


In the
Supreme Court of the United States



BUCK GENE BRUNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A circuit split exists as to when jeopardy attaches after a defendant enters a plea of guilty. To determine when jeopardy attaches the First, Third, and Fifth Circuits balance several factors. The Second, Sixth, Eighth, Ninth, and Eleventh Circuits have determined jeopardy attaches upon the occurrence of a particular event in the proceedings.

The Question Presented Is:

Under the Fifth Amendment's Double Jeopardy Clause, upon a defendant's plea of guilty, does jeopardy attach:

- a. when the district court accepts the defendant's plea of guilty;
- b. when the district court adjudges the defendant guilty of the offense; or
- c. independent of a specific event?

LIST OF PROCEEDINGS

United States Court of Appeals for the Fifth Circuit
No. 19-11360

United States of America v. Buck Gene Brune

Date of Final Opinion: March 22, 2021

United States District Court for the
Northern District of Texas

No. 4:19-CR-00159-Y-1

United States of America v. Buck Gene Brune

Date of Final Judgment: December 19, 2019

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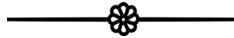
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PRAYER

Petitioner Buck Gene Brune (“Mr. Brune”) prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.



OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, dated March 22, 2021, is reported as *United States v. Brune*, 991 F.3d 652 (5th Cir. 2021) and included below at App.1a. The Judgment of the United States District Court for the Northern District of Texas, dated December 19, 2019, is included below at App.27a.



JURISDICTION

The United States Court of Appeals entered a decision was March 22, 2021. (App.1a). The petition is timely filed within 150 days of the March 22, 2021 order of the court of appeals denying Mr. Brune’s appeal. *See* Sup. Ct. R. 13.3 & Order Regarding Filing Deadlines (March 19, 2020) (Rescinded July 19, 2021).

This Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

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. (App.55a).

21 U.S.C. § 841

Prohibited acts A

Because of length, the pertinent text is set out in the appendix. (App.56a).

21 U.S.C. § 846

Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (App.76a).



STATEMENT OF THE CASE

A. The Indictment and Plea.

On May 20, 2019, the United States Attorney charged Mr. Brune, by information, with *Conspiracy to Possess with Intent to Distribute a Controlled Substance* (Violation of 21 U.S.C. § 846). (App.38a). The information alleges that Mr. Brune agreed with others to violate 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). (App.56a). This offense set Mr. Brune’s maximum punishment as 20 years of incarceration.

On May 29, 2019, Mr. Brune waived his right to be indicted by a federal grand jury. On May 29, 2019, Mr. Brune pleaded “Guilty” without a plea agreement to the charged offense before the United States magistrate judge. Also on May 29, 2019, pursuant to 28 U.S.C. § 636, the United States magistrate judge entered a *Report of Action and Recommendation on Plea Before the United States Magistrate Judge*. (App.35a). In this report, the United States magistrate judge noted that the information charged Mr. Brune with a “violation of 21 U.S.C. § 846 (21 U.S.C. §§ 841 (a)(1) and (b)(1)(C)).” (App.36a). This report made no other reference or description of the offense to which Mr. Brune pleaded guilty. (App.35a-37a). The magistrate judge’s report also recommended that the district court accept Mr. Brune’s plea of guilty and adjudge him guilty. (App.37a).

On June 13, 2019, the district court entered an order: accepting the *Report of Action and Recommendation on Plea Before the United States Magistrate Judge*; finding that neither party objected within the

fourteen-day period pursuant to 28 U.S.C. 626(b)(1); accepting Mr. Brune's plea of guilty; and adjudging Mr. Brune guilty of the offense. (App.33a).

B. Sentencing.

A United States Probation Officer prepared a presentence report ("the PSR"). The PSR noted that Mr. Brune pleaded guilty to a "violation of 21 U.S.C. §§ 846, 841(a)(1) & (b)(1)(C)." The government objected to this statement and other paragraphs of the PSR that stated the statutory maximum sentence was 20 years. Mr. Brune objected to changing the statutory maximum as noted in the PSR because the district court had already adjudged Mr. Brune guilty of an offense under 21 U.S.C. § 846 (21 U.S.C. §§ 841(a)(1) and (b)(1)(C)).

During the sentencing hearing, the district court noted that the information contains the language of a violation under 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). (App.50a-51a). The district court also noted that the information incorporated 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). (App.50a-51a). Subsequently, the district court amended the *Report of Action and Recommendation on Plea Before the United States Magistrate Judge* to read, "[t]he Court accepts the plea of guilty to violation 21, United States Code, Section 846, and 21, United States Code, Sections 841 and (b)(1)(B)." (App.53a). At the conclusion of the sentencing hearing, the district court imposed a sentence of 288 months incarceration, which is within the statutory range of a violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(B). (App.29a). However, this sentence is not within the statutory range of a violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(C).



REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the acknowledged circuit split as to when jeopardy attaches upon a defendant's guilty Plea.

A. TO REACH ITS DECISION, THE FIFTH CIRCUIT DETERMINED THAT JEOPARDY DID NOT ATTACH WHEN THE DISTRICT COURT ADJUDGED MR. BRUNE GUILTY OF THE OFFENSE BECAUSE MR. BRUNE LACKED AN INTEREST IN THE FINALITY OF JUDGMENT AND THERE WAS NO EVIDENCE OF PROSECUTORIAL OVERREACH.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .” U.S. CONST. AMEND. V. In its opinion, the United State Court of Appeals for the Fifth Circuit concluded that jeopardy does not always attach upon acceptance of a guilty plea. *United States v. Brune*, 991 F.3d 652, 663 (5th Cir. 2021). Rather than drawing a bright line rule, the Fifth Circuit adopted a balancing framework where courts look to a criminal defendant's finality interest and the need to prevent prosecutorial overreach. *Id.*

This framework is not a workable standard for the district courts and state courts to apply. The Court of Appeals relied upon *Ohio v. Johnson*, 467 U.S. 493 (1984) to assess Mr. Brune's finality interest by analyzing three considerations. First, whether the situation before the court involved “any of the implications of an implied acquittal which results from a

verdict . . . rendered by a jury.” *Brune*, 991 F.3d at 665 (citing *Ohio v. Johnson*, 467 U.S. 493, 501-02 (1984) (internal quotation marks omitted)). Second, whether the prosecution presented its evidence on more than one occasion. *Id.* Third, whether a greater offense was pending at the time of a plea of guilty. *Id.*

When addressing the considerations of prosecutorial overreach, the Fifth Circuit, again relying on *Johnson*, looked to two considerations. First, whether a greater charge remains pending. *Id.* at 666. And second, whether ending the prosecution would deny the prosecution of its right to convict those who have violated the law. *Id.* at 666.

In deciding that the prosecution had been denied its right to an opportunity to convict Mr. Brune, the Fifth Circuit begged the question. The government drafted and filed a single-count felony information. Mr. Brune pleaded guilty to the single count. The United States magistrate judge recommended the district court accept the guilty plea to 21 U.S.C. § 846 (21 U.S.C. §§ 841(a)(1) and (b)(1)(C)). Section 841(b)(1)(C) was incorporated within the single-count information. Subsequently, the district court adjudged Mr. Brune guilty of the offense in accordance with the magistrate’s recommendation. Mr. Brune was convicted of the offense charged by information. Thus, the government had not been denied the opportunity to convict Mr. Brune for the charged violation of the law. This confusion illustrates a flaw in the Fifth Circuit’s framework.

This balancing framework presents several issues. First, defendants entering a plea of guilty cannot know with certainty when they may rely upon the protections

of the bar against double jeopardy. Guilty pleas serve a vital function in our criminal justice system. Defendants abandon or bargain away a plenitude of fundamental rights to stave off the government's prosecution. Second, the indistinct framework leaves trial level courts to unnecessarily toil with defining the moment jeopardy attaches and needlessly creates a pool of appellate issues. Finally, under such a framework, courts and law makers throughout the nation would be left to fashion procedures around the nebulous or shifting event of jeopardy attaching.

The First and Third Circuits align with the Fifth Circuit in the conclusion that jeopardy does not always attach upon acceptance of a guilty plea. *United States v. Santiago Soto*, 825 F.2d 616, 620 (1st Cir. 1987) (notably, the government objected to the plea of guilty to the lesser charge); *Gilmore v. Zimmerman*, 793 F.2d 564 (3d Cir. 1986). Those Circuits also identify the same finality and overreach considerations relied upon by the Fifth Circuit. *See id.*

B. OTHER CIRCUITS HAVE DETERMINED JEOPARDY ATTACHES UPON THE OCCURRENCE OF A PARTICULAR EVENT.

The Second Circuit applies *Johnson v. Ohio* as an exception to the general rule that jeopardy attaches when the district court accepts a defendant's guilty plea. *Morris v. Reynolds*, 264 F.3d 38, 49 (2d Cir. 2001) (citing *Kercheval v. United States*, 274 U.S. 220, 223 (1927)). This exception is only triggered if the greater offense is pending and the prosecution objects to the plea of guilty. *Id.*

The Sixth Circuit found that jeopardy attaches when the district court accepts a defendant's plea of

guilty. *United States v. Bearden*, 274 F.3d 1031 (6th Cir. 2005).

In the Eleventh Circuit, jeopardy attaches when a district court unconditionally accepts a defendant's guilty plea. *United States v. Baggett*, 901 F.2d 1546, 1548 (11th Cir. 1990). However, when the district court accepts a plea agreement, jeopardy does not bar the prosecution of abandoned counts where the defendant later withdraws his plea of guilty. *Id.* at 1550.

The Ninth Circuit has concluded that jeopardy attaches when the district court accepts a defendant's guilty plea. *United States v. Patterson*, 381 F.3d 859, 864 (9th Cir. 2004) (once a plea is accepted, the court does not have authority to vacate the plea on the government's motion). Further, in considering a petition for rehearing *en banc*, judges of the Ninth Circuit stressed the need to develop a clearer rule as to when jeopardy attaches following *Johnson v. Ohio*. *United States v. Patterson*, 406 F.3d 1095, 1101 (9th Cir. 2005).

C. IN OTHER CIRCUITS THE APPROACH FOR DETERMINING JEOPARDY IS LESS DEFINED.

The Eighth Circuit has explicitly avoided announcing a rule. *Bally v. Kemna*, 65 F.3d 104, 108 (8th Cir. 1995). On occasions, the Eighth Circuit has applied a case-by-case analysis to determine whether jeopardy bars a subsequent prosecution. *Id.* at 109. Nevertheless, in *Bally* the Eighth Circuit assumed that jeopardy attached when the trial court accepted the guilty plea. *Id.* at 108.

The Tenth Circuit acknowledged that the earliest jeopardy may attach is when the district court accepts a guilty plea. *United States v. Wampler*, 624 F.3d 1330, 1341 (10th Cir. 2010). In *Wampler*, because the dis-

trict court had not accepted the defendant's plea of guilty, the Tenth Circuit found it lacked appellate jurisdiction. *Id.* at 1341-42.



CONCLUSION

The Fifth Circuit’s application of the attachment balancing framework is similar to the approaches of the First and Third circuits and conflicts with the consistent jeopardy-attachment rules applied by the Second, Sixth, Eighth, Ninth, and Eleventh circuits. The essence of the protection against double jeopardy is finality—for the parties, the courts, and the public. The farrago of law immerging from the several circuits provides no semblance of finality. Guidance from the Court is needed to anchor the assembly of plea procedures in our federal and state courts. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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