d 1095, 1097 (9th Cir. 2005) (Kozinski, J., dissenting from denial of rehearing en banc).

19 *See United States v. Wampler*, 624 F.3d 1330, 1341 (10th Cir. 2010); *Bally v. Kemna*, 65 F.3d 104, 108 (8th Cir. 1995).

a.

Sanchez's rule about attachment is inconsistent with *Johnson*. Under *Sanchez*, jeopardy attaches upon acceptance of a guilty plea. *Sanchez*, 609 F.2d at 762. Moreover, lesser-included and greater offenses constitute the "same offense" for double-jeopardy purposes. *Brown v. Ohio*, 432 U.S. 161, 166 n.6 (1977). Thus, if *Sanchez* were correct that jeopardy attaches upon acceptance of a guilty plea of a lesser offense, then—under Supreme Court precedent[20]—a successive prosecution for a greater offense would implicate double-jeopardy interests.[21] Consequently, if jeopardy had attached upon acceptance of Johnson's guilty plea to the lesser-included offense, then prosecution of him for the greater offense would have had double-jeopardy consequences.[22]

But the government's prosecution of Johnson for the greater offense did not invoke double-jeopardy

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[20] Attachment occurs where double-jeopardy "purposes and policies are implicated." *Serfass*, 420 U.S. at 388. It follows that, if jeopardy attaches *vis-à-vis* a lesser-included offense, then prosecution of a greater offense would have double-jeopardy implications.

[21] *Sanchez*, 609 F.2d at 762 (concluding that, because jeopardy attaches upon acceptance of a guilty plea, "acceptance of a guilty plea to [a lesser-included] charge would bar later prosecution on the [greater] charge"). Brune likewise contends that, because jeopardy allegedly attaches upon acceptance of a guilty plea, "[a]cceptance of a plea to a

[22] *See Patterson*, 406 F.3d at 1097 (Kozinski, J., dissenting from denial of rehearing en banc) ("If jeopardy had attached when [Johnson] pled guilty to the lesser offenses, the Double Jeopardy Clause would have barred the state from prosecuting him.").

interests.[23] It necessarily follows that jeopardy did not attach upon the court's acceptance of Johnson's guilty plea of the lesser-included offense. Thus, under *Johnson* and contrary to *Sanchez*, jeopardy does not always attach upon acceptance of a guilty plea.

The Third Circuit came to a similar conclusion. Although the court had previously held that "jeopardy . . . attached with the acceptance of [a] guilty plea," *Jerry*, 487 F.2d at 606, the court later concluded that *Jerry*'s statement about attachment was "only an assumption," which "is inconsistent with . . . *Johnson*," *Gilmore*, 793 F.2d at 571. Importantly, *Jerry* was the sole basis for *Sanchez*'s statement that jeopardy attaches upon acceptance of a guilty plea. *See Sanchez*, 609 F.2d at 762 (citing *Jerry*, 487 F.2d at 606).

In sum, *Sanchez*'s rule about attachment is inconsistent with *Johnson*. Moreover, *Johnson* abrogated *Sanchez*'s sole buttress—*Jerry*. It is no surprise, then, that Brune concedes that *Sanchez* and *Johnson* are in conflict.[24] lesser-included charge bars later prosecution on the associated greater charge."

b.

Johnson's holding has the hallmarks of attachment, not some other facet of double jeopardy. For instance, attachment occurs at the "point in criminal

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[23] *See Johnson*, 467 U.S. at 501 (concluding that "acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending" does not implicate any "interest . . . protected by the Double Jeopardy Clause").

[24] Brune acknowledges that "*Johnson* limits . . . or gives some exceptions to *Sanchez*."

proceedings at which [double-jeopardy] purposes and policies are implicated."[25] Consistently with that concept, *Johnson*, 467 U.S. at 501, held that "[n]o interest . . . protected by the Double Jeopardy Clause is implicated" in that situation. *Johnson*'s focus on the threshold inquiry—whether double jeopardy is even implicated in the first place—thus sounds in attachment.

Conversely, *Johnson* does not resemble an exception to the double-jeopardy prohibition.[26] For instance, where the Supreme Court applies such an exception, it first "assume[s] that jeopardy attached" and then asks whether an exceptional circumstance "removed the double jeopardy bar." *Ricketts*, 483 U.S. at 8. *Johnson* neither assumed that jeopardy attached nor used language about removing the double-jeopardy bar.

Finally, although *Johnson*'s holding appears to implement the policy behind termination, *see* Part II.A, *supra*, it does not appear to engraft termination's legal test onto plea proceedings. For instance, to establish that jeopardy did not terminate after a trial, a prosecutor must show a "manifest necessity"

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[25] *Serfass*, 420 U.S. at 388; *see also United States v. Jorn*, 400 U.S. 470, 480 (1971) ("Thus the conclusion that 'jeopardy attaches' when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings.").

[26] Brune's counsel suggested at oral argument that *Johnson* might constitute an exception to *Sanchez*'s rule about attachment—not to the double-jeopardy prohibition in general. And, even if he is right in that interpretation of *Johnson*, we still must apply *Johnson*'s framework to see whether that exception would apply.

to "retry the defendant." *Richardson*, 468 U.S. at 323-24 (quotation marks and citation omitted). *Johnson* did not, however, employ anything akin to the manifest-necessity standard.[27] In fact, the First and Third Circuits, which had attempted to graft that standard onto pleas, concluded that *Johnson* was inconsistent with those precedents. *See Soto*, 825 F.2d at 619; *Gilmore*, 793 F.2d at 571.

In short, *Johnson*'s holding has more to do with attachment than with termination or an exception to the double-jeopardy bar.

2.

Brune raises two counterarguments.[28] Neither is persuasive.

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[27] *See Johnson*, 467 U.S. at 494-502; *Soto*, 825 F.2d at 619 (concluding that, under *Johnson*, "it becomes unnecessary to demonstrate 'manifest necessity' to warrant a judicial vacation of a guilty plea").

[28] Additionally, Brune contends, for the first time in his reply brief, that *Sanabria v. United States*, 437 U.S. 54, 69 (1978), stands for the proposition that "final judgment as to one substantive charge contained in the single count of the information bars future prosecution of [*sic*] other charge contained in the same count." "We ordinarily disregard arguments raised for the first time in a reply brief." *Cotropia v. Chapman*, 978 F.3d 282, 289 n.14 (5th Cir. 2020) (cleaned up). Even if he had properly presented that argument, it would fail for two reasons.

First, the trial court acquitted Sanabria after trial had begun, *Sanabria*, 437 U.S. at 59, and the Court concluded that "a verdict of acquittal . . . may not be reviewed . . . without putting the defendant twice in jeopardy," *id.* at 64 (cleaned up). Here, the court accepted Brune's guilty plea—it did not acquit him. Moreover, the acceptance of a guilty plea, at least where a charge remains pending, "has none of the implications" of an

a.

The Supreme Court said—about a century ago, in a case that didn't mention double jeopardy—that "[a] plea of guilty . . . is itself a conviction." *Kercheval v. United States*, 274 U.S. 220, 223 (1927). And double jeopardy prohibits "a second prosecution for the same offense after conviction." *Johnson*, 467 U.S. at 498 (quotation marks and citation omitted). Thus, if we myopically weld those precedents together, the argument goes, attachment must occur upon the plea of guilty, because that is when the conviction occurs. *See Morris*, 264 F.3d at 49. The *Johnson* dissenters made that sort of argument and lost.[29] It is no surprise, then, that, besides its cameo in *Morris*, that argument largely inhabits pre-*Johnson* concurrences[30] and student notes.[31] Brune raises it here, and it fails for three reasons.

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acquittal after trial has already begun. *Johnson*, 467 U.S. at 501-02. Second, the acquittal in *Sanabria* constituted a final judgment. *Sanabria*, 437 U.S. at 72-73. But the court modified its acceptance of Brune's guilty plea before it sentenced him or entered judgment.

[29] *See Johnson*, 467 U.S. at 503 (Stevens, J., dissenting) (concluding that "a plea of guilty has the same legal effect as a conviction" and that double jeopardy "prohibits prosecution of a defendant for a greater offense when he has already been convicted on the lesser included offense" (cleaned up)). That argument also made a brief appearance in Ninth Circuit *dictum*. *See United States v. Smith*, 912 F.2d 322, 324-25 (9th Cir. 1990).

[30] *See United States v. Combs*, 634 F.2d 1295, 1300 (10th Cir. 1980) (McKay, J., concurring in part and dissenting in part).

[31] Andrew Cassady, Comment, *No Rest for the Weary: Double Jeopardy Implications of Vacating a Defendant's Guilty Plea*, 81 U. Cin. L. Rev. 1539, 1551 (2013).

First, that theory is inconsistent with *Johnson*. If Johnson's guilty plea of a lesser-included offense constituted his conviction for double-jeopardy purposes, then the government's subsequent prosecution would have implicated double-jeopardy interests. But the subsequent prosecution did not do that. *Johnson*, 467 U.S. at 501. And, to the extent that *Kercheval* conflicts with *Johnson*, we must follow *Johnson* as the Court's later pronouncement.

Second, Brune cherry-picks *Kercheval*'s language. In *Kercheval*, 274 U.S. at 225, the Court had nothing to say about double jeopardy; it concluded that evidence of a withdrawn guilty plea is inadmissible at trial. In any event, a more vigorous examination of *Kercheval* undermines Brune's argument. Although Brune notes *Kercheval*'s statement that a guilty plea is "conclusive" of guilt, he omits its observation that it would be wrong to "hold [a withdrawn] plea conclusive." *Id.* at 224. *Kercheval* even noted that, in some circumstances, courts may "vacate a plea of guilty," "substitute a plea of not guilty," and "have a trial." *Id.* Brune does not engage with any of that language. We thus decline to graft *Kercheval*'s inapposite, cherry-picked statement onto the double-jeopardy context in a manner that undermines *Johnson*.

Third, Brune's reasoning places more weight on *Kercheval*'s use of "conviction" than it can bear. *See id.* at 223. Because a judgment of conviction can occur only after sentencing, FED. R. CRIM. P. 32(k)(1), a "defendant ha[s] not been formally convicted" until

"entry of judgment and sentencing on the accepted guilty plea."[32]

b.

Some scholars suggest that jeopardy attaches where "the risks of injury" are sufficiently great. LAFAVE ET AL., *supra*, § 25.1(d) (quotation marks and citation omitted). Moreover, a guilty plea exposes a defendant to risks, because it constitutes an admission of material facts along with a waiver of myriad rights. *Combs*, 634 F.2d at 1300 (McKay, J., concurring in part and dissenting in part). Thus, Brune contends that, "[w]ith the risk of a determination of guilt, jeopardy attaches." That argument fails for two reasons.

First, Brune confuses necessary and sufficient conditions. Citing *Serfass*, 420 U.S. at 3992, he contends that a risk of a determination of guilt is sufficient to show attachment.[33] But he shrewdly omits any quotation, because *Serfass* really says that,

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[32] *Combs*, 634 F.2d at 1298; *see also Mitchell v. United States*, 526 U.S. 314, 325 (1999) (rejecting the notion that "incrimination is complete once guilt has been adjudicated," if a "sentence has yet to be imposed" (quoting *Estelle v. Smith*, 451 U.S. 454, 462 (1981)).

[33] He also contends that jeopardy attaches whenever a procedure begins before a trier of fact who can determine guilt. He is right that double jeopardy "does not come into play until a proceeding begins before a trier having jurisdiction to try the question of the guilt or innocence of the accused." *Serfass*, 420 U.S. at 391 (quotation omitted). But that does not mean that identification of a procedure before a trier of fact is sufficient to show attachment. For instance, procedures—such as motions and opening statements—occur in front of a trier of fact before jeopardy attaches in a bench trial. *See Crist*, 437 U.S. at 49 (Powell, J., dissenting).

"[w]ithout risk of a determination of guilt, jeopardy does not attach." *Id.* Thus, *Serfass* said that risk is necessary—not sufficient—to show attachment. That makes sense, because, before trial, a defendant must conduct motions and jury selection, which "may decide the defendant's case." *Crist*, 437 U.S. at 49 (Powell, J., dissenting). Yet, even with exposure to those risks, jeopardy does not attach until later. *Id.* Thus, pointing to some risk of a determination of guilt is not enough to show that jeopardy attaches.

Second, Brune's single-minded focus on risks ignores the government's interest in completing its prosecution. Yet, *Johnson*, 467 U.S. at 502, considered it relevant that "ending prosecution now would deny the State its right to one full and fair opportunity to convict those who have violated its laws." A singular focus on risks would allow a defendant to place himself in jeopardy—by pleading guilty—and thus "use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution." *Id. Johnson*, therefore, bars us from focusing on risk to the exclusion of the government's interest in completing its prosecution.

3.

Given those considerations, jeopardy does not always attach upon acceptance of a guilty plea.[34] We

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[34] *Accord Patterson*, 406 F.3d at 1097 (Kozinski, J., dissenting from denial of rehearing en banc); *Soto*, 825 F.2d at 620; *Gilmore*, 793 F.2d at 571; Lafave et al., *supra*, § 25.1(d) (concluding that the rule that jeopardy attaches upon acceptance of a guilty plea is "an oversimplification, one that fails to speak to the many situations in which a guilty plea will not bar further prosecution").

thus join the majority of circuits that have analyzed the impact of *Johnson* and, in doing so, we affirm our only previous analysis of that issue, namely that *Johnson* "effectively reject[ed] the double jeopardy concerns expressed . . . in *Sanchez*." *Foy*, 28 F.3d at 471 n.13. The rule of orderliness does not preclude that conclusion, because (a) *Sanchez* made pronouncements about attachment only in now-abrogated *dicta*, and (b) none of our later opinions reciting *Sanchez*'s rule about attachment grappled with whether *Johnson* rejected *Sanchez*'s rule.

a.

Sanchez made conclusions about attachment only in *dicta*. For instance, although *Sanchez*, 609 F.2d at 762, stated that "[j]eopardy attaches with the acceptance of a guilty plea," the trial court accepted Sanchez's guilty plea only conditionally, so there was no double-jeopardy violation, *id.* at 763. Because any successive prosecution occurred before acceptance of the guilty plea, we needed only to conclude—as then-Judge Gorsuch did in his analysis of that issue—that jeopardy does not attach at least until acceptance of a guilty plea.[35]

Because the broader assumption about attachment was unnecessary to our decision, that "broad and unnecessary language of [*Sanchez*] [can]not be

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[35] *See Wampler*, 624 F.3d at 1341 ("[J]eopardy does not attach *at least* until the guilty plea is accepted, and perhaps not until even later." (emphasis added)); *cf. Ricketts*, 483 U.S. at 8 ("[J]eopardy attache[s] *at least* when [a defendant] [is] sentenced." (emphasis added)).

considered binding authority."[36] Moreover, because *Johnson* "implicitly overrule[d]" *Sanchez*'s statement about attachment, "we have the . . . obligation to declare and implement this change in the law." *Hines v. Quillivan*, 982 F.3d 266, 271 (5th Cir. 2020) (quotation marks and citation omitted). In short, *Sanchez*'s statements about attachment are abrogated *dicta*.

b.

We have repeated *Sanchez*'s rule about attachment in three, post-*Johnson*, published cases.[37] None of those opinions, however, grappled with whether *Johnson* rejected *Sanchez*'s rule.[38] And, under the rule of orderliness, "[a]n opinion restating a prior panel's ruling does not *sub silentio* hold that the prior ruling survived an uncited Supreme Court decision." *Gahagan v. United States Citizenship & Immigr. Servs.*, 911 F.3d 298, 302 (5th Cir. 2018). Thus, "the rule of orderliness has little persuasive force when the prior panel decision at issue conflicts with a Supreme Court case to which the subsequent panel decision is faithful." *Kennedy v. Tangipahoa Par. Libr. Bd. of Control*, 224 F.3d 359, 370 n.13 (5th Cir. 2000). Because our prior opinions did not analyze whether *Johnson* abrogated *Sanchez*'s rule about

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[36] *Texaco Inc. v. Duhé*, 274 F.3d 911, 920 n.13 (5th Cir. 2001) (citing *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972)).

[37] *See Jones*, 733 F.3d at 580; *United States v. Kim*, 884 F.2d 189, 191 (5th Cir. 1989); *Fransaw v. Lynaugh*, 810 F.2d 518, 523 (5th Cir. 1987).

[38] *See Jones*, 733 F.3d at 580; *Kim*, 884 F.2d at 191; *Fransaw*, 810 F.2d at 523.

attachment, we are not bound by their rote recitations of *Sanchez*'s rule.[39]

B.

Because jeopardy does not always attach upon acceptance of a guilty plea, we next determine the test for ascertaining when it attaches.

Johnson had to address that same question. Specifically, the Court had held that the Double Jeopardy Clause barred prosecution of a greater offense after a court accepted a guilty plea and sentenced for a lesser-included offense. *Brown*, 432 U.S. at 169, 162.

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[39] *See Gahagan*, 911 F.3d at 302. The parties also debate the district court's statutory power to correct an erroneous citation in an order accepting a guilty plea, but a "court may at any time correct a clerical error in a[n] . . . order." Fed. R. Grim. P. 36. We have "used Rule 36 to correct errors in the judgment relating to . . . the offense underlying a plea." *United States v. Cooper*, 979 F.3d 1084, 1089 (5th Cir. 2020), *cert. denied*, 2021 WL 1073631 (U.S. Mar. 22, 2021) (No. 20-7122).

Specifically, where a "judgment refers to the offense of conviction" as one offense, but "the record indicates that [the defendant] pleaded guilty to" another offense, that "reflects a clerical error in the written judgment." *United States v. McCoy*, 819 F. App'x 262, 262 (5th Cir. 2020) (per curiam). Given the nine references to subparagraph B, "the record indicates that [Brune] pleaded guilty" to it. *Id.* Moreover, the "transcript of the plea hearing makes clear that [Brune] pleaded guilty" of subparagraph B, given its multiple references thereto. *Cooper*, 979 F.3d at 1089. Finally, the district court's modification of its order did not "contradict[] the court's and the parties' intentions as to the judgment." *United States v. Crawley*, 463 F. App'x 418, 421 (5th Cir. 2012) (per curiam). As Brune's counsel frankly admitted, "the intention of the parties was for Mr. Brune to" plead guilty to subparagraph B. The district court had statutory authority to correct its clerical error.

Because *Johnson* also involved a successive prosecution of a greater offense after a plea of a lesser-included offense, the Court needed to distinguish *Brown*—which implicated double jeopardy—from *Johnson*—which did not. *Johnson*, 467 U.S. at 496. To do so, the Court determined that "the principles of finality and prevention of prosecutorial overreaching applied in *Brown*" were absent in *Johnson*. *Id.* at 501.

Johnson thus "provided a framework . . . for determining whether jeopardy attaches when a defendant pleads guilty."[40] Courts must examine "the twin aims of the Double Jeopardy Clause: protecting a defendant's finality interests and preventing prosecutorial overreaching." *Patterson*, 406 F.3d at 1097 (Kozinski, J., dissenting from denial of rehearing en banc).

The Second Circuit disagrees, concluding that the lodestar of *Johnson*'s analysis was the fact that the greater charge remained pending at the time Johnson pleaded guilty of the lesser-included offense.[41] *Johnson*, however, used "pending" once. *Johnson*, 467 U.S. at 501. Moreover, it did so only within its analysis of finality and prosecutorial overreach. *See id.* To be sure, whether a charge of a greater offense was pending may prove relevant, but that was not the Court's guiding principle in distinguishing *Brown*.

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40 *Patterson*, 406 F.3d at 1097 (Kozinski, J., dissenting from denial of rehearing en banc); *see also Soto*, 825 F.2d at 620 (examining the potential for prosecutorial overreach and a defendant's finality interests to determine whether jeopardy attached).

41 *See Morris*, 264 F.3d at 50 ("[T]he only question is whether the felony charge was 'pending.'").

C.

To determine whether jeopardy attached, we consider (1) Brune's finality interest and (2) prevention of prosecutorial overreach.

1.

Johnson employed three considerations in ascertaining a defendant's finality interest. None is present here.

First, the Court asked whether the situation before it involved any of the "implications of an implied acquittal which results from a verdict . . . rendered by a jury." *Id.* at 501-02 (cleaned up). "The mere acceptance of a guilty plea," however, "does not carry the same expectation of finality and tranquility that comes with a jury's verdict." *Soto*, 825 F.2d at 620. Moreover, given a court's ability to correct errors, an erroneous citation in an order accepting a plea does not imply an acquittal. Fed. R. Crim. P. 36.

Second, *Johnson* asked whether "the State had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial." *Johnson*, 467 U.S. at 501. The government had no opportunity to marshal evidence against Brune, however, because his plea proceedings "[did] not involve the ordeal of a trial." *Soto*, 825 F.2d at 618.

Third, *Johnson*, 467 U.S. at 501, noted that the charges of the greater offenses were pending, which was relevant presumably because "Johnson could have foreseen a prosecution on the pending charges," *Soto*, 825 F.2d at 619. Evidence abounds that Brune foresaw a subparagraph B prosecution. His factual

resume referenced subparagraph B five times, reciting its citation, penalty range, and 50-gram threshold. His waiver of indictment cited that subparagraph. At his arraignment, the government referenced that subparagraph's elements and penalty range. Finally, Brune's counsel conceded that "the intention of the parties was for Mr. Brune to enter a guilty plea" to subparagraph B. Given that evidence, Brune's finality interest is even more miniscule than that of the defendant in *Johnson*: Johnson was merely on notice of his greater offense; Brune intended to plead guilty of his.

In short, Brune intended to plead guilty to subparagraph B. Because the government botched its citations, he now seeks "an undeserved windfall by shaving" years off his sentence. *Patterson*, 406 F.3d at 1095 (Kozinski, J., dissenting from denial of rehearing en banc). In other words, Brune seeks to "use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution" of subparagraph B—a contingency that *Johnson* sought to avoid.[42] Brune's finality interest is nil.

2.

Johnson employed two considerations in identifying prosecutorial overreach. First, in *Johnson*, 467 U.S. at 501-02, there was no overreach where the charge for the greater offense remained "pending." In contrast, some authorities suggest there might be

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[42] *Johnson*, 467 U.S. at 502. Brune suggests that *Johnson* is limited to cases in which a defendant proactively games the system—not where he passively stumbles across a windfall and then invokes double jeopardy. *Johnson*, however, did not limit its reasoning to defendants who proactively game the system.

overreach where the government charges a defendant "with a second crime after getting him to plead guilty" with a plea agreement.[43] The government did not bring new charges against Brune. Nor did it dupe him with a plea agreement—there never was one to begin with.

Second, *Johnson*, 467 U.S. at 502, considered whether "ending prosecution now would deny the [government] its right to one full and fair opportunity to convict those who have violated its laws." Because Brune's case has not gone to trial, and the government has not dismissed the charge for subparagraph B, the government has not yet had one full opportunity to convict him of subparagraph B. And there's nothing unfair to Brune about that result: The government seeks to prosecute him for the only charge to which Brune himself pleaded guilty.

In sum, the Double Jeopardy Clause "was not written or originally understood to pose an insuperable obstacle to the administration of justice in cases"—like Brune's—"where there is no semblance of . . . oppressive practices." *Currier P. Virginia*, 138 S. Ct. 2144, 2149 (2018) (quotation marks and citation omitted). Correction of a typo isn't oppressive.

Because Brune's finality interest is low, and there is no evidence of prosecutorial overreach, jeopardy

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[43] *See Patterson*, 406 F.3d at 1099 (Kozinski, J., dissenting from denial of rehearing en banc); *see also* LaFave et al., *supra*, § 25.1(d) (finding potential for prosecutorial overreach where the government prosecutes a greater offense after "enter[ing] into an agreement that a greater charge will be dismissed in exchange for the defendant's plea to a lesser charge").

did not attach upon the court's acceptance of Brune's guilty plea. There is no double-jeopardy violation.

III.

Brune avers that the district court clearly erred in applying an "importation" sentencing enhancement. We disagree.

Under U.S.S.G. § 2D1.1(b)(5), a court can increase a defendant's offense level by two if his offense "involved the importation of . . . methamphetamine." "We review the district court's factual determination that an offense involved the importation of methamphetamine for clear error."[44] We will find no clear error so long as the court's conclusion is "plausible in light of the record read as a whole." *United States P. Dinh*, 920 F.3d 307, 310 (5th Cir. 2019) (quotation marks and citation omitted).

Brune sold at least 50-75 pounds of meth over nine months. His supplier was a member of the Michoacán Cartel based in Dallas, and that cartel borrows its name from a Mexican state. Those facts support the inference that some of Brune's drugs were imported.[45] The importation finding is "plausible

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[44] *United States P. Nimerfroh*, 716 F. App'x 311, 315 (5th Cir. 2018) (per curiam); *see also United States P. Serfass*, 684 F.3d 548, 550 (5th Cir. 2012).

[45] *See United States P. Castillo-Curiel*, 579 F. App'x 239, 239 (5th Cir. 2014) (per curiam) (considering as relevant to application of the importation enhancement the fact that "the methamphetamine was associated with two Mexican drug cartels").

in light of the record read as a whole," so there is no clear error.[46]

AFFIRMED.

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[46] *Dinh*, 920 F.3d at 310 (quotation marks and citation omitted). In an unpublished opinion, we concluded that "the mere reference to a cartel is [not] sufficient to prove by a preponderance of the evidence that [a defendant] was dealing with imported methamphetamine." *See Nimerfroh*, 716 F. App'x at 316. *Nimerfroh* is distinguishable because the cartel had not been identified, but the evidence shows that Brune dealt specifically with the Michoacán Cartel. *Id.*

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS (DECEMBER 19, 2019)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v.

BUCK GENE BRUNE

Case Number: 4:19-CR-159-Y(1)

Before: Terry R. MEANS,
United States District Judge.

On May 29, 2019, the defendant, Buck Gene Brune, entered a plea of guilty to count one of the one-count information. Accordingly, the defendant is adjudged guilty of such count, which involves the following offense:

Title & Section

21 U.S.C. § 846 (21 U.S.C. §§ 841(a)(1) and (b)(1)(B))

Nature of Offense

Conspiracy to Possess with Intent to Distribute a Controlled Substance

Offense Concluded

February 28, 2019

Count 1

The defendant is sentenced as provided in pages two through three of this judgment. The sentence is imposed under Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission under Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of $100.00 for one of the one-count information.

The defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed December 17, 2019.

/s/ Terry R. Means
United States District Judge

Signed December 19, 2019.

IMPRISONMENT

The defendant, Buck Gene Brune, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 288 months on count one of the one-count information.

The Court recommends that the defendant participate in the Institution Residential Drug Abuse Treatment Program, if eligible.

The defendant is remanded to the custody of the United States marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of four years on count one of the one-count information.

While on supervised release, the defendant shall comply with the standard conditions of supervision adopted by the United States Sentencing Commission at § 5D1.3(c) of the sentencing guidelines, and shall:

(1) not leave the judicial district without the permission of the Court or probation officer;

(2) report to the probation officer in a manner and frequency directed by the Court or probation officer;

(3) answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) support the defendant's dependents and meet other family responsibilities;

(5) work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) notify the probation officer within seventy-two (72) hours of any change in residence or employment;

(7) refrain from excessive use of alcohol and not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

(8) not frequent places where controlled substances are illegally sold, used, distributed, or administered;

(9) not associate with any persons engaged in criminal activity and not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) permit a probation officer to visit the defendant at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer;

(11) notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

(12) not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;

(13) notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement, as directed by the probation officer;

(14) not commit another federal, state, or local crime;

(15) not possess illegal controlled substances;

(16) not possess a firearm, destructive device, or other dangerous weapon;

(17) cooperate in the collection of DNA as directed by the probation officer as authorized by the Justice for All Act of 2004;

(18) report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Federal Bureau of Prisons;

(19) refrain from any unlawful use of a controlled substance. The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court;

(20) provide to the probation officer complete access to all business and personal financial information; and

(21) participate in a program approved by the probation officer for treatment of narcotic or

drug or alcohol dependency that will include testing for the detection of substance use,

abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least $25 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

United States marshal

BY _____

deputy marshal

ORDER ACCEPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND ADJUDGING DEFENDANT GUILTY (JUNE 13, 2019)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v.

BUCK GENE BRUNE (1)

Case Number: 4:19-CR-159-Y

Before: Terry R. MEANS,
United States District Judge.

The Court has reviewed all relevant matters of record in this case, including especially (1) the Consent to Administration of Guilty Plea and Allocution by United States Magistrate Judge and (2) the Report of Action and Recommendation on Plea Before the United States Magistrate Judge. No objections to either have been filed within fourteen (14) days of service in accordance with 28 U.S.C. § 636(b)(1). Therefore, the Court concludes that the report and recommendation of the magistrate judge on the plea of guilty is correct, and it is hereby accepted by the Court. Accordingly, the Court accepts the plea of guilty, and defendant is hereby adjudged guilty. The defendant's

sentence will be imposed in accordance with the Court's sentencing scheduling order.

SIGNED June 13, 2019.

/s/ Terry R. Means
United States District Judge

REPORT OF ACTION AND RECOMMENDATION ON PLEA BEFORE THE UNITED STATES MAGISTRATE JUDGE (MAY 29, 2019)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v.

BUCK GENE BRUNE (01)

Case Number: 4:19-CR-159-Y

Before: Hal R. RAY, JR.,
United States Magistrate Judge.

This Report of Action on Plea is submitted to the court pursuant to 28 U.S.C. § 636(b)(3). This case has been referred by the United States district judge to the undersigned for the taking of a guilty plea. The parties have consented to appear before a United States magistrate judge for these purposes.

The defendant appeared with counsel before the undersigned United States magistrate judge who addressed the defendant personally in open court and informed the defendant of, and determined that the defendant understood, the admonitions contained in Rule 11 of the Federal Rules of Criminal Procedure.

The defendant pled guilty to count one of the one—count information charging defendant with the violation of 21 U.S.C. § 846 (21 U.S.C. §§ 841(a)(1) and (b)(1)(C)). The undersigned magistrate judge finds the following:

1. The defendant, upon advice of counsel, has consented orally and in writing to enter this guilty plea before a magistrate judge subject to final approval and sentencing by the presiding district judge;
2. The defendant fully understands the nature of the charges and penalties;
3. The defendant understands all constitutional and statutory rights and wishes to waive these rights, including the right to a trial by jury and the right to appear before a United States district judge;
4. The defendant's plea is made freely and voluntarily;
5. The defendant is competent to enter this plea of guilty;
6. There is a factual basis for this plea; and
7. The ends of justice are served by acceptance of the defendant's plea of guilty.

Although I have conducted these proceedings, accepted the defendant's plea of guilty, and pronounced the defendant guilty in open court, upon the defendant's consent and the referral from the United States district judge, that judge has the power to review my actions in this proceeding and possesses final decision making authority. Thus, if the defendant has any objections to the findings or any other action of the

undersigned he should make those known to the United States district judge within fourteen days of today.

I recommend that defendant's plea of guilty be accepted and that the defendant be adjudged guilty by the United States district judge and that sentence be imposed accordingly.

SIGNED May 29, 2019.

/s/ Hal R. Ray, Jr.
United States Magistrate Judge

FELONY INFORMATION
(MAY 20, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v.

BUCK GENE BRUNE (01)

Case Number: 4:19-CR-159-Y

The United States Attorney Charges:

COUNT ONE

CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE
(VIOLATION OF 21 U.S.C. § 846)

Beginning in or before April 2018, and continuing until in or around February 2019, in the Fort Worth Division of the Northern District of Texas, and elsewhere, defendant, Buck Gene Brune, along with others known and unknown, did knowingly and intentionally combine, conspire, confederate, and agree to engage in conduct in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), namely to possess with intent to distribute a mixture and substance containing more than 50 grams of methamphetamine, a Schedule II controlled substance.

In violation of 21 U.S.C. § 846 (21 U.S.C. §§ 841 (a)(l) and (b)(l)(C)).

Erin Nealy Cox
United States Attorney

/s/ Laura G. Montes
Assistant United States Attorney
Massachusetts State Bar No. 687739
801 Cherry Street, Suite 1700
Fort Worth, Texas 76102
Telephone: 817-252-5200
Facsimile: 817-252-5455

SENTENCE HEARING
RELEVANT EXCERPT
(DECEMBER 17, 2019)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v.

BUCK GENE BRUNE

Criminal Action No. 4:19-CR-159-Y

Before: Terry R. MEANS,
United States District Judge.

[December 17, 2019; Transcript p. 5]

The Court grants the defendant's motion for downward variance for the reasons argued by the defendant in his motion, or, actually, I find that I should grant it.

Okay. Does the government have any objection or evidence relating to my tentative findings?

MR. COLE [*Counsel for United States*]: Not related to the tentative findings, Your Honor, no.

THE COURT: Okay. Does the defendant have any objection or evidence relating to my tentative findings?

MR. COFER [*Counsel for Defendant, Mr. Brune*]: Yes, sir.

THE COURT: Go ahead, sir.

MR. COFER: I will rely on my written objection related to the importation of two levels, but then as it relates to the statutory maximum, we object for the reasons laid out in the written objection. I, also, object at this time that to proceed on the five to 40 count would violate Mr. Brune's protection against double jeopardy under the Fifth Amendment.

He has already been adjudicated by this Court of the lesser included offense with a zero to 20 range, and so for the Court now to determine that he will be adjudicated for the greater offense violates his protections against double jeopardy.

The Court directed the parties not to file an objection or response to the addendum unless additional facts were alleged. However, I would draw the Court's attention to a 1980 case from the Fifth Circuit, United States versus Sanchez. Although, the holding really doesn't touch specifically on our case here, because the defendant's prosecution is not barred in that instance because the defendant consented to the withdrawal of his plea and, thereby, consented to waiving double jeopardy, that case in Sanchez does lay out the principle that adjudication, based on a guilty plea of—or acceptance, rather—the term used by the Court is jeopardy attaches with the acceptance of a guilty plea. So jeopardy

attached to Mr. Brune's case when the Court accepted his guilty plea.

Likewise, the case that is cited for that principle is a Third Circuit case, and in that case the Third Circuit back in '73—it was just an unusual circumstance. We had to dig pretty deep on this.

THE COURT: Right.

MR. COFER: But back in '73 recognizes the same principle that jeopardy attaches with the acceptance of a plea, and in that case it talks about the Court's ability to—about waiving your right to be placed in jeopardy and then—and the Court's ability to rescind or withdraw an order, and it talks about the common-law rule that, so long as the Court had jurisdiction to rescind or reform an order, that the Court could do it, and it says the Federal Rules of Criminal Procedure don't extinguish that common-law rule, which, generally, would not help my position. However, it recognizes that in that specific instance, the rules of criminal procedure had not addressed the procedure in the way that the Court would rescind or change an order in that regard. It was a final—or it was an order allowing the withdrawal of a guilty plea.

In this instance we do have the Federal Rules of Criminal Procedure. They lay out how the government is to challenge the Court's order if it's incorrect, and the government did not avail themselves of the procedure to ask the Court to reform the order.

And so the common-law rule that survives, absent a conflict with the Rules of Criminal Procedure, has an exception that the Court only is able to make that reformation of order if the party seeking it has exercised due diligence, and in this instance, the government has not done that. They didn't do it within the timeline prescribed by the rules. Even once everything was pointed out to them in the PSR and by Mr. Brune's objection, they still didn't file a motion asking the Court to reform the order.

So at this point, to go forward, one, violates Mr. Brune's rights against not being twice put into jeopardy for the same offense, but, Your Honor, I don't know that the Court, based on the Rules of Criminal Procedure, has the—should have the power to go back and reform or rescind the order adjudicating Mr. Brune.

THE COURT: What does that order—I don't have it in front of me. Does that order recite C or B?

MR. COFER: C.

THE COURT: Okay.

MR. COFER: And so—and it is from that order, I believe—actually, I can't be sure whether the probation officer took the code provision from the information or from the order.

THE COURT: So you don't have the order adjudicating guilt in front of you right now?

MR. COFER: Oh, I do, Your Honor.

I was saying that I don't know which the probation officer relied on.

THE COURT: Well, if they relied on the information—

MR. COFER: Perhaps, I don't.

THE COURT: —it relied on the waiver or the factual resume, it was B?

MR. COLE: Your Honor, may I speak?

THE COURT: Yes, sir.

MR. COLE: I'm looking at Document 109, which is the order accepting the Court recommendation of the United States Magistrate Judge. Is that the order you're—

THE COURT: That's the order I'm asking about.

MR. COFER: No, Your Honor. That order does not recite the code provision.

THE COURT: Either way?

MR. COFER: Either way. It merely adopts the report and recommendation of Judge Ray, which does cite (b)(1)(C).

MR. COLE: Your Honor, it is Document 106, is the report and recommendation of the magistrate judge, which recites (b)(1)(C).

THE COURT: (b)(1)(C)?

MR. COLE: Yes, Your Honor.

THE COURT: Okay. Is there anything in the transcript that gives any indication either way?

MR. COFER: Yes, Your Honor. Without a doubt, the transcript will reflect the intention of the parties was for Mr. Brune to enter a guilty plea to that

offense, which was in the factual resume, and that would be a five to 40 count.

You know, I mean, it's analogous to the jury just filling out the wrong verdict form and then the Court accepting that verdict. You know, regardless of the intention of the parties—I mean, I intend to get Mr. Brune a 15 year sentence today. So if the Court is going to rely on intentions, I would like for you to rely on that one.

THE COURT: Okay.

MR. COFER: It doesn't have any effect on the legal posture. The rule of law will be that Mr. Brune was adjudicated and jeopardy attached.

THE COURT: Okay. It sounds like a good practice run for the Fifth Circuit, but let's hear what Dan has to say.

MR. COLE: Thank you, Your Honor. A couple of matters here.

First, this Court holds ultimate jurisdiction–not the magistrate. This is the Court that holds jurisdiction over the guilty plea, and this is the Court that will adjudicate him.

The Court holds the absolute right to review any decision by the magistrate de novo with or without the request of the parties, and I would direct the Court's attention, as Ms. Montes noted in her response to the defendant's objection, to the second to the last paragraph of Rule 59. It says, despite—and we're speaking right now that the government did not file a motion requesting the Court to correct the magistrate's error.

The government did immediately bring to the parties's attention and the Court's attention by filing its objection to the presentence report saying the presentence report is wrong. It should be five to 40, and it was at that point that Laura Montes recognized the typo in the information.

So, first, there was no waiver or—there wasn't even, I would say, incompetence on the government's part in not filing a motion. She did notify all the parties. It was just through the response to the original objection to the PSR.

THE COURT: Mr. Cole, let me interrupt. Don't lose your place, but I need to interrupt before I forget what I want to say.

In the colloquy between—of course, I didn't do this. Judge Ray did it. In the colloquy between the Court and the parties, there is typically a point at which the Court requires the U.S. Attorney to set out the potential penalties to which the defendant is—to the crime to which he is pleading guilty.

Is there agreement between the parties that when that happened, it was stated to be a five to 40 offense?

MR. COLE: I would have to rely on Mr. Cofer because I wasn't present, but I assume that it was because—

THE COURT: Well, he was there. Let's see what he says.

MR. COFER: I was present, Your Honor, and that is my recollection.

THE COURT: He was told five to 40 years?

MR. COFER: That is correct, Your Honor.

THE COURT: So at that point nobody thought that it was two to ten or under ten, whatever it was?

MR. COFER: That's right.

THE COURT: Okay.

MR. COFER: And Ms. Montes argues in her response to my objection, basically, that the plea was voluntary, and that's not the issue.

THE COURT: No, it's not.

MR. COLE: And, Your Honor, I would since we're speaking of the factual resume and colloquy, the factual resume does correctly cite (b)(1)(B), and that is the document that the defendant signed.

THE COURT: It does, and so does the waiver. The waiver of indictment says (b)(1)(B), also.

MR. COLE: But the Court, under the second to the last paragraph of the advisory committee notes to Rule 59, states that the district judge retains the authority to review any magistrate judge's decision or recommendation whether or not objections are timely filed and the discretionary view is in accord with the Supreme Court's decision in *Thomas v. —and Matthew v. Webber*.

And both of those cases clearly state that ultimately this Court holds ultimate authority of what to accept regarding a magistrate's recommendation. So I would argue that jeopardy attaches when this Court finally accepts a guilty plea and that this Court retains the authority to review what happened in front of the magistrate

and make sure, what did the parties understand they were—

THE COURT: Well, I think I agree with you. I will say this, that you just said that jeopardy attaches when the Court approves in the plea agreement, but it's inconsistent—not inconsistent. It's unclear what the determination was because, as you just said, the order accepting the recommendation does not refer to the statute.

MR. COLE: And so that's where I would say, let's look at what the parties understood they were pleading guilty to on that day. What did the factual resume say? Was the penalty on the factual resume the correct citation, is listed. The information, the substantive language of the information, is (b)(1)(B). The elements of the offense in the factual resume that the defendant and the attorney signed is (b)(1)(B). The maximum penalty and the stipulated facts are all (b)(1)(B) language.

And, furthermore, this is a citation error on the information, and Rule 7(c)(2) states that, unless a defendant was misled and, thereby, prejudiced, neither an error in this citation or a citation omission, is a ground to dismiss the indictment or information or to reverse a conviction.

And here, clearly, from the factual resume I think is evidence in and of itself what everybody understood was happening, and this Court has the right to review this de novo, to review the defendant's guilty plea de novo, to look at what did all parties understand he was pleading

guilty to, and it was (b)(1)(B). So I believe the conviction should stand based on that.

Let's see, if the Court could give me just a second?

THE COURT: Yes, sir.

(Brief pause in proceedings)

MR. COLE: That's it, Your Honor.

THE COURT: All right.

MR. COFER: Your Honor, there was one matter I didn't want the Court to misunderstand.

THE COURT: All right.

MR. COFER: The Court mentioned a plea agreement and if the Court would accept a plea agreement. That's not this case. The Court has not deferred the decision as to whether to accept Mr. Brune's plea of guilty.

THE COURT: That's true. I misspoke if I said that.

MR. COFER: And then, finally, one point in response to Mr. Cole—or two points. I think he correctly spoke that jeopardy does attach once the Court has accepted the guilty plea. That's already happened. I think that's correct.

Number two, Rule 59 does provide for the Court to review the order or the report of the magistrate judge, but Rule 59 does not give procedure for the Court to rescind the order entered by the district court, and regularity of proceedings the presumption would be that the Court reviewed the magistrate's order and recommendation and in entering that order, to adopt it, incorporate it within the Court's order.

THE COURT: Hold on just a moment.

(Brief pause in proceedings)

MR. COLE: Your Honor, may I make a comment briefly?

THE COURT: Yes, sir.

MR. COLE: While I also think that it is the Court's responsibility, not just to review the recommendation of a magistrate, but when there is a conflict of some kind or a misunderstanding, to review the entire record, and that in reviewing the entire record of the guilty plea, this Court accepted the guilty plea of the defendant, and so it would be correct and appropriate for the Court to review the entire record to determine what it is exactly that the defendant was charged with and what he pled guilty to, and the substantive language of the information is what matters, according to Rule 7, which is the (b)(1)(B) offense and the factual resume in its entirety, was the acceptance of responsibility and a plea of guilty to (b)(1)(B) by the defendant.

So that's the entire record. The Court shouldn't make its decision off of one document by a magistrate. It should look at the entire record.

THE COURT: Well, let me focus in on the information, which says in its body that he agreed to engage in conduct in violation of 21, United States Code, Sections 841(a)(1) and (b)(1)(C). That's the problem. It's a "C" instead of a "B."

But is there anything peculiar to the rest of the information that makes it clear that that's a

typo in and of itself, such as, namely, to possess more than 50 grams?

MR. COLE: Yes. That is the language of (b)(1)(B), and that is (b)(1)(B) language.

THE COURT: In fact, it's the 50 grams that makes it the "B"?

MR. COLE: Yes, sir.

MR. COFER: Yes, Your Honor.

THE COURT: So if the information had said, in violation of 21, United States Code, Section 841, said no more, namely, to possess with the intent to distribute a mixture or substance containing methamphetamine, we would have an ambiguity. We don't know if it's "B" or "C," but with the language in the information of, a mixture or substance containing more than 50 grams, we know that it's "B"?

MR. COLE: Yes.

THE COURT: I know he's being charged with "B," though it says, apparently, erroneously and accidentally, it says "C"?

MR. COFER: Yes. I believe it to be accidental, but it says "C," and, Your Honor—but, also, the Court has an exercise talking about hypothetical information text, if you deleted a certain part. So if you had the hypothetical text in the information and it ended with the statute (b)(1)(B) and said nothing more, it didn't say an amount, well, that would be sufficient. If there were ever an indictment, that would be sufficient notice for Mr. Brune to go to trial.

THE COURT: Right.

MR. COFER: So the statute that is within the text is not merely a citation as contemplated by Rule 7. It contains—Rule 7 talks about the citation that's at the top of the information, 846, that's the citation. The statute that is within the text of the information, it actually contains the required mental state for conspiracy. If you took the statute out completely, you wouldn't have the offense of conspiracy—I'm sorry. You wouldn't have any offense because it actually contains the mental state for the possession with intent to distribute. So it's indispensable.

THE COURT: Okay. Hold on.

(Brief pause in proceedings)

THE COURT: Okay. Mr. Cole, did you get to say everything you wanted to say?

MR. COLE: The last issue that I wanted to bring to the Court's attention—and, again, Ms. Montes—I'm sorry. I didn't want to waste the Court's time. Ms. Montes referenced this case in her response to the defendant's objections. But *United States versus Garcia*, 954 F.2d 273rd, is referenced in her response, and that case is almost exactly on point.

And in that case you have, again, an erroneous citation as an authority to a sentencing enhancement in an information, and the Fifth Circuit held that, error in citation shall not be grounds for dismissal of an indictment or information if the error did not mislead the defendant to his prejudice. It reflects the long-standing notion

that the written statements contained in the indictment, not the citation to the statute, are the controlling feature of an indictment.

It goes on to say, incorrect citations of statutes are harmless error under Rule 7(c)(3) unless a defendant was misled to his prejudice, and, clearly, from looking at the factual resume, knowing how colloquies go in all of these, there was no misleading here. Everybody understood what the defendant was pleading guilty to.

THE COURT: I agree with the government.

The order accepting report of recommendation of the United States Magistrate Judge and adjudging the defendant guilty filed on June 13, 2019 as Document 109 is, hereby, amended to read:

The Court accepts the plea of guilty to violation 21, United States Code, Section 846, and 21, United States Code, Sections 841 and (b)(1)(B).

Both parties made a good argument, but the government has the better of this, both under *Garcia* and just under common sense. So that's the ruling of the Court.

With that, you may have other things you wanted to bring up at this time where you're objecting to my tentative findings. Are there other matters you wish to bring up?

MR. COFER: Your Honor, I believe, if I remember correctly, the Court tentatively overruled the government's objection related to aggravating role. So I have nothing as it relates to that. And I'm standing on my written objection for the import-

ation, and I think this resolves the outstanding—

THE COURT: Okay. Thank you, sir.

MR. COLE: And the Court also indicated tentatively that you intend to grant the motion for downward variance?

THE COURT: Yes, sir, that's correct.

MR. COLE: Very good.

THE COURT: I think the government said no objection to the Court's tentative findings. Is that correct?

MR. COLE: That's correct, Your Honor.

THE COURT: Then I adopt as my final findings of fact the statements of fact made in the presentence report subject . . .

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. V—Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

21 U.S.C. § 841
Prohibited Acts A

(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.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in sub clauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-

[1-(2-phenylethyl) -4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $10,000,000 if the defendant is an individual or $50, 000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with

the provisions of title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4-

piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenyl-ethyl) -4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from

the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results

from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment

if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of

supervised release of at least 4 years in addition to such term of imprisonment.

(E)

(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised

release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property

shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution—

(A) In general—

Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) Definition—

For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses Involving Listed Chemicals

Any person who knowingly or intentionally—

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal Property; Penalties; "Boobytrap" Defined

(1)Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under title 18, or both.

(2)If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under title 18, or both.

(3)For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when

triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18 or imprisoned not more than one year, or both.

(g) Internet sales of date rape drugs

(1) Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that—

(A) the drug would be used in the commission of criminal sexual conduct; or

(B) the person is not an authorized purchaser;

shall be fined under this subchapter or imprisoned not more than 20 years, or both.

(2) As used in this subsection:

(A) The term "date rape drug" means—

(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4–butanediol;

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of title 5, to be used in committing rape or sexual assault.

The Attorney General is authorized to remove any substance from the list of date rape drugs pursuant to the same rulemaking authority.

(B) The term "authorized purchaser" means any of the following persons, provided such

person has acquired the controlled substance in accordance with this chapter:

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by the Attorney General. A "qualifying medical relationship" means a medical relationship that exists when the practitioner has conducted at least 1 medical evaluation with the authorized purchaser in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other heath [1] professionals. The preceding sentence shall not be construed to imply that 1 medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(ii) Any practitioner or other registrant who is otherwise authorized by their registration to dispense, procure, purchase, manufacture, transfer, distribute, import, or export the substance under this chapter.

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate purpose for using any "date rape drug" for which a prescription is not required.

(3) The Attorney General is authorized to promulgate regulations for record-keeping and reporting by persons handling 1,4–butanediol in order to implement and enforce the provisions of this section. Any record or report required by such regulations shall be considered a record or report required under this chapter.

(h) Offenses involving dispensing of controlled substances by means of the Internet

(1) In general

It shall be unlawful for any person to knowingly or intentionally—

(A) deliver, distribute, or dispense a controlled substance by means of the Internet, except as authorized by this subchapter; or

(B) aid or abet (as such terms are used in section 2 of title 18) any activity described in subparagraph (A) that is not authorized by this subchapter.

(2) Examples

Examples of activities that violate paragraph (1) include, but are not limited to, knowingly or intentionally—

(A) delivering, distributing, or dispensing a controlled substance by means of the Internet by an online pharmacy that is not validly registered with a modification authorizing such activity as required by section 823(f) of this title (unless exempt from such registration);

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or dispensation by means of the Internet in violation of section 829(e) of this title;

(C) serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance in a manner not authorized by sections [2] 823(f) or 829(e) of this title;

(D) offering to fill a prescription for a controlled substance based solely on a consumer's completion of an online medical questionnaire; and

(E) making a material false, fictitious, or fraudulent statement or representation in a notification or declaration under subsection (d) or (e), respectively, of section 831 of this title.

(3) Inapplicability

(A) This subsection does not apply to—

(i) the delivery, distribution, or dispensation of controlled substances by nonpractitioners to the extent authorized by their registration under this subchapter;

(ii) the placement on the Internet of material that merely advocates the use of a controlled substance or includes pricing information without attempting to pro-

pose or facilitate an actual transaction involving a controlled substance; or

(iii) except as provided in subparagraph (B), any activity that is limited to—

(I) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of title 47); or

(II) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of title 47 shall not constitute such selection or alteration of the content of the communication.

(B) The exceptions under subclauses (I) and (II) of subparagraph (A)(iii) shall not apply to a person acting in concert with a person who violates paragraph (1).

(4) Knowing or intentional violation

Any person who knowingly or intentionally violates this subsection shall be sentenced in accordance with subsection (b).

21 U.S.C § 846
Attempt and Conspiracy

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.