NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVIS ENNIS,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANK GRANGER
CJA Panel Attorney
Frank Granger, APLC
1135 Lakeshore Drive, 6th Floor
Lake Charles, LA 70601
Phone: (337) 439-2732
Email: frank@fgrangerlaw.com
CJA Counsel for Petitioner
Member, Supreme Court Bar

QUESTIONS PRESENTED FOR REVIEW

This case presents a question whether judicial fact-finding of a greater type and quantity of a controlled substance, an element of the offense, required to trigger an enhanced mandatory minimum 10 year sentence based on the reasonable foresseability of the defendant, violates the Sixth Amendment when the defendant and government stipulated to a lesser quantity attributable to the defendant that triggers a 5 year mandatory minimum sentence.

Further, when the plea agreement's general stipulations are inconsistent with a specific drug type and quantity stipulation that does not permit an enhanced mandatory minimum sentence, which controls?

The rule of lenity applies to judicial fact-finding that misapplies the method by which the type and quantity of a narcotic are attributed to the defendant for sentencing purposes. If two or more interpretations of the "object" of the conspiracy referred to in § 846 are possible, that statute is subject to the rule of lenity, and the construction chosen should not disfavor the defendant.

PARTIES TO THE PROCEEDING

Petitioner is Davis Ennis, a citizen of the United States of America. Respondent is the United States.

In the District Court proceedings, William Cain was petitioner's co-defendant, whose sentence was vacated by the Court of Appeals for the Fifth Circuit in accordance with the unpublished decision in this consolidated matter of August 7, 2024.

PRIOR PROCEEDINGS

The opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed, United States v. Davis Ennis, 23-30397 consolidated with United States v. William Cain, 23-30570, (August 7, 2024) (5th Cir. 2024), appears as Appendix B.

This matter arises from the Western District of Louisiana, Lake Charles Division, Case No. 2:22-CR-18-02.

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The U.S. Court of Appeals for the Fifth Circuit rendered its decision in United States v. Davis Ennis, 23-30397 consolidated with United States v. William Cain, 23-30570, (August 7, 2024) (5th Cir. 2024), reversing the sentence of co-defendant, William Cain, and affirming the trial court's sentence of Davis Ennis. Rehearing En Banc was denied on September 6, 2024.

JURISDICTION

This Court has jurisdictional authority over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

21 U.S.C. § 841(b)(1)(A)

In the case of a violation of subsection (a) of this section involving - (viii) 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life. . .

21 U.S.C. § 841(b)(1)(B)

In the case of a violation of subsection (a) of this section involving - (viii) 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5 years or more than life. . .

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 attempt or conspiracy.

STATEMENT OF THE CASE

Ennis became involved in a criminal conspiracy to distribute a substance containing a detectable amount of methamphetamine from on or about January 1, 2020 after his discharge from the U.S. Army. He withdrew from the conspiracy sometime in June 2020, prior to his arrest on October 28, 2020.

Ennis was indicted and prosecuted in the Western District of Louisiana. He entered a plea to the drug conspiracy on October 18, 2022. His stipulated factual basis provided that the quantity of drugs attributable to him was 350 grams but less than 500 grams of a substance containing a detectable amount of methamphetamine and the conspiracy involved 500 grams or more of methamphetamine.

Ennis's pre-sentence investigation report (PSR) calculated a base offense level of 28 with an enhancement of 2 points for possession of a dangerous weapon pursuant to USSG § 2D1.1(b)(1), and a deduction of 3 points for acceptance of responsibility, for a total offense level of 27. The PSR calculated his criminal history points as 5 yielding a criminal history category of III. The PSR noted that Ennis's advisory guideline range was 87 to 108 months; but, because he was attributed the conspiracy-wide

quantity of drugs, greater than 500 grams of a substance containing a detectable amount of methamphetamine, and not his stipulated amount, more than 350 grams but less than 500 grams of methamphetamine, he was subject to an enhanced mandatory minimum term of imprisonment of 10 years to life imprisonment, pursuant to 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846, and not a mandatory minimum sentence pursuant to 21 U.S.C. §§ 841(b)(1)(B) and 846.

Ennis filed two sets of objections to the PSR, pertinently objecting to the application of the mandatory minimum of 10 years (120 months) imprisonment pursuant to 21 U.S.C. § 841(b)(1)(A). At sentencing, the trial court denied Ennis's objections and sentenced him to the mandatory minimum 120 month sentence of imprisonment. The Fifth Circuit Court of Appeals affirmed Ennis's sentence of 120 months, ruling that Ennis acknowledged the quantity he "knew or should have known" was distributed in the conspiracy exceeded the threshold for a mandatory minimum 120 month sentence despite the fact that the amount of methamphetamine attributed to him in his stipulated factual basis was more than 350 grams but less than 500 grams, an amount that triggered a 5 year mandatory minimum sentence.

REASONS FOR GRANTING THE WRIT

The type and amount of a controlled substance necessary to trigger a mandatory minimum 10 year sentence is an element of the offense that must be found by a unanimous jury beyond a reasonable doubt or admitted to by the defendant. Ennis stipulated in his plea agreement to an amount of drugs less than 500 grams that triggered a 5 year mandatory minimum sentence under § 841(b)(1)(B), less than the 500 grams or more amount required, to impose a 10 year mandatory minimum sentence § 841(b)(1)(A). The district court found the conspiracy-wide drug amount reasonably foreseeable to the defendant was sufficient to impose the 10 year mandatory minimum sentence and the court of appeals affirmed that an acknowledgment by the defendant in the plea agreement was sufficient to impose the greater mandatory minimum sentence despite the lesser amount of drugs stipulated to by the defendant. This judicial fact-finding supplied an element of the offense, i.e., a "fact" or "ingredient" of the charged conduct: the type and quantity of narcotics to trigger the enhanced mandatory minimum sentence. Such judicial fact finding cannot supply an element of the offense and it violates the defendant's Sixth Amendment right that an element of the offense must be found by

the jury beyond a reasonable doubt or stipulated to by the defendant. See, Apprendi v. New Jersey, 530 U.S. 466, 490 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), Alleyne v. United States, 133 S. Ct. 2151, 2158, 186 L. Ed. 2d 314 (2013), Burrage v. United States,134 S. Ct. 887, 892 F. 3d 1203 and Blakely v. Washington, 541 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), "The statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 120 S.Ct. at 2537. The Alleyne court held that "Apprendi's definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor applied to mandatory minimum sentences. 570 U.S. 108.

Further, an ambiguity exists, as well as a conflict, between the circuits over whether the reasonably foreseeable conspiracy-wide quantity of drugs or the amount attributable to the defendant (individualized approach) applies in determining whether the type and amount of drugs attributable to a defendant in determining whether a mandatory minimum sentence applies. The ambiguity is subject to the rule of lenity.

A statutory ambiguity exists in §846's interpretation of "object" of

the conspiracy which allows two different interpretations of the statute with significantly different penalty consequences to the defendant. In that case, the interpretation of that federal criminal statute is subject to the rule of lenity. Where the statutory construction is subject to two different interpretations, one should not choose the interpretation (construction) that disfavors the defendant to increase the penalty it places on him. Bifulco v. United States, 100 S. Ct. 2247, 2252 (1980); Ladner v. United States, 79 S. Ct. 209, 214 (1958), and Lewis v. United States, 100 S. Ct. 915, 921 (1980). In this case, Ennis believes the rule of lenity should be applied to him to avoid disparate sentences between similarly situated defendants, both of whom entered stipulations to less than 500 grams of methamphetamine, the amount required to trigger an enhanced mandatory minimum sentence of ten years § 841(b)(1)(A).

The amount of controlled substances necessary to trigger a mandatory minimum 10 year sentence is an element of the offense that must be found by a unanimous jury beyond a reasonable doubt or admitted to by Ennis. He did not admit to such an amount. See, Apprendi, Alleyne and Burrage, supra.

ARGUMENT

1) THE STIPULATED QUANTITY OF DRUGS ATTRIBUTABLE TO THE DEFENDANT IN A CONSPIRACY IS AN ELEMENT OF THE OFFENSE DETERMINING THE APPLICATION OF A § 841(b) MANDATORY MINIMUM SENTENCE AND JUDICIAL FACT-FINDING CANNOT SUPPLY THE CONSPIRACY-WIDE QUANTITY

Judicial fact-finding that increases the mandatory minimum sentence for a violation of the Controlled Substances Act, 21 U.S.C. § 841(a)(1), (b)(1)(A-C), and § 846 violates the Sixth Amendment and this Court's holdings in Apprendi, Alleyne, and Burrage. The Court of Appeals affirmed the district court's finding that the "reasonably foreseeable" language from a plea agreement was sufficient to attribute a greater drug quantity to the defendant to invoke a higher mandatory minimum sentence than allowed by the drug amount defendant stipulated was attributable to him.

The Court of Appeals for the Fifth Circuit erred by affirming the trial court's judicial fact-finding that the "fourth" element of a drug conspiracy conviction, the drug quantity or type, was satisfied by defendant's statements or acknowledgments in the plea agreement, notwithstanding the defendant's stipulated factual basis attributed a

lesser amount of narcotics to himself: an amount less than the particular drug type and quantity required to trigger a mandatory minimum sentence of ten (10) years pursuant to 18 U.S.C. § 841(b)(1)(A). Essentially, the Fifth Circuit holds by affirming Mr. Ennis's sentence, that a stipulated amount of drugs attributable to the defendant and less than the amount required to trigger an enhancement to the mandatory minimum sentence does not control, but the type and quantity found by the judicial fact-finder in a conspiracy-wide drug quantity and type is sufficient to trigger a higher mandatory minimum sentence.

In the case at bar, Mr. Ennis acknowledged in his plea agreement:

1) The quantity of drugs attributable to him was 350 grams but less than 500 grams of a substance containing a detectable amount of methamphetamine;

2) That he knew or reasonably should have known that the scope of the conspiracy involved 500 grams or more of a substance containing a detectable amount of methamphetamine, and

3) The conspiracy involved 500 grams or more of a substance containing a detectable amount of methamphetamine.

But, Ennis stipulated the amount attributable to him was 350 grams but

less than 500 grams, which carried a mandatory minimum sentence of five (5) years, §841(b)(1)(B), and not what the district court found an amount greater than 500 grams and a mandatory minimum 10 year sentence §841(b)(1)(A). In order to enhance a mandatory minimum sentence to ten (10) years pursuant to 18 U.S.C. § 841(b), the drug quantity and type must meet a particular statutory minimum which, in this case, must exceed 500 grams of a substance containing a detectable amount of methamphetamine. In his Stipulated Factual Basis, Mr. Ennis admitted that the quantity of drugs attributable to him was at least 350 grams but less than 500 grams of methamphetamine. This amount is less than the threshold required for a mandatory minimum sentence of 10 years, under §841(b)(1)(B) the mandatory minimum sentence is 5 years.

To prove a drug conspiracy to violate the narcotics laws, the government is required to prove the essential elements of that offense: "1) an agreement by two or more persons to violate narcotics laws; 2) a defendant's knowledge of the agreement; and 3) his voluntary participation in the agreement. Proving a particular amount of drugs possessed/distributed is not required. However, when the government seeks to enhance a sentence based upon the drug quantity and type

specified in § 841(b), "the drug quantity must be stated in the indictment and submitted to the 'factfinder' for a finding of proof beyond a reasonable doubt. United States v. Jones, 969 F. 3D 192, (5th Cir. 2020). This is required because the conviction is based upon a particular type and quantity of a narcotic which increases a mandatory minimum sentence under§ 841(b) and any fact (the drug type and quantity) that increases a mandatory minimum is a "element" that must be submitted to a jury and found beyond a reasonable doubt. Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

In other words, the Circuit Courts of Appeals acknowledge that under Supreme Court precedent, drug quantity/type essentially becomes the "fourth element" of an offense which must be submitted to the jury and found beyond a reasonable doubt or admitted by the defendant before for a conviction or sentence enhancement can stand under the Sixth Amendment and the Apprendi and Alleyne holdings. However, the drug quantity and type is not a formal element of a §846 conspiracy offense; a violation of § 846 refers to § 841(b)(1)(A-C) to determine the penalty for its violation based on to the amount distributed.

The Fifth Circuit found that the drug quantity and type are not

"formal" elements of a conspiracy or possession offense; but, any failure by the government to prove quantity and type only affects the statutorily prescribed sentence that the court must impose under § 841(b), but not the conviction itself. The Court of Appeals"found" in the plea agreement, that Mr. Ennis acknowledged a conspiracy; that he participated in it; and the conspiracy involved 500 grams or more of a substance containing a detectable amount of methamphetamine. In order to satisfy the drug quantity requirement for a 10 year mandatory minimum sentence, the Fifth Circuit reviewed the plea agreement and held that Ennis reasonably knew or could foresee that more than 500 grams of methamphetamine were involved in the conspiracy which satisfied the quantity and type element essential for an enhanced mandatory minimum sentence. The appeals court found that this acknowledgment by Ennis met the requirement under§ 841(b) to impose a mandatory minimum sentence of 10 years. The Court of Appeals does not address the "fact" that in Ennis's plea agreement, his Stipulated Factual Basis, he only admitted to possessing/distributing more than 350 grams but less than 500 grams of methamphetamine, the amount attributable to him, which is less than the amount required to enhance his sentence to 10 years §841(b)(1)(A).

The Court of Appeals accepted the acknowledgments in the plea agreement as proof beyond a reasonable doubt of the drug quantity and type without considering that defendant Ennis only stipulated to an amount of methamphetamine (350 grams but less than 500 grams), which was less than the statutory amount required to enhance the 5 year mandatory minimum sentence § 841(b)(1)(B) to 10 years under § 841(b)(1)(A). This judicial finding by the district court, and affirmed by the court of appeals, increased the statutory minimum mandatory sentence. This finding of an element of the offense changed both the statutory mandatory minimum sentence as well as the statutory maximum sentence to which Ennis was exposed. See, McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 545 (2002), and Apprendi, supra. This issue now appears to be foreclosed by Alleyne which expanded Apprendi's limited holding to instances where the factual finding increases a statutory maximum punishment (which would cover Ennis) by holding that "[a]ny fact that by law increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." 570 U.S. 108, 133 S. Ct. 2155, 186 L. Ed. 2d 321.

The Fifth Circuit's decision makes it is possible for one of two co-defendants to receive a mandatory minimum sentence of 10 years and the other a 5 year mandatory minimum sentence, based solely on non-element (facts) in the plea agreement; the statement that it was "reasonably foreseeable" to the defendant that the conspiracy-wide drug amount exceeded 500 grams, even though both defendants stipulated to a conspiracy with intent to distribute methamphetamine and both the defendants stipulated to an amount attributable to himself of less than 500 grams of methamphetamine, the amount required to trigger a mandatory minimum 10 year sentence.

The Fifth Circuit, in its opinion (Appendix B, p. 4) relied on a stipulation in the plea agreement regarding "reasonable foreseeability" of the conspiracy distributing more than 500 grams as a basis for affirming an enhanced 10 year mandatory minimum sentence on defendant, Ennis, rather than the lesser sentence of five (5) years pursuant to §841(b)(1)(B). Ennis believes that this is contrary to this Supreme Court's decisions in Apprendi and Alleyne. The Fifth Circuit used the reasonably foreseeable quantity of drugs attributable to the conspiracy as a whole rather than the individualized approach, the amount of drugs attributable to the

defendant. It differentiated this approach by finding that the co-defendant, Cain, who was not subject to an enhanced 10 year mandatory minimum sentence because he did not acknowledge that he knew or reasonably should have known the scope of the conspiracy involved 500 grams or more of methamphetamine.

Ennis pointed out that the use of the reasonable foreseeability approach is an inaccurate and an improper application of the individualized approach. More importantly, such reliance by the Fifth Circuit on an acknowledgment to trigger the enhanced or greater mandatory minimum sentence is misplaced as it essentially allows the district court to find an element of the offense in much the same way as it would find a sentencing enhancement factor. But, such a finding violates the Sixth Amendment because that element was not found by a jury beyond a reasonable doubt. This fact (the drug type and quantity) is an element of the offense not subject to judicial discretion as is a sentencing factor. This finding violates the Sixth Amendment. The fact that triggers a mandatory minimum sentence is the type and quantity of the Schedule I or II substance distributed. Here, Ennis admitted to more than 350 grams but less than 500 grams of methamphetamine being

attributable to him. This stipulated fact does not meet the quantity required to trigger an enhanced mandatory minimum 10 year sentence. This is contrary to this Court's holding in Apprendi which found "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" 530 U.S. 489, 1205 S.Ct. 2362, 147 L. Ed. 2d 455.

Does the Fifth Circuit's approach differ from the other circuits in applying the individualized approach which holds that a sentence should be based upon the quantity of drugs attributable or "reasonably foreseeable" to the defendant? It ruled otherwise in United States v. Haines, 803 F. 3d 713, (5th Cir. 2015). The First Circuit in United States v. Pizarro, 772 F. 3d 284 (1st Cir. 2014) held that the jury must be the finder of fact to determine the quantity upon which the mandatory minimum/statutory maximum sentences are based. This holding follows Alleyne in that the drug quantity which triggers a mandatory minimum for a 18 U.S.C. § 846 conspiracy must be found by a jury beyond a reasonable doubt." The court also specified that the "conspiracy-wide quantity . . . governs the statutory maximum while 'the individualized

quantity that is foreseeable to the defendant. . . triggers the mandatory minimum." 772 F. 3d at 292-3.

In this case at bar, there was a plea and not a trial by jury. The plea agreement stipulated to a particular amount of drugs attributable to the defendant, Ennis, which was set out in a stipulated factual basis of at least 350 grams but less than 500 grams of a substance containing a detectable amount of methamphetamine. The Fifth Circuit fails to consider that the plea agreement, like a jury determination, sets forth an individualized amount, a stipulated fact that is an element of the offense. It is not some other "fact" found by the court while exercising its discretion as in looking at factors in determining the appropriate guideline range and sentence. The plea agreement stipulated to the amount of drugs attributable to Ennis less than 500 grams; therefore, the crucial "fact" or element of the offense necessary to trigger the enhanced 10 year statutory mandatory minimum sentence under§ 841(b) was not met. This distinction is important because the Alleyne court found that when there is a fact which has the potential to increase the sentencing range on a defendant, that fact should be considered an element of the crime. 570 U.S. 99, 115-116 (2013). This Court further found that these "aggravating

facts" cause a defendant to face a higher statutory penalty, therefore, a jury must find that the prosecution proved each fact beyond a reasonable doubt before it can cause a defendant to face a harsher penalty.

In the case at bar, the government did not prove nor did a jury find beyond a reasonable doubt, the amount of narcotics attributable to Ennis. The government and Ennis stipulated to an amount attributable to him: at least 350 grams but less than 500 grams of methamphetamine, a type and quantity of drugs less than required to trigger a mandatory minimum sentence of 10 years under § 841(b). The finding of a quantity of drugs attributable to the defendant is a fact which must be found by the jury beyond a reasonable doubt or stipulated to by the defendant. The secondary question is whether the plea agreement is afforded the same respect and effect as a jury finding beyond a reasonable doubt. McMillan v. Pennsylvania, 477 U.S. at 86, 106 S. Ct. 2411, 91 L. Ed. 2d 67, and Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L. Ed. 2d 524 line of cases made a distinction between "elements" and sentencing factors which allowed a state court judge to increase a defendant's state law minimum sentence. This holding has been undermined by Apprendi and overruled by Alleyne. There is no legal space to distinguish judicial fact-

finding in the case at bar between general plea agreement language on reasonable foreseeability of a conspiracy-wide drug quantity on one hand and a stipulation between the government and defendant as to the type and amount of drugs attributable to him as legally equivalent to determining a sentencing factor. Such a holding is inconsistent with the Apprendi, Alleyne, and Burrage line of cases and violates the Sixth Amendment.

In viewing this factual finding as an enhancement, it is clear the courts are required to follow the principle put forth in Burrage: "the enhancement must be determined by a jury" or stipulated to by the defendant, 134 S. Ct. 887, 892 F. 3d 1203. This specific quantity and type of controlled substances, "facts" prescribed under§ 841(b), subjects a defendant to an enhanced mandatory minimum sentence and therefore, must be found by a jury beyond a reasonable doubt or admitted by the defendant. Alleyne overruled the Court's prior decision in Harris which found judicial fact-finding that increased a mandatory minimum sentence for a crime permissible under the Sixth Amendment and held: "[m]andatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an

element that must be submitted to the jury" 570 U.S. 103, 133 S. Ct. 2155, 186 L. Ed. 2d 321. The government and defendant stipulated to a type and quantity of a drug attributable to the defendant less than the amount required to enhance his statutory mandatory minimum sentence. Any judicial fact-finding increasing the amount of drugs and the statutory mandatory minimum sentence of the defendant violated the Sixth Amendment and must be reversed, vacated, and remanded for resentencing to the lower mandatory minimum sentence.

Does an enhanced mandatory minimum sentence apply to a defendant who stipulates to a drug quantity less than the threshold amount required to trigger an enhanced mandatory minimum sentence, but who also acknowledged a conspiracy-wide quantity (scope) exceeding the threshold amount? The court of appeals opinion states that "the drugs need not be personally attributable to Ennis for him to know or reasonably foresee the quantity involved in the conspiracy. . . . Section 841(b)(1)(A)'s mandatory-minimum sentence triggered once Ennis admitted his knowing that the conspiracy involved at least 500 grams of meth."

The opinion differentiates the stipulated factual basis of Ennis's co-defendant:

> "Cain did acknowledge that 'the overall scope of the conspiracy involved 500 grams or more of methamphetamine.' But, unlike Ennis, Cain never admitted to knowing that the conspiracy involved such a quantity of drugs." (Appendix B, p. 5).

The Fifth Circuit interpreted the defendant's knowledge of the conspiracy-wide quantity ("scope") to control the applicability of a mandatory minimum sentence, and not the individualized quantity to which the defendant stipulated and for which he is legally responsible. This finding is inconsistent with the court of appeals's own opinion in United States v. Haines, 803 F. 3d 713 (5th Cir. 2015), in which a jury found the scope of the conspiracy involved one kilogram or more of heroin, triggering a 20 year mandatory minimum sentence. On appeal, the Fifth Circuit held an individualized approach to drug quantity and not a conspiracy-wide quantity would determine whether a mandatory minimum 20 years sentence applied. The case was reversed, the sentence vacated, and remanded for resentencing.

Although Ennis's co-defendant, Cain stipulated factual basis includes the "overall scope of the conspiracy involved 500 grams or more" of methamphetamine, this was not considered an admission or acknowledgment by him, but it was for Ennis. This inconsistent finding

by the Court of Appeals violates the Sixth Amendment which requires each fact that increases a statutory mandatory minimum sentence be found by the jury beyond a reasonable doubt. Alleyne, supra.

The Fifth Circuit, in Gurrusquieta held: "in other words, an individual convicted of conspiring to distribute at least 1,000 kilograms of marijuana . . . is not necessarily subject to a ten-year minimum. Only if the defendant is responsible for at least 1,000 kilograms, as determined by the Sentencing Guidelines, does the mandatory statutory minimum apply." 54 Fed. App'x 592 (5th Cir. 2002). This rationale was not applied to Ennis. The element of the offense, the drug type and quantity attributable to Ennis was stipulated to be less than 500 grams of methamphetamine, an amount insufficient to trigger an enhanced mandatory minimum sentence of ten years under § 841(b)(1)(A).

The D.C. Circuit in United States v. Stoddard, 892 F. 3d 1203 (D.C. Cir. 2018) found "in order for a defendant to be sentenced to a mandatory minimum sentence triggered by a certain quantity of drugs, a jury must find the drug quantity attributable to a defendant on an individualized basis, not just the drug quantity attributable to the conspiracy as a whole." Id at 1208. The Stoddard court cited the Fifth Circuit's holding in

Haines with approval and followed its analysis in reaching its decision. Importantly, there is a distinction between the drug quantity attributable to the conspiracy as a whole and the amount attributable to a defendant. In looking at Ennis's plea, there is no distinction in drug quantity between the conspiracy as a whole and the amount of which he had knowledge. However, he stipulated in his factual basis that only a lesser amount of drugs, at least 350 grams but less than 500 grams of methamphetamine, were attributable to him. If that be the case, the judicial fact-finding by the district court of an amount greater than 500 grams of methamphetamine and affirmed by the Fifth Circuit, was not found by a jury beyond a reasonable doubt or admitted to by the defendant. As such, this "fact" is an element of the crime that increases a mandatory minimum sentence and its "finding" by the Court violates Ennis's Sixth Amendment rights. See, Apprendi, Alleyne, and Burrage.

Reasonable foreseeability shapes the outer bounds of co-conspirator liability. It applies to drug quantities that trigger enhanced penalties just the same as it applies to other acts committed by co-conspirators. See Burrage, 134 S. Ct. at 886-7. 892 F. 3d 1203, 1221. The Burrage Court offered a new way to think about drug conspiracy offenses involving an

aggravating element that enhances a defendant's sentence. Conspiring to violate § 841(a)(1) is properly thought of as "a lesser-included offense" of conspiring to violate § 841(a)(1) when death results from the drug distribution. Burrage, 134 S. Ct. 887 n. 3. Alleyne sets up this paradigm because the "death results" element is a fact that triggers a mandatory minimum sentence and thus must be found by a jury. See 570 U.S. at 108. Similarly, conspiring to violate § 841(a)(1) is a "lesser included offense" of conspiring to violate § 841(a)(1) when the drug quantity meets a threshold that triggers an enhanced sentence. 892 F. 3d 1203, at 1222.

In United States v. Pizarro, 772 F. 3d 284 (1st Cir. 2014), the First Circuit followed the Apprendi, Alleyne, Burrage line of cases in holding that the drug quantity that triggers a mandatory minimum for a § 846 conspiracy must be found by a jury beyond a reasonable doubt and further, that the conspiracy-wide quantity governs the statutory maximum, while the individual quantity, i.e., the quantity foreseeable to the defendant, triggers the mandatory minimum sentence. 772 F. 3d 292-293. When a defendant makes an admission of fact that may or may not increase the mandatory minimum sentence, that fact (the quantity of drugs) is an essential element of the crime, no different than had "that

fact" been found by a jury beyond a reasonable doubt. Ennis stipulated to an individual drug quantity less than the amount required to trigger an enhanced mandatory minimum sentence of 10 years. This was the amount foreseeable to him, yet, the court of appeals found the conspiracy-wide amount controlled, even though the "fact" or element of the crime (the type of drug and quantity) was not found by a jury beyond a reasonable doubt; consequently, that fact-finding abridges the defendant's Sixth Amendment rights.

The district court's ruling found that the conspiracy wide drug quantity controlled and not the individualized amount the defendant stipulated was attributable to him, which was less than the amount required to trigger the enhanced mandatory minimum sentence. Davis Ennis asks this court to reverse, vacate, and remand the Fifth Circuit's decision which affirmed his conspiracy conviction to distribute controlled substances of 500 grams or more of methamphetamine based on the "scope" of the conspiracy rather than the individualized drug quantity: the amount to which he stipulated §841(b), and § 846. The drug quantity attributable to the "scope" of the conspiracy is the same as the conspiracy-wide quantity. The Fifth Circuit's distinction and deviation from its prior

decision in Haines sanctions judicial fact-finding that increases a mandatory minimum sentence by finding that Ennis reasonably foresaw that the conspiracy exceeded 500 grams, rather than looking to the elements of the offense, the drug quantity he admitted was directly attributable to him: an amount less than the threshold amount necessary to impose an enhanced mandatory minimum sentence of ten years.

The Fifth Circuit appears to equate the determination of the drug quantity to a sentencing fact or not an element of the offense as this Court has held violates the due process clause of the Fifth Amendment and the notice and guarantees of the Sixth Amendment. See Apprendi, Alleyne, and Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999).

Ennis never stipulated to a quantity of methamphetamine attributable to him in excess of 500 grams which would trigger a mandatory minimum sentence of ten years, pursuant to § 841(b)(1)(A). He stipulated to an amount more than 350 grams, but less than 500 grams of methamphetamine to limit his exposure to a mandatory minimum ten year sentence. However, the district court and Court of Appeals found the reasonably foreseeable "scope" of the conspiracy

exceeded 500 grams and that judicially determined fact was sufficient to attribute more than 500 grams to Ennis, who contends that "reasonable foreseeability" is not an element of the offense, which can be utilized to prove, beyond a reasonable doubt, a greater drug quantity attributable to him than the drug quantity to which he stipulated. The drug quantity and type is the "fact" that determines whether a defendant is subject to a mandatory minimum sentence or an enhanced mandatory minimum sentence. No jury found this element of the offense beyond a reasonable doubt, nor did defendant stipulate to such a fact. The Court of Appeals decision regarding Ennis is inconsistent with this Court's holdings in Apprendi, Alleyne, and Burrage, and the protections afforded a criminal defendant under the Sixth Amendment.

Ennis entered into a plea agreement in which he stipulated the drug quantity attributable to him to be at least 350 grams but less than 500 grams of methamphetamine. The district court and appeals court held that Ennis "knew or reasonably should have known that the scope of the conspiracy involved 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine" (Appendix B, p. 4). The drug quantity stipulated to and admitted by Ennis to be attributable

to him was less than the threshold amount to trigger the applicability of an enhanced 10 year mandatory minimum sentence. This is a "fact" that increases the penalty for a crime beyond the prescribed statutory maximum [and] must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 489, 120 S. Ct. 2363, 147 L. Ed. 2d 455. Compare 21 U.S.C. § 841(b)(1)(B) to § 841 (b)(1)(A). Needless to say, the type and amount of drugs is a "fact", an element of the crime which cannot be found by the court as it would be a sentencing enhancement factor without violating the Sixth Amendment. See, Alleyne, infra.

Second, the individualized approach is generally considered to be the more appropriate method of calculating the quantity of drugs for the penalty provisions under §841(b), because §846 does not provide a separate penalty for the conspiracy charge, unlike the general federal conspiracy law, 18 U.S.C. § 371, which provides a zero to five year prison sentence. § 846 provides that the sentence is based upon the violation of the underlying substantive offense in the narcotics law: § 841(b). The drug conspiracy statute does not require an overt act to find the defendant guilty, whereas § 371 does. In U.S. v. Shabani, 115 S. Ct. 382 (1994), this Court concluded that Congress adopted the common-law understanding

of conspiracy when it enacted § 846. Further, the sentencing guidelines incorporated the Pinkerton limits on conspiratorial liability to provide defendants a degree of protection from unlimited liability (strict liability) in substantive drug crimes of co-conspirators. See, Pinkerton v. United States, 328 U.S. 640, 66 S. Ct. 1180 (1946).

The holdings of Apprendi and Alleyne protect the rights of defendants by requiring prosecutors to prove beyond a reasonable doubt any facts that would increase a statutory minimum or maximum sentence. In effect, the district court and Fifth Circuit's decision creates strict liability for Ennis and other similarly situated defendants. Strict liability for a conspiracy to commit a drug crime is problematic in itself, because as in the case at bar, the issue was not whether Ennis knew the amount and type of drugs he personally was involved with and admitted were attributable to him, but, whether he knew the amount and type of drugs his co-conspirators had dealt during the conspiracy itself. That leads to other issues, more importantly, ambiguity in the drug conspiracy statute itself.

The district court and court of appeals' decision is contrary to the Second Circuit's opinion in United States v. Martinez, 987 F. 3d 920 which

found that "§ 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 the crimes." at 924. The reason is primarily because the term "object" of the conspiracy as used in § 846 is ambiguous and nothing in the Legislative history of the statute suggested that Congress intended to expand the culpability of defendants in that manner. 987 F. 2d 920, 925. Congress amended §846 in 1986 in response to this Courts' decision in Bifulco v. U.S., 447 U.S. 381, 100 S. Ct. 2247 (1980), because the original version of §846 subjected minor players to higher penalties than ringleaders.

The problem in the case at bar is that the district court and court of appeals looked at "reasonable foreseeability" of the scope of the conspiracy to determine the amount of drugs for purposes of sentencing under § 841(b), when such a view does not sufficiently and accurately quantify the amount of drugs attributable to an individual defendant. Here, Ennis entered into a stipulation with the government limiting the type and quantity of drugs attributable to him to be more than 350 grams but less than 500 grams of methamphetamine which subjected him to a 5 year mandatory minimum sentence pursuant to § 841(b)(1)(B). However, the

district court found and the court of appeals affirmed a finding that the scope of the conspiracy involved more than 500 grams of methamphetamine which was reasonably foreseeable to Ennis, thus subjecting him to a mandatory minimum 10 year sentence pursuant to § 841(b)(1)(A). The amount of drugs necessary to trigger a mandatory minimum sentence is an element of the offense which can only be found by a jury or by the defendant's admission in a plea. Looking to the conspiracy-wide amount subjects the defendant to strict liability for all acts of the conspirators. This result is contrary to a plain reading of §846, Pinkerton, Apprendi, and Alleyne. It is submitted that "reasonable foreseeability" of the scope of the conspiracy is not equivalent and does not reach the proof requirements of "beyond a reasonable doubt," nor can it be substituted interchangeably. The facts necessary to prove an element of the offense are far different from and subject to stricter proof than sentencing factors found by the district court such as a drug type and quantity in a sentencing guidelines calculation and/or the amount attributed to a defendant in the PSR and used at sentencing.

The Martinez court's ruling focuses on the fact that the word "object" in the conspiracy statute, § 846 may be interpreted in two

different ways: 1) that which existed in the mind of the individual defendant or 2) the quantity of drugs sold under the umbrella of the whole conspiracy. 987 F. 2d at 924. See also, Alexis S. Hughes, Unequal Justice: Why Federal Courts Should Adopt the Individualized approach to Sentencing Defendants Convicted of Drug Conspiracy, 72 American University Law Review Forum 19 at 46. This ambiguity within §846 is primarily the reason why an individualized approach and reliance on the amount of narcotics attributable to the defendant and found by jury beyond a reasonable doubt or stipulated to by the defendant is the appropriate mechanism to determine the type and quantity of drugs which triggers the applicable penalty for which he would be sentenced under 841(b).

In the case at bar, it was improper for the court to use the "reasonable foreseeability" or "scope" of the conspiracy drug quantity as the amount attributable to Ennis because he never admitted to that drug quantity nor was that drug quantity found by a jury beyond a reasonable doubt. To apply the conspiracy wide drug quantity is contrary to the individualized approach. The amount directly attributable to Ennis is less than 500 grams of methamphetamine. This quantity is less than the

threshold amount (500 grams or more) needed to apply a mandatory minimum sentence of ten years imprisonment. The judicial fact-finding of more than 500 grams increased the mandatory minimum sentence applicable to Ennis. Such fact-finding is not permissible under the Sixth Amendment. The drug quantity and type is a "fact" that increases the applicable mandatory minimum sentence. "The penalty for a crime is an element that must be submitted to the jury and found beyond a reasonable doubt." Alleyne. The decision of the Fifth Circuit Court of Appeals must be reversed and vacated, and the matter be remanded for resentencing.

2) THE RULE OF LENITY APPLIES TO JUDICIAL FACT-FINDING THAT MISAPPLIES § 846'S AMBIGUITY IN THE "OBJECT OF THE CONSPIRACY CAUSING DISPARATE TREATMENT OF SIMILARLY SITUATED DEFENDANTS. THE CONSTRUCTION CHOSEN SHOULD NOT DISFAVOR THE DEFENDANT.

Ennis contends that the rule of lenity applies to this case because of the ambiguity created by judicial fact-finding the type and quantity of narcotics attributable to him to be determined by the "reasonable foreseeability" that the conspiracy involved more than 500 grams of methamphetamine thus triggering a 10 year mandatory minimum sentence under § 841(b)(1)(A) the type and quantity of narcotics

attributable to the defendant, which was more than 350 grams but less than 500 grams of methamphetamine which triggered a lesser 5 year mandatory minimum sentence.

This Court in Ladner v. United States, 358 U.S. 169, 178, 79 S. Ct. 209, 214, states the rule: "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." The Court further emphasized that the "touchstone" of the rule of lenity "is statutory ambiguity." See, e.g., Lewis v. United States, 445 U.S. 55, 65, 100 S. Ct. 915, 921, 63 L. Ed. 2d 198 (1980).

It is unfair to the defendant to stipulate to a type and quantity of narcotic (an element of the offense) only to have the court make a finding that a conspiracy-wide drug quantity is attributable to him rather than the individualized approach, the amount to which he stipulated he was responsible.

This ambiguity and the two disparate interpretations available to the court in interpreting the criminal statutes, subject to the rule of lenity, requires that the interpretation chosen should not disfavor the defendant.

Burrage, 571 U.S. 216, 134 S. Ct. 891, 187 L. Ed. 2d 726. The court of appeals' decision clearly disfavored the defendant, Ennis.

A second reason to invoke the rule of lenity is that § 846 is ambiguous because its use of the key word "object" of the conspiracy may be interpreted in two different, but profound 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." Hughes, 72:19, p. 46. Ennis argues that the concept of lenity should apply to him because two interpretations of § 846's meaning of "object" of the conspiracy are permissible. The district court and court of appeals chose the more severe interpretation and the one that disfavors the defendant. The rule of lenity provides that an ambiguity within a criminal statute should be construed in favor of the less severe punishment. Ennis believes that such is the case at bar: an enhanced mandatory minimum sentence of 10 years was found to apply to him, but not his co-defendant, Cain, even though both defendants stipulated to a drug quantity less than the threshold amount required to trigger the enhanced mandatory minimum sentence of 10 years. Ennis should be liable for the quantity of drugs that he admitted was directly attributable to him: less than 500 grams of

methamphetamine. That amount did not trigger the enhanced 10 year mandatory minimum sentence. The use of the conspiracy-wide drug quantity violated Ennis's Sixth Amendment rights as it was a fact found by the court and not by a jury.

CONCLUSION

The district court and court of appeals should have followed precedent and applied a defendant-specific approach to the drug quantity attributable to Ennis (the stipulated amount of drugs he agreed was attributable to him), rather than judicially determining the amount, a conspiracy-wide drug quantity. Ennis did not admit to an element of the offense, a drug quantity of more than 500 grams of methamphetamine required to trigger the mandatory minimum ten year sentence required by § 841 (b)(1)(A). However, judicial fact-finding that it was "reasonably foreseeable" to Ennis that more than 500 grams of methamphetamine were involved in the conspiracy, was applied to him to enhance the mandatory minimum sentence applicable to him; a mandatory minimum sentence of 10 years. This "fact" found by the court is an element of the offense that increases the mandatory minimum sentence. The judicial fact-finding violates the Sixth Amendment which requires such a fact to

be submitted to the jury and found beyond a reasonable doubt. Alleyne, 570 U.S. 103, 133 S. Ct. 2155, 186 L. Ed. 2d 321. Consequently, Ennis's sentence should be reversed and vacated and it be remanded with instructions to sentence him based upon the lesser amount he admitted was attributable to him.

Further, due to the ambiguity of the judicial determination of the type and amount of drugs attributable to the defendant that were "reasonably foreseeable" in the drug conspiracy versus the amount of drugs the defendant stipulated were attributable to him, the Court of Appeals's interpretation of the applicability of the drug statutes' mandatory minimum sentences is subject to the rule of lenity. The courts are bound to choose an interpretation that does not disfavor the defendant. But, it did. Also, due to the ambiguity in the statutory interpretation of the word "object" in the drug conspiracy statute, § 846, the rule of lenity should apply, making Ennis subject to the less severe interpretation of the statute: a drug quantity of less than 500 grams and a 5 year mandatory minimum sentence as provided in §841(b)(1)(B).

Therefore an enhanced mandatory minimum 10 year sentence does not apply. Ennis's sentence should be reversed and vacated and remanded for resentencing to the lesser mandatory minimum sentence of 5 years.

Respectfully submitted,

FRANK GRANGER
A PROFESSIONAL LAW CORPORATION

FRANK GRANGER
FRANK GRANGER* Federal ID No. 06219
1135 Lakeshore Drive, 6th Floor
Lake Charles, Louisiana 70601
Telephone: (337) 439-2732
Email: frank@fgrangerlaw.com
CJA Counsel for Davis Ennis
*Counsel of Record
Member Supreme Court Bar