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## **CHAIN GANG: EXAMINING THE SEVENTH CIRCUIT'S "CHAIN OF DISTRIBUTION TEST" WHEN APPLYING MINIMUM SENTENCES FOR DRUG-RELATED DEATHS**

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### INTRODUCTION

On October 27, 1986, President Ronald Reagan signed the Anti-Drug Abuse Act of 1986 (ADAA).<sup>1</sup> This law, designed to give federal agencies increased powers to combat drug offenders, created a series of minimum sentences for individuals convicted of various drug-related crimes.<sup>2</sup> One of the more well-known, and controversial provisions in the ADAA proscribed heightened sentences at a 100-to-one ratio for individuals found with "crack" cocaine as opposed to powdered cocaine.<sup>3</sup> The constitutionality and wisdom of the "100-to-

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<sup>1</sup> Statement by President Ronald Reagan Upon Signing H.R. 5484, 22 WEEKLY COMP. PRES. DOC. 1463 (Nov. 3, 1986), *reprinted in* 1986 U.S.C.C.A.N. 5394, 1986 W.L. 67634 (Leg. Hist.).

<sup>2</sup> *See* 41 U.S.C.A. § 841(b) (West 2010).

<sup>3</sup> *See* 41 U.S.C.A §§ 841(b)(1)(A)(ii)(I-II), 841(b)(1)(A)(vii), 841(b)(1)(B)(ii), 841(b)(1)(B)(viii) (West 2010).

one” ratio has been extensively discussed elsewhere<sup>4</sup> and will not be covered in this paper.

Instead, this paper will address the ADAA’s mandatory minimum sentences for deaths or serious injuries resulting from a controlled substance and how courts apply these sentences to members of drug distribution conspiracies.<sup>5</sup> These provisions, codified under 21 U.S.C. § 841(b), establish minimum fines and imprisonment sentences whenever a person dies or suffers serious injuries as a result of using certain controlled substances defined under the Act.<sup>6</sup> A dealer who sells a fatal dose of heroin, for example, is subject to a statutory minimum sentence of twenty-years in prison, a \$10,000.00 fine, or both.<sup>7</sup>

Most circuits applying the mandatory sentencing language in § 841(b) hold that a victim’s death does not need to be reasonably foreseeable in order for a mandatory sentencing provision to apply.<sup>8</sup> According to those courts, § 841(b)’s minimum sentences apply whenever a defendant “directly produces, distributes, or uses an intermediary to distribute” fatal doses of drugs.<sup>9</sup> Although the circuits disagree on whether § 841(b) creates a “strict liability” offense,<sup>10</sup> most

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<sup>4</sup> See, e.g., Elizabeth Tison, *Amending the Sentencing Guidelines for Cocaine Offenses: The 100-to-1 Ratio is not as “Cracked” Up as Some Suggest*, 27 S. ILL. U. L.J. 413 (Winter 2003); Spencer A. Stone, *Federal Drug Sentencing – What was Congress Smoking? The Uncertain Distinction Between “Cocaine” and “Cocaine Base” in the Anti-Drug Abuse Act of 1986*, 30 W. NEW ENG. L. REV. 297 (2007); see also 21 U.S.C.A. § 841 (West 2010) (Relevant Notes of Decisions (Generally)).

<sup>5</sup> See 21 U.S.C.A. § 841(b) (West 2010).

<sup>6</sup> 21 U.S.C.A. §§ 841(b)(1)(A)(viii), (b)(1)(B)(viii), (b)(1)(C), (b)(1)(C), (b)(1)(E)(i-ii) (West 2010).

<sup>7</sup> 21 U.S.C.A. § 841(b)(1)(A)(viii) (West 2010).

<sup>8</sup> *United States v. Walker*, 721 F.3d 828, 834 (7th Cir. 2013) (citing precedent from the First, Fourth, Sixth, Eighth, Ninth, and Eleventh circuits).

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., *United States v. Houston*, 406 F.3d 1238 (9th Cir. 2005) (stopping short of ascribing a “strict liability” language to § 841(b)).

circuits still apply the minimum sentences without finding whether a death or injury was foreseeable.<sup>11</sup>

Even though the circuits generally agree<sup>12</sup> that § 841(b) applies to *individuals* who produce or distribute fatal doses of drugs, the analysis becomes more complicated when applied to members of drug distribution conspiracies.<sup>13</sup> On July 3, 2013, the Seventh Circuit, in *United States v. Walker*, held, as a matter of first impression, that § 841(b)'s minimum sentences could apply to members of a drug distribution conspiracy operating in the area around Milwaukee, Wisconsin.<sup>14</sup> That court held that district courts, when applying § 841(b) mandatory sentences to members of a drug distribution conspiracy, must make additional findings of fact beyond those required for applying § 841(b) to individuals.<sup>15</sup> Joining with the Sixth Circuit, the Seventh Circuit held that when the government brings charges against a drug distribution conspiracy, fact finders must make specific findings regarding each defendant's place within the distribution chain that led to a death or serious injury.<sup>16</sup> Section 841(b)'s mandatory sentences only apply if the defendant's conduct falls within the "chain of distribution" for the fatal dose.<sup>17</sup>

This Comment will argue that the Seventh Circuit made the correct decision when it adopted a fact-specific test for applying mandatory sentences to members of drug distribution conspiracies under § 841(b). First, this Comment will look at the legislative history behind § 841(b). Second, this Comment will analyze how other courts

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<sup>11</sup> *Id.*

<sup>12</sup> The Supreme Court recently granted *cert* to *United States v. Burrage*, 687 F.3d 1015 (8th Cir. 2013), *cert granted*, --- U.S. ---, 133 S.Ct. 2049, 185 L.Ed.2d 884 (2013). This case will decide whether § 841 creates "strict liability" crimes without a foreseeability or proximate cause requirement. This decision could affect how courts apply § 841(b) to individuals. Their decision, however, should not affect the Seventh Circuit's application of the "chain of distribution" theory towards members of drug-organizations.

<sup>13</sup> *Walker*, 721 F.3d at 831.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

have applied § 841(b)'s mandatory sentencing provisions. Third, this Comment will analyze the facts in *United States v. Walker*, discuss how the Seventh Circuit's holding distinguished between each defendants' various roles within the conspiracy, and analyze each defendants' relationship with the deceased. Finally, this Comment will argue that the court's decision in *Walker* takes an important step towards a more unified sentencing scheme for drug related conspiracies operating within the Seventh Circuit.

### I. THE ANTI-DRUG ENFORCEMENT ACT OF 1986

During the 1980s, the United States saw a drastic increase in drug sales and drug related crimes.<sup>18</sup> A new cheap and dangerous drug, "crack" cocaine, entered the United States in small quantities in the early 1980s but quickly expanded to epidemic proportions.<sup>19</sup> The Federal Government estimated that, from 1984 to 1986, drug dealers doubled the amount of crack cocaine imported into the United States – an increase from 85 tons to 150 tons.<sup>20</sup> At the same time, drug organizations imported an additional 12 tons of heroin, 60,000 tons of marijuana, and 200 tons of hashish to the United States.<sup>21</sup> In total, the government estimated that the total dollar value of all illegal drugs entering the United States in a single year ranged from \$27 to \$110 billion.<sup>22</sup>

In addition to the increased import and sale of illegal drugs, a huge percentage of America's prison population had either previously

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<sup>18</sup> See U.S. Department of Justice, Bureau of Justice Statistics, *Drugs and Crime Facts, 1988*, reprinted at <http://www.bjs.gov/content/pub/pdf/DCF88.pdf> (last visited Dec. 15, 2013) [hereinafter *Drug Facts*].

<sup>19</sup> *Id.*

<sup>20</sup> 132 CONG. REC. E3106-01 (daily ed. Sept. 12, 1986) (extension of remarks of Rep. Arlan Strangeland) [hereinafter *Strangeland*].

<sup>21</sup> *Id.*

<sup>22</sup> 132 CONG. REC. H 6716 (daily ed. Sept. 11, 1986) (statement of Rep. Edward Markey), available at <http://congressional.proquest.com.kentlaw-iit.idm.oclc.org/congressional/docview/t17.d18.9eaa1f236db39003?accountid=28377>.

used illegal drugs or was currently serving sentences for drug related offenses. In 1986 alone, 75% of jail inmates, 79.5% of state prisoners, and 82.7% of youth in long-term juvenile facilities reported using illegal drugs at some point in their lives.<sup>23</sup> Furthermore, the same study showed that 54% of all inmates in state prisons reported that they were either under the influence of drugs, alcohol, or both, when they committed their crimes.<sup>24</sup> Finally, the FBI reported that arrests for drug violations doubled from 1970 to 1985 – increasing from 400,000 in 1970 to more than 800,000 in 1985.<sup>25</sup> These findings prompted Congressional action.

On September 8, 1986 Texas' representative, James Wright, joined by more than 300 members of the House of Representatives, introduced H.R. 5484 – The Anti-Drug Enforcement Act of 1986.<sup>26</sup> This bill was designed to encourage foreign cooperation to combat drug production and international drug trafficking, to provide Federal leadership in creating anti-drug and rehabilitation programs,<sup>27</sup> and to establish sentencing criteria for individuals convicted of certain drug-related crimes.<sup>28</sup> Because of H.R. 5484's various foreign and domestic concerns, it was referred to fourteen House committees for consideration, including the Committee on Armed Forces, the

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<sup>23</sup> See *Drug Facts*, *supra* note 18, at 7.

<sup>24</sup> *Id.*

<sup>25</sup> 132 CONG. REC. H 6716 (daily ed. Sept. 11, 1986) (statement of Rep. John LaFalce), available at <http://congressional.proquest.com.kentlaw-iit.idm.oclc.org/congressional/docview/t17.d18.9.eaa1f236db39003?accountid=28377>.

<sup>26</sup> *H.R. 5484 (99<sup>th</sup>): Anti-Drug Abuse Act of 1986*, GOV TRACK, <https://www.govtrack.us/congress/bills/99/hr5484> (last visited Dec. 15, 2013). This website lists all of the sponsors for H.R. 5484.

<sup>27</sup> 132 CONG. REC. H6459-01 (daily ed. Sept. 8, 1986) (Public Bills and Resolution), reprinted in 1986 WL 785682.

<sup>28</sup> 132 CONG. REC. H 6716 (daily ed. Sept. 11, 1986) (statement of Rep. Byron Dorgan), available at <http://congressional.proquest.com.kentlaw-iit.idm.oclc.org/congressional/docview/t17.d18.9.eaa1f236db39003?accountid=28377>.

Committee on Government Operations, and the Committee on the Judiciary.<sup>29</sup>

On September 11, 1986, H.R. 5484 returned to the House floor for an extensive five-hour debate.<sup>30</sup> During this debate, the House considered, and ultimately passed, eighteen amendments to the bill, including amendments affecting foreign expenditures<sup>31</sup> and amendments increasing funding for certain drug treatment programs.<sup>32</sup> Pennsylvania Representative George Gekas proposed one of the most contentious amendments debated by the House.<sup>33</sup> That amendment added a death penalty option for criminals involved in organized drug distribution operations, particularly when their actions led to the deaths of another person.<sup>34</sup>

Dean Gallo, a Representative from New Jersey, supported Representative Gekas' death-penalty amendment.<sup>35</sup> In his argument, Representative Gallo praised H.R. 5484 as an important step towards combining past legislative efforts to combat drug abuse into one "across-the-board" approach.<sup>36</sup> But he felt that Congress's actions, particularly against drug distributors, did not go far enough.<sup>37</sup> Specifically citing the mandatory sentencing provision for death or serious injuries coming from drug-use, Representative Gallo argued:

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<sup>29</sup> 132 CONG. REC. H6459-01 (daily ed. Sept. 8, 1986) (Public Bills and Resolution), *reprinted in* 1986 WL 785682.

<sup>30</sup> Bill Summary & Status, 99<sup>th</sup> Congress (1985-86), H.R. 5484, All Congressional Actions with Amendments, *available at* <http://thomas.loc.gov/cgi-bin/bdquery/D?d099:1:./temp/~bd51if:@@S/home/LegislativeData.php?n=BSS;c=99> [hereinafter *Bill Summary & Status*].

<sup>31</sup> *Id.* For example, H.AMDT.1189 required that Mexico investigate the murder of a DEA agents before receiving any funds provided by the bill.

<sup>32</sup> *Id.*

<sup>33</sup> Bill Summary & Status, 99<sup>th</sup> Congress (1985-86), H.AMDT.1203, *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d099:HZ01203:>

<sup>34</sup> *Id.*

<sup>35</sup> 132 CONG. REC. H 6716 (daily ed. Sept. 11, 1986) (statement of Rep. Dean Gallo), *available at* <http://congressional.proquest.com.kentlaw-iit.idm.oclc.org/congressional/docview/t17.d18.9eaa1f236db39003?accountid=28377>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

Mr. Chairman, I urge my colleagues to support this comprehensive approach and then to go one step farther to break the biggest link in the chain of drug production delivery and dependency. I am referring to the organized system that exists exclusively to make big money by distributing imported, watered down, and repackaged illegal drugs for street sales. *Criminals who are making big money from this illegal enterprise and whose actions result in the death of another person deserve the most severe possible sentence.* I feel the death penalty should be an option for juries in this particular instance.<sup>38</sup>

A draft of H.R. 5484 containing the death penalty language ultimately passed the House with a vote of 392-16.<sup>39</sup>

Following this vote, Arlan Strangeland, a representative from Minnesota, went on the House floor and expressed happiness that the bill had been passed by such a clear majority.<sup>40</sup> He praised Congressional action, stating that, “[t]he easy access to illegal drugs and the significant use by Americans demonstrate the validity of taking *harsh* steps to escalate the war against drugs.”<sup>41</sup> Although he admitted that the bill could never be an all-inclusive fix, he maintained that, by creating new crimes and increasing sentences for criminals convicted of drug-related crimes, the House took an important step towards meeting an “enormous challenge.”<sup>42</sup>

The Senate received H.R. 5484 on September 15, 1986 and began considering the legislation on September 26, 1986.<sup>43</sup> During floor debate, the Senate considered and passed seven amendments.<sup>44</sup> Some

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<sup>38</sup> *Id.* (emphasis added).

<sup>39</sup> *Bill Summary & Status, supra* note 30.

<sup>40</sup> *Strangeland, supra* note 20 (emphasis added).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Bill Summary & Status, supra* note 30.

<sup>44</sup> *Id.*



of these amendments simply addressed technical corrections,<sup>45</sup> while others granted funds to community groups in order to sponsor anti-drug and -alcohol abuse programs.<sup>46</sup> One amendment, however, removed H.R. 5484's death-penalty provision.<sup>47</sup> The Senate approved H.R. 5484 on bill with a 97-2 vote on September 30, 1986.<sup>48</sup>

The House approved the Senate's bill by unanimous consent, but attached a related bill, H.R. 5664, as an amendment.<sup>49</sup> That amendment reintroduced the death penalty as a possible punishment for violating the Anti-Drug Enforcement Act of 1986.<sup>50</sup> This action was not without its share of controversy. For example, Representative Dan Kildee, from Michigan, warned against adopting a federal death penalty provision as part of an anti-drug measure.<sup>51</sup> Specifically, he claimed that, if Congress enacted the Act with a death penalty provision, the United State would join South Africa as one of the only industrialized nations that allows a federal death penalty (as separate from state death penalties).<sup>52</sup> Notwithstanding his dissent, the House of Representative approved language containing the death penalty provision with a 378-16-38 vote.<sup>53</sup>

The Senate rejected the death penalty provision, and instead instituted mandatory life sentences<sup>54</sup> by a vote of 50-38.<sup>55</sup> The House

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<sup>45</sup> See, e.g., Bill Summary & Status, 99<sup>th</sup> Congress (1985-86), S.AMDT. 3093, <http://thomas.loc.gov/cgi-bin/bdquery/z?d099:SP03093>: (Senate amendment sponsored by Sen. Robert Dole (KS)).

<sup>46</sup> See, e.g., Bill Summary & Status, 99<sup>th</sup> Congress (1985-86), S.AMDT.3047, <http://thomas.loc.gov/cgi-bin/bdquery/z?d099:SP03047>: (Senate amendment sponsored by Sen. Mark Andrews (ND)).

<sup>47</sup> See, e.g., 132 CONG. REC. H10776-04 (Elie Wiesel: Speak Truth to Power, Oct. 17, 1986) (statement by Rep. Claude Pepper) *reprinted in* 1986 WL 788784 [hereinafter *Elie Wiesel*].

<sup>48</sup> *Bill Summary & Status*, *supra* note 30.

<sup>49</sup> *Id.*

<sup>50</sup> *Elie Wiesel*, *supra* note 47.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> 132 CONG. REC. S16915 (daily ed. Oct. 17, 1986) (statement by Sen. Carl Levin) *reprinted in* 1986 WL 788855.

<sup>55</sup> *Bill Summary & Status*, *supra* note 30.

of Representatives ultimately approved the Senate's version without the death penalty provision.<sup>56</sup> A joint bill passed both chambers and was sent to President Ronald Reagan on October 27, 1986.<sup>57</sup> President Reagan signed the bill on the same day.<sup>58</sup>

Although the death penalty amendment ultimately did not make its way into the law, the intense debate<sup>59</sup> surrounding the amendment represents an early attempt by Congress to recognize increased sentences, although not referred to as "mandatory," for criminals involved in organized drug distribution operations.<sup>60</sup> Specifically, members of Congress repeatedly voiced concerns that "drug kingpins" may take extreme measures, including killing, in order to establish their drug empires.<sup>61</sup> Although the cases discussed in this Comment do not concern drug-related murders, the discussions in Congress represent Congressional intent to apply strict sentences to leaders of illegal drug distribution organizations.

## II. THE CIRCUITS' APPLICATION OF § 841(B) TO INDIVIDUALS

In *United States v. Walker*, the Seventh Circuit applied § 841(b)'s minimum sentences for any death or serious bodily injury to members of a drug distribution "conspiracy."<sup>62</sup> Because applying § 841(b) to members of a drug distribution conspiracy was a matter of first impression in the Seventh Circuit,<sup>63</sup> an analysis of how the Seventh Circuit, and other circuits, interprets § 841(b) as applied to individual defendants is instructive.

The Seventh Circuit in *Walker* recognized that when applying § 841(b)'s minimum sentencing requirement for death or serious bodily

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<sup>56</sup> 132 CONG. REC. E3826-01 (daily ed. Oct. 18 1986) (extension of remarks by Sen. Ted Weiss) reprinted in 1986 WL 789718.

<sup>57</sup> *Bill Summary & Status*, supra note 30.

<sup>58</sup> *Id.*

<sup>59</sup> *Elis Weisel*, supra note 46.

<sup>60</sup> *See id.*

<sup>61</sup> *Id.*

<sup>62</sup> *United States v. Walker*, 721 F.3d 828, 836 (7th Cir. 2013).

<sup>63</sup> *Id.* at 834.

injuries, the other circuits fit into two camps.<sup>64</sup> The majority of circuits agree that a death resulting from use of an illegal drug does not need to be foreseeable, and therefore they define § 841(b) as a “strict liability” offense.<sup>65</sup> The Seventh and Ninth Circuits, however, while also not considering whether the death or serious injury was foreseeable, do not consider § 841(b) as a “strict liability” statute.<sup>66</sup>

The majority of circuits apply the mandatory sentencing provisions in § 841(b) without considering whether a victim’s death was reasonably foreseeable.<sup>67</sup> The rationale behind this approach is that Congress, when drafting § 841(b), neglected to include any reference to a defendant’s mental state before triggering the mandatory sentencing provision.<sup>68</sup> Instead of reading a *mens rea* requirement into § 841(b), these circuits simply apply minimum sentences whenever a death results.<sup>69</sup>

In *United States v. Soler*, the First Circuit, as an issue of first impression, applied § 841(b)’s mandatory sentencing after several men died from a heroin overdose.<sup>70</sup> In that case, several men purchased a drug, initially thought to be cocaine, from Abinal Soler, a drug dealer in Sunderland, Massachusetts.<sup>71</sup> Unbeknownst to those men, the drug was actually heroin.<sup>72</sup> When the men snorted the heroin they collapsed and died from drug overdose.<sup>73</sup> Police arrested the drug dealer and charged him under § 841(b) for “distribution of heroin, death

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<sup>64</sup> *Id.* at 835.

<sup>65</sup> *Id.* at 834 (citing *United States v. Soler*, 275 F.3d 146, 152 (1st Cir. 2008); *United States v. McIntosh*, 236 F.3d 968, 974 (8th Cir. 2001)).

<sup>66</sup> *Id.* at 835.

<sup>67</sup> *See id.* at 835 (citing *United States v. Webb*, 655 F.3d 1238 (11th Cir. 2011); *United States v. De La Cruz*, 514 F.3d 121 (1st Cir. 2008); *United States v. Houston*, 406 F.3d 1121 (9th Cir. 2005); *United States v. Soler*, 275 F.3d 146 (1st Cir. 2002); *United States v. McIntosh*, 236 F.3d 968 (8th Cir. 2001); *United States v. Robinson*, 167 F.3d 824 (3d Cir. 1999); *United States v. Patterson*, 38 F.3d 139 (4th Cir. 1994)).

<sup>68</sup> *Id.* at 835.

<sup>69</sup> *Id.*

<sup>70</sup> *United States v. Soler*, 275 F.3d 146, 149 (1st Cir. 2002).

<sup>71</sup> *Id.* at 153.

<sup>72</sup> *Id.* at 149.

<sup>73</sup> *Id.*

resulting,” and other drug distribution statutes.<sup>74</sup> A jury convicted Soler on all counts.<sup>75</sup>

Soler appealed, arguing, *inter alia*, that the key event leading to the death – snorting heroin under the misimpression that it was cocaine – was not reasonably foreseeable.<sup>76</sup> The First Circuit, however, noted that § 841(b) does not contain any language indicating a requisite state of mind for defendants.<sup>77</sup> Specifically, the First Circuit stated, “[a]fter all, Congress knows how to write statutes containing state-of-mind-requirements-and[*sic*] Congress demonstrated that facility in crafting this very statute.”<sup>78</sup> The First Circuit, therefore, held that § 841(b) should apply under a “rule of strict liability.”<sup>79</sup>

Likewise, the Eighth Circuit applies § 841(b) under a strict liability theory.<sup>80</sup> In *United States v. McIntosh*, a woman, Jean Smith, and her 12- and 14-year-old children moved in with a man named Curtis McIntosh.<sup>81</sup> Although Jean initially agreed to move in with McIntosh and maintain his home if he would supply her with methamphetamine, the two soon began a romantic relationship.<sup>82</sup> Jean eventually gave methamphetamine to her 14-year-old daughter, who tragically overdosed and died.<sup>83</sup> McIntosh, despite not knowing that the daughter was given methamphetamine, was convicted of violating § 841(b) because he played a direct part in manufacturing the fatal dose of drugs.<sup>84</sup>

On appeal, McIntosh argued that the lower court erroneously increased his sentence without a finding that the death was reasonably

<sup>74</sup>*Id.* at 150. Soler was also charged under 21 U.S.C.A. § 841(a)(1) (West 2010); 21 U.S.C.A. § 860(a) (West 2013); 21 U.S.C.A. § 846 (West 2013).

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* at 152.

<sup>77</sup>*Id.*

<sup>78</sup>*Id.*

<sup>79</sup>*Id.* at 153; *see also* U.S. v. Rebmann, 226 F.3d 521, 525 (6th Cir. 2000) (stating, in *dicta*, that § 841(b) is a strict liability statute.).

<sup>80</sup>*United States v. McIntosh*, 236 F.3d 968, 974 (8th Cir. 2001).

<sup>81</sup>*Id.* at 970.

<sup>82</sup>*Id.*

<sup>83</sup>*Id.*

<sup>84</sup>*Id.* at 971.

foreseeable.<sup>85</sup> The Eighth Circuit disagreed.<sup>86</sup> Citing holdings from the Third<sup>87</sup> and Fourth Circuits,<sup>88</sup> the Eighth Circuit held that the plain intent of Congress was that § 841(b)'s sentencing enhancements should apply without regard to proximate cause or foreseeability.<sup>89</sup>

Interestingly, the Eighth Circuit, in *McIntosh*, considered applying a similar “chain of causation” theory<sup>90</sup> that the Seventh Circuit ultimately applied in *United States v. Walker*.<sup>91</sup> But rather than apply § 841(b) to a criminal “conspiracy,” the Eighth Circuit held that the “chain of causation” theory should only apply where a defendant either manufactures or distributes the fatal dose.<sup>92</sup> Instead, based on the facts in *McIntosh*, § 841(b) imposed “strict liability” on McIntosh for his involvement in manufacturing the drug that led to the young girl’s death.<sup>93</sup>

Finally, the Ninth Circuit, while still eschewing the proximate cause requirement, stopped short of describing § 841(b) as a “strict liability” statute.<sup>94</sup> In *United States v. Houston*, the Ninth Circuit reviewed the conviction of Rosemary Houston for distributing methadone, which resulted in a lethal overdose.<sup>95</sup> Joining with the majority of circuits, that court held that § 841(b) requires a “cause-in-fact” analysis, but not proximate cause or foreseeability.<sup>96</sup>

The Ninth Circuit, however, refused to characterize § 841(b) as a “strict liability” statute.<sup>97</sup> Specifically, that court recognized that “there may be fact patterns in which the distribution of a controlled substance

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 975.

<sup>87</sup> *See* *United States v. Robinson*, 167 F.3d 824, 831 (3d Cir. 1999).

<sup>88</sup> *See* *United States v. Patterson*, 38 F.3d 139 (4th Cir. 1994).

<sup>89</sup> *McIntosh*, 236 F.3d at 972-73.

<sup>90</sup> *Id.* at 974.

<sup>91</sup> *See* *United States v. Walker*, 721 F.3d 828, 836 (7th Cir. 2013)(calling the test a “chain of distribution” test.).

<sup>92</sup> *McIntosh*, 236 F.3d at 974.

<sup>93</sup> *Id.*

<sup>94</sup> *United States v. Houston*, 406 F.3d 1121, 1125-24 n.5 (9th Cir. 2005).

<sup>95</sup> *Id.* at 1121.

<sup>96</sup> *Id.* at 1124-25.

<sup>97</sup> *Id.* at n.5.

is so removed and attenuated from the resulting death that criminal liability could not be imposed within the bounds of Due Process.”<sup>98</sup> The Seventh Circuit in *Walker* also adopted this rationale, and it may have influenced the court’s decision to apply a foreseeability requirement to members of drug distribution organizations charged under § 841(b).<sup>99</sup>

The Seventh Circuit’s reluctance to adopt “strict liability” language makes sense when compared to its previous holding in *U.S. v. Hatfield*. In *Hatfield*, the defendants were convicted for burglarizing pharmacies and distributing controlled substances.<sup>100</sup> Because four people died and one was seriously injured after using these drugs, the trial court applied heightened sentences under § 841(b).<sup>101</sup>

The Seventh Circuit held that foreseeability and, to a certain degree, “but for causation was not required when applying a separate portion of § 841(a)(1).<sup>102</sup> As long as the death “resulted from” the drug use, the seller, if found guilty, was subject to the minimum sentence.<sup>103</sup> In order to drive this point, the Seventh Circuit contemplated a hypothetical scenario where a drug user goes into a bathroom in order to avoid being seen while injecting the drug.<sup>104</sup> While in the bathroom, the ceiling collapses on that person, killing him instantly.<sup>105</sup> Although the drug user was only in the bathroom because of the drugs purchased from a defendant, “it would be strange to think that the seller of the drug” would be punishable.<sup>106</sup>

The Supreme Court may soon shed some guidance on whether § 841(b) should be interpreted as a strict liability statute. On June 17, 2013, the Supreme Court granted certiorari to *Burrage v. United*

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<sup>98</sup> *Id.*

<sup>99</sup> *United States v. Walker*, 721 F.3d 828, 836 (7th Cir. 2013).

<sup>100</sup> *United States v. Hatfield*, 591 F.3d 945, 947 (7th Cir. 2010) (The drugs included morphine, methadone, oxycodone, fentanyl, alprazolam, cocaine, and hydrocodone.).

<sup>101</sup> *Id.* at 947.

<sup>102</sup> *Id.* at 948-49.

<sup>103</sup> *Id.* at 950.

<sup>104</sup> *Id.* at 948.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

*States*, an appeal from the Eighth Circuit.<sup>107</sup> Although the Eighth Circuit in *Burrage* did not explicitly refer to § 841(b) as a “strict liability” statute, that court held that the minimum sentences in § 841(b) apply without showing proximate cause.<sup>108</sup> The petitioner in *Burrage* asked the Supreme Court to grant *cert* to the question of whether § 841(b) is a “strict liability crime without a foreseeability or proximate cause requirement.”<sup>109</sup>

As this paper will discuss, the Supreme Court’s decision in *Burrage* is unlikely to change the Seventh Circuit’s “chain of distribution” test. Specifically, the chain of distribution looks to the various members of a drug distribution organization beyond the defendant who sold the fatal dose of drugs.<sup>110</sup> Therefore, even if the Supreme Court adopts some heightened level of proof before applying § 841(b), that heightened level of proof will only change the Seventh Circuit’s application towards individuals, *i.e.*, the defendant closest to the deceased on the chain of distribution.<sup>111</sup> While such a ruling from the Supreme Court will likely change the Seventh Circuit’s treatment of drug dealers, it is unlikely to drastically affect its treatment of members of drug distribution conspiracies, like the defendants in *Walker*.<sup>112</sup>

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<sup>107</sup> *Burrage v. United States*, 133 S.Ct. 2049 (Mem.) (granting petitioner’s writ for certiorari).

<sup>108</sup> *United States v.*, 687 F.3d 1015, 1020 (8th Cir. 2012).

<sup>109</sup> Petitioner’s Opening Brief, *Burrage v. United States*, 133 S.Ct. 2049 (2013) (No. 12-7515), 2013 WL 3830502, at i.

<sup>110</sup> *United States v. Walker*, 721 F.3d 828, 831 (7th Cir. 2013).

<sup>111</sup> *See Walker*, 721 F.3d, at 831; *Burrage*, 687 F.3d, at 1020.

<sup>112</sup> The Supreme Court issued its opinion in *Burrage v. United States*, --- S. Ct. ----, 2014 WL 273243 (2014) on January 27, 2014; mere days before this Comment was set to be published.

Justice Antonin Scalia wrote the opinion for a unanimous Court. The Court did not address the issue of whether § 841(b) has a foreseeability or proximate requirement. Instead, the Court held that the “results from” language in § 841(b)’s sentencing enhancement precluded the twenty-year minimum sentence where the use of a drug distributed by a defendant was not an independently sufficient cause of death or serious bodily injury. Because the deceased in *Burrage* died after ingesting multiple drugs from multiple dealers, the defendant was not an independently

### III. U.S. v. WALKER

In *United States v. Walker*, the Seventh Circuit, as a matter of first impression, applied the minimum sentencing provisions found in § 841(b) to members of a drug distribution conspiracy who did not directly distribute a fatal dose of drugs.<sup>113</sup> This case involved ten people: five defendants and five deceased.<sup>114</sup> These defendants occupied various levels within a drug distribution conspiracy – several were low-level drug dealers, and the remaining defendants occupied higher levels within the organization.<sup>115</sup> The government charged each of the defendants with: 1) possession of heroin with intent to distribute, and 2) conspiracy to distribute more than one kilogram of heroin.<sup>116</sup> These charges fell under two statutes;<sup>117</sup> first, the defendants were charged under a different provision in § 841 – specifically § 841(a)(1)<sup>118</sup> – and second, the defendants were charged under a conspiracy statute codified at 21 U.S.C. § 846.<sup>119</sup>

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sufficient cause of death and could not face the twenty-year minimum sentence for distributing a fatal dose of heroin.

Here, the defendants in *United States v. Walker*, 721 F.3d 828 (7th Cir. 2013) all died injecting heroin sold by a defendant. There is no evidence that any of the deceased were under the influence of other drugs at the time of death. As a result, those dealers should meet the requirement of being an “independently sufficient cause of death.” Therefore, the Court’s holding in *Burrage* should have no effect on the conclusions argued in this Comment.

<sup>113</sup> *Walker*, 721 F.3d at 828.

<sup>114</sup> *Id.* at 831.

<sup>115</sup> *Id.* at 831-33.

<sup>116</sup> *Id.* at 831.

<sup>117</sup> *Id.*

<sup>118</sup> 21 U.S.C.A. § 841(a)(1) (West 2010). The text of § 841(a)(1) reads:

(a) Unlawful Acts:

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally [. . .] manufacture, distribute, or possess with intent to distribute, or disperse, a controlled substance[.]

<sup>119</sup> 21 U.S.C.A. § 846 (West 2013). The text of § 846 reads:

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



Because five people died after using the defendants' heroin, the government argued that each defendant should receive the minimum sentence proscribed for a death resulting from heroin use.<sup>120</sup> That portion of the statute, codified as 21 U.S.C. § 841(b)(1)(a), imposes a twenty-year minimum sentence, a \$10,000 dollar fine, or both.<sup>121</sup> Furthermore, the government argued that the mandatory minimum sentence should apply to all members of the drug conspiracy under a strict liability theory.<sup>122</sup>

### A. *The Defendants*

This case revolved around a heroin distribution conspiracy operating in the area around Milwaukee, Wisconsin between 2005 and 2008.<sup>123</sup> Lonnie Johnson, a supplier operating out of Chicago, ran this organization and provided the bulk quantities of heroin distributed in the Milwaukee area.<sup>124</sup> Johnson was not a defendant in this case. His lieutenant, however, Jamie Stewart, was arrested and charged as part of the drug operation.<sup>125</sup> According to the Seventh Circuit, Stewart operated directly under Johnson and managed heroin distribution in the Milwaukee-area.<sup>126</sup>

The Seventh Circuit described the heroin conspiracy as a tiered structured system, breaking down to citywide distributors and, finally, lower-level dealers.<sup>127</sup> Two defendants, Keith Walker and Eneal Gladney, worked out of Milwaukee as high-level dealers.<sup>128</sup> The remaining defendants, Jean Lawler and Jason Lund, operated in Pewaukee, Muskego, and Waukesha—cities outside of Milwaukee.<sup>129</sup>

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<sup>120</sup> *Walker*, 721 F.3d at 831.

<sup>121</sup> 21 U.S.C.A. § 841(b)(1)(a) (West 2010).

<sup>122</sup> *Walker*, 721 F.3d at 831.

<sup>123</sup> *Id.* at 831.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

Jason Lund operated out of Waukesha and connected customers with higher-level distributors, including the conspiracy's "lieutenant," Jamie Stewart.<sup>130</sup> The final defendant, Jean Lawler, was a lower-level member of the conspiracy who purchased small quantities of heroin both to sell and to use.<sup>131</sup>

### *B. Deaths and Subsequent Arrest*

The details of this case are tragic: five people lost their lives when they overdosed on heroin sold by the defendants.<sup>132</sup> The Seventh Circuit noted that two of the deceased died after injecting heroin bought from a defendant, Jason Lund.<sup>133</sup> One of the deceased, Andrew Goetzke, began buying heroin from the drug conspiracy in 2007.<sup>134</sup> Although he acted as a confidential informant for police officers, he continued to use heroin until his death.<sup>135</sup> On June 5, 2008, the defendant, Lund, drove with Goetzke to Milwaukee in order to buy heroin from another defendant, Jamie Stewart.<sup>136</sup>

Lund and Goetzke split the drugs, with Lund receiving additional money for setting up the sale to Goetzke.<sup>137</sup> After injecting the drugs, Goetzke returned to his mother's home.<sup>138</sup> The next morning, Goetzke's mother found him unresponsive in his bed.<sup>139</sup> She called 911, but it was too late; emergency personnel could not save Goetzke.<sup>140</sup>

One month after Goetzke died, another person, David Knuth, died of a heroin overdose after he used heroin provided by Lund.<sup>141</sup> On July

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 832.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

3, 2008, Lund organized the purchase of heroin from the defendant, Jamie Stewart.<sup>142</sup> Lund shared this heroin with Knuth and a third person.<sup>143</sup> Immediately after Knuth injected the heroin, he stopped breathing, became unconscious, and began bleeding from the nose.<sup>144</sup> Lund drove to an emergency clinic where the third person began administering CPR.<sup>145</sup> Unfortunately, the clinic was closed.<sup>146</sup> The third person called 911 and kept administering CPR in the clinic parking lot.<sup>147</sup> Lund drove off.<sup>148</sup> By the time the ambulance arrived, Knuth was dead.<sup>149</sup>

A third person, Jeffery Topczewski, died after buying heroin from the defendant, Jean Lawler.<sup>150</sup> Topczewski contacted Lawler on February 19, 2008 and arranged to buy heroin.<sup>151</sup> Topczewski went to Lawler's home, purchased the drug, and then returned to his parents' house.<sup>152</sup> The next day, Topczewski's parents found him dead in his bed.<sup>153</sup>

The final two deaths in this case occurred in 2007.<sup>154</sup> These two individuals, Valerie Luszak and Joshua Carroll, each purchased heroin from members of the drug distribution organization who were not defendants in this case.<sup>155</sup> Although the drug dealers were not defendants in the instant case, witnesses were able to identify the drugs as heroin sold by the conspiracy due to its unique packaging.<sup>156</sup>

On July 22, 2008, the government brought a one-count indictment against thirty-one defendants, alleging a conspiracy to distribute

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 832-33.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

heroin in violation of 21 U.S.C. §§ 841(a)(1) and 846.<sup>157</sup> The five defendants in this case, Walker, Stewart, Gladney, Lund, and Lawler, all entered into plea agreements with the government, but they reserved their right to challenge the mandatory sentencing provision for deaths proscribed in § 841(b).<sup>158</sup> Notwithstanding the defendants' objections, the district court applied § 841(b)(1)(a) without any finding of foreseeability or proximate cause and sentenced all of the defendants to the statutory minimum of twenty years<sup>159</sup> in prison.<sup>160</sup> The defendants appealed to the United States Court of Appeals for the Seventh Circuit.<sup>161</sup>

*C. The "Chain of Distribution" Test: From the Sixth Circuit and Beyond.*

Because *Walker* raised an issue of first impression regarding the minimum sentencing provisions in § 841(b), the Seventh Circuit looked to the other circuits for guidance.<sup>162</sup> First, the court noted that other circuits – including the Seventh Circuit –consistently held that § 841(b) does not require a death to be reasonably foreseeable before the minimum sentence applies.<sup>163</sup> Instead, the statutory minimum sentence applies if the defendant actually distributed or used intermediaries to distribute the drugs that resulted in a death.<sup>164</sup>

Although the Seventh Circuit agreed with the other circuits regarding foreseeability,<sup>165</sup> it ultimately adopted a test established by

<sup>157</sup> Brief of Jamie J. Stewart, Defendant – Appellant and Required Short Appendix, *United States v. Walker*, 721 F.3d 828 (2013) (Nos. 11-1501, 10-2176, 10-2355, 10-3788, 10-1024), 2011 WL 3679018, at \*4.

<sup>158</sup> *Walker*, 721 F.3d at 832.

<sup>159</sup> *Id.* at 833. Four of the defendants had their sentences eventually reduced based on “substantial assistance provided to the government.”

<sup>160</sup> *Id.* at 831.

<sup>161</sup> *Id.* at 833.

<sup>162</sup> *Id.* at 834.

<sup>163</sup> *Id.* at 836.

<sup>164</sup> *Id.*

<sup>165</sup> See the discussion *supra* Section II. The Circuit’s Application of § 841(b) to Individuals.

the Sixth Circuit for sentencing members of drug distribution conspiracies.<sup>166</sup> The Sixth Circuit in *United States v. Swiney*<sup>167</sup> addressed a factually similar case to *Walker*.<sup>168</sup> In that case, a grand jury returned a twenty-four-count indictment against twelve members of a drug distribution organization operating in Mountain Tennessee.<sup>169</sup> The government argued, *inter alia*, that the defendants were involved in a conspiracy to distribute heroin and that a death resulted from the use of that heroin.<sup>170</sup>

Seven of the defendants entered into plea agreements with the government.<sup>171</sup> In exchange for guilty pleas for violating 21 U.S.C. § 846, the drug conspiracy statute,<sup>172</sup> the government agreed to dismiss the remaining charges against those defendants.<sup>173</sup> None of the plea agreements, however, referred to any involvement in the sale of the heroin leading to a death.<sup>174</sup> After considering the evidence, the United States District Court for the Eastern District of Tennessee held that only one of the defendants was responsible for a death and § 841(b)'s heightened sentencing.<sup>175</sup> Therefore, the judge refused to impose § 841(b)'s heightened sentences on the remaining defendants.<sup>176</sup> The government appealed, asserting a right to a limited appeal based on "an incorrect application of the [Federal] Sentencing Guidelines."<sup>177</sup>

<sup>166</sup> *Walker*, 721 F.3d at 834-35.

<sup>167</sup> *United States v. Swiney*, 203 F.3d 397, 400 (6th Cir. 2000).

<sup>168</sup> *Walker*, 721 F.3d at 831-32.

<sup>169</sup> *Swiney*, 203 F.3d at 400.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 400.

<sup>172</sup> 21 U.S.C.A. § 846 (West 2013); *see supra* note 116 for the text of the statute.

<sup>173</sup> *Swiney*, 203 F.3d at 400.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (citing 18 U.S.C.A. § 3742(b)(2) (West 2003)). The text of § 3742(b)(2) reads:

“(b) Appeal by the Government.

--The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence [. . .]

The government argued that all of the defendants should be liable for the death because it is always reasonably foreseeable that someone will die after using heroin.<sup>178</sup> Specifically, the government argued that the Supreme Court's approach in *Pinkerton v. United States* controlled and that, under *Pinkerton*, defendants may be criminally liable for all reasonably foreseeable acts of co-conspirators regardless of actual knowledge, intent, or participation.<sup>179</sup>

The Sixth Circuit disagreed, holding that the government's *Pinkerton* argument only applied to conviction liability.<sup>180</sup> Specifically, that court noted that the Federal Sentencing Guidelines "modified the *Pinkerton* theory of liability so as to harmonize it with the Guidelines' goal of sentencing a defendant according to the 'seriousness of the actual conduct of the defendant and his accomplices.'"<sup>181</sup> As a result, "in a broad conspiracy, the relevant conduct considered in constructing the [sentencing range] may not be the same for every defendant in the conspiracy, although each may be equally liable for conviction under *Pinkerton*."<sup>182</sup> Therefore, although each defendant in a conspiracy may be *criminally* liable, district courts applying the minimum sentencing enhancements codified in § 841(b) must first find that each defendant was part of the actual distribution chain that led to the death.<sup>183</sup>

The Seventh Circuit adopted the Sixth Circuit's reasoning and held that a district court must "make specific factual findings to determine whether *each* defendant's relevant conduct encompasses the

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(2) was imposed as a result of an incorrect application of the sentencing guidelines[.]”

<sup>178</sup> *Swiney*, 203 F.3d at 401-02.

<sup>179</sup> *Id.* at 401-02 (citing *Pinkerton v. United States*, 328 U.S. 640 (1946).); *see also* *United States v. Myers*, 102 F.3d 227 (6th Cir. 1996); *see also* Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back From An Ever Expanding Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 7 (1992).

<sup>180</sup> *Swiney*, 203 F.3d at 404.

<sup>181</sup> *Id.* (citing William W. Wilkins & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C.L. REV. 495, 502 (1990)).

<sup>182</sup> *Id.* at 403-04 (citing William W. Wilkins & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C.L. REV. 495, 508-10 (1990)).

<sup>183</sup> *Id.* at 406.

distribution chain that caused a victims death before applying the twenty-year penalty.”<sup>184</sup> Using the “chain of distribution” test, the Seventh Circuit vacated the twenty-year minimum sentences for two of the defendants, Keith Walker and Eneal Gladney, but affirmed the sentences for the remaining defendants, Jean Lawler, Jason Lund, and Jeramie Stewart.<sup>185</sup>

#### *D. The Chain of Distribution in Walker.*

The Seventh Circuit found that the relevant chain of distribution proceeded as follows: Stewart, operating as a “lieutenant,” organized high level distribution in the Milwaukee area.<sup>186</sup> Stewart sold large quantities of heroin to Walker and Glandey, who ran operations in Milwaukee.<sup>187</sup> Stewart sold heroin meant for Waukesha to Lund.<sup>188</sup> Lund, then, sold quantities of that heroin to Lawler.<sup>189</sup>

The Seventh Circuit affirmed Stewart’s sentence because he, as a principal member in the heroin conspiracy, was the ultimate source of the drugs that killed all five users.<sup>190</sup> The court quoted the trial judge, “Now, I appreciate you may not have been standing over [the deceased] when he took the final dose, but that is not what the law requires. The law simply tracks who provided the substance[.]”<sup>191</sup> A “kingpin who finances and controls a drug distribution operation cannot escape liability for the ‘death resulting’ penalty simply because he never personally sold to customers.”<sup>192</sup>

The Seventh Circuit then tracked the fatal drugs sold by Stewart in order to establish a chain of causation to the specific deaths. First, the court found that both Lund and Lawler, although occupying relatively low positions within the conspiracy, sold drugs obtained

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<sup>184</sup> United States v. Walker, 721 F.3d 828, 831 (7th Cir. 2013).

<sup>185</sup> *Id.* at 842.

<sup>186</sup> *Id.* at 831.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 839.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

from Stewart to two of the victims.<sup>193</sup> Indeed, the Seventh Circuit noted that Lund and Lawler had “perhaps the closest connection to the deaths of customers who used drugs distributed by the conspiracy.”<sup>194</sup>

Therefore, the court affirmed both Lund’s and Lawler’s minimum twenty-year sentences under § 841(b)(1)(A).<sup>195</sup> Specifically, the Seventh Circuit held that there could be “little doubt” that the statute would apply to the two defendants.<sup>196</sup> Although the court conceded that the deceased might have had a hypersensitivity to heroin, it ultimately held that the risk of death is inherent with illegal drug use and that distributors accept that risk at their own peril.<sup>197</sup>

Finally, the Seventh Circuit held that the final two defendants, Walker and Gladney, were not a part of the chain of distribution.<sup>198</sup> Citing the Sixth Circuit,<sup>199</sup> the court noted that there is a difference between criminal liability for acts committed by members of a criminal conspiracy and the specific sentencing consequences applicable to each member of that conspiracy.<sup>200</sup> Although Walker and Gladney could be subject to criminal prosecution, the government offered no evidence that they actually contributed to the sales that killed the five decedents.<sup>201</sup>

Instead, the Seventh Circuit noted that four of the five decedents lived and died in Waukesha, Wisconsin.<sup>202</sup> Walker and Gladney, however, only operated drug distribution within Milwaukee.<sup>203</sup> And the only decedent from Milwaukee died because he purchased drugs directly from a third-party that was not involved in this litigation.<sup>204</sup>

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<sup>193</sup> *Id.* at 840.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 838.

<sup>199</sup> *United States v. Swiney*, 203 F.3d 397, 406 (6th Cir. 2000).

<sup>200</sup> *Walker*, 721 F.3d at 838.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* (noting that the third-party ultimately bought his heroin from Johnson, the head of the conspiracy).



Because Walker and Gladney were not part of any distribution efforts outside of Milwaukee, they were outside of the chain of distribution.<sup>205</sup>

The Seventh Circuit, however, did note that merely acting outside of the chain of distribution might not always defeat § 841(b)'s minimum sentencing requirement.<sup>206</sup> The court offered the following analogy:

A gives drugs to B, B sells them to C, and C dies. D, a member of the overall drug conspiracy, may be subject to the twenty-year sentencing penalty even though she did not directly sell the fatal dose to C, but “the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake” under U.S.S.G. § 1B1.3(a)(1)(B)<sup>207</sup> before the penalty is applied. Otherwise, we have no way to know whether a defendant is being sentenced on the basis of drugs that were distributed in furtherance of the conspiracy and that distribution was reasonably foreseeable, or whether a defendant is being

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> U.S.S.G. § 1B1.3(a)(1)(B) (West 2013). This statute establishes factors for determining the range of sentences available for convicted individuals. Specifically, this statute establishes:

“Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:  
(1)(B): in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense[.]”

sentenced strictly on the basis of his general participation in a conspiracy in which a drug user died.<sup>208</sup>

Because the government offered no evidence that Walker and Gladney sold drugs, even if not to the decedents, in furtherance of a specific conspiracy in Waukesha, they were not subject to the minimum sentencing requirement.

### III. WALKER UNIFIES THE SEVENTH CIRCUIT'S APPLICATION OF § 841(B) SENTENCING FOR DRUG QUANTITIES AND DRUG-RELATED DEATHS.

With *Walker*, the Seventh Circuit took an important step toward a unified application of § 841(b) sentences. Indeed, the *Walker* court clearly stated that the Sixth Circuit's reasoning already applied in a "parallel context" in Seventh Circuit jurisprudence: § 841(b)'s minimum sentencing provisions for quantities of drugs trafficked by criminal conspiracies.<sup>209</sup> The Seventh Circuit, supporting this position, cited several cases.<sup>210</sup>

First, in *U.S. v. Edwards*, a Grand Jury returned a 132-count indictment against members of "the 'IBM' of heroin distribution systems on the south side of Chicago" for participating in a three-year heroin distribution conspiracy.<sup>211</sup> After the jury found all members of the conspiracy guilty, a trial judge issued sentences ranging from seven- to thirty-years.<sup>212</sup> The defendants appealed.<sup>213</sup>

Although the Seventh Circuit affirmed all of the convictions, it remanded for new sentences for several of the defendants.<sup>214</sup> The Seventh Circuit held that heightened sentences for varied amounts of drug quantities only applied to sales that were reasonably foreseeable

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<sup>208</sup> *Walker*, 721 F.3d at 838.

<sup>209</sup> *Id.* at 835.

<sup>210</sup> *Id.*

<sup>211</sup> *U.S. v. Edwards*, 945 F.3d 1387, 1395 (7th Cir. 1991).

<sup>212</sup> *Id.* at 1389.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 1404.

to each defendant.<sup>215</sup> Therefore, when sentencing defendants for drug quantities sold by a conspiracy, a defendant's liability for sentencing purposes must be limited to the drug transactions each defendant was "aware of or that he should have reasonably foreseen."<sup>216</sup> The trial court, therefore, erred when it failed to consider the scope of the agreement each defendant had with his co-conspirators.<sup>217</sup> Instead, the trial court, like the *Walker* court, must consider each defendant's involvement within the actual conspiracy before sentencing.<sup>218</sup>

The *Walker* court also cited a 2011 decision, *U.S. v. Alvarado-Tizoc*.<sup>219</sup> In *Alvarado-Tizoc*, several defendants were wholesalers of heroin and fentanyl<sup>220</sup> who sold fentanyl to various "retail dealers."<sup>221</sup> The retailers then diluted the fentanyl and sold it to consumers.<sup>222</sup> Once diluted, the weight of the fentanyl mixture was approximately 11 to 16 times the weight of the pure fentanyl sold by the defendants.<sup>223</sup> Despite the dilution, federal sentencing provisions<sup>224</sup> allowed courts to treat the combined weight of the diluted fentanyl as if it was the pure

<sup>215</sup> *Id.* at 1395.

<sup>216</sup> *Id.* (citing *U.S. v. Guerrero*, 894 F.3d 261, 266 (7th Cir. 1990)).

<sup>217</sup> *Id.* at 1396.

<sup>218</sup> *Id.* at 1395.

<sup>219</sup> *United States v. Walker*, 721 F.3d, 828, 835 (7th Cir. 2013); *United States v. Alvarado-Tizoc*, 656 F.3d 740 (7th Cir. 2011).

<sup>220</sup> *Alvarado-Tizoc*, 656 F.3d at 741-72 ("Fentanyl is a very potent synthetic narcotic, used lawfully as a painkiller and unlawfully as a substitute for heroin. [. . .] Because of its potency it must be greatly diluted before being consumed; otherwise it will kill." (citations omitted)).

<sup>221</sup> *Id.* at 742.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> U.S.S.G. § 2D1.1(c)n.A. (West). U.S.S.G. § 2D1.1(c) lists a drug quantity table that enumerates various base offense levels for different quantities of controlled substances. Note A reads:

"Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level."

fentanyl.<sup>225</sup> Therefore, although the retailers had diluted the fentanyl, the sentencing rules treated them as if they were selling more fentanyl than their actual suppliers.<sup>226</sup>

The trial judge, however, applied the amount of fentanyl sold by the retailers to the wholesalers and increased their sentences.<sup>227</sup> The district court argued that the wholesaling was a “jointly undertaken criminal activity” with the retailers, and therefore, the defendants were liable for any “reasonably foreseeable acts,” including all subsequent sales of diluted fentanyl.<sup>228</sup> The wholesalers appealed.<sup>229</sup>

The Seventh Circuit vacated the district court’s decision and remanded for new sentencing.<sup>230</sup> First, the Seventh Circuit noted that, although the case law interpreting the sentencing guidelines treats “jointly undertaken criminal activity” the same as “criminal conspiracies,” courts have never held that a seller is a part of a conspiracy with a “mere buyer.”<sup>231</sup> Without more evidence, the mere commercial transaction between the wholesalers and retailers was not enough to suggest a “conspiracy” and, thus, the same heightened sentence.<sup>232</sup>

Notwithstanding the district court’s mistake, the wholesalers could still be subject to heightened sentences.<sup>233</sup> Because some drugs, including fentanyl, are frequently diluted before reaching consumers, defendants could be subject to heightened sentences based on their place in the “chain of distribution.”<sup>234</sup> One factor that courts may consider when addressing the “chain of distribution” is whether an individual selling a highly potent drug occupies a higher level on the “chain of distribution.”<sup>235</sup> Although the Seventh Circuit noted that a

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<sup>225</sup> *Alvarado-Tizoc*, 656 F.3d at 742.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 743.

<sup>229</sup> *Id.* at 740.

<sup>230</sup> *Id.* at 747.

<sup>231</sup> *Id.* at 743-44.

<sup>232</sup> *Id.* at 743.

<sup>233</sup> *Id.* at 744.

<sup>234</sup> *Id.* at 745.

<sup>235</sup> *Id.*

drug's potency, without more evidence, is not dispositive of a defendant's position on the "chain of distribution," a judge may still use the relative number of doses produced by the seller's quantities of drugs as a sentencing factor.<sup>236</sup> Therefore, that court remanded for new sentences based on the drugs actually sold by the defendants.<sup>237</sup>

Both of these cases show a natural progression towards the court's decision in *Walker*. First, *Edwards* established that a defendant's liability for sentencing purposes should be based upon the defendant's actual involvement in a criminal conspiracy.<sup>238</sup> *Alvarado-Tizoc* then expanded that by looking at both the scope of a defendant's involvement in a conspiracy and a defendant's place on the "chain of distribution."<sup>239</sup> Finally, *Walker* and its predecessors firmly established a difference between a defendant's *criminal* liability and the extent to which that liability affects a court's discretion to sentence that defendant appropriately.<sup>240</sup>

#### IV. CONCLUSION

In *U.S. v. Walker*, the Seventh Circuit held that courts, before applying § 841(b)'s minimum sentences for drug-related deaths to members of criminal conspiracies, must first make factual findings regarding the chain of distribution for each fatal dose of drug.<sup>241</sup> This test, adopted from the Sixth Circuit, marks a departure from traditional application of § 841(b) towards individuals by removing any indication of "strict liability" and, instead, asking courts to take additional fact-specific steps.<sup>242</sup> Although the Sixth and Seventh Circuit represent a minority view for drug-related deaths, the Seventh Circuit's test does not represent a departure from its traditional

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 746.

<sup>238</sup> *United States v. Edwards*, 945 F.3d 1387, 1395 (7th Cir. 1991).

<sup>239</sup> *Alvarado-Tizoc*, 656 F.3d at 743, 745.

<sup>240</sup> *United States v. Walker*, 721 F.3d 828, 835-36 (7th Cir 2013).

<sup>241</sup> *Id.* at 836.

<sup>242</sup> *Id.* at 835-36.

treatment of members of drug-distribution conspiracies.<sup>243</sup> To the contrary, the Seventh Circuit's fact-intensive requirement for sentencing for drug-related deaths fits directly in line with its previous holdings for mandatory minimum sentences for drug quantities trafficked by a conspiracy.<sup>244</sup> By adopting similar standards for two major areas of § 841(b) sentences, the Seventh Circuit's tests increase predictability for defendants and give trial judges more discretion to apply sentences based on the unique facts in each case.

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<sup>243</sup> *Id.* at 835.

<sup>244</sup> *Id.*