No. 21-273

In the Supreme Court of the United States

BUCK GENE BRUNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated the Double Jeopardy Clause by correcting, during petitioner's sentencing proceeding, a typographical error that cited the wrong statutory provision in its order accepting petitioner's guilty plea.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 991 F.3d 652.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 2021. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on August 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was

convicted of conspiring with intent to distribute a mixture or substance containing more than 50 grams of methamphetamine, in violation of 21 U.S.C. 846 and 21 U.S.C. 841(a)(1) and (b)(1)(B). Judgment 1. The district court sentenced him to 288 months of imprisonment, to be followed by four years of supervised release. Judgment 2. The court of appeals affirmed. Pet. App. 1a-26a.

1. Petitioner was a methamphetamine dealer in Wise County, Texas, and the surrounding area. Gov't C.A. Br. 1-2. Petitioner's supplier was a member of the Michoacán Cartel. Pet. App. 2a. During a nine-month period beginning in March 2018, petitioner sold a single individual between 50 and 75 pounds of methamphetamine. *Ibid.*; Gov't C.A. Br. 3. For five months, he was selling that person half a pound of methamphetamine each day. See Pet. App. 2a.

Petitioner was charged by information with conspiring to violate "21 U.S.C. §§ 841(a)(1) and (b)(1)(C), namely * * * possess[ing] with intent to distribute a mixture and substance containing more than 50 grams of methamphetamine, a Schedule II controlled substance." Information 1. Petitioner does not dispute that the citation to Section 841(b)(1)(C) in the information was a typographical error. See, *e.g.*, C.A. ROA 38-39, 173, 176; see generally Pet. Section 841(b)(1)(C) provides that where a covered controlled-substances offense involves any quantity of certain drugs, including methamphetamine, a defendant shall be sentenced to a term of imprisonment of not more than 20 years (as long as death or serious bodily injury did not result from the use of the substance). Section 841(b)(1)(B)(viii) provides that where a covered controlled-substances offense involves 50 or more grams of a mixture or sub-

stance containing methamphetamine, a defendant shall be sentenced to a term of imprisonment of five to 40 years (as long as death or serious bodily injury did not result from the use of the substance).

Petitioner waived indictment; the waiver that he signed stated that he was "accused in the Information with the felony offense of Conspiracy to Possess with Intent to Distribute a Controlled Substance, in violation of 21 U.S.C. § 846 (21 U.S.C. §§ 841(a)(1) and (b)(1)(B))." C.A. ROA 40. Petitioner informed the district court that he intended to plead guilty to the information, *id.* at 37, and signed a factual resume that stated that the information had charged him under Section 841(b)(1)(B), *id.* at 38. The factual resume also stated that "the conspiracy involved at least 50 grams of a mixture or substance containing a detectable amount of methamphetamine" and noted that the applicable statutory term of imprisonment was "not less than five (5) years nor more than forty (40) years." *Id.* at 38-39.

Petitioner pleaded guilty to the information before a magistrate judge. During the plea hearing, the prosecutor listed the essential elements of the offense, which included that the "conspiracy involved at least 50 grams of a mixture or substance containing a detectable amount of methamphetamine." C.A. ROA 122. Petitioner admitted that he committed that and all of the other essential elements of the offense. *Id.* at 123. The prosecutor also noted that petitioner would be subject to "not less than five years imprisonment, nor more than 40 years imprisonment," *id.* at 137, and petitioner stated that he understood that he would be subject to such a sentence if he pleaded guilty, *id.* at 137-138.

At the conclusion of the plea hearing, the magistrate judge recommended that the district court accept

petitioner's guilty plea, but the recommendation copied the information's erroneous citation, stating that petitioner had pleaded guilty to a conspiracy under Section 846 to violate Section 841(a)(1) and (b)(1)(C). C.A. ROA 41. The court adopted that report and recommendation, accepted petitioner's guilty plea, and adjudged him guilty of the charged offense. *Id.* at 50.

The Probation Office prepared a presentence investigation report. The Probation Office noted that, based on "Count 1 of the Information," petitioner's conspiracy offense was in violation of Section 841(b)(1)(C), and petitioner therefore was subject to "not more than 20 years imprisonment." C.A. ROA 201 (emphasis omitted). The government objected to the Probation Office's statement of the applicable range of imprisonment, explaining that "[p]ursuant to the plea documents submitted in this case" petitioner pleaded guilty to a conspiracy to violate Section 841(b)(1)(B), "with an imprisonment range of not less than five years and not more than forty." *Id.* at 217. The Probation Office "accept[ed] the government's clarification as to [petitioner's] count of conviction"; found that the inclusion of Section 841(b)(1)(C) in the information was a "typographical error"; and determined that petitioner pleaded guilty to a violation of Section 841(b)(1)(B). *Id.* at 238. Petitioner did not object to those findings.

At petitioner's sentencing hearing, the district court found that when petitioner previously pleaded guilty he had "knowingly and informedly" pleaded guilty to violating Section 846 and Section 841(a)(1) and (b)(1)(B). C.A. ROA 167. Petitioner's counsel objected to the application of the statutory penalty range in Section 841(b)(1)(B), arguing that petitioner "ha[d] already been adjudicated [guilty] * * * of the lesser included

offense with a zero to 20 range" and that applying Section 841(b)(1)(B) would "violate[] his protections against double jeopardy." *Id.* at 169-170. Petitioner's counsel acknowledged that "the intention of the parties was for [petitioner] to enter into a guilty plea to [the Section 841(b)(1)(B)] offense, which was in the factual resume." *Id.* at 173; see *id.* at 176 (statement by petitioner's counsel confirming that "nobody" at the plea hearing "thought" that the penalty range in Section 841(b)(1)(C) was applicable). The court rejected petitioner's double-jeopardy argument and amended its prior order accepting petitioner's guilty plea and adjudging him guilty to cite Section 841(b)(1)(B). *Id.* at 182-183. The court sentenced petitioner to 288 months of imprisonment, to be followed by four years of supervised release. Judgment 2.

2. The court of appeals affirmed, rejecting petitioner's contention that the district court's correction of the erroneous citation in its order accepting petitioner's plea agreement violated the Double Jeopardy Clause. Pet. App. 1a-26a.

The court of appeals observed that "[i]f a trial gets derailed, it * * * puts the defendant in jeopardy if jeopardy (1) attached and (2) terminated." Pet. App. 5a. The court then examined this Court's decision in *Ohio* v. *Johnson*, 467 U.S. 493 (1984), which held that a trial court's acceptance of a guilty plea to a lesser included offense (over the government's objection) did not bar trial on the greater offense included in the same indictment. See, *e.g.*, Pet. App. 6a-8a. The court of appeals determined that, under *Johnson*, "jeopardy does not always attach upon acceptance of a guilty plea," *id.* at 17a, and that, when deciding whether jeopardy attaches when a particular defendant pleads guilty, a court must

examine the defendant's "finality interest" and consider the "prevention of prosecutorial overreach," *id.* at 22a.

The court of appeals then found that petitioner's "finality interest is nil" because the record clearly demonstrated that petitioner "intended to plead guilty to" a Section 841(b)(1)(B) offense. Pet. App. 23a; see *id.* at 22a-23a. The court noted that petitioner sought "'an undeserved windfall [that would] shav[e]' years off his sentence" and hoped "to 'use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution' of" Section 841(b)(1)(B)—which was "a contingency that *Johnson* sought to avoid." *Id.* at 23a (citations omitted).

The court of appeals also found "no evidence of prosecutorial overreach" because "[t]he government did not bring new charges against" petitioner, or "dupe him with a plea agreement." Pet. App. 24a. And the court observed that "the government ha[d] not yet had one full opportunity to convict" petitioner of Section 841(b)(1)(B), and found "nothing unfair to [petitioner] about th[e] result" because "[t]he government seeks to prosecute him for the only charge to which [petitioner] himself pleaded guilty." *Ibid.* (emphases omitted). The court also emphasized that, as this Court explained in *Currier* v. *Virginia*, 138 S. Ct. 2144 (2018), "the Double Jeopardy Clause 'was not written or originally understood to pose an insuperable obstacle to the administration of justice in cases' * * * 'where there is no semblance of . . . oppressive practices'" and found that "[c]orrection of a typo isn't oppressive." Pet. App. 24a (quoting *Currier*, 138 S. Ct. at 2149). The court of appeals accordingly determined that "[b]ecause [petitioner's] finality interest is low, and there is no evidence of prosecutorial overreach, jeopardy did not attach

upon the court's acceptance of [his] guilty plea." *Id.* at 24a-25a.

ARGUMENT

Petitioner contends (Pet. 5-7) that the district court's correction of a typographical error in its order accepting petitioner's guilty plea—a correction that occurred before petitioner was sentenced—violated the Double Jeopardy Clause. The court of appeals correctly rejected petitioner's claim. Its decision does not conflict with any decision of this Court or of another court of appeals. This Court's review of the precise moment at which jeopardy attaches in the context of a guilty plea is unwarranted.

1. a. The Double Jeopardy Clause provides that no person will be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. As this Court has explained, a "primary purpose of the Clause [i]s to preserve the finality" and "integrity of judgments." *United States* v. *DiFrancesco*, 449 U.S. 117, 128 (1980) (citations and internal quotation marks omitted). It also prevents the prosecution from having "another opportunity to supply evidence which it failed to muster in the first proceeding" and "embraces the defendant's valued right to have his trial completed by a particular tribunal." *Ibid.* (citations and internal quotation marks omitted). This Court has emphasized, however, that "the Clause was not written or originally understood to pose an insuperable obstacle to the administration of justice in cases where there is no semblance of" such "oppressive practices." *Currier* v. *Virginia*, 138 S. Ct. 2144, 2149 (2018) (citation and internal quotation marks omitted).

The Court accordingly has indicated that a trial court's correction of a clerical or similar error does not

violate the Double Jeopardy Clause. In *Bozza* v. *United States*, 330 U.S. 160 (1947), the Court found no violation of the Clause when a statute required a sentence that included both a term of imprisonment and a fine, but the district court only mentioned imprisonment at sentencing and, after sentencing concluded, recalled the prisoner and imposed a fine. *Id.* at 166-167. The Court observed that the "error" was "inadvertent" and explained that "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Ibid.*; see *Smith* v. *Massachusetts*, 543 U.S. 462, 474 (2005) ("Double-jeopardy principles have never been thought to bar the immediate repair of a genuine error in the announcement of an acquittal, even one rendered by a jury."). Consistent with that approach, Federal Rule of Criminal Procedure 36 authorizes a district court to "correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission" "at any time." Fed. R. Crim. P. 36.

Later, in *Ohio* v. *Johnson*, 467 U.S. 493 (1984), this Court considered when jeopardy attaches in the context of a guilty plea. The defendant in *Johnson* pleaded guilty to two charged offenses that were lesser included offenses of two other offenses with which he was also charged; the trial court accepted his guilty plea over the State's objection and dismissed the charges of the greater offenses on double-jeopardy grounds. *Id.* at 494, 496. This Court reversed, *id.* at 500-502, holding that the case did not implicate the "principles of finality and prevention of prosecutorial overreaching," that underlie the prohibition on double jeopardy, *id.* at 501. Beginning with the finality interest, the Court observed

that the defendant "ha[d] not been exposed to conviction on the charges to which he pleaded not guilty, nor ha[d] 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." *Ibid.* The Court also observed that the case "ha[d] none of the implications of an 'implied acquittal' which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses." *Id.* at 502. And the Court found "none of the governmental overreaching that double jeopardy is supposed to prevent" and that "ending prosecution now would deny the State its right to one full and fair opportunity to convict those who have violated its laws." *Ibid.* The Court therefore concluded that "[n]o interest of [the defendant] protected by the Double Jeopardy Clause" would be "implicated by continuing prosecution on the remaining charges brought in the indictment." *Id.* at 501.

b. Under the principles that this Court laid out in *Bozza* and *Johnson*, the court of appeals correctly determined that the district court's correction of a typographical error in its order adjudicating petitioner guilty did not violate the Double Jeopardy Clause. Like the error in *Bozza*, the error here was "inadvertent." 330 U.S. at 166. And the error here occurred earlier—and was discovered and corrected earlier—than the error in *Bozza*, where the error occurred at sentencing and was corrected after sentencing concluded, *id.* at 167.

As the court of appeals correctly recognized, the clerical correction here did not implicate the "principles of finality and prevention of prosecutorial overreaching," that underlie the prohibition on double jeopardy.

Johnson, 467 U.S. at 501. The correction did not implicate petitioner's finality interests because it did not provide the government with multiple opportunities to prosecute petitioner, nor did it suggest that petitioner was implicitly acquitted of a Section 841(b)(1)(B) offense. See *id.* at 501-502. Petitioner—who knowingly and voluntarily waived indictment on a Section 841(b)(1)(B) offense—clearly understood that he was actually charged with violating Section 841(b)(1)(B) and that he was pleading guilty to that charge, with its attendant statutory range of imprisonment. See pp. 3-5, *supra*. He has no finality interest in avoiding a conviction and sentence that he plainly expected when he pleaded guilty.

Even less does the correction suggest prosecutorial overreach. Indeed, permitting petitioner to benefit from mistaken citations in the information and the district court's order when he fully intended to plead guilty to violating Section 841(b)(1)(B) "would deny the State its right to one full and fair opportunity to convict those who have violated its laws." *Johnson*, 467 U.S. at 502. The waiver of indictment, and all of the other references to Section 841(b)(1)(B), took the clerical-error issue off the table, and nothing in the Double Jeopardy Clause entitled petitioner to resurface it at sentencing to obtain a windfall at odds with his plea.

2. Petitioner asserts (Pet. 5-9) that the courts of appeals disagree on when jeopardy attaches following a guilty plea. But petitioner identifies no decision in which a court of appeals found a double-jeopardy violation following a district court's correction of a prior clerical error at sentencing, and he has not otherwise identified any conflict among the courts of appeals that warrants the Court's review in this case.

None of the decisions on which petitioner relies in support of his alleged circuit conflict (Pet. 7-8) held that a district court commits a double-jeopardy violation when, during the sentencing hearing, it corrects an incorrect statutory citation contained in its prior acceptance of a defendant's guilty plea. Indeed, none of those decisions involves the application of the Double Jeopardy Clause to the correction of typographical or similar errors at all.

The Second and Ninth Circuit decisions on which petitioner relies involved situations in which a guilty plea was or would have been followed by a separate prosecution for a greater offense—rather than simply a mid-sentencing correction of a clerical error. In *Morris* v. *Reynolds*, 264 F.3d 38 (2001), cert. denied, 536 U.S. 915 (2002), the Second Circuit concluded that the Double Jeopardy Clause barred the State from reinstating a felony gun charge against the defendant following his plea of guilty to a lesser misdemeanor offense, when the State did not object to the guilty plea and the felony gun charge was not pending at the time of the plea. *Id.* at 48-50. And in *United States* v. *Patterson*, 381 F.3d 859 (2004), the Ninth Circuit concluded that the district court violated the Double Jeopardy Clause when it accepted the defendant's uncontested plea to a lesser offense but, before sentencing, vacated the plea over the defendant's objection and permitted the government to try the defendant on a greater offense. *Id.* at 864-865.

The remaining decisions on which petitioner relies all rejected double-jeopardy challenges—and are thus consistent with the bottom-line result here—on a variety of different facts. For example, in *United States* v. *Wampler*, 624 F.3d 1330 (2010) (Gorsuch, J.), cert. denied, 564 U.S. 1021 (2011), the Tenth Circuit found no

time at which jeopardy could have attached because the district court never accepted a plea, *id.* at 1341, and did not address whether, let alone hold that, jeopardy necessarily would attach in a case like this one. The same is true of *United States* v. *Bearden*, 274 F.3d 1031 (2001), where the Sixth Circuit found no attachment when a magistrate judge provisionally accepted a nolo contendere plea, *id.* at 1036-1038, as well as *United States* v. *Baggett*, 901 F.2d 1546 (per curiam), cert. denied, 498 U.S. 862 (1990), where the Eleventh Circuit found no attachment in a withdrawn midtrial plea, see *id.* at 1548-1550, and *Bally* v. *Kemna*, 65 F.3d 104 (1995), cert. denied, 516 U.S. 1118 (1996), where the Eighth Circuit found no double-jeopardy violation in a fresh charging document that followed the dismissal of the charge underlying a prior guilty plea, *id.* at 105, 108-109.

In contrast, courts of appeals routinely find no double-jeopardy violation when district courts timely correct typographical errors similar to the erroneous statutory citation that the district court timely corrected here.[*] Accordingly, there is no indication that

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[*] See, *e.g.*, *Jones* v. *Winn*, No. 16-2688, 2017 WL 6048865, at *3 (6th Cir. May 26, 2017) (finding no double-jeopardy violation where "[t]he trial court indicated during the resentencing hearing that it intended * * * to impose consecutive sentences" but "neglected to indicate the same" in the judgment and later "correct[ed] its clerical error"); *United States* v. *Smith*, 656 F.3d 821, 828 (8th Cir. 2011) (finding no double-jeopardy violation where "[t]he failure to include a forfeiture order in the judgment was a clerical error"), cert. denied, 565 U.S. 1218 (2012); *Merry* v. *Alaska*, 983 F.2d 1076, 2007 WL 1501023, at *1-*2 (9th Cir. 1993) (Tbl.) (finding no double-jeopardy violation on facts similar to those in *Jones*); *Giacalone* v. *United States*, 739 F.2d 40, 41-42 (2d Cir. 1984) (discussing a prior court of appeals order finding no double-jeopardy violation in a case

another court of appeals would reach a different result on the facts of this case.

Furthermore, to the extent that the courts of appeals may take different approaches in determining when jeopardy attaches, such differences do not support further review of the decision below. The idiosyncratic fact pattern here does not provide a sound basis for resolving broader questions regarding when jeopardy generally attaches in cases involving guilty pleas.

Moreover, the fact that jeopardy has attached does not automatically mean that further proceedings would violate the Double Jeopardy Clause because "[i]n situations where jeopardy has attached, [this] Court has abjured 'rigid, mechanical rule[s]' to determine when retrial does not violate double jeopardy." *Bally*, 65 F.3d at 108 (quoting *Illinois* v. *Somerville*, 410 U.S. 458, 467 (1973)). Petitioner has not argued that any differences among the courts of appeals regarding when jeopardy attaches have systemically led to materially different resolutions of the ultimate question of whether a double-jeopardy violation occurred.

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involving facts similar to those in *Jones*); *United States* v. *DiLorenzo*, 429 F.2d 216, 221 (2d Cir. 1970) (finding no double-jeopardy violation where "[t]he record indicate[d] [that the district court] clearly intended originally to sentence appellant to the maximum terms on each of the two counts and inadvertently transposed the sentences he had intended to impose" and "corrected" the sentence "a few hours later"), cert. denied, 402 U.S. 950 (1971); see also *Dukles* v. *Warden*, No. 17-3953, 2018 WL 4440453, at *2 (6th Cir. Mar. 27, 2018) (finding no double-jeopardy violation where a verdict mistakenly indicated that an individual had been acquitted on a particular count and the trial court later corrected the verdict); *United States* v. *Stauffer*, 922 F.2d 508, 511, 513-514 (9th Cir. 1990) (similar).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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