

No. 21 - \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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TANNOUS FAZAH,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

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**APPENDIX TO PETITION FOR WRIT OF CERTIORARI**

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# Appendix A

**NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT****FILED**

MAR 15 2021

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSE CESAR SANCHEZ, AKA Loco,  
AKA Locotroll, AKA Juan Sanchez, AKA  
Troll, AKA Trouble,

Defendant-Appellant.

No. 17-50139

D.C. No.  
2:13-cr-00537-BRO-24

MEMORANDUM\*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GISELLE CASADO, AKA Guera,

Defendant-Appellant.

No. 17-50173

D.C. No.  
2:13-cr-00537-BRO-27

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

No. 17-50212

D.C. No.  
2:13-cr-00537-BRO-13

\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

JOSE MANUEL DORADO, AKA Lazy,  
AKA Yogi,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TANNOUS FAZAH, AKA Terist,

Defendant-Appellant.

No. 17-50213

D.C. No.  
2:13-cr-00537-BRO-14

Appeal from the United States District Court  
for the Central District of California  
Beverly Reid O'Connell, District Judge, Presiding

Argued and Submitted March 3, 2021  
Pasadena, California

Before: GRABER, MILLER, and LEE, Circuit Judges.

Defendants Jose Cesar Sanchez, Giselle Casado, Jose Manuel Dorado, and Tannous Fazah timely appeal their convictions and sentences stemming from their participation in the activities of the Florencia-13 gang. We vacate Defendant Dorado's sentence on Count Five, and we remand for resentencing on that count only. We otherwise affirm.

1. The district court correctly denied Defendant Fazah's motion to suppress.

We review de novo the district court's legal conclusions and for clear error the

court's factual findings. United States v. Peterson, 902 F.3d 1016, 1019 (9th Cir. 2018).

- a. Exigent circumstances justified the officers' entry into Fazah's apartment.

After a man was beaten, shot, and killed in a nearby alley, two 911 callers independently reported seeing a group of persons in the apartment complex's parking lot and reported seeing only a subset of persons leave the parking lot. Some persons had arrived in a white car that remained in the parking lot. After officers cleared the other two apartments and Fazah eventually opened the door to his apartment, a detective saw two apparently unconscious men in the apartment.

The detective reasonably feared that the men were hurt and needed assistance; "considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others . . . from serious harm." United States v. Reyes-Bosque, 596 F.3d 1017, 1029 (9th Cir. 2010) (internal quotation marks omitted).

Additionally, "the search's scope and manner were reasonable to meet the need." Id. (internal quotation marks omitted). Given that others had been hiding in the apartment, officers reasonably opened the door to a large closet in the room where the two prone men were lying.

The court did not clearly err in crediting the detective's testimony, which comported with his contemporaneous police report, that he could see the men from

outside the apartment. See, e.g., United States v. JDT, 762 F.3d 984, 1002 (9th Cir. 2014) ("[I]t is the exclusive province of the fact finder to determine the credibility of witnesses." (internal quotation marks omitted)). The photographs taken by Fazah's expert two years later did not definitively disprove the detective's testimony.

We decline to consider Fazah's arguments, raised for the first time on appeal, that hinge on factual development, such as whether Fazah opened the door only because the detective had threatened to enter and whether the detective actually inserted the key into the lock. United States v. Guerrero, 921 F.3d 895, 897–98 (9th Cir. 2019) (per curiam), cert. denied, 140 S. Ct. 1300 (2020).

b. Alternatively, even if the initial search was impermissible, suppression would not be warranted because the officers acted in good faith. To justify suppression, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." United States v. Artis, 919 F.3d 1123, 1133 (9th Cir. 2019) (quoting Herring v. United States, 555 U.S. 135, 144 (2009)). Fazah has shown, at most, "isolated negligence" that does not justify suppression. Id.

2. The district court acted well within its discretion in addressing the topic of juror safety. See United States v. Scott, 642 F.3d 791, 796 (9th Cir. 2011) (per curiam) (holding that we review for abuse of discretion the court's questioning

during voir dire); United States v. Ivester, 316 F.3d 955, 960 (9th Cir. 2003) (holding that we review for abuse of discretion "whether and how to hold a hearing on allegations of jury bias" stemming from a juror's safety concerns). For example, the court permissibly concluded that asking jurors explicitly about "fear" would do more harm than good. And in response to Juror 9's particularized safety concerns, the court conducted a hearing with the juror and concluded from the juror's responses and demeanor that, as the juror stated, the juror could be fair to both sides.

3. The district court's formulation of the instructions as to Racketeer Influenced and Corrupt Organizations Act ("RICO") conspiracy did not result in reversible error. The instructions accurately required the jury to find that each "defendant became a member of the conspiracy knowing of its object and intending to help further or facilitate the scheme." See Salinas v. United States, 522 U.S. 52, 65 (1997) ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor."). Any error in failing to add an additional element, announced in a non-binding, out-of-circuit case, was not obvious.

Read in their entirety, the instructions properly required that each Defendant know about the scheme; know the scheme's object; know that the scheme would

result in at least one conspirator's committing a pattern of racketeering acts; and agree and intend to facilitate or further that scheme. See United States v. Rodriguez, 971 F.3d 1005, 1012 (9th Cir. 2020) ("Jury instructions must be evaluated 'as a whole, and in context,' rather than in piecemeal.").

4. The district court correctly entered judgment against Defendants Dorado and Fazah as to their violations of the Violent Crimes in Aid of Racketeering Activity statute. The jury instructions accurately required a finding that a "substantial purpose" of the assault was gang affiliation. Id. at 1009–11. Ample evidence supports the jury's finding "that gang affiliation motivated the relevant conduct" of Defendants Dorado and Fazah. Id. at 1012. At the request of an influential gang member, who feared a threat to his status in the gang, Dorado and Fazah assaulted and killed another gang member.

5. We assume, without deciding, that the district court abused its discretion under Federal Rule of Evidence 403 by admitting photographs of graffiti on the courthouse. But any error was harmless. The photographs had very little non-cumulative probative value, and the risk of harm was low to nonexistent. The photographs predated the trial by two years, and no juror expressed any safety concerns after seeing the photographs. We readily conclude that "it is more probable than not that the error did not materially affect the verdict." United States v. Morales, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc).

6. With several small exceptions, the district court did not abuse its discretion or otherwise err in its decisions concerning the testimony by Agents Starkey, Montenegro, and Velasquez.

The district court adequately ensured that the witnesses described the basis of their testimony so that the jury knew whether the testimony was lay or expert in nature. The district court did not plainly err by giving a model dual-role instruction. Agents Montenegro and Velasquez testified in two roles, a permissible practice, United States v. Gadson, 763 F.3d 1189, 1206–07 (9th Cir. 2014), and the instruction accurately described our caselaw. Agent Starkey testified solely as a lay witness, but the court gave the instruction during her testimony only after Defendants agreed to the instruction, and the instruction pertained in part to lay testimony. Any error concerning the inapt part of the instruction was not plain.

Nearly all of Agent Starkey’s testimony was proper lay testimony because it stemmed from her experience in the investigation of this particular gang. United States v. Barragan, 871 F.3d 689, 704 (9th Cir. 2017). To the extent that her testimony at times was expert in nature, any error was harmless because she indisputably had the credentials of an expert witness. United States v. Figueroa-Lopez, 125 F.3d 1241, 1246–47 (9th Cir. 1997); United States v. Maher, 645 F.2d 780, 784 (9th Cir. 1981) (per curiam); see also Gadson, 763 F.3d at 1213 n.10 (applying the same principle in the context of plain-error review).

We assume, without deciding, that small portions of testimony by Agents Starkey and Montenegro were impermissibly speculative or lacked proper foundation. For example, Agent Starkey's initial testimony about the organizational structure, unconnected to a specific recorded call or any specific evidence in the record; her speculation as to what caused an imprisoned gang member's death; and Agent Montenegro's digression into a separate identity-theft scheme by two gang members may have strayed from permissible bounds. We have carefully reviewed the entire record, and we conclude that any error was harmless. The possibly impermissible testimony either was cumulative or pertained to tangential topics that could not have affected the jury's verdict.

7. The district court did not commit reversible error in instructing the jury under Count Three's allegation of conspiracy, in violation of 21 U.S.C. § 846, to commit at least one of the drug distribution (or possession with intent to distribute) offenses described in 21 U.S.C. § 841(a)(1) & (b)(1). Nor did insufficient evidence support the jury's drug-quantity findings.

No Defendant objected to the jury instructions, so we review them for plain error. United States v. Backman, 817 F.3d 662, 665 (9th Cir. 2016). We recently held that

a defendant convicted of conspiracy under § 846 is subject to a penalty under § 841(b)(1)(A)–(B) if the government has proven beyond a reasonable doubt that the underlying § 841(a)(1) offense involved the drug type and quantity set forth in § 841(b)(1)(A)–(B). The

government does not have to prove that the defendant had any knowledge or intent with respect to those facts.

United States v. Collazo, 984 F.3d 1308, 1336 (9th Cir. 2021) (en banc). Reading together the jury instructions and the verdict form, which required a finding that the conspiracy that the defendant joined involved a specified quantity of drugs, we conclude that the jury was not misled. See United States v. Pineda-Doval, 614 F.3d 1019, 1031 (9th Cir. 2010) ("To determine whether the jury was misled, we must consider the instructions and the verdict form together.").

Sufficient evidence supported the jury's findings of drug quantity because evidence supported the conclusion that fellow gang members sold the requisite quantities of drugs. See Collazo, 984 F.3d at 1319 ("When the government proves that a defendant had a knowing connection with an extensive enterprise (such as a drug trafficking organization) and had reason to know of its scope, a fact-finder may infer that the defendant agreed to the entire unlawful scheme."); see also United States v. Smith, 609 F.2d 1294, 1300 (9th Cir. 1979) ("The jury could conclude [the defendants] knew that drugs are frequently dispensed through a network of suppliers, wholesalers, and scattered retailers in different states and therefore that they were not [the supplier's] only retailers."); id. (rejecting the significance of a defendant's assertion that "he never met with the other retailers" on the ground that a co-conspirator need not know "all of the participants in the conspiracy").

8. Cumulative error did not affect the jury's verdict. The "combined effect of [any] errors" did not "amplify each other in relation to a key contested issue in the case." United States v. Preston, 873 F.3d 829, 835 (9th Cir. 2017) (internal quotation marks omitted).

9. The district court did not clearly err at sentencing in determining that Defendant Sanchez was responsible for more than 150 grams of methamphetamine. The court permissibly concluded that the sales by fellow gang members constituted "relevant conduct" pursuant to U.S. Sentencing Guidelines Manual § 1B1.3(a)(1)(B), because those sales were part of the "jointly undertaken criminal activity," were in furtherance of the activity, and were reasonably foreseeable in connection with that activity.

The court did not procedurally err, plainly or otherwise, at Defendant Casado's sentencing hearing. The presentence report calculated drug quantity, and the court expressly adopted the presentence report in general and the specific drug-quantity finding.

Defendants Dorado and Fazah join both arguments, but those arguments fail for the same reasons. The court did not err at their sentencing hearings.

10. With the exception noted below, the district court did not err in imposing life sentences on Defendants Dorado and Fazah.

The district court independently determined, for Guidelines purposes, that Defendants were responsible for first-degree murder. Contrary to Defendants' argument, the court did not misunderstand the nature of the jury's finding. Nor did the court misunderstand the elements of first-degree murder. Next, the court did not treat the Guidelines' "range" of life imprisonment as presumptively reasonable. The court's factual findings at sentencing did not increase the sentence beyond the statutory maximum penalty of life imprisonment, 18 U.S.C. § 1963(a), so Defendant Fazah's constitutional challenge fails. United States v. Rodriguez, 851 F.3d 931, 948 (9th Cir. 2017).

The court did not clearly err in finding, by clear and convincing evidence, that Defendants Fazah and Dorado were responsible for first-degree murder. The court permissibly concluded that a gang member ordered Fazah to kill the victim, an eyewitness testified that Fazah shot the victim, and Fazah boasted about the crime afterwards. Although the evidence was not equally overwhelming with respect to Dorado's agreement to the plot, the court's view that clear and convincing evidence supported his culpability was not "illogical, implausible, or without support in the record." United States v. Graf, 610 F.3d 1148, 1157 (9th Cir. 2010). For example, after Fazah received the order to kill and handed the phone to Dorado, Dorado assured the caller not to worry because Fazah would "get

at" the victim, suggesting that Dorado overheard the order to kill; and afterwards, Dorado reported the murder as a "done deal."

11. The district court correctly calculated the mandatory minimum sentences under 21 U.S.C. § 841 for Defendants Dorado and Fazah. Defendants' convictions retain federal significance despite state-court recharacterizations of the convictions. United States v. Diaz, 838 F.3d 968, 974–75 (9th Cir. 2016). Defendants' constitutional claims, raised for the first time on appeal, do not constitute plain error. See, e.g., Harmelin v. Michigan, 501 U.S. 957 (1991) (affirming a life sentence, as consistent with the Eighth Amendment, for a single conviction of possessing 672 grams of cocaine base). Similarly, we reject Defendant Fazah's argument, raised for the first time on appeal, that one of his convictions is not categorically a drug offense. This court has held that the possible overbreadth of California's definition of methamphetamine is a factual question, United States v. Rodriguez-Gamboa, 946 F.3d 548, 552–53 (9th Cir. 2019), and "an error that hinges on a factual dispute is not 'obvious,'" United States v. Yijun Zhou, 838 F.3d 1007, 1011 (9th Cir. 2016).

12. The district court neither clearly erred in its factual findings nor abused its discretion in applying the Guidelines, United States v. Gasca-Ruiz, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc), in rejecting a "mitigating role" reduction for Defendant Casado or in applying gun-possession and drug-smuggling

enhancements for Defendant Fazah. As in United States v. Diaz, 884 F.3d 911, 916 (9th Cir. 2018), nothing in the record here suggests that the district court misunderstood the Guidelines during Casado's sentencing hearing.

13. As the government concedes, the district court plainly erred by imposing, on Count Five as to Defendant Dorado, a sentence that exceeded the statutory maximum. We remand for resentencing on that count only. United States v. Evans-Martinez, 611 F.3d 635, 645 (9th Cir. 2010).

**AFFIRMED in all respects but one: Defendant Dorado's sentence on Count Five is VACATED, and case no. 17-50212 is REMANDED for the limited purpose of resentencing on that count only.**

# Appendix B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE BEVERLY REID O'CONNELL, U.S. DISTRICT JUDGE

**REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS**

## **SENTENCING HEARING**

MONDAY, JUNE 5, 2017

10:30 A.M.

**LOS ANGELES, CALIFORNIA**

MYRA L. PONCE, CSR NO. 11544, CRR, RPR, RMR, RDR  
FEDERAL OFFICIAL COURT REPORTER  
350 WEST 1ST STREET, ROOM 4311  
LOS ANGELES, CALIFORNIA 90012  
(213) 894-2305

UNITED STATES DISTRICT COURT

1 **APPEARANCES OF COUNSEL:**

2 **FOR THE PLAINTIFF:**

3 SANDRA R. BROWN  
4 United States Attorney  
5 BY: TERRENCE P. MANN  
6 BY: SHEILA NAGARAJ  
7 BY: VICTORIA A. DEGTYAREVA  
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United States Courthouse  
312 North Spring Street  
Los Angeles, California 90012

9  
10 **FOR THE DEFENDANT TANNOUS FAZAH:**

11 LAW OFFICES OF IRA LEE PLUMMER  
12 BY: IRA LEE PLUMMER  
13 Attorney at Law  
1286 University Avenue, Suite 277  
San Diego, California 92103

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1 MONDAY, JUNE 5, 2017; 10:30 A.M.

2 LOS ANGELES, CALIFORNIA

3 -00o-

4 THE COURTROOM DEPUTY: Case No. CR 13-537(B) BRO,  
5 United States of America vs. Tannous Fazah.

6 MR. PLUMMER: Good morning, Your Honor. Ira Plummer  
7 on behalf of Mr. Fazah.

8 THE COURT: Good morning.

9 MR. MANN: Good morning, Your Honor. Terrence Mann,  
10 Sheila Nagaraj, and Victoria Degtyareva on behalf of the  
11 United States.

12 THE COURT: Good morning.

13 Mr. Fazah at the moment is not present before the  
14 Court, but he'll be out here momentarily.

15 (Pause in the proceedings.)

16 MR. PLUMMER: Mr. Fazah is present before the Court  
17 in custody.

18 THE COURT: Yes.

19 Mr. Fazah is shackled, and I intend to ask that he  
20 remain shackled given the nature of the case, Mr. Plummer. And  
21 as of yet, there's been no request. I'm not inclined to do it  
22 anyway, but I'll let you be heard if you are asking for it.

23 MR. PLUMMER: No. I submit on that issue,  
24 Your Honor.

25 THE COURT: Okay. All right. Let's talk about

1 what's going to go on here. Let me tell you what I've read and  
2 considered.

3 I've read and considered the presentence report that  
4 was released and disclosed on September 19, 2016; the  
5 addendum January -- strike that -- June 1st, 2017; the  
6 Government's position papers, April 11, 2017; Government's  
7 reply, May 31, 2017; defense position papers February 20, 2017;  
8 supplement, May 8th, 2017; and the sentencing letter, May 30th,  
9 2017.

10 Mr. Plummer, have I -- is there anything that I  
11 haven't read that I should have read?

12 MR. PLUMMER: No, Your Honor.

13 THE COURT: Okay. Government?

14 MR. MANN: No, Your Honor.

15 THE COURT: Okay. Have you discussed with Mr. Fazah  
16 the presentence report and the addenda in this case?

17 MR. PLUMMER: I have.

18 THE COURT: Okay. Have you discussed your  
19 objections in this case?

20 MR. PLUMMER: Yes.

21 THE COURT: And are you expecting an evidentiary  
22 hearing?

23 MR. PLUMMER: I am not.

24 THE COURT: Okay. So first order of business in  
25 this case is the 851 enhancement. And I know you're

1 challenging the legal consequence of the 851 enhancement under  
2 Title 21, which, as I understand it, your client has suffered  
3 two prior felony narcotics convictions, one on Case BA358538  
4 and Case VA, Victor, Albert, 107994, on -- do you wish to have  
5 an evidentiary hearing as it relates to the 851 prior  
6 convictions?

7 MR. PLUMMER: I do not.

8 THE COURT: Okay. Is your client willing to admit  
9 that?

10 MR. PLUMMER: We're not admitting that he has those  
11 convictions as he stands here today because we've had them  
12 reduced to misdemeanors. But we're willing to admit that he  
13 had them in the past.

14 THE COURT: Okay. So let's -- because I do believe  
15 on January 27, 2016, the Los Angeles Superior Court reduced  
16 your client's BA358538 to a misdemeanor pursuant to California  
17 constitutional amendment Proposition 47. Similarly, on  
18 March 21, 2016, Los Angeles Superior Court reduced your  
19 client's former felony conviction, Case Victor Albert 107994  
20 under Prop 47 as well.

21 So, Mr. Fazah, I'm going to ask you some questions.  
22 You have the right -- the Government has the burden of proving  
23 those prior convictions at the time you suffered them beyond a  
24 reasonable doubt.

25 Do you waive and give up the right to contest those

1 prior convictions and admit that -- it looks like the deferred  
2 entry of judgment -- the VA case was DEJ pursuant to California  
3 Penal Code Section 1000, which Mr. Fazah fell off, which then  
4 became a felony conviction.

5 My notes say that became a felony conviction  
6 April 14, 2010, when Prop 36 -- he fell off of DEJ, it was  
7 converted to Proposition 36, and Proposition 36 was terminated.  
8 So my timing is that it was April 14, 2010.

9 Is that your recollection, Mr. Plummer?

10 MR. PLUMMER: Yes, Your Honor.

11 THE COURT: Okay. So, Mr. Fazah, did you suffer  
12 that conviction at that date and -- date, sir, VA107994?

13 THE DEFENDANT: Yes.

14 THE COURT: Okay. Did you suffer a prior conviction  
15 for a violation of Health and Safety Code, Section 11377(a), a  
16 felony, at the time you pled, BA358538, which was later reduced  
17 to a misdemeanor on or about January 27, 2016?

18 THE DEFENDANT: Yes.

19 THE COURT: Okay. So the question -- many of the --  
20 Mr. Plummer was out here listening to my conversation with  
21 Mr. Litman on behalf of Mr. Dorado. The two issues -- first is  
22 the 851 enhancement which, having suffered two prior felony  
23 narcotics convictions, invokes a statutory mandatory minimum of  
24 life imprisonment. The question is whether or not Diaz  
25 applies. Second, the Sentencing Guideline range under RICO

1 depends upon the nature of -- the type of elements for the RICO  
2 conspiracy.

3 The RICO extortion portion is driven by 3 -- strike  
4 that -- 2E1.1(a) (2) and 2B3.2, for a total offense level of 18.  
5 There is a multi-count adjustment in this case. The narcotic  
6 portion, my view is that Mr. Fazah's responsible for  
7 198.48 grams of actual methamphetamine, invoking an offense  
8 level of 32 under 2D1.1. His firearm, under 2D1.1(b) (1), was  
9 in close proximity to pay-and-owe sheets, multiple amounts of  
10 narcotics, multiple different types of narcotics.

11 So I am inclined to employ a two-level upward  
12 adjustment for a firearm, finding that it is not improbable,  
13 which is a double negative -- therefore, meaning that it is  
14 probable.

15 And then the attempted distribution of the narcotics  
16 into the jail for a two-level upward adjustment, a total  
17 offense level on the narcotics of 36.

18 This case is like Mr. Dorado's case as it relates to  
19 the RICO murder or assault, comes down to whether or not it's a  
20 murder or whether or not it is an assault. And if it were  
21 deemed to be an assault, my preliminary calculation is level  
22 14, plus 2 for more than minimal planning, plus 10 for the  
23 discharge of a firearm, and plus 2 for the increase of a thing  
24 in value, meaning reputation of Mr. Fazah.

25 So generating a total offense level if it were an

1 assault of 28, 43 if it were a murder, multi-count adjustment  
2 of one, nine criminal history points, generating a Criminal  
3 History Category IV.

4 That's where we begin. Mr. Plummer.

5 MR. PLUMMER: Thank you.

6 THE COURT: I'll let you begin --

7 MR. PLUMMER: Do you want me --

8 THE COURT: -- then I'll go to Mr. Mann.

9 MR. PLUMMER: Okay.

10 THE COURT: And then, Mr. Fazah, after I've heard  
11 from your lawyer and the Government, you'll have the  
12 opportunity to speak to me. You don't have to speak to me. If  
13 you want to, you may. And I won't hold it against you either  
14 way. Okay?

15 Mr. Plummer, any order you wish, but I think you've  
16 heard my concerns. *Diaz*, I think, applies. And then the  
17 murder portion you can talk about.

18 MR. PLUMMER: Well, with regards to the 851s first,  
19 Mr. Fazah stands before you without those convictions. He has  
20 two misdemeanor drug convictions, which were basically for, you  
21 know, less than -- less than gram quantities of drugs. He --  
22 we went before the Superior Court in the State of California  
23 and got those reduced to a misdemeanor.

24 So right now those two offenses are misdemeanors.  
25 They're not felonies. And we believe they should not -- not

1 count as -- under 851, 841.

2 The difference between Mr. Fazah and  
3 Mr. Jesse Vasquez in the *Diaz* case is that Mr. Vasquez came  
4 back after being sentenced -- after being sentenced, he got his  
5 felony conviction reversed -- or reduced to a misdemeanor.  
6 Then he came back for resentencing.

7 So at the time he stood before the judge in his  
8 initial sentencing, the California law at that point in time  
9 was that it counted -- they were felonies, and they counted as  
10 felonies and his sentence was -- he was sentenced accordingly.

11 Mr. Fazah is in a different position. His position  
12 is that, as he stands before you, he does not have those  
13 convictions. And those -- the California Prop 47 --

14 THE COURT: Well, he has -- he has convictions.

15 MR. PLUMMER: He has convictions but not those two  
16 convictions.

17 THE COURT: Not felonies.

18 MR. PLUMMER: Right. They're misdemeanor  
19 convictions.

20 California law states under Prop 47 that for all  
21 purposes those convictions are now misdemeanors.

22 THE COURT: Right. But how do you square that with  
23 *Diaz*? Because California law does not interpret 21 U.S.C.,  
24 Section 841. And as you know, you know, federal law is  
25 different.

1                   MR. PLUMMER: But we're using California law to  
2 enhance his sentence.

3                   THE COURT: Using any felony narcotics conviction.

4 So -- and *Diaz* is a Ninth Circuit case. It dealt with Prop 47.  
5 I am bound to follow *Diaz*. So tell me why -- other than the  
6 timing, how that is a distinguishable factor.

7                   MR. PLUMMER: Well, that is the distinguishable  
8 factor in *Diaz*. *Diaz* is the timing. And that's what *Diaz* is  
9 about, it's the timing. It's trying to get something changed  
10 because California changed the law. But we're not trying to  
11 get something changed. He hasn't been sentenced yet. We're  
12 not trying to change his sentence. We're just trying to have a  
13 sentence imposed that reflects the fact that those convictions  
14 are misdemeanors, not felonies.

15                  THE COURT: Well, how do you -- I guess I disagree  
16 with your reading of *Diaz*. And -- that Mr. Vasquez, who was  
17 the person in *Diaz*, not the witness in this case, they make it  
18 pretty clear -- you know, the panel makes it pretty clear that  
19 any subsequent actions taken by the California Courts,  
20 legislature people don't impact the federal sentence because if  
21 you read 841, it's at the time of the commission of the  
22 offense, which most certainly at the commission of the offense  
23 he had suffered two prior felony drug convictions because it  
24 wasn't until 2016, after the Indictment came down in this case,  
25 that his felonies were reduced to misdemeanors.

1                   MR. PLUMMER: That's correct. His felonies were  
2 reduced to misdemeanors.

3                   THE COURT: January, March 2016. And the Indictment  
4 came down in 2013, I think.

5                   MR. PLUMMER: But he hasn't been convicted until  
6 Your Honor pronounces sentence. So at this point in time,  
7 those are misdemeanors. That's my point.

8                   THE COURT: Okay. All right.

9                   MR. PLUMMER: With regards to the homicide portion  
10 of the case.

11                  THE COURT: Yes.

12                  MR. PLUMMER: I mean, it was never even indicted as  
13 a homicide. It was never treated as a homicide. There's a  
14 whole different procedure in the federal system for how we deal  
15 with homicides. We go to Main Justice, we talk to people up  
16 there about it.

17                  THE COURT: I'm not sure that's true, Mr. Plummer.  
18 I understand that happens in death cases, but I don't believe a  
19 murder has to go to Main Justice.

20                  Mr. Mann, am I correct or am I wrong in that?

21                  MR. MANN: Your Honor, any racketeering-based  
22 offense would go to OCGS, basically the organized crime  
23 section. But it's not -- just because something is a murder  
24 does not require, from my understanding, Main Justice's  
25 approval.

1                   THE COURT: Okay. Okay.

2                   MR. PLUMMER: And in addition, the jury didn't have  
3 to -- to find that Mr. Acosta, or R.A., was murdered. They  
4 just had to find that the gang was involved in murders.

5                   So we don't have a jury finding that this particular  
6 gentleman committed a murder.

7                   THE COURT: We do have his admission to Mr. Acosta.

8                   MR. PLUMMER: We have what?

9                   THE COURT: His admission to Mr. Acosta that he  
10 smoked "the dude."

11                  MR. PLUMMER: Mr. Eliazar --

12                  THE COURT: Eliazar Acosta.

13                  MR. PLUMMER: Correct. We have that admission. And  
14 I would ask the Court to look at that with some suspicion  
15 because Mr. Eliazar Acosta was in custody. He's a jailhouse  
16 snitch. He's trying to get a better sentence for himself.  
17 He's trying to cooperate with the Government, make himself  
18 valuable. So I would ask that his statement not be given any  
19 credibility.

20                  We also had a witness, a non-participant witness to  
21 the -- to the shooting of Mr. R.A. who indicated that the  
22 person who did the shooting matched a description that more was  
23 closer to Alex Valenzuela than it was to my client.

24                  So, I mean, that whole issue could have been decided  
25 by the jury completely differently if they'd been asked:

1 Did -- was there a -- a murder of Mr. R.A. in this case? And  
2 if so, who did it? That whole issue was not explored.

3 It's kind of like a backdoor way of punishing  
4 somebody -- somebody for something that they're not indicted  
5 for, that they're not found -- found guilty of by the jury.

6 THE COURT: Well, but under 1B1.1, don't I have to  
7 look at the relevant conduct? I mean, I think that's what the  
8 Government's arguing, it's relevant conduct. It's a direct  
9 conspiracy to murder Roberto Acosta between Mr. Ulloa,  
10 Mr. Fazah, and Mr. Dorado.

11 MR. PLUMMER: But the fact that the Government says  
12 it proved it beyond a reasonable doubt doesn't make it so. The  
13 jury didn't say --

14 THE COURT: Absolutely right.

15 MR. PLUMMER: The jury didn't say that.

16 THE COURT: We can agree on that.

17 MR. PLUMMER: Yes. And now we're punishing for  
18 something -- or potentially punishing for something that the  
19 jury didn't find him guilty of.

20 THE COURT: Right. But the Sentencing Guideline  
21 calculation isn't for the jury. And the law, as I understand  
22 it, says that it's generally by a preponderance of the evidence  
23 standard. But it's such a big sway under the Sentencing  
24 Guidelines, the Government bears the burden of showing that the  
25 facts under the relevant conduct are by clear and convincing

1 evidence. And they're asking me to make a finding beyond a  
2 reasonable doubt, which I'm empowered to do, to find the facts  
3 under Rule 32 in the sentencing context. So that's what  
4 they're asking for, I think. At least, that's my whole  
5 perception of what I'm supposed to be doing up here.

6 MR. PLUMMER: Well, it's my position that if the  
7 Government wanted him sentenced on a murder, they should have  
8 charged him with a murder.

9 THE COURT: Well, I cannot make the Government  
10 charge anything.

11 MR. PLUMMER: I can't either.

12 THE COURT: I mean, they have wide discretion.  
13 They're a coequal branch of Government. I only listen to the  
14 evidence. But I don't think that's their theory. I think  
15 their theory is that it is relevant conduct. So --

16 MR. PLUMMER: And Mr. Valenzuela -- I mean, he  
17 admitted to his participation. He's pled guilty to voluntary  
18 manslaughter. We didn't have that whole discussion about  
19 whether this was a murder or a voluntary manslaughter.

20 It's my position that Mr. Valenzuela is the shooter  
21 of Mr. R.A. and that this was an assault -- that the boys went  
22 out there to beat this guy up. There was no authority given by  
23 anybody for a green light.

24 THE COURT: Wait a minute. This is sort of boys  
25 will be boys in Florencia 13? I mean, that is a ridiculous

1 argument. "The boys went out." Your client's a grown man.

2 MR. PLUMMER: Okay. Well, my client went out there  
3 with some of -- some other people. That's what the evidence  
4 sort of shows. But I think Mr. Valenzuela is the person who  
5 was the shooter.

6 THE COURT: What about the comment from Mr. Ulloa to  
7 Mr. Fazah that -- Trial Exhibit 25, the recorded conversation,  
8 where he says "smoke him like an enemy"? I mean, that -- and  
9 your client, Mr. Fazah, agrees.

10 MR. PLUMMER: "Smash him like an enemy."

11 THE COURT: "Smash him." Sorry, not "smoke him."  
12 "Smash him."

13 MR. PLUMMER: Yeah. I remember that as well.  
14 And --

15 THE COURT: Because there was evidence before me  
16 that, other than Sergeant Montenegro, that that meant there's  
17 no discipline for enemies in the gang lifestyle, the gang  
18 culture. It is death.

19 So how is that not your client agreed, even if,  
20 hypothetically, assuming for a second that I discard  
21 Eliazar Acosta's statement about your client?

22 MR. PLUMMER: We learned from the Government, from  
23 the reglas, from their expert, that you can't kill a member of  
24 the gang without permission. You can't --

25 THE COURT: But Mr. Ulloa said, You go ahead -- I'll

1 take care of that. I'll cover you. Whether or not Mr. Ulloa  
2 gets in trouble is not the issue before me. It's -- Mr. Ulloa  
3 is clearly above your client in the hierarchy, and that was the  
4 evidence that was presented to me. And that's where Mr. Ulloa  
5 is assuring your client in Trial Exhibit 25 that I have -- I'll  
6 cover you.

7 So what about that?

8 MR. PLUMMER: Mr. Ulloa knew he didn't have the  
9 authority. He was talking about giving a beating. Mr. Ulloa  
10 knew -- he's been in the gang longer than my client, a lot  
11 longer, obviously. And he knew that he couldn't authorize a  
12 killing. Even the shot-callers can't authorize a killing. We  
13 heard in evidence that it has to come from the Bay, where the  
14 Eme people are.

15 You can't -- it's true, you can -- you can kill  
16 somebody that comes into your territory. It doesn't mean you  
17 can kill another gang member, another Florencia 13 gang member  
18 without permission. The consequences for that are dire.

19 If my client had done that, he probably wouldn't  
20 even be standing here today. I mean, there's -- you can't kill  
21 a fellow gang member without permission.

22 Now, Mr. Ulloa and my client both knew they didn't  
23 have that kind of authority. Even -- even the shot-callers on  
24 the street don't have that -- that authority.

25 So my position is that he -- this was intended to be

1 an assault because Mr. Acosta was talking out of school. He  
2 was criticizing Mr. Ulloa, saying he was a snitch, and that --  
3 the people that were at the party were going out there to -- to  
4 beat him up.

5 I don't deny that he got shot. I do deny who shot  
6 him. But whether that was a murder or voluntary manslaughter  
7 or whatever the heck it was, we didn't get into that in this  
8 case because it wasn't charged that way.

9 THE COURT: Pause a moment, please, Mr. Plummer.

10 (Pause in the proceedings.)

11 THE COURT: Okay. Mr. Plummer, I apologize for the  
12 pause. Go ahead, please.

13 MR. PLUMMER: The only weapon found in my client's  
14 unit or apartment, whatever you want to call it, was a squirrel  
15 gun. There's no evidence that he maintained --

16 THE COURT: It was a 9 millimeter, wasn't it?

17 THE DEFENDANT: .22 rifle.

18 MR. PLUMMER: .22 rifle.

19 THE COURT: .22? Okay.

20 MR. PLUMMER: Long rifle. I don't even know if it  
21 was operable or not. There was some ammunition lying around,  
22 two bullets lying around. I don't think they even took the  
23 gun.

24 At the time this case was initiated, the Government  
25 was really not that well aware of my client. There was no

1 wiretap on his phone. He's a -- he wasn't like a target. He's  
2 very low down in the system. That's why we're asking for role.

3 He's also been in custody for seven years because he  
4 went in on a state case after this -- the incident here where  
5 Mr. R.A. was killed. He went in on a state case. He did a  
6 state term and then came back over to the Federal Government.  
7 So we're asking for some consideration for the time that he  
8 spent in state custody as well.

9 As far as the smuggling drugs into the jail part of  
10 this case, there was some talk about that, but he never  
11 actually participated in any of those activities.

12 THE COURT: Anything else?

13 MR. PLUMMER: No, Your Honor. Thank you.

14 THE COURT: Okay. Who will speak from the  
15 Government?

16 MR. MANN: I will, Your Honor.

17 THE COURT: Mr. Mann.

18 MR. MANN: Your Honor, the Government's position  
19 with respect to the 851 enhancement -- enhancement is  
20 consistent, namely, that *Diaz* and its -- its precursor *Norbury*  
21 foreclosed this argument. And at the time -- the operative  
22 time period with respect to prior felony convictions, um, is --  
23 we look at it when the defendant committed the offense under  
24 Section 841, the Title 21 offense at issue here.

25 And at that time, through the conspiracy, the

1 defendant had the two convictions. So it's the date of  
2 conviction. What happened this year or last year doesn't  
3 change that.

4 And unless the Court has questions, I'll move on.

5 THE COURT: Move on.

6 MR. MANN: With respect to the homicide, Your Honor,  
7 the Government's position is that the evidence was crystal  
8 clear at trial.

9 The defendant shot and killed someone. And it  
10 doesn't matter what the paperwork says. And that to suggest  
11 that he should get a pass because he was charged one way and  
12 not another, that truly would be getting off on a technicality.

13 It was clear from the beginning on the phone calls  
14 defendant was -- identified his voice. He received the kill  
15 order. It was described as such -- I'll just say that the  
16 evidence underlying the fact that it was a kill order was  
17 provided by Lieutenant Velasquez, Sergeant Montenegro, and  
18 Eliazar Acosta as well.

19 Excuse me.

20 With respect to how this case would be charged, I  
21 would just note if it were charged as murder, that would mean  
22 that there would be discussions of the death penalty. There  
23 would be a mandatory term of life imprisonment upon conviction.  
24 So it is a very different pact. And at this time, by charging  
25 it this way, it also gives the defendant an opportunity to

1 argue for something else, you know, at least under those  
2 offenses.

3 The Government submits that the evidence is clear,  
4 the defendant shot Robert Acosta. The defendant Jose Dorado  
5 aided and abetted it. So they conspired to do it, but it's  
6 basically the substantive acts which, under the Guidelines,  
7 make him responsible.

8 There was Exhibit 22. There was the testimony of  
9 Valenzuela. There was the testimony of the officers from  
10 Huntington Park Police Department who were present, went to the  
11 defendant's apartment and identified him there. There was  
12 gunshot residue evidence as well. There was the subsequent  
13 gang investigation by Eliazar Acosta in which defendant  
14 admitted to pulling the trigger.

15 I would also note that there was Exhibit 32 -- I  
16 realize -- I don't think I mentioned it in my papers -- where  
17 Ulloa and Arana are trying to remember the guy -- what's the  
18 young guy's name? And they're arguing about it.

19 And they say it's Terist, the young guy, the young  
20 guy who said he had a warrant. And Ulloa is referencing -- I'm  
21 sorry, Your Honor -- they're talking about the one that got  
22 caught. And Sergeant Montenegro confirmed that they were  
23 talking about Terist, AKA this defendant. And Arana discussed  
24 that they thought that one was a cop or something, talking  
25 about Robert Acosta.

1                   And in the course of that discussion, they're  
2 talking about Terist, they're talking about this defendant  
3 right here.

4                   From before the murder to the evidence after the  
5 murder, it only points to one person.

6                   If Dopey had been the killer, there would be  
7 something somewhere in the record. There would be a reference  
8 to then Dopey went crazy and did something or whatever the  
9 defense theory is. That is not what we have. We have  
10 references to Terist, and we have Alex Valenzuela, who I  
11 believe the Court should find credible, who said that Fazah at  
12 the end of the beating, when Robert Acosta was lying  
13 unconscious, brandished a firearm, aimed it. The weapon  
14 jammed. Fazah, showing -- this was premeditated, showing this  
15 wasn't simply I lost my cool -- cocked the gun, the round  
16 ejected, landed right next to the ear of the victim, and then  
17 Fazah committed the murder.

18                   The Government believes there's no doubt and the  
19 Court should find so beyond a reasonable doubt that  
20 Defendant Fazah committed the murder.

21                   THE COURT: Do you want to talk about minor role and  
22 the credits for the VA114895 case?

23                   MR. MANN: I'm sorry, Your Honor?

24                   THE COURT: Do you want to talk about role  
25 adjustment and the VA -- the credits for time served on

1 VA114895?

2 MR. MANN: I would note, with respect to the  
3 defendant's role, he was, I would say, at least an average  
4 participant, if not -- if these aggravating facts make him to  
5 have a greater role than the average participant. He was a  
6 regular trafficker of narcotics, according to Alex Valenzuela.

7 The defendant also had distributed quantities of  
8 methamphetamine on his property, his residence the night of the  
9 murder. Defendant offered to smuggle drugs into the  
10 L.A. County jail to Ulloa. And in the course of doing so, this  
11 defendant, as again evidenced by the jail calls, described  
12 again basically drug operations going on.

13 He was involved in multiple prongs of the RICO  
14 conspiracy and by no means should get the benefit of a lesser  
15 role.

16 With respect to credit, I don't believe the defense  
17 provided any authority for it. That is a determination to be  
18 made by the Attorney General and is certainly that -- that  
19 crime was certainly not -- should be deemed to be part of this  
20 offense.

21 THE COURT: Mr. Plummer, anything from you?

22 MR. PLUMMER: With regards to the gunshot residue,  
23 Alex Valenzuela also tested positive for gunshot residue.  
24 There was no physical evidence of the murder. There was no  
25 weapon recovered. We're totally -- no DNA. We're just totally

1       relying on the word of Alex Valenzuela and Eliazar Acosta.

2                   Alex Valenzuela has pled guilty to essentially  
3 committing the murder. And Eliazar Acosta is a jailhouse  
4 snitch trying to get his sentence reduced.

5                   With that, I would submit.

6                   THE COURT: Mr. Fazah, is there anything you wish to  
7 say at this time?

8                   THE DEFENDANT: Yeah, Your Honor. I would like to  
9 apologize on behalf of my family. I would like to say to this  
10 day, um, I'm not guilty of this murder. I didn't kill anybody.  
11 Um, I never fully felt that I was innocent because I did commit  
12 some crimes. Um, I did have 16 grams. I did have a rifle.  
13 And I was on the phone talking about an assault. But I never  
14 murdered anybody.

15                  I wanted to plead guilty, I wanted to take  
16 responsibility for what I did, but the Government didn't allow  
17 me. They kept insisting that I plead guilty to a murder I  
18 didn't commit. And I'm standing before you still saying that I  
19 didn't commit this murder.

20                  I ask that you don't sentence me as if I were  
21 guilty. I ask that you take into consideration all the time  
22 that I spent in jail. I ask that you please find me guilty or  
23 sentence me for things that I've done, for the facts,  
24 Your Honor.

25                  Nothing else -- nothing proves that I was out there

1 that day other than testimony of people who have cooperated.  
2 And am I getting punished because I didn't cooperate? Am I  
3 getting punished because I'm not a snitch? I was more than  
4 willing to admit to the things that I did and I still am. But  
5 to murder -- I'm not a murderer, Your Honor. I never killed  
6 anybody. And I would just please ask that you take that into  
7 consideration.

8 I have been in jail for a long time. I got arrested  
9 when I was 19 years old, and I've been in jail since. I'm not  
10 the same person that I was when -- when I got arrested. I have  
11 rehabilitated myself. I've used everything, all the resources  
12 that the Government has given me to try to become a better  
13 person.

14 I spent all my adult years in jail. I haven't had a  
15 chance to come home to prove to my family, to prove to myself  
16 that I'm a better person. I stand before you, and I may lose  
17 my life. And I ask that you don't take it from me because I  
18 really, really believe I can function in society.

19 That's it, Your Honor. Thank you.

20 THE COURT: Thank you for your comments, Mr. Fazah.  
21 Again, this is not a decision that I take lightly.  
22 And it is something that I have given great thought and  
23 reflection.

24 And let's first start with the 851 enhancement. I  
25 think most certainly -- the way I read *United States vs. Diaz*,

1 it is an interpretation of Title 21, United States Code,  
2 Section 841, which Federal Courts are charged with  
3 interpreting. And I believe that *Diaz* says that any -- it is  
4 measured -- whether or not something is a prior felony,  
5 narcotics conviction is measured from the time of the  
6 commission of the instant offense.

7 I believe that *Norbury* is also important to this  
8 analysis, 492 F.3d 1012, which dealt with dismissals and 1203.4  
9 expungements. And that California's laws don't affect an  
10 interpretation of 841 -- Title 21, Section 841(b)(1)(A). And  
11 that *Diaz* is binding upon me.

12 I don't believe that the timing of the attack on the  
13 sentence is what controls. I don't think it distinguishes this  
14 case from *Diaz*.

15 So I am following *United States vs. Diaz*. And on  
16 that ground alone, it invokes a statutory mandatory, mandatory  
17 minimum of life imprisonment. However, that does not relieve  
18 of my obligation to accurately calculate the crimes of  
19 conviction. That, of course, depends upon the portion of what  
20 the object is, the extortion. I am finding that the total  
21 offense level is 18, the RICO extortion part.

22 With respect to the drugs, I do find that Mr. Fazah  
23 was an integral part of this narcotics trafficking enterprise,  
24 this conspiracy. And I do find that he knew about the  
25 narcotics trafficking activities and that I am holding him

1 responsible for 198.48 grams of meth, actual methamphetamine  
2 for an offense level of 32.

3 The firearm in this case, whether or not it matches,  
4 the gun that was used, the 9 milliliter bullet that was used to  
5 kill Mr. Acosta is of no moment because it was close to  
6 multiple different kinds of drugs, pay-and-owe sheets, and  
7 scales. So I'm finding that the two-level upward adjustment  
8 under 2B1.1 -- 2D1.1(b) (1) to be appropriate. And I do find  
9 that Mr. Fazah attempted to smuggle the narcotics into the jail  
10 facility for an additional two-level upward adjustment under  
11 2D1.1(b) (4) for a total offense level on the drug portion of  
12 36.

13 With respect to the assault or the murder portion, I  
14 think the conversations are the most compelling evidence that  
15 this was a request or an order by Ulloa to kill Robert Acosta,  
16 when he says to him, "smash him like an enemy, fool, and I'll  
17 clear it up."

18 Whether or not Mr. Ulloa had proper permission  
19 doesn't change Mr. Fazah's intent, his desire to work his way  
20 up the Florencia 13 gang. And it's actually a statement to  
21 Mr. Fazah that he, Ulloa, has Mr. Fazah's back, if there's  
22 any -- somebody thinks that he did something unauthorized. And  
23 Mr. Fazah was almost enthusiastic and said, "Don't even trip,  
24 my boy. I'll smash that fool down." And he is agreeing to do  
25 that.

1                   And I think he and Mr. Dorado lured and planned to  
2 kill Robert Acosta pursuant to Mr. Ulloa's orders.

3                   I do, having observed the demeanor of Mr. Vasquez,  
4 while he did ingest narcotics, I found him to be credible. And  
5 the same with Eliazar Acosta, who, whilst he was certainly --  
6 had his fair share of criminal convictions, he testified quite  
7 forthrightly. And I've observed his demeanor. And although he  
8 is a criminal, he is a criminal, he, I believe, told the truth.

9                   The jury's decision to check the box as it related  
10 to murder, I think the Government further corroborates that  
11 this 1B1.1 finding of relevant conduct, I think that  
12 Mr. Acosta's testimony that Mr. Fazah admitted to it further  
13 corroborates it and the details provided by Mr. Vasquez -- is  
14 corroborated by the forensic evidence. And there is absolutely  
15 no evidence before me the fact that Mr. Acosta was tasked with  
16 investigating this murder.

17                   MR. MANN: I'm sorry, Your Honor. When the Court  
18 said Mr. Vasquez, did the Court mean Mr. Valenzuela?

19                   THE COURT: Excuse me. Mr. Valenzuela.

20                   And Lieutenant Velasquez also testified about the  
21 three levels of discipline with the enemy, not being subject to  
22 court-outs, not being subject to beatings. But, rather,  
23 Sergeant Montenegro called it a court order, Eliazar Acosta  
24 called it a court order -- strike that -- a kill order. When I  
25 said "court order," I meant kill order.

1                   So I do believe that this was a -- that this was --  
2                   Mr. Fazah knew that he was going to kill Mr. Acosta, he was  
3                   going to make himself bigger in the gang, and I do believe  
4                   those witnesses.

5                   So the offense level in this case is 43. There's a  
6                   multi-count adjustment. With respect -- I don't believe that  
7                   Mr. Fazah should receive a minor role. He's not substantially  
8                   less culpable than anybody else. In fact, he is trying to  
9                   further ingratiate himself into the gang lifestyle.

10                  With respect to the criminal history overstatement,  
11                  I think that Mr. Fazah's criminal convictions accurately  
12                  reflect his inability to comply with the areas of  
13                  confinement -- strike that -- the laws. And his statements  
14                  here today confirm that.

15                  Mr. Fazah's actions have led him to be incarcerated  
16                  since 19. Not me, not the Court, not any Court. So I don't  
17                  find his criminal history to be overstated in this case.

18                  Pursuant to the Sentencing Reform Act of 1984, it's  
19                  the judgment of the Court that the defendant Tannous Fazah is  
20                  committed on Counts 1, 2, 3, 4, and 8 of the Second Superseding  
21                  Indictment to the custody of the Bureau of Prisons for a term  
22                  of life imprisonment.

23                  The term consists of life imprisonment on Counts 1,  
24                  3, and 4, 36 months on Count 2, and 120 months on Count 8  
25                  served concurrently.

1                   It's ordered that, Mr. Fazah, you shall pay to the  
2 United States a special assessment of \$500 due immediately.  
3 Any unpaid balance shall be due during the period of  
4 imprisonment at a rate of not less than \$25 per quarter,  
5 pursuant to the Bureau of Prisons Inmate Financial  
6 Responsibility Program.

7                   Pursuant to 5E1.2, all fines are waived, as I'm  
8 finding, given the lengthy sentence, that Mr. Fazah is unable  
9 to pay the fine or become able to pay the fine in the future.

10                  All right. That's the order of the Court.

11                  Anything further, Mr. Plummer?

12                  MR. PLUMMER: No, Your Honor.

13                  THE COURT: I will say I've also looked at the  
14 3553(a) factors. Mr. Fazah is 26 years old. He's on the  
15 younger side. His upbringing -- he himself said he was an only  
16 son and spoiled. So he's enjoyed a wonderful upbringing. And  
17 I feel truly sorry for the suffering of his mother.

18                  MR. PLUMMER: Thank you, Your Honor. She's present,  
19 as well as his wife.

20                  We're requesting a western region.

21                  THE COURT: I will recommend that Mr. Fazah be  
22 housed in the western region. Preferably Southern California  
23 or no?

24                  MR. PLUMMER: Yes, Your Honor.

25                  THE COURT: Preferably Southern California, given

1 his strong ties to the community.

2 All right. Anything further, Mr. Plummer?

3 MR. PLUMMER: No, Your Honor.

4 THE COURT: Mr. Mann?

5 MR. MANN: Only one thing. In the interest of  
6 justice, the Government moves to dismiss the underlying  
7 Indictment as to this defendant only.

8 THE COURT: Granted.

9 Mr. Fazah, you have the right to appeal your  
10 conviction and sentence. What that means is that you must file  
11 a Notice of Appeal within a certain time frame. If you fail to  
12 file any Notice of Appeal, you forever waive that right.

13 Do you understand your right to appeal, sir?

14 THE DEFENDANT: Can I put it on the record right  
15 now, my appeal?

16 THE COURT: I'm sure Mr. Plummer will file -- you  
17 can -- you can put it on the record right now, but I'm sure  
18 Mr. Plummer will file a written Notice of Appeal.

19 THE DEFENDANT: Thank you.

20 MR. PLUMMER: I will.

21 THE COURT: But I understand your comments to  
22 indicate to me that you seek to appeal both your conviction and  
23 your sentence in this case; correct?

24 THE DEFENDANT: Correct.

25 THE COURT: Okay. Mr. Plummer, would you please

1 file a written Notice of Appeal reflecting your client's  
2 statements?

3 MR. PLUMMER: Yes, Your Honor.

4 THE COURT: Okay. Thank you.

5 All right. Thank you. Good luck to you, Mr. Fazah.

6 MR. PLUMMER: Thank you.

7 MR. MANN: Thank you, Your Honor.

8 (Proceedings concluded at 11:15 a.m.)

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**CERTIFICATE OF OFFICIAL REPORTER**

3 COUNTY OF LOS ANGELES )  
4 STATE OF CALIFORNIA )

6 I, MYRA L. PONCE, FEDERAL OFFICIAL REALTIME COURT  
7 REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE  
8 CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT  
9 TO SECTION 753, TITLE 28, UNITED STATES CODE THAT THE FOREGOING  
10 IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY  
11 REPORTED PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT  
12 THE TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE  
13 REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

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DATED THIS 11TH DAY OF SEPTEMBER, 2017.

/S/ MYRA L. PONCE

MYRA L. PONCE, CSR NO. 11544, CRR, RDR  
FEDERAL OFFICIAL COURT REPORTER

# Appendix C

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JUN 22 2021

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSE CESAR SANCHEZ, AKA Loco,  
AKA Locotroll, AKA Juan Sanchez, AKA  
Troll, AKA Trouble,

Defendant-Appellant.

No. 17-50139

D.C. No.  
2:13-cr-00537-BRO-24  
Central District of California,  
Los Angeles

ORDER

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GISELLE CASADO, AKA Guera,

Defendant-Appellant.

No. 17-50173

D.C. No.  
2:13-cr-00537-BRO-27  
Central District of California,  
Los Angeles

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSE MANUEL DORADO, AKA Lazy,  
AKA Yogi,

No. 17-50212

D.C. No.  
2:13-cr-00537-BRO-13  
Central District of California,  
Los Angeles

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TANNOUS FAZAH, AKA Terist,

Defendant-Appellant.

No. 17-50213

D.C. No.

2:13-cr-00537-BRO-14

Central District of California,  
Los Angeles

Before: GRABER, MILLER, and LEE, Circuit Judges.

The panel judges have voted to deny Appellant's petition for panel rehearing and rehearing en banc.

The full court has been advised of Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellants's petition for panel rehearing and rehearing en banc, Docket No. 133, is DENIED.

# Appendix D

United States Code Annotated  
Constitution of the United States  
Annotated  
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due  
Process; Takings

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy;  
Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

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.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V, USCA CONST Amend. V  
Current through PL 117-52.

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United States Code Annotated  
Constitution of the United States  
Annotated

Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural  
rights [Text & Notes of Decisions subdivisions I to XXII]

Currentness

<Notes of Decisions for this amendment are displayed in multiple documents.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials  
Current through PL 117-52.

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## PART D—OFFENSES AND PENALTIES

## § 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 subclauses (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 felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 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 two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release 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-phenylethyl)-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 felony drug offense 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 Hillary 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 health<sup>1</sup> 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 the 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<sup>2</sup> 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 non-practitioners 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 propose 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).

(Pub. L. 91-513, title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub. L. 95-633, title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub. L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub. L. 98-473, title II, §§ 224(a), 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2030, 2068, 2070; Pub. L. 99-570, title I, §§ 1002, 1003(a), 1004(a), 1005(a), 1103, title XV, § 15005, Oct. 27, 1986, 100 Stat. 3207-2, 3207-5, 3207-6, 3207-11, 3207-19; Pub. L. 100-690, title VI, §§ 6055, 6254(h), 6452(a), 6470(g), (h), 6479, Nov. 18, 1988, 102 Stat. 4318, 4367, 4371, 4378, 4381; Pub. L. 101-647, title X, § 1002(e), title XII, § 1202, title XXXV, § 3599K,

<sup>1</sup>So in original. Probably should be “health”.

<sup>2</sup>So in original. Probably should be “section”.

Nov. 29, 1990, 104 Stat. 4828, 4830, 4932; Pub. L. 103-322, title IX, § 90105(a), (c), title XVIII, § 180201(b)(2)(A), Sept. 13, 1994, 108 Stat. 1987, 1988, 2047; Pub. L. 104-237, title II, § 206(a), title III, § 302(a), Oct. 3, 1996, 110 Stat. 3103, 3105; Pub. L. 104-305, § 2(a), (b)(1), Oct. 13, 1996, 110 Stat. 3807; Pub. L. 105-277, div. E, § 2(a), Oct. 21, 1998, 112 Stat. 2681-759; Pub. L. 106-172, §§ 3(b)(1), 5(b), 9, Feb. 18, 2000, 114 Stat. 9, 10, 13; Pub. L. 107-273, div. B, title III, § 3005(a), title IV, § 4002(d)(2)(A), Nov. 2, 2002, 116 Stat. 1805, 1809; Pub. L. 109-177, title VII, §§ 711(f)(1)(B), 732, Mar. 9, 2006, 120 Stat. 262, 270; Pub. L. 109-248, title II, § 201, July 27, 2006, 120 Stat. 611; Pub. L. 110-425, § 3(e), (f), Oct. 15, 2008, 122 Stat. 4828, 4829; Pub. L. 111-220, §§ 2(a), 4(a), Aug. 3, 2010, 124 Stat. 2372.)

## REFERENCES IN TEXT

This subchapter, referred to in subsecs. (a), (b)(1), (c)(1), (2), (f)(1), (g)(1), and (h)(1), (3)(A)(i), was in the original “this title”, meaning title II of Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1242, and is popularly known as the “Controlled Substances Act”. For complete classification of title II to the Code, see second paragraph of Short Title note set out under section 801 of this title and Tables.

Schedules I, II, III, IV, and V, referred to in subsec. (b), are set out in section 812(c) of this title.

Section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Prohibition Act of 2000, referred to in subsec. (b)(1)(C), is section 3(a)(1)(B) of Pub. L. 106-172, which is set out in a note under section 812 of this title.

This chapter, referred to in subsec. (g)(2)(B), (3), was in the original “this Act”, meaning Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1236. For complete classification of this Act to the Code, see Short Title note set out under section 801 of this title and Tables.

## AMENDMENTS

2010—Subsec. (b)(1)(A). Pub. L. 111-220, § 4(a)(1), in concluding provisions, substituted “\$10,000,000” for “\$4,000,000”, “\$50,000,000” for “\$10,000,000”, “\$20,000,000” for “\$8,000,000”, and “\$75,000,000” for “\$20,000,000”.

Subsec. (b)(1)(A)(iii). Pub. L. 111-220, § 2(a)(1), substituted “280 grams” for “50 grams”.

Subsec. (b)(1)(B). Pub. L. 111-220, § 4(a)(2), in concluding provisions, substituted “\$5,000,000” for “\$2,000,000”, “\$25,000,000” for “\$5,000,000”, “\$8,000,000” for “\$4,000,000”, and “\$50,000,000” for “\$10,000,000”.

Subsec. (b)(1)(B)(iii). Pub. L. 111-220, § 2(a)(2), substituted “28 grams” for “5 grams”.

2008—Subsec. (b)(1)(D). Pub. L. 110-425, § 3(e)(1)(A), struck out “or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam” after “hashish oil”.

Subsec. (b)(1)(E). Pub. L. 110-425, § 3(e)(1)(B), added subparagraph (E).

Subsec. (b)(2). Pub. L. 110-425, § 3(e)(2), substituted “5 years” for “3 years”, “10 years” for “6 years”, and “after a prior conviction for a felony drug offense has become final,” for “after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final.”.

Subsec. (b)(3). Pub. L. 110-425, § 3(e)(3), substituted “4 years” for “2 years” and “after a prior conviction for a felony drug offense has become final,” for “after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, mari-

huana, or depressant or stimulant substances, have become final,” and inserted at end “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.”

Subsec. (h). Pub. L. 110-425, § 3(f), added subsec. (h).

2006—Subsec. (b)(5). Pub. L. 109-177, § 732, inserted “or manufacturing” after “cultivating” in introductory provisions.

Subsec. (f)(1). Pub. L. 109-177, § 711(f)(1)(B), inserted “, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies,” after “shall”.

Subsec. (g). Pub. L. 109-248 added subsec. (g).

2002—Subsec. (b)(1)(A), (B). Pub. L. 107-273, § 3005(a), substituted “Notwithstanding section 3583 of title 18, any sentence” for “Any sentence” in concluding provisions.

Subsec. (b)(1)(C), (D). Pub. L. 107-273, § 3005(a), substituted “Notwithstanding section 3583 of title 18, any sentence” for “Any sentence”.

Subsec. (d)(1). Pub. L. 107-273, § 4002(d)(2)(A)(i), substituted “or fined under title 18, or both” for “and shall be fined not more than \$10,000”.

Subsec. (d)(2). Pub. L. 107-273, § 4002(d)(2)(A)(ii), substituted “or fined under title 18, or both” for “and shall be fined not more than \$20,000”.

2000—Subsec. (b)(1)(C). Pub. L. 106-172, § 3(b)(1)(A), inserted “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),” after “schedule I or II,” in first sentence.

Subsec. (b)(1)(D). Pub. L. 106-172, § 3(b)(1)(B), substituted “(other than gamma hydroxybutyric acid), or 30” for “, or 30”.

Subsec. (b)(7)(A). Pub. L. 106-172, § 5(b), inserted “or controlled substance analogue” after “distributing a controlled substance”.

Subsecs. (c) to (g). Pub. L. 106-172, § 9, redesignated subsecs. (d) to (g) as (c) to (f), respectively.

1998—Subsec. (b)(1). Pub. L. 105-277 in subparagraph (A)(viii) substituted “50 grams” and “500 grams” for “100 grams” and “1 kilogram”, respectively, and in subparagraph (B)(viii) substituted “5 grams” and “50 grams” for “10 grams” and “100 grams”, respectively.

1996—Subsec. (b)(1)(C). Pub. L. 104-305, § 2(b)(1)(A), inserted “, or 1 gram of flunitrazepam,” after “schedule I or II”.

Subsec. (b)(1)(D). Pub. L. 104-305, § 2(b)(1)(B), inserted “or 30 milligrams of flunitrazepam,” after “schedule III”.

Subsec. (b)(7). Pub. L. 104-305, § 2(a), added paragraph (7).

Subsec. (d). Pub. L. 104-237, § 302(a), in concluding provisions, substituted “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,” for “not more than 10 years.”.

Subsec. (f). Pub. L. 104-237, § 206(a), inserted “manufacture, exportation,” after “distribution,” and struck out “regulated” after “engaging in any”.

1994—Subsec. (b). Pub. L. 103-322, § 180201(b)(2)(A), inserted “849,” before “859,” in introductory provisions.

Subsec. (b)(1)(A). Pub. L. 103-322, §§ 90105(c), 180201(b)(2)(A), in concluding provisions, inserted “849,” before “859,” and struck out “For purposes of this subparagraph, the term ‘felony drug offense’ means an offense that is a felony under any provision of this subchapter or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances.” before “Any sentence under this subparagraph”.

Subsec. (b)(1)(B). Pub. L. 103-322, § 90105(a), in sentence in concluding provisions beginning “If any person commits”, substituted “a prior conviction for a felony

drug offense has become final" for "one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final".

Subsec. (b)(1)(C). Pub. L. 103-322, § 90105(a), in sentence beginning "If any person commits", substituted "a prior conviction for a felony drug offense has become final" for "one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final".

Subsec. (b)(1)(D). Pub. L. 103-322, § 90105(a), in sentence beginning "If any person commits", substituted "a prior conviction for a felony drug offense has become final" for "one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final".

1990—Subsec. (b). Pub. L. 101-647, § 1002(e)(1), substituted "section 859, 860, or 861" for "section 845, 845a, or 845b" in introductory provisions.

Subsec. (b)(1)(A). Pub. L. 101-647, § 1002(e)(1), substituted "section 859, 860, or 861" for "section 845, 845a, or 845b" in concluding provisions.

Subsec. (b)(1)(A)(ii)(IV). Pub. L. 101-647, § 3599K, substituted "any of the substances" for "any of the substance".

Subsec. (b)(1)(A)(viii). Pub. L. 101-647, § 1202, substituted "or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine" for "or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine".

Subsec. (b)(1)(B)(ii)(IV). Pub. L. 101-647, § 3599K, substituted "any of the substances" for "any of the substance".

Subsec. (c). Pub. L. 101-647, § 1002(e)(2), directed amendment of subsec. (c) by substituting "section 859, 860, or 861 of this title" for "section 845, 845a, or 845b of this title". Subsec. (c) was previously repealed by Pub. L. 98-473, § 224(a)(2), as renumbered by Pub. L. 99-570, § 1005(a), effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of such amendment. See 1984 Amendment note and Effective Date of 1984 Amendment note below.

1988—Subsec. (b)(1)(A). Pub. L. 100-690, §§ 6452(a), 6470(g), 6479(1), inserted "or 1,000 or more marihuana plants regardless of weight" in cl. (vii), added cl. (viii), substituted "a prior conviction for a felony drug offense has become final" for "one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final" in second sentence, and added provisions relating to sentencing for a person who violates this subpar. or section 485, 485a, or 485b of this title after two or more prior convictions for a felony drug offense have become final and defining "felony drug offense".

Subsec. (b)(1)(B). Pub. L. 100-690, §§ 6470(h), 6479(2), inserted "or 100 or more marihuana plants regardless of weight" in cl. (vii) and added cl. (viii).

Subsec. (b)(1)(D). Pub. L. 100-690, § 6479(3), substituted "50 or more marihuana plants" for "100 or more marihuana plants".

Subsec. (b)(6). Pub. L. 100-690, § 6254(h), added par. (6).

Subsec. (d). Pub. L. 100-690, § 6055(a), amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows: "Any person who knowingly or intentionally—

"(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this subchapter, or

"(2) possesses any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine except as authorized by this subchapter,

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."

Subsecs. (f), (g). Pub. L. 100-690, § 6055(b), added subsecs. (f) and (g).

1986—Pub. L. 99-570, § 1005(a), amended Pub. L. 98-473, § 224(a). See 1984 Amendment note below.

Subsec. (b). Pub. L. 99-570, § 1103(a), substituted "845a, or 845b" for "or 845a" in introductory provisions.

Subsec. (b)(1)(A). Pub. L. 99-570, § 1002(2), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "In the case of a violation of subsection (a) of this section involving—

"(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of—

"(I) coca leaves;

"(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

"(III) a substance chemically identical thereto;

"(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

"(iii) 500 grams or more of phencyclidine (PCP); or

"(iv) 5 grams or more of lysergic acid diethylamide (LSD);

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than \$250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than \$500,000, or both".

Subsec. (b)(1)(B). Pub. L. 99-570, § 1002(2), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: "In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A) and (C), such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than \$125,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than \$250,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment."

Subsec. (b)(1)(C). Pub. L. 99-570, § 1002(2), added subpar. (C). Former subpar. (C) redesignated (D).

Subsec. (b)(1)(D). Pub. L. 99-570, § 1004(a), substituted "term of supervised release" for "special parole term" in two places.

Pub. L. 99-570, §§ 1002(1), 1003(a)(1), redesignated former subpar. (C) as (D), substituted "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" for "a fine of not more than \$50,000" and "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" for "a fine of not more than \$100,000", and inserted "except in the case of 100 or more marihuana plants regardless of weight."

Subsec. (b)(2). Pub. L. 99-570, §1004(a), substituted "term of supervised release" for "special parole term" in two places.

Pub. L. 99-570, §1003(a)(2), substituted "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" for "a fine of not more than \$25,000" and "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" for "a fine of not more than \$50,000".

Subsec. (b)(3). Pub. L. 99-570, §1003(a)(3), substituted "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" for "a fine of not more than \$10,000" and "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" for "a fine of not more than \$20,000".

Subsec. (b)(4). Pub. L. 99-570, §1003(a)(4), which directed the substitution of "(1)(D)" for "(1)(C)" was executed by substituting "(1)(D)" for "(1)(C)" as the probable intent of Congress.

Subsec. (b)(5). Pub. L. 99-570, §1003(a)(5), amended par. (5) generally. Prior to amendment, par. (5) read as follows: "Notwithstanding paragraph (1), any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be fined not more than—

"(A) \$500,000 if such person is an individual; and  
"(B) \$1,000,000 if such person is not an individual."

Subsec. (c). Pub. L. 99-570, §1004(a), substituted "term of supervised release" for "special parole term" whenever appearing, effective Nov. 1, 1987, the effective date of the repeal of subsec. (c) by Pub. L. 98-473, §224(a)(2). See 1984 Amendment note below.

Pub. L. 99-570, §1103(b), substituted "845a, or 845b" for "845a" in two places.

Subsec. (d). Pub. L. 99-570, §1003(a)(6), substituted "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" for "a fine of not more than \$15,000".

Subsec. (e). Pub. L. 99-570, §15005, added subsec. (e).

1984—Subsec. (b). Pub. L. 98-473, §503(b)(1), inserted reference to section 845a of this title in provisions preceding par. (1)(A).

Pub. L. 98-473, §224(a)(1)-(3), (5), which directed amendment of this subsection effective Nov. 1, 1987 (see section 235(a)(1) of Pub. L. 98-473 set out as an Effective Date note under section 3551 of Title 18, Crimes and Criminal Procedure) was repealed by Pub. L. 99-570, §1005(a), and the remaining pars. (4) and (6) of Pub. L. 98-473, §224(a), were redesignated as pars. (1) and (2), respectively.

Subsec. (b)(1)(A). Pub. L. 98-473, §502(1)(A), added subpar. (A). Former subpar. (A) redesignated (B).

Subsec. (b)(1)(B). Pub. L. 98-473, §502(1)(A), (B), redesignated former subpar. (A) as (B), substituted "except as provided in subparagraphs (A) and (C)," for "which is a narcotic drug", "\$125,000" for "\$25,000", and "\$250,000" for "\$50,000", and inserted references to laws of a State and a foreign country. Former subpar. (B) redesignated (C).

Subsec. (b)(1)(C). Pub. L. 98-473, §502(1)(A), (C), redesignated former subpar. (B) as (C), substituted "less

than 50 kilograms of marihuana, 10 kilograms of hashish, or one kilogram of hashish oil" for "a controlled substance in schedule I or II which is not a narcotic drug", "and (5)" for "(5), and (6)", "\$50,000" for "\$15,000", and "\$100,000" for "\$30,000", and inserted references to laws of a State and a foreign country.

Subsec. (b)(2). Pub. L. 98-473, §502(2), substituted "\$25,000" for "\$10,000" and "\$50,000" for "\$20,000", and inserted references to laws of a State or of a foreign country.

Subsec. (b)(3). Pub. L. 98-473, §502(3), substituted "\$10,000" for "\$5,000" and "\$20,000" for "\$10,000", and inserted references to laws of a State or of a foreign country.

Subsec. (b)(4). Pub. L. 98-473, §502(4), substituted "(1)(C)" for "(1)(B)".

Pub. L. 98-473, §224(a)(1), as renumbered by Pub. L. 99-570, §1005(a), substituted "in section 844 of this title and section 3607 of title 18" for "in subsections (a) and (b) of section 844 of this title".

Subsec. (b)(5). Pub. L. 98-473, §502(5), (6), added par. (5) and struck out former par. (5) which related to penalties for manufacturing, etc., phencyclidine.

Subsec. (b)(6). Pub. L. 98-473, §502(5), struck out par. (6) which related to penalties for violations involving a quantity of marihuana exceeding 1,000 pounds.

Subsec. (c). Pub. L. 98-473, §224(a)(2), as renumbered by Pub. L. 99-570, §1005(a), struck out subsec. (c) which read as follows: "A special parole term imposed under this section or section 845, 845a, or 845b of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845, 845a, or 845b of this title shall be in addition to, and not in lieu of, any other parole provided for by law."

Pub. L. 98-473, §503(b)(2), inserted reference to section 845a of this title in two places.

1980—Subsec. (b)(1)(B). Pub. L. 96-359, §8(c)(1), inserted reference to par. (6) of this subsection.

Subsec. (b)(6). Pub. L. 96-359, §8(c)(2), added par. (6).

1978—Subsec. (b)(1)(B). Pub. L. 95-633, §201(1), inserted "except as provided in paragraphs (4) and (5) of this subsection," after "such person shall".

Subsec. (b)(5). Pub. L. 95-633, §201(2), added par. (5).

Subsec. (d). Pub. L. 95-633, §201(3), added subsec. (d).

#### EFFECTIVE DATE OF 2008 AMENDMENT

Amendment by Pub. L. 110-425 effective 180 days after Oct. 15, 2008, except as otherwise provided, see section 3(j) of Pub. L. 110-425, set out as a note under section 802 of this title.

#### EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by section 6055 of Pub. L. 100-690 effective 120 days after Nov. 18, 1988, see section 6061 of Pub. L. 100-690, set out as a note under section 802 of this title.

#### EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99-570, title I, §1004(b), Oct. 27, 1986, 100 Stat. 3207-6, provided that: "The amendments made by this section [amending this section and sections 845, 845a, 960, and 962 of this title] shall take effect on the date of the taking effect of section 3583 of title 18, United States Code [Nov. 1, 1987]."

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by section 224(a) of Pub. L. 98-473 effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of such amendment, see section 235(a)(1) of Pub. L. 98-473, set out as an Effective Date note under section 3551 of Title 18, Crimes and Criminal Procedure.

**EFFECTIVE DATE OF 1978 AMENDMENT**

Amendment by Pub. L. 95-633 effective Nov. 10, 1978, see section 203(a) of Pub. L. 95-633 set out as an Effective Date note under section 830 of this title.

**EFFECTIVE DATE**

Section effective on first day of seventh calendar month that begins after Oct. 26, 1970, see section 704 of Pub. L. 91-513, set out as a note under section 801 of this title.

**REPEALS**

Pub. L. 96-359, §8(b), Sept. 26, 1980, 94 Stat. 1194, repealed section 203(d) of Pub. L. 95-633, which had provided for the repeal of subsec. (d) of this section effective Jan. 1, 1981.

**§ 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.

(Pub. L. 91-513, title II, §406, Oct. 27, 1970, 84 Stat. 1265; Pub. L. 100-690, title VI, §6470(a), Nov. 18, 1988, 102 Stat. 4377.)

**AMENDMENTS**

1988—Pub. L. 100-690 substituted “shall be subject to the same penalties as those prescribed for the offense” for “is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense”.

**EFFECTIVE DATE**

Section effective on first day of seventh calendar month that begins after Oct. 26, 1970, see section 704 of Pub. L. 91-513, set out as a note under section 801 of this title.

1170.18. (a) A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (“this act”) had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.

(b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, those sections have been amended or added by this act, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. In exercising its discretion, the court may consider all of the following:

(1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes.

(2) The petitioner's disciplinary record and record of rehabilitation while incarcerated.

(3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.

(c) As used throughout this Code, “unreasonable risk of danger to public safety” means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667.

(d) A person who is resentenced pursuant to subdivision (b) shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole. Such person is subject to Section 3000.08 parole supervision by the Department of Corrections and Rehabilitation and the jurisdiction of the court in the county in which the parolee is released or resides, or in which an alleged violation of supervision has occurred, for the purpose of hearing petitions to revoke parole and impose a term of custody.

(e) Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence.

(f) A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.

(g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.

(h) Unless requested by the applicant, no hearing is necessary to grant or deny an application filed under subsection (f).

(i) The provisions of this section shall not apply to persons who have one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.

(j) Any petition or application under this section shall be filed within three years after the effective date of the act that added this section or at a later date upon a showing of good cause.

(k) Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.