

53 of 18 U.S.C. § 924(c) (count III), and being a convicted felon in
54 possession of a firearm in violation of 18 U.S.C. § 922(g)(1)
55 (count V). At arraignment, Bounds entered not guilty pleas to all
56 four counts.

57 On the morning of trial, Bounds opted to change his plea to
58 guilty as to counts I and V in exchange for the government's
59 promise to dismiss the remaining counts at sentencing. Before
60 sentencing, Bounds moved to withdraw his guilty plea, asserting
61 that he was unaware of the consequences of that plea when he
62 entered it. The district court denied that motion and sentenced
63 Bounds to 300 months' imprisonment. On appeal of that ruling to
64 this court, we ordered that the judgment of conviction be vacated
65 and that the matter be remanded to the district court for further
66 proceedings. United States v. Bounds, 943 F.2d 541 (5th Cir.
67 1991).

68 Bounds was rearraigned on counts I, II, III and V and entered
69 not guilty pleas to each count. After a two-day trial, he moved
70 for acquittal pursuant to Fed. R. Crim. P. 29 and for a mistrial.
71 The district court denied both motions, and the jury later returned
72 a guilty verdict against Bounds as to all four counts. After his
73 motions for arrest of judgment, acquittal, and new trial were
74 similarly denied, Bounds filed a timely notice of appeal.

75 After a sentencing hearing, Bounds was sentenced to 240
76 months' imprisonment on count I, 240 months' imprisonment on count
77 II (132 months of which was to run consecutively with count I and
78 the remainder of which was to run concurrently with count I), 60

79 months' imprisonment on count III (to run consecutively with counts
80 I and II), and 60 months' imprisonment on count V (to run concur-
81 rently with his other sentences). The total sentence amounts to
82 432 months. The court also imposed a three-year term of supervised
83 release as well as the mandatory \$50 per count assessment.

84 Bounds appeals his conviction on numerous grounds under
85 No. 92-4363. In addition, in No. 92-4747 Bounds appeals the
86 district court's denial of his motion to correct the trial
87 transcript.

88 III.

89 We affirm the district court in No. 92-4747. At trial, the
90 district court apparently allowed Deborah Richardson's counsel to
91 sit near her while she testified. Bounds filed a motion to correct
92 the trial transcript to reflect that Richardson conferred with
93 counsel during her testimony. Because of our conclusion infra, we
94 do not consider the alleged error or omission in the transcript to
95 be material. In deciding Bounds's appeal in No. 92-4363, we will
96 assume that Richardson did confer with counsel during her testi-
97 mony. Consequently, we see no need to correct the transcript. We
98 express no opinion as to the propriety of the district court's
99 actions in a circumstance where the error in the transcript might
100 be material.

101 IV.

102 We now address the first of nine points of error Bounds raises

103 in No. 92-4363. Bounds initially pleaded guilty to two of the four
104 counts contained in the indictment; the district court's judgment
105 dismissed the other two counts pursuant to the plea bargain. We
106 reversed this judgment because the district judge failed properly
107 to apprise Bounds of the period of supervised release he could
108 receive. In an apparent blunder, the government failed to either
109 reindict Bounds or move for reinstatement of the dismissed charges.

110 At trial, Bounds moved for a mistrial, alleging that the
111 district court had no jurisdiction over two of the four counts.
112 Although Bounds's counsel admits he knew of the mistake earlier, he
113 did not raise the issue before trial because he wanted to create a
114 double jeopardy issue. Bounds's motion nevertheless was timely.
115 Fed. R. Crim. P. 12(b)(2). We express no opinion regarding the
116 double jeopardy implications of these circumstances.

117 Our research does not reveal a previous case involving this
118 factual scenario. Bounds relies upon cases that hold that
119 reindicting the defendant or reinstating dismissed charges does not
120 violate the double jeopardy clause where a plea bargain was
121 reversed on appeal. E.g., Harrington v. United States, 444 F.2d
122 1190, 1193 (5th Cir. 1971). These cases do suggest that the
123 government ordinarily should reindict or move to reinstate the
124 dismissed charges. We will assume, without deciding, that the
125 government had to move to reinstate the charges.¹

¹ We need not address the government's suggestion that reversal of a conviction obtained via a plea bargain automatically reinstates charges dismissed pursuant to that plea bargain. We suggest that the government could place a provision to this effect in the plea bargain itself.

126 Bounds alleges that the government's error violated his Fifth
127 Amendment right to indictment by a grand jury. Bounds was legally
128 indicted, however, on the dismissed charges and alleges no
129 prejudice from the government's error. Bounds knew that the
130 government intended to try him on all four counts at trial as he
131 was rearraigned on all counts after we reversed his first conviction.
132 Indeed, Bounds' counsel admits he knew of the government's
133 error at the time of rearraignment. Bounds identifies no illicit
134 motive for the government's failure and can neither identify any
135 harm to the preparation of his defense nor any unfair surprise he
136 suffered at trial.

137 We hold that in the unique circumstances of this case, the
138 government's failure to move to reinstate the dismissed charges was
139 harmless error. See United States v. Mechanik, 475 U.S. 66 (1986);
140 Fed. R. Crim. P. 52(a). In Mechanik, the Supreme Court held that
141 prosecutorial misconduct which violated the defendant's Fifth
142 Amendment right to indictment by grand jury was harmless error. We
143 find the present case an even stronger occasion to apply harmless
144 error analysis. Here, unlike Mechanik, Bounds can identify no
145 prejudice resulting from the government's actions. In addition,
146 the violation in Mechanik involved misconduct by the prosecutor
147 before the grand jury. Here, Bounds does not claim any misconduct
148 on the government's part. The prosecution did not attempt to gain
149 any unfair advantage; it made a mistake. We caution the government
150 that a case may well arise where the failure to reinstate dismissed
151 charges does prejudice the defendant. In this case, we find no

152 prejudice to Bounds and conclude any error was harmless.

153 V.

154 Next, Bounds argues for reversal based upon the government's
155 reference to a polygraph examination. During the examination of
156 Deborah Richardson, the following exchange took place:

157 Q. Have you ever taken a lie detector test in your life?

158 A. Yes.

159 Q. At whose request?

160 A. Joe Bounds.

161 Q. What was the result of the test?

162 A. I passed.

163 Mr. Focke: Your Honor.

164 A. I passed.

165 Mr. Focke: I'm going to object.

166 The Court: Don't Answer.

167 Mr. Focke: Your Honor, Polygraph Examination.

168 The Court: Excuse me, don't. Ladies and gentlemen, If
169 y'all will step out just a second.

170 The court never ruled on the objection. The context of the line of
171 questioning the government was pursuing demonstrates that the
172 prosecutor was attempting to elicit testimony from Richardson that
173 Bounds beat her as a "result" of the polygraph examination. After
174 the conference, the government elicited precisely that testimony.
175 Bounds never requested a curative instruction, and none was
176 otherwise given.

177 Bounds essentially argues for a per se rule of reversal at the

178 mere mention the use of a polygraph. We previously have rejected
179 such a rule. See United States v. Martino, 648 F.2d 367, 391 (5th
180 Cir. June 1981), vacated in part on other grounds, 650 F.2d 651
181 (5th Cir. July 1981) (per curiam), cert. denied, 456 U.S. 949
182 (1982) (any prejudice caused by reference to polygraph cured by
183 instruction). Bounds did not ask for a curative instruction.
184 Consequently, we review only for plain error. Such an error must
185 be so egregious that a miscarriage of justice has occurred. United
186 States v. Maceo, 947 F.2d 1191, 1198 (5th Cir. 1991). We conclude
187 that under the facts and circumstances of the instant case, the
188 mere reference to a polygraph examination does not amount to plain
189 error.²

190 VI.

191 Bounds next claims that the trial court erred by admitting
192 evidence that his codefendant, Deborah Richardson had pleaded
193 guilty. This contention has no merit. Bounds did not object at
194 trial or request a limiting instruction, so we review for plain
195 error. We do not have to reach the plain error issue, however, as
196 we find no merit in Bounds's claim. The government questioned

² We remind the government of the well-established rule of inadmissibility of polygraph evidence in this circuit. E.g., United States v. Clark, 598 F.2d 994, 995 (5th Cir. 1979), cert. denied, 449 U.S. 1128 (1981). Other circuits have begun to erode the rule of per se inadmissibility. E.g., United States v. Piccinonna, 885 F.2d 1529, 1535-36 (11th Cir. 1989) (en banc). The rule in this circuit cannot change, however, unless the court chooses to do so en banc. We caution that reference to a polygraph by counsel may warrant reversal in some cases where opposing counsel properly objects and requests a curative instruction. Our Martino holding extends only to cases where a witness makes reference to a polygraph examination without apparent encouragement of counsel. We may view the case differently where counsel has made the reference. Because of our holding, we leave this more difficult issue for another day.

197 Richardson only in anticipation of impeachment on cross examina-
198 tion, which we have previously approved. See United States v.
199 Valley, 928 F.2d 130, 133 (5th Cir. 1991); United States v.
200 Marroquin, 885 F.2d 1240, 1246-47 (5th Cir. 1989), cert. denied,
201 494 U.S. 1079 (1990); United States v. Borchardt, 698 F.2d 697, 701
202 (5th Cir. 1983).

203 Moreover, Richardson's testimony only established that she had
204 previously been convicted of conspiracy to manufacture methamphet-
205 amine. Her testimony mentions nothing about a guilty plea or that
206 the conviction had to do with the events giving rise to Bounds's
207 trial. Because the government never even made reference to
208 Richardson's pleading guilty, we conclude that no error occurred.

209 VII.

210 Bounds next objects that the court's instruction to the jury
211 regarding the definition of the term "firearm" improperly expanded
212 the indictment. Four firearms were relevant in the case, but only
213 two of these were relevant to count V. The court gave the legal
214 definition of "firearm" and proceeded to instruct the jury that all
215 four firearms introduced as evidence were "firearms" within the
216 scope of that definition. In referring to count V, the court
217 stated that the term "firearm" was defined above. Bounds contends
218 that this confused the jury, as count V involved only two of the
219 four guns.

220 Again, because Bounds did not object to the jury instructions
221 at trial, we review for plain error. See Fed. R. Crim. P. 30.

222 Again, we conclude that no plain error occurred. The court's
223 instruction refers back to the definition of the term firearm, not
224 the instruction that all four guns constituted firearms within the
225 meaning of that definition. In addition, the jury had access to
226 the indictment at all times during deliberations and could read for
227 itself what the indictment charged.

228 VIII.

229 As his next point of error, Bounds alleges we should reverse
230 his conviction because Deborah Richardson's counsel was allowed to
231 sit and confer with her during her testimony. Apparently, the
232 district court allowed Richardson's counsel to sit next to her on
233 the stand while she was testifying. As we indicated above, we will
234 assume arguendo, although the record does not so reflect, that
235 Richardson did confer with her counsel during questioning. During
236 the examination, Richardson's counsel did ask Bounds's attorney to
237 repeat a question and did ask the judge which page of a document
238 Richardson should read. Bounds alleges that this violated his
239 right to confrontation.

240 Once again, Bounds failed to object at trial, so we review for
241 plain error. Bounds does not suggest how his ability to cross-
242 examine Richardson was diminished, nor does he suggest any
243 testimony he was unable to elicit as a result of the alleged error.
244 In fact, Bounds's brief describes how he successfully impeached
245 Richardson on cross-examination.

246 We do not think this case implicates the confrontation clause.

247 It appears Bounds's right to confrontation was not harmed in the
248 least. Not only did Bounds have the opportunity to cross-examine
249 Richardson, it appears to have been effective. Although we are
250 troubled by the district court's actions and strongly disapprove of
251 allowing counsel to sit next to a witness while she testifies, we
252 hold that no plain error occurred, as Bounds has not identified any
253 prejudice from the district court's error.

254 IX.

255 Bounds next alleges that the jury should have determined the
256 amount of drugs involved in the crime. He contends the amount of
257 drugs constitutes an element of the crime, as differing amounts of
258 drugs subject a defendant to differing penalties. We find no merit
259 in this argument, as we have previously held that the quantity of
260 drugs does not constitute an element of the crime; rather quantity
261 is a fact to consider in sentencing. United States v. Royal, 972
262 F.2d 643, 650 (5th Cir. 1992) (citing United States v. Lokey, 945
263 F.2d 825 (5th Cir. 1991)), petition for cert. filed, 61 U.S.L.W.
264 3403 (Nov. 16, 1992) (No. 92-855). At least four other circuits
265 have rejected this argument. See United States v. Lam Kwong-Wah,
266 966 F.2d 682, 685 (D.C. Cir.), cert. denied, 113 S. Ct. 287 (1992).

267 X.

268 Next, Bounds alleges that the district court erred by not
269 allowing him to have counsel present during his pre-sentence
270 interview. Once again, we have previously rejected this argument,

271 reasoning that no right to counsel attaches at a pre-sentence
272 interview, as the interview is not a critical stage of the
273 proceedings. United States v. Woods, 907 F.2d 1540, 1543 (5th Cir.
274 1990), cert. denied, 111 S. Ct. 792 (1991); United States v.
275 Kinsey, 917 F.2d 181 (5th Cir. 1990); Brown v. Butler, 811 F.2d 938
276 (5th Cir. 1987). Consequently, Bounds's argument has no merit.

277 XI.

278 Bounds next contends that the district court erred in
279 sentencing him to consecutive terms as to counts I and II, as
280 count I constitutes an indispensable step to count II. Count I
281 charges Bounds with conspiracy to manufacture phenylacetone and
282 amphetamine, while count II charges Bounds with manufacturing or
283 attempting to manufacture phenylacetone and methamphetamine.

284 Bounds relies upon United States v. Forester, 836 F.2d 856
285 (5th Cir. 1988), where we held that the defendant could not be
286 sentenced to consecutive terms for attempting to manufacture
287 methamphetamine and for possessing a chemical needed to produce
288 methamphetamine. In Forester, we were careful to point out the
289 unique circumstances of the case. We noted that the defendant
290 produced the chemical from other chemicals as one step in the
291 manufacturing process. Possession of the chemical, then, resulted
292 only from attempts to manufacture the drug. We noted that the case
293 may well have been different, for example, had the defendant
294 acquired the chemical from others rather than producing it on his
295 own.

296 We limit Forester to its facts and instead follow United
297 States v. Kleinbreil, 966 F.2d 945, 952 (5th Cir. 1992), where we
298 held that a court may impose consecutive sentences for a drug
299 offense and conspiracy to commit a drug offense under U.S.S.G.
300 § 5G1.2(c). Agreeing to manufacture amphetamines is not an
301 indispensable step in manufacturing them; Bounds could have
302 manufactured them on his own without agreeing with anyone else.
303 See United States v. Miley, No. 92-4194 (5th Cir. Dec. 23, 1992)
304 (unpublished). As a result, we conclude that count I does not
305 constitute an indispensable step to count II.

306 XII.

307 Finally, Bounds alleges that the district court erred in
308 calculating Bounds's sentence by relying upon the theoretical
309 amount of amphetamine producible rather than upon the amount of
310 phenylacetone producible. The district court used the drug
311 equivalency table to compute Bounds's sentence based upon the
312 theoretical amount of amphetamine producible with the amount of
313 chemicals recovered. Bounds contends that using the equivalency
314 for phenylacetone would produce a lower offense level. The record
315 does not appear to contain any evidence of how much phenylacetone
316 Bounds could have produced with the chemicals. As a result, we
317 cannot make a meaningful harmless error analysis.³

³ The government suggests in its brief that the error was harmless because 18 kilograms of amphetamine would produce only a two-level difference from 18 kilograms of phenylacetone. Leaving aside the fact that a different offense level may have led the district court to impose a different sentence, the government assumes that an equivalent amount of phenylacetone could have been produced from the chemicals. Given that the two drugs have different

318 Bounds argues that where a general verdict makes it unclear
319 what he was convicted of, and where the two possible offenses may
320 result in two potentially different offense levels, the district
321 court must choose the lower offense level. Bounds relies upon
322 United States v. Owens, 904 F.2d 411 (8th Cir. 1990), which
323 involved a conviction for conspiracy to distribute and attempt to
324 manufacture "methamphetamine/amphetamine." On appeal, the court
325 determined that the general verdict made it impossible to determine
326 which drug was involved in the conviction. For sentencing
327 purposes, the court decided that the district court must use the
328 violation carrying the lower offense level or must use a special
329 verdict form.

330 The Eighth Circuit distinguished Owens in a later case, as the
331 indictment in Owens charged the defendants with an offense
332 involving one drug or another drug, while the later case concerned
333 an indictment involving one drug and another drug. United States
334 v. Watts, 950 F.2d 508 (8th Cir. 1991), cert. denied, 112 S. Ct.
335 1276 (1992). Here, Bounds's indictment says "phenylacetone and
336 amphetamine." In the jury instructions, however, the district
337 judge sometimes says "phenylacetone or amphetamine." Given the
338 jury instructions, we conclude that this case looks more like
339 Owens: We do not really know which drug (or both) the jury
340 considered in deciding on conviction. In this circuit, moreover,

molecular structures, basic chemistry tends to suggest that the respective amounts producible from a given quantity of precursor chemicals would be different. Without any expert testimony in the record on the issue, we certainly cannot assume the same amount of both drugs could be produced.

341 even where the indictment says "and," the government, to sustain
342 its burden, need only prove that one or the other drug was
343 produced. See United States v. McCann, 465 F.2d 147, 162 (5th Cir.
344 1972). Given this rule, we will never know upon which of two
345 drugs, or both, the jury based its conviction, unless the court
346 uses a special verdict form or the government charges the defendant
347 with separate counts for each drug.

348 Because we cannot tell which drug the jury focused upon in
349 convicting Bounds, we remand for resentencing. On remand, the
350 district court could find that the producible amount of
351 phenylacetone yields the same offense level as 18 kilograms of
352 amphetamine. If that is the case, or if the equivalency table
353 yields a higher offense level for the producible quantity of
354 phenylacetone, the court may simply reimpose the original sentence.
355 If, however, the equivalency table yields a lower offense level for
356 phenylacetone, the district court must sentence Bounds using the
357 lower offense level. We express no opinion as to whether the
358 district court must impose a lower sentence on remand if the
359 original sentence were to come within the range allowed by the
360 lower offense level.

361 XIII.

362 We AFFIRM Bounds's conviction on all counts. We VACATE
363 Bounds's sentence and remand for resentencing in accordance with
364 this opinion.

365 REAVLEY, Circuit Judge, concurring:

366 Instead of a formal motion by the United States Attorney to
367 reinstate the second and third counts, the government attorney and
368 defense attorney accepted Judge Walters' statement that the
369 reversal of his judgment put the court and parties back where they
370 were prior to the plea and dismissal of the two counts, i.e. back
371 with the four counts. Bounds was rearraigned on the four counts
372 and pleaded to each of them. Trial proceeded without objection.
373 Counts two and three were reinstated by acceptance of all attorneys
374 and the court. There was no error. If the counts were not somehow
375 reinstated, I fail to see the harmlessness.

376 I concur in the judgment and the opinion except for part IV.