

No.

IN THE SUPREME COURT OF THE UNITED STATES

RAY GIBSON,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

Whether the relevant conduct standard under U.S.S.G. §1B1.3 for determining a co-conspirator's sentencing liability for drug activity of other members of the conspiracy also governs the applicability and enforcement of the mandatory minimum sentencing provisions of 21 U.S.C. §841(b)?

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Petitioner Ray Gibson (“Petitioner”) respectfully prays that a writ of certiorari will issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in Case No. 15-6122 on October 31, 2017.

OPINION AND ORDERS BELOW

On October 31, 2017, the United States Court of Appeals for the Sixth Circuit, sitting *en banc*, filed an order, without an accompanying opinion, affirming Petitioner’s sentence for conspiracy to possess with intent to distribute 50 or more grams of methamphetamine. (App. 1a). The order is officially reported at *United States v. Gibson*, 874 F.3d 544 (6th Cir. 2017).

A three-judge panel of the court had previously issued an opinion and order on November 21, 2016. (App. 4a) The opinion is unpublished. The court's order granting an en banc rehearing was entered on April 19, 2017 and is officially reported at *United States v. Gibson*, 854 F.3d 367 (6th Cir. 2017). (App. 3a)

The United States District Court entered its criminal judgment without opinion on October 5, 2015. (App. 7a).

JURISDICTION

Petitioner seeks review of the order of the United States Court of Appeals for the Sixth Circuit, sitting en banc, entered on October 31, 2017. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. §991:

(a)

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

. . . .

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating

factors not taken into account in the establishment of general sentencing practices;

. . . .

21 U.S.C. §841:

(a) Unlawful acts. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

. . . .

(b) Penalties. Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(A) In the case of a violation of subsection (a) of this section involving—

. . . .

(viii) 50 grams or more of methamphetamine, its salts, isomers, and 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. §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

Petitioner sold methamphetamine to a confidential informant on three occasions. The aggregate drug weight was slightly over 5 grams. If the government had prosecuted him solely for the three individual drug sales, his advisory Guideline imprisonment range would likely have been either 12 to 18 months, or 41 to 51 months, depending on the purity of the methamphetamine.¹

However, Petitioner's transactions took place during the government's investigation of a large scale drug trafficking operation ("DTO") in Clay County, Kentucky. A federal grand jury in the Eastern District of Kentucky indicted the DTO's leaders and numerous other individuals, including lower-level participants like Petitioner, with conspiracy to distribute 50 or more grams of methamphetamine. By statute, a controlled substance offense "involving" a threshold amount of 50 grams of methamphetamine triggers a mandatory minimum prison term of ten years.

Petitioner pled guilty. During the plea colloquy, he agreed with the government's statement that the conspiracy "as a whole" distributed 50 or more grams of methamphetamine. But there was no stipulation, and Petitioner did not admit, that this amount was reasonably foreseeable to him and within the scope of his jointly-undertaken criminal activity.

¹The Drug Quantity Table under U.S.S.G. §2D1.1(c) distinguishes between "pure" methamphetamine and a mixture containing a detectable amount of methamphetamine for purposes of establishing the base offense level. The district court did not make any findings regarding drug purity due to its belief that a statutory minimum prison term applied pursuant to 21 U.S.C. §841(B)(1).

At sentencing, the district judge announced that “the mandatory minimum is one hundred twenty months and the court is bound by that minimum. It can’t go below it.” He then imposed a 120-month prison term.

A three-judge panel of the Sixth Circuit rejected Petitioner’s claim that the ten-year mandatory prison term does not apply to him. It reasoned that Petitioner’s admission that the “entire” conspiracy “involved” the threshold drug quantity (50 grams of methamphetamine) was sufficient to trigger the mandatory minimum “regardless of whether [Petitioner] could reasonably foresee the drug quantity.” (App. 5a)

The Sixth Circuit granted Petitioner’s petition for rehearing *en banc* to resolve an intra-Circuit conflict. (App. 3a) Following oral argument, the *en banc* Circuit announced it was “evenly split” on the issue and affirmed Petitioner’s sentence. (App. 1a)

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

THE RELEVANT CONDUCT STANDARD UNDER U.S.S.G. §1B1.3 FOR DETERMINING A CO-CONSPIRATOR’S SENTENCING LIABILITY FOR THE DRUG ACTIVITY OF OTHER MEMBERS OF THE CONSPIRACY GOVERNS THE APPLICABILITY AND ENFORCEMENT OF THE MANDATORY MINIMUM SENTENCING PROVISIONS OF 21 U.S.C. §841(B).

With the passage of the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, 100 Stat. 3207 (1986), Congress introduced a “market-oriented” approach to the sentencing of drug traffickers. *Chapman v. United States*, 500 U.S. 453, 460 (1991). Under this approach, the quantity of drugs manufactured, possessed or

distributed by an offender is the key factor used to determine the length of his prison term. *Id.* Toward that end, subsection (b) of 21 U.S.C. §841, the primary statute for prosecuting drug traffickers in the federal courts, prescribes a schedule of mandatory minimum prison terms for offenses “involving” threshold quantities of common street drugs, including heroin, cocaine, cocaine base, methamphetamine, and marijuana.

The United States Sentencing Commission has structured the Sentencing Guidelines to conform to the Act’s quantity-driven imprisonment ranges. *Neal v. United States*, 516 U.S. 284, 291 (1996) (“Like 21 U.S.C. §841(b)(1), the Sentencing Guidelines calibrate the punishment of drug traffickers according to the quantity of drugs involved in the offense.”) The offense levels corresponding to the drug quantity ranges in the Drug Quantity Table “are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute[.]” U.S.S.G. §2D1.1, b’ground.

The application of §841(b) to a single episode of drug trafficking is seldom difficult. The net weight of the controlled substance that the offender manufactured, possessed, or sold determines his or her eligibility for a mandatory prison term and the length of that term. *United States v. Martinez*, 987 F.2d 920, 924 (2nd Cir. 1993) (“An individual sentenced for possession of narcotics is sentenced for the full quantity in his possession.”)

The mandatory minimum sentencing scheme “becomes more complicated when dealing with conspiracy.” *Id.* The complexities stem from the fact that federal

conspiracy prosecutions are typically directed against DTO's involving numerous trafficking offenses by multiple participants over an extended period of time.

These large-scale prosecutions present concerns of equity in the sentencing process: Is it fair to sentence each member of the conspiracy, regardless of level and duration of his or her participation, according to the total quantity of drugs distributed by the entire organization? Congress has provided no explicit guidance for answering this question. The conspiracy statute, 21 U.S.C. §846, merely directs that a co-conspirator in a drug trafficking offense “shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the . . . conspiracy.”

From its inception, the Sentencing Commission recognized the potential for unfairness in holding lower-level co-conspirators accountable for distribution of large drug quantities of which they were unaware or in which they had no involvement. To fulfill the statutory objective of “avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct,” see 18 U.S.C. §991(b)(1)(B), the Commission adopted the concept of relevant conduct.

Under the Relevant Conduct Guideline, U.S.S.G. §1B1.3, a drug offender is responsible for drug quantities in which he was directly involved. *Witte v. United States*, 515 U.S. 389, 393 (1995). In addition, he is accountable for any reasonably foreseeable drug quantities that were within the scope of the criminal activity in which he was involved with others. *Id.*

Every federal Circuit, except the Sixth Circuit, has recognized that Congress' stated directive of avoiding sentencing disparities would be undermined if the mandatory minimum prison terms in §841(b) were enforced using more stringent criteria than the relevant conduct standard employed in the Guidelines. These courts have directed district judges to apply the relevant conduct principles under U.S.S.G. §1B1.3 when determining whether a co-conspirator is subject to a statutory mandatory minimum prison term under §841(b). *United States v. Colon-Solis*, 354 F.3d 101, 103 (1st Cir. 2004) ("In the absence of [] an individualized finding, the drug quantity attributable to the conspiracy as a whole cannot automatically be shifted to the defendant"); *Martinez*, 987 F.2d at 926 ("we hold that the same 'reasonable foreseeability' standard of the Guidelines must be applied to sentencing for conspiracy under 21 U.S.C. § 846"); *United States v. Miller*, 645 Fed. Appx. 211, 217-18 (3rd Cir. 2016) (agreeing with government's concession that imposition of statutory minimum prison requires an "individualized determination" by the jury regarding the amount of cocaine and cocaine base "directly attributable" to the defendant); *United States v. Irvin*, 2 F.3d 72, 77 (4th Cir. 1993) ("This approach allows a sentencing court to differentiate, for sentencing purposes, among degrees of culpability of coconspirators even though all are convicted of the same statutory offense"); *United States v. Ruiz*, 43 F.3d 985, 992 (5th Cir. 1995) ("the standards for determining the quantity of drugs involved in a conspiracy for guideline sentencing purposes apply in determining whether to impose the statutory minimums prescribed in Sec.

841(b)"); *United States v. Young*, 997 F.2d 1204, 1210 (7th Cir. 1993) ("in imposing a sentence for conspiracy under the mandatory provisions of section 841(b), the district court must determine the quantity of drugs that the defendant could reasonably have foreseen"); *United States v. Becerra*, 992 F.2d 960, 966 n. 2 (9th Cir.1993) ("We reject the government's argument that sentencing under the statutory mandatory minimums should differ from the Guidelines"), *United States v. Ellis*, 868 F.3d 1155, 1170 (10th Cir. 2017) (jury must make finding of "individually attributable" amount of drugs before a conspiracy defendant may be subject to mandatory prison term); *United States v. Bacon*, 598 F.3d 772, 778 (11th Cir. 2010) ("when a defendant is convicted of participating in a drug-trafficking conspiracy under 21 U.S.C. § 846, the court must sentence the defendant based on an individualized finding . . .as to the drug quantity foreseeable by that defendant"), and *United States v. Law*, 528 F.3d 888, 906 (D.C. Cir. 2008) ("We join our sister circuits in holding a defendant convicted of conspiracy to deal drugs, in violation of § 846 , must be sentenced, under §841(b), for the quantity of drugs the jury attributes to him as a reasonably foreseeable part of the conspiracy").

A frequently cited rationale for this construction is Judge Altimari's opinion in *Martinez*. He reasoned that the Sentencing Guidelines went into effect in 1987, and Congress amended 21 U.S.C. §846, the conspiracy statute, one year later by adding the "shall be subject to the same penalties as those prescribed for the offense" language. In his view, the legislative history of the 1988 amendment

indicated that Congress's intent "was to synchronize the penalties for conspiracies and their underlying offenses." *Id.* 987 F.2d at 925.

It is a perspective shared by Judge Wilkins, the first chairman of the Sentencing Commission. In *Irvin*, he explained, "two distinct congressionally approved sentencing schemes, the mandatory minimum approach and the sentencing guidelines, are presently in place, two schemes that should be reconciled to the extent legitimate and practical." *Id.* 2 F.3d at 78

In a less contentious time period, even appellate panels of the Sixth Circuit appreciated the wisdom of this approach. *See United States v. Capps*, 48 F.3d 1220 (Table), 1995 U.S. App. LEXIS 5195 (6th Cir. 1995) (applying relevant conduct principles to mandatory minimum sentencing "permits the administration of the statute in a way that does no violence to the approach of the Sentencing Guidelines."); *United States v. Swiney*, 203 F.3d 397, 405 (6th Cir. 1999) (formally adopting the reasoning of "a number of circuits [that] have applied the foreseeability analysis of the relevant conduct provision to the calculation of drug quantities for purposes of mandatory minimum sentences under 21 U.S.C. §§ 841(b)(1) and 846").

But in 2008, the Circuit inexplicably departed from the mainstream view. In *United States v. Robinson*, 547 F. 3d 632, 640 (6th Cir. 2008), a Sixth Circuit panel stated that because the jury found that the defendant had participated in a conspiracy that involved five or more kilograms of cocaine, there was no need

to “to determine the amount or kind of drugs for which Robinson was personally responsible.” The rationale for this conclusion is inscrutable.

The *Robinson* opinion does not mention the Sixth Circuit’s prior decisions in *Capps* or *Swiney*, or the overwhelming line of authority from other Circuits pointing in the opposite direction. Instead, it cites a hodge-podge of cases having little relevance to the issue at hand. Even the Department of Justice has questioned the soundness of *Robinson*. See *United States v. Young*, 847 F.3d 328, 366 (6th Cir. 2017) (“the government contends that *Robinson* is inconsistent with [] *Swiney* [], because *Swiney* held that an individualized approach, as articulated in the Sentencing Guidelines, determines the statutory range, whereas *Robinson* holds that a conspiracy-wide drug quantity determines the statutory penalty range.”)

Subsequent Sixth Circuit panels have interpreted *Robinson* as establishing an absolute rule that a co-conspirator’s eligibility for a mandatory, minimum prison term is controlled by the aggregate drug amount possessed and distributed by the entire conspiracy. See e.g. *United States v. Watson*, 620 Fed.Appx. 493, 508 (6th Cir. 2015) (relying on *Robinson* to reject defendant’s claim that “the jury should have been free to find that a particular defendant was responsible for a lesser amount because certain quantities predate his entry into the conspiracy or fall outside the scope of his involvement.”)

Ordinarily, *en banc* review under Fed. R. App. P. 35 is an adequate remedy for resolving intra-Circuit conflicts. Alas, the process failed in this instance, when the *en banc* Sixth Circuit announced it was “evenly divided.”

Of course, there is no counterpart to the “*Allen* charge” in *en banc* rehearings. Rule 35 makes no provision for a neutral arbiter to urge the jurists to “examine the question submitted with candor and with a proper regard and deference to the opinions of each others” and to “decide the case if they could conscientiously do so.” *Allen v. United States*, 164 U.S. 492, 501 (1896). Only this Court has the authority to break an impasse when an *en banc* Circuit cannot agree.

If the Court grants certiorari and decides the issue presented in Petitioner’s favor, the resolution of his challenge to his sentence is relatively straightforward. The Sixth Amendment right to a trial by an impartial jury, in conjunction with the Due Process Clause, requires any “fact” which increases the statutory minimum prison term for an offense to be submitted to a jury. *Alleyne v. United States*, 133 S.Ct. 2151, 2155 (2013).

During the guilty plea proceeding, Petitioner did not admit that the threshold amount of 50 grams of methamphetamine was foreseeable and within the scope of his conspiratorial agreement. Therefore, the enforcement of the mandatory ten-year prison term under §841(b) violated *Alleyne*.

Petitioner did not raise a Sixth Amendment objection at the time of sentencing. Accordingly, he must establish plain or obvious error that affected his

substantial rights, and seriously affected the fairness, integrity, or public reputation of the proceedings. *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1343 (2016).

The Sixth Circuit's opinion in *Swiney* was issued prior to *Robinson*. Under the Sixth Circuit's Law of the Circuit doctrine, when two published opinions are in conflict, the earlier opinion is controlling. *Darrah v. City of Oak Park*, 255 F.3d 301, 310 (6th Cir. 2001). Under *Swiney*, then, the error was clear and obvious.

An *Alleyne* error affects a defendant's substantial rights unless there is overwhelming evidence such that no reasonable jury could find that the drug quantity attributable to the defendant under relevant conduct principles "was less than that required for the mandatory minimum to apply." *United States v. Morris*, 784 F.3d 870, 874 (1st Cir. 2015) (Souter, Justice.). The presentence investigation report described Petitioner's offense conduct as involving three sales of methamphetamine to an informant. The aggregate weight was 5.028 grams.

This information fell short of providing overwhelming evidence for a properly-instructed jury to find that the threshold quantity of methamphetamine needed to trigger a ten-year mandatory prison term was reasonably foreseeable to Gibson and within the scope of his jointly-undertaken criminal activity. It therefore follows that the *Alleyne* error affected his substantial rights.

As noted earlier, Petitioner's direct involvement in the three transactions would have supported an advisory Guideline imprisonment range of either 12 to 18 months, or 41 to 51 months, depending on the purity of the

methamphetamine. The error therefore seriously affected the fairness and integrity of Petitioner's sentencing.

CONCLUSION

The Sixth Circuit stands alone in rejecting the application of relevant conduct principles for purposes of determining a co-conspirator's exposure to the mandatory minimum prison terms under 21 U.S.C. §841(b). The *en banc* Court had an opportunity to resolve an intra-Circuit conflict on this issue, but failed in this mission. For these reasons, Petitioner asks this Court to grant a writ of certiorari and order full briefing and oral arguments on the merits.

Respectfully submitted,

Dated: January 26, 2018

s/Dennis C. Belli

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