

1-1-2020

## One Should Not Pay for All - Drug Quantity Triggering Mandatory Minimums Should Be Individualized in Conspiracy Sentencing

Hunter R. Wildrick

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

---

### Recommended Citation

25 Suffolk J. Trial & App. Advoc. 66 (2019-2020)

This Notes is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact [dct@suffolk.edu](mailto:dct@suffolk.edu).

# ONE SHOULD NOT PAY FOR ALL—DRUG QUANTITY TRIGGERING MANDATORY MINIMUMS SHOULD BE INDIVIDUALIZED IN CONSPIRACY SENTENCING

*“It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”<sup>1</sup> In the consideration of conspiracy drug offenses, the circuits have not yet come to a consensus as to whether an individualized or conspiracy-wide theory should be used to determine the quantity of drugs for each defendant required to trigger a mandatory minimum sentencing requirement.<sup>2</sup>*

## I. INTRODUCTION

In the current political climate, harsh sentencing requirements for drug offenses is a fiercely-contested issue between dueling political parties.<sup>3</sup>

---

<sup>1</sup> See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1999) (Stevens, J., concurring)) (emphasizing constitutional requirement of proving defendant guilty beyond reasonable doubt).

<sup>2</sup> See *United States v. Stoddard*, 892 F.3d 1203, 1220 (D.C. Cir. 2018) (“The question remains ‘whether it is the *individualized* drug quantity that is a fact that increases the mandatory minimum sentence.’” (quoting *United States v. Pizarro*, 772 F.3d 284, 292 (1st Cir. 2014))).

<sup>3</sup> See Editorial, *Sessions’ Wrong Call on Nonviolent Drug Offenders*, CHI. TRIB. (May 24, 2017, 5:47 PM), <https://www.chicagotribune.com/news/opinion/editorials/ct-sessions-mandatory-minimum-sentences-edit-0525-md-20170524-story.html> [<https://perma.cc/ZM72-9XNU>] (stating disproportional effect of tough-on-drug-crime policies on minorities); see also Matt Ford, *Jeff Sessions Reinvigorates the Drug War*, ATLANTIC (May 12, 2017), <https://www.theatlantic.com/politics/archive/2017/05/sessions-sentencing-memo/526029/> [<https://perma.cc/HU2V-RS46>] (criticizing Sessions’s appeal to prosecutors to seek maximum punishment lawfully possible). “In some cases, mandatory-minimum and recidivist-enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution . . . . Long sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation.” Ford, *supra* note 3 (quoting memo from previous Attorney General Eric Holder); Jennifer Hansler, *Trump Set One Woman Free, But He’s Trying to Put a Lot More Drug Offenders Away*, CNN (June 7, 2018, 12:53 PM), <https://www.cnn.com/2018/06/07/politics/trump-alice-johnson-drug-policies/index.html> [<https://perma.cc/XBE4-NM95>] (contrasting Trump’s general demonization of drug offenders with specific generosity toward Alice Marie Johnson); but see Josh Gerstein, *Sessions Moves to Lengthen Drug Sentences*, POLITICO (May 12, 2017, 6:24 AM), <https://www.politico.com/story/2017/05/12/mandatory-minimum-drug-sentences-jeff-sessions-238295> [<https://perma.cc/7A52-K96L>] (explaining Session’s concession that the opioid crisis “won’t be solved solely by putting more people in prison but . . . tougher law enforcement is an essential part of the solution.”). “While the new policy does instruct

Proponents argue that the benefit of lenient sentencing for nonviolent drug offenders is a lower rate of incarceration with fewer devastating effects on communities of color where longer sentences do not really deter crime to begin with.<sup>4</sup> Meanwhile, advocates of the maximum punishment strategy contend that directing federal prosecutors to “charge and pursue the most serious, readily provable offense in felony cases” fulfills the government’s vital responsibility of keeping communities safe and protecting American citizens from corruption and harm.<sup>5</sup>

Title 21 of the United States Code, section 841, which prescribes mandatory minimum sentencing requirements for defendants convicted of trafficking over a certain quantity of illegal drugs, is likely one of the most controversial provisions in the federal judicial system.<sup>6</sup> Often times, the

---

prosecutors to generally pursue the most serious provable drug charge, it does allow for exceptions based on ‘good judgment.’” Gerstein, *supra* note 3; see also Alfred S. Regnery, *Longer Prison Sentences: Good for the Crime Rate, Bad for the Criminal*, FOX NEWS (May 27, 2017), <https://www.foxnews.com/opinion/longer-prison-sentences-good-for-the-crime-rate-bad-for-the-criminal> [<https://perma.cc/Z8ED-THKL>] (opining Sessions’s memo restores law to original intentions of Congress).

<sup>4</sup> See Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL’Y 13, 14 (2011) (opining that increasing already lengthy prison sentences does not effectively fight crime); see also Editorial, *supra* note 3 (arguing harsh sentencing for nonviolent offenders does not produce effective results). Money put toward “housing a [prison] population that is nearly half drug offenders” could be better used to “beef[] up drug use treatment programs.” Editorial, *supra* note 3.

<sup>5</sup> See Regnery, *supra* note 3 (asserting drug traffickers tend to be career criminals dangerous to community).

When an arrest is made of a pusher lower on the totem pole, prosecutors will use the threat of a severe sentence as a bargaining chip to work up the chain to nab the kingpin and those just under him. Charging one of the lowly ones with a fifteen year mandatory minimum can be a very effective way of getting the fellow to rat on his colleagues in return for a deal on the sentence.

*Id.*; Toby Helm & Jamie Doward, *Longer Prison Terms Really Do Cut Crime, Study Shows*, GUARDIAN (July 7, 2012, 2:45 PM), <https://www.theguardian.com/law/2012/jul/07/longer-prison-sentences-cut-crime> [<https://perma.cc/6586-YMV4>] (finding long sentences particularly effective when targeted at serious repeat offenders).

<sup>6</sup> See 21 U.S.C. § 841(b) (listing drug quantities to corresponding required penalties). For example, a person who was convicted of trafficking five kilograms or more of cocaine would have a mandatory minimum sentence of the following:

[M]ay 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.

crime that a defendant commits does not truly warrant the severe punishment that he or she is prescribed.<sup>7</sup> Cynthia Powell, a first-time offender, sold \$300.00 worth of hydrocodone pills to an undercover police officer, for which she is serving a twenty-five year mandatory minimum sentence in Florida state prison.<sup>8</sup>

At age 17, she dropped out of high school and gave birth to a daughter, Jackie . . . . [whose] father left when [she] was only a month or two old. On disability because of uncontrollable diabetes, Cynthia focused her life on raising her daughter and helping out with other family members' kids . . . . Jackie had a premature daughter . . . . When she was released from the hospital after five months . . . Cynthia took on a major part of the responsibility of raising her. Over the years, Cynthia's diabetes worsened, and she began taking the prescription medication Lorcet, which contains hydrocodone, for severe pain in her legs . . . . An acquaintance of hers was working as a confidential informant[] for the police, and called Cynthia. She had the flu, she said, and she'd heard that Cynthia had a prescription for Lorcet. Cynthia refused, but the CI kept calling. Eventually . . . . [s]he sold 35 hydrocodone tablets and Soma tablets . . . . The Lorcet pills containing hydrocodone weighed 29.3 grams, just 1.3 grams above the weight necessary to trigger a 25-year mandatory minimum sentence . . . . The judge [said to her at sentencing], 'I'm sorry, Ms. Powell, there's nothing else I can do. It's not an

---

*Id.* § 841(b)(1)(A). See David Bjerk, *Mandatory Minimums and the Sentencing of Federal Drug Crimes*, 46 J. LEGAL STUD. 93, 93–94 (2017) (detailing controversial nature of mandatory minimum requirement).

This law is prominent and controversial for several reasons. First, it potentially applies to a very large population of defendants. Indeed, in fiscal year 2010, drug offenses made up almost 30 percent of all federal offenses (second only to immigration offenses), with almost 25,000 offenders convicted of a federal drug offense . . . . Second, the mandatory minimums can be quite long . . . even for nonviolent first-time offenders.

*Id.*

<sup>7</sup> See Bjerk, *supra* note 6, at 94 (acknowledging disparity amongst different types of drugs in sentencing requirements); *Cynthia Powell: 25 Years for 35 Pills*, FAMILIES AGAINST MANDATORY MINIMUMS, <https://famm.org/stories/cynthia-powell-25-years-35-pills-2/> (last visited Dec. 16, 2019) [<https://perma.cc/FE8U-XWJD>] (demonstrating devastating effects of mandatory minimum sentence on nonviolent offender).

<sup>8</sup> See *Cynthia Powell: 25 Years for 35 Pills*, *supra* note 7 (describing Cynthia's reasons for selling prescription diabetes medication).

easy thing, but I can't do anything else.' The mandatory minimum stripped [the judge] of all discretion.<sup>9</sup>

The accused has a constitutional right to require the prosecutor to prove every element of the charged offense to the jury beyond a reasonable doubt.<sup>10</sup> The utilization of aggressive prosecutorial methods regarding mandatory minimums has sparked a debate amongst the circuits over the constitutionality of sentencing a defendant based on the quantity of drugs recovered from the entire conspiracy that he or she was involved in.<sup>11</sup> Since the Supreme Court held in *Alleyne v. United States*<sup>12</sup> that the constitutional right to proof beyond a reasonable doubt applies to facts triggering mandatory minimum sentences, there has been a shift in the circuits from the requirement that the prosecutor show conspiracy-wide drug quantity in order to invoke mandatory minimum sentences for all defendants involved to a defendant-specific burden of proof regarding the drug quantity.<sup>13</sup> In a post-

---

<sup>9</sup> See *id.* (demonstrating problematic nature of mandatory minimums where judge has no discretion in sentencing).

<sup>10</sup> See U.S. CONST. amend. VI (describing rights in criminal proceedings).

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 [sic].

*Id.* (emphasis added); see *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (“[U]nder . . . the notice and jury trial guarantees of the Sixth Amendment, any fact other than prior conviction[] that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” (quoting *Jones v. United States*, 526 U.S. 227, 243, n.6 (1999))).

<sup>11</sup> See *United States v. Stoddard*, 892 F.3d 1203, 1220 (D.C. Cir. 2018) (recognizing circuit split on issue). The D.C. Circuit Court of Appeals held, “a defendant convicted of conspiracy to deal drugs, in violation of § 846, must be sentenced, under § 841(b), for the quantity of drugs *the jury attributes to him as a reasonably foreseeable part of the conspiracy*.” *Id.* at 1221 (quoting *United States v. Law*, 528 F.3d 888, 906 (D.C. Cir. 2008)); but see *United States v. Phillips*, 349 F.3d 138, 142–43 (3d Cir. 2003), *vacated on other grounds by* *Barbour v. United States*, 543 U.S. 1102 (2005) (“In drug conspiracy cases, *Apprendi* requires the jury to find only the drug type and quantity element as to the conspiracy as a whole, and not the drug type and quantity attributable to each co-conspirator.”). “Once the jury makes these findings, it is for the sentencing judge to determine by a preponderance of the evidence the drug quantity attributable to each defendant . . .” *Phillips*, 349 F.3d at 143.

<sup>12</sup> 570 U.S. 99 (2013).

<sup>13</sup> See *Stoddard*, 892 F.3d at 1220 (recognizing shift in two circuits from initially adopting conspiracy-wide approach to individualized approach); see also *United States v. Gibson*, No. 15-6122, 2016 U.S. App. LEXIS 21141 at \*2–3 (6th Cir. Nov. 21, 2016), *vacated*, 854 F.3d 367 (6th Cir. 2017) (applying individualized approach); but see *United States v. Gibson*, 874 F.3d 544, 544 (6th Cir. 2017) (reinstating district court’s sentence based on conspiracy-wide approach); see also

*Alleyne* world, it is likely unconstitutional to sentence a defendant in compliance with a mandatory minimum requirement if the quantity of drugs has not been proven beyond a reasonable doubt attributable to him as an individual, deterring exposure to jail time for an unforeseen quantity of drugs.<sup>14</sup>

## II. HISTORY OF U.S. DRUG POLICY AND APPLICATION OF APPRENDI AND ALLEYNE

Drug policy has had a profound effect on the United States criminal justice system over the last forty years, largely emerging from President Nixon's declaration that drug abuse is "America's public enemy number one."<sup>15</sup> In October of 1982, Ronald Reagan addressed the nation during a radio broadcast and announced his intent to crack down on drug prosecutions, "We're making no excuses for drugs—hard, soft, or otherwise.

---

United States v. Stiger, 413 F.3d 1185, 1193 (10th Cir. 2005) (recognizing that "[a] jury is not required to make individualized findings as to each coconspirator [sic] because 'the sentencing judge's findings do not . . . have the effect of increasing an individual defendant's exposure beyond the statutory maximum justified by the jury's guilty verdict.'" (citation omitted)). *Stiger*, however, was overturned 12 years later. See United States v. Ellis, 868 F.3d 1155, 1176 (10th Cir. 2017). "[A] defendant can be held 'accountable for that drug quantity which was within the scope of the agreement and reasonably foreseeable' to him." *Id.* at 1170 (quoting United States v. Dewberry, 790 F.3d 1022, 1030 (10th Cir. 2015)).

<sup>14</sup> See *Dewberry*, 790 F.3d at 1030 (holding defendant "can be held accountable for that drug quantity which was within the scope of agreement and reasonably foreseeable to him" (citation omitted)). In order to highlight the impact of the amount of drugs on sentencing, the court highlighted, "[i]f he had been found instead to have distributed only 28 grams or more and less than 280 grams of crack, with his prior conviction, he would have been subject to a 10-year mandatory minimum," as opposed to the 20-year mandatory minimum he received for distribution of 280 grams or more. *Id.* at 1029; see *Stoddard*, 892 F.3d at 1221 (stating that "'reasonable foreseeability' shapes the outer bounds of co-conspirator liability, and it applies to drug quantities that trigger enhanced penalties, just the same as it applies to other acts committed by co-conspirators."); United States v. Rangel, 781 F.3d 736, 742–43 (4th Cir. 2015) (stating sentencing requirement unconstitutional where court "'effectively attributed to [the defendant], an individual member of the conspiracy, the quantity of cocaine base distributed by the entire conspiracy.'" (quoting United States v. Collins, 415 F.3d 304, 314 (4th Cir. 2005))).

<sup>15</sup> See Don Stemen, *Beyond the War: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL'Y REV. 375, 375 (2017) (citing Richard Nixon, President of the United States, Remarks About an Intensified Program for Drug Abuse Prevention and Control at the White House Briefing Room (June 17, 1971) (transcript available at <https://www.presidency.ucsb.edu/documents/remarks-about-intensified-program-for-drug-abuse-prevention-and-control>) [<https://perma.cc/HSZ6-XQWA>]) (delineating emerging "concerns about the manufacture, distribution, and possession of drugs . . ."). "President Reagan's subsequent pronouncement of drugs as 'an especially vicious virus of crime' set a course for national drug policy that emphasized enforcement and punishment over treatment to 'win the war on drugs.'" *Id.* (citing Ronald Reagan, President of the United States, Radio Address to the Nation on Federal Drug Policy at Camp David (Oct. 2, 1982) (transcript available at <https://www.presidency.ucsb.edu/documents/radio-address-the-nation-federal-drug-policy>), available at [<https://perma.cc/DS9U-ZXAG>]).

Drugs are bad, and we're going after them . . . we've taken down the surrender flag and run up the battle flag . . . we're going to win the war on drugs."<sup>16</sup> Towards the mid-1990s, the perception of drugs in the United States began to shift in the direction of a more rehabilitation-friendly approach, leading to the expansion of drug courts, treatment programs, and alternative sentencing policies for drug offenders.<sup>17</sup>

Both President Bush and Obama forged forward in the effort toward rehabilitating drug offenders—Bush pushing for increased funding for substance abuse treatment, and Obama declaring the war on drugs an “utter failure,” reducing sentences for all drug offenses under the sentencing guidelines of the federal government.<sup>18</sup> Obama-era Attorney General Eric Holder asserted that prosecutors should decline to charge the quantity necessary to trigger mandatory minimums if a defendant’s relevant conduct does not involve the use or threat of violence, the possession of a weapon, the trafficking of drugs to minors, or death or serious bodily injury, the

---

<sup>16</sup> See Reagan, *supra* note 15 (depicting President Reagan’s optimism regarding crack down on drugs); see also Stemen, *supra* note 15, at 375 (explaining how Reagan’s drug policy led to adoption of new mandatory sentences and sentence enhancements).

<sup>17</sup> See Stemen, *supra* note 15, at 376 (exhibiting ways jurisdictions sought “to divert drug offenders from prison and to develop community- and prison-based treatment programs for drug users.”); see also Office of Justice Programs, *Looking at a Decade of Drug Courts*, DRUG CT. CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT (June 1999), <https://www.ncjrs.gov/html/bja/decade98.htm> [<https://perma.cc/EP4S-NZZ2>] (analyzing shift to drug court to curb recidivism rates).

<sup>18</sup> See Stemen, *supra* note 15, at 377 (articulating continuation of shift towards rehabilitation under Bush and Obama); see also WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY, 20 (March 2004) (“[Drug offenders] have an immediate need, and we have launched a new program to address it—Access to Recovery. Begun in . . . 2004, with an additional \$100 million requested in fiscal year 2005, the program will expand access to clinical substance abuse treatment . . .”); Bernd Debusmann, *Obama and the Failed War on Drugs*, REUTERS (Apr. 16, 2012, 1:55 PM), <https://www.reuters.com/article/us-column-debusmann-drugs/obama-and-the-failed-war-on-drugs-bernd-debusmann-idUSBRE83F0ZR20120416> [<https://perma.cc/5577-V5HD>] (quoting Obama from 2004 debate at Northwestern University); *Sensible Sentencing Reform: The 2014 Reduction of Drug Sentences*, U.S. SENT’G COMM’N, at 1–2, available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/profile\\_2014\\_drug\\_amendment.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/profile_2014_drug_amendment.pdf) [<https://perma.cc/WT43-A89N>] (“Congress set up the ‘safety valve,’ which allows low-level drug offenders who cooperate to be sentenced below the mandatory minimum . . . provid[ing] much greater incentive to plead.”); Eric H. Holder, Attorney General, *Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases*, 30 FED. SENT’G REP. 12, 12 (Oct. 1, 2017) (emphasizing need to “ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers.”). “Long sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation.” Holder, *supra* note 18; but see Tim Dickinson, *Why America Can’t Quit the Drug War*, ROLLING STONE (May 5, 2016, 4:07 PM), <https://www.rollingstone.com/culture/culture-news/why-america-cant-quit-the-drug-war-47203/> [<https://perma.cc/AU87-ML44>] (“Despite strides toward a more sane national drug policy, the deeper infrastructure of the War on Drugs remains fundamentally unaltered under Obama.”).

defendant is not a supervisor of others within a criminal organization, tied to a large-scale organization, and the defendant does not have a significant criminal history.<sup>19</sup> Trump's presidency has brought about a sharp turn away from the ever-growing pattern of distancing the country from the war on drugs.<sup>20</sup>

[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.<sup>21</sup>

Title 21, § 841 of the United States Code sets out the illegality of the manufacturing and distribution of controlled substances and specifies the mandatory minimum and maximum penalties associated with particular quantities of controlled substances.<sup>22</sup> The prosecutor may also charge a drug offender with conspiracy to commit those offenses, and subject them to the same penalties as if they had committed the offense that was the "object of the attempt or conspiracy."<sup>23</sup> In order to sentence a defendant to a penalty

<sup>19</sup> See Holder, *supra* note 18, at 13 (incentivizing lenient sentence proposals for federal prosecutors).

<sup>20</sup> See Ford, *supra* note 3 ("It is a core principle that prosecutors should charge and pursue the most serious, readily provable offense . . . . By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory-minimum sentences.").

<sup>21</sup> See *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 243, n.6 (1999)).

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . 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 . . . .

U.S. CONST. amend. V.

<sup>22</sup> See 21 U.S.C. § 841(a) (2018) ("Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or . . . a counterfeit substance."); *Id.* § 841(b) (proscribing sentencing requirements for particularized quantities of controlled substances).

<sup>23</sup> *Id.* § 846 (dictating penalties for conspiracy to manufacture or distribute controlled substances). "Any person who attempts or conspires to commit any offense defined in this title 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." *Id.*



reflecting the controlled substance's weight, the quantity of that substance must be presented to the jury and proven beyond a reasonable doubt.<sup>24</sup>

If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the [government] is put to proof of those circumstances—be deprived of the protections that have, until that point, unquestionably attached.<sup>25</sup>

In *Alleyne v. United States*, the United States Supreme Court applied the *Apprendi* ruling to factors triggering a mandatory minimum sentence, holding that any fact “[e]levating the low end of a sentencing range heightens the loss of liberty associated with the crime” and therefore must be proven to the jury beyond a reasonable doubt.<sup>26</sup> The Court concluded that including every fact that was a basis for imposing or increasing punishment in the

---

<sup>24</sup> See *Apprendi*, 530 U.S. at 476–77 (emphasizing constitutional importance of proving all elements of crime to jury beyond reasonable doubt).

At stake . . . are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without “due process of law,” and the guarantee that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,” . . . . Taken together, these rights indisputably entitle a criminal defendant to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.”

*Id.* (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)); see 2 CRIMINAL PROCEDURE CHECKLISTS 6TH AMEND. § 7:16 (2018) (“The judge] can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.”) (citing *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016)); Nancy J. King & Susan R. Klein, *Acceptance of Responsibility and Conspiracy Sentences in Drug Prosecutions After Apprendi*, 14 FED. SENT’G R. 165 (2002) (discussing impact of *Apprendi* on drug prosecution). Before *Apprendi*, where the defendant decided to plead guilty but could not come to an agreement with the government as to the amount of drugs that would establish his offense level under the guidelines, both parties would enter into the agreement without quantifying the amount and leave that determination to the judge at sentencing. King, *supra* note 24. After *Apprendi*, “a plea agreement that does not specify drug quantity, now an element of each greater offense, will support only a sentence within the statutory maximum of the lesser offense, even if the greater drug amount is later established at sentencing.” *Id.*

<sup>25</sup> See *Apprendi*, 530 U.S. at 484 (noting that there should be heightened protections for defendants who face sentence greater than statute).

<sup>26</sup> See *Alleyne v. United States*, 570 U.S. 99, 113 (2013) (declaring that any fact increasing sentencing floor is essential ingredient of offense); see also 1 J. BISHOP, LAW OF CRIMINAL PROCEDURE § 80, 51 (2d ed. 1872) (defining crime). “Crime” consists of every fact which “is in law essential to the punishment sought to be inflicted . . .” or the whole of the wrong “to which the law affixes . . . punishment.” *Alleyne*, 570 U.S. at 109 (citing BISHOP at 51).

indictment was a well-established practice supported by widely recognized principles.<sup>27</sup> In the 5-4 decision by the Court, Justice Thomas extended *Apprendi*'s requirement of proof to facts increasing the mandatory minimum of the offense, recognizing that the elevation of the low end of a sentencing range heightens the potential for loss of liberty:

Just as the maximum of life marks the outer boundary of the range, so seven years marks its floor. And because the legally prescribed range *is* the penalty affixed to the crime, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense.<sup>28</sup>

As mandatory minimum sentences have the potential to vastly increase exposure to harsher verdicts and longer prison time, defendants charged with conspiracy to commit a drug violation face potentially daunting punishments if they are sentenced pursuant to the drug quantity attributed to the conspiracy as a whole.<sup>29</sup> Shortly after *Apprendi* was decided, courts were

---

<sup>27</sup> See *Alleyne*, 570 U.S. at 110 (recognizing historical emphasis on proof of all elements contributing to punishment); see also *United States v. Fisher*, 25 F.Cas. 1086, 1086 (C.C. Ohio 1849) ("A [mail carrier] is subject to a higher penalty where he steals a letter out of the mail, which contains an article of value . . . the indictment must allege the letter contained an article of value, which aggravates the offense and incurs a higher penalty."); *Hope v. Commonwealth*, 50 Mass. 134, 137 (1845) (holding value of stolen property in larceny case to be element of offense).

Our statutes, it will be remembered, prescribe the punishment for larceny, with reference to the value of the property stolen; and for this reason, as well as because it is in conformity with long established practice, the court are of [the] opinion that the value of the property alleged to be stolen must be set forth in the indictment.

*Hope*, 50 Mass. at 137; see *Ritchey v. State*, 7 Blackf. 168, 169 (Ind. 1844) (declaring indictment must allege value of destroyed property under arson statute); J. ARCHBOLD, PLEADING & EVIDENCE IN CRIMINAL CASES 51 (15th ed. 1862) ("Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision.").

<sup>28</sup> See *Alleyne*, 570 U.S. at 112 (emphasizing Court's decision is supported by common sense). "It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime . . . . Indeed, criminal statutes have long specified both the floor and ceiling of sentence ranges, which is evidence that both define the legally prescribed penalty." *Id.*; *Apprendi*, 530 U.S., at 478-79 (requiring that facts increasing mandatory minimums be defined so defendants may predict applicable penalty).

<sup>29</sup> See *United States v. Stoddard*, 892 F.3d 1203, 1222 (D.C. Cir. 2018) (recognizing defendants' exposure to significantly higher sentence attributed to conspiracy's drug quantity not individualized quantity); Hansler, *supra* note 3 (emphasizing harsh sentences resulting from mandatory minimums). "[T]hose convicted in the 2016 fiscal year of crimes carrying mandatory minimum penalties received an average of 110 months—approximately 9 years—in prison. That

permitted to convict each individual conspirator for agreeing to participate in a drug conspiracy of a specified type and amount without proof that they reasonably should have foreseen the amount or type of all drugs involved.<sup>30</sup> Since the *Alleyne* decision, however, all of the circuits that have explicitly addressed the issue determined that there must be an individualized jury finding as to the quantity and type of drugs attributable to each individual conspirator in order to trigger a mandatory minimum sentence.<sup>31</sup>

### III. THE CIRCUIT SPLIT

Although it is without dispute amongst the circuits that a drug quantity must be proven to the jury beyond a reasonable doubt, there is a disagreement surrounding the constitutional implications of sentencing a co-conspirator based on the conspiracy's total drug quantity.<sup>32</sup> Under both *Apprendi* and *Alleyne*, each subsection of 21 U.S.C. § 841(b)(1) is a separate crime prescribed with its own drug quantity and sentencing range.<sup>33</sup> The

---

was four times the average sentence—a bit over 2 years—for those convicted of a crime without the mandatory minimum.” Hansler, *supra* note 3.

<sup>30</sup> See King and Klein, *supra* note 24 (examining state of drug conspiracy sentencing after *Apprendi*). “[P]resently courts do not demand that the jury determine that each individual conspirator agree that the conspiracy involve the possession with intent to deliver the type and amount of drugs involved in the conspiracy itself.” *Id.*; see United States v. Knight, 342 F.3d 697, 710 (7th Cir. 2003) (“*Apprendi* . . . does not require defendant-specific findings of drug type and quantity in drug-conspiracy cases.”); United States v. Fields, 251 F.3d 1041, 1043–1044 (D.C. Cir. 2001) (stating individualized knowledge of drug quantity not necessary to prove to jury); United States v. Promise, 255 F.3d 150, 157 n.6 (4th Cir. 2001) (deciding that “the task of identifying the amount of drugs for which the defendant should be held accountable . . . is left to the district court.”); United States v. Sanchez, 269 F.3d 1250, 1266 n.28 (11th Cir. 2001) (recognizing knowledge of amount of drugs in conspiracy not element of offense under 18 U.S.C. § 841).

<sup>31</sup> See *Stoddard*, 892 F.3d at 1220 (“The circuits that earlier adopted the conspiracy-wide approach have, at times, failed to grapple with it in subsequent published and unpublished cases decided after *Alleyne*.”). “It is a core principle of conspiratorial liability that a co-conspirator may be held liable for acts committed by co-conspirators during the course of the conspiracy only when those acts are ‘in furtherance of the conspiracy’ and ‘reasonably foreseeable’ to the defendant.” *Id.* at 1221 (citing *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946)).

<sup>32</sup> See *id.* at 1220 (quoting United States v. Pizarro, 772 F.3d 284, 292 (1st Cir. 2014)) (recognizing split amongst circuits in answering “whether it is the *individualized* drug quantity that is a fact that increases the mandatory minimum sentence.”). “The question remains . . . whether, as the District Court found, the amount of drugs attributable to the conspiracy as a whole can be the fact which triggers the mandatory minimum for an individual defendant.” *Id.*

<sup>33</sup> See *Pizarro*, 772 F.3d at 292 (stating Supreme Court held each subsection is separate crime).

Citing *Alleyne* and *Apprendi*, the Supreme Court in *Burrage v. United States*, 134 S. Ct. 881 (2014), explained that because an aggravating element in § 841(b)(1) . . . “increased the minimum and maximum sentences to which the defendant was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt.” . . . Just as the “death results” element [addressed in *Burrage*] makes the distribution of drugs

majority of circuits have adopted the individualized approach, while a small number of courts still have not explicitly rejected the conspiracy-wide approach.<sup>34</sup>

The D.C., First, Fourth, Fifth, and Ninth Circuits all embrace the individualized approach.<sup>35</sup> These circuits have universally determined that the drug quantity triggering an individual's mandatory minimum sentence must have been foreseeable to him.<sup>36</sup> In particular, long before *Apprendi* and *Alleyne* were decided, the Fifth and Ninth Circuits held steadfast to the rule that a particular defendant must have a connection with the quantity of drugs that would trigger his penalty for conspiracy to distribute.<sup>37</sup> The courts in

---

where death results a separate crime . . . without a death resulting, drug quantity in § 841(b)(1) creates aggravated conspiracy and possession offenses.

*Id.* (citations omitted).

<sup>34</sup> See *Stoddard*, 892 F.3d at 1220 (“The circuits that earlier adopted the conspiracy-wide approach have, at times, failed to grapple with it in subsequent published and unpublished cases decided after *Alleyne*.”).

<sup>35</sup> See *id.* at 1221 (“We adopt the individualized approach to drug-quantity determinations that trigger an individual defendant's mandatory minimum sentence.”); *Pizarro*, 772 F.3d at 293–94 (conforming to individualized sentencing method).

[F]or a [drug] conspiracy conviction. . . the jury must now find that the defendant (1) conspired, (2) knowingly or intentionally to distribute [a controlled substance], (3) in a conspiracy that involved a total of [a certain quantity of that controlled substance]. . . (4) where at least [that same quantity was] foreseeable to the defendant.

*Pizarro*, 772 F.3d at 293–94 (citations omitted); *United States v. Rangel*, 781 F.3d 736, 744 (4th Cir. 2015) (applying individualized principle that “district court . . . [must find defendant himself] responsible” for quantity); *United States v. Haines*, 803 F.3d 713, 739 (5th Cir. 2015) (holding that defendants' mandatory minimum was improperly determined). “[Defendants] should have been sentenced based on the drug quantity attributable to them as individuals, not the quantity attributable to the entire conspiracy.” *Haines*, 803 F.3d at 739. See *United States v. Banuelos*, 322 F.3d 700, 704 (9th Cir. 2003) (reversing and remanding case where district court sentenced defendant based on conspiracy as whole). “In sentencing a defendant convicted of conspiracy to distribute a controlled substance, a district court may not automatically count as relevant conduct the entire quantity of drugs distributed by the conspiracy.” *Id.* (citing *United States v. Garcia-Sanchez*, 189 F.3d 1143, 1147 (9th Cir. 1999)).

<sup>36</sup> See *Haines*, 803 F.3d at 740 (highlighting reasonable foreseeability requirement). “[F]or a sentencing court to attribute to a defendant a certain quantity of drugs, the court must make two separate findings: (1) the quantity of the drugs in the entire operation and (2) the amount which each defendant knew or should have known was involved in the conspiracy.” *Id.* (quoting *United States v. Quiroz-Hernandez*, 48 F.3d 858, 870 (5th Cir. 1995)); *Banuelos*, 322 F.3d at 704 (explaining requirements to sentence defendant on drug conspiracy charge). “[T]he court must find the quantity of drugs that either (1) fell within the scope of the defendant's agreement with his coconspirators [sic] or (2) was reasonably foreseeable to the defendant.” *Banuelos*, 322 F.3d at 704.

<sup>37</sup> See *Haines*, 803 F.3d at 740 (“For purposes of . . . determining statutory minimum and maximum sentences, our cases always have limited the defendant's liability to the quantity of drugs with which he was directly involved or that was reasonably foreseeable to him.”); *Banuelos*, 322 F.3d at 704 (chronicling Ninth Circuit's well-settled application of individualized method to

this majority have wholly rejected the government's oft-contended argument that reasonable foreseeability flows automatically from membership in a conspiracy.<sup>38</sup>

Originally, the Third and Seventh Circuits followed the conspiracy-wide approach.<sup>39</sup> For these circuits, the courts specified that the jury must determine beyond a reasonable doubt: (1) the existence of a conspiracy, (2) the defendant's involvement in it, and (3) the requisite drug type and quantity involved in the conspiracy as a whole.<sup>40</sup> Several cases in both the Third and Seventh Circuits, however, have called into question whether the conspiracy-wide position is still being followed, but they have yet to concretely reject it.<sup>41</sup> Although these circuits have not explicitly rejected the conspiracy-wide

---

sentencing). The Ninth Circuit held that a court may not impose a statutory mandatory minimum without making a finding that "a particular defendant had some connection with the larger amount on which the sentencing is based or that he could reasonably foresee that such an amount would be involved in the transactions of which he was guilty." *Banuelos*, 322 F.3d at 704 (quoting *United States v. Becerra*, 992 F.2d 960, 966–67 & n.2 (9th Cir. 1993)); *United States v. Quiroz-Hernandez*, 48 F.3d 858, 870 (5th Cir. 1995) (setting Ninth Circuit precedent in regards to this issue).

Under the Sentencing Guidelines, a defendant who participates in a drug conspiracy is accountable for the quantity of drugs, which is attributable to the conspiracy and reasonably foreseeable to him. "Reasonable foreseeability does not follow automatically from proof that [the defendant] was a member of the conspiracy." Reasonable foreseeability requires a finding separate from a finding that the defendant was a conspirator.

*Quiroz-Hernandez*, 48 F.3d at 870 (citations omitted).

<sup>38</sup> See *Stoddard*, 892 F.3d at 1221 (highlighting importance of foreseeability for each individual co-conspirator); *United States v. Puma*, 937 F.2d 151, 160 (5th Cir. 1991) (rejecting government's argument that defendant must have reasonably foreseen quantity of drugs in conspiracy); *but see Pizarro*, 772 F.3d at 290 (opining government properly conceded error occurred in regards to sentencing).

<sup>39</sup> See *United States v. Phillips*, 349 F.3d 138, 142 (3d Cir. 2003), *vacated on other grounds*, *Barbour v. United States*, 543 U.S. 1102 (2005) (holding that "*Apprendi* does not require a jury to make defendant-specific determinations of drug type and quantity in conspiracy cases."). "The finding of drug quantity for purposes of determining the statutory maximum is, in other words, to be an offense-specific, not a defendant-specific, determination." *Id.* at 143. See *United States v. Knight*, 342 F.3d 697, 711–12 (7th Cir. 2003) (conforming to conspiracy-wide approach). "*Apprendi* . . . does not require defendant-specific findings of drug type and quantity in drug-conspiracy cases." *Id.* at 710.

<sup>40</sup> See *Phillips*, 349 F.3d at 143 (listing requirements to sentence defendant on drug conspiracy charge); *Knight*, 342 F.3d at 712 (identifying what jury must determine beyond reasonable doubt). "[T]he jury [must determine] whether each defendant was guilty of participating in the conspiracy and then [must determine] that the conspiracy involved a type and quantity of drugs sufficient to trigger the statutory maximum . . . ." *Knight*, 342 F.3d at 712.

<sup>41</sup> See *United States v. Miller*, 645 F. App'x 211, 218 (3d Cir. 2016) (finding *Alleyne* error harmless where "jury did not determine [a drug quantity] directly attributable" to individual defendant); *United States v. Cruse*, 805 F.3d 795, 817 (7th Cir. 2015) (contradicting Seventh Circuit's conspiracy-wide position, though not on *Alleyne* grounds).

approach, they certainly seem to struggle with its application in the wake of *Alleyne*, and may have abandoned the approach in practice.<sup>42</sup>

Both the Sixth and Tenth Circuits have openly questioned their application of the conspiracy-wide approach following the *Alleyne* determination.<sup>43</sup> The Sixth Circuit appeared to adopt the conspiracy-wide approach in *Robinson*, but later questioned whether it was consistent with constitutional principles in both *Young* and *Gibson*, reluctantly applying the traditional conspiracy-wide test.<sup>44</sup> The Tenth Circuit, which explicitly adopted the conspiracy-wide approach in *Stiger*, shifted after *Alleyne* and determined in *Ellis* that it was error for the defendant to be sentenced according to a mandatory minimum where the jury did not find the amount of drugs individually attributable to him.<sup>45</sup>

---

The jury was told that Cruse and McClain were responsible for “the amount of cocaine involved in the agreement, and all amounts involved in all acts of the coconspirators committed in furtherance of the conspiracy.” This instruction omitted the *Pinkerton* principle that coconspirator liability only extends to those criminal acts that (1) were reasonably foreseeable to the defendants; and (2) occurred during the time that they were members of the conspiracy . . . . Everyone agrees that the jury should have been instructed on the *Pinkerton* doctrine.

*Cruse*, 805 F.3d at 817.

<sup>42</sup> See *Miller*, 645 Fed. App’x at 218 (“This lack of an individualized determination . . . was error in light of *Alleyne* . . . . However, such a lapse was harmless.”).

<sup>43</sup> See *United States v. Robinson*, 547 F.3d 632, 639 (6th Cir. 2008) (“Here, the ‘fact’ that increases the default penalty for a conspiracy to distribute drugs is the quantity of drugs involved in the conspiracy.”); but see *United States v. Young*, 847 F.3d 328, 367 (6th Cir. 2017) (stating “regardless of which approach we apply to [defendant’s] sentence, the outcome is the same.”); *United States v. Gibson*, No. 15-6122, 2016 U.S. App. LEXIS 21141, at \*1–2 (6th Cir. Nov. 21, 2016) (utilizing conspiracy-wide approach), *vacated*, 854 F.3d 367 (6th Cir. 2017) (en banc); *United States v. Gibson*, 874 F.3d 544 (6th Cir. 2017) (en banc) (addressing case amongst full circuit, ultimately dividing equally and reinstating conspiracy-wide approach utilized in trial court); see also *United States v. Stiger*, 413 F.3d 1185, 1193 (10th Cir. 2005) (holding “[t]he jury is not required to make individualized findings as to each coconspirator because the sentencing judge’s findings do not, because they cannot, have the effect of increasing an individual defendant’s sentencing exposure beyond the statutory maximum justified by the jury’s guilty verdict.”). The 10th Circuit later held that the district court committed the *Alleyne* of error convicting defendant “without the jury’s having found his individually attributable amount of cocaine. . . .” *United States v. Ellis*, 868 F.3d 1155, 1170 (10th Cir. 2017).

<sup>44</sup> See *Young*, 847 F.3d at 367 (avoiding choice between individualized approach and conspiracy-wide approach). “[T]here is no need for us to reconcile these cases at this time.” *Id.*; *Gibson*, 874 F.3d at 544 (announcing even divide amongst en banc circuit). Because the judges of the Sixth Circuit were unable to come to an agreement on what method to use, the sentence imposed by the district court was affirmed, where the district court stated that “[b]ecause Gibson pleaded guilty to conspiring to distribute methamphetamine, and admitted that the conspiracy ‘involved’ 50 grams or more of methamphetamine, the drug conspiracy statute exposes him to the crime of distributing 50 grams or more of methamphetamine, together with its ten-year mandatory minimum sentence.” *Gibson*, 2016 LEXIS 21141, at \*2.

<sup>45</sup> See *Ellis*, 868 F.3d at 1177 (announcing *Alleyne* directly overruled *Stiger* “on one point”).

## IV. ANALYSIS

The Supreme Court has not addressed the constitutionality of sentencing a defendant to a mandatory minimum sentence based off a drug quantity attributable to the conspiracy he or she was involved in without conclusively determining that the defendant should have reasonably foreseen the quantity of drugs.<sup>46</sup> In order to determine whether the Supreme Court has implied through *Alleyne* that sentencing a defendant based on a conspiracy-wide quantity of drugs is in fact unconstitutional, the holding and reasoning of the Court must be examined thoroughly, as it holds tremendous importance in the understanding of this realm of the law.<sup>47</sup> According to the Court in *Alleyne*, “[t]he touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an ‘element’ or ‘ingredient’ of the charged offense.”<sup>48</sup> All of the circuits agree

---

In a reversal of fortune, *Stiger*’s conspiracy-wide maximum sentence is now limited by the mandatory-minimum sentence’s statutory range. For example, if a defendant’s individually attributable amount of crack cocaine is 100 grams, that compels a statutory sentencing range of 5 to 40 years, under § 841(b)(1)(B). And even if the conspiracy-wide crack-cocaine amount far exceeds 280 grams, the maximum cannot rise past 40 years without creating a new sentencing range of 5 years to life. Nothing in 841(b) suggests that Congress intended us to merge its precise statutory sentencing ranges in this fashion.

*Id.* at 1178.

<sup>46</sup> See *United States v. Stoddard*, 892 F.3d 1203, 1220 (D.C. Cir. 2018) (noting indecision on issue of individualized versus conspiracy-wide sentencing method).

The question remains “whether it is the *individualized* drug quantity that is a fact that increases the mandatory minimum sentence . . . or whether, as the District Court found, the amount of drugs attributable to the conspiracy as a whole can be the fact which triggers the mandatory minimum for an individual defendant.”

*Id.* (quoting *United States v. Pizarro*, 772 F.3d 284, 292 (1st Cir. 2014)).

<sup>47</sup> See *id.* at 1220 (recognizing courts’ reliance on *Alleyne* in declaring conspiracy-wide approach unconstitutional).

Although some circuits have used the conspiracy-wide approach, it has been called into question by *Alleyne* and subsequent cases from those circuits. Notably, the circuits to adopt the conspiracy-wide approach did so before *Alleyne* was decided in 2013, while all circuits to explicitly address the issue in *Alleyne*’s wake have adopted or followed the individualized approach. The circuits that earlier adopted the conspiracy-wide approach have, at times, failed to grapple with it in subsequent published and unpublished cases decided after *Alleyne*.

*Id.*

<sup>48</sup> See *Alleyne v. United States*, 570 U.S. 99, 107 (2013) (defining which facts constitute an element of offense). Applying *Apprendi*’s reasoning to mandatory minimum offenses, *Alleyne* specifies that elements include “not only facts that increase the ceiling, but also those that increase

that the quantity of drugs that a defendant is held accountable for is an element of the offense and therefore must be charged to the jury and proven beyond a reasonable doubt.<sup>49</sup> The disagreement among the circuits stems from the confusion over which particular approach to use in sentencing a defendant in a conspiracy drug case.<sup>50</sup>

### A. Principles Outlined in *Alleyne* Show Support for Individualized Approach

The principles set out in *Alleyne* coincide quite conclusively with the individualized approach.<sup>51</sup> The *Alleyne* Court's reasoning that the "linkage of facts with particular sentence ranges . . . reflects the intimate connection between crime and punishment" demonstrates why the individualized approach is much more suited to the nation's constitutional values.<sup>52</sup> In order

the floor . . . [because both] alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment." *Id.* at 108.

<sup>49</sup> See *Stoddard*, 892 F.3d at 1219 (noting requirement of jury determination for mandatory-minimum drug quantity); *Haines*, 803 F.3d at 738 ("Because the quantity of heroin involved affects [defendants'] minimum sentences under § 841, it must be found by a jury."); *United States v. Rangel*, 781 F.3d 736, 743 (4th Cir. 2015) (considering quantity of drugs element that must be proven to jury); *Pizarro*, 772 F.3d at 293 ("In a drug conspiracy . . . conviction with a mandatory minimum and statutory maximum based on drug quantity, the jury must find those requisite drug quantities."); *United States v. Robinson*, 547 F.3d 632, 639 (6th Cir. 2008) (acknowledging in conspiracy-wide jurisdiction drug quantity must be proven to jury); *United States v. Banuelos*, 322 F.3d 700, 704–05 (9th Cir. 2005) (recognizing drug quantity must be proven to jury beyond reasonable doubt); *United States v. Knight*, 342 F.3d 697, 710 (7th Cir. 2003) ("[D]efendants may be subject to a statutorily enhanced sentence based on drug type and quantity, as provided in § 841(b), only if those facts are charged in the indictment and proven to a jury beyond a reasonable doubt.").

<sup>50</sup> See *United States v. Young*, 847 F.3d 328, 367 (6th Cir. 2017) (avoiding decision of which approach to use). "[R]egardless of which approach we apply to [the defendant's] sentence, the outcome is the same. Thus, there is no need for us to reconcile these cases at this time." *Id.*; *Gibson*, 874 F.3d at 544 (affirming lower court's use of conspiracy-wide approach after even divide amongst en banc circuit). But see *Stoddard*, 892 F.3d at 1222 ("[T]he *Alleyne/Burrage* paradigm supports our conclusion that the individualized approach to determining a mandatory-minimum-triggering drug quantity is correct."); *Banuelos*, 322 F.3d at 704 (holding steadfast to accuracy of individualized approach).

<sup>51</sup> See *Stoddard*, 892 F.3d at 1222 (explaining *Alleyne*'s support of individualized approach). "*Alleyne* sets up this paradigm . . . conspiring to violate § 841(a)(1) is a 'lesser-included offense' of conspiring to violate § 841(a)(1) when the drug quantity meets a threshold that triggers an enhanced sentence." *Id.*; see *United States v. Haines*, 803 F.3d 713, 741 (5th Cir. 2015) ("*Apprendi* and *Alleyne* require the jury . . . to determine the amount which each defendant knew or should have known was involved in the conspiracy" (internal quotation marks omitted)).

<sup>52</sup> See *Alleyne*, 570 U.S. at 109 (trumpeting consistency of Court's holding with ancient principles of justice). "Consistent with this connection between crime and punishment, various treatises defined crime as consisting of every fact which is in law essential to the punishment sought to be inflicted." *Id.* (internal quotation marks omitted).



to preserve this “intimate connection,” a defendant’s punishment should directly correlate with the infraction that he or she committed.<sup>53</sup> The connection between crime and punishment is ruptured when a defendant is punished based on a quantity of drugs that he or she could not have reasonably foreseen.<sup>54</sup> A penalty imposed evenly on each member of a conspiracy without regard to that person’s own level of involvement casts a shadow on the justice system’s principle of the “intimate connection between crime and punishment,” subjecting a defendant to a disproportionately severe penalty for criminal conduct that he or she personally may not have committed.<sup>55</sup>

*B. Government’s Willingness to Comply with the Individualized Approach*

The individualized approach to drug conspiracy sentencing is strongly bolstered by the government’s willingness to comply with this approach.<sup>56</sup> In the government’s brief to the Fifth Circuit in *Haines*, the

---

<sup>53</sup> See *Stoddard*, 892 F.3d at 1221 (describing importance of holding one liable only for things “reasonably foreseeable” to him). “It is a core principle of conspiratorial liability that a co-conspirator may be held liable for acts committed by co-conspirators during the course of the conspiracy only when those acts are ‘in furtherance of the conspiracy’ and ‘reasonably foresee[able]’ to the defendant.” *Id.* (quoting *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946)); *Haines*, 803 F.3d at 741 (emphasizing importance of personal wrongdoing). “[A]n individual convicted of conspiring to distribute at least 1,000 kilograms of marijuana . . . is not necessarily subject to the ten-year minimum. Only if the defendant is responsible for at least 1,000 kilograms . . . does the mandatory statutory minimum apply.” *Haines*, 803 F.3d at 741 (quoting *United States v. Gurrusqueta*, No. 01-11034, 2002 WL 31730264, at \*3 (5th Cir. Nov. 21, 2002)).

<sup>54</sup> See *Alleyne*, 570 U.S. at 113 (opining about connection between punishment and wrongdoing). “Why else would Congress link an increased mandatory minimum to a particular aggravating fact other than to heighten the consequences for that behavior?” *Id.*; *Pizarro*, 772 F.3d at 292 (describing longstanding custom of individualized method).

<sup>55</sup> See *Alleyne*, 570 U.S. at 108 (recognizing importance of proving wrongdoing to jury). The importance that the Supreme Court places on proving every element of a crime to the jury that has the potential to increase a mandatory minimum sentence demonstrates the retributivist principle of the American criminal justice system to punish an individual only for the crimes that the government can prove he personally committed. *Id.*; see *Stoddard*, 892 F.3d at 1220 (noting defendants’ exposure to significantly higher sentence if conspiracy-wide method is utilized); *Hansler*, *supra* note 3, at 2 (highlighting devastating effect of conspiracy-wide sentencing for Alice Johnson). “Johnson was sentenced to life in federal prison without parole in 1996 after being convicted on charges of conspiracy to possess cocaine, attempted possession of cocaine, and money laundering.” *Hansler*, *supra* note 3, at 2.

<sup>56</sup> See *Stoddard*, 892 F.3d at 1222 (showcasing government’s general support for individualized approach); *Haines*, 803 F.3d at 738 (demonstrating government’s agreement with defendants on use of individualized approach to calculate sentence).

government not only consented to using the individualized approach, but urged it.<sup>57</sup>

In its brief, the government agrees with the defendants that “at least [as] to imposing a mandatory minimum, . . . the sentence should be based on a defendant-specific approach—a finding as to the type and quantity of drugs that can be attributed to the individual defendant by his personal conduct and reasonable-foreseeability of co-conspirator conduct.”<sup>58</sup>

In the D.C. Circuit, the government has also demonstrated its preference for the individualized approach.<sup>59</sup> “The Government’s general charging and motions practices offer further evidence that the criminal justice system is moving toward the individualized approach,” as the court notes that “the Government’s argument for the conspiracy-wide approach here appears to be a one-case wonder.”<sup>60</sup>

Even in the Sixth Circuit, which has continued to utilize the conspiracy-wide approach, the government has urged the courts to reconsider, tending to charge defendants using the individualized approach.<sup>61</sup>

---

<sup>57</sup> See *Haines*, 803 F.3d at 742 (depicting government’s support).

<sup>58</sup> See *id.* (explaining government’s position).

At the time of sentencing, the government advocated [that] both mandatory minimums and statutory maximums were controlled by the jury’s conspiracy-wide finding. After defendants were sentenced, the Department of Justice shifted its policy, urging that mandatory minimum sentences in drug conspiracy cases should be determined by a jury’s defendant-specific finding, in light of *Alleyne*.

*Id.* But see *id.* (recognizing government’s inconsistent reasoning at trial).

However, at oral argument the government cautioned that the rule for drug quantity findings that increase the mandatory minimum should be the same as the rule for [those] . . . that increase the statutory maximum—and the government suggests that our precedent . . . requires a finding as to the conspiracy-wide quantity for purposes of the statutory maximum.

*Id.*

<sup>59</sup> See *Stoddard*, 892 F.3d at 1222 (discussing government’s charging practices).

<sup>60</sup> See *id.* (noting government’s inability to show other cases where it argues for adoption of conspiracy-wide approach). “At oral argument, the Government could not safely say that there are any other cases in this Circuit in which it is currently arguing for a court to adopt the conspiracy-wide approach.” *Id.*

<sup>61</sup> See *United States v. Young*, 847 F.3d 328, 366 & n. 3 (6th Cir. 2017) (addressing government’s contention that court is inconsistent in application of conspiracy-wide approach). “The government asserts that we have been inconsistent in addressing whether mandatory

In *Young*, the government contended that the court's precedent is unclear, as it decided one case using the individualized approach, another using the conspiracy-wide approach, and later attempted to reconcile the two by utilizing language from both approaches.<sup>62</sup> The Sixth Circuit avoided confronting this accusation by stating in its opinion, "there is no need for us to reconcile these cases at this time."<sup>63</sup>

### C. Clear Lack of Support for Conspiracy-Wide Approach Nationwide

The conspiracy-wide approach has a clear lack of support across the nation—nothing demonstrates this point better than to examine circuits that have once fought for the approach shift their position or toil in an uninspired manner to champion it.<sup>64</sup> The Sixth Circuit, up until this point, still expressly utilizes the conspiracy-wide approach.<sup>65</sup> In the Sixth Circuit, admission or conviction of a conspiracy involving a certain quantity of drugs "triggers the mandatory-minimum sentence in [this] circuit, regardless of whether [the

---

minimum sentences for § 846 drug conspiracy offenses are determined by conspiracy-wide or defendant-specific drug quantities." *Id.*

<sup>62</sup> See *id.* at 366 (explaining government's contention).

The government contends that *Robinson* is inconsistent with *United States v. Swiney*, 203 F.3d 397 (6th Cir. 2000), because *Swiney* held that an individualized approach, as articulated in the Sentencing Guidelines, determines the statutory range, whereas *Robinson* holds that a conspiracy-wide drug quantity determines the statutory penalty range. The government also asserts that our decision in *United States v. Watson*, 620 F. App'x 493, 509 (6th Cir. 2015) incorrectly reconciled *Robinson* and *Swiney* . . . [as defendants] were sentenced to mandatory minimums due to the quantity of drugs attributable to the individual defendants and all reasonably foreseeable quantities of contraband that were within the scope of the conspiracy.

*Id.*

<sup>63</sup> See *id.* at 362 (avoiding rejection of either approach).

<sup>64</sup> See *Stoddard*, 892 F.3d at 1220 (recognizing struggle of several circuits to grapple with conspiracy-wide approach). "We are also persuaded by the decisions of our sister circuits that have adopted the individualized approach. Those opinions buttress our conclusion here." *Id.* at 1222.

<sup>65</sup> See *id.* at 1220 (noting Sixth Circuit's hesitant reinstatement of sentence based on conspiracy-wide ruling); *United States v. Gibson*, 874 F.3d 544, 544 (6th Cir. 2017) (dividing equally amongst full panel causing reinstatement of lower court sentence). "The en banc court is evenly divided; therefore, the sentence imposed by the district court is AFFIRMED." *Id.* See *United States v. Gibson*, No. 15-6122, 2016 U.S. App. LEXIS 21141, at \*2 (6th Cir. Nov. 21, 2016) (supporting conspiracy-wide approach). "While [the defendant] did not further admit that he reasonably foresaw that the conspiracy would involve that drug quantity, he did not need to. In *Robinson* . . . [we] 'interpreted 21 U.S.C. § 841(b)(1)(A) to focus on the threshold quantity involved in the entire conspiracy.'" *Id.* at \*2 (quoting *United States v. Robinson*, 547 F.3d 632, 638 (6th Cir. 2008)).

defendant] could reasonably foresee the drug quantity.”<sup>66</sup> The Sixth Circuit relied on its precedent, and declined to join the other circuits in acknowledging the more preferable individualized approach, articulating likely the strongest argument one could make against *Alleyne* requirement of the conspiracy-wide approach in *Gibson*.<sup>67</sup> The court stated:

“*Alleyne* did not rewrite § 841(b) to add a new *mens rea* requirement.” . . . [The defendant] also asserts that *United States v. Swiney*, 203 F.3d 397 (6th Cir. 2000), holds that there is a *mens rea* requirement on the drug-quantity element, and argues that that case must be followed as the prior published opinion. This court has already rejected that argument too. “[*Swiney*]- which stated ‘that *Pinkerton* principles . . . determine whether a defendant convicted under 21 U.S.C. § 846 is subject to the penalty [for the addict’s death as] set forth in 21 U.S.C. § 841(b)(1)(C)’ concerns sentencing under the Guidelines,” and sets out a “different standard” from “the standard applicable to the drug quantity finding.”<sup>68</sup>

This reasoning is anything but clear, but it is the only justification to stand against *Alleyne* requiring the individualized approach: that it goes against case precedent and is not explicitly mandated by the Supreme Court.<sup>69</sup> At the end of *Gibson*, even Circuit Judge John M. Rogers acknowledged the lack of support for the opinion and use of the conspiracy-wide approach.<sup>70</sup>

The result in this case may appear unjust. Mandatory minimums for limited-amount co-conspirators do not serve the drug statute’s underlying purpose of more severely punishing larger amount drug dealers. Nonetheless, absent

---

<sup>66</sup> See *Gibson*, 2016 U.S. App. LEXIS 21141, at \*3 (excerpting circuit’s position on reasonable foreseeability).

<sup>67</sup> See *id.* (dismissing defendant’s argument that *Alleyne* requires use of individualized approach). “[The defendant] contends on appeal, though, that he was involved in only three meth sales, and that *Alleyne* . . . turned the drug quantity into an element of a drug conspiracy that must be found by the jury. This court has already rejected this argument . . .” *Id.*

<sup>68</sup> See *id.* (quoting *United States v. Dado*, 759 F.3d 550, 570 (6th Cir. 2014), and *United States v. Watson*, 620 F. App’x 493, 509 (6th Cir. 2015)) (reasoning *Alleyne* does not forbid conspiracy-wide approach).

<sup>69</sup> See *id.* at \*4 (commenting on harsh result of case).

<sup>70</sup> See *id.* (explaining Judge Roger’s reasoning for what appears to be unfair outcome).

a change in our law from the en banc court, the Supreme Court, or Congress, we are bound by our precedents.<sup>71</sup>

Following the appeal of this case to the en banc court, there was an even split among the circuit judges, and the conspiracy-wide approach was reinstated.<sup>72</sup>

In the Third Circuit, the conspiracy-wide approach, while not being explicitly overruled by the court, was impliedly rejected.<sup>73</sup> In *Miller*, in order to find the defendant guilty of conspiracy, the jury was instructed by the district court that they must “unanimously find beyond a reasonable doubt that the weight or quantity of cocaine . . . involved in the conspiracy was five kilograms or more.”<sup>74</sup> Both the government and the defendant submitted to the court that this conspiracy-wide determination at the point of sentencing was constitutional error in light of the Court’s holding in *Alleyne*.<sup>75</sup> The Third Circuit specified that it “agree[d]” with both of the parties regarding the *Alleyne* error, but in reviewing for harmlessness the court concluded that the defendant was charged with a drug quantity easily attributable to the his responsibility in the conspiracy, determining that it was a pure sentencing error that was harmless to the integrity of the conviction.<sup>76</sup>

Additionally, the Seventh Circuit, a formerly avid supporter of the conspiracy-wide theory, has contradicted its conspiracy-wide position,

---

<sup>71</sup> See *Gibson*, 2016 U.S. App. LEXIS 21141, at \*4 (exposing appeals judges’ limited ability to change law absent binding precedent). Judge Rogers’s opinion in *Gibson* demonstrates the lack of enthusiasm for the use of the conspiracy-wide approach and the urgency for the Supreme Court to comment on the constitutionality of the conspiracy-wide approach in light of *Alleyne*. *Id.*

<sup>72</sup> See *Gibson*, 874 F.3d at 544 (announcing court was unable to come to decision on which approach to adopt).

<sup>73</sup> See *United States v. Miller*, 645 Fed. App’x 211, 217 (3d Cir. 2016) (portraying importance of Supreme Court’s holding in *Alleyne*).

<sup>74</sup> See *id.* (instructing jury to utilize conspiracy-wide approach). “In finding [the defendant] guilty of conspiracy, the jury unanimously determined that the conspiracy involved five or more kilograms of cocaine . . . . But, as [the defendant] submits, and the Government concedes, the jury did not determine an exact amount of cocaine and cocaine base directly attributable to [the defendant] himself.” *Id.* at 217–18.

<sup>75</sup> See *id.* at 218 (demonstrating consensus among parties to case). “This lack of an individualized determination, the parties maintain, was error in light of *Alleyne*.” *Id.*

<sup>76</sup> See *id.* at 218–20 (qualifying court’s decision to proscribe harmless error analysis).

[W]hile the Supreme Court had not discussed such a review in *Alleyne*, the Court has “. . . adopted the general rule that a constitutional error does not automatically require a reversal of a conviction,” and that the Supreme Court has “applied harmless error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless.”

*Id.* at 218 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991)).

though on grounds other than *Alleyne*.<sup>77</sup> The defendants in *Cruse* raised a claim on appeal of instructional error in their sentencing process, due to the special verdict form instructing the jury based on the conspiracy-wide approach.<sup>78</sup> In finding error here, the court relied on the *Pinkerton* principle that “coconspirator liability only extends to those criminal acts that (1) were reasonably foreseeable to the defendants; and (2) occurred during the time that they were members of the conspiracy.”<sup>79</sup> Although not relying on *Alleyne* in finding a constitutional violation in this case, the court abandoned the conspiracy-wide approach nonetheless, implicitly, if not explicitly.<sup>80</sup>

In August 2017, the Tenth Circuit, a conspiracy-wide circuit before the Supreme Court’s decision in *Alleyne*, reevaluated their policy regarding sentencing requirements for mandatory minimum triggering drug conspiracy cases.<sup>81</sup> In *Ellis*, the Tenth Circuit expressly adopted and demanded that the government prove to a jury beyond a reasonable doubt the quantity of drugs personally attributable to the defendant.<sup>82</sup> The court recognized that in order for the defendant to have preserved an “*Alleyne* objection,” he would have to object at the sentencing phase of the trial.<sup>83</sup> The court determined that the

---

<sup>77</sup> See *United States v. Cruse*, 805 F.3d 795, 817 (7th Cir. 2015) (pointing to *Pinkerton* principle).

<sup>78</sup> See *id.* (addressing defendants’ points of appeal). The jury was instructed that the defendants were responsible for “the amount of cocaine involved in the agreement, and all amounts involved in all acts of the coconspirators committed in furtherance of the conspiracy.” *Id.*

<sup>79</sup> See *id.* (citing *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946)).

<sup>80</sup> See *id.* (noting jury should have been instructed on such constitutional principles). “Everyone agrees that the jury should have been instructed on the *Pinkerton* doctrine.” *Id.* (emphasis added).

<sup>81</sup> See *United States v. Ellis*, 868 F.3d 1155, 1174–75 (10th Cir. 2017) (clarifying confusion surrounding which approach to use).

[T]o succeed on his *Alleyne* argument, [the defendant] must still show that individually attributable cocaine amounts are an element of the cocaine-conspiracy charge. On this point, the government asserts that “this Court has not issued a published decision [after *Alleyne*] expressly stating what determination the jury must make when a defendant is charged with an offense that carries a statutory mandatory-minimum penalty” . . . the district court committed *Alleyne* error by convicting and sentencing [the defendant] on 21 U.S.C. § 841(b)(1)(A) without the jury’s having found his individually attributable amount of cocaine as at least [the amount triggering the mandatory minimum].

*Id.*

<sup>82</sup> See *id.* (dismissing government’s position that court had not demanded individualized approach before). “In [*Dewberry*], decided two years after *Alleyne*, we said that, because 280 grams of crack cocaine would increase the statutory mandatory-minimum sentence, that drug amount ‘was an element of the offense and had to be proved at trial.’” *Id.* (quoting *United States v. Dewberry*, 790 F.3d 1022, 1029 (10th Cir. 2015)).

<sup>83</sup> See *id.* at 1171 (determining standard to use to assess *Alleyne* error).

defendant himself did object to the sentence that was imposed on him, appearing pro se at the sentencing hearing:

I don't understand why I'm here today. And for the jury to find me guilty, I didn't understand because there was no amount . . . the jury transcripts, it was no amount to say if I was guilty of 280 grams. I mean, even the videos that I was in does not show me specifically with crack cocaine in possession selling to no one.<sup>84</sup>

Further, as previously mentioned, the First, Fourth, Fifth, Ninth, and D.C. Circuits have openly supported and urged courts to use the individualized approach since *Alleyne* was decided.<sup>85</sup> Not only have these circuits expressly endorsed the use of the individualized approach after *Alleyne*, but they have employed this approach before *Alleyne* was even decided.<sup>86</sup> For example, in *Stoddard*, the D.C. Circuit recognized that the law in that circuit implicitly required the individualized method since 2008.<sup>87</sup> Similarly, in *Banuelos*, the Ninth Circuit commented that the court has been using the individualized approach since 1993.<sup>88</sup> In *Pizarro*, the First Circuit recognized that it had been using the individualized approach for sentencing

---

<sup>84</sup> See *id.* (excerpting defendant's pro se objection). "And I was never shown to be convicted by the jury by a certain drug amount because 280 grams, there's never no evidence, to my knowledge, that's being brought up." *Id.* (citations omitted).

<sup>85</sup> See *United States v. Stoddard*, 892 F.3d 1203, 1221 (D.C. Cir. 2018) (adopting individualized approach to drug-quantity determinations triggering individual defendant's mandatory-minimum sentence); *United States v. Haines*, 803 F.3d 713, 739 (5th Cir. 2015) (holding that defendants' should have been sentenced based on individualized method); *United States v. Rangel*, 781 F.3d 736, 744 (4th Cir. 2015) (applying individualized principle that defendant must be personally responsible for drug quantity); *United States v. Pizarro*, 772 F.3d 284, 293–94 (1st Cir. 2014) (conforming to individualized sentencing method); *United States v. Banuelos*, 322 F.3d 700, 704 (9th Cir. 2003) (reversing and remanding case where district court sentenced defendant based on conspiracy-wide quantity).

<sup>86</sup> See *Stoddard*, 892 F.3d at 1222 (exposing D.C. Circuit preference for individualized method); *Haines*, 803 F.3d at 741 (affirming individualized approach has been longstanding rule); *Rangel*, 781 F.3d at 742 (noting *Collins* requirement of individualized sentencing); *Pizarro*, 772 F.3d at 292 (articulating use of individualized approach before *Alleyne*); *Banuelos*, 322 F.3d at 704 (citing numerous cases before *Alleyne* requiring individualized approach).

<sup>87</sup> See *Stoddard*, 892 F.3d at 1221 (recognizing holding in *United States v. Law*, 528 F.3d 888 (D.C. Cir. 2008). "[W]e held [in *Law*] that 'a defendant convicted of conspiracy to deal drugs, in violation of § 846, must be sentenced, under § 841(b), for the quantity of drugs the jury attributes to him as a reasonably foreseeable part of the conspiracy.'" *Id.* (citing *Law*, 528 F.3d at 906).

<sup>88</sup> See *Banuelos*, 322 F.3d at 704 (reaffirming longstanding use of individualized approach). "[The] court may not impose statutory mandatory minimum without finding that 'a particular defendant had some connection with the larger amount on which the sentencing is based or that he could reasonably foresee that such an amount would be involved in the transactions of which he was guilty.'" *Id.* (quoting *United States v. Becerra*, 992 F.2d 960, 966–67 & n.2 (9th Cir. 1993)).

before *Alleyne* was decided, in 2004.<sup>89</sup> In *Rangel*, the Fourth Circuit pointed to precedent from 2005 requiring that the government prove individualized quantities of drugs attributable to defendants involved in conspiracy cases.<sup>90</sup> Likewise, in *Haines*, the Fifth Circuit recognized that it found error in the past, dating back to 2002, where district courts based a statutory minimum in reliance on conspiracy-wide quantities of drugs.<sup>91</sup> The longstanding use of the individualized method by a number of the circuits tends to support the argument that the use of the conspiracy-wide method is unconstitutional, particularly in light of the Supreme Court's ruling in *Alleyne*.<sup>92</sup>

#### *D. Public Opinion Regarding Drug Policy Tends to Favor Use of Individualized Approach*

In general, citizens of the United States are already acrimonious and resentful of mandatory-minimum sentencing for drug offenders responsible for a bush-league quantity of drugs.<sup>93</sup> An organization entitled Families

<sup>89</sup> See *Pizarro*, 772 F.3d at 292 (citing precedent utilizing individualized approach). “We have already answered that question in *United States v. Colón-Solís*, 354 F.3d 101 (1st Cir. 2004), where we held that a mandatory minimum . . . ‘cannot be applied in [a particular coconspirator’s] case without an individualized finding that the triggering amount was attributable to, or foreseeable by, him.’” *Id.* (quoting *Colón-Solís*, 354 F.3d at 103).

<sup>90</sup> See *Rangel*, 781 F.3d at 742 (recalling case precedent requiring individualized approach).

In [*Collins*], we considered on direct appeal the district court’s failure to give an instruction ‘that, for purposes of setting a specific threshold drug quantity under § 841(b), the jury must determine what amount of cocaine base was attributable to [a drug conspiracy defendant]’ . . . the failure to give such instruction was error . . . .

*Id.* (quoting *Collins*, 415 F.3d at 314).

<sup>91</sup> See *Haines*, 803 F.3d at 741 (offering case precedent supporting individualized method).

In *Gurrusquieta*, we noted that a defendant’s conviction for conspiring to distribute in excess of 1,000 kilograms of marijuana did not automatically trigger the 10-year mandatory minimum because “a defendant is only accountable for all quantities of the marijuana with which he was directly involved, and all reasonably foreseeable quantities of marijuana that were within the scope of the criminal activity that he jointly undertook . . . . In other words, an individual convicted of conspiring to distribute at least 1,000 kilograms of marijuana . . . is not necessarily subject to the ten-year minimum. Only if the defendant is responsible for at least 1,000 kilograms, as determined by the Sentencing Guidelines, does the mandatory statutory minimum apply.”

*Id.* (citing *United States v. Gurrusquieta*, No. 01-11034, 2002 WL 31730264, at \*3 (5th Cir. Nov. 21, 2002)).

<sup>92</sup> See *United States v. Stoddard*, 892 F.3d 1203, 1222 (D.C. Cir. 2018) (noting general acceptance amongst federal courts of individualized approach).

<sup>93</sup> See *Bjerk*, *supra* note 6, at 93 (outlining American hostility of 21 U.S.C. § 841 provision of mandatory minimums).



Against Mandatory Minimums (FAMM) echoes the position of a large number of the American population in demonstrating why mandatory minimums are so strongly disliked, detailing the stories of its members.<sup>94</sup> When Sessions made the call to sentence defendants charged with drug offenses with “the most serious, readily provable offense,” the country responded in outcry.<sup>95</sup> Eric Holder commented on Sessions decision as an “absurd reversal . . . driven by voices who have not only been discredited but until now have been relegated to the fringes of this debate.”<sup>96</sup> Reasons behind the severe public dislike of mandatory minimum sentencing for drug crimes have included uncontrollably large prison populations, disproportionate effect on minorities, and high costs to taxpayers.<sup>97</sup> “States that have relied on treatment and rehabilitation programs over imprisonment for low-level drug crimes have seen success . . . Texas . . . saved \$2 billion by shutting down prisons no longer needed.”<sup>98</sup>

---

On its website, Families Against Mandatory Minimums [FAMM] includes a number of facts, highlighting the boom in prison populations, prison costs, and the high number of drug offenders serving long prison terms, with the implication being that the mandatory minimums for drug offenders are a primary contributor to these facts and trends . . . being convicted of trafficking a drug quantity just in excess of a mandatory-minimum-eligibility threshold is associated with a significant increase in expected sentence length for powder cocaine, methamphetamine, marijuana, and heroin offenders . . .

*Id.* at 94–95 (noting this is not case for crack cocaine offenders).

<sup>94</sup> See Cynthia Powell: *25 Years for 35 Pills*, *supra* note 7 (“FAMM’s greatest asset has always been the stories of its members. By sharing the impact of unjust sentencing and prison policies on incarcerated individuals, their families, and their communities, FAMM has helped create urgency around the issue . . .”).

<sup>95</sup> See Editorial, *supra* note 3 (demonstrating public loathing of mandatory minimum sentences for nonviolent drug offenders).

<sup>96</sup> See Ford, *supra* note 3 (noting Holder’s distaste and lack of support for strict mandatory minimums).

<sup>97</sup> See Editorial, *supra* note 3 (demonstrating why Americans dislike mandatory minimum sentences). “Mandatory minimum sentences that prevailed through the 1980s and 1990s filled federal prisons with low-level offenders, at great expense to taxpayers and to the country’s black and Hispanic communities. Cities, meanwhile, did not get safer.” *Id.*; see also Ford, *supra* note 3 (“The policy announced today is not tough on crime . . . It is dumb on crime. It is an ideologically motivated, cookie-cutter approach that has only been proven to generate unfairly long sentences that are often applied indiscriminately and do little to achieve long-term public safety.”); Hansler, *supra* note 3 (commenting on long prison sentences as result of mandatory minimums).

The [US Sentencing Commission] found that those convicted in the 2016 fiscal year of crimes carrying mandatory minimum penalties received an average of 110 months—approximately nine years—in prison. That was four times the average sentence—a bit over two years—for those convicted of a crime without the mandatory minimum.

Hansler, *supra* note 3.

<sup>98</sup> See Editorial, *supra* note 3 (presenting example benefit of cutting back number of defendants sentenced to mandatory minimum offenses). “The cost of the federal prison system has reached \$7

If all the circuits were to adopt the individualized approach, the harsh effect of mandatory minimum sentencing would be slightly muted.<sup>99</sup> Although this approach does not get rid of mandatory minimum sentences altogether, it ensures that every defendant will be sentenced in direct accordance with his individual level of blameworthiness.<sup>100</sup> This would naturally cut down on the prison population and save taxpayer money.<sup>101</sup> While not a perfect solution, compliance with the constitutional requirement of *Alleyne* would necessarily limit the mandate on federal prosecutors across the country in preventing defendants from being sentenced to a disproportionately lengthy mandatory minimum as a result of the unforeseeable actions of other members of the conspiracy that he or she was involved in.<sup>102</sup>

## V. CONCLUSION

When a defendant is charged with a conspiracy drug crime, he or she is exposed to a lengthy mandatory minimum sentence that will be inescapable if found guilty. As a result of the high risk of extensive prison time, the government should be required to prove beyond a reasonable doubt

---

billion, while housing a population that is nearly half drug offenders. But instead of beefing up drug use treatment programs, the Trump administration has proposed cutting funding for them.” *Id.*

<sup>99</sup> See *United States v. Stoddard*, 892 F.3d 1203, 1222 (D.C. Cir. 2018) (vacating defendants’ convictions while noting severe mandatory minimum as result of conspiracy-wide method).

The District Court’s error was not harmless here because the evidence was far from overwhelming with respect to the quantity of heroin involved in the conspiracy that was reasonably foreseeable to [the defendants]. Had the jury been properly instructed and given a proper verdict form, the outcome may well have been different.

*Id.*

<sup>100</sup> See *id.* (emphasizing importance on sentence reflecting individual liability). “[We] remand to the District Court with instructions to re-sentence each Appellant based on the crime for which the jury found each one of them individually liable . . .” *Id.*

<sup>101</sup> See *United States v. Haines*, 803 F.3d 713, 740 (5th Cir. 2015) (detailing individualized process that would limit sentence length). “Under the Sentencing Guidelines, a defendant who participates in a drug conspiracy is accountable for the quantity of drugs, which is attributable to the conspiracy and reasonably foreseeable to him. Reasonable foreseeability does not follow automatically from proof that the defendant was a member of the conspiracy.” *Id.* (citing *United States v. Quiroz-Hernandez*, 48 F.3d 858, 870 (5th Cir. 1995)) (quotation marks omitted); see Editorial, *supra* note 3 (“Harsh and inflexible sentencing policies have proved counterproductive in the fight against illegal drugs. The focus should be on prosecuting the traffickers who rely on violence to grow and protect their predatory enterprise.”).

<sup>102</sup> See *United States v. Ellis*, 868 F.3d 1155, 1170 (10th Cir. 2017) (limiting government to individualized approach). “[T]he government asserts that this ‘Court has not issued a published decision . . . expressly stating what determination the jury must make when a defendant is charged with an offense that carries a statutory mandatory-minimum penalty’ . . . . But the government is mistaken.” *Id.* (citation omitted).

that the defendant is culpable for the conspiracy that he is charged with participating in. According to the First, Fourth, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits, following the Supreme Court's ruling in *Alleyne*, proof beyond a reasonable doubt of every element of the offense charged *requires* prosecutors to demonstrate that drug quantity involved in the conspiracy was reasonably foreseeable to the defendant. The fact that the Sixth and Third Circuits struggle to defend the conspiracy-wide approach demonstrates that the Sixth Amendment to the United States Constitution requires proof of this "reasonable foreseeability" element to the jury when imposing a mandatory minimum sentence on a defendant charged with a conspiracy drug offense. If conspiracy-wide circuits' palpable conflict is not enough to require this element of proof, public hostility towards mandatory minimum sentencing and the sheer effect that it has on defendants across the country should mandate the uniform adoption of the individualized approach.

*Hunter R. Wildrick*