

No.

IN THE SUPREME COURT OF THE UNITED STATES

RAY GIBSON,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0246p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAY GIBSON,

Defendant-Appellant.

No. 15-6122

Appeal from the United States District Court
for the Eastern District of Kentucky at London.
No. 6:14-cr-00025-1—Amul R. Thapar, District Judge.

Argued: October 11, 2017

Decided and Filed: October 31, 2017

Before: COLE, Chief Judge; BATCHELDER, DAUGHTREY, MOORE,
CLAY, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, GRIFFIN,
KETHLEDGE, WHITE, STRANCH, DONALD, and BUSH, Circuit Judges.*

COUNSEL

ARGUED EN BANC: Dennis C. Belli, Columbus, Ohio, for Appellant. Finnuala K. Tessier, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON SUPPLEMENTAL BRIEF:** Dennis C. Belli, Columbus, Ohio, for Appellant. Finnuala K. Tessier, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Charles P. Wisdom, Jr., John Patrick Grant, UNITED STATES ATTORNEY'S OFFICE, Lexington, Kentucky, for Appellee.

* Judge Amul R. Thapar recused himself from participation in this ruling.

No. 15-6122

United States v. Gibson

Page 2

ORDER

This case was heard by the en banc court on October 11, 2017. The en banc court is evenly divided; therefore, the sentence imposed by the district court is AFFIRMED. *See Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 256 (6th Cir. 2009) (en banc); *Stupak-Thrall v. United States*, 89 F.3d 1269, 1269 (6th Cir. 1996) (en banc).

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0087p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAY GIBSON,

Defendant-Appellant.

No. 15-6122

Appeal from the United States District Court
for the Eastern District of Kentucky at London.
No. 6:14-cr-00025-1—Amul R. Thapar, District Judge.

Decided and Filed: April 19, 2017

Before: COLE, Chief Judge; BATCHELDER, MOORE, CLAY, GIBBONS,
ROGERS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE,
WHITE, STRANCH, and DONALD, Circuit Judges.

ORDER

A majority of the Judges of this Court in regular active service has voted for rehearing en banc of this case. Sixth Circuit Rule 35(b) provides as follows:

The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal.

Accordingly, it is ORDERED that the previous decision of this court is vacated, the mandate is stayed, and this case is restored to the docket as a pending appeal.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR PUBLICATION
File Name: 16a0618n.06

No. 15-6122

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Nov 21, 2016
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAY GIBSON (#17645-032),

Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE EASTERN
DISTRICT OF KENTUCKY

BEFORE: DAUGHTREY, ROGERS, and COOK, Circuit Judges.

ROGERS, Circuit Judge. Ray Gibson pleaded guilty to conspiring to distribute fifty grams or more of methamphetamine. *See* 21 U.S.C. § 846. That crime carries a mandatory-minimum sentence of ten years' imprisonment. 21 U.S.C. § 841(b)(1)(A)(viii). The district court sentenced Gibson to ten years' imprisonment. In this direct appeal, Gibson challenges his sentence, arguing that he never admitted that it was reasonably foreseeable to him in particular that the drug conspiracy would involve fifty grams or more of methamphetamine, and that his trial counsel's failure to challenge imposition of the mandatory-minimum sentence was constitutionally ineffective assistance. In light of our clear precedents, both arguments fail.

Gibson pleaded guilty to a conspiracy to distribute methamphetamine, where the conspiracy "involved" fifty grams or more of methamphetamine. That admission sufficed to trigger the ten-year mandatory minimum. The drug conspiracy statute exposes a co-conspirator

No. 15-6122

United States v. Gibson

to “the same penalties as those prescribed for the offense, the commission of which was the object of the . . . conspiracy.” 21 U.S.C. § 846. The substantive drug statute imposes a ten-year mandatory minimum to “any person” who “knowingly or intentionally . . . distribute[s] . . . a counterfeit substance,” 21 U.S.C. § 841(a)(2), where the distribution “involv[es] . . . 50 grams or more of methamphetamine,” 21 U.S.C. § 841(b)(1)(A)(viii). Because Gibson pleaded guilty to conspiring to distribute methamphetamine, and admitted that that conspiracy “involved” 50 grams or more of methamphetamine, the drug conspiracy statute exposes him to the crime of distributing fifty grams or more of methamphetamine, together with its ten-year mandatory-minimum sentence.

While Gibson did not further admit that he reasonably foresaw that the conspiracy would involve that drug quantity, he did not need to. In *Robinson*, we read our previous decision in *United States v. Pruitt*, 146 F.3d 638 (6th Cir. 1998), as having “interpreted 21 U.S.C. § 841(b)(1)(A) to focus on the threshold quantity *involved in the entire conspiracy*.” *United States v. Robinson*, 547 F.3d 632, 638 (6th Cir. 2008) (emphasis added). Thus we approved the district court’s instructions to the jury “that the relevant quantity determination is of the quantity involved in the . . . conspiracy to distribute cocaine.” *Robinson*, 547 F.3d at 638. Here, too, the relevant quantity determination is the quantity involved in the conspiracy, which Gibson admitted was fifty grams or more of methamphetamine. That admission triggers the mandatory-minimum sentence in our circuit, regardless of whether Gibson could reasonably foresee the drug quantity.

Gibson contends on appeal, though, that he was involved in only three small meth sales, and that *Alleyne v. United States*, 133 S. Ct. 2151 (2013), turned the drug quantity into an element of a drug conspiracy that must be found by the jury. This court has already rejected this

No. 15-6122

United States v. Gibson

argument, stating that “*Alleyne* did not rewrite § 841(b) to add a new *mens rea* requirement.” *United States v. Dado*, 759 F.3d 550, 570 (6th Cir. 2014). Gibson also asserts that *United States v. Swiney*, 203 F.3d 397 (6th Cir. 2000), holds that there is a *mens rea* requirement on the drug-quantity element, and argues that that case must be followed as the prior published opinion. This court has already rejected that argument, too. “[*Swiney*]—which stated ‘that *Pinkerton* principles . . . determine whether a defendant convicted under 21 U.S.C. § 846 is subject to the penalty [for the addict’s death as] set forth in 21 U.S.C. § 841(b)(1)(C)’—concerns sentencing under the Guidelines,” and sets out a “different standard” from “the standard applicable to the drug quantity finding.” *United States v. Watson*, 620 F. App’x 493, 509 (6th Cir. 2015) (quoting *Swiney*, 203 F.3d at 509).

Gibson also failed to preserve this challenge to his sentence. As Gibson concedes, this court therefore reviews Gibson’s sentence for plain error only. *See, e.g., United States v. Cabrera*, 811 F.3d 801, 808 (6th Cir. 2016). There is no plain error in this mandatory-minimum sentence. Moreover, Gibson’s counsel cannot have been ineffective for not having raised a legal argument that is foreclosed by our precedent.

The result in this case may appear unjust. Mandatory minimums for limited-amount co-conspirators do not serve the drug statute’s underlying purpose of more severely punishing larger-amount drug dealers. Nonetheless, absent a change in our law from the en banc court, the Supreme Court,¹ or Congress, we are bound by our precedents.

The district court’s sentence is affirmed.

¹ There is a split in the circuits on the issue. The First and Fourth Circuits, for instance, squarely require that the triggering amount of the mandatory minimum in a drug conspiracy case be reasonably foreseeable to the individual defendant. *See United States v. Pizarro*, 772 F.3d 284, 292–94 (1st Cir. 2014); *United States v. Foster*, 507 F.3d 233, 250–251 (4th Cir. 2007).

UNITED STATES DISTRICT COURT

OCT - 5 2015

Eastern District of Kentucky – Southern Division at London

AT COVINGTON
ROBERT R. CARR
CLERK U.S. DISTRICT COURT

UNITED STATES OF AMERICA

v.

Ray Gibson

JUDGMENT IN A CRIMINAL CASE

Case Number: 6:14-CR-25-SS-ART-1

USM Number: 17645-032

Willis G. Coffey
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1ss (DE #324)

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:846, 841(b)(1)(A)	Conspiracy to Distribute 50 Grams or More of Methamphetamine	July 2014	1ss

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

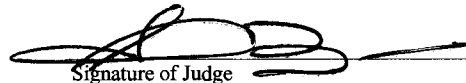
☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) Underlying indictments (DE #9 & DE #40) ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

September 29, 2015

Date of Imposition of Judgment


Signature of Judge

Honorable Amul R. Thapar, U.S. District Judge

Name and Title of Judge

10/5/15
Date

Judgment — Page 2 of 6

DEFENDANT: Ray Gibson
CASE NUMBER: 6:14-CR-25-SS-ART-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

ONE HUNDRED AND TWENTY (120) MONTHS IMPRISONMENT

- ☒ The court makes the following recommendations to the Bureau of Prisons:
The defendant shall participate in a job skills and/or vocational training program.
The defendant shall participate in a program towards the completion of a GED.

- ☒ The defendant is remanded to the custody of the United States Marshal.

- ☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ ☐ a.m. ☐ p.m. on _____ .
☐ as notified by the United States Marshal.

- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____ .
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: Ray Gibson
CASE NUMBER: 6:14-CR-25-SS-ART-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

TEN (10) YEARS SUPERVISED RELEASE

The defendant may petition the Court after five (5) years from release of imprisonment, pending no violations, to be removed from supervision.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- ☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Ray Gibson
CASE NUMBER: 6:14-CR-25-SS-ART-1

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall abstain from the excessive use of alcohol.
2. The defendant shall participate in a substance abuse treatment program and shall submit to periodic drug and alcohol testing at the direction and discretion of the probation officer during the term of supervision. The defendant shall pay for the cost of treatment services to the extent he is able as determined by the probation officer.
3. The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing or location monitoring which is required as a condition of release.
4. The defendant shall provide to the USPO, within 7 (seven) days of release from the custody of the Bureau of Prisons, a written report, in a form the USPO directs, listing each and every prescription medication in Defendant's possession, custody or control. The list shall include, but not be limited to, any prescription medication that contains a controlled substance and encompasses all current, past and outdated or expired prescription medications in a Defendant's possession, custody, or control at the time of the report.
5. The defendant shall notify the USPO immediately (i.e. within no later than 72 hours) if Defendant receives any prescription for a medication containing a controlled substance during the period of supervised release. Defendant shall provide the USPO such documentation and verification as the USPO may reasonably request and in a form the USPO directs.
6. The defendant must comply strictly with the orders of any physician or other prescribing source with respect to use of all prescription medications.
7. The defendant shall report any theft or destruction of his/her prescription medications to the U.S. Probation Officer within 72 hours of the theft or destruction.
8. The defendant shall complete his GED within two years of his release from BOP custody.
9. The defendant shall seek medical treatment and obtain/fill any prescriptions only in the state of Kentucky, unless otherwise approved by the probation office. The defendant shall provide full disclosure of his prior drug addiction to any treating physician.
10. The defendant shall submit his person, residence and curtilage, office or vehicle to a search, based upon reasonable suspicion of a violation of supervised release, at the direction and discretion of the United States Probation Office

ACKNOWLEDGMENT

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____
(Defendant)

Date

U. S. Probation Officer/Designated Witness

Date

DEFENDANT: Ray Gibson
 CASE NUMBER: 6:14-CR-25-SS-ART-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ Waived	\$ COMMUNITY WAIVED

- ☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$ _____	\$ _____
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- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Ray Gibson
CASE NUMBER: 6:14-CR-25-SS-ART-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

Criminal monetary penalties are payable to:
Clerk, U. S. District Court, Eastern District of Kentucky
310 S. Main Street, Room 215, London KY 40741

INCLUDE CASE NUMBER WITH ALL CORRESPONDENCE

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.