

VANDERBILT UNIVERSITY LAW SCHOOL  
PUBLIC LAW & LEGAL THEORY

Research Paper Number 02-05



Acceptance of Responsibility and Conspiracy  
Sentences in Drug Prosecutions *After Apprendi*

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A Revised version of this paper is forthcoming in:  
*FEDERAL SENTENCING REPORTER* (2002)

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**Acceptance of Responsibility and Conspiracy Sentences  
in Drug Prosecutions After *Apprendi*,**  
14 Fed. Sent. Rep.\_\_\_\_  
(revised version forthcoming 2002).

## I. Introduction

In our post-*Apprendi* world,<sup>2</sup> drug quantity and type, when they trigger an extended sentence under 21 U.S.C. §§ 841 or 846, must be treated as elements. For the defendant who goes to trial, *Apprendi* forces the prosecutor seeking an enhanced sentence to prove yet another fact beyond a reasonable doubt. This prospect can convince a prosecutor to settle for a plea to a lesser offense.<sup>3</sup> These consequences of the *Apprendi* decision are clear. Less clear, it seems, is how this revised understanding of the elements of federal drug offenses interacts with certain statutory and Guidelines provisions. In this essay, we offer two proposals -- one directed to the U.S. Sentencing Commission to clarify post-*Apprendi* application of § 3E1.1 (acceptance of responsibility), and another directed to Congress, to preserve options for leniency in sentencing under 21 U.S.C. § 846 and § 1B1.3(a)(1)(B) (relevant conduct for conspiracy) that existed prior to the *Apprendi* decision but now appear unavailable.

First, we suggest that the Commissioners add an Application Note to the Commentary that accompanies the acceptance of responsibility section of the Guidelines, in order to clarify that

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<sup>2</sup> In *Apprendi v. New Jersey*, 530 U.S. 466 (2000) the Court held that any fact, other than a prior conviction, that increases the penalty for an offense beyond the proscribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.

<sup>3</sup> See Nancy J. King & Susan R. Klein, *Apprendi and Plea Bargaining*, 54 STAN. L. REV. 295, 301, nn. 23-25; 305, nn. 33-40 (2001) (listing federal and state reversals for *Apprendi* error on grounds that the record did not reflect proof beyond a reasonable doubt as to the contested aggravating factor).

acceptance points are appropriate not only for defendants who plead guilty to the charged offense, but for defendants whose unambiguous offers to plead guilty to a lesser-included offense are rejected by the prosecution, and who are acquitted of the greater offense. Most judges, we expect, are already interpreting § 3E1.1 in this fashion, but recent debate on the point warrants clarification.<sup>4</sup> Second, we suggest that Congress consider amending the federal drug conspiracy statute, 21 U.S.C. § 846, to add a mens rea requirement for drug quantity and type. Our second suggestion is more controversial, but we believe it is the best way to retain pre-*Apprendi* conspiracy sentencing practice, which was unintentionally modified by the interaction between *Apprendi*, the conspiracy statute, and § 1B1.3 (a)(1)(B) of the Guidelines.

## **II. Acceptance of Responsibility**

Section 3E1.1 of the U.S. Sentencing Guidelines provide that a defendant who "clearly demonstrates acceptance of responsibility for his offense" is entitled to a two-level decrease in his base offense level. Where the offense level is 16 or greater, as will be the case in many drug prosecutions, a defendant is entitled to a three-level acceptance of responsibility decrease in his base offense level by either timely providing information to the government concerning his own involvement in the offense, or timely notifying the government of his intention to enter a plea thereby allowing the government to avoid preparing for trial and the court to schedule its calendar efficiently.<sup>5</sup> The Commentary to this section states that it is not intended to apply "to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse."<sup>6</sup>

### **A. Pre-*Apprendi* Application in Drug Cases**

Prior to *Apprendi*, many defendants receiving points for acceptance of responsibility pleaded guilty pursuant to a plea agreement whereby the defendant admitted to a particular amount that would establish his offense level under the Guidelines. Where the defendant and the government could not agree on the amount of drugs for which that defendant was responsible, the prosecutor and defendant might enter into a plea agreement without quantifying an amount, leaving that determination to be made by the judge at sentencing. In this scenario, the defendant generally still received her two or three point reduction. In the few appellate decisions that discussed this situation, a defendant was likewise granted the full acceptance of responsibility deduction when a prosecutor refused to accept a guilty plea unless the defendant was willing to plead to the enhanced quantity, and the judge after a jury conviction found

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<sup>4</sup> See Stanford Law Review, Volume 54, Issue No. 2.

<sup>5</sup> U.S. Sentencing Guidelines Manual, § 3E1.1(b) (2001).

<sup>6</sup> U.S. Sentencing Guidelines Manual, § 3E1.1, Application Note 2 (2001).

only the lesser quantity at sentencing.<sup>7</sup>

## **B. Post-Apprendi Application in Drug Cases**

In the post-*Apprendi* world, 21 U.S.C. § 841 includes graded offenses – the lesser offense of delivery or possession with intent to deliver an unspecified amount of a particular drug type, and a series of greater offenses of increasing severity depending upon drug quantity and type. A plea agreement that does not specify drug quantity, now an element of each greater offense, will support only a sentence within the statutory maximum of the lesser offense, even if the greater drug amount is later established at sentencing.<sup>8</sup> A defendant wishing to plead guilty to a lesser-included offense involving a smaller quantity of drugs may nonetheless be forced to trial on the greater offense in order to contest the government’s allegation of a larger quantity. If the prosecutor refuses to accept a plea to the lesser amount, the defendant is acquitted on the aggravated offense, and the judge does not find that the defendant falsely denied relevant conduct, should that judge award credit for acceptance of responsibility? We believe the answer is clearly "yes." The Guideline for acceptance of responsibility, U.S.S.G. § 3E1.1, provides that the defendant qualifies by "truthfully admitting the conduct compromising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under section 1B1.3." Where a defendant has offered to stipulate to all of the elements except the one that triggers the higher offense, and he is ultimately convicted of only the lesser offense, he has truthfully admitted the conduct comprising the only

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<sup>7</sup> See, e.g., *United States v. Guerrero-Cortez*, 110 F.3d 647, 653-56 (8th Cir. 1997) (finding the trial court's refusal to grant three-point reduction for acceptance of responsibility clearly erroneous where defendant offered to plead guilty to drug offenses involving two kilograms of cocaine, the prosecutor refused to accept the plea unless the defendant admitted involvement to five kilograms, and the judge found the defendant responsible only at sentencing only for the two kilograms); *United States v. McKinney*, 15 F.3d 849, 851-54 (9th Cir. 1994) (granting the defendant a reduction for acceptance of responsibility even though he had already been convicted at trial where the district court thwarted his attempt to plead guilty), *cert. denied*, 515 U.S. 857 (1995). See also *United States v. Hines*, 196 F.3d 279, 273-74 (1<sup>st</sup> Cir. 1999) (suggesting, without deciding, that a three level acceptance of responsibility reduction would be appropriate where a defendant had offered to plead to all counts except the one of which the defendant was subsequently acquitted at trial); *United States v. Eschman*, 227 F.3d 886, 891-92 (7<sup>th</sup> Cir. 2000) (remand where the denial of an acceptance adjustment may have been based on the defendant's objection to the method of calculating the quantity of controlled substances in the offense, and the appellate court agreed with the defendant's calculations).

<sup>8</sup> See U.S. Sentencing Guidelines Manual § 5G1.1 (2001) (noting that relevant conduct cannot be used to increase the penalty beyond the statutory maximum). Given that the maximum penalty for the drug offense simpliciter is 20 years, situations where the prosecutor will need an enhancement to reach the appropriate Guidelines sentence will be rare.

offense for which he was convicted. A defendant willing to plead guilty to the only offense of which he is convicted shows all of the remorse contemplated under the Guidelines, even if the guilty plea is rejected by the prosecutor. Moreover, Application Note 2 does provide that insistence on a trial "does not automatically preclude a defendant from consideration for such a reduction."<sup>9</sup>

In most of these cases, this acceptance reduction will be unaffected by the relevant conduct provision of § 1B1.3. Section 3E1.1 was amended in 1992 to resolve a circuit split regarding whether the defendant must accept responsibility for all criminal conduct, or just the offense of conviction. The Commission settled upon the latter.<sup>10</sup> The acceptance of responsibility guideline now provides that "a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility."<sup>11</sup> Thus, while a jury finding of not guilty as to the greater offense should frequently ensure that a defendant receives his reduction for pleading guilty to the lesser offense, there may be instances where a judge will find by a preponderance of evidence that the greater offense constituted relevant conduct under 1B1.1, that the defendant falsely denied these acts, and therefore refuse to award an acceptance reduction.<sup>12</sup>

This approach is already followed for other lesser-included offenses. For example, in *United States v. Kelly*,<sup>13</sup> the defendant was charged with the felony charge of intimidating a witness, and attempted to plead guilty to misdemeanor witness harassment prior to trial on the felony charge of

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<sup>9</sup> U.S. Sentencing Guidelines, § 3E1.1, application n. 2 (2001).

<sup>10</sup> U.S.S.G. App. C, amends. 46 (Jan. 1, 1988), 351 (Nov. 1 1990), 459 (Nov. 1, 1992).

<sup>11</sup> U.S.S.G section 3E1.1, application note 1(a).

<sup>12</sup> *See, e.g., United States v. Berthiaume*, 223 F.3d 1000 (7<sup>th</sup> Cir. 2000) (where defendant pleads guilty to one count distributing methamphetamine but frivolously denied that he sold 3,735 grams, the district court properly denied reduction for acceptance of responsibility and sentenced defendant to 212 months); *United States v. Patron-Montano*, 223 F.3d 1184 (10<sup>th</sup> Cir. 2000) (defendant's failure to admit relevant conduct beyond the scope of the offense of conviction did not render him ineligible for acceptance of responsibility, but his false identification of the source of the cocaine constituted a lie about relevant conduct which precluded the reduction). *See also United States v. Watts*, 519 U.S. 148 (1997) (trial judge may, consistent with the double jeopardy clause, sentence defendant under relevant conduct provisions for acquitted drug charge captured on videotape).

<sup>13</sup> 169 F. Supp. 2d 171 (S.D.N.Y. 2001).

intimidating a witness. However, the U.S. Attorney's Misdemeanor Committee refused the plea offer and took Kelly to trial on the felony. At the request of the defense, the jury was instructed on the lesser-included charge, and Kelly was ultimately convicted of misdemeanor harassment rather than felony intimidation. "Under the circumstances," the court concluded, "Kelly's demonstrated willingness to take responsibility for the conduct of which a jury ultimately found him guilty satisfies the requisites of § 3E1.1 and warrants a two-point reduction." The court reasoned, "Kelly did seek to accept responsibility formally for his criminal conduct before trial, and it was the government's choice, not his, to proceed."<sup>14</sup>

The single reported case we have found, thus far, that has discussed this sort of problem in the context of a drug prosecution applied similar reasoning to grant a severance of substantive and conspiracy charges. In *United States v. Colon*,<sup>15</sup> the defendant indicated that he was willing to plead guilty to the substantive counts and to plead guilty to his participation in the conspiracy, but not to the specific quantity alleged in the indictment -- more than 100 grams of heroin. He wanted acceptance points under § 3E1.1 with respect to the counts to which he would plead guilty. The government objected to a severance of the substantive offense and the conspiracy, and also refused to allow the defendant to plead to the elements of conspiracy--minus quantity--and try the quantity in a bench trial. In order to preserve the acceptance of responsibility deduction with respect to the counts on which the defendant wished to plead guilty, the court granted severance. The court explained:

Pre-*Apprendi*, when allegations about drug quantity were typically not included in indictments, the defendant could have pled guilty to the elements of conspiracy, reserving quantity issues for sentencing. The government did not have to agree. The decision was for the defendant, and ultimately the Court. Since *Apprendi*, with drug quantities included in indictments, and treated as the functional equivalents of offense elements, the defendant's options have been narrowed. Without government approval, the defendant cannot agree to plead to less than all the elements of the offense (like pleading to the lesser included offense of manslaughter on a murder indictment).

The court concluded that to deny severance "would be to burden the very trial rights announced in *Apprendi*."<sup>16</sup> "A decision that was intended to increase the due process protection for the defendant cannot be transformed by government fiat into a new bludgeon to coerce guilty pleas."<sup>17</sup>

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<sup>14</sup> Id. at 173.

<sup>15</sup> 165 F.Supp.2d 67, 68-69 (D. Mass. 2002).

<sup>16</sup> Id. at 70.

<sup>17</sup> Id. at 69.

If there is any ambiguity after *Apprendi* about the operation of § 3E1.1 in this situation, it would be inappropriate and ironic to interpret the guideline in a way that promotes governmental overreaching. After all, *Apprendi* was designed to enforce fundamental protections against the same. To clarify any possible uncertainty on this point we recommend that the Commissioners add a new Application Note to the Commentary that describes this situation. For example:

"Application Note 2 (a): This adjustment is also intended for a defendant whose attempt to plead guilty to the offense of conviction was rejected by the prosecution. Acceptance points may be appropriate for any defendant who contests at trial only those elements that differentiate a lesser-included offense from a greater offense; who is acquitted of the greater offense and convicted of the lesser-included offense; who submitted to the government and the court before trial an offer in writing to admit to all of the elements of that lesser-included offense, and whose offer to plead guilty to the lesser-included offense was rejected by the prosecution. This adjustment will not apply if the sentencing judge determines that, despite the acquittal on the greater-offense, the greater offense constitutes relevant conduct within the meaning of section 1B1.3, and the defendant falsely denied that conduct."<sup>18</sup>

### **III. *Apprendi* and Conspiracy**

#### **A. Pre-*Apprendi* Drug Conspiracy Sentencing**

Prior to *Apprendi*, drug type and quantity generally controlled the sentence range for both a controlled substance offense under 21 U.S.C. § 841 and the offense of conspiracy to commit a controlled substance offense, 21 U.S.C. § 846. But the prosecutor did not need to prove the defendant's awareness of either the type or amount of the substance in order to establish either crime.<sup>19</sup>

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<sup>18</sup> This Application Note would apply, of course, not just to drug cases, but to all instances of greater and lesser included federal offenses. *See*, Nancy King & Susan Klein, 12 *Fed. Sent. Rep.* 331 Appendix A (2001), for a list of selected federal statutes which include aggravators that, after *Apprendi*, are now elements of greater offenses.

<sup>19</sup> *See* Welling, Beale & Bucy, FEDERAL CRIMINAL LAW AND RELATED ACTIONS, § 9.3, nn. 1-10 (West 1998 and 2000 Pocket Part). The same was true in most state jurisdictions. *See, e.g., Commonwealth v. Rodriguez*, 614 N.E.2d 649 (Mass. 1993). *But see, People v. Ryan*, 626 N.E.2d 51 (N.Y. Ct. App. 1993) (prosecutor must prove the defendant had knowledge regarding the weight of the hallucinogen in order to obtain the higher sentence).

The elements of the substantive offense are that a defendant knowingly possesses a controlled substance with intent to distribute it, and the elements of the conspiracy offense are that the defendant knowingly enter into a conspiracy and intend to commit the object offense. *See, e.g., United States v. Fraguso*, 978 F.2d 896 (5th Cir. 1992) (detailing elements of substantive and conspiracy offenses),

At sentencing for the substantive crime, mens rea as to quantity remained unimportant. Once a defendant was convicted of 21 U.S.C. § 841(a), she was sentenced under § 841(b) and U.S.S.G. § 2D1.1 based on quantity and type, regardless of whether the defendant knew the amount or type she possessed.<sup>20</sup> Although this could cause quite a high and some might say unfair sentence for a low-level courier unaware of the amount of controlled substance she was carrying, this was uniformly the law in every circuit.

This was not true for drug conspiracy sentencing. Congress amended § 846 in 1988 to "assure that all the penalties applicable to the underlying drug offense also apply to an attempt or conspiracy to commit the offense."<sup>21</sup> Thus, the statute provides that any person who conspires to commit a drug offense "shall be subject to the same penalty as those prescribed for the offense."<sup>22</sup> However, prior to *Apprendi*, various defendants convicted of the same conspiracy did not all receive the same penalty as that prescribed for the underlying substantive drug offense; some co-conspirators received a lower sentence than others. Rather than simply sentencing each co-conspirator based upon the actual quantity involved in the conspiracy, courts instead relied upon U.S.S.G. § 1B1.3(a)(1)(B), and determined a conspirator's sentence based on the quantity with which she was directly involved and all reasonably foreseeable quantities within the scope of the conspiracy.<sup>23</sup> Thus, unlike the low-level drug mule facing a

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cert. denied, 507 U.S. 1012 (1993); *United States v. Sales*, 25 F.3d 709, 711 (8th Cir. 1994) ("This circuit has repeatedly held that a quantity of drugs involved in a conspiracy is not an essential element of the offense ...").

<sup>20</sup> See *supra* note 19; *United States v. Levine*, 166 F.3d 895, 906 (7th Cir. 1999) ("In the situation where a defendant knowingly transports a suitcase containing illegal drugs, he is accountable for all the contraband regardless of whether he knows its amount or type.")

<sup>21</sup> 134 Cong. Rec. 2 17, 366, Daily Ed. (Nov. 10, 1998).

<sup>22</sup> 21 U.S.C. § 846 (West 2001) (emphasis added).

<sup>23</sup> U.S.S.G. § 1B1.3(a)(1)(B), the Relevant Conduct provision, provides that the base offense level shall be determined on the basis of, "in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity . . ." See *United States v. Ruiz*, 43 F.3d 985, 990 (5th Cir. 1995) (relying on U.S.S.G. § 1B1.3(a)(1)(B), application n. 2, providing that a defendant is "accountable for all quantities of contraband with which he was directly involved and . . . all reasonable foreseeable quantities of contraband which were within the scope of the criminal activity that he jointly undertook"); *United States v. Thomas*, 114 F.3d 228, 255 (D.C. Cir. 1997); *United States v. Flores*, 73 F.3d 826, 833 (8th Cir. 1996) (indicating that a defendant is only liable at sentencing for the amounts of drugs involved in the single conspiracy that were reasonable foreseeable to him); *United States v. O'Campo*, 973 F.2d 1015, 1026 (1st Cir. 1992); *United States v. Cardenas*, 917 F.2d 683, 687 (2d Cir. 1990).



substantive drug charge, a low-level conspirator might escape a mandatory minimum or enhanced maximum sentence based on the total drug quantity involved in the conspiracy if she was not directly involved in or did not reasonably foresee that quantity.<sup>24</sup>

## **B. Post-*Apprendi* Drug Conspiracy Sentencing – The Problem**

In the post-*Apprendi* world, prosecutors who seek for any drug co-conspirator an enhanced sentence over the statutory maximum for conspiracy to distribute simpliciter must include the drug type and quantity in the indictment, and prove to the jury beyond a reasonable doubt that the conspiracy involved that type and quantity.<sup>25</sup> This is because conspiracies involving different amounts or types of drugs are now different crimes carrying different sentence maxima, and a jury finding is required as to which conspiracy crime was committed.

The problem arises with the sentencing of individual conspirators. Current practice is to demand that the jury find that a conspiracy itself involve a certain type and threshold amount of drugs. However, presently courts do not demand that the jury determine that each individual conspirator agree that the conspiracy involve the possession with intent to deliver *the type and amount of drugs involved in the conspiracy itself*. In other words, each conspirator is convicted of agreeing to participate in a drug conspiracy of unspecified type and amount, without proof even that he should have foreseen the amount or type of drugs involved.<sup>26</sup> Nevertheless, while mens rea as to the type or amount

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<sup>24</sup> See e.g., *United States v. Goines*, 988 F.2d 750, 777 (7<sup>th</sup> Cir. 1993) (evidence supported jury finding of single broad cocaine distribution conspiracy joined by 12 of the 13 defendants, but 4 cases with sentences ranging from 181 to 510 months remanded for resentencing, as the judge failed to make factual findings as to each defendant's reasonable awareness as to the quantity of drugs for which he was found accountable); *United States v. Banks*, 10 F.3d 1044, 1057-58 (4<sup>th</sup> Cir. 1993) (affirming district court's decision to hold defendant Banks "accountable for only 14.02 kilograms of heroin for whose distribution he was shown to be directly responsible, declining to hold him accountable for the total amount, 34.7 kilograms, concededly distributed through the conspiracy's operation," thought this resulted in a 310 month sentence for Banks rather than the life sentences received by his co-conspirators).

<sup>25</sup> See, e.g., *United States v. Webb*, 255 F.3d 890, 896 (D.C. Cir. 2001); *United States v. Thomas*, 274 F.3d 655, 663 (2d Cir. 2001); *United States v. Vazquez*, 271 F.3d 93, 98-99 (3d Cir. 2001); *United States v. Promise*, 255 F.3d 150, 157 (4th Cir. 2001); *United States v. Doggett*, 230 F.3d 160, 163-64 (5th Cir. 2000 (same)); *United States v. Maynie*, 257 F.3d 908, 918 (8th Cir. 2001); *United States v. Gill*, 280 F.3d 923 (9th Cir. 2001); *United States v. Hishaw*, 236 F.3d 565, 574-75 (10th Cir. 2000); *United States v. Rogers*, 228 F.3d 1318, 1327 (11th Cir. 2000).

<sup>26</sup> See, e.g., *United States v. Fields*, 251 F.3d 1041 (D.C. Cir. 2001) (while the penalty for both the substantive and the conspiracy drug offense is determined by drug quantity, knowledge of such

of drugs involved in the conspiracy presently need not be established for conspiracy *liability*, courts continue to use it to determine the appropriate sentence for conspirators under the Guidelines, often finding some conspirators responsible for less than the total amount of drugs that the jury found was involved in the conspiracy.<sup>27</sup> We believe that this combination of practices may violate Congressional intent under 846, which mandates that any person who conspires to commit a drug offense "shall be subject to the same penalty as those prescribed for *the offense*."<sup>28</sup> The words "the offense", which determine the penalty to which any drug conspirator is subject is, after *Apprendi*, no longer the old Section 841 -- the crime of possessing with intent to deliver an unspecified drug of unspecified amount. Section 841 after *Apprendi* consists of several, different, graded offenses. After *Apprendi* "the offense" referenced in § 846, is that crime involving the drug type and amount found by the jury to be the object of the conspiracy, *not* a lesser offense involving a lesser type or amount that the defendant should have foreseen. Sentencing individual conspirators as if they were involved in crimes lesser than the crime that is the object of the conspiracy seems to us to be contrary to the plain language of ' 846.

An example will illustrate. Assume that several defendants are charged and convicted of violating § 846 by conspiring to engage in street sales of cocaine base, and the jury finds that the amount involved in the conspiracy was 50 grams or more. The jury has thus determined that the crime the defendants conspired to commit was the crime of trafficking in crack in the amount of 50 grams or more, a crime that under 21 U.S.C. ' 841(b), carries a ten-year mandatory minimum sentence. Prior to *Apprendi*, the judge was not required to impose a ten-year sentence upon every conspirator in a conspiracy to sell 50 grams of crack. The judge under the Guidelines could have found that a particular low-level conspirator personally handled or reasonably could have foreseen the sale of only one gram, sentencing her to term of 27 to 33 months.<sup>29</sup> After *Apprendi*, given that there was only a single

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quantity is unnecessary); *United States v. Promise*, 255 F.3d 150, 157 (4th Cir. 2001) (holding that quantity must be alleged in the indictment, and stating that "the jury need only determine whether the drug quantity exceeds specific thresholds. . . . The task of identifying the amount of drugs for which the defendant should be held accountable at sentencing is left to the district court pursuant to the principles set forth in the sentencing guidelines."); *United States v. Schurter*, No. 01-2515, 2002 U.S. App. LEXIS 559, at \*1, *per curiam* (8th Cir., Jan. 14, 2002) (unpublished) (affirming the defendant's conviction despite his objection that "the district court's jury instructions improperly allowed the jury to attribute to him quantities outside his knowledge"); *United States v. Sanchez*, 269 F.3d 1250, 1266 n.28 (11th Cir. 2001) (noting that knowledge of the amount of drugs involved in a conspiracy is not an element of an offense under 18 U.S.C. § 846).

<sup>27</sup> See *supra* note 23.

<sup>28</sup> 21 U.S.C. ' 846 (West 2001) (emphasis added).

<sup>29</sup> See § 2D1.1, based on a level one criminal history and no reduction for acceptance of responsibility.

conspiracy, one involving the offense of trafficking in 50 grams or more, it seems to us that the judge is required by the terms of ' 846 to impose a ten-year mandatory minimum sentence on every member of the conspiracy. Put somewhat differently, when ' 846 mandates that coconspirators "shall be subject to the same penalty as those prescribed for *“the offense”* -- that “offense,” after *Apprendi*, is no longer the generic offense of violating ' 841. Instead, it is one of a series of graded offenses, involving a particular minimum drug amount, the drug amount found by the jury to be the quantity involved in the conspiracy.

### C. The Solution

What, if anything, should be done about the possibility that *Apprendi* might actually have the unintended effect of *increasing* sentences for low-level drug conspirators? One could argue that these greater sentences are what defendants should have been receiving all along, and that the break previously given to them under the Guidelines was contrary to congressional intent in mandating equal sentences for § 841 and § 846. On the other hand, the practice of requiring direct involvement or foreseeability before sentencing under U.S.S.G. § 1B1.3(a)(1)(B) has remained undisturbed by Congress since 1988 and nothing about *Apprendi* suggests a need to boost penalties for drug conspirators. Rather, there has been a pronounced trend recently to impose lesser, not greater, sentences in federal drug cases.<sup>30</sup> For judges who seek to preserve the greater leniency they exercised in conspiracy sentencing prior to *Apprendi*, at least three alternatives are open, none of them problem-free.<sup>31</sup>

The first option would be to interpret § 846 to require proof that each conspirator agreed to possess with intent to distribute a certain type and quantity of drug, where that type and quantity increases the statutory maximum sentence. The conspiracy charge already requires proof beyond a reasonable doubt of type and total quantity involved in the conspiracy; this approach would require, in addition, that each conspirator intended that the conspiracy involve that particular type and quantity.<sup>32</sup> If

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<sup>30</sup> Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L. Rev. 1043 (2001), and Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data at the District Level*, 87 Iowa L.R. 477 (2002).

<sup>31</sup> These alternatives are in addition, of course, to existing options for imposing a lesser sentence, including downward departures. *See generally id.* (discussing various options for reducing drug sentence).

<sup>32</sup> This approach was adopted by the Supreme Court of Michigan in interpreting a state drug offense. *People v. Mass*, 628 N.W.2d 540 (Mich. 2001) (after *Apprendi*, knowledge of the statutory minimum amount of a controlled substance necessary to enhance a sentence is an element of a conspiracy charge).

every conspirator agreed to commit the greater offense involving the larger amount, then the mandate of § 846 would be perfectly consistent with the Guidelines command to sentence each conspirator for only that amount he should have foreseen (a defendant who agreed to deal 50 grams of crack can't complain that he didn't foresee that amount). If the agreement that the government must establish for a § 846 conspiracy is an agreement to commit a specific § 841 crime, and if *Apprendi* has divided what used to be the single crime of violating § 841 into several different offenses of varying seriousness, then proof of agreement as to type and amount could be another unanticipated aspect of *Apprendi's* legacy.

However, it seems unlikely to us that courts will embrace this position. Such an interpretation of § 846 contravenes Congress's intent that quantity and type be strict liability elements, evidenced by placement of those factors in the penalty rather than offense sections of the statute, and the absence of any mens rea requirement regarding those facts. The language of § 846 prohibits attempting or conspiring to "commit any offense defined in this subchapter." Prior to *Apprendi*, appellate courts uniformly held that Congress did not intend that the substantive offenses defined in § 841 required any mens rea as to quantity or amount;<sup>33</sup> post-*Apprendi* appellate courts uniformly hold the same.<sup>34</sup> Since the substantive offense itself requires no mens rea as to quantity or type,<sup>35</sup> neither should the agreement to commit that substantive offense.<sup>36</sup> Thus, pre and post-*Apprendi* appellate courts have uniformly

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<sup>33</sup> See *supra* note 19. Likewise, courts have not required knowledge as to location for enhancements under the schoolyard statute, 21 U.S.C. § 860, or knowledge as to age under the sale to minor statute, 21 U.S.C. § 861. See, e.g., *U.S. v. Rodriguez*, 961 F.2d 1089 (3d Cir. 1992); *U.S. v. Chin*, 981 F.2d 1275 (D.C. 1992).

<sup>34</sup> See *supra* note 41.

<sup>35</sup> Alternatively, a federal court could hold that after *Apprendi*, § 841, the substantive drug offense, actually requires proof of mens rea as to quantity as well as proof of quantity itself, and thus that the conspiracy offense requires the government to establish each conspirator anticipated the same drug amount. Again, it is difficult to construct an argument that this is what Congress intended. See, e.g., cases cited note 19 *supra*, Cf. *Feola*, *infra* note 38 (holding that to convict for 18 U.S.C. § 1111, defendant need not know that the person he was assaulting was a federal officer or that the officer was engaged in the performance of his official duties); *United States v. Bryant*, 766 F.2d 370, 374-75 (8<sup>th</sup> Cir. 1985) (violation of wire fraud statute requires interstate transmission in executing of fraud, but, since the interstate nexus was unrelated to culpability, the government need not show that the defendants had any knowledge or foresight of the interstate character of the transmission); *United States v. Zeigler*, 19 F.3d 486, 491 n. 3 (10<sup>th</sup> Cir. 1994) (Hobbs Act robbery conviction did not require that government prove that defendant knew of the effect on commerce).

<sup>36</sup> See e.g., *Feola*, *infra* note 38; *U.S. v. Freed*, 401 U.S. 601 (1971) (holding that actual knowledge that the hand grenade was unregistered is not an element of the substantive offense of

held that a conspiracy charge requires no additional mens rea above that required for the substantive offense itself.<sup>37</sup> There is no reason to believe that Congress would wish to add a mens rea element as to quantity, to the substantive or conspiracy drug offenses, simply because the Court has insisted as a constitutional matter that the prosecutor submit quantity to the jury before raising the statutory maximum sentence based upon that quantity.

The Court's decision in *United States v. Feola*, holding that a conviction for conspiracy to assault a federal officer did not require a criminal intent greater than that necessary to convict for the substantive offense,<sup>38</sup> supports our expectation that drug quantity will remain a strict liability element in drug conspiracies. The Court in *Feola* rejected the defendant's argument that conviction of conspiring to assault a federal officer required the government to prove that the defendant was aware of the officer's federal status. For the completed crime of assault under 18 U.S.C. § 111, the officer's federal status was a circumstance element that, like drug amount under § 841, carried strict liability – a defendant could be found guilty of the completed offense even without proof that he should have known the circumstance existed. Congress did not intend under the general federal conspiracy statute, 18 U.S.C. § 371, that conspirators be aware of strict liability elements of the object offense, and there is no basis to read in a different meaning for the drug conspiracy statute.

A defendant may argue that *Feola* is distinguishable because the circumstance element in *Feola* was jurisdictional, determining whether the offense could be prosecuted in federal court, while drug amount is a grading element that not only determines the seriousness of the offense and the penalty to which a defendant is exposed, but is tied to his culpability. Thus, a defendant might argue that due process demands some level of mens rea as to this element. The *Feola* Court acknowledged, without deciding, that it may have come to a different conclusion regarding both the substantive and conspiracy offenses if the conduct engaged in without mens rea was otherwise innocent.<sup>39</sup> However, such is not the case for either § 841 or 846: The conduct of knowingly possessing with the intent to distribute any detectable quantity of any controlled substance, or conspiracy to do the same, is not innocent behavior. However this debate is resolved, an additional showing of mens rea for drug conspiracies would be a radical departure from present practice, one that would significantly undercut the government's ability to

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possession of unregistered weapon under 26 U.S.C. § 5861 (d), and declining to require a greater degree of intent for the conspiracy charge); *U.S. v. Bordelon*, 871 F.2d 491 (5<sup>th</sup> Cir.) (conspiracy to commit mail fraud requires the same mens rea as the substantive mail fraud offense, thus proof of intent to use the mail in unnecessary), cert. denied, 493 U.S. 838 (1989).

<sup>37</sup> See *supra* notes 19 and 27.

<sup>38</sup> See *United States v. Feola*, 420 U.S. 671 (1975).

<sup>39</sup> *Feola* 420 U.S. at 671, 691. See also *Lambert v. California*, 355 U.S. 225 (1957) (striking strict liability statute criminalizing the act of remaining in Los Angeles without registering as a felon).

bring together under a single conspiracy umbrella defendants of varying culpability.

Another approach to the difficulty of reconciling the language of 846 with the practice of insisting on a jury finding of one large drug amount for the conspiracy while sentencing individual conspirators for smaller amounts was suggested to us by a federal judge at one of the Federal Judicial Center's *Apprendi* Workshops. This judge would ask the jury to make a specific finding, for each conspirator, as to the quantity with which she was involved or reasonably foresaw. Initially, we note that allowing the jury to find that each defendant conspired to distribute (or at least foresaw) a different quantity of drugs may make it difficult to uphold the notion that each is involved in the same conspiracy.<sup>40</sup> Moreover, this instruction exacerbates rather than solves the problem. The single conspiracy of which every member is convicted in fact involves some certain quantity of some certain type of drug, whether every member realizes this or not. Sentencing contingent upon direct involvement and foreseeability is simply contrary to § 846, which requires that each co-conspirator *shall* receive the sentence she would have received for the substantive offense; and the substantive offense, §841, does not require that the defendant be directly involved with or foresee the quantity distributed.<sup>41</sup>

A similar solution adopted by the Fifth Circuit in its new Pattern Jury Instructions is to mandate the pre-*Apprendi* process by judicial fiat, and ignore the jury finding as to quantity involved in the entire conspiracy when sentencing convicted drug conspirators.<sup>42</sup> The Committee Note to Pattern Instruction

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<sup>40</sup> See *Kotteakos v. United States*, 328 U.S. 750 (1946) (reversing conviction for single conspiracy on grounds of fatal variance where at least eight conspiracies were proven).

<sup>41</sup> See *United States v. Collazo-Aponte*, 281 F.3d 320 (1st Cir. 2002) (rejecting argument that drug quantity requires scienter, concluding “nothing in the statutory language of § 841(b) supports a mens rea requirement,” that “the presumption in favor of a scienter requirement should only apply ‘to each of the statutory elements that criminalize otherwise innocent conduct’”); *United States v. Barbosa*, 271 F.3d 438 (3d. Cir. 2001) (rejecting defendant’s argument that jury must determine that he knowingly possess cocaine base, when actually he intended to distribute heroin, noting “the Government’s mens rea burden has not changed with the advent of *Apprendi* . . . the structure and plain text of § 841 affords no support for a requirement that the Government must prove more than the defendant’s knowledge that he was trafficking in a controlled substance. . . [T]o construe the statute otherwise would entail making drastic revisions to a statutory scheme, which, in the first instance, lies in the hands of Congress.”); *United States v. Garcia*, 252 F.3d 838 (6th Cir. 2001) (rejecting defense argument that “in order to be convicted under § 841, the government must prove mens rea as to the type and quantity of the drugs,” noting simply that the defendant “is mistaken on this point of law”).

<sup>42</sup> See FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS CRIMINAL 2.89 at 262 (West 2001) (“However, in a drug conspiracy, two separate findings are required. One is the quantity involved in the entire conspiracy, and the other is the quantity which each particular defendant knew or should have known was involved in the conspiracy.”). One of the authors sat on the judicial committee drafting these

2.89 explains that "the *Apprendi* doctrine affects only the potential maximum sentence. It does not affect any statutory minimum sentences, ...nor sentence calculations under the sentencing guidelines."<sup>43</sup> Other Circuits appear to have adopted this approach.<sup>44</sup> Again, this allows a judge to ignore a jury finding beyond a reasonable doubt as to quantity for the very conspiracy for which the defendant is being sentenced, disregard a statutory mandate to sentence for conspiracy as the defendant would have been sentenced for the substantive offense, and instead rest the sentence upon a consideration (lack of direct involvement or foreseeability) that Congress did not include in the statutory definition of the offense. Such sentencing allows the Guidelines to undercut the mandatory-minimum sentence contained in the statute, which is contrary to Supreme Court precedent and the Guidelines themselves.<sup>45</sup>

The best solution, though one improbable politically, is for Congress to amend 21 U.S.C. § 846

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pattern jury instructions in the wake of *Apprendi*, and recommended against this course of action.

<sup>43</sup> Fifth Circuit Pattern Jury Instructions Criminal 2.89, Note at p. 262 (2001) (citations omitted).

<sup>44</sup> See, e.g., *United States v. Frazier*, 280 F.3d 835, 852 (8th Cir. 2002) (upholding the defendant's sentence determination where the district court based its calculations on drug sales that were reasonably foreseeable to the defendant); *United States v. Nubuor*, 274 F.3d 435, 443 (7th Cir. 2001) ("[I]n the context of drug distribution cases, we have held that a defendant who has conspired with others may be sentenced for drug quantities that he did not handle, so long as he could reasonable foresee that the drug transactions would occur."); *United States v. Culbert*, No. 99-4664, 2000 U.S. App. LEXIS 15085, at \*15 (4th Cir. 2000, June 28, 2000) ("[I]n determining the proper base offense level to apply to a defendant involved in a crack cocaine conspiracy, a defendant is responsible for his acts, as well as "all reasonably foreseeable acts" of his co-conspirators.").

In one case, a district judge ruled that while "the record supports a [jury] finding that the scope of the conspiracy was 50 grams of crack cocaine or more," the amount foreseeable to two lower-levels defendants was only 5 grams. *U.S. v. Miller*, 2002 WL 319466 (E.D. Pa. 2002). While this memorandum denying a new trial did not discuss sentences, the district judge, by his factual finding, indicated he would sentence these defendants under 21 U.S.C. § 841(b)(1)(B)(iii), to a mandatory minimum of 5 years and maximum of 40, rather than under 21 U.S.C. § 841(b)(1)(A)(iii), which carries a mandatory minimum of 10 years and maximum if life.

<sup>45</sup> See *Neal v. United States*, 516 U.S. 284 (1996) (amendment to Guideline § 2D1.1(c) Application Note (H), subtracting the carrier medium for LSD for purposes of determining the Guidelines range under the Drug Quantity Table, cannot overcome the Court's interpretation of § 841(b)(1) in *Chapman* as directing the sentencing court to count the weight of the blotter paper, thus the mandatory minimum sentence required by the statute will trump the lower Guidelines calculation); USSG § 2D1.1, Application Note 7 (providing that mandatory minimum sentence may be "waived" only by substantial assistance under § 5K1.1 or non-violent first time offender exception in § 5K1.2).

so that it expressly requires minimal *mens rea* – negligence, or foreseeability – as to those circumstance elements that distinguish the more serious drug offenses from the less serious. This avoids the risk of reading into either 841 or 846 a meaning that was never intended, a risk that accompanies any solution grafting additional mens rea requirements onto existing wording. It also imposes the exact standard courts applied under the Guidelines prior to *Apprendi*.<sup>46</sup>

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<sup>46</sup> Any higher standard may be too easily circumvented by prosecutors employing accomplice liability or *Pinkerton* liability theories. See *Pinkerton v. United States*, 328 U.S. 640 (1946). Under *Pinkerton*, those who conspired concerning a lesser amount of drugs would be liable for those foreseeable offenses involving greater amounts committed by coconspirators in furtherance of the conspiracy. Our proposal would require the prosecution to establish the same mens rea – foreseeability – that *Pinkerton* liability demands. While it might be possible to bypass this legislative fix by using an aiding and abetting theory to obtain liability on the substantive drug crimes, assuming there was insufficient actus reus to charge the substantive crime, it may be difficult to prove that the defendant took sufficient affirmative steps to participate in the substantive offense. See *United States v. Garcia*, 242 F.3d 593, 596 (5<sup>th</sup> Cir. 2001) (listing elements of aiding and abetting liability under 18 U.S.C. § 2).