COMMENT

UNEQUAL JUSTICE: WHY FEDERAL COURTS SHOULD ADOPT THE INDIVIDUALIZED APPROACH TO SENTENCING DEFENDANTS CONVICTED OF DRUG CONSPIRACY

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For several decades, the Federal Circuit Courts have been split about how to sentence defendants convicted of drug conspiracy under 21 U.S.C. §§ 846 and 841. While some circuits hold defendants strictly liable for all the drugs dealt by all members of the conspiracy, other circuits take a fundamentally different approach: they hold individuals accountable for the amount and type of drugs reasonably foreseeable to the individual. Until recently, the Federal Circuit Courts were trending toward the individualized sentencing approach. However, in 2021, the en banc Ninth Circuit Court reversed trend, and joined three circuits holding defendants strictly liable for drug conspiracy. This Comment argues that the plain language of the federal statutes resolves this issue in favor of the individualized approach. Further, it argues that under key U.S. Supreme Court decisions and fundamental principles of common law conspiracy, all federal courts should adopt the individualized approach to sentencing drug conspirators.

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TABLE OF CONTENTS

INTRODUCTION

The Federal Circuit Courts are split about how to interpret the federal drug conspiracy statute, 21 U.S.C. § 846,[1] and the penalty provisions, 21 U.S.C. § 841.[2] Specifically, the circuits disagree about whether an individual conspirator's lack of knowledge or intent with respect to the overall drug operation should factor into that conspirator's prison sentence. This situation has and will continue to create jurisdictional inequities in sentencing for the same federal offense.

1. 21 U.S.C. § 846.
2. *Id.* § 841.

United States v. Stoddard[3] provides an example of the human cost of this circuit split. In 2012, the Federal Bureau of Investigation and the District of Columbia's Metropolitan Police Department began a surveillance operation targeting notorious drug dealer Jermaine Washington.[4] They "wiretapped" Washington's cell phone for sixty days and recorded several calls to a man named Calvin Stoddard.[5] Police also observed Washington meet with Stoddard on one occasion.[6] Following a search of Washington's apartment that turned up 20.1 grams of heroin, a scale, and $17,850 in cash, police arrested Washington, and he agreed to cooperate in exchange for leniency.[7] Washington would later become the government's star witness in a joint trial against Stoddard and two other codefendants.[8]

The government's evidence proffered at trial against Stoddard did not include the amount of heroin Stoddard was involved with.[9] The strongest proof of Stoddard's role in the drug conspiracy was Washington's testimony, clarifying what he and Stoddard were talking about during two recorded phone conversations.[10] Stoddard said, "'[i]nstead of trying to grab for the extra two, I probably need just to leave that, you know, just keep it,'" which Washington claimed was a reference to the cut of heroin Stoddard was going to purchase.[11] During another conversation, Washington told Stoddard, "'[e]verybody's clientele is different,'" which Washington explained was a reference to buyers' preferences.[12] Later in that same conversation, Stoddard told Washington that he "'learn[ed] a lot'" from Washington.[13]

Washington's testimony was problematic, however, due to his bias and propensity to lie. Not only did Washington get a better deal in exchange for testifying against Stoddard, but on the record Washington outright stated, "[i]f somebody needed a false statement,

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3. 892 F.3d 1203 (D.C. Cir. 2018).
4. *Id.* at 1208.
5. *Id.*
6. *Id.*
7. *See id.* (noting that Washington pleaded guilty to drug conspiracy, and conspiracy to commit wire fraud and money-laundering).
8. *Id.* at 1209.
9. *See id.* at 1209–10 (discussing the government's evidence against Stoddard).
10. *Id.* at 1209.
11. *Id.*
12. *Id.*
13. *Id.*

and they was trying to pay some money for it, I sell it to them."[14] Washington also repeatedly indicated he did "not remember" anything not written down.[15] At one point, Washington had to be removed from the courtroom due to an emotional outburst in response to questioning.[16] All three defendants moved for a mistrial but were denied.[17] Ultimately, a jury convicted Stoddard and one of his codefendants for their involvement in the drug conspiracy, which included a grand total of 100 grams of heroin.[18] However, instead of sentencing Stoddard for an indefinite amount of heroin, which the proffered evidence supported, and which constitutes a crime that carries no mandatory minimum sentence, the U.S. District Court opted to hold Stoddard strictly liable for the higher crime of 100 grams of heroin, notwithstanding Stoddard's lack of knowledge or any responsibility for that amount of drugs.[19] Distributing 100 grams of heroin carries a mandatory minimum sentence of five years imprisonment.[20]

In summary, the government only had to prove Stoddard was responsible for "some" amount of heroin in order for Stoddard to be punished for all 100 grams dealt by all other members of the organization.[21] Thus, based on minimal evidence, Stoddard received a five-year mandatory minimum sentence plus four years of supervised release.[22]

The strict liability approach to sentencing drug conspirators, which federal courts refer to as the conspiracy-wide approach, is fundamentally flawed.[23] As the Tenth Circuit has noted, holding a small-time dealer responsible for all the drugs of a massive cartel

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14. *Id.* at 1208, 1210.
15. *Id.* at 1210.
16. *Id.*
17. *Id.*
18. *Id.* at 1207–08.
19. *Id.* at 1210–11; 21 U.S.C. §§ 846,841(b)(1)(B)–(C).
20. § 841(b)(1)(B). *See generally* Kevin Jon Heller, Note, *Whatever Happened to Proof Beyond a Reasonable Doubt? Of Drug Conspiracies, Overt Acts, and* United States v. Shabani, 49 STAN. L. REV. 111 (1996) (arguing that the elimination of the overt act requirement from drug conspiracy cases encourages the government to try to convict defendants in drug conspiracy cases solely through coconspirator testimony and hearsay).
21. *Stoddard*, 892 F.3d at 1211.
22. *Id.*; §§ 846, 841(b)(1)(B).
23. *See* United States v. Martinez, 987 F.2d 920, 926 (2d Cir. 1993) ("We find that Congress did not intend . . . strict liability . . . [for] conspiracy.").

"pervert[s] the concept of conspiracy."[24] In Stoddard's case, as in other cases, even the prosecutors voiced their opposition to the conspiracy-wide sentencing approach.[25] Fortunately for Stoddard, the U.S. Court of Appeals for the D.C. Circuit vacated his sentence, holding that "[i]t is a core principle of conspiratorial liability that a co-conspirator may be held liable for acts committed by co-conspirators during the course of the conspiracy only when those acts are 'in furtherance of the conspiracy' and 'reasonably foresee[able]' to the defendant."[26]

The D.C. Circuit's holding in *Stoddard* encapsulates the individualized sentencing approach. It bounds conspiratorial liability within limits that the U.S. Supreme Court articulated in *Pinkerton v. United States*.[27] In announcing its decision to adopt the individualized approach, the D.C. Circuit joined seven other circuits, including the Second Circuit, which has provided the most comprehensive analysis of the federal statutes governing this issue in *United States v. Martinez*.[28] At the time the D.C. Circuit decided *Stoddard* in 2018, only three circuits were following the conspiracy-wide sentencing approach, and of those three, the Sixth Circuit had second-guessed its own logic repeatedly.[29] In 2021, however, the Ninth Circuit overruled its 1993 precedent, and abruptly switched to the conspiracy-wide sentencing approach.[30] In *United States v. Collazo*,[31] the Ninth Circuit endorsed the Sixth Circuit's reasoning despite the Sixth Circuit's acknowledgement

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24. United States v. Ellis, 868 F.3d 1155, 1176 (10th Cir. 2017).

25. *See Stoddard*, 892 F.3d at 1210 (noting that the Government agreed the "the District Court should sentence the defendants based on an indeterminate quantity of heroin [which carries no mandatory minimum sentence], not the [conspiracy-wide amount of] 100 grams"); *see also* United States v. Haines, 803 F.3d 713, 738 (5th Cir. 2015) ("[T]he relevant quantity should be the quantity attributable to each individual defendant.").

26. *Stoddard*, 892 F.3d at 1221 (quoting Pinkerton v. United States, 328 U.S. 640, 647–48 (1946)).

27. 328 U.S. 640, 647–48 (1946).

28. 987 F.2d 920, 926 (2d Cir. 1993); *accord Ellis*, 868 F.3d at 1159; *Haines*, 803 F.3d at 719; United States v. Pizarro, 772 F.3d 284, 287 (1st Cir. 2014); United States v. Littrell, 439 F.3d 875, 878 (8th Cir. 2006); United States v. Collins, 415 F.3d 304, 306 (4th Cir. 2005); United States v. Becerra, 992 F.2d 960, 966 (9th Cir. 1993), *overruled by* United States v. Collazo, 984 F.3d 1308, 1335 (9th Cir. 2021) (en banc).

29. *See, e.g.*, United States v. Gibson, 2016 WL 6839156, at *2 (6th Cir. Nov. 21, 2016) (recognizing that its decision is unjust and "do[es] not serve" Congress's purpose).

30. *See Collazo*, 984 F.3d at 1335–36 (holding that the court previously failed to recognize that the *Pinkerton* rule of coconspirator liability does not apply to a § 846 offense).

31. 984 F.3d 1308, 1335 (9th Cir. 2021) (en banc).

that its approach "may appear unjust" and does not "serve the drug statute's underlying purpose of more severely punishing larger-amount drug dealers."[32] This Comment will explore the reasons why the Ninth Circuit abruptly switched to the conspiracy-wide approach and how its reasoning is flawed.[33]

Drug conspiracy is among the most commonly charged crimes in the federal system, and prosecutors have enormous discretion in terms of who and what to charge.[34] In 2016 alone, more than 5,900 defendants were convicted on federal drug conspiracy charges and received mandatory minimum sentences.[35] This Comment will demonstrate why defendants convicted of drug conspiracy under 21 U.S.C. §§ 846 and 841 should be punished only for the quantity of drugs known or reasonably foreseeable to the individual defendant. It will argue that under precedent established in *Pinkerton v. United States*,[36] *Apprendi v. New Jersey*,[37] *Alleyne v. United States*,[38] and other fundamental principles of common law conspiracy, all federal courts should follow the individualized approach to sentencing drug conspirators. Unlike the conspiracy-wide approach, the individualized approach reduces the risk a defendant will be imprisoned for the crimes of others to which the defendant did not contribute, never foresaw, and indeed never even contemplated.[39]

Part I of this Comment provides a background on the history and present-day use of common law conspiracy.[40] Part I then examines the

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32. *Gibson*, 2016 WL 6839156, at *2 (noting it is bound by the precedent set in United States v. Robinson, 547 F.3d 632, 638 (6th Cir. 2008) unless and until the en banc court, the Supreme Court, or the Congress takes corrective action).

33. *See infra* Sections II.A, II.B.

34. *See* U.S. SENT'G COMM'N, OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 35 (2017) (noting the most frequently reported conviction of an offense carrying a mandatory minimum was federal drug conspiracy); *see also* Letter from Sen. Richard Blumenthal et al. to Att'y Gen. Merrick Garland, U.S. Dep't of Justice (Feb. 16, 2022), https://www.blumenthal.senate.gov/imo/media/doc/0216.22 garlandsacklerinvestigation.pdf [https://perma.cc/8RNJ-QCLB] (urging the Department of Justice to investigate Sackler family members for their role in fueling America's opioid crisis).

35. U.S. SENT'G COMM'N, *supra* note 34.

36. 328 U.S. 640, 647–48 (1946).

37. 530 U.S. 466, 490 (2000).

38. 570 U.S. 99, 103 (2013).

39. *See* United States v. Martinez, 987 F.2d 920, 926 (2d Cir. 1993) (holding that "Congress did not intend . . . strict liability . . . [for] conspiracy").

40. *See infra* Section I.A.

advent of federal drug laws in the 1970s, and the evolution of the federal drug conspiracy statute.[41] Finally, Part I discusses key judicial decisions regarding the appropriate approach to sentencing defendants convicted of drug conspiracy, with a particular focus on the Ninth Circuit's recent switch to the conspiracy-wide approach.[42]

Part II of this Comment discusses why the individualized approach to sentencing defendants convicted of drug conspiracy is the correct approach. First, this section demonstrates that the Second Circuit's 1993 analysis of the federal drug conspiracy statute is superior to the Ninth Circuit's 2021 analysis of the same law because the Second Circuit comprehends Congress's rationale for choosing the words it set forth in 21 U.S.C. § 846.[43] Second, Part II discusses why the Ninth Circuit's rationale is a flawed interpretation of U.S. Supreme Court precedent.[44] Finally, Part II argues for consistency of approach and equitable sentencing, and concludes that all federal circuits should follow the individualized approach when sentencing defendants convicted of drug conspiracy under 21 U.S.C. §§ 846 and 841.

I. BACKGROUND

The debate over the correct approach to sentencing defendants convicted on federal drug conspiracy charges has been ongoing since the early 1990s.[45] To understand the current landscape, one must first understand the history. This Comment begins by reviewing the origins of the crime of conspiracy, the federal drug laws, and the judicial decisions that shape the debate. Section I.A explores the origins of common law conspiracy and its present-day application. Section I.B examines the Controlled Substances Act and the Federal Sentencing Guidelines that are now used solely at the courts' discretion. Section I.C discusses key Supreme Court sentencing decisions and then delves into the current split among the federal appellate courts.

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41. *See infra* Section I.B.

42. *See infra* Section I.C.

43. *See Martinez*, 987 F.2d at 924 (discussing the meaning of § 846); United States v. Collazo, 984 F.3d 1308, 1329 (9th Cir. 2021) (en banc).

44. *Collazo*, 984 F.3d at 1329.

45. *See Martinez*, 987 F.2d at 924 (noting that only the Eighth Circuit had addressed the issue and it, too, rejected the conspiracy-wide sentencing approach in *United States v. Jones*, 965 F.2d 1507, 1516–17 (8th Cir. 1992)).

A. Common Law Conspiracy

Conspiracy is the doctrine that addresses the special dangers associated with group criminality.[46] Dating back to the early common law, English legal practitioners perceived that the incomplete or inchoate agreement of two or more people to carry out a crime was itself a social harm worthy of punishment.[47] In theory, when two or more people work together toward a common criminal goal, the world becomes more dangerous because the likelihood of a crime occurring increases.[48] Thus, the prospective "victim" of conspiracy is the entire community.[49]

1. History of conspiracy beginning with its ancient roots and ending with Pinkerton

Conspiracy is older than the common law. In ancient times, the Romans used "conspiracy" to refer to collective oath-taking and plots against the State.[50] Then in the year 847, the Roman Catholic Council of Mainz promised to excommunicate those "rebellious" conspirators who swore oaths of allegiance against the Church and State.[51] At the dawn of the fourteenth century in England, the king had only just begun to encourage oral complaints against his officials.[52] "Concert[ed]" false accusations quickly became a problem and threatened to undermine the nascent system of justice.[53] Thus, in the year 1305, "conspiracy to corrupt civil processes [and] . . . legal and administrative procedures" was the first crime Parliament defined via statute.[54] The 1305 Ordinance of Conspirators precluded known

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46. Callanan v. United States, 364 U.S. 587, 593–94 (1961).

47. Alan Harding, *The Origins of the Crime of Conspiracy*, 33 TRANSACTIONS ROYAL HIST. SOC'Y 89, 106 (1983) ("Conspiracy was originally the crime against the whole community represented by the mere existence of sworn confederacies working in the private interest.").

48. *See* Krulewitch v. United States, 336 U.S. 440, 448–49 (1949) (Jackson, J., concurring) (explaining that conspiracy has a place in modern criminal law because to join "the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone" wolf).

49. Harding, *supra* note 47, at 90.

50. *Id.* at 92.

51. *Id.* at 93.

52. *Id.* at 94.

53. *Id.*

54. *Id.* at 96-97.

conspirators from lodging further complaints against state officials.[55] It treated conspirators as misdemeanants due to the "obvious inappropriateness" of the severe penalties then inflicted upon convicted felons and traitors.[56] Over the next several centuries, Parliament continued to redefine conspiracy by statute, while the original "conspiracy . . . to corrupt legal process" became the law of perjury.[57]

By the end of the eighteenth century in England, conspiracy had evolved into an offense separate from any underlying crime.[58] It was typically punished by a fixed term without regard for the seriousness of the offense the conspirators had agreed to commit.[59] Indeed, common law conspiracy did not limit the object of agreement to crimes.[60] In the earliest conspiracy cases in the United States, individuals could be criminally responsible for conspiring to do things that were simply against public policy, such as agreeing to bargain for wages as a group.[61]

Vicarious criminal liability, which is holding one person responsible for the crimes of another, existed at common law in felony murder cases.[62] However, vicarious criminal liability was not widely recognized in the context of conspiracy until 1946, when the Supreme Court decided *Pinkerton v. United States*.[63] The case involved brothers, Walter and Daniel Pinkerton, who lived two hundred yards from each other on Daniel's farm, and together ran an illicit whiskey business.[64] A jury convicted both men of conspiracy to violate the tax code and many

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55. *Id.* at 97, 108. That same year, 1305, the Ordinance of Trailbastons marked a "watershed" moment in criminal law because it conceived the idea that certain "enormous trespasses" were crimes against the State, and thus punishable "at the king's suit alone." *Id.* at 107–08.

56. *Id.* at 108.

57. *Id.* at 91, 101.

58. *Id.* at 100.

59. *Id.* Today, the general federal conspiracy statute carries a five-year maximum penalty regardless of the scope or object of the conspiracy. 18 U.S.C. § 371.

60. *See* People v. Fisher, 14 Wend. 9, 19 (N.Y. 1835) (finding that union members who organized to raise wages and refused to work were guilty of conspiracy against trade and commerce).

61. *Id.* at 16, 18–19.

62. *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 97 (2004) (examining a 1786 felony murder case and concluding that at common law, vicarious criminal responsibility was highly constrained).

63. 328 U.S. 640, 643 (1946).

64. *Id.* at 641.

substantive counts of tax evasion.[65] However, the government proffered "no evidence to show that Daniel participated directly in the commission of the substantive offenses" or even knew of their commission.[66] Daniel, in fact, was already serving time in prison when Walter committed some of the substantive crimes.[67]

In its landmark ruling, the U.S. Supreme Court rejected Daniel's argument that he could not be held liable for the crimes of his brother because he did not "aid, abet, counsel, command, induce, or procure" their commission.[68] Indeed, Daniel did not even know of their commission.[69] In a short, two-paragraph discussion, Justice Douglas, writing for the majority, based the analysis on a rule articulated in 1910: in a criminal conspiracy, "an overt act of one partner may be the act of all without any new agreement specifically directed to that act."[70] Then, in the final paragraph of the opinion, Justice Douglas announced the new rule of conspiratorial liability.[71] Under *Pinkerton*, a defendant may be liable for the crimes of co-conspirators that were 1) within the scope of the unlawful agreement, 2) reasonably foreseeable, and 3) undertaken in furtherance of the conspiracy.[72]

Academics "almost universally condemned" the Court's decision to hold people criminally responsible for the acts of others in this manner, and in 1962, the framers of the Model Penal Code outright rejected so-called *Pinkerton* liability.[73] They agreed with the dissenting Justices in Pinkerton, who wrote that the decision "is without precedent here and is a dangerous precedent to establish."[74] While the Court likely did not intend for the sweeping *Pinkerton* liability that

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65. *Id.*

66. *Id.* at 645.

67. *Id.* at 648 (Rutledge, J., dissenting).

68. *See id.* at 645–47 (majority opinion) (abrogating United States v. Sall, 116 F.2d 745, 747–48 (3d Cir. 1940) and the notion that only those who directly commit a crime or who "aid, abet, counsel, command, induce, or procure" a crime can be punished for the substantive offense).

69. *Id.* at 648.

70. *Id.* at 646–47 (quoting United States v. Kissel, 218 U.S. 601, 608 (1910)).

71. *Id.* at 647–48.

72. *Id.*

73. Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of* Pinkerton, 57 AM. U. L. REV. 585, 597 (2008); *see also* MODEL PENAL CODE § 2.06 cmt. at 307 (Am. L. Inst. 1985) (recognizing that the law "lose[s] all sense of just proportion if simply because of the conspiracy itself each [conspirator is] held accountable for thousands of additional offenses of which he was completely unaware and which he did not influence at all").

74. *Pinkerton*, 328 U.S. at 648 (Rutledge, J., dissenting).

exists today, its decision would set the stage for the government to imprison hundreds of thousands of Americans during the "War on Drugs," beginning in the 1970s.[75]

2. Present-day use of common law conspiracy

Today, conspiracy charges remain a powerful weapon in the government's arsenal. Conspiracy enables law enforcement to intervene in the nascent stage of the criminal process, and to cast a wide net to prevent criminal organizations from accomplishing their objectives.[76] Additionally, when prevention fails, *Pinkerton* liability allows the government to hold an entire group accountable for both substantive offenses and conspiracy to commit them.[77]

Conspiracy charges afford prosecutors many special advantages. The first is flexible choice of venue since prosecutors may file charges in any jurisdiction in which any member of the conspiracy committed an act in furtherance thereof.[78] Second, prosecutors may try co-conspirators jointly, thus making it difficult for jurors not to attribute guilt by association.[79] Third, prosecutors may benefit from the co-conspirator exception to the hearsay rule, which allows hearsay statements of co-conspirators to be admitted as substantive evidence so long as the statements were made during and in furtherance of the conspiracy.[80] Fourth, prosecutors can hold conspirators responsible for the crimes of their co-conspirators even with minimal evidence directly linking them to those crimes.[81] Not surprisingly, given the aforementioned prosecutorial advantages and widespread application

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75. Kreit, *supra* note 73, at 594, 598.

76. Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, WM. & MARY L. SCH. FAC. PUBL'NS, 925, 929 (1977).

77. *See Pinkerton*, 328 U.S. at 643 (noting that the Court has long recognized the substantive offense and conspiracy to commit it as separate and distinct offenses).

78. 18 U.S.C. § 3237.

79. Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring) ("A co-defendant in a conspiracy trial occupies an uneasy seat.").

80. FED. R. EVID. 801(d)(2)(E); *see also* Bourjaily v. United States, 483 U.S. 171, 183–84 (1987) (holding that so long as a co-conspirator's statement meets the requirements of Rule 801(d)(2)(E) by preponderance of the evidence, the Confrontation Clause is satisfied, and the hearsay is admissible).

81. *See, e.g.*, United States v. Mothersill, 87 F.3d 1214, 1216, 1219 (11th Cir. 1996) (holding members of a violent drug ring responsible for the murder of a State Trooper despite them having no knowledge or involvement in the bombing operation that killed him). In reaching its decision, the Circuit Court relied on its reasoning in United States v. Alvarez, 755 F.2d 830, 850 (11th Cir. 1985), which expanded *Pinkerton* liability to include "originally unintended" substantive crimes. *Mothersill*, 87 F.3d at 1218.

to various underlying crimes, the doctrine of conspiracy remains controversial.[82]

Furthermore, the crime of conspiracy may be the closest our judicial system comes to punishing people for their thoughts or intentions. It is a crime that is "predominantly mental."[83] Since "the essence" of conspiracy is agreement, and agreement is simply a meeting of the minds, often the contours of a criminal agreement can only be inferred from the substantive crime(s) that eventually result.[84] In a case such as *Pinkerton*, where the group was only two brothers living "a short distance from each other," the inferences are relatively simple.[85] But as the size, breadth, and compartmentalization of criminal enterprises increase, inferences as to the scope of a defendant's agreement become less reliable.[86] Such inferences may also become more susceptible to implicit biases.[87] While some courts recognize that not all members of criminal organizations are similarly situated in terms of knowledge or goals, other courts have found that defendants "may be convicted of conspiracy with little or no knowledge of the entire breadth of the criminal enterprise."[88]

Despite the aforementioned prosecutorial advantages, the government still bears the burden of proving all the criminal elements. When bringing a conspiracy charge, the government must prove beyond reasonable doubt that a defendant intended to enter a

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82. *See* Marcus, *supra* note 76, at 926 (noting that the sheer volume of important Supreme Court cases and "widespread assumption" that prosecutors use conspiracy to fight serious crimes makes the doctrine highly controversial).

83. United States v. Shabani, 513 U.S. 10, 16 (1994).

84. Ianelli v. United States, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act."); *see Developments in the Law—Criminal Conspiracy*, *supra* note 76, at 984 (noting that because conspirators tend to operate secretly, the contours of the agreement typically are not subject to direct proof but rest on inferences).

85. *See* Pinkerton v. United States, 328 U.S. 640, 641, 647 (1946) ("The unlawful agreement contemplated *precisely* what was done.") (emphasis added).

86. *See Developments in the Law—Criminal Conspiracy*, *supra* note 76, at 984 (discussing how prosecutors rely on circumstantial evidence in conspiracy cases due to the secret nature of criminal agreements).

87. *See generally* Emily V. Shaw, Mona Lynch, Sofia Laguna & Steven J. Frenda, *Race, Witness Credibility, and Jury Deliberation in a Simulated Drug Trafficking Trial*, 45 L. & HUM. BEHAV. 215 (2021).

88. United States v. Burgos, 94 F.3d 849, 858 (4th Cir. 1996). *But see* United States v. Ellis, 868 F.3d 1155, 1176, 1181 (10th Cir. 2017) (reversing Ellis's sentence because the Court did not believe Ellis "was integral to the vast conspiracy," but was a small-time dealer, and the Mexican cartel that supplied him was importing hundreds of kilograms of cocaine into Kansas City).

criminal agreement.[89] The government also must prove that a defendant intended the underlying, substantive crime to occur.[90] The mens rea requirement of conspiracy, therefore, may be higher than the mens rea of the underlying substantive crime.[91] For example, if Sue and another person set a building on fire, but did not intend to burn it down, they may be guilty of arson but not conspiracy to commit arson. In order for Sue and the other person to be guilty of conspiracy to commit arson, they must have specifically intended to burn down the building. Therefore, specific intent acts as a safeguard against otherwise unlimited conspiratorial liability for crimes that may eventuate.[92] Additionally, in many jurisdictions, such as Washington D.C., conspiracy requires proof of an overt act in furtherance of the plan.[93]

In *United States v. Feola*,[94] the Supreme Court addressed the fundamentally different question of whether a conspiracy to assault a federal officer requires knowledge that the intended victim is a federal officer.[95] The facts were that four men conspired and then assaulted an individual who turned out to be an undercover federal officer, triggering federal jurisdiction and a higher penalty.[96] The Supreme Court held that the conspirators were not required to know their victim worked for the federal government to be guilty of conspiracy and subject to the higher penalty.[97] The Court explained that the relevant question is whether the acts agreed upon by the conspirators were legally different from the acts performed solely due to their unintended criminal consequences.[98] In *Feola*, the answer was yes.[99] Much more recently, in *Ocasio v. United States*,[100] the Supreme Court succinctly summarized common law conspiracy's specific intent

89. Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 636 (1941) ("That a specific intent must be proved is clear.").

90. *Id.*; *see also* Ocasio v. United States, 578 U.S. 282, 288 (2016).

91. Harno, *supra* note 89, at 635.

92. *See id.* at 636.

93. *See, e.g.*, D.C. Code § 22-1805a(b) (2013) ("No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators pursuant to the conspiracy and to effect its purpose.").

94. 420 U.S. 671 (1975), *superseded in part by statute*, 18 U.S.C. § 111.

95. *Id.* at 672–73.

96. *Id.* at 675.

97. *Id.* at 696.

98. *Id.* at 692–93.

99. *Id.* at 696.

100. 578 U.S. 282 (2016).

requirement: "[E]ach conspirator must have specifically intended that *some conspirator* commit each element of the substantive offense."[101]

In summary, conspiracy is a crime that is "predominantly mental."[102] It requires 1) an agreement between at least two people to commit a crime, and 2) an intent that some member of the group commit each element of that crime.[103] Under *Pinkerton*, once a conspiracy is established, a defendant is liable for the substantive crimes committed by co-conspirators as long as the crimes were 1) within the scope 2) reasonably foreseeable and 3) in furtherance of the conspiracy.[104] Finally, prosecutors have special advantages when it comes to trying conspiracy cases, including joint trials, where inferences of guilt by association may work in their favor, and a flexible choice of venue.[105] Prosecutors rarely invoked *Pinkerton* liability until the 1970s.[106] Then they began applying it with increasing frequency in the context of drug crimes, which are *malum prohibitum* versus *malum in se*.[107]

B. The Federal Drug Laws and the Federal Sentencing Guidelines

The federal drug laws date back to the Nixon era. Having successfully campaigned on law-and-order promises, in 1969, President Nixon announced a new initiative: a comprehensive measure to combat dangerous drugs at the federal level by combining all existing federal laws into one new statute.[108] As it turns out, the Nixon

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101. *Id.* at 292.

102. United States v. Shabani, 513 U.S. 10, 16 (1994).

103. *Ocasio*, 578 U.S. at 292.

104. Pinkerton v. United States, 328 U.S. 640, 647–48 (1946).

105. Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring) ("A co-defendant in a conspiracy trial occupies an uneasy seat."); 18 U.S.C. § 3237.

106. Jon May, Pinkerton v. United States *Revisited: A Defense of Accomplice Liability*, 8 NOVA L.J. 21, 21 (1983).

107. *Id.* at 23. *Malum prohibitum* is Latin for "prohibited evil" and refers to a crime that is not necessarily immoral but is prohibited by statute, whereas *malum in se* means "evil in itself" and is used for inherently immoral crimes, such as murder, arson, or rape. BLACK'S LAW DICTIONARY (11th ed. 2019). Drugs are *malum prohibitum*. *See* Inge Fryklund, *On Drugs and Democracy*, INST. POL'Y STUD. (Aug. 6, 2012), https://ips-dc.org/on_drugs_and_democracy [https://perma.cc/TY3P-GCSS] (noting that during the era of Prohibition (1920–1933), alcohol was *malum prohibitum*, and then went back to being regulated, traded, and taxed like all other products).

108. Richard Nixon, *Special Message to the Congress on Control of Narcotics and Dangerous Drugs*, THE AM. PRESIDENCY PROJECT (July 14, 1969), https://www.presidency.ucsb.edu/documents/special-message-the-congress-control-narcotics-and-dangerous-drugs [https://perma.cc/ZNR4-27P9].

Administration's intentions were anything but pure.[109] A body of reports, research, and scholarship has shined a light on the racist underpinnings of the "War on Drugs" and the Comprehensive Drug Abuse Prevention and Control Act of 1970.[110] In the past fifteen years, Congress has made some progress toward reforming these laws and removing some disparities.[111] But vast disparities remain, and the damage to communities has been substantial.[112] The next Section will begin by examining the substantive offenses, then the federal drug conspiracy statute, before moving on to the U.S. Sentencing Commission's Federal Guidelines.

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109. *See generally* DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE (1996) (discussing the racist motives that fueled the War on Drugs, resulting in a system of mass incarceration that still exists today).

110. *See id.* at 13 (Nixon's Chief of Staff H.R. Haldeman contemporaneously wrote in his diary that "[President Nixon] emphasized that you have to face the fact that the whole problem is really the [B]lack[ ] [people]. The key is to devise a system that recognizes this while not appearing to."); Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAG., Apr. 2016, at 24 (responding to an interview question in 1994, Nixon's former domestic policy advisor John Ehrlichman stated, "We knew we couldn't make it illegal to be either against the [Vietnam] [W]ar or [B]lack, but by getting the public to associate the hippies with marijuana and [B]lack[ ] [people] with heroin and then criminalizing both heavily we could disrupt those communities."); United States v. Armstrong, 517 U.S. 456, 478 (1996) (Stevens, J., dissenting) (excoriating Congress for its Anti-Drug Abuse Act of 1986 and subsequent legislation which treated one gram of crack the same as 100 grams of powder cocaine, grossly disadvantaging Black people).

111. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (reducing the disparity in crack cocaine versus powder cocaine sentencing amounts from 100:1 to 18:1); *see also* First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194 (applying the Fair Sentencing Act retroactively to those who were sentenced under the former, 100:1 regime).

112. DRUG POLICY ALLIANCE, RETHINKING THE "DRUG DEALER" 2 (2019), https://drugpolicy.org/sites/default/files/dpa-rethinking-the-drug-dealer_0.pdf [https://perma.cc/KP6B-3JGS] ("We did the experiment. In 1980, we had about 15,000 people behind bars for drug dealing. And now we have about 450,000 people behind bars for drug dealing. And the prices of all major drugs are down dramatically. So if the question is do longer sentences lead to higher drug prices and therefore less drug consumption, the answer is no.") (quoting German Lopez, *Read: Jeff Session's Memo Asking Federal Prosecutors to Seek the Death Penalty for Drug Traffickers*, VOX (Mar. 21, 2018, 12:40 PM), https://www.vox.com/policy-and-politics/2018/3/21/17147580/trump-sessions-death-penalty-opioid-epidemic [https://perma.cc/GK6Y-QFCV]).

1. The Controlled Substances Act (CSA)

Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is better known as the Controlled Substances Act or CSA.[113] The CSA not only expanded the scope of existing federal drug laws, but also expanded federal law enforcement responsibility to combat the manufacturing, importation, possession, use, and distribution of dangerous drugs.[114] Additionally, the CSA created five classifications of controlled substances known as the "Schedules" of Controlled Substances.[115] The federal statute outlawing the substantive drug offenses is 21 U.S.C. § 841. It provides that it is

> "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; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."[116]

21 U.S.C. § 841(b) contains the penalty provisions for each type and quantity of drug.[117] A small amount of marijuana defined as fifty kilograms or less, for example, does not carry a mandatory minimum penalty.[118] But for eight specified Schedule I and II controlled substances,[119] § 841(b) prescribes mandatory minimum sentences based on the drug type and quantity.[120] For example, one kilogram or more of heroin, absent other aggravating factors, carries a sentence of ten years to life in prison; whereas 100 grams to just under one kilogram of heroin, absent other aggravating factors, has a range of five to forty years; and less than 100 grams of heroin, absent other

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113. The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 202, 84 Stat. 1247 (codified as amended at 21 U.S.C. §§ 801–904).

114. *Id.* § 103 (appropriating additional funds and authorizing the Bureau of Narcotics and Dangerous Drugs to add at least 300 new agents).

115. 21 U.S.C. § 812(a).

116. *Id.* § 841(a).

117. *Id.* § 841(b).

118. *Id.* § 841(b)(1)(D).

119. *See id.* §§ 841(b)(1)(A) and (b)(1)(B) (prescribing mandatory minimum penalties for crack cocaine, powder cocaine, fentanyl, heroin, LSD, PCP, methamphetamine, and large quantities of marijuana).

120. *Id.*; *see also* United States v. Collazo, 984 F.3d 1308, 1329 (9th Cir. 2021) (en banc) (noting that when it comes to substantive drug offenses, such as possession, all [ten] circuits that have considered the issue agree that the statute does not require a finding of the defendant's mens rea as to the drug type and quantity). Stated another way, the courts interpret the substantive drug statute to denote strict liability crimes.

aggravating factors, has a range of zero to twenty years.[121] Under federal law, marijuana remains a Schedule I controlled substance and large enough quantities carry a mandatory minimum sentence.[122]

At the same time that Congress created the substantive drug law in 1970, it also enacted the federal drug attempt and conspiracy statute, now codified at 21 U.S.C. § 846.[123] In its original form, the statute provided that the penalty for conspiring to commit substantive drug offenses "may not exceed" that which was prescribed for the substantive offense.[124] But in 1988, then-Senator Joseph Biden sponsored a bill that amended the drug conspiracy statute to its current form.[125] Now it states that "[a]ny person who attempts or conspires to commit any offense defined in [§ 841] . . . 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."[126]

Congress passed the 1988 amendment to the federal drug conspiracy statute in response to the Supreme Court's decision in *Bifulco v. United States*.[127] There, the Court held that the statute, as written, precluded a convicted drug conspirator from being sentenced as harshly as a defendant convicted of the same substantive offense.[128] Applying "the rule of lenity," which is the rule that ambiguous criminal statutes should be construed in favor of the less severe punishment, the Court remanded the case for re-sentencing.[129] It then dropped a not-subtle hint to Congress that if it wished for a different result, a

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121. 21 U.S.C. § 841(b)(1)(A)–(C).

122. *Id.* § 812.

123. The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 406, 84 Stat. 1265 (codified as amended at 21 U.S.C. § 846).

124. *Id.*

125. *See* 134 CONG. REC. S17,360–66 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) (explaining that the decision to amend 21 U.S.C. § 846 by striking the "may not exceed" language and replacing it with the phrase "shall be subject to the same penalties" would make clear that any penalty that may be imposed for a substantive drug offense may also be imposed for an attempt or conspiracy to commit that offense).

126. 21 U.S.C. § 846.

127. 447 U.S. 381 (1980).

128. *Id.* at 382–83, 400. As Justice Stevens noted in his dissent, it is unlikely Congress intended the leaders of narco-trafficking operations to "be punished less severely than their subordinates . . . ." *Id.* at 402 (Stevens, J., dissenting).

129. *Id.* at 400–01.

"simple remedy" would be to amend the statute.[130] Congress took the hint. Biden explained that replacing the words "may not exceed" with "shall be subject to the same penalties" would prevent minor players who handled the drugs from being punished more severely than the masterminds who were orchestrating entire operations.[131]

Finally, it is worth noting two details about the disparity between the federal drug conspiracy statute and the general federal conspiracy statute. In contrast with the general federal conspiracy statute, which requires an additional "overt act" in furtherance of the conspiracy, the Supreme Court has determined that § 846 does not require any act apart from the agreement itself.[132] Additionally, unlike the drug conspiracy statute, the general conspiracy statute carries fines and a zero to five-year maximum penalty, even when the underlying offense is a serious crime.[133]

2. The Federal Sentencing Guidelines (now discretionary only)

During the mid-1980s, Congress also created the U.S. Sentencing Commission to address the widespread disparities in federal sentencing.[134] While the scope of the Sentencing Commission's work was much broader than drug crimes, the Sentencing Guidelines prescribed a consistent approach—the individualized approach—to sentencing defendants convicted of drug conspiracy.[135] The Guidelines were binding on the federal courts from the late 1980s until 2005 when

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130. *See id.* ("If our construction of Congress' intent . . . clashes with present legislative expectations, there is a simple remedy—the insertion of a brief appropriate phrase . . . into the present language.").

131. *See* 134 CONG. REC. S17,360–66 (daily ed. Nov. 10, 1988) (statement of Sen. Biden).

132. *Compare* 18 U.S.C. § 371 ("If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."), *with* 21 U.S.C. § 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the conspiracy."), *and* United States v. Shabani, 513 U.S. 10, 11, 13–14 (1994) (concluding that Congress adopted the common law understanding of conspiracy when it enacted § 846).

133. 18 U.S.C. § 371.

134. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended at 18 U.S.C. § 3551).

135. *See id.* §§ 3551 and 3553(a)(2)(A)–(D).

the Supreme Court decided they were discretionary only.[136] The Guidelines incorporated the *Pinkerton* limits on conspiratorial liability, and therefore afforded defendants a degree of protection from unlimited liability for the substantive drug crimes of co-conspirators.[137] In relevant part, § 1B1.3(a)(1)(B) of the now-discretionary Guidelines provide:

> [I]n 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 acts and omissions of others that were—
>
> (i) within the scope of the jointly undertaken criminal activity,
>
> (ii) in furtherance of that criminal activity, and
>
> (iii) reasonably foreseeable in connection with that criminal activity.[138]

One of the effects of having discretionary-only Guidelines is that today, some federal appellate courts approach sentencing in a drug conspiracy case by determining both the statutory range of punishment and the Guidelines range.[139] The statutory range controls the outer limits of sentencing.[140] However, the Guidelines "work[] with" the statutes to afford defendants in every circuit at least a modicum of protection from unlimited liability for the acts of co-conspirators.[141]

As was the case as far back as the 1970s, drug conspiracy is one of the most commonly charged crimes in the federal system.[142] Violations of the federal drug conspiracy statute, 21 U.S.C. § 846, account for the

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136. *See* United States v. Booker, 543 U.S. 220, 246. (2005) (stating that 18 U.S.C. § 3553(b)(1), which had made the Guidelines mandatory, is not compatible with "today's" Sixth Amendment "jury trial" holding, and therefore must be excised).

137. *See* Pinkerton v. United States, 328 U.S. 640, 646 (1946) (holding that once there is an established conspiracy, defendants may be charged with substantive offenses that were reasonably foreseeable).

138. 18 U.S.C. § 1B1.3 (section on Relevant Conduct). As a factor in determining the Guideline range, this section was amended most recently in 2015.

139. United States v. Haines, 803 F.3d 713, 738 (5th Cir. 2015).

140. *Id.*

141. See United States v. Collazo, 984 F.3d 1308, 1336 (9th Cir. 2021) (en banc) (explaining that while the Guidelines do not impact the Ninth Circuit's interpretation of the statute, they work with the statute to protect the defendant from unlimited liability).

142. *See* U.S. SENTENCING COMM'N, *supra* note 34, at 41 (noting that the most frequently reported conviction of an offense carrying a mandatory minimum was federal drug conspiracy).

largest single category (24.9%) of convictions among statutes that carry a mandatory minimum penalty.[143]

C. Judicial Decisions

The debate over the correct approach to sentencing defendants convicted of federal drug conspiracy has bubbled under the surface since the early 1990s.[144] It has been punctuated by Supreme Court decisions such as *Booker*, which rendered the Federal Sentencing Guidelines discretionary only.[145] However, no two cases have been more influential in shaping the current split amongst the U.S. Courts of Appeals than the Supreme Court's decisions in a pair of cases about mandatory maximum and minimum sentences: *Apprendi v. New Jersey*[146] and *Alleyne v. United States*.[147] This Section will address these two key sentencing cases in turn and will then move into a discussion of the circuit split.

1. Judicial decisions about sentencing

In December 1994, Charles Apprendi, Jr. fired several shots into the home of a Black family.[148] Apprendi told police he did it because he did not want Black people living in his neighborhood, although he later retracted his statement.[149] The prosecutor charged Apprendi with possession of a firearm for an unlawful purpose, which carries a sentence of five to ten years.[150] After Apprendi pleaded guilty, the prosecutor moved for a sentence enhancement.[151] The New Jersey Court found, by a preponderance of the evidence, that the shooting was racially motivated and sentenced Apprendi to twelve years imprisonment.[152] On appeal, Apprendi argued that the Due Process Clause requires facts, such as bias, to be proven to a jury beyond a

143. *Id.*
144. *See* United States v. Martinez, 987 F.2d 920, 924 (2d Cir. 1993) (noting that only the Eighth Circuit had addressed the issue and it, too, rejected the conspiracy-wide sentencing approach in United States v. Jones, 965 F.2d 1507, 1516–17 (8th Cir. 1992)).
145. United States v. Booker, 543 U.S. 220, 227 (2005).
146. 530 U.S. 466 (2000).
147. 570 U.S. 99 (2013).
148. *Apprendi*, 530 U.S. at 469.
149. *Id.*
150. *Id.* at 469–70.
151. *Id.* at 470.
152. *Id.* at 471.

reasonable doubt.[153] The case eventually made its way to the Supreme Court, which found in favor of Apprendi by a 5–4 margin.[154] The Court held that under the Fifth and Sixth Amendments, "any fact (other than prior conviction) that increases the maximum penalty for a crime must be . . . submitted to a jury, and proven beyond a reasonable doubt."[155]

Thirteen years later in *Alleyne*, the Court held that juries, not judges, are also required to determine all facts that increase a mandatory minimum penalty.[156] The Court explained that the question of whether the defendant had "brandished" his weapon during a robbery was not simply a "sentencing factor[]" for the judge to decide.[157] Rather, it was an "ingredient of the offense" that increased the mandatory minimum sentence, thus, it must be found by the jury.[158] In so holding, the Court brought the law into line with both *Apprendi* and "the original meaning of the Sixth Amendment."[159] Through these two decisions, *Apprendi* and *Alleyne*, the Court intended to further protect the rights of defendants by forcing prosecutors to prove beyond reasonable doubt any facts that would increase the statutory minimum or maximum sentence.[160]

Apprendi and *Alleyne*, however, have produced unintended results. Counterintuitively, these cases have increased sentences for minor players caught up in drug conspiracies.[161] Prior to *Apprendi*, multiple "defendants convicted of the same conspiracy did not all receive the same penalty."[162] Sentencing judges had the latitude to determine each defendant's penalty individually.[163] The significance of *Apprendi* is that it caused the federal courts to begin thinking about the § 841 drug offenses as wholly separate crimes.[164] In other words, conspiracy to

153. *Id.*
154. *Id.* at 497.
155. *Id.* at 476 (quoting Jones v. United States, 526 U.S. 227, 243, n.6 (1999)).
156. Alleyne v. United States, 570 U.S. 99, 103 (2013).
157. *Id.* at 106.
158. *Id.* at 103; *id.* at 113 (plurality opinion).
159. *Id.* at 103 (majority opinion).
160. Nancy J. King & Susan R. Klein, *Acceptance of Responsibility and Conspiracy Sentences in Drug Prosecutions After* Apprendi, 14 FED. SENT'G REP. 165, 165 (2002).
161. *Id.* at 168.
162. *Id.* at 167.
163. *Id.* at 167–68.
164. *See* United States v. Pizarro, 772 F.3d 284, 292 (1st Cir. 2014) (explaining that based on the Supreme Court's holding in *Apprendi* and *Alleyne*, the 21 U.S.C. § 841(b) subsections, with their associated drug quantities and sentencing ranges are separate crimes).

distribute heroin is a lesser-included offense of conspiracy to distribute 100 grams of heroin, as shown in Stoddard's case in the Introduction.[165] Thus, in a joint trial, when the government seeks a sentence enhancement for at least one co-conspirator, the *Apprendi* and *Alleyne* requirements have the potential to expose all defendants to the higher penalty.[166] This issue remains unresolved. The next Section will address the current split regarding the correct approach to sentencing drug conspirators.

2. Judicial decisions about drug conspiracy—the circuit split

Today in the United States, a defendant such as Stoddard would receive at least a five-year statutory minimum penalty if tried in the Sixth or Ninth Circuits, and no statutory minimum penalty if tried in the D.C. Circuit or the Second Circuit, for example.[167] This disparity is particularly problematic given that prosecutors may have flexible choice of venue if acts related to the conspiracy were committed in different federal jurisdictions.[168] Furthermore, among the six circuits that have addressed this issue following the Supreme Court's 2013 ruling in *Alleyne*, all but the Sixth and Ninth Circuits, as discussed further below, have chosen the individualized approach.[169] Predictably, the individualized approach leads to shorter sentences for many defendants.[170]

The D.C. Circuit's 2018 decision to adopt the individualized approach in *Stoddard* accords with the Second Circuit's decision in *United States v. Martinez*.[171] In *Martinez*, the defendant, whose name was Ortiz, argued that he "should not be held accountable for the" cocaine that his co-conspirator Martinez distributed up to two years prior to

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165. United States v. Stoddard, 892 F.3d 1203, 1221–22 (D.C. Cir. 2018); *see supra* Introduction.

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

167. *See* United States v. Collazo, 984 F.3d 1308, 1315 (9th Cir. 2021). *But see* United States v. Martinez, 987 F.2d 920, 926 (2d Cir. 1993).

168. 18 U.S.C. § 3237.

169. *See, e.g.*, *Stoddard*, 892 F.3d at 1208; United States v. Ellis, 868 F.3d 1155, 1160 (10th Cir. 2017); United States v. Haines, 803 F.3d 713, 720 (5th Cir. 2015); *Pizarro*, 772 F.3d at 287.

170. U.S SENT'G COMM'N, INTERACTIVE DATA ANALYZER, https://www.ussc.gov/research/ interactive-data-analyzer [https://perma.cc/8EF3-DU2U] (enabling comparison between 2d Circuit "Sentencing Outcomes" and 6th Circuit "Sentencing Outcomes" for drug-trafficking crimes from 2015 to 2021 while controlling other variables).

171. *Martinez*, 987 F.2d at 924–26.

Ortiz's participation in the conspiracy because those acts had occurred entirely without his knowledge.[172] The government argued that such foreseeability is not required under §§ 846 and 841.[173] To advance its argument the government cited numerous cases, but the Second Circuit Court aptly pointed out that none of them were drug *conspiracy* cases.[174]

The Second Circuit drew a sharp distinction between strict liability for *substantive* drug crimes and the notion of strict liability for the crimes of co-conspirators.[175] The Court said that the former "does not offend due process" because drug "dealers must bear the risk of knowing what drugs they are dealing . . . [i]n light of Congress's clear, unequivocal, and rational purpose."[176] But strict liability for conspiracy to commit drug crimes is problematic.[177] Here, the issue was not whether the defendant knew the amount and type of drugs he, personally, was involved with, but whether he knew about the amount and the type of drugs his co-conspirator had dealt during prior years.[178] The Second Circuit agreed with the defendant that it is illogical to "hold defendants strictly liable not for what they conspire to do, but for what any individual they conspire with conspires to do."[179]

Fearing the expansion of *Pinkerton*, the Second Circuit joined the Eighth Circuit, which was the only other circuit to have addressed this issue at the time.[180] The Second Circuit concluded that § 846 "does not subject the defendant to liability for any crimes committed by any other members of the conspiracy" primarily because the statute's use of the words "'object' of the conspiracy" is ambiguous and nothing in

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172. *Id.* at 921. In the first appeal, United States v. Miranda-Ortiz, 926 F.2d 172, 173 (2d Cir. 1991), the Second Circuit Court affirmed the defendant's conviction for conspiracy to distribute more than five kilos of cocaine but remanded the case to the lower court for re-sentencing. On remand, the government successfully argued that under 21 U.S.C. § 841(b)(1)(A), the ten-year statutory minimum trumps the Guidelines. *Martinez*, 987 F.2d at 922. The defendant again appealed, this time arguing that the lower court erred by imposing a statutory minimum sentence without regard for his knowledge or intent. *Id.*

173. *Martinez*, 987 F.2d at 923.

174. *Id.*

175. *Id.* at 924.

176. *Id.* at 923 (quoting United States v. Collado-Gomez, 834 F.2d 280, 281 (2d Cir. 1987) (per curiam)).

177. *Id.* at 924.

178. *Id.* at 923.

179. *Id.*

180. *Id.* at 924 (citing United States v. Jones, 965 F.2d 1507, 1516–17 (8th Cir. 1992)).

the legislative history suggests that Congress intended to expand the culpability of defendants in this manner.[181] In fact, as the Second Circuit recalled, Congress amended the statute in 1988 in response to the Supreme Court's decision in *Bifulco*, precisely because the original version was subjecting minor players to higher penalties than the "ringleaders."[182] Finally, the Second Circuit reasoned that to interpret the current drug statutes otherwise would be to eviscerate the Federal Sentencing Guidelines, which were then newly implemented.[183] Such a result would "drastically" and "devastating[ly]" undermine the Guidelines.[184] If Congress had intended such a revision, "that intent would surely have been clearly expressed."[185]

The Second Circuit's concern about the expansion of conspiratorial liability now seems prophetic. In a 6–5 decision published in early 2021, the Ninth Circuit abruptly switched from the individualized approach, which it had steadfastly maintained since 1993, to the conspiracy-wide sentencing approach. In *United States v. Collazo*, the Ninth Circuit held that once the government proves a defendant conspired to distribute a controlled substance, the defendant is then automatically liable for all the drug types and quantities involved in the conspiracy regardless of whether they were foreseeable to the defendant or fell within the scope of the agreement the defendant made.[186] This is a significant departure from the Ninth Circuit's previous precedent and from the trend among the circuits, particularly in the wake of *Alleyne*.[187]

The Ninth Circuit arrived at its conclusion after a fresh look at the controlling statutes, 21 U.S.C. §§ 846 and 841.[188] The Court observed that all circuits interpret the substantive drug offenses set forth in § 841(b) to denote the defendant's strict liability for the drug type and quantity.[189] Ergo the drug conspiracy statute, § 846, which points to the same § 841(b) penalties, requires no heightened mens rea for

181. *Id.*
182. *Id.* at 925.
183. *Id.* at 926.
184. *Id.*
185. *Id.*
186. 984 F.3d 1308, 1315 (9th Cir. 2021) (en banc).
187. *See supra* note 169 and accompanying text.
188. *Collazo*, 984 F.3d at 1318.
189. *See id.* at 1329 n.21 (citing cases from the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits).

conspiracy.[190] The *Collazo* Court pointed to the Supreme Court's reasoning in *Feola* as proof that a person may be guilty of conspiracy without knowing the precise details of the crime at the time of agreement.[191] The Ninth Circuit noted that once defendants purposely violate federal law, "it is not unusual to punish [them] for the unintended consequences of their *unlawful* acts."[192] Thus, the Ninth Circuit removed from its jury instruction the requirement to make an individualized finding of drug quantity.[193]

The Ninth Circuit's decision in *Collazo* removed a procedural safeguard to achieve a substantive result. "[T]he imposition of an additional burden on the government to prove the conspirator's knowledge of drug type and quantity 'would serve only to make it more difficult to obtain convictions on charges of conspiracy, a policy with no apparent purpose.'"[194] In announcing its decision, the Ninth Circuit praised the Sixth Circuit's analysis[195] set forth in *United States v. Robinson*.[196] Such praise is slightly awkward given that in *Alleyne*'s wake, the Sixth Circuit itself doubts the wisdom of *Robinson*.[197]

In *Robinson*, the Sixth Circuit upheld the petitioner's life sentence, finding no error in the lower court's response to the jury's question: whether the defendant had to have known or been directly involved with the drug type/quantities of the overall conspiracy.[198] The Sixth Circuit wrote that the defendant's knowledge of the type and quantity of drugs involved in the overall conspiracy is irrelevant.[199] However, it has questioned its conclusion subsequently. For example, in *United*

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190. *Id.* at 1329.

191. *Id.* at 1329–33.

192. *See id.* at 1327–28 (citing Dean v. United States, 556 U.S. 568, 575 (2009)).

193. *See id.* at 1317 (excising the following *Pinkerton* language from future instruction: "If you find a defendant guilty of the charge in Count [X] of the indictment, you are then to determine as to that defendant whether the government proved beyond reasonable doubt that the amount of [specified drug] that was reasonably foreseeable to him or fell within the scope of his particular agreement equaled or exceeded [X] grams of [specified drug] in connection with his criminal activity. Your decision as to weight must be unanimous").

194. *Id.* at 1333 (quoting United States v. Feola, 420 U.S. 671, 694 (1975)).

195. *Id.* at 1335.

196. 547 F.3d 632, 637 (6th Cir. 2008).

197. *See* United States v. Gibson, 2016 WL 6839156, at *1 (6th Cir. Nov. 21, 2016) (second-guessing the wisdom of *Robinson*), *vacated*, 854 F.3d 367 (6th Cir. 2017) (en banc); *infra* notes 200–203 and accompanying text.

198. *Robinson*, 547 F.3d at 639.

199. *Id.*

States v. Gibson,[200] the Court recognized that conspiracy-wide liability for limited-amount co-conspirators "may appear unjust" and does not "serve the drug statute's underlying purpose of more severely punishing larger-amount drug dealers."[201] After re-hearing the *Gibson* case en banc, the Sixth Circuit Court divided equally, resulting in a reinstatement of the lower court's ruling via the conspiracy-wide sentencing approach.[202] Then in *United States v. Young*,[203] the Sixth Circuit found no need to reconcile *Robinson* with earlier case law since the result in Young's case would be the same under either the individualized approach or the conspiracy-wide approach.[204]

In summary, the Ninth and Sixth Circuits are currently in alignment that drug conspirators should be held strictly liable under the conspiracy-wide sentencing approach, for whatever amount of drugs were involved in the conspiracy writ large.[205] Further, in the Ninth and Sixth Circuits, juries are not required to determine whether an individual had any knowledge or intent as to the amount of drugs in the overall conspiracy because that information is irrelevant.[206]

Meanwhile, at least seven other circuits including the Second Circuit and the D.C. Circuit follow the individualized approach to sentencing drug conspirators.[207] Their approach is consistent with the now discretionary Federal Sentencing Guidelines, and with *Pinkerton*, *Apprendi*, and *Alleyne*.[208] The next section will analyze these antithetical approaches in greater detail.

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200. 874 F.3d 544 (6th Cir. 2017) (en banc).

201. *See* Gibson, 2016 WL 6839156, at *2 (declaring itself bound by its precedent in *Robinson*, 547 F.3d at 638).

202. United States v. Gibson, No. 15-6122, 2016 WL 6839156 (6th Cir. Nov. 21, 2016), *vacated*, 854 F.3d 367 (6th Cir. 2017) (en banc).

203. 847 F.3d 328 (6th Cir. 2017).

204. *Id.* at 366–67.

205. *See, e.g.*, United States v. Collazo, 984 F.3d 1308, 1329 (9th Cir. 2021) (en banc) (holding that the government is not required to prove knowledge or an intent with respect to drug type and quantity).

206. *See id.* at 1335 ("We join the well reasoned opinion of the Sixth Circuit.").

207. *See* United States v. Stoddard, 892 F.3d 1203, 1208 (D.C. Cir. 2018); United States v. Ellis, 868 F.3d 1155, 1160 (10th Cir. 2017); United States v. Haines, 803 F.3d 713, 720 (5th Cir. 2015); United States v. Pizarro, 772 F.3d 284, 287 (1st Cir. 2014); United States v. Littrell, 439 F.3d 875, 880–81 (8th Cir. 2006); United States v. Collins, 415 F.3d 304, 313 (4th Cir. 2005); United States v. Martinez, 987 F.2d 920, 926 (2d Cir. 1993).

208. *See, e.g.*, *Martinez*, 987 F.2d at 926 (adopting the individual approach and noting that an alternative interpretation would devastate the Guideline's clearly demonstrated approach).

II. ANALYSIS

This Part articulates why the individualized approach to sentencing defendants convicted of federal drug conspiracy is the correct approach based on statutory construction, Supreme Court precedent, legislative intent, and policy considerations. First, this Part looks to the relevant federal statutes, 21 U.S.C. §§ 846 and 841, and explains why the Second Circuit's statutory analysis is superior to that of the Ninth Circuit.[209] Second, this Part analyzes the Ninth Circuit's rationale for its recent switch to the conspiracy-wide approach and concludes that its interpretation of Supreme Court precedent is flawed.[210] Third, it considers Congress' intent in amending the drug conspiracy statute, finding it unlikely that Congress intended to discard conspiracy's "specific intent" requirement or negate the Federal Sentencing Guidelines, which were then binding on the courts.[211] Finally, this Part addresses why this issue should be resolved, once and for all, in favor of the individualized approach.[212]

A. The Second Circuit's Statutory Analysis is More Comprehensive than the Ninth's

The drug conspiracy statute, 21 U.S.C. § 846, does not dictate that defendants are strictly liable for the crimes of co-conspirators.[213] In the early 1990s, the Second Circuit reached this same conclusion after carefully examining the language and nuances of the statute and the interplay between §§ 846 and 841.[214] In its precedential decision, *Martinez*, the Second Circuit considered whether convicted drug conspirator, Ortiz, should be sentenced for drug crimes that his co-conspirator, Martinez, had committed up to two years before the men had even made each other's acquaintance.[215] The government argued that Ortiz's knowledge of Martinez's previous drug sales was irrelevant.[216] But the Second Circuit rejected this oversimplified

209. *See infra* Section II.A.
210. *See infra* Section II.B.
211. *See infra* Section II.C.
212. *See infra* Section II.C.
213. *See, e.g.*, United States v. Ellis, 868 F.3d 1155, 1178 (10th Cir. 2017) (explaining that after *Alleyne*, "only jury-found, individually attributable amounts can authorize [a ten-year minimum] sentence for a defendant").
214. *See* United States v. Martinez, 987 F.2d 920, 926 (2d Cir. 1993).
215. *Id.* at 923.
216. *Id.* at 923–24.

interpretation of the federal statutes.[217] Instead, the Court held that the defendant's "reasonable knowledge" is required to hold him accountable for an amount of drugs that increases his statutory sentencing range.[218]

The plain language of the federal drug conspiracy statute, § 846, militates in favor of the individualized sentencing approach.[219] The statute provides that "[a]ny person who . . . 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 . . . conspiracy."[220] The Second Circuit identified that the key word "object" may be interpreted in at least two different ways: 1) that which existed in the mind of the individual defendant or 2) the actual amount of drugs sold under the umbrella of the conspiracy.[221] The first of these two possibilities, that which existed in the mind of the individual defendant, is far more in keeping with the common law understanding of conspiracy.[222]

The "essence" of conspiracy is the agreement itself.[223] Dating back to the early common law, it was the incomplete or inchoate agreement alone that made communities less safe and gave rise to the crime we now know as conspiracy.[224] As Phillip E. Johnson pointed out in his seminal work, conspiracy may be the closest our judicial system comes to punishing people for their thoughts or intentions.[225] The crime is "predominantly mental," and specific intent is the "gist" of

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217. *Id.* at 924.

218. *See id.* ("We disagree" with the government's position that Ortiz's lack of knowledge is irrelevant).

219. *See id.* ("Section 846 does not subject the defendant to liability for any crimes committed by any other members of the conspiracy, regardless of the defendant's knowledge about those crimes.").

220. 21 U.S.C. § 846.

221. *Martinez*, 987 F.2d at 924.

222. *See* Iannelli v. United States, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.").

223. *Id.*

224. *See* Harding, *supra* note 47, at 106 (explaining that conspiracy was "the crime against the whole community represented by the mere existence of sworn confederacies working in the private interest"); *see also* Krulewitch v. United States, 336 U.S. 440, 448–49 (1949) (Jackson, J., concurring) (explaining that conspiracy has a place in modern criminal law because to join "the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer").

225. Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1139 (1973).

conspiracy.[226] Thus, the *object* to which Congress was very likely referring in the federal drug conspiracy statute is that which existed in the mind of the defendant.[227] The alternative, which is the actual amount of drugs sold under the umbrella of the conspiracy, gets into the substantive offenses of co-conspirators, which are separate and distinct from the crime of conspiracy.[228] While it may be possible, in other instances, to infer a conspirator's intent from the crime or crimes that eventually result, such inferences would not be reliable in a drug conspiracy due to the size, scope, and compartmentalization of the criminal enterprise.[229]

Furthermore, construing the word "object" to mean the conspiracy-wide amount of drugs versus that which existed in the mind of an individual defendant shatters the *Pinkerton* limits on conspiratorial liability.[230] Abandoning these limits is problematic. The Supreme Court has never condoned the expansion of *Pinkerton*, and many federal courts take for granted that the *Pinkerton* limits are constitutionally derived.[231] The framers of the Model Penal Code outright rejected *Pinkerton* liability as too expansive already, but at least it limits a defendant's liability to those crimes of co-conspirators that

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226. United States v. Shabani, 513 U.S. 10, 16 (1994); Harno, *supra* note 89, at 636.

227. *See* United States v. Martinez, 987 F.2d 920, 924 (2d Cir. 1993) (recognizing that small-time drug dealers often are charged for minor involvement in vast conspiracies); *see also* United States v. Ellis, 868 F.3d 1155, 1178 (10th Cir. 2017) (vacating Ellis's sentence because Ellis was a small-time dealer while the Mexican cartel was importing hundreds of kilograms of cocaine into the region).

228. *See Martinez*, 987 F.2d at 925 (concluding that Congress did not intend to expand the conspiratorial liability of defendants beyond the substantive offenses the defendants themselves had committed).

229. *See Developments in the Law-Criminal Conspiracy*, supra note 76, at 984 (explaining that because conspirators tend to operate secretly, the contours of the agreement typically are not subject to direct proof but rest on inferences); *see also Ellis*, 868 F.3d at 1176 (noting that to hold a small-time dealer responsible for all the drugs of a massive cartel "pervert[s] the concept of conspiracy").

230. *See Martinez*, 987 F.2d at 924 (stating that "[t]he government misinterprets the meaning of 21 U.S.C. § 846 . . . . To allow the government's interpretation would be to expand dangerously the scope of conspiratorial culpability").

231. Kreit, *supra* note 73, at 586–87; *see also* Mark Noferi, *Towards Attenuation: A "New" Due Process Limit on* Pinkerton *Conspiracy Liability*, 33 AM. J. CRIM. L. 91, 124–33, 147–52 (2006) (discussing cases and arguing that substantive due process must preclude *Pinkerton* liability for defendants who played a minor or attenuated role in a conspiracy).

are 1) within the scope of the conspiracy, 2) reasonably foreseeable to the defendant, and 3) in furtherance of the plan.[232]

In creating and then amending § 846, Congress did not intend to abandon the *Pinkerton* limits on liability.[233] Not only would such a drastic departure from the common law undercut the U.S. Sentencing Commission's Guidelines, but also it would exacerbate the exact problem Congress was trying to fix in 1988, when it amended § 846 to its current form.[234] Then-Senator Joseph Biden, who sponsored the bill, explained that replacing the words "may not exceed" with "shall be subject to the same penalties" would prevent minor players who handled the drugs from being punished more severely than the masterminds who were orchestrating entire operations.[235]

Interpreting § 846 to require the conspiracy-wide sentencing approach is the opposite of what Congress intended when it amended the statute in 1988.[236] It "expand[s] dangerously" the risk that minor participants could be punished as if they were masterminds.[237] An individual defendant's conspiratorial liability would be limited only by the size of the drug organization to which he or she belonged.[238] Further, the Second Circuit recognized the reality that small-time dealers often are charged for their involvement in vast trafficking

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232. Pinkerton v. United States, 328 U.S. 640, 647–48 (1946); MODEL PENAL CODE § 2.06 cmt. at 307 (1985) (rejecting *Pinkerton* liability because the law "lose[s] all sense of just proportion if simply because of the conspiracy itself each [conspirator is] held accountable for thousands of additional offenses of which he was completely unaware and which he did not influence at all").

233. *Martinez*, 987 F.2d at 926.

234. *Id.*

235. *See* 134 Cong. Rec. S17,360-66 (daily ed. November 10, 1988) (statement of Sen. Biden) (explaining that the decision to amend 21 U.S.C. § 846 by striking the "may not exceed" language and replacing it with the phrase "shall be subject to the same penalties" would make clear that any penalty that may be imposed for a substantive drug offense may also be imposed for an attempt or conspiracy to commit that offense). This change was in response to the Supreme Court's not so subtle hint in *Bifulco v. United States*. *See* 447 U.S. 381, 401 (1980) (hinting that "there is a simple remedy . . .").

236. *Martinez*, 987 F.2d at 926.

237. *Id.* at 924.

238. *See* Kreit, *supra* note 73, at 627 (explaining that liability becomes "divorced from personal guilt" "if individuals can be held liable for crimes and acts that they did not foresee and did not influence, based entirely on an abstract post-hoc definition of the conspiracy as a whole"); *see also* MODEL PENAL CODE § 5.03 cmt. at 422–23 (1985) (noting that the most frustrating and confusing aspect of conspiracy is appropriately defining its scope).

conspiracies.[239] It identified that the language of § 846 could be misinterpreted to require a defendant's strict liability for the crimes of co-conspirators, and it rejected this interpretation after carefully weighing both possibilities.[240] Thus, the Second Circuit's statutory analysis was more comprehensive than the Ninth's, and identified nuances that the Ninth Circuit would overlook nearly thirty years later in its 2021 analysis.[241]

In *Collazo*, the en banc Ninth Circuit Court did not closely analyze the language of the drug conspiracy statute, § 846, before switching to the conspiracy-wide sentencing approach.[242] It did not weigh the alternative meanings of the word "object" as the Second Circuit did in 1993.[243] The Ninth Circuit assumed that the words "shall be subject to the *same* penalties" meant that Congress intended the mens rea requirement for conspiracy to be strict liability, the "same" as the underlying substantive offenses.[244] Thus, it did not examine the legislative history of § 846 or comprehend that Congress added the "same penalties" provision to achieve the opposite effect: ensuring that minor players would not be punished more severely than the masterminds.[245] Thus the Ninth Circuit wrongly concluded that Congress intended for drug conspirators to be punished for all drugs in the conspiracy, regardless of the defendant's specific knowledge or intent, regardless of role, and regardless of how long the defendant had been a participant in the organization.[246]

Furthermore, instead of considering how §§ 846 and 841 work together, the Ninth Circuit primarily analyzed § 841, which defines the *substantive* drug offenses and their associated penalties.[247] Unremarkably, the Ninth Circuit concluded that § 841 defines these *substantive* offenses to be strict liability crimes, which all circuits agree

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239. *Martinez*, 987 F.2d at 924.

240. *Id.*

241. *See id.* (analyzing the meaning of the word "object" as reflected in 21 U.S.C. § 846); *see also* United States v. Collazo, 984 F.3d 1308, 1329 (9th Cir. 2021) (en banc) (concluding that conspiracy is a strict liability crime without scrutinizing the language of § 846).

242. *See Collazo*, 984 F.3d at 1329 (ending its "explication of . . . the imposition of penalties under § 841(b)(1)").

243. *Martinez*, 987 F.2d at 924.

244. *Collazo*, 984 F.3d at 1332 (emphasis added).

245. *See id.* at 1328 (considering only the legislative history of § 841, not § 846).

246. *See id.* at 1332.

247. *Id.* at 1320–29.

upon.[248] It then reached the conclusion, based on misapplication of the Supreme Court's decision in *Feola* as discussed further below, that conspirators must also be strictly liable for the substantive drug crimes of all other co-conspirators, notwithstanding an individual defendant's knowledge or intent.[249]

Finally, the Ninth Circuit did not consider that specific intent is fundamental to the crime of conspiracy.[250] In *Ocasio v. United States*, the Supreme Court explained conspiracy's specific intent requirement to mean that "[e]ach conspirator must have specifically intended that *some conspirator* commit each element of the substantive offense."[251] Since drug type and quantity are elements, *Ocasio* requires that a defendant must have specifically intended that *some conspirator* manufacture, distribute or dispense the *specified* quantities of *specified* drugs in order for liability to attach.[252] Therefore, even though Congress did not include an intent requirement in the substantive penalty provisions of § 841(b), conspiracy to commit those same offenses incorporates this requirement automatically.[253]

For the foregoing reasons, the Second Circuit's 1993 analysis of 21 U.S.C. §§ 846 and 841 is superior to the Ninth's Circuits 2021 analysis of the same statutes.

B. The Ninth Circuit's Analysis of Supreme Court Precedent is Flawed

In *Collazo*, the Ninth Circuit discarded the *Pinkerton* limits as inapposite because they did "not apply to the liability determination for a § 846 conspiracy offense."[254] While the Ninth Circuit is technically correct that "[t]he rule of coconspirator liability under *Pinkerton*

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248. *See id.* at 1329; United States v. Ramos, 814 F.3d 910, 915–17 (8th Cir. 2016) (en banc); United States v. Dado, 759 F.3d 550, 569–70 (6th Cir. 2014); United States v. Sanders, 668 F.3d 1298, 1310 (11th Cir. 2012) (per curiam); United States v. Andino, 627 F.3d 41, 45–47 (2d Cir. 2010); United States v. De La Torre, 599 F.3d 1198, 1204 (10th Cir. 2010); United States v. Betancourt, 586 F.3d 303, 308–09 (5th Cir. 2009); United States v. Branham, 515 F.3d 1268, 1275–76 (D.C. Cir. 2008); United States v. Brower, 336 F.3d 274, 277 (4th Cir. 2003); United States v. Collazo-Aponte, 281 F.3d 320, 326 (1st Cir. 2002); United States v. Barbosa, 271 F.3d 438, 458 (3d Cir. 2001); United States v. Carrera, 259 F.3d 818, 830 (7th Cir. 2001).

249. *Collazo*, 984 F.3d at 1333.

250. *See* Harno, *supra* note 89, at 636 (explaining that the "gist" of conspiracy is the intent element).

251. 578 U.S. 282, 292 (2016).

252. *Id.*

253. *Id.*; Harno, *supra* note 89, at 636.

254. *Collazo*, 984 F.3d at 1335.

applies when the government charges a defendant with substantive offenses [of co-conspirators] . . . " versus liability for the crime of conspiracy itself, this distinction is meaningless in the context of drug conspiracies prosecuted under §§ 846 and 841.[255] For lack of a better analogy, the Ninth Circuit seeks to have its cake and eat it too. While imputing responsibility for all drug crimes of co-conspirators onto an individual defendant, the Ninth Circuit simultaneously asserts that the Supreme Court's outer limits on co-conspirator liability for the crimes of others do not apply.[256]

Expanding *Pinkerton* increases risk, as illustrated by *Stoddard*, *Martinez*, *Ellis*, and probably hundreds more, that small-time traffickers will be sentenced for years-worth of conspiracy-wide drug transactions they reasonably knew nothing about.[257] Again, the Supreme Court has never condoned the expansion of conspiratorial liability beyond *Pinkerton*.[258] Yet today, in the Ninth Circuit, juries are not required to determine whether a defendant reasonably could have known about the crimes of co-conspirators in order for the defendant to be accountable for those higher crimes at sentencing.[259]

The conspiracy-wide sentencing approach is also discordant with the Supreme Court's decisions in *Apprendi* and *Alleyne*.[260] The essential holding of this pair of cases is that any fact, apart from a prior conviction, that increases a statutory minimum or maximum penalty constitutes an "ingredient of the offense" that the government must

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255. *Id.* at 1319 n.9.

256. *See id.* at 1335 (noting that *Pinkerton* is "irrelevant to a defendant's liability for conspiracy").

257. United States v. Martinez, 987 F.2d 920, 924 (2d Cir. 1993); *see also* Attorney General Eric Holder, *Memorandum: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases*, U.S. DEP'T OF JUST., at 1 (Aug. 12, 2013), https://www.justice.gov/sites/default/files/ag/legacy/2014/04/11/ag-memo-drug-guidance.pdf [https://perma.cc/G8PC-FVT9] ("In some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution.").

258. *See* Pinkerton v. United States, 328 U.S. 640, 648–50 (1946) (Rutledge, J., dissenting in part) (criticizing the majority's opinion as "a dangerous precedent" that will pave the way for an "almost unlimited scope of vicarious responsibility for others' acts which follows once agreement is shown").

259. *Collazo*, 984 F.3d at 1315.

260. *See, e.g.*, United States v. Ellis, 868 F.3d 1155, 1170 (10th Cir. 2017) (holding that the District Court "committed *Alleyne* error" when it sentenced Ellis to ten years imprisonment without the jury's having found his individually attributable amount of drugs).

prove to a jury beyond a reasonable doubt.[261] The Ninth Circuit Court correctly identified that both *Apprendi* and *Alleyne* are steeped in constitutional law principles, including the Fifth Amendment, which provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . ." and the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[262] However, the Ninth Circuit's decision to make drug conspiracy a strict liability crime removes the Supreme Court's articulated fact-finding responsibility from the province of juries.[263]

Rather than acknowledging the disconnect, however, the Ninth Circuit Court used *Apprendi* and *Alleyne* to justify its switch to the conspiracy-wide approach.[264] The Ninth Circuit recognized that before *Apprendi*, drug type and quantity could be determined by a judge because they were only "sentencing factor[s]."[265] In the wake of *Apprendi* and *Alleyne*, these factors became ingredient[s] of the offense that can only be determined by a jury.[266] As discussed in Part II.A, the Ninth Circuit failed to recognize that the drug conspiracy statute, § 846, incorporates the specific intent requirement.[267] Therefore, it simply rationalized that "[b]ecause *Apprendi* and *Alleyne* 'did not rewrite § 841(b) to add a new *mens rea* requirement,' [the cases] do not assist us in determining the requisite *mens rea* necessary for the imposition of penalties."[268]

To further establish that Congress did not intend for drug conspiracy to have a higher mens rea than the substantive drug offenses, the Ninth Circuit chose to rely on *United States v. Feola*.[269]

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261. Alleyne v. United States, 570 U.S. 99, 113 (2013); *see* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

262. U.S. CONST. amend. V; U.S. CONST. amend. VI; *Collazo*, 984 F.3d at 1321.

263. *See* United States v. Stoddard, 892 F.3d 1203, 1222 (D.C. Cir. 2018) (finding *Alleyne* error because the evidence was "far from overwhelming" that the amount of drug in the conspiracy was foreseeable to the defendants); *Ellis*, 868 F.3d at 1170 (finding *Alleyne* error because lower court sentenced Ellis to ten years based on the conspiracy-wide amount of drugs).

264. *Collazo*, 984 F.3d at 1322; *see also* King & Klein, *supra* note 160, at 167 (explaining how the U.S. Supreme Court's decision in *Apprendi* actually increased sentences for small-amount dealers caught up in drug conspiracies).

265. *Collazo*, 984 F.3d at 1321.

266. *Id.*

267. *See* Harno, *supra* note 89, at 636 (explaining that the gist of conspiracy is the intent element).

268. *Collazo*, 984 F.3d at 1322 (emphasis added).

269. *Id.* at 1329; United States v. Feola, 420 U.S. 671, 696 (1975).

There, the Supreme Court declined to require a greater degree of intent for conspiratorial liability to assault a federal officer than for that of the underlying substantive offense.[270] The Ninth Circuit's reliance on *Feola* is misplaced because *Feola* was purely a jurisdictional case.[271] The defendants were found guilty of conspiring to assault a federal officer despite their not knowing that the victim worked for the government.[272]

Feola is not applicable to drug conspiracies prosecuted under §§ 846 and 841 for several reasons. First, the object of the *Feola* conspiracy was never in any doubt.[273] Four men, with unity of purpose, plotted to assault and commenced to assault a particular person.[274] They would have been successful but for one federal agent reacting in defense of the other.[275] Whereas in a drug conspiracy, rarely is there such unity or clarity of purpose.[276] Everyone is making their own risk and reward calculations.[277] Co-conspirators often are not similarly situated in terms of knowledge or resources.[278] For example, based on the facts of *United States v. Ellis*, the Tenth Circuit vacated Ellis's sentence because it did not believe Ellis "was integral to the vast conspiracy."[279] Instead, Ellis was a small-time dealer while the Mexican cartel was importing hundreds of kilograms of cocaine into the region.[280]

Second, the acts agreed upon by the *Feola* conspirators (assault of a particular person) only differed from the acts actually performed (assault of a federal officer) due to their unintended criminal consequences.[281] However, drug offenses are different.[282] A defendant's agreement to dispense a small amount of marijuana, for

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270. *Feola*, 420 U.S. at 696.
271. *Id.*
272. *Id.* at 674–75.
273. *Id.* at 674.
274. *Id.*
275. *Id.*
276. *See* United States v. Ellis, 868 F.3d 1155, 1176 (10th Cir. 2017) (noting that to hold a small-time dealer responsible for all the drugs of a massive cartel "pervert[s] the concept of conspiracy").
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. United States v. Feola, 420 U.S. 671, 672 (1975).
282. *See* United States v. Pizarro, 772 F.3d 284, 292 (1st Cir. 2014) (explaining that based on the Supreme Court's holding in *Apprendi* and *Alleyne*, the 21 U.S.C. § 841(b) subsections, with their associated drug quantities and sentencing ranges are separate crimes).

example, does not result in the unintended consequence of a massive cocaine operation.[283]

Third, *Feola* was a jurisdictional matter, in which the assault victim happened to have special status making the crime federal.[284] Whereas in the case of defendants convicted of drug conspiracy, the amount and type of drugs are the defining elements of the crime and hence the severity of sentence; they are not simply elements that dictate jurisdiction.[285]

Fourth, *Feola* involved a conspiracy to commit an act that was *malum in se* versus *malum prohibitum*.[286] In contrast, the federal drug crimes are manmade crimes that did not exist at common law.[287] The state laws prohibiting marijuana and other substances continue to evolve, and for some offenders, drug-dealing is a means to make ends meet.[288]

Finally, the timing and scope of the conspiracy in *Feola* differs greatly from a drug conspiracy.[289] In *Feola*, the delta between the defendants' specific intent and the scope of the conspiracy charged was very small.[290] The same was true of the Pinkerton brothers' tax fraud conspiracy.[291] But in a drug conspiracy that spans months or even years, culpability is far less uniform amongst members of the group.[292] The delta between a defendant's specific intent and the scope of the entire drug operation may be enormous.[293] Conspirators charged with the same offense may differ greatly from one another in terms of knowledge, role, and length of time in the organization.[294] For all the

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283. *Id.*

284. *Feola*, 420 U.S. at 696.

285. *See* 21 U.S.C. § 841(b) ("Penalties").

286. *Feola*, 420 U.S. at 691; *supra* note 107.

287. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Title II, § 202, 84 Stat. 1236, 1247 (codified as amended at 21 U.S.C. §§ 801–904).

288. *See, e.g.*, D.C. Code § 48-904.01 (legalizing the possession, use, purchase, or transport of two ounces or less of marijuana as of 2015); *see generally* DRUG POLICY ALLIANCE, *supra* note 112, at 25 (exemplifying how some drug dealers have no other source of income to support themselves and their families).

289. *See* Kreit, *supra* note 73, at 594 (explaining that in *Pinkerton*, the delta between the scope of the conspiracy and the substantive offenses was as small as it could possibly be).

290. *Id.*; *Feola*, 420 U.S. at 673.

291. *See* Kreit, *supra* note 73, at 594.

292. *See* United States v. Ellis, 868 F.3d 1155, 1176 (10th Cir. 2017) (vacating Ellis's sentence because Ellis was a minor player in a major drug conspiracy).

293. *Id.*

294. *Id.*

aforementioned reasons, *Feola* is inapposite to federal drug conspiracies.

C. Consistency and Other Policy Support for the Individualized Approach

The individualized approach to sentencing drug conspirators has the advantage of consistency. It is consistent with the U.S. Sentencing Commission's Federal Guidelines, which Congress tacitly endorsed from 1987 until the Supreme Court rendered them discretionary only in 2005.[295] Additionally, the majority of federal circuits, including the First, Second, Fourth, Fifth, Eighth, Tenth, and D.C. Circuits, have adopted and continue to follow the individualized approach.[296] Furthermore, the individualized approach is consistent with the reasons Congress amended the drug conspiracy statute in 1988, and accords with *Pinkerton*, *Apprendi*, and *Alleyne*.[297] The individualized approach also comports with constitutional principles of fairness and due process.[298]

During the last decade and a half, both Congress and the Department of Justice have made some progress toward reformation and equitable administration of the federal drug laws. In 2010, for example, Congress passed the Fair Sentencing Act which reduced the disparity in crack cocaine versus powder cocaine from 100:1 down to 18:1.[299] However, it was not until eight years later that Congress passed the First Step Act, applying the new 18:1 ratio retroactively to those prisoners who were sentenced under the former, 100:1 regime.[300]

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295. *See* United States v. Booker, 543 U.S. 220, 260 (2005) (rendering the Guidelines discretionary only); United States v. Martinez, 987 F.2d 920, 926 (2d Cir. 1993) (reasoning that Congress would have clearly communicated its intent if it wanted to depart from the Guidelines).

296. *See* United States v. Stoddard, 892 F.3d 1203, 1208 (D.C. Cir. 2018); *Ellis*, 868 F.3d at 1170; United States v. Haines, 803 F.3d 713, 720 (5th Cir. 2015); United States v. Pizarro, 772 F.3d 284, 287 (1st Cir. 2014); United States v. Littrell, 439 F.3d 875, 878 (8th Cir. 2006); United States v. Collins, 415 F.3d 304, 312 (4th Cir. 2005); *Martinez*, 987 F.2d at 926.

297. *See Stoddard*, 892 F.3d at 1222 (vacating Stoddard's sentence due to an *Alleyne* error); *Martinez*, 987 F.2d at 926.

298. *See* Kreit, *supra* note 73, at 586–87 (explaining that the *Pinkerton* limits are constitutionally derived).

299. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, 2372 (2010).

300. First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018).

The work of individual policymakers also has made an impact.[301] For instance, in the wake of *Alleyne* in 2013, Attorney General Eric Holder directed the Justice Department to reserve "severe mandatory minimum penalties . . . for serious, high-level, or violent drug traffickers."[302] His initiative had a near immediate effect on the percentage of offenders convicted of crimes carrying mandatory minimum sentences: between fiscal years 2013 and 2016, the percentage steadily declined from twenty-seven percent down to twenty-two percent; whereas from 1991 until 2013, the percentage fluctuated between twenty-six percent and thirty-two percent.[303] But even more work must be done to resolve the disparities of our justice system.

CONCLUSION

Taking the next step of implementing the individualized approach in all federal courts will require the U.S. Supreme Court to resolve this long-running discrepancy. Based on *Apprendi* and *Alleyne*, which were aimed at protecting defendants' Fifth and Sixth Amendment rights, the more severe, conspiracy-wide sentencing approach is untenable. It is based on a flawed analysis that affects a geographic subset of cases. It represents an expansion of *Pinkerton* liability that fails to account for the real differences in knowledge and culpability among group members. It does not comport with Congress' intent, and its continued practice creates an unequal system of justice based solely on the geography of the federal circuit courts.

Determining sentences based on 21 U.S.C. §§ 846 and 841 is more complicated than need be. However, the majority of circuits have reconciled the ambiguity in favor of the individualized approach. They hold that the individualized approach is more consistent with Congress' intent in the early 1990s and certainly more consistent with Congress' intent in 2022. Further, the individualized approach comports with Supreme Court jurisprudence, and the general notion that the punishment must fit the crime.

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301. *See* U.S. SENT'G COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 29 (2017), https://www.ussc.gov/sites/default/files/ pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf [https://perma.cc/2Z9P-KAVZ] (discussing the Justice Department's 2013 "Smart on Crime" policy initiative).

302. *Id.* at 71 n.143.

303. *Id.* at 29.

For decades, Congress left undisturbed the practice of requiring knowledge or foreseeability before holding drug conspirators accountable for the crimes of co-conspirators.[304] For decades, the political trend has been to impose lesser, not greater, sentences in federal drug cases.[305] The U.S. Supreme Court must address this unequal justice in sentencing defendants convicted of one of the most commonly charged crimes in the federal system.

304. King & Klein, *supra* note 160, at 168.

305. First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194; Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372; King & Klein, *supra* note 160, at 168.