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THE IMPORTANCE OF DRUG QUANTITY IN FEDERAL
SENTENCING: HOW CIRCUIT COURTS SHOULD DETERMINE
THE MANDATORY MINIMUM SENTENCE FOR CONSPIRACY TO
DISTRIBUTE CONTROLLED SUBSTANCES IN LIGHT OF UNITED
STATES V. STODDARD

Elizabeth McKinley

I. INTRODUCTION

Each day, nearly half of all individuals serving sentences in federal penitentiaries are drug offenders.¹ That equates to approximately 77,000 inmates.² These staggering numbers continue to remain high as more and more individuals are being charged, convicted, and sentenced for federal drug crimes.³ A majority of the individuals serving sentences for drug offenses received a mandatory minimum sentence.⁴ One of the most prevalent mandatory minimum sentence statutes that drug offenders are charged under is 21 U.S.C. § 846,⁵ otherwise known as the attempt or conspiracy statute.⁶

Many federal circuits have disagreed on the proper approach for determining the quantity of drugs used to establish the mandatory minimum sentence for an individual convicted on the charge of conspiracy to distribute a controlled substance. Multiple circuits have held that the mandatory minimum for conspiracy to distribute should be based on the amount of drugs attributable to the conspiracy as a whole. However, other circuits have held that the amount of drugs attributable or reasonably foreseeable to the defendant is the proper basis for the

1. FED. BUREAU OF PRISONS, *BOP Statistics: Inmate Offenses* https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last updated Jan. 29, 2019).

2. *Id.*

3. See U.S. SENTENCING COMM'N, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, Chapter Eight: Mandatory Minimum Penalties for Drug Offenses* at 152, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_08.pdf (2011) (“In fiscal year 2010, drug offenses were 28.0 percent of the reported cases [to the Commission], with 23,964 offenders convicted of a drug offense.”); see also, *BOP Statistics: Inmate Offenses*, *supra* note 2.

4. U.S. SENTENCING COMM'N, *2017 Overview of Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System*, at 4 (Oct. 2017) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf [hereinafter U.S. SENTENCING COMM'N, *2017 Overview*] (“Among drug offenders in federal prison as of September 30, 2016, almost three-quarters (72.3%) were convicted of an offense carrying a mandatory minimum penalty, and more than half (50.4%) remained subject to that penalty at sentencing.”).

5. 21 U.S.C. § 846 (LexisNexis, Lexis Advance through PL 115-385, approved 12/21/18, with a gap of PL 115-334).

6. U.S. SENTENCING COMM'N, *2017 Overview*, *supra* note 5, at 15-16.

mandatory minimum. The most recent court to uphold the use of this individualized approach is the District of Columbia Circuit in *United States v. Stoddard*.⁷ This Note asserts that every federal circuit court should determine the mandatory minimum sentence for an individual convicted of conspiracy to distribute a controlled substance based on the amount attributable or reasonably foreseeable to the individual defendant rather than the amount attributable to the conspiracy as a whole. Part II of this Note provides a background of the federal drug offenses and the federal conspiracy statute under the United States Code. Further, Part II discusses the split among the Federal Circuits regarding the appropriate method to determine the mandatory minimum for an individual convicted of conspiracy to distribute a controlled substance. Finally, Part II concludes by examining the circuits that have recently questioned their use of the conspiracy-based approach.

Part III of this Note discusses why the individual based approach is the proper method to determine an individual's mandatory minimum sentence for conspiracy to distribute. First, this section will discuss why the legal rationale set forth by the D.C. Circuit in *United States v. Stoddard* is the proper interpretation of Supreme Court and district court precedent to determine whether the individualized or conspiracy-based approach should be utilized. Second, Part III will examine various policy reasons that support the individualized approach, including: (1) instances of the Government's support of the individualized approach and (2) the data on the immense number of individuals serving prison terms for drug offenses with lengthy mandatory minimum sentences. This section ends by discussing the current shift in some circuits toward the adoption of the individualized approach in determining the mandatory minimum for conspiracy to distribute.

Finally, Part IV concludes that because precedential case law and strong policy reasons support the use of the individualized approach, all Circuits should adopt this method of determining the mandatory minimum sentences for conspiracy to distribute drugs. Additionally, this section calls on circuits that still utilize the conspiracy-based approach, including the Sixth Circuit, to change the law and formally adopt the individualized approach.

II. BACKGROUND

A. Conspiracy and the Drug Offenses

An individual can be charged under the United States Code with the

7. *United States v. Stoddard*, 892 F.3d 1203, 1219 (D.C. Cir. 2018).

crime of attempt to commit an act or conspiracy.⁸ Section 846 states that “[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”⁹ When an individual is charged with conspiracy to distribute a controlled substance, 21 U.S.C. § 841 proscribes the specific base drug offense and the subsequent penalties.¹⁰ 21 U.S.C. § 841(a) states that “it shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”¹¹ To determine the penalties for a violation of 21 U.S.C. § 841(a)(1), courts must look to § 841(b) to determine the corresponding penalty for the specific controlled substance at issue and the weight of that substance.¹² While this statute gives guidance to courts on the maximum penalties for the specific types and weights of drugs a defendant possesses, circuit courts are ideologically split on how to determine the amount of drugs upon which to base the defendant’s mandatory minimum sentence under § 841.

B. Calculating the mandatory minimum based on quantity of controlled substance attributable to the conspiracy as a whole

Some circuits are of the opinion that to determine a defendant’s mandatory minimum sentence for conspiracy to distribute a controlled substance, courts should base the amount of drugs used for sentencing purposes on the amount of drugs attributable to the conspiracy as a whole.¹³ In *United States v. Knight*,¹⁴ the Seventh Circuit held that the defendant’s sentence of life in prison for conspiracy and possession was proper because the jury determined that each defendant participated in the conspiracy and the type and amount of drugs attributable to the conspiracy, while the judge “determined the drug quantity attributable to that particular defendant and sentenced him accordingly.”¹⁵

In *Knight*, the two defendants, Knight and Williams, created a

8. 21 U.S.C. § 846.

9. *Id.*

10. 21 U.S.C. § 841 (LexisNexis, Lexis Advance through PL 115-385, approved 12/21/18, with a gap of PL 115-334).

11. *Id.* § 841(a)(1).

12. *Id.* § 841(b).

13. *E.g.* *United States v. Phillips*, 349 F.3d 138 (3d Cir. 2003), *vacated on other grounds*, *Barbour v. United States*, 543 U.S. 1102 (2005); *United States v. Knight*, 342 F.3d 697 (7th Cir. 2003)

14. *Knight*, 342 F.3d 697 (7th Cir. 2003).

15. *Id.* at 712.

conspiracy to traffic cocaine from California to Wisconsin.¹⁶ Knight, “the organizer and leader” of the drug conspiracy and Williams, “his second in command,” recruited many individuals to act as “couriers and dealers” who transported and distributed the drugs to other individuals.¹⁷ One courier was arrested and stated that she received her supply of drugs from Knight and Williams.¹⁸ Thereafter, the two were arrested and charged, in part, with both conspiracy to distribute and possession of a controlled substance with the intent to distribute.¹⁹ During the trial, the jury was instructed to “determine each defendant’s guilt on each count” and then, “once guilt was established, whether the offense charged involved five or more kilograms of cocaine.”²⁰ The jury found Knight and Williams guilty of conspiracy and, under the guidelines of the statute, the defendants were both sentenced to life in prison, the maximum punishment that either defendant was able to receive for the charge of conspiracy to distribute controlled substances.²¹

On appeal, Knight and Williams argued that the jury instructions were “erroneous” due to the rationale set forth in the Supreme Court case, *Apprendi v. New Jersey*,²² arguing that there is a requirement for the jury make an individualized finding of fact of the amount and type of drug for which each defendant is responsible instead of finding that the amount of drug involved in the conspiracy exceeded the amount prescribed by the statute.²³ The Seventh Circuit, however, held that the jury instruction was not erroneous as the jury determined not only that the defendants’ were part of the conspiracy, but also that the prosecution proved beyond a reasonable doubt a specific quantity of drugs attributable to the entire conspiracy.²⁴ Additionally, the Seventh Circuit found that the trial judge properly sentenced the defendant’s based on the amount he determined was attributable to each individual defendant, as the amount attributable to each defendant was the entire amount attributable to the conspiracy as a whole.²⁵

In Knight, the Seventh Circuit adopted the conspiracy-based approach from the First Circuit’s previous reasoning in *Dernman v. United*

16. *Id.* at 701.

17. *Id.* at 701-702.

18. *Knight*, 342 F.3d at 703.

19. *Id.* Two other defendants, Newton and Durant, were also charged with conspiracy and tried with Knight and Williams. *Id.* at 703-04.

20. *Id.* at 704.

21. *Id.*

22. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

23. *Knight*, 342 F.3d at 709.

24. *Id.* at 712.

25. *Id.*

States,²⁶ which stated that the jury must only make the determination of whether an individual was involved in a conspiracy and any factors that may increase the statutory maximum penalty, while “the judge may lawfully determine the drug quantity attributable to that defendant and sentence him accordingly” within that prescribed statutory maximum determined by the jury’s findings.²⁷ The Seventh Circuit agreed with the Derman rationale which posited that there is no requirement under the holding of Apprendi that a jury must use the individualized approach in “findings of drug type and quantity in drug-conspiracy cases.”²⁸ The Knight court did find, however, that there was “overwhelming evidence” that each of the defendants played important roles in the conspiracy and specifically possessed, or had knowledge that other individuals in the conspiracy possessed, many kilograms of cocaine.²⁹ Therefore, the court found that each defendant was responsible for “the full weight of drugs involved [in the conspiracy].”³⁰

C. Calculating the mandatory minimum based on quantity of controlled substance that was “reasonably foreseeable” to each individual defendant

On the contrary, many circuits have held that in determining the mandatory minimum sentence for conspiracy to distribute a controlled substance, a sentence should be based on the quantity of drugs that was attributable or “reasonably foreseeable” to the individual defendant.³¹ The First Circuit recently held that the jury must be the finder of fact who determines the quantities of controlled substance upon which the mandatory minimum and statutory maximum are based.³² In *United States v. Pizarro*, the defendant, Pizarro, was convicted on charges of conspiracy to distribute various types of controlled substances³³ and was sentenced to life in prison.³⁴ When determining the amount of controlled substances attributable to Pizarro, the district court judge determined there was sufficient evidence to find that Pizarro was accountable for more than the “five kilograms or more of cocaine or one kilogram or

26. *Derman v. United States*, 298 F.3d 34 (1st Cir. 2002).

27. *Knight*, 342 F.3d at 710 (citing *Derman v. United States*, 298 F.3d 34, 42-43 (1st Cir. 2002)).

28. *Knight*, 342 F.3d at 710.

29. *Id.* at 712.

30. *Id.*

31. *E.g.*, *United States v. Pizarro*, 772 F.3d 284 (1st Cir. 2014); *United States v. Rangel*, 781 F.3d 736 (4th Cir. 2015); *United States v. Haines*, 803 F.3d 713 (5th Cir. 2015); *United States v. Banuelos*, 322 F.3d 700 (9th Cir. 2003).

32. *Pizarro*, 772 F.3d at 293.

33. *Id.* at 287.

34. *Id.* at 288.

more of a mixture or substance containing heroin”³⁵ and thus should be sentenced to the maximum of life.³⁶ Pizarro appealed his sentence³⁷ and argued that “the district court committed an Alleyne error by applying a mandatory minimum sentence without the requisite drug quantity findings by the jury.”³⁸ On appeal, the First Circuit rationalized the holding under *Alleyne v. United States*,³⁹ finding that “the drug quantity that triggers the mandatory minimum for a 21 U.S.C. § 846 conspiracy must be found by a jury beyond a reasonable doubt.”⁴⁰ The court further specified that the “conspiracy-wide quantity . . . governs the statutory maximum” while “the individualized quantity, i.e. the quantity that is foreseeable to the defendant, . . . triggers the mandatory minimum.”⁴¹ Based on this rationale, the court held that the jury did not make a finding of fact on the quantity of drugs reasonably foreseeable to Pizarro; therefore, the lower court erred in Pizarro’s sentencing.⁴²

The Fifth Circuit also adopted the individual-based approach in *United States v. Haines*.⁴³ In *Haines*, the defendants, Haines, Porter, and Iturres-Bonilla, were charged in part with “conspiracy to possess with intent to distribute one kilogram or more of heroin.”⁴⁴ The defendants were convicted based on the jury finding that the entire conspiracy “involved one kilogram or more of heroin.”⁴⁵ The district court found that this finding of fact by the jury “triggered the statutory minimum of twenty years for Haines and Porter.”⁴⁶ On appeal, two of the defendants, Haines and Porter, challenged the district court’s use of the conspiracy-based approach in determining the quantity of controlled substance for sentencing rather than the jury making the finding of fact of the quantity of controlled substance attributable to each individual defendant.⁴⁷ On appeal, the government agreed with the defendants that the district court should have based the sentence on the individualized approach but believed that the Fifth Circuit’s precedent supported the conspiracy-

35. *Id.* (“court found Pizarro accountable for more than 150 kilograms . . .”).

36. *Id.*

37. *Pizarro*, 772 F.3d at 289-290.

38. *Id.* at 289-290 (stating that the appeal was on “the convictions for the aggravated offenses with enhanced drug quantities under § 841(b)(1)(A),” *Pizarro*, 772 F.3d at 290). (emphasis added?)

39. *Alleyne v. United States*, 570 U.S. 99 (2013).

40. *Pizarro*, 772 F.3d at 292.

41. *Id.* at 292-93.

42. *Id.* at 293.

43. *United States v. Haines*, 803 F.3d 713 (5th Cir. 2015).

44. *Id.* at 719-20.

45. *Id.* at 720.

46. *Id.*

47. *Id.*

wide approach.⁴⁸

Finding for the defendants, the Haines court held that the defendants' sentences should have been "based on the drug quantity attributable to them as individuals" and thus vacated the defendants' sentences as the jury made no finding of fact with regard to the quantity attributable to each individual defendant.⁴⁹ The court rationalized this shift away from Fifth Circuit precedent by determining that the Supreme Court opinions in *Apprendi* and *Alleyne* require a finding by the jury of factors that increase a defendant's sentence.⁵⁰ The court found that because "the quantity of the controlled substance can 'significantly increase the maximum penalty[,]'" the quantity of heroin attributable to each defendant was a fact that should have been determined by the jury.⁵¹

*D. United States v. Stoddard*⁵²

The most recent decision in which a circuit court shifted from using the conspiracy-based approach to the individualized approach is the District of Columbia Circuit's decision in *United States v. Stoddard*.⁵³ In 2012, the Federal Bureau of Investigation ("FBI") was investigating the heroin-trafficking activities of Jermaine Washington.⁵⁴ The FBI observed Washington's activities by utilizing various methods of surveillance, including drug-buys by a confidential informant, a wiretap, surveillance, and recorded phone conversations.⁵⁵ During this surveillance, the FBI recorded phone conversations between Washington and two individuals, Sidney Woodruff and Calvin Stoddard, and observed Washington meeting with the two aforementioned individuals.⁵⁶ Further, the FBI obtained conversations between Washington and Jerome Cobble.⁵⁷ Subsequently, when the FBI conducted a search of Washington's residence, it found over 20 grams of heroin, drug paraphernalia, and thousands of dollars in cash.⁵⁸ Washington then pled guilty to multiple charges including conspiracy to distribute a controlled substance and agreed to be a cooperating witness

48. *Haines*, 803 F.3d at 738.

49. *Id.* at 739.

50. *Id.* at 738.

51. *Id.* at 738-39.

52. *Stoddard*, 892 F.3d 1203 (D.C. Cir. 2018).

53. *Id.*

54. *Id.* at 1208.

55. *Id.*

56. *Id.*

57. *Stoddard*, 892 F.3d at 1208.

58. *Id.* at 1208.

for the government.⁵⁹

A grand jury indicted Calvin Stoddard, Jerome Cobble, and Sidney Woodruff with conspiracy to distribute 100 grams or more of heroin in violation of 21 U.S.C. §§ 841 and 846 in conjunction with additional charges.⁶⁰ During the trial, Washington testified against Stoddard and recounted various conversations where he and Stoddard discussed purchasing heroin as well as instances where Washington sold heroin to Stoddard.⁶¹ After both the Government and the defense rested their cases, the court denied the defendants' motions for acquittal and proceeded with the jury instructions.⁶² When contemplating the jury instructions, the Government proposed that the jury determine the amount of drugs the jury believed to be attributable to each specific defendant.⁶³ The district court, although cognizant of other circuits that followed the individualized approach, determined that it was appropriate to "use a verdict form without individualized drug quantity determinations."⁶⁴

When issuing a verdict, "[t]he jury found Woodruff and Stoddard guilty of the drug-conspiracy charge and found that the conspiracy, as a whole, involved 100 grams or more of heroin."⁶⁵ The defendants then moved for a new trial, arguing that the jury should have been instructed to determine the amount of controlled substance attributable to each individual defendant rather than finding the amount of controlled substance attributable to the entire conspiracy.⁶⁶ While the Government opposed the defendants' motion for a new trial, it agreed that the jury should have been given the instruction to "find the amount attributable to each defendant" and the defendants' sentence should not have been based on "the 100 grams the jury found attributable to the conspiracy as a whole."⁶⁷ The district court ultimately rejected the defendants motion for a new trial.⁶⁸ During sentencing, Woodruff and Stoddard again raised the issue that the amount of controlled substance utilized in determining the mandatory minimum and statutory maximum for sentencing should not be based on the quantity attributable to the entire conspiracy.⁶⁹ The Government agreed again in their sentencing

59. *Id.*

60. *Id.*

61. *Id.* at 1209.

62. *Stoddard*, 892 F.3d at 1210.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 1210-11.

67. *Stoddard*, 892 F.3d at 1210-11.

68. *Id.*

69. *Id.* at 1211.

memorandum with the defendants' proposition.⁷⁰

On appeal, both Woodruff and Stoddard again raised the issue that their sentences were improperly calculated based on the amount of controlled substance attributable to the conspiracy as a whole rather than the amount a jury should find attributable to each of them individually.⁷¹ Upon review, the D.C. Circuit confirmed that the jury instructions mandated that the jury find that the defendants' had "entered a conspiracy to distribute a controlled substance containing heroin" and that the amount of that controlled substance in the conspiracy was greater than 100 grams.⁷² The court further established that jury instructions did not charge the jury with finding that "it was 'reasonably foreseeable' to each defendant that 100 grams or more would be distributed within the scope of the conspiracy."⁷³ The D.C. Circuit held that the "reasonably foreseeable" approach was the proper approach to use when determining the mandatory minimum for conspiracy to distribute a controlled substance and, thus, vacated the defendants' sentences.⁷⁴

In arriving to this position, the Stoddard court first reviewed their own precedent in *United States v. Law*,⁷⁵ which held that a violation of § 846 "encompasses all of the crimes reasonably foreseeable within that conspiracy" and thus "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."⁷⁶ The Stoddard court found that this reasonably foreseeable principle in *Law* was applicable in the determination of drug quantity for sentencing.⁷⁷ The court then looked to Supreme Court precedent that supported the decision in *Law* and the utilization of the individualized approach.⁷⁸ The first Supreme Court case the Stoddard court reviewed was *Burrage v. United States*,⁷⁹ which held that a jury must make the factual finding that a death resulted from a controlled substance under § 841(b)(1) before a mandatory minimum sentence could be imposed upon a defendant for that crime.⁸⁰ The Burrage court determined that because the death enhancement increased the mandatory

70. *Id.*

71. *Id.* at 1218.

72. *Stoddard*, 892 F.3d at 1219.

73. *Id.*

74. *Id.*

75. *United States v. Law*, 528 F.3d 888 (D.C. Cir. 2008).

76. *Stoddard*, 892 F.3d at 1221 (citing *Law*, 528 F.3d at 906).

77. *Stoddard*, 892 F.3d at 1221-1222.

78. *Id.*

79. *Burrage v. United States*, 571 U.S. 204 (2014).

80. *Stoddard*, 892 F.3d at 1219 (citing *Burrage*, 571 U.S. at 210).

minimum sentence of the controlled substance charge, it is necessary for a jury to make a specific finding as to that fact.⁸¹ Similarly, the Stoddard court held that this principle was applicable to the issue “of a mandatory-minimum drug quantity” as the quantity of a controlled substance is a fact that increases a sentence.⁸² Next, the court rationalized the Burrage issue under the Supreme Court’s holding in *Alleyne v. United States*.⁸³ In support of its deviation from First Circuit precedent, the court then noted that many circuits who continue to follow the conspiracy-wide approach have begun to question whether that approach is correct in light of the Supreme Court’s decision in *Alleyne*.⁸⁴ Finally, the Stoddard court stated that their individual based approach was supported by instances of the Government urging other circuits to reconsider the use of the conspiracy-wide approach and because the Government’s “charging policy employs the individualized approach.”⁸⁵

E. Circuits that are re-examining their precedents

Recently, some circuit courts have begun to re-examine their use of a conspiracy-based approach. In *United States v. Ellis*,⁸⁶ the Tenth Circuit found that the district court committed error under the holding of *Alleyne* by sentencing the defendant “without the jury’s having found his individually attributable amount of cocaine.”⁸⁷ While the court concluded that the district court erred in the sentencing of the defendant, the court nevertheless based the sentence on the holding in the previous circuit case of *United States v. Stiger*.⁸⁸ The *Ellis* court understood *Stiger* to hold that the jury’s finding of the amount of drugs attributable to the conspiracy “sets the maximum sentence that each coconspirator could be given” but the judge has the authority to determine the minimum sentence for each defendant by making a decision as to the amount of controlled substance attributable to each individual defendant involved in the conspiracy.⁸⁹ In *Ellis*, the Tenth Circuit, thus lessened

81. *Id.*

82. *Id. Stoddard*, 892 F.3d at 1219.

83. *Id.* at 1222; *see Alleyne v. United States*, 570 U.S. 99, 108 (2013) (holding that “[f]acts that increase the mandatory minimum sentence are therefore elements that must be submitted to the jury and found beyond a reasonable doubt.”).

84. *Stoddard*, 892 F.3d at 1220.

85. *Id.* at 1222.

86. *United States v. Ellis*, 868 F.3d 1155 (10th Cir. 2017).

87. *Id.* at 1170.

88. *Id.* at 1178; *United States v. Stiger*, 413 F.3d 1185 (10th Cir. 2005).

89. *Ellis*, 868 F.3d at 1175 (quoting *United States v. Stiger*, 413 F.3d at 1192 (10th Cir. 2005)).

the precedential value of the Stiger decision.⁹⁰

The Sixth Circuit has also recently reviewed the conspiracy-wide approach in its decisions in *United States v. Gibson*⁹¹ and *United States v. Young*.⁹² In 2008, the Sixth Circuit seemingly adopted the conspiracy-wide approach in *United States v. Robinson*.⁹³ In *Robinson*, the jury was instructed to determine whether the defendant, Robinson, “knowingly joined the conspiracy” and what “quantity [of drugs] [were] involved in the conspiracy,” but not whether Robinson had knowledge of the conspiracy wide quantity of the drugs.⁹⁴ Robinson was convicted and sentenced to life.⁹⁵ The Sixth Circuit upheld the jury instructions and subsequent conviction by reasoning that the district court was unable to determine the “amount or kind of drugs for which Robinson was personally responsible” because there was no minimum or maximum sentencing range for Robinson.⁹⁶

This conspiracy-based approach taken in *Robinson* has recently been revisited in both *Young* and *Gibson*. In *United States v. Young*, the defendants Young, Duncan, Parnell, and Vance were indicted on conspiracy to “distribute and possess with intent to distribute controlled substances.”⁹⁷ On appeal, Parnell argued that the district court erred in sentencing by not allowing the jury to find the amount of controlled substance attributable to him.⁹⁸ The Sixth Circuit held that even though the Sixth Circuit had issued contradictory opinions on how the mandatory minimum should be determined, Parnell’s sentence would be the same under either approach, thus refusing to clarify the contradictory opinions.⁹⁹ The court examined the facts under the individualized approach and found that the life sentence of Parnell was appropriate because “the quantity of cocaine and crack cocaine required for conviction . . . were within the scope of the conspiracy of which Parnell was a part and was reasonably attributable to Parnell.”¹⁰⁰ The court reasoned that because Parnell obtained his drugs from the “kingpin of the conspiracy” and had knowledge that other members of the conspiracy were manufacturing and possessing the narcotics, the amount

90. *Ellis*, 868 F.3d at 1178.

91. *United States v. Gibson*, 874 F.3d 544 (6th Cir. 2017).

92. *United States v. Young*, 847 F.3d 328 (6th Cir. 2017).

93. *United States v. Robinson*, 547 F.3d 632 (6th Cir. 2008).

94. *Id.* at 637.

95. *Id.*

96. *Id.* at 640.

97. *Young*, 847 F.3d at 338.

98. *Id.* at 365.

99. *Id.* at 367.

100. *Id.*

of the entire conspiracy was reasonably attributable to him.¹⁰¹

In the Sixth Circuit case *Gibson*, the defendant, *Gibson*, appealed his sentence for conspiracy to distribute methamphetamine arguing that in his plea “he never admitted that it was reasonably foreseeable to him” that the conspiracy involved the amount of drugs prescribed under the statute.¹⁰² The district court followed the *Robinson* precedent that “the relevant quantity determination is the quantity involved in the conspiracy.”¹⁰³ Subsequently, the Sixth Circuit reheard *Gibson*’s appeal of his sentence en banc.¹⁰⁴ However, the en banc court divided evenly and upheld the district court’s sentence.¹⁰⁵

III. DISCUSSION

In sentencing an individual defendant charged with, and convicted of, conspiracy to distribute a controlled substance under 21 U.S.C. § 846, federal courts should determine the mandatory minimum sentence based upon the amount of controlled substance which is specifically attributable to each individual defendant. In determining the amount attributable to individual defendants, courts and juries must base this finding on the amount of controlled substance that was either directly attributable, or reasonably foreseeable, to each individual defendant. On this issue, circuits are divided regarding whether to continue using a conspiracy-based approach or adopt the defendant-advantageous, individualized approach. Most recently, the District of Columbia Circuit Court in *United States v. Stoddard* shifted from the previous position of using the conspiracy-based approach to using an individualized approach in determining the mandatory minimum for conspiracy to distribute drugs. In *Stoddard*, the D.C. Circuit grounded their argument on both legal precedents and persuasive reasoning. The rationale put forth by *Stoddard* is the correct interpretation courts should determine the issue of whether to use the individualized or conspiracy-wide approach when determining the mandatory minimum for conspiracy to distribute drugs.

This discussion section will first explore the rationale the D.C. Circuit used in *United States v. Stoddard* by evaluating the court’s reliance on Supreme Court and circuit court precedent when determining the mandatory minimum sentence for conspiracy to distribute a controlled

101. *Id.* at 367-68.

102. *United States v. Gibson*, 2016 U.S. App. LEXIS 21141 at *1 (6th Cir. 2016).

103. *United States v. Gibson*, 2016 U.S. App. LEXIS 21141 at *3.

104. *United States v. Gibson*, 874 F.3d 544 (6th Cir. 2017).

105. *Id.*

substance. Second, this section will discuss various policy reasons supporting the individualized approach, including various instances of the Government's support of the use of the individualized approach and the immense number of individuals in federal prison serving sentences for controlled substance crimes which carry lengthy mandatory minimums. Finally, this discussion will look at how circuits are moving toward adopting the individualized approach, including the various shifts in the Sixth Circuit that demonstrate support for the use of the individualized approach, as well as the potential for adopting that approach in the near future.

A. The Stoddard court properly analyzed Supreme Court and circuit precedent to affirm the use of the individualized approach.

A primary case the Stoddard court relied upon in their determination to utilize the individualized approach was *Alleyne v. United States*. The court properly relied on this precedent in finding for the individualized approach for multiple reasons. First, the Supreme Court in *Alleyne* held that when there is a fact that has the potential to increase the sentencing range for a defendant, that fact should be considered as an element of the crime.¹⁰⁶ The Court reasoned that because these “aggravating facts” cause a defendant to face a higher statutory penalty, a jury must find that the prosecution proved these facts beyond a reasonable doubt before it can cause a defendant to face a harsher penalty.¹⁰⁷

The legal analysis set forth in *Alleyne* provides guidance to the circuit courts on how to evaluate and decide whether to adopt the conspiracy or individualized approach when determining mandatory minimum sentences for conspiracy to distribute cases.¹⁰⁸ The holding in *Alleyne* clearly delineates that there are instances under various federal statutory penalties where the jury must make a finding of fact before the court has the ability to impose a lengthier sentence upon a defendant.¹⁰⁹ As this holding in *Alleyne* is broad, it is applicable to the elements of various federal crimes. The rationale serves as a foundation from which courts can determine what facts are, or are not, “aggravating facts” for an individual defendant and, thus, determine the appropriate sentence to be imposed.

The decision to find that circuits should follow the individualized approach is additionally bolstered by the Supreme Court's holding in

106. *Alleyne v. United States*, 570 U.S. 99, 115-116 (2013).

107. *Id.*

108. *Id.*

109. *Id.*

Burrage v. United States.¹¹⁰ When interpreting the holding of the *Burrage* case, the *Stoddard* court properly analogized the death enhancement for a conspiracy case to the type and quantity of drugs attributable to a defendant in a conspiracy case.¹¹¹ The statute that describes the base-level offenses for the drug crimes distinguishes the sentences for those offenses by both the type of drug and the quantity of said drug. In *Burrage*, the Supreme Court found that the enhancement for a death resulting from the distribution of drugs was a factor that a jury had to consider when reaching a verdict. Because *Burrage* directly advanced the principle that a jury must determine the factual finding of the offense and enhancement before a court can impose the mandatory minimum for that enhancement, the *Stoddard* court properly applied that rationale to the mandatory minimum sentence for various drug quantities.

While not expressly described as enhancements, the specific quantity and type of controlled substance as prescribed under 21 U.S.C. § 841 alters the sentence a defendant may receive for possession or distribution of a drug.¹¹² When a jury or judge makes the factual finding as to the amount and type of drug applicable to each defendant, this factual finding increases the possible sentence which the defendant may receive under § 841. In viewing this factual finding as an enhancement, it is clear that the courts are then required to follow the principle put forth in *Burrage*: the enhancement must be determined by a jury. Therefore, this enhancement standard set forth in *Burrage* is directly applicable to the imbedded enhancement of the sentence based on type and quantity of controlled substances in the drug offense statute.

Finally, the *Stoddard* court looked to its own circuit's decision in *United States v. Law*¹¹³ to support its finding to utilize the individualized approach.¹¹⁴ In *Law*, the D.C. Circuit held that when a defendant is convicted of conspiracy to distribute, the sentence must be based on the "quantity of drugs that the jury attributes to him as a reasonably foreseeable part of the conspiracy."¹¹⁵ While the *Stoddard* court acknowledged that *Law* was distinguishable from *Stoddard*, as they did not directly rule on the individualized issue in *Law*, the court did find that the *Law* decision supports the finding of the individualized

110. *Burrage v. United States*, 571 U.S. 204 (2014).

111. *United States v. Stoddard*, 892 F.3d 1203, 1222 (D.C. Cir. 2018).

112. 21 U.S.C. § 841 (LexisNexis, Lexis Advance through PL 115-385, approved 12/21/18, with a gap of PL 115-334).

113. *United States v. Law*, 528 F.3d 888 (D.C. Cir. 2008).

114. *Stoddard*, 892 F.3d at 1221-1222.

115. *Law*, 528 F.3d at 906.

approach in determining drug quantity for sentencing.¹¹⁶ The Stoddard court correctly rationalized and interpreted the Law decision in adopting the individualized approach. While the Law decision is not dispositive on the issue of how mandatory minimums should be determined for conspiracy to distribute, the fact that the court held that the jury must determine the amount of controlled substance reasonably foreseeable to the defendant as part of the conspiracy is indicative of the court desiring to sentence a defendant for the limited quantity of controlled substance of which he or she knew.

B. Policy reasons supporting the adoption of the individualized approach

One persuasive policy argument supporting the position that the federal courts should apply the individual based approach is that, in multiple cases on this issue, the Government has asserted that the individualized approach should be utilized.¹¹⁷ In the Stoddard opinion, the D.C. Circuit correctly noted, and took into consideration, the Government's support of the individualized approach. In the Government's final brief on the Stoddard appeal, it was conceded that the Government, at trial, argued that the jury should be charged with utilizing the individualized approach and make the determination of the quantity of drugs attributable to each individual defendant.¹¹⁸

Furthermore, in the Fifth Circuit's decision in *United States v. Haines*, the court also acknowledged that the Government agreed that the proper approach for determining the mandatory minimum should be based on the jury's finding as to the amount of controlled substance attributable to or reasonably foreseeable to each individual defendant.¹¹⁹ Moreover, the Government again supported the individualized approach in *United States v. Young*.¹²⁰ In *Young*, the Sixth Circuit acknowledged the Government's assertion that the Government utilizes the individualized approach when determining the appropriate charges for individuals accused of conspiracy to distribute controlled substances and other conspiracy charges.¹²¹

116. *Stoddard*, 892 F.3d at 1221-1222 (distinguishing *United States v. Law*, 528 F.3d 888, finding that *Law* dealt with whether a violation of §846 encompasses all crimes in the conspiracy that were reasonably foreseeable to the defendant.)

117. *E.g. Stoddard*, 892 F.3d at 1222; *United States v. Young*, 847 F.3d 328, 367 n.3 (6th Cir. 2017); *United States v. Haines*, 803 F.3d 713,738 (5th Cir. 2015).

118. Final Brief for Appellee at 65, *United States v. Stoddard*, 892 F.3d 1203 (D.C. Cir. 2018) (No. 15-3060).

119. *Haines*, 803 F.3d at 738.

120. *Young*, 847 F.3d at 367 n.3.

121. *Id.*

As is clear from these opinions, the Government, along with defendants, have taken the stance that an individualized approach should be utilized when determining the mandatory minimum for conspiracy to distribute a controlled substance. Because both parties find the individualized approach to be appropriate in determining the mandatory minimum sentences, the circuit courts should heed this guidance and support, and adopt the individualized approach. When both parties agree to a sentence or sentencing scheme, it is often apparent that these parties arrive at the conclusion due to the belief that it is the best policy decision and in the best interest of both parties. When the circuit courts continue to utilize the conspiracy-based approach, these courts are undermining the Government's reasoned decision of the how cases of this type should be handled. These courts should align themselves with the Government's approach that the mandatory minimum for conspiracy to distribute a controlled substance should be determined by the amount attributable to or reasonably foreseeable to the individual defendant.

A second policy reason supporting the shift toward utilizing the individualized approach is the large number of individuals in federal prison for lengthy drug sentences.¹²² In October 2017, the United States Sentencing Commission released a report based on their 2016 findings regarding the impact of mandatory minimum sentences on individuals charged and sentenced with federal drug offenses.¹²³ While it does acknowledge that “[t]he most commonly prosecuted drug offenses that carry mandatory minimum penalties are 21 U.S.C. §§ 841 and 960,” this report also discusses every drug offense that carries a mandatory minimum penalty.¹²⁴

The data collected by the U.S. Sentencing Commission demonstrates that in 2016, convictions under the conspiracy statute, 21 U.S.C. § 846, were one of the “most frequently used statutes carrying a mandatory minimum penalty.”¹²⁵ The report found that 21 U.S.C. § 846 accounted for almost 6,000, or approximately 25%, of federal drug offenders serving a mandatory minimum sentence for a controlled substance offense.¹²⁶ Additionally, most offenders, almost 50%, who are convicted of a drug offense that carries a mandatory minimum penalty are Category I offenders¹²⁷—meaning that these offenders have 0 to 1 criminal history points.¹²⁸ Therefore, these offenders are individuals

122. *See generally*, U.S. SENTENCING COMM'N, *2017 Overview*, *supra* note 5.

123. *Id.* at 2.

124. *Id.* at 10.

125. *Id.* at 15.

126. *Id.* at Table 1.

127. U.S. SENTENCING COMM'N, *2017 Overview*, *supra* note 5, Table 3.

128. U.S. SENTENCING GUIDELINES MANUAL Ch. 5, pt. A, sentencing table (U.S. SENTENCING

who have had very few, if any, prior convictions for other offenses. Additionally, when reviewing the length of the mandatory minimum sentences for drug offenders, the Commission found that “offenders who remained subject to a drug mandatory minimum penalty at sentencing” had an average sentence length of 126 months.”¹²⁹

One main distinction between individuals convicted of controlled substance offenses are their roles and functions in a “drug distribution chain.”¹³⁰ The United States Sentencing Commission has created twenty-one categories for each function in the distribution chain based on the conduct of the individual.¹³¹ The “ten most common functions”¹³² performed by individuals in a distribution chain include functions such as importer/high level supplier, organizer, manager, street-level dealer, mule, and employee.¹³³ The Sentencing Commission has defined a street-level dealer as an individual who “[d]istributes retail quantities directly to the user; sells less than 1 ounce (28 grams) quantities to any user(s).”¹³⁴ While these street-level dealers do not deal large quantities of controlled substances to users, in 2016, these individuals comprised just over 16% of mandatory minimum drug offenders, second only to courier’s at 18.6%.¹³⁵ However, these street-level dealers who were convicted and subject to mandatory minimum sentences received an average sentence of only 97 months, compared to the 186 month and the 156 month sentences of individuals who were organizers/leaders or who were managers/supervisors, respectively.¹³⁶

Based on this data provided by the United States Sentencing Commission, it is obvious that there is a great need to reduce the sentences for low-level drug offenders. Since convictions under § 846, the conspiracy statute, make up almost a quarter of controlled substance convictions carrying a mandatory minimum penalty, it is clear that the manner which the mandatory minimum is determined for that offense can have an impact on the sentences of a large number of individuals charged with federal drug crimes. Further, many individuals who are charged with drug crimes are low level members of drug conspiracies

COMM’N 2018) (Shows that as an individual obtains more criminal history points on their record, the Criminal History Category of the Sentencing Table likewise increases).

129. U.S. SENTENCING COMM’N, *2017 Overview*, *supra* note 5, at 37.

130. *Id.* at 43.

131. *Id.* (however, the “report only presents data on the ten most common functions.”).

132. *Id.*

133. *Id.* at 44.

134. U.S. SENTENCING COMM’N, *2017 Overview*, *supra* note 5, at 44.

135. *Id.* at 45 (A courier is defined as an individual who “[t]ransports or carries drugs with the assistance of a vehicle or other equipment.” *Id.* at 44).

136. *Id.* at fig. 33.

and organizations, such as street-level dealers or employees. However, these street-level dealers, who are distributing comparatively small quantities of controlled substances, still receive an average mandatory minimum sentence for a drug offense of just over eight years. This average mandatory minimum for street level dealers is only about five to seven years lower than the average mandatory minimum sentence for an organizer of a conspiracy.

These high average mandatory minimum sentences for individuals distributing small quantities of drugs show a need for courts to adopt sentencing policies that will provide lower mandatory minimums for low-level dealers. By adopting the individualized approach over the conspiracy-based approach, individuals will only be liable for the amount they actually possessed or sold, or the amount that was reasonably foreseeable or attributable to them, thus potentially making their mandatory minimum penalty lower than if they were sentenced based on the amount of drugs attributable to the entire conspiracy. Following the individual based approach would allow courts to keep individuals who served low-level functions from serving long and unjust prison sentences.

C. Multiple circuits, such as the Sixth Circuit and Tenth Circuit, should follow the guidance of Stoddard and change their standard to the individualized approach.

While many circuits have adopted the individualized approach in determining drug quantity for conspiracy to distribute,¹³⁷ multiple circuits are still adhering to precedent that embraces the conspiracy-wide approach.¹³⁸ One circuit that has recently upheld the conspiracy-based approach is the Sixth Circuit, in *United States v. Gibson and United States v. Young*. While the Sixth Circuit may have upheld the conspiracy-based approach, there are multiple indicators showing that, in the future, the Sixth Circuit may come to embrace the individualized approach.

First, in the Sixth Circuit's decision in *United States v. Gibson*, the court, upon hearing the case en banc, issued a split decision on whether the defendant's conspiracy based mandatory minimum sentence was proper and should be upheld.¹³⁹ The divided court indicates that there is

137. *E.g.*, *United States v. Pizarro*, 772 F.3d 284 (1st Cir. 2014); *United States v. Rangel*, 781 F.3d 736 (4th Cir. 2015); *United States v. Haines*, 803 F.3d 713 (5th Cir. 2015); *United States v. Banuelos*, 322 F.3d 700 (9th Cir. 2003).

138. *E.g.* *United States v. Phillips*, 349 F.3d 138 (3d Cir. 2003), *vacated on other grounds*, *Barbour v. United States*, 543 U.S. 1102 (2005); *United States v. Knight*, 342 F.3d 697 (7th Cir. 2003).

139. *United States v. Gibson*, 874 F.3d 544, 544 (6th Cir. 2017).

a possibility the court may shift away from the conspiracy-based approach and to the individualized approach in the future. This shift toward considering the utilization of the individualized approach has the possibility of occurring on similar future cases because mere months before Gibson was decided, the Sixth Circuit refused to reconcile their conflicting opinions on this issue in their decision in *United States v. Young*. Although the *Young* court refused to resolve this issue in that particular case, they found that when using either approach, all of the controlled substances in that specific conspiracy were reasonably foreseeable to the individual defendants.¹⁴⁰ While the court refused to reconcile the conflicting opinions on the quantity determination, this shows that the court might have wanted to hold open the possibility of taking a future, on-point case on this issue to utilize the individualized approach.

While the Sixth Circuit has not directly overruled or affirmed the use of the conspiracy-based approach in recent cases, the pattern jury instructions for the Sixth Circuit show a support of the individualized approach.¹⁴¹ The pattern jury instructions are drafted by a committee that is comprised of United States Attorneys, Federal Public Defenders, defense attorneys, District Court judges, and professors (the “Committee”).¹⁴² These pattern jury instructions are created by the Committee to provide guidance to the courts when instructing juries during trials.¹⁴³ These instructions are only officially approved by ruling of the Sixth Circuit Court of Appeals through “a case-by-case review,” as the instructions “should be tailored to fit the facts of each individual case.”¹⁴⁴

The pattern jury instruction for determining the amount of controlled substance states that the jury must “determine the quantity of the controlled substance involved in the conspiracy that was attributable to him as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him.”¹⁴⁵ This instruction clearly directs the jury to utilize the individualized approach in determining the drug quantity for which the defendant is responsible for in a drug conspiracy case. The aforementioned language is repeated in the subsequent subsections of the instruction for determining quantity of

140. *United States v. Young*, 847 F.3d 328, 367 (6th Cir. 2017).

141. SIXTH CIRCUIT COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, *Pattern Criminal Jury Instructions*, ch. 14.07B, http://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern_jury/pdf/crmpattjur_full_0.pdf (updated Jan. 1, 2019).

142. *Id.* at Sixth Circuit Pattern Criminal Jury Instruction Committee 2019.

143. *Id.* at intro.

144. *Id.* at intro.

145. *Id.* at Ch. 14.07B(1).

a controlled substance. The subsequent two sections, 14.07(B)(2) and (3), of the instruction repeat the phrase the “amount of [name of controlled substance] was attributable to the defendant as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him.”¹⁴⁶

In its commentary to this jury instruction, the Committee addressed the inconsistencies in the Sixth Circuit’s determination of the mandatory minimum for conspiracy to distribute drugs and other drug conspiracy offenses.¹⁴⁷ The Committee found that the determination of the mandatory minimum should be bound by the older precedent of *United States v. Swiney*,¹⁴⁸ rather than the recent decisions of cases, such as *Gibson and Young*.¹⁴⁹ In *United States v. Swiney*, the Sixth Circuit held that the mandatory minimum sentence for an individual under 21 U.S.C. §§ 841 and 846 should be determined based on the reasonably foreseeable analysis as set forth in U.S.S.G. §1B1.3(a)(1)(B).¹⁵⁰ The *Swiney* court reasoned that the “Sentencing Guidelines have modified the Pinkerton theory” of conspirator liability thus making that case law consistent with the goal of giving sentences based on the conduct done by the individual defendant.¹⁵¹ Based on the precedent of the *Swiney* decision, the Committee amended the pattern jury instruction to “delete the phrase ‘involved in the conspiracy as a whole’ throughout the text.”¹⁵² Further, the Committee went on to create special verdict forms which also omitted language regarding the conspiracy-wide approach, and replaced that language with a charge to the jury to utilize the individualized approach and determine the quantity of the drugs attributable to or reasonably foreseeable to the defendant.¹⁵³

By acknowledging what the Committee believes to be the proper precedent for drug conspiracy sentencing and by changing the language of the pattern jury instructions, the Committee is asserting to the Sixth Circuit that the court should clearly adopt the individualized approach. The amendments to this section of the jury instructions demonstrates a

146. SIXTH CIRCUIT COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 142, ch. 14.07B(2); *Id.* at ch. 14.07(B)(3) (emphasis added).

147. SIXTH CIRCUIT COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 142, at ch. 14.07B, committee cmt. ¶ 2.

148. *United States v. Swiney*, 203 F.3d 397 (6th Cir. 2000).

149. SIXTH CIRCUIT COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 142, at ch. 14.07B, committee cmt. ¶ 2.

150. *Id.* at 405-406.

151. *Id.* at 404.

152. SIXTH CIRCUIT COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 142, ch. 14.07B, committee cmt. ¶ 2.

153. *Id.*; *See. e.g.* SIXTH CIRCUIT COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 142, Special Verdict Form §846, Form 14.07B-1.

clear desire by the legal community to turn away from the conspiracy-based approach to the individualized approach. While these pattern jury instructions are not binding and are used only as a guide for the district courts, these amendments demonstrate yet another indicator that there may be a change to the Sixth Circuit's jurisprudence on this issue.

IV. CONCLUSION

In light of the Stoddard decision and weighty policy objectives, it is clear that all circuit courts use the amount of controlled substance attributable to or reasonably foreseeable to a defendant as the standard when determining the mandatory minimum sentence for a conspiracy to distribute drugs charge. The decision in Stoddard provides a clear and correct analysis of the precedent. Further, the United States Sentencing Committee research demonstrates that mandatory minimum sentences are lengthy for low-level offenders in drug conspiracies and that conspiracy charges account for almost a quarter of drug offenses with mandatory minimum sentences. Therefore, to combat high prison populations, to provide just sentences for the crimes an individual actually committed, and to align with Government charging decisions in conspiracy to distribute cases, circuit courts should adopt the individualized approach for determining the mandatory minimum for conspiracy to distribute a controlled substance.

Additionally, the Sixth Circuit, and other circuits questioning the proper approach to determining the mandatory minimum sentence, should take note of the shifting opinions of the legal community and apply the individualized approach in their opinions. Based on the clear support of the legal community and sound legal rationale for utilizing the individualized approach, the Sixth Circuit should follow the Stoddard court by reassessing a case on this issue and finding that the mandatory minimum for conspiracy to distribute drugs should be determined based on the amount of drugs attributable to or reasonably foreseeable to the individual defendant.