In the

United States Court of Appeals

For the Seventh Circuit

No. 16-2381

JASON M. LUND,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 16-CV-119 — **J.P. Stadtmueller**, *Judge*.

ARGUED OCTOBER 25, 2017— DECIDED JANUARY 17, 2019

Before KANNE and SYKES, *Circuit Judges,* and DARROW, *District Judge*.*

DARROW, *District Judge*. Petitioner Jason Lund appeals the denial of his motion to vacate, set aside, or correct his sentence brought pursuant to 28 U.S.C. § 2255. The district court concluded that Lund's motion was untimely under each of the

* Of the Central District of Illinois, sitting by designation.

potential statutes of limitations and that Lund could not invoke the actual innocence exception to the statute of limitations because his claim of actual innocence was based on a case that interpreted the substantive law of his conviction: *Burrage v. United States*, 571 U.S. 204 (2014). Lund challenges only this conclusion, arguing that a claim of actual innocence can be based on a change in the law. To resolve this case, however, we need not rule on this issue. Even assuming actual innocence can be premised on a change in the law, Lund cannot take advantage of the exception because he rests both his actual innocence claim and his claim for relief on *Burrage*. We affirm.

I. *Background*

In 2008, Jason Lund and thirty others were charged via federal indictment with conspiracy to distribute heroin in violation of 21 U.S.C. § 841(a)(1). The indictment alleged that the conspiracy resulted in overdose deaths of five individuals, including Andrew Goetzke and David Knuth, in violation of 21 U.S.C. § 841(b)(1)(A). Lund pleaded guilty to the single-count indictment, but denied responsibility for the deaths of Goetzke and Knuth, arguing that he had withdrawn from the conspiracy prior to their deaths. The district court judge rejected that argument and sentenced him in accordance with the twenty-year mandatory minimum—sometimes referred to as the "death results" enhancement or penalty—under § 841(b)(1)(A). Lund appealed and his sentence was affirmed. *United States v. Walker*, 721 F.3d 828, 841 (7th Cir. 2013), *judgment vacated on other grounds*, *Lawler v. United States*, 572 U.S. 1111 (2014) (mem.). He did not file a petition for a writ of certiorari, so his sentence became final on October 1, 2013.

On February 1, 2016, Lund filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 based on two changes in the law occurring after his conviction. *See Burrage*, 571 U.S. at 211; *Alleyne v. United States*, 570 U.S. 99, 102 (2013). In *Burrage*, 571 U.S. at 211, the Supreme Court held that finding a defendant guilty of the "death results" penalty "requires proof 'that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct.'" (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346–47 (2013)). This but-for causation rule applies retroactively. *Krieger v. United States*, 842 F.3d 490, 499–500 (7th Cir. 2016). In essence, Lund argued that under *Burrage*, he is actually innocent of the "death results" enhancement because the heroin he provided to Goetzke and Knuth was not the but-for cause of their deaths. Dist. Ct. Order 7, Br. Appellant App. 1–15. *Alleyne*, which concerns who must determine a fact that increases the mandatory minimum, is not retroactive, *Crayton v. United States*, 799 F.3d 623, 624 (7th Cir. 2015), so the district court denied any relief based on *Alleyne*, Dist. Ct. Order 9.[1]

The government moved to dismiss the motion as untimely. The district court found that there was no statutory basis to find his petition timely—it was filed more than a year after his conviction became final, 28 U.S.C. § 2255(f)(1); more than a year after the Supreme Court decided *Burrage*, *id.* § 2255(f)(3); and more than a year after the evidence he presented could have been discovered, *id.* § 2255(f)(4). Dist. Ct. Order 4–7. The district court held that Lund was not entitled

[1] Lund concedes on appeal that *Alleyne* is not retroactive, so it is "of limited use now." Br. Appellant 25.

to equitable tolling. *Id.* at 12–13.[2] It also held that he was unable to use the actual innocence gateway exception to the statute of limitations, which would allow the court to hear his otherwise barred claims, because this Court had not determined "that an intervening change in law supports a claim of actual innocence." *Id.* at 10. The court did not reach the merits of Lund's claims, but it granted him a certificate of appealability. This appeal followed.

II. *Discussion*

We review the district court's legal conclusions de novo. *Coleman v. Lemke*, 739 F.3d 342, 349 (7th Cir. 2014). Lund raises one legal issue: whether an intervening change in law can serve as the basis for an actual innocence claim.

"[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar ... or ... expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *see Schlup v. Delo*, 513 U.S. 298, 317 (1995) (holding that a petitioner who procedurally defaults his claims can overcome the procedural bar if he successfully raises a claim of actual innocence—that is, if he "raise[s] sufficient doubt about [his] guilt to undermine confidence in the result"). The actual innocence gateway exception is "grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (quoting *McCleskey v. Zant*, 499 U.S. 467, 502 (1991)). To establish actual innocence, "a petitioner must show that it is more likely than not that no

[2] Lund does not challenge the district court's ruling on equitable tolling, so we do not address it.

reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327.

The actual innocence exception certainly applies where the petitioner has new evidence, like DNA evidence. *See House v. Bell*, 547 U.S. 518, 537 (2006). But this Court has never explicitly held that it can be used in situations where a subsequent change to the scope of a law renders the conduct the petitioner was convicted for no longer criminal. *See Gladney v. Pollard*, 799 F.3d 889, 897 (7th Cir. 2015).

We need not take a position on this issue, because even assuming that actual innocence could be predicated on a case substantively interpreting the law under which a petitioner was convicted, it would not extend to this case.

Lund is attempting to use *Burrage* as his claim for actual innocence and his claim for relief on the merits. This is a problem for two reasons. First, it is "doubtful" that a petitioner's actual innocence claim and claim for relief on the merits can be the same. *See Perrone v. United States*, 889 F.3d 898, 903 (7th Cir. 2018). And second, even if it can, in this situation it would completely undermine the statute of limitations for bringing initial § 2255 motions within one year from the date a new right is recognized by the Supreme Court.

The actual innocence exception is merely a gateway through which a court can consider a petitioner's otherwise barred claims on their merits. *See Herrera*, 506 U.S. at 404–05. Framing the exception as a gateway presupposes that a petitioner will have underlying claims separate from the claim that he is actually innocent. "The Supreme Court has not recognized a petitioner's right to habeas relief based on a standalone claim of actual innocence." *Gladney*, 799 F.3d at 895.

Moreover, "[t]he point of the exception is to ensure that 'federal constitutional errors do not result in the incarceration of innocent persons.'" *Perrone*, 889 F.3d at 903 (quoting *Herrera*, 506 U.S. at 404). This suggests that the underlying claim must be a constitutional claim, rather than a statutory claim like *Burrage*.

Lund argues that he does not need to bring a separate constitutional claim because *Burrage* is itself cognizable in § 2255 proceedings. By contrast, he argues, a state prisoner would need to bring an underlying constitutional claim because neither a claim of actual innocence based on new evidence nor a claim based on a state law error would be cognizable in a § 2254 proceeding. We do not find this persuasive. The Supreme Court has never mentioned a difference in the purpose or application of the actual innocence exception between § 2254 and § 2255 proceedings. Therefore, we concur that it is "doubtful" that Lund's *Burrage* claim could be both his argument for actual innocence and his claim for relief. *See id.* at 902–03 (holding that the parties' assumption that a claim of actual innocence based on *Burrage* could do "double duty" was "doubtful").

Lund also argues that he has raised underlying constitutional claims. We disagree. Lund claims that his pro se pleadings should have been construed to include an ineffective assistance of counsel claim. In his reply brief below, he argued that his "main cause for not putting forth [a] petition in light of the Supreme Court's decision in Alleyne [wa]s Ineffective Assistance of Counsel." Reply Br. Pet'r 2, ECF No. 8;[3] *see id.* at 3 ("With these facts in mind, if the court were to enforce

[3] This ECF number refers to the district court's docket.

procedural default/untimeliness, the result would be a fundamental miscarriage of justice."). The district court held that Lund "d[id] *not* assert an ineffective assistance of counsel claim in his petition." Dist. Ct. Order 3 n.3. It read Lund's argument regarding his attorney's effectiveness to relate only to his position that his claims should have been equitably tolled. *Id.* Lund asserts that the district court should have construed his reference to ineffective assistance of counsel as a request to amend his § 2255 claim to include a separate ineffective assistance of counsel claim, which then should have been granted.

The district court did not err. True, pro se pleadings must be liberally construed, *see McNeil v. United States*, 508 U.S. 106, 113 (1993), but Lund never indicated—neither in the title of his response, nor its substance—that he was seeking to add a claim. Instead, it appears from his pro se filings that he was seeking to use ineffective assistance of counsel as cause to excuse his procedural default and untimeliness. Therefore, the district court need not have construed Lund's response as a request to amend.[4]

More to the point, allowing *Burrage* to serve as both Lund's basis for actual innocence and his claim for relief on the merits directly contracts a Congressionally-imposed statute of limitations. *McQuiggin*, 569 U.S. at 386, involved the time limit in 28 U.S.C. § 2244(d)(1)(D), which starts the clock

[4] Lund also argues that his motion should have been construed to include a Due Process claim based on *Burrage*. We will not consider this argument because it was raised for the first time in his reply brief, *see United States v. Wescott*, 576 F.3d 347, 354 (7th Cir. 2009), and because it was not raised below, *see Freeland v. Enodis Corp.*, 540 F.3d 721, 731 (7th Cir. 2008).

for the one-year limitation on the date when the facts of the claim could have been discovered. Lund's *Burrage* claim, by contrast, is barred by the statute of limitations which prohibits petitioners from bringing habeas claims based on rights recognized by the Supreme Court, and made retroactively applicable to cases on collateral review, more than one year after the right was recognized by the Court. *See* 28 U.S.C. § 2255(f)(3).

In *McQuiggin*, 569 U.S. at 397, the Supreme Court explained that, as there is "no clear command [in § 2244(d)(1)] countering the courts' equitable authority to invoke the miscarriage of justice exception," it survived the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), at least as it relates to the statutes of limitations contained within that section. The Court noted, however, that other provisions of AEDPA did contain language modifying the actual innocence exception. *Compare Schlup*, 513 U.S. at 327 ("[A] petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."), *with* § 2244(b)(1)(B) (providing that a claim presented in a successive habeas petition that was not presented in a prior § 2254 petition will be dismissed unless the facts establish by clear and convincing evidence that no reasonable factfinder would have found the applicant guilty of the underlying offense).

Likewise, here, there is a clear statutory command limiting courts' equitable discretion to use the actual innocence gateway to excuse failure to comply with § 2255(f)(3). Congress set a one-year limit for petitioners to bring § 2255 motions based on new rights recognized by the Supreme Court. Allowing a claim like *Burrage* to serve as both the basis for actual

innocence and the basis for relief would render this statute of limitations superfluous, at least as it applies to newly recognized statutory rights. Every time there is a retroactive interpretation of a criminal law, petitioners convicted under it would have an initial § 2255 claim based on the new interpretation indefinitely.

We affirm the district court's decision denying Lund's § 2255 motion as untimely. Lund's § 2255 motion was concededly untimely and we hold that he cannot use the actual innocence gateway to overcome the statute of limitations in this case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JASON M. LUND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. 16-CV-119-JPS
Case No. 08-CR-00197-JPS-15

ORDER

The petitioner, Jason M. Lund, was charged, along with twenty-six co-defendants, with conspiring to distribute heroin. *See United States of America v. Johnson*, Case No. 08-CR-197, Docket #1, #60 (E.D. Wis. filed July 14, 2008). Mr. Lund pled guilty on June 3, 2009, to a single count violation of 21 U.S.C. § 841(a)(1). *Id.* at Docket #534. As a part of his plea, Mr. Lund agreed that death and serious bodily injured resulted from the use of the heroin distributed in furtherance of that conspiracy. *Id.* at Docket #534 (listing, *inter alia*, the deaths of Andrew Goetzke and David Knuth). Pursuant to the Court's conclusion that Mr. Lund had coordinated the sales of heroin resulted in the deaths of Mr. Goetzke and Mr. Knuth, Mr. Lund was sentenced in accordance with a twenty-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)—which is also sometimes known as the "death results" penalty enhancement. *Id.* at Docket #730; *see also* 21 U.S.C. § 841(b)(1)(A) (if death or serious bodily injury results from use of substance, defendant shall be sentenced to a term of imprisonment of not less than 20 years or more than life). Mr. Lund unsuccessfully appealed that sentence. *United States v. Walker*, 721 F.3d 828, 840 (7th Cir. 2013), *reh'g en banc denied* Aug. 23, 2013.

On February 1, 2016, Mr. Lund filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (Docket #1). He argues that his sentence should be corrected because *Burrage v. United States*, —U.S.—, 134 S.Ct. 881 (2014) and *Alleyne v. United States*, —U.S.—, 133 S.Ct. 2151 (2013)[1] render him "actually innocent" of the conduct required to support the penalty enhancement under 21 U.S.C. § 841(b)(1)(A). (*See* Docket #1, #2). And, according to this theory, Mr. Lund argues that his mandatory minimum sentence is no longer supported by the evidence. (Docket #1, #2).

Pursuant to Rule 4 of the Rules Governing Section 2255 Proceedings, the Court screened Mr. Lund's petition on February 12, 2016. (Docket #3). In that screening order, the Court concluded that Mr. Lund's petition was likely time-barred. (Docket #3). However, because the Court could not determine, based on the record before it, whether the actual innocence gateway and/or the doctrine of equitable tolling might excuse Mr. Lund's apparent delay in

[1]In *Alleyne*, the Supreme Court held any fact—other than the fact of a prior conviction—that increases the applicable statutory mandatory minimum sentence for a crime must be submitted to a jury and found beyond a reasonable doubt. *See Alleyne*, 133 S. Ct. at 2155. Furthermore, in *Burrage*, the Court held that in context of a drug conviction under 21 U.S.C. § 841(b)(1)(C), a defendant cannot be held liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) where the use of a drug distributed by the defendant is "not an independently sufficient cause of the victim's death or serious bodily injury…unless the drug use is a but-for cause of the death or injury." *Burrage*, 134 S.Ct. at 884. Mr. Lund's argument—which presupposes the retroactive applicability of *Alleyne* and *Burrage* on collateral review—is thus that: (1) his sentence must be corrected because the facts supporting his mandatory minimum sentence were not found by a jury beyond a reasonable doubt, *see Alleyne*, 133 S. Ct. at 2155; and (2) his sentence must be corrected because the toxicology reports prepared with respect to Mr. Goetzke and Mr. Knuth purportedly establish that heroin was not the "but for" cause of their deaths, *Burrage*, 134 S.Ct. at 884. (*See* Docket #9). The Court will address the sufficiency of these arguments in further detail below.

filing, the Court permitted Mr. Lund's petition to proceed past the initial screening stage. (Docket #3).

In response, the government filed an answer in which it argues that the Court's suspicion regarding the untimeliness of Mr. Lund's petition is indeed correct. (Docket #6). More to the point, the government argues that the facts of this case do not support either a statutory or common law exception to the one-year timeliness rules embodied in Section 2255(f). (Docket #6 at 2-3). Further, the government argues that the "new" evidence upon which Mr. Lund relies is not "new" in any sense of that word—Mr. Knuth's and Mr. Goetzke's toxicology reports were a part of discovery in Mr. Lund's underlying criminal case. (Docket #6 at 4).

With respect to the timing of his petition, Mr. Lund makes three arguments.[2] (Docket #8). First, with respect to his position under *Alleyne*, Mr. Lund posits that because his direct appeal with the Seventh Circuit was still pending when *Alleyne* was decided, his claim herein is timely. (Docket #8 at 2). Second, Mr. Lund argues that the toxicology reports upon which he relies are "newly discovered." (Docket #1, #2). Third, Mr. Lund argues that his claims should be equitably tolled because: (1) he experienced difficulties communicating with counsel beginning in February of 2014;[3] and (2) he was not aware of the one-year time limit for Section 2255 petitions. (Docket #8).

---

[2]Mr. Lund also filed a motion for summary judgment in this case based on the timeliness of the government's answer. (Docket #7). However, Mr. Lund's motion fails to account for the fact that the government complied with the Court's order dated April 5, 2015. (Docket #4). Accordingly, the Court will deny Mr. Lund's motion for summary judgment. (Docket #7).

[3]Mr. Lund does *not* assert an ineffective assistance of counsel claim in his petition. (Docket #1). Rather, Mr. Lund's argument regarding the effectiveness of his counsel appears to relate to his position that Mr. Lund's claims should be equitably tolled. (Docket #1, #2, #8, #9).

Mr. Lund's petition is now fully briefed and ripe for adjudication. As a threshold matter, the Court must address whether Mr. Lund's petition is timely. *See* 28 U.S.C. § 2255(f). The Court must examine both statutory and common law timing rules and exceptions applicable to Section 2255 petitions.

The statute of limitations governing Section 2255 petitions is embodied in 28 U.S.C. § 2255(f). Mr. Lund arguably presents three statutory bases upon which this Court may find his petition timely: (1) Section 2255(f)(1) (stating that the "1-year period of limitation…shall run from…the date on which the judgment of conviction becomes final"); (2) Section 2255(f)(3) (stating that the "1-year period of limitation…shall run from…the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"); or (3) Section 2255(f)(4) (stating that the "1-year period of limitation…shall run from…the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence"). The Court will address each possibility in turn.

First, to determine whether Mr. Lund's petition is timely under Section 2255(f)(1), the Court must ascertain the date upon which Mr. Lund's conviction became "final." Here, Mr. Lund directly appealed his sentence to the Seventh Circuit, who upheld his sentence on July 3, 2013. *See Walker*, 721 F.3d at 840. Because Mr. Lund did not file a petition for a writ of certiorari to the Supreme Court, his judgment of conviction became final on October 1, 2013, and he therefore had until October 1, 2014, to file a timely Section 2255 petition. *See* 28 U.S.C. § 1254(1); *Latham v. United States*, 527 F.3d 651, 652 (7th Cir. 2008) ("The Supreme Court held [in *Clay v. United States*, 537 U.S. 522, (2003)] that a federal conviction becomes 'final' with the expiration of time

to file a petition for a writ of certiorari (or, if certiorari is sought and denied, on the date of denial.)"); S. Ct. Rule 13.1. Under this rule, and contrary to Mr. Lund's position, it is of no moment that *Alleyne* was decided while Mr. Lund's direct appeal was pending before the Seventh Circuit. (Docket #8). Rather, because Mr. Lund filed his petition on February 1, 2016—more than one year after his conviction became final—his petition fails to satisfy Section 2255(f)(1). (*See* Docket #1).

Next, in order for Section 2255(f)(3) to save Mr. Lund's petition from being time-barred, Mr. Lund must have filed his petition within one year of when "the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." In his petition, Mr. Lund argues that both *Burrage*, 134 S.Ct. at 881, and *Alleyne*, 133 S.Ct. at 2151, are the sources of "newly recognized" rights that are relevant to this petition. (*See* Docket #1, #2, #8, #9). These cases, however, do not assist Mr. Lund under Section 2255(f) because the Supreme Court decided them over a year before Mr. Lund filed the instant Section 2255 petition. *See Burrage*, 134 S.Ct. at 881 (decided January 27, 2014); *Alleyne*, 133 S.Ct. at 2151 (decided on June 17, 2013). Thus, Mr. Lund's petition fails to satisfy the statutory timeliness exception embodied in Section 2255(f)(3).

Finally, the rule embodied in Section 2255(f)(4) states that a habeas petition is timely if it is presented within one year from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." Mr. Lund's arguments on this point are not clear. On the one hand, Mr. Lund suggests that the toxicology reports are "newly discovered" in the sense that they have new legal significance following the Supreme Court's decisions in *Burrage* and

Alleyne. (*See* Docket #8 at 7) ("[W]ith the dramatic change of law…the new law effectively converted the toxicology documents…into evidence favorable to petitioner."). On the other hand, Mr. Lund states—without elaboration—that he has only recently had an opportunity to view the toxicology reports of Mr. Knuth and Mr. Goetzke. (*See* Docket #2 at 1) ("This claim also comes…through newly discovered facts within the Toxicology and Investigative Reports…[which] could not have been discovered earlier by the petitioner.") In his reply, Mr. Lund states that this may be due to some measure of ineffective assistance of his counsel. (*See* Docket #8 at 7) (explaining that Mr. Lund "took it upon himself to send for those documents, which were discovered for the first time by petitioner [in] May [of] 2015….[t]his is obviously attributed to ineffective assistance of counsel….").

Under either theory, Mr. Lund's arguments fail. With regard to Mr. Lund's first argument, the Seventh Circuit has expressly rejected the notion that a substantive "court decision can be a 'factual predicate' within the meaning" of a statutory tolling mechanism like Section 2255(f)(4). *See e.g.*, *Lo v. Endicott*, 506 F.3d 572, 575-76 (7th Cir. 2007) (holding that a clarification in the law is "not a fact within [the petitioner's] own litigation history that change[s] his legal status" for the purpose of Section 2244(d)(1)(C)), the state conviction equivalent of Section 2255(f)(4)). With regard to Mr. Lund's second argument, Mr. Lund does not dispute that his lawyers had access to the documents in question, which the government represents were part of discovery in the underlying criminal case. (Docket #6 at 4). Moreover, the presentence investigative report prepared by the probation department with respect to Mr. Lund expressly cites to Mr. Goetzke's toxicology report. Indeed, the toxicology reports presented by Mr. Lund are dated June of 2008 and July of 2008, respectively—over a year prior to Mr. Lund's sentencing.

(Docket #2, Ex. 1 at 15-17, 19-21; *Johnson*, Case No. 08-CR-197, Docket #616). Thus, this Court concludes that Mr. Lund filed his petition outside of the one-year window in which he could have discovered Mr. Knuth's and Mr. Goetzke's toxicology reports with due diligence. The timeliness rule embodied in Section 2255(f)(4) is not the life raft upon which Mr. Lund's petition may be salvaged.

Though all of the statutory rules governing the Section 2255 limitations period indicate that Mr. Lund's petition is untimely, Mr. Lund argues that two common law exceptions to the Section 2255 time bar may nonetheless render his petition timely: the actual innocence gateway and equitable tolling. (Docket #1, #2). With respect to his actual innocence argument, Mr. Lund contends that the toxicology reports from Mr. Goetzke and Mr. Knuth reveal that the heroin he conspired to distribute was not the "but for" cause of the mens' deaths, thereby rendering him actually innocent of the conduct supporting his penalty enhancement under 28 U.S.C. § 841(b)(1)(A). (Docket #1, #2). Moreover, he argues that his sentence was imposed in violation of *Alleyne*, 133 S. Ct. at 2153, because the fact that he "caused" Mr. Knuth's and Mr. Goetzke's deaths—and was, therefore, subject to the mandatory minimum penalty enhancement embodied in 28 U.S.C. § 841(b)(1)(A)—was not submitted to a jury and found beyond a reasonable doubt. (Docket #8 at 1-2). Accordingly, Mr. Lund contends that, under the Supreme Court's intervening case law, he is "actually innocent."

Mr. Lund may avoid the statutory time limits embodied in Section 2255(f) by arguing that the common law doctrine of actual innocence applies. *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013). To qualify for this narrow equitable gateway, Mr. Lund must "present[] evidence of innocence so strong that a court cannot have confidence in the outcome of the trial

unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Schlup v. Delo*, 513 U.S. 298, 316 (1995). Further, he must show "that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House v. Bell*, 547 U.S. 518, 536-37 (2006) (quoting *Schlup*, 513 U.S. at 327). "The new evidence may include 'exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.'" *Coleman v. Lemke*, 739 F.3d 342, 349 (7th Cir.), *cert. denied*, 134 S. Ct. 2317 (2014) (internal citations omitted). "The actual innocence standard is a demanding one that "permits review only in the 'extraordinary' case." *Id.* (internal citations omitted).

As described above, Mr. Lund does not present "new evidence" in the form of new *facts*. Nonetheless, Mr. Lund argues that a change in governing law—namely, *Burrage* and *Alleyne*— constitute "new evidence" which entitle him to equitable relief from the statutory time bar governing this case.

As noted in this Court's screening order, however, it is an open question in this Circuit as to whether an intervening change in law is sufficient to constitute "new evidence" for the purpose of a claim of actual innocence. *See Gladney*, 799 F.3d at 897 ("That argument raises a new question in this circuit, which is whether the *Schlup* actual innocence standard can be satisfied by a change in law *rather than* new evidence.") (emphasis added). There is likewise a circuit split on this question. *See Vosgien v. Persson*, 742 F.3d 1131, 1134 (9th Cir. 2014) ("One way a petitioner can demonstrate actual innocence is to show in light of subsequent case law that he cannot, as a legal matter, have committed the alleged crime."); *Phillips v. United States*, 734 F.3d 573, 581 n. 8 (6th Cir. 2013) (declining "to accept the government's suggestion that in *McQuiggin*, the Court meant to limit actual innocence claims to those

instances where a petitioner presents new facts…and by implication to undermine those cases that have applied an equitable exception in cases where the innocence is occasioned not by new evidence but by an intervening, controlling change in the law as applied to a static set of facts"); *McKay v. United States*, 657 F.3d 1190, 1197 (11th Cir. 2011) ("First, and most importantly, for purposes of the actual innocence exception, 'actual innocence' means factual innocence, not mere legal insufficiency.") (internal citations omitted); *United States v. Mikalajunas*, 186 F.3d 490, 494 (4th Cir. 1999) ("Typically, to establish actual innocence a petitioner must demonstrate actual factual innocence of the offense of conviction, *i.e.*, that petitioner did not commit the crime of which he was convicted; this standard is not satisfied by a showing that a petitioner is legally, but not factually, innocent."). The Seventh Circuit in *Gladney* declined to address this issue because the Wisconsin Supreme Court had expressly held that the legal rule upon which the petitioner sought to rely had not been found to be retroactively applicable. *See Gladney*, 799 F.3d at 897 (citing *State v. Lo*, 264 Wis.2d 1, 665 N.W.2d 756, 770–72 (2003)).

Even assuming that the Seventh Circuit had endorsed the argument that the actual innocence gateway may be supported by an intervening change in law, the Seventh Circuit has expressly held that *Alleyne* does not apply retroactively on collateral review. *See Crayton v. United States*, 799 F.3d 623, 624 (7th Cir.), *cert. denied*, 136 S. Ct. 424 (2015). Admittedly, the Seventh Circuit has not clarified the same with respect to *Burrage*. *Compare Krieger v. United States*, No. 14-CV-00749-JPG, 2015 WL 3623482, at *3 (S.D. Ill. June 10, 2015) ("Because the Supreme Court did not declare that *Burrage* applied retroactively on collateral attack, this Court cannot authorize a *successive* collateral attack based on Section 2255.") (emphasis added) *with Weldon v.*

United States, No. 14-0691-DRH, 2015 WL 1806253, at *3 (S.D. Ill. Apr. 17, 2015) ("Weldon argues that *Burrage* makes him innocent of the charges contained in the indictment against him. In response, the government concedes that *Burrage* is substantive in nature and is retroactive. However, the government argues that *Burrage* does not help Weldon because at the time of his plea and sentencing the Seventh Circuit's decision in *Hatfield v. United States* was the controlling law and that *Hatfield* utilized the same "but for" causation test as *Burrage* now requires."); *cf. United States v. Martin*, 564 Fed. Appx. 850, 851 (7th Cir. 2014) (noting that "decisions in the *Apprendi* sequence do not apply retroactively") (internal citations omitted).

The Court declines to reach the unnecessary question of whether *Burrage* is retroactive under the framework of *Teague v. Lane*, 489 U.S. 288 (1989) because the Seventh Circuit has not endorsed Mr. Lund's preliminary position: that an intervening change in law supports a claim of actual innocence. *See Gladney*, 799 F.3d at 897. This Court's conclusion that intervening changes in the law do not support a claim of actual innocence comports with the Supreme Court's insistence that the gateway is "extremely rare" and must be supported "with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Id.* (citing *Schlup*, 513 U.S. at 324); *see also Bousley v. United States*, 523 U.S. 614, 615 (1998) ("Actual innocence means factual innocence, not mere legal insufficiency."); *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992) ("We emphasized that the miscarriage of justice exception is concerned with actual as compared to legal innocence.…"). Accordingly, because Mr. Lund's sole basis for arguing that actual innocence should apply relies on intervening changes in the law, the Court concludes that Mr. Lund is not

entitled to relief under this "narrow" equitable gateway. *Gladney*, 799 F.3d at 897

This does not end the inquiry, though. "The statute of limitations in section 2255 is just that—a statute of limitations, not a jurisdictional limitation, and so it can be tolled." *Clarke v. United States*, 703 F.3d 1098, 1101 (7th Cir. 2013) (citing *Nolan v. United States*, 358 F.3d 480, 483–84 (7th Cir. 2004); *Ramos–Martinez v. United States*, 638 F.3d 315, 323–24 (1st Cir. 2011); *Holland v. Florida*, 560 U.S. 631, 645 (2010)). The Seventh Circuit has explained that:

> [t]here are two principal tolling doctrines. One is equitable estoppel, which comes into play "if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations" as a defense. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450–51 (7th Cir. 1990).…The other doctrine is "equitable tolling. It permits a plaintiff to avoid the bar of the statute of limitations if *despite all due diligence* he is unable to obtain vital information bearing on the existence of his claim." *Id.* at 451 (emphasis added); *see also Ramos–Martinez v. United States*, *supra*, 638 F.3d at 323–24.

Clarke v. United States, 703 F.3d 1098, 1101 (7th Cir. 2013). "Under equitable tolling principles, a petitioner need not count the time during which he (1) pursues his rights diligently, and (2) 'some extraordinary circumstance stood in his way and prevented timely filing.'" *Gladney*, 799 F.3d at 894–95 (quoting *Holland*, 560 U.S. at 649). "It is the petitioner's burden to establish both of these points." *Socha v. Boughton*, 763 F.3d 674, 684 (7th Cir. 2014) (citing *Tucker v. Kingston*, 538 F.3d 732, 734 (7th Cir. 2008)). Moreover, "tolling is rare; it is 'reserved for extraordinary circumstances far beyond the litigant's control that prevented timely filing.'" *Id.* at 684 (citing *Nolan v. United States*, 358 F.3d 480, 484 (7th Cir. 2004)).

Mr. Lund's statutory filing deadline is not entitled to equitable tolling in this case. For his part, Mr. Lund argues that equitable tolling should apply because: (1) he experienced difficulties communicating with his attorneys beginning in approximately February of 2014; and (2) he was not aware of the one year statute of limitations for Section 2255 petitions. (Docket #8).

Mr. Lund's arguments fail for three reasons. First, lack of knowledge regarding the statute of limitations and/or lack of legal expertise are insufficient to support equitable tolling. *See Tucker*, 538 F.3d at 735. Second, with regard to the first prong of the *Holland* test, the Court cannot conclude that Mr. Lund acted diligently in pursuing his claims. He proffers no excuse for his delay in drafting his habeas petition from the date his conviction became final—October 1, 2013—until February of 2014. (Docket #8 at 8). Moreover, despite Mr. Lund's assertion that he attempted to contact his attorneys in February of 2014 and again in August of 2014, Mr. Lund fails to explain what "diligent" actions he was taking *during* this time period. *See Taylor v. Michael*, 724 F.3d 806, 810-11 (7th Cir. 2013) (explaining how the petitioner in *Holland* "repeatedly sought assurance that his claims would be preserved for federal habeas review and that statutory deadlines would be met" and "repeatedly wrote to both the Florida Supreme Court and its clerk to ask that his attorney be removed from the case because of this failure to communicate.…").

Third, though "egregious behavior" on behalf of an attorney in certain cases can satisfy the second "extraordinary circumstances" prong, neither "a garden variety claim of excusable neglect" nor a "miscalculation" about the time available for filing will meet this high bar. *Holland*, 560 U.S. at 633; *see also Modrowski v. Mote*, 322 F.3d 965, 967 (7th Cir. 2003) ("[A]ttorney negligence is not grounds for equitable tolling.…"). "The rationale is that

attorney negligence is not extraordinary and clients, even if incarcerated, must 'vigilantly oversee,' and ultimately bear responsibility for, their attorneys' actions or failures." *Id.* Here, despite Mr. Lund's assertion that his attorneys failed to promptly communicate with him, Mr. Lund failed to submit evidence of these alleged communications. Moreover, Mr. Lund admits to having received at least two emails in June of 2014 and July of 2014 from paralegals regarding relevant legal updates. (Docket #8 at 8). He also admits to having spoken with his attorney, Brian Kinstler, in September of 2014. (Docket #9 at 9). In sum, although the record suggests that Mr. Lund's communications with his attorneys were intermittent and inconsistent, this Court is counseled by binding precedent which has expressly held that equitable "tolling is rare; it is 'reserved for extraordinary circumstances *far beyond the litigant's control* that prevented timely filing.'" *Socha*, 763 F.3d at 684 (internal citations omitted) (emphasis added). Mr. Lund's circumstances, with regard to both prongs of the equitable tolling test, do not meet that criteria.[4] *See Montenegro*, 248 F.3d at 594 (refusing to apply equitable tolling despite language barrier, attorney's nonresponsiveness to prisoner's letter, prisoner's limited education and lack of knowledge of prison system, and prisoner's transfer between prisons).

However, under Rule 11(a) of the Rules Governing Section 2255 Cases, "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." To obtain a certificate of

[4]Mr. Lund's final arguments in his reply brief are that: (1) his plea should not be deemed an admission that he "caused" the deaths of Mr. Knuth and Mr. Geotzke (Docket #8 at 12); and (2) the guidelines applicable to his sentencing are inappropriate in light of the arguments stated above (Docket #8 at 13). In light of the Court's conclusion that Mr. Lund's petition is barred as untimely, the Court need not address the merits of these arguments and/or Mr. Lund's claims.

appealability under 28 U.S.C. § 2253(c)(2), Mr. Lund must make a "substantial showing of the denial of a constitutional right" by establishing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal citations omitted). Further, when the Court has denied relief on procedural grounds, the petitioner must show that jurists of reason would find it debatable both that the "petition states valid claim of the denial of a constitutional right" and that "the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As the Court discussed above, reasonable jurists may debate whether the petition should have been resolved in a different manner. This petition presented two open questions in the Seventh Circuit: (1) whether an intervening change in law is "new evidence" upon which a claim of actual innocence may be supported; and (2) whether *Burrage* is retroactively applicable to cases on collateral review. As a consequence, the Court is compelled to grant a certificate of appealability as to Mr. Lund's petition.

Finally, the Court closes with some information about the actions that Mr. Lund may take if he wishes to challenge the Court's resolution of this case. This order and the judgment to follow are final. A dissatisfied party may appeal this Court's decision to the Court of Appeals for the Seventh Circuit by filing in this Court a notice of appeal within 30 days of the entry of judgment. *See* Fed. R. App. P. 3, 4. This Court may extend this deadline if a party timely requests an extension and shows good cause or excusable neglect for not being able to meet the 30-day deadline. *See* Fed. R. App. P. 4(a)(5)(A). Moreover, under certain circumstances, a party may ask this

Court to alter or amend its judgment under Federal Rule of Civil Procedure 59(e) or ask for relief from judgment under Federal Rule of Civil Procedure 60(b). Any motion under Federal Rule of Civil Procedure 59(e) must be filed within 28 days of the entry of judgment. The Court cannot extend this deadline. *See* Fed. R. Civ. P. 6(b)(2). Any motion under Federal Rule of Civil Procedure 60(b) must be filed within a reasonable time, generally no more than one year after the entry of the judgment. The court cannot extend this deadline. See Federal Rule of Civil Procedure 6(b)(2). A party is expected to closely review all applicable rules and determine what, if any, further action is appropriate in a case.

Accordingly,

IT IS ORDERED that, the Court having determined that Mr. Lund's petition for a writ of habeas corpus (Docket #1) is untimely, the petition (*id.*) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that Mr. Lund's motion for summary judgment (Docket#7) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that this action be and the same is hereby DISMISSED with prejudice; and

IT IS FURTHER ORDERED that a certificate of appealability be and the same is hereby GRANTED.

The Clerk of Court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 27th day of May, 2016.

BY THE COURT:

J.P. Stadtmueller
U.S. District Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 19, 2019

Before

MICHAEL S. KANNE, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

SARA DARROW, *Chief District Judge*[*]

No. 16-2381

JASON M. LUND,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:16-cv-00119-JPS

J.P. Stadtmueller,
Judge.

O R D E R

On consideration of the petition for rehearing and rehearing *en banc*, no judge in active service has requested a vote on the petition for rehearing *en banc* and all members of the original panel have voted to deny rehearing. It is, therefore, **ORDERED** that rehearing and rehearing *en banc* are **DENIED**.

[*] Of the Central District of Illinois, sitting by designation.

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 10-2173, 10-2176, 10-2355,
11-1024 & 11-1510

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEITH L. WALKER, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 2:08-cr-197—**J.P. Stadtmueller**, *Judge*.

ARGUED NOVEMBER 30, 2011—DECIDED JULY 3, 2013

Before MANION, WILLIAMS, and TINDER, *Circuit Judges.*

WILLIAMS, *Circuit Judge*. Joshua Carroll, Andrew Goetzke, David Knuth, Valerie Luszak, and Jeffrey Topczewski died after using heroin distributed by a large-scale narcotics trafficking organization. The five defendants in this case each pled guilty to possession with intent to distribute and conspiracy to distribute in excess of one kilogram of heroin in violation of 21 U.S.C. §§ 841(a)(1),

846. Because five people died, the government requested that the district court impose a mandatory minimum penalty of twenty years' imprisonment to each defendant's sentence under 21 U.S.C. § 841(b)(1)(A). The district court thought that it was required to impose the same penalty on all of the defendants under a theory of strict liability. So the major issue we need to decide on appeal is whether each of the defendants must receive the same statutory penalty, regardless of their role in the conspiracy or connection to the drugs that killed the users.

We now agree with the Sixth Circuit that a district court must make specific factual findings to determine whether each defendant's relevant conduct encompasses the distribution chain that caused a victim's death before applying the twenty-year penalty. And we affirm the sentences of Jean Lawler, Jason Lund, and Jermaine Stewart since the court found that they were in the distribution chain that led to the five deaths and the record clearly supports those findings. However, we vacate the sentences of Keith Walker and Eneal Gladney, and remand for further proceedings because the district court did not make the required findings.

I. BACKGROUND

The conspiracy charged here ran from 2005 to 2008 and operated in and around Milwaukee, Wisconsin, with Lonnie Johnson acting as one of its leaders and supplying bulk quantities of heroin. Stewart was Johnson's chief

lieutenant, managing regional operations after Johnson relocated to Chicago. Johnson and Stewart used a network of distributors in Milwaukee and Waukesha to co-ordinate sales for the organization. Walker and Gladney worked out of Milwaukee as higher-level distributors. The conspiracy's distributors partnered with lower-level street dealers and individual users who brokered further sales to customers.

A substantial portion of the conspiracy's customer base came from Pewaukee, Muskego, and Waukesha—areas west of Milwaukee. Lund worked out of the Waukesha branch as a dealer, connecting potential customers to Stewart and another distributor, Luke Bandkowski. Lawler was a low-level member of the conspiracy, also based in the Waukesha area. She purchased relatively small quantities of heroin from Bandkowski to resell to others and for personal use. The five individuals identified earlier died from using heroin distributed by this organization and four of these deaths occurred in the Waukesha area.

Between 2007 and 2008, the government worked with confidential informants to infiltrate the conspiracy and obtain evidence of its operations. On July 22, 2008, a grand jury returned a one-count indictment charging the defendants with conspiracy to distribute heroin. The indictment further alleged that death and serious bodily injury resulted from the use of heroin distributed by the conspiracy. Each of the appellants entered into plea agreements with the government reserving the right to

challenge the sentencing penalty for death or serious injury.

The district court found that Lund had coordinated the sales of heroin that killed two victims: Andrew Goetzke and David Knuth. Goetzke began using heroin in early 2007, buying drugs from the conspiracy through Bandkowski. He was eventually interviewed by police officers and agreed to become a confidential informant. On the night of June 5, 2008, Lund called his ex-girlfriend, Candice Haid, to get her help in coordinating Goetzke's purchase of heroin from Stewart. Lund and Stewart had a prior falling out and were not communicating directly, so Lund got Stewart's current phone number from Haid. Lund and Goetzke drove together to pick up heroin from Stewart's apartment in Milwaukee. The two split the drugs and Lund received an additional thirty dollar cut for setting up the sale. After they injected the heroin, Goetzke left for his mother's apartment with his girlfriend. The next morning, his mother was unable to wake him and called 911, but emergency personnel could not revive him.

One month later, on the night of July 3, 2008, Lund again contacted Stewart to coordinate a sale for himself, Haid, and David Knuth. After completing the purchase, the three began injecting heroin in a car. Knuth stopped breathing almost immediately. Haid was initially able to revive Knuth using cardiopulmonary resuscitation (CPR) and the three started driving home. But Knuth lapsed into unconsciousness and began bleeding from

the nose. Haid called 911 while Lund drove to the parking lot of a local healthcare facility. The dispatcher advised that Knuth be moved to a flat surface. So Haid pulled him onto the ground of the parking lot where she administered CPR. Lund drove off. Unfortunately the clinic was closed and Knuth could not be revived by emergency personnel when they finally responded. He was later pronounced dead.

The district court further found that Lawler sold the drugs that killed Jeffrey Topczewski. Jeffrey's sister, Jennifer Topczewski, is a co-defendant in the case and the siblings shared a severe addiction to heroin. On February 17, 2008, Jeffrey talked to his sister about using a recent tax refund to buy heroin. He contacted his sister to get the phone number for Lawler who had sold him drugs a few days earlier. At the time, Jeffrey was living with his parents and used their home phone since he did not have a cell phone. On February 19, 2008, the day before his death, Jeffrey called Lawler from his parents' home phone to set up a purchase. When Jeffrey did not arrive at the agreed time, Lawler called the Topczewski residence that evening to check on his status. Shortly thereafter, Jeffrey went to her house to complete the sale. Telephone records corroborate this series of events and confirm that the only calls from the Topczewski residence were to Jennifer and to Lawler while Jeffrey was home on the 19th. After taking heroin that evening, Jeffrey told his parents he felt sick. The next day, Jeffrey's mother checked his room in the evening and found him dead. In later interviews with

police, Jennifer Topczewski and Lawler's friend, Kallie Klappa, eventually confirmed that on the night of February 19th Lawler sold Jeffrey the heroin that killed him.

In addition, two others died from drugs sold by different participants in the conspiracy. The first was Valerie Luszak, a woman in Milwaukee who died on August 26, 2007. That night, she went to the house of a friend, Louis Brown, and offered to share her heroin with him. Brown could identify the heroin as that sold by the conspiracy due to distinctive ways in which the drugs were packaged. He also knew that Johnson, the conspiracy's leader, was Luszak's principal source. After shooting up, Brown warned Luszak about the strength and purity of the dose. But Luszak believed she had built up sufficient tolerance and injected the drug anyway. She fell unconscious and died several hours later. On December 29, 2007, Joshua Carroll set up a purchase of heroin from Bandkowski. Another user informed police that he and Carroll drove with Bandkowski to Milwaukee to collect the drugs that evening. Later that night, emergency personnel were called to Carroll's residence after he was found unresponsive. He could not be revived and was pronounced dead.[1]

The district court found that all five deaths had resulted from heroin distributed by the conspiracy and applied

[1] The district court adopted the factual findings in the PSR as its findings of fact at sentencing.

a twenty-year mandatory minimum sentencing penalty to each of the defendants under 21 U.S.C. § 841(b)(1)(A), but the sentences for four of the five appellants were adjusted below twenty years pursuant to § 5K1.1 of the Sentencing Guidelines for substantial assistance provided to the government. Each defendant now appeals the district court's findings and application of the twenty-year penalty to their sentence.

II. ANALYSIS

We review the district court's legal determinations and interpretation of sentencing statutes de novo. *United States v. Hernandez*, 544 F.3d 743, 746 (7th Cir. 2008). The penalty provisions of § 841(b)(1)(A) outline sentencing factors which must be supported by a preponderance of the evidence. *United States v. Krieger*, 628 F.3d 857, 866-67. We will reverse the district court's factual findings only where there is a "definite and firm conviction that a mistake has been committed." *United States v. Bennett*, 461 F.3d 910, 912 (7th Cir. 2006).

A. Liability for Death Caused by Drug Use

Each of the defendants pled guilty to conspiracy to possess with intent to distribute and distribute in excess of one kilogram of heroin in violation of 21 U.S.C. §§ 841(a)(1), 846. Section 846 specifically provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the

same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." Section 841(b)(1)(A) increases the penalty when a drug user dies and instructs that a defendant's term of imprisonment "shall not be less than 20 years . . . if death or serious bodily injury results from the use of such substance" distributed in violation of § 841(a)(1). 21 U.S.C. § 841(b)(1)(A).[2]

The conspiracy charged in this case was a broad, multi-level drug network and each defendant played a different role in the organization. But the district court interpreted the penalty provision of § 841(b)(1)(A) as setting an identical twenty-year mandatory floor for all members of the conspiracy because the drug network, as a whole, had caused the deaths of several customers. Although the district court appeared troubled by these sentencing implications, it concluded that Congress intended that all defendants be held strictly liable for deaths caused by illegal drug distribution, regardless of their role in the distribution chain. The defendants argue that this was error and urge that we interpret § 841(b)(1)(A) as requiring a district court to find death or serious bodily injury reasonably foreseeable to a defendant before imposing this statutory en-

[2] U.S.S.G. § 2D1.1(a)(2) mirrors the language in § 841(b)(1)(A) and assigns a base offense level of 38 "if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A) . . . [and] death or seriously bodily injury resulted from the use of the substance. . . ." U.S.S.G. § 2D1.1(a)(2).

hancement. This issue is a matter of first impression in this circuit.

Almost every other circuit to consider the penalty under § 841(b)(1)(A) has held that a victim's death need not be reasonably foreseeable for the penalty to apply in cases where the defendant either directly produces, distributes, or uses an intermediary to distribute, fatal doses of drugs. *See United States v. Webb*, 655 F.3d 1238 (11th Cir. 2011); *United States v. De La Cruz*, 514 F.3d 121 (1st Cir. 2008); *United States v. Houston*, 406 F.3d 1121 (9th Cir. 2005); *United States v. Soler*, 275 F.3d 146 (1st Cir. 2001); *United States v. McIntosh*, 236 F.3d 968 (8th Cir. 2001); *United States v. Robinson*, 167 F.3d 824 (3d Cir. 1999); *United States v. Patterson*, 38 F.3d 139 (4th Cir. 1994). By its very terms, the statutory language of § 841(b)(1)(A) omits any reference to the mental state that would trigger the penalty. It simply applies whenever "death . . . results" from the use of drugs supplied by the defendant. The First and Eighth Circuits have described a defendant's liability under this provision as "strict," meaning that once a causal connection has been established, a defendant is automatically liable for the increased penalty regardless of whether or not he knew, or should have known, that a drug user might die. *See Soler*, 275 F.3d at 152; *McIntosh*, 236 F.3d at 974. *Cf. United States v. Burrage*, 687 F.3d 1015 (8th Cir. 2012) (affirming district court's use of "contributing cause" language in jury instructions where a drug dealer sold heroin to a user who later died with cocktail of various drugs found in his system), *cert. granted*, ___ S. Ct. ___, 2013 WL 1788076

(U.S. April 29, 2013) (granting certiorari to consider the question of whether § 841 is a strict liability crime without a foreseeability or proximate cause requirement). In the Fourth Circuit's view, "[t]he statute puts drug dealers on clear notice that their sentences will be enhanced if people die from using the drugs they distribute." *Patterson*, 38 F.3d at 145.

In contrast, the Ninth Circuit "stop[ped] short of ascribing to the . . . 'strict liability' language" used by other circuits, concluding instead that "[p]roof that the resulting death was actually caused by ingestion of the controlled substance knowingly distributed by the defendant is sufficient to increase the punishment for the unlawful distribution." *Houston*, 406 F.3d at 1124 n.5. The court recognized that "there may be some fact scenarios in which the distribution of a controlled substance is so removed and attenuated from the resulting death that criminal liability could not be imposed . . . ." *Id.*

The Sixth Circuit confronted such a scenario in *United States v. Swiney*, 203 F.3d 397 (6th Cir. 2000), in evaluating the application of the twenty-year penalty to low-level conspirators who played no direct part in the underlying conduct which resulted in a drug user's death. In *Swiney*, a victim died after taking heroin sold by a multi-level drug conspiracy and the government claimed that all of the defendants should receive the same twenty-year minimum penalty. But the Sixth Circuit rejected the strict liability approach advocated by the government. The *Swiney* court began its analysis by finding that

the government's argument "ignores the Sentencing Guideline's treatment of conspiracy." 203 F.3d at 402 (citing § 1B1.3(a)(1)(B)). Section 1B1.3(a)(1)(B) of the Sentencing Guidelines outlines different sentencing consequences for different defendants "in the case of a jointly undertaken criminal activity." Application Note 2 further explains this now-familiar concept:

> In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:
>
> A. in furtherance of the jointly undertaken criminal activity; and
>
> B. reasonably foreseeable in connection with that criminal activity.
>
> Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the "jointly undertaken criminal activity") is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agree-

> ment). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

Id. cmt. n.2. The Guidelines make clear that the scope of a defendant's relevant conduct for determining sentencing liability may be narrower than the scope of criminal liability. So in applying the principles of relevant conduct as defined in § 1B1.3(a)(1)(B), the Sixth Circuit in *Swiney* held that "before any of the [co-conspirators] can be subject to the twenty-year sentence enhancement of 21 U.S.C. § 841(b)(1)(C)" a "district court must find that [a given defendant] is part of the distribution chain" that led to an individual's death. 203 F.3d at 406. We read this to mean a defendant can only be subject to the enhancement if the distribution of heroin that ultimately led to a victim's death was "reasonably foreseeable" and in furtherance of jointly undertaken activity as defined in § 1B1.3(a)(1)(B).

We have already applied the logic of *Swiney* in a parallel context: mandatory minimums for drug quantities trafficked by a conspiracy. In that context, we have found that a defendant is only liable for the foreseeable

quantities of drugs attributed to co-conspirators. *See, e.g.*, *United States v. Alvarado-Tizoc*, 656 F.3d 740, 744 (7th Cir. 2011); *Gray-Bey v. United States*, 156 F.3d 733, 740-41 (7th Cir. 1998), *United States v. Edwards*, 945 F.2d 1387, 1395 (7th Cir. 1991). In other words, "the foreseeability analysis employed in the Guidelines context is also applicable in the statutory context." *United States v. Young*, 997 F.2d 1204, 1210 (7th Cir. 1993), *superseded on separate grounds*, *United States v. Rivera*, 411 F.3d 864, 866 (7th Cir. 2005). As a result, we decline to hold defendants presumptively liable for quantities distributed by the entire conspiracy because "it would . . . be difficult to assume Congress intended to employ under the statute a sentencing scheme that is so completely at odds with the measured approach clearly required by the Guidelines." *Id.*; *see also United States v. Munoz-Cerna*, 47 F.3d 207, 210 (7th Cir. 1995) ("[A]lthough Congress has chosen to address sentencing policy issues through both statutes and sentencing guidelines, we ought not presume lightly that it intended that these two vehicles of its legislative will be at odds with each other."). As noted above, § 846 makes co-conspirators "subject to the same penalties" whether or not they directly distributed drugs to users. But this does not mean that every co-conspirator shares the same mandatory minimum sentence for the entire quantity of drugs distributed by the conspiracy, or for the deaths of every buyer. *See United States v. Martinez*, 987 F.2d 920, 924 (2d Cir. 1993) (explaining that "[s]ection 846 does not subject the defendant to liability for any crimes committed

by any other member of the conspiracy, regardless of the defendant's knowledge about those crimes [because such an approach] would . . . expand dangerously the scope of conspiratorial culpability.").

As discussed in greater detail below, we join the consensus reached by other circuits and conclude that a district court generally need not find death reasonably foreseeable for the mandatory minimum sentence to apply in cases where a defendant directly distributes drugs or uses intermediaries to distribute drugs that result in death. But like the *Houston* court, we hesitate to characterize this liability as absolutely "strict." And like the *Swiney* court, we hold that a district court must find the distribution chain that ultimately led to an individual's death to be relevant conduct under § 1B1.3(a)(1)(B) before a defendant can receive the twenty-year penalty.

1. Finding Walker and Gladney Liable for Deaths Caused by Co-Conspirators' Distribution of Heroin Was Error

We begin by considering whether the district court correctly imposed the statutory penalty on Walker and Gladney—two street-level distributors—who did not directly distribute drugs to the users who died or distribute drugs through intermediaries. At sentencing, Walker and Gladney argued that the mandatory minimum penalty did not apply to them because the government failed to prove that the drug users' deaths were reasonably foreseeable to them. The district court

expressed misgivings about the manner in which § 841(b)(1)(A) could be applied, but believed its hand were tied, stating:

> [A]lthough [Gladney] perhaps did not in any one of these deaths personally deliver the heroin that ultimately was ingested by the decedents, the statute on its face makes it clear that anyone associated with the conspiracy and the conduct that underlies it during the relevant time period is strictly liable and accountable for sentencing purposes for death.

But we cannot conclude that the application of the penalty to Walker and Gladney was supported by this record.

The government maintains that when a victim dies from using drugs distributed by a conspiracy, all co-conspirators are subject to the twenty-year mandatory minimum penalty under *Pinkerton v. United States*, 328 U.S. 640 (1946). The *Pinkerton* doctrine holds that a member of a conspiracy can only be held liable for the reasonably foreseeable crimes committed by his accomplices in the course of the conspiracy. *Id.* at 647-48. The government argues that the *Pinkerton* doctrine was intended to hold defendants liable for the substantive *offenses* of their co-conspirators, not for the *consequences* of their co-conspirators' actions. In this case, it is foreseeable that members of heroin distribution conspiracy will sell heroin. Users died from heroin sold by members of the conspiracy. Therefore, in the government's view,

every defendant must be held strictly liable for a death caused by any co-conspirator's sale of drugs. But the Sixth Circuit in *United States v. Swiney* dealt with a factual scenario nearly identical to our case and rejected the strict liability approach for defendants like Walker and Gladney.

Swiney highlighted an important distinction between a defendant's criminal *liability* for acts committed by others in furtherance of the conspiracy and the *sentencing consequences* for a particular defendant. Under § 1B1.3(a)(1)(B), sentencing liability is limited to "the scope of the specific conduct and objectives embraced by the defendant's agreement." As a result, the Sixth Circuit had "no difficulty in reconciling the mandatory minimum language of § 841(b)(1)(C) and § 1B1.3(a)(1)(B)," finding it "clear that the Sentencing Guidelines have modified the *Pinkerton* theory of liability so as to harmonize it with the Guidelines' goal of sentencing a defendant according to the 'seriousness of the actual conduct of the defendant and his accomplices.'" *Swiney*, 203 F.3d at 404-05 (quoting William W. Wilkins & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C.L. Rev. 495, 502 (1990)).

The government argues that death is always a foreseeable result of illegal drug distribution, but the resulting sentencing scheme for co-conspirators under § 841(b)(1)(A) would have far-reaching implications. Consider the circumstances in *United States v. McIntosh*, 236 F.3d 968 (7th Cir. 2001), where a young girl died

from ingesting methamphetamine residue retained on a coffee filter. In that case, the defendant did not directly provide the victim with the drug, but the district court applied the mandatory minimum sentence under § 841(b)(1)(A) because the defendant originally produced the drug. Under the government's approach here, not only would the individual who produced the methamphetamine receive the twenty-year minimum sentence, but *every* person connected with the conspiracy in any way—from the lowliest lookout on the corner to the boss—would all receive the same twenty-year penalty. Such a result is overly broad and not supported by the law in our view. A member of a multi-level drug network may be criminally liable for aiding the broader conspiracy, but a district court has to explain why the fatal heroin doses are among the drugs attributable to a defendant for relevant conduct purposes in sentencing. *See Swiney*, 203 F.3d at 404. This does not mean that a defendant has to foresee a particular drug transaction leading to a user's death, but mere participation in the overall conspiracy is not sufficient for relevant conduct purposes.

Notably, much of the circuit precedent on which the government relies explicitly distinguishes defendants like Walker and Gladney—whose sentences were enhanced based solely on the conduct of their co-conspirators—from those who either directly distributed (or used an intermediary to distribute) drugs that killed users. In *McIntosh*, the Eighth Circuit specifically noted that it was not faced

> with a situation in which the government seeks to vicariously enhance a defendant's sentence based *solely* on the actions of a co-conspirator or co-conspirators . . . . We find *Swiney's* reasoning applicable only in those cases in which a conspiracy defendant played no direct part in manufacturing the drug or in immediately distributing the drug that caused the death or serious bodily injury. If the government seeks to enhance a conspiracy defendant's sentence, as it did in *Swiney*, based *solely* on conduct of a co-conspirator, a foreseeability analysis *may* be required in determining whether Congress intended, under § 846, that the defendant be held accountable for the conduct of a coconspirator.

236 F.3d at 974 (emphasis added); *see also United States v. Carbajal*, 290 F.3d 277, 284 (5th Cir. 2002) ("The court in *Swiney* . . . addressed a situation in which the defendant played no direct role in distributing or manufacturing the drugs that allegedly caused the deaths.").

The circumstances of Walker and Gladney are equivalent to *Swiney* and we adopt the reasoning of the Sixth Circuit. Walker and Gladney do not dispute that they distributed drugs as members of the conspiracy. But the government offered no evidence that they had any connection to manufacturing or distributing the fatal doses of heroin that caused the five deaths, and the district court failed to explain why the fatal doses should count for relevant conduct. The government

contends that the district court *implicitly* found that the deaths fell within Walker's and Gladney's relevant conduct because the court stated that the two were "deeply" involved in the conspiracy. But the presentence report outlines different sentencing liability for these defendants vis-à-vis their superiors. As leaders, Johnson and Stewart were equally responsible for the total drugs distributed—between three and ten kilograms of heroin—but the quantities attributed to Walker and Gladney did not equal that amount. Walker was responsible for one to three kilograms of heroin, while Gladney distributed between 700 grams and 1 kilogram of heroin. Four of the five deaths occurred in Waukesha, but the district court made no findings about whether Walker and Gladney dealt drugs in that area or whether they should have reasonably foreseen their co-conspirators' distribution.[3] Furthermore, the record contains a diagram of the conspiracy from the initial request for a search warrant, which visually links the four Waukesha deaths to a distribution chain running from Johnson to Stewart, Lund, Bandkowski, and Lawler with no connection to Walker or Gladney. And Valerie Luszak, the one victim who died in Milwaukee, appears to have purchased heroin directly from Johnson.

[3] Gladney's defense counsel also objected to the admission of the autopsy report for Joshua Carroll since he died on December 30, 2007, and Gladney did not join the conspiracy until sometime in February 2008.

To be clear, the twenty-year sentencing enhancement may apply even if Walker and Gladney did not personally sell any of the fatal doses at any point in the distribution chain that ultimately reached the victims. Consider the following example: A gives drugs to B, B sells them to C, and C dies. D, a member of the overall drug conspiracy, may be subject to the twenty-year sentencing penalty even though she did not directly sell the fatal dose to C, but "the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake" under U.S.S.G. § 1B1.3(a)(1)(B) before the penalty is applied. Otherwise, we have no way to know whether a defendant is being sentenced on the basis of drugs that were distributed in furtherance of the conspiracy and that distribution was reasonably foreseeable, or whether a defendant is being sentenced strictly on the basis of his general participation in a conspiracy in which a drug user died.

In reaching this conclusion, we also have no doubt that in setting a twenty-year mandatory minimum sentence, Congress sought to emphasize the inherent dangers associated with distributing controlled substances and to severely penalize sellers. But the question of whether defendants will be subject to this twenty-year minimum sentence depends upon whether their relevant conduct encompasses the drugs linked to an individual's death. Because the district court did not explicitly make such a finding for Walker and Gladney, we vacate their sentences and remand for resentencing.

2. Stewart Is Liable for Distribution of Heroin Through Intermediaries

We next consider whether the district court correctly applied the twenty-year penalty to Stewart, a leader of the conspiracy. The government offered extensive evidence that Stewart was working at the top of the organization, in partnership with its leader, Lonnie Johnson. Stewart was the principal contact and supplier for the conspiracy's distributors as well as many of its customers. Several of the government's confidential informants identified him as one of the heads of the organization.

Although the district court made no finding that Stewart directly sold the fatal doses of heroin that killed the victims, the government offered extensive evidence supporting the district court's finding that Stewart was the ultimate source of drugs that killed users. Goetzke and Knuth overdosed on drugs sold by Lund, who had obtained them from his regular supplier: Stewart. Stewart also gave another distributor, Bandkowski, the drugs that caused Carroll's death. Lawler was the last link in the chain that killed Topczewski, having resold to him a smaller quantity of heroin she had purchased from Bandkowski. At Stewart's sentencing, the court told the defendant, "Now, I appreciate you may not have been standing over Mr. Knuth when he took that final dose, but that is not what the law requires. The law simply tracks who provided the substance . . . ."

The district court correctly applied the sentencing enhancement to Stewart for victims who died using

heroin he had provided through intermediaries. As explained above, many of our sister circuits have considered cases involving defendants higher in the chain of distribution than the co-conspirators who gave fatal doses directly to victims. All these cases have held defendants liable for subsequent death caused by drugs resold through an intermediary. *See United States v. De La Cruz*, 514 F.3d. at 125-26 (defendant led conspiracy, dispensing drugs through intermediaries); *McIntosh*, 236 F.3d at 970 (defendant provided drugs to intermediary who later gave them to decedent without defendant's knowledge or authorization); *Robinson*, 167 F.3d at 826-27 (same).

This conclusion is no accident but the result of the legislative design of § 846. As the Second Circuit observed in *United States v. Martinez*, 987 F.2d 920, 925 (2d Cir. 1993):

> The legislative history of 21 U.S.C. § 846 reveals that the intent of Congress in enacting that section was to ensure that a defendant who is charged with only conspiracy not be in a better position for sentencing than one who is charged solely with possession of the same amount of narcotics.

Id. Under the same rationale, a kingpin who finances and controls a drug distribution operation cannot escape liability for the "death resulting" penalty simply because he never personally sold to customers.

In this case, it is clear that Stewart's actions and conduct led to the victims' deaths. He supplied his distributors and relied upon them to resell to end users. It was

certainly understood that recipients of drugs Stewart provided would resell, share, or otherwise offer the drugs to unknown or unauthorized users. *See Robinson*, 167 F.3d at 831 ("It was reasonably foreseeable to [the defendant] that [the intermediary] would deliver the drugs to someone else . . . ."). Like our sister circuits, we acknowledge that our analysis might differ if a defendant's participation in the chain of distribution is especially removed from a victim's resulting death, as in the cases of Walker and Gladney. In such cases, "a court might conclude that it would not be consistent with congressional intent to apply the mandatory 20-year minimum sentence." *Id*. at 831-32. But Stewart's case does not require us to weigh these concerns. The victims' deaths were directly caused by Stewart's criminal conduct; indeed, they were part of the ordinary course of business for the conspiracy *he* led. Therefore Stewart is liable for the deaths and we affirm the district court's application of the penalty to his sentence.

3. Lund and Lawler Are Liable for the Direct Distribution of Heroin Causing Death

Finally, we address the most straightforward application of the statute to Lund and Lawler who—while occupying relatively low-level roles in the organization as a whole—had perhaps the closest connection to the deaths of customers who used drugs distributed by the conspiracy. Lund purchased heroin for his own use

from Stewart, but also distributed larger quantities to customers and associates at the street level. Lawler was even further down in the distribution chain, purchasing small quantities from distributors primarily for herself while reselling some to friends. But whatever their role in the conspiracy, the district court found that both Lund and Lawler directly provided users with the doses that ended their lives. Lund coordinated the sales of heroin that killed Goetzke and Knuth, and Lawler sold the drugs that killed Topczewski.

There can be little doubt that Congress intended the mandatory minimum penalty to apply to Lund and Lawler for their direct distribution of deadly heroin doses to users. This penalty applies without regard for any special care the defendant took, the reputation for safety of the controlled substance, or the hypersensitivity of the victim because "risk is inherent in [a controlled substance,] . . . [and so] persons who distribute it do so at their peril." *Robinson*, 167 F.3d at 831. So we affirm the district court's application of the twenty-year penalty to Lund and Lawler. They also challenge the trial court's factual findings related to the deaths of certain users, but as discussed below, these challenges are without merit.

a. No Evidence of Withdrawal From Conspiracy by Lund

Lund contends that the district court erred in finding that he was still a member of the conspiracy when

Goetzke and Knuth died of overdoses. Lund argues that the mandatory minimum should not apply because the deaths occurred after he had withdrawn from the conspiracy following a dispute with Stewart.

"In order to withdraw from a conspiracy, a defendant must cease his activity in the conspiracy and take an affirmative act to defeat or disavow the conspiracy's purpose, either by making a full confession to the authorities or by communicating his withdrawal in a manner reasonably calculated to inform his co-conspirators." *United States v. Bullis*, 77 F.3d 1553, 1562 (7th Cir. 1996). Furthermore, we have noted that "[i]nactivity alone does not constitute withdrawal; to withdraw from a conspiracy, the defendant must terminate completely his active involvement in the conspiracy, as well as take affirmative steps to defeat or disavow the conspiracy's purpose." *United States v. Hargrove*, 508 F.3d 445, 449 (7th Cir. 2007) (internal quotation marks and citation omitted); *United States v. Wilson*, 134 F.3d 855, 863 (7th Cir. 1998) ("The withdrawal must be complete and in good faith.").

Lund says he and Stewart had a falling-out after Stewart swindled him on a sale of heroin in December 2007. Stewart allegedly drove off without giving Lund the full amount he had purchased. Lund responded by tricking Stewart in a later transaction, paying him less than the full amount due. After this incident Lund was imprisoned for five months on unrelated charges. When he was released, Stewart refused to contact or

work with Lund directly because of the dispute over the prior sale and Lund contends that this rupture constituted a break in his participation in the conspiracy.

The district court did not err in declining to deem this disagreement an effective withdrawal. Soon after Lund was released from jail, he coordinated sales of heroin between the conspiracy and customers. In addition to more heroin, Lund received a cash cut of the sale after referring Goetzke to Stewart. It may be true that Stewart refused to speak with or take money directly from Lund because of their falling-out. But this does not represent a withdrawal. Lund never fully terminated his involvement in the scheme but rather continued his active—if strained—participation.

Lund's counsel questioned how a conspirator can legitimately extricate himself once an organization's leadership has expelled him. But even if this disagreement could be considered an expulsion, we need not entertain the hypothetical here. Withdrawal requires affirmative steps by a conspirator to defeat or disavow the conspiracy. Lund never confessed to authorities or provided any notice to coconspirators of his purported withdrawal. To the contrary, Lund's efforts to contact and work with Stewart indicate that he wanted back in even as he continued to be held at arm's length. Even after Goetzke's overdose, Lund continued to connect new customers to the conspiracy, resulting in the death of Knuth one month later, and so we affirm Lund's sentence.

b. No Clear Error in Finding That Lawler Gave Fatal Doses to Topczewski

Lawler claims that the district court wrongly determined that she provided Jeffrey Topczewski with the heroin that killed him. In reaching its conclusion, the trial court relied in part on portions of a presentence report compiled from police interviews with Jeffrey Topczewski's sister Jennifer and a friend, Kallie Klappa. Lawler contends that Jennifer Topczewski and Klappa's accounts were inconsistent because initially they did not inculpate Lawler and they only implicated her in exchange for dramatic sentencing reductions from the government. Lawler also contends that the district court should not have solely relied on the representations in the presentence report without evaluating the witnesses' sworn in person testimony.

In addition to the testimony of Jennifer and Klappa, there are two independent sources of evidence that Lawler does not rebut. First, Lawler admitted that she was providing heroin to Jeffrey Topczewski a few days before his death. Second, telephone records corroborate that Lawler sold the fatal doses of heroin to Jeffrey the night before he died. These records show a call from Jeffrey's residence to Jennifer, followed by a call from his residence to Lawler. Later, Lawler dialed Jeffrey's home phone. This evidence corroborates the presentence report's account that Jeffrey asked Jennifer for Lawler's phone number to secure heroin that night. Lawler returned the call to complete the sale.

Lawler is correct that Jeffrey had other sources who could have given him heroin and that the telephone records are not conclusive proof of a drug sale. But the doubts Lawler raises do not rise to the level of clear error. The evidence in the record is sufficient to support a finding by preponderance of the evidence that the "death resulting" enhancement applies to Lawler. Therefore we affirm Lawler's sentence.

B. Stewart's Guilty Plea was Voluntary and his Sentence was Reasonable

Stewart challenges the voluntariness of his guilty plea as well as his 300-month sentence. Both challenges are without merit.

A guilty plea must be entered knowingly and voluntarily in order to be valid. To ensure that a guilty plea is knowing, Federal Rule of Criminal Procedure 11(b) requires that a district court "inform the defendant of, and determine that the defendant understands" the nature of the charge to which the plea is offered, the possible sentencing range, and the fact that, by pleading guilty, the defendant waives certain constitutional rights. In addition, a "court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)." Fed. R. Crim. P. 11(b)(2).

Stewart's guilty plea was knowing and voluntary. Stewart signed a written plea agreement containing an

unambiguous factual stipulation encompassing the government's charges in the complaint. In the district court's Rule 11 colloquy, Stewart affirmed his understanding of the plea agreement, the factual stipulation, and the penalties he faced, as well as the government's charges against him.

Stewart further contends that the district court erred in calculating his guideline range by making him accountable for three to ten kilograms of heroin without holding an evidentiary hearing. This argument must also fail because the drug quantity did not play a part in the calculation of Stewart's base offense level. The presentence report calculated the offense level by applying the enhancement for drug distribution offenses resulting in death under § 2D1.1 of the Sentencing Guidelines. As discussed above, this enhancement applies to Stewart and there were no other errors in the district court's calculation of a guideline range from 360 years to life imprisonment. The district court appropriately weighed sentencing factors, arrived at a reasonable below-guideline sentence of 300 months, and we therefore affirm the district court's determination.

III. CONCLUSION

For the reasons stated above, we VACATE the sentences of defendants Walker and Gladney and REMAND for the resentencing. We AFFIRM the sentences of each of the other defendants.

7-3-13