COMBATING THE OPIOID CRISIS: HOW A DISCRETIONARY DEPARTURE MAY ENCOURAGE APPLICATION OF THE “DEATH RESULTS” SENTENCING ENHANCEMENT

MARA A. SOMLO*


INTRODUCTION

Drug overdose deaths are rising at an alarming rate.1 In 2016 alone, 63,632 people died from a drug overdose in the United States.2 In 2017, drug overdose deaths grew to an estimated 72,000.3 And yet, these statistics just scratch the surface; the United States government does not track death rates for every drug.4 In March 2018, the National Institute on Drug Abuse declared the misuse of and addiction to

---


2 Id.

3 Id.

4 Id. Opioids are the main driver of drug overdose deaths. Opioid Data Analysis and Resources, CENTERS FOR DISEASE CONTROL AND PREVENTION, (February 9, 2017), https://www.cdc.gov/drugoverdose/data/index.html. Every day, more than 115 people in the United States die after overdosing on opioids. Id.
opioids a national crisis. The Centers for Disease Control and Prevention estimated that the total “economic burden” of prescription opioid abuse alone is $78.5 billion a year, which includes the cost of healthcare, lost productivity, addiction treatment and criminal justice involvement.

On May 10, 2017, then United States Attorney General Jeff Sessions sent a memorandum to all federal prosecutors notifying them of a change in Department of Justice charging and sentencing policy. He instructed prosecutors to charge and pursue the most serious, readily provable offense, which, by his definition, “are those that carry the most substantial guidelines sentence, including mandatory minimum sentences.” With this memorandum came the understanding that President Donald Trump’s administration would be tough on crime and committed to ending the drug crisis. To further this goal, federal prosecutors began looking to the United States Sentencing Guidelines for support—in particular, the “death results” sentencing enhancement.

The “death results” sentencing enhancement is derived from the Comprehensive Drug Abuse Prevention and Control Act of 1970. The Act criminalizes manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense a


6 Id.

7 Jeff Sessions, Department Charging and Sentencing Policy (May 10, 2017) (Memorandum for all federal prosecutors) (on file with the Office of the Attorney General).

8 Id.


10 Id.

controlled substance.\textsuperscript{12} The “death results” enhancement may be applied when the defendant commits a drug offense and “death or serious bodily injury results from the use of such substance.”\textsuperscript{13} Should the Government prove the dealer’s drugs were the but-for cause of a drug user’s death, the dealer’s mandatory minimum sentence is twenty years in prison.\textsuperscript{14} This is a significant increase from the penalty for simple drug distribution.\textsuperscript{15}

In \textit{United States v. Harden}, the Eastern District of Wisconsin imposed the “death results” enhancement in a case involving a heroin overdose.\textsuperscript{16} The defendant was convicted of conspiring to distribute heroin and was sentenced to life in prison.\textsuperscript{17} The defendant appealed his conviction and sentence to the Seventh Circuit, which heard, as a matter of first impression, arguments as to whether the “death results” enhancement requires the Government prove the user’s death was reasonably foreseeable to the defendant.\textsuperscript{18} The Seventh Circuit held the “death results” enhancement does not require the Government prove any \textit{mens rea} element, including reasonable foreseeability.\textsuperscript{19} Therefore, the “death results” enhancement shall be treated as a matter of strict liability.\textsuperscript{20} This holding has significant policy implications;

\begin{itemize}
  \item \textsuperscript{12} \textit{Id}.
  \item \textsuperscript{13} \textit{Id}.
  \item \textsuperscript{14} \textit{Id}.
  \item \textsuperscript{15} The penalties for simple drug distribution vary based on the quantity and type of drug; however, sentences can reach as low as five years. 18 U.S.C.A. § 841(b) (Westlaw through Pub. L. No. 115-231).
  \item \textsuperscript{16} 893 F.3d 434, 439 (7th Cir. 2018), cert. denied, No. 18-6036, 2018 WL 4509897 (Oct. 15, 2018).
  \item \textsuperscript{17} \textit{Id} at 445.
  \item \textsuperscript{18} \textit{Id} at 446. The court’s standard of review was de novo. \textit{Id}.
  \item \textsuperscript{19} \textit{Id} at 454. The Seventh Circuit also held: (1) the evidence was sufficient to establish that heroin distributed by the defendant was the but-for cause of death; (2) the defendant had waived his challenge to a jury instruction regarding causation; (3) the exclusion of testimony about an alternative heroin source was proper; (4) the defendant was not entitled to a mistrial even though a photograph not admitted into evidence was given to the jury; and (5) the prosecutor’s alleged misstatements did not warrant new trial. \textit{Id} at 434.
  \item \textsuperscript{20} \textit{Id} at 448.
\end{itemize}
courts have expressed hope that drug distributors and manufacturers will think twice about dealing drugs that are dangerous to drug users because the dealer will be responsible for the user’s death.21

While the Seventh Circuit reached the right decision in Harden, federal courts are taking two very different approaches to handling two similar fact patterns. Courts require the Government prove foreseeability in drug conspiracy cases where a defendant is sentenced based on a co-conspirator’s conduct; however, the Government is not required to prove foreseeability when seeking the sentencing enhancement for a defendant charged with simple drug distribution.22 This discrepancy is one of many, leading some district courts to express a desire for discretion—a way to “opt out” of the mandatory minimum sentence even if the “death results” enhancement applies.23 Although the Government should not be required to prove an overdose death was reasonably foreseeable to a defendant to apply the “death results” sentencing enhancement, a district court should be able to depart from the mandatory minimum sentence when the sentence can be considered a miscarriage of justice.

This Comment has four parts. Part I analyzes how courts have historically interpreted the “death results” enhancement, including the decision to require but-for causation and beyond a reasonable doubt as the burden of proof. Part II considers how similar fact patterns result in drastically different sentences, warranting some judicial discretion. Part III dives deeper into how the Seventh Circuit reached its holding in Harden. Finally, in Part IV, I consider the implications of Harden: how recent cases have used Harden as precedent, why the Supreme Court should hear a case like Harden, and how the “death results” enhancement will affect the opioid crisis.

21 United States v. Alvarado, 816 F.3d 242, 250 (7th Cir. 2016).
23 United States v. Krieger, 628 F.3d 857, 861 (7th Cir. 2010).
STATUTORY INTERPRETATION IS FAVORABLE TO THE GOVERNMENT

Case law regarding statutory interpretation of the “death results” enhancement overwhelmingly benefits the Government. The Government should not be required to prove a user’s death was reasonably foreseeable to a defendant in order for the court to impose the “death results” enhancement because the statutory provision’s plain language demonstrates Congress’s intent to require but-for cause, rather than proximate cause. Still, since courts consider the “death results” enhancement to be an element of the offense, the Government faces a higher burden in proving the “death results” enhancement than it would if treated as a sentencing factor.

A. The Government should not be required to prove foreseeability because the “death results” sentencing enhancement requires but-for causation rather than proximate causation.

The Controlled Substances Act, as originally enacted, “tied the penalties for drug offenses to both the type of drug and the quantity involved, with no provision for mandatory minimum sentences.” This changed in 1986, when Congress enacted the Anti-Drug Abuse Act, which redefined offense categories, increased the maximum penalties, and set minimum penalties for offenders. The Act also created the “death results” enhancement. With the enhancement, the default sentencing rules do not apply when “death or serious bodily injury results from the use of the distributed substance.” The defendant is instead sentenced to a term of imprisonment which shall

25 Id. The provisions of 21 U.S.C. § 841 are often referred to as the “Len Bias laws” and are named after a popular college basketball star who died of a drug overdose in 1986. Congress enacted the provisions of 21 U.S.C. § 841 under the theory that but for their purchase of drugs, the overdose victims would not have died. Katherine Daniels and Carol M. Bast, Difficulties in Investigating and Prosecuting Heroin Overdose Cases, 41 CRIM. L. LAW. LAW BULLETIN 5 (2005).
26 Burrage, 571 U.S. at 209.
27 Id.
not be less than twenty years or more than life, a substantial fine, or both.\textsuperscript{28}

Because the “death results” enhancement increases the minimum and maximum sentence, the elements of the enhancement have to be submitted to the jury and found beyond a reasonable doubt.\textsuperscript{29} The Supreme Court, in \textit{Burrage v. United States}, considered what evidence the Government had to present in order to meet its burden.\textsuperscript{30} Specifically, the Court assessed whether the Government met its burden when the evidence suggested the use of a drug, supplied by the defendant, contributed to, but was not the but-for cause of, the victim’s death.\textsuperscript{31} There the defendant distributed heroin to an individual who died of a drug overdose.\textsuperscript{32} The defendant was charged with unlawfully distributing heroin and that “death resulted from the use of that substance—thus subjecting [the defendant] to a 20-year mandatory minimum sentence” pursuant to 21 U.S.C. § 841(b)(1).\textsuperscript{33} At trial, medical experts testified that the user may have died even if he did not inject the heroin.\textsuperscript{34} The defendant moved for a judgment of acquittal, arguing the Government must show the defendant’s heroin was the proximate cause of the user’s death.\textsuperscript{35} Proximate cause is defined in this context as “a cause of death that played a substantial part in bringing about the death . . . meaning the death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred.”\textsuperscript{36} The district court denied the motion and instructed the jury that the Government only had to prove the heroin was a contributing cause of

\textsuperscript{28} \textit{Id.} Notably, the “substantial” fines range from $1 million to $50 million, depending on the drug. 18 U.S.C. § 841(b) (Westlaw through Pub. L. No. 115-231).
\textsuperscript{29} \textit{Alleyne v. United States}, 570 U.S. 99, 103 (2013).
\textsuperscript{30} 571 U.S. 204, 208 (2014).
\textsuperscript{31} \textit{Id.} at 205.
\textsuperscript{32} \textit{Id.} at 204.
\textsuperscript{33} \textit{Id.}.
\textsuperscript{34} \textit{Id.} at 206.
\textsuperscript{35} \textit{Id.} at 207.
\textsuperscript{36} \textit{Id.} at 208.
the victim’s death. After the defendant was convicted, the court was required to apply the sentencing enhancement. The Eighth Circuit found the district court did not err in denying the defendant’s motion for a judgment of acquittal. The Supreme Court granted certiorari and ultimately reaffirmed that “when a crime requires not merely conduct but also a specified result of conduct, a defendant generally may not be convicted unless his conduct is both (1) the actual cause, and (2) the “legal cause (often called the “proximate cause”) of the result.” However, Congress may abrogate this principle by “speaking directly to the question.” The Court interpreted the phrase “results from” in § 841(b) as requiring but-for causation—that the death would not have occurred but for the defendant’s drug dealing—rather than proximate causation. Therefore, the Supreme Court affirmed the district court’s decision.

Proximate cause is not easily defined; “it is a flexible concept.” To say one event proximately caused another is a way of making two separate but related assertions. First, it means “the former event caused the latter.” This is known as actual cause or cause in fact.

---

37 Id. at 207.
38 Id. at 208.
39 Id.
40 Id. at 210.
41 Id. at 216.
42 Id. at 208.
43 Id. The Government expressed concerns that the Supreme Court’s interpretation of the “death results” enhancement would “unduly limit criminal responsibility”. However, the Court disagreed, stating “we doubt that the requirement of but-for causation for this incremental punishment will prove a policy disaster.” Id. at 216-17.
45 Paroline, 572 U.S. at 444.
46 Id.
47 Id.
proximate. To say that one event was a proximate cause of another means “it was not just any cause, but one with a sufficient connection to the result.” Proximate cause is often explained in terms of foreseeability. A requirement of proximate cause precludes liability in situations where “the causal link between conduct and the result is so attenuated that the consequence is more aptly described as mere fortuity.” The Supreme Court has “found a proximate-cause requirement built into a statute that did not expressly impose one.”

In *United States v. Alvardo*, the Fourth Circuit considered whether Congress intended for § 841(b)(1) to include proximate cause. In *Alvardo*, the defendant was convicted of knowingly and intentionally distributing heroin, resulting in death. On appeal, the defendant argued that the district court failed to instruct the jury that he must have “reasonably foreseen” that death could result. The district court gave the following jury instruction:

If you find that the Government has proved beyond a reasonable doubt that the defendant knowingly or intentionally distributed a mixture or substance containing a detectable amount of heroin on or about March 29, 2011, you must then determine whether the Government has proved beyond a reasonable doubt that death resulted from the use of such substance.

The defendant relied on *Staples v. United States*, where the Supreme Court held “offenses that require no mens rea generally are

---

48 Id.
49 Id.
50 Id. at 445.
52 Paroline, 572 U.S. at 446.
53 816 F.3d 242, 244 (4th Cir. 2016).
54 Id. at 246.
55 Id. at 244.
56 Id. at 246.
disfavored.” The court broke § 841(b)(1)(C) down into two elements: (1) knowing or intentional distribution and (2) death caused by the use of that drug. The court found the first element, knowing or intentional distribution of heroin, included mens rea. The defendant’s reliance on Staples was misplaced however, because the court found Staples did not require every element of an offense to have a mens rea. Instead, Staples directed courts to “think twice before concluding that an offense, viewed as a whole, contains no mens rea requirement.” Therefore, § 841(b)(1)(C) did not support having a separate mens rea, but rather served to elevate the crime of knowingly or intentionally distributing heroin to a more serious level. The absence of a separate mens rea meant but-for cause was appropriate.

The Tenth Circuit has also held that the “death results” enhancement only requires proof of but-for causation. In United States v. Burkholder, a district court declined to instruct the jury that the Government was required to prove an individual’s death was a reasonably foreseeable result of the charged drug distribution. The defendant was subsequently convicted. On appeal, the defendant argued that § 841(b)(1) required proof that the substance he distributed proximately caused the user’s death: that the death was a reasonably foreseeable result of his distribution. The defendant was a recovering addict and he was prescribed an opioid as part of his treatment.

---

57 Id. at 249 (citing Staples v. United States, 511 U.S. 600, 606 (1994)).
58 Alvardo, 816 F.3d at 250.
59 Id.
60 Id.
61 Id.
62 Id.
63 Id.
64 816 F.3d 607, 609 (10th Cir. 2016), cert. denied (2017).
65 Id. at 610.
66 Id. at 609.
67 Id.
68 Id. at 610.
agreement with his doctor to not “sell, share or give any [amount] to another person.” The defendant was informed that taking the drug with other drugs, including alcohol, could be dangerous. Still, the defendant gave one of his pills to a friend, who ultimately ingested the pill and died as a result. The Tenth Circuit reached its holding after declaring the case an issue of statutory interpretation, inquiring whether the “death results” enhancement requires proof of proximate cause. Like its sister circuits, the Tenth Circuit looked to the plain language of § 841(b)(1), specifically Congress’s choice of the words “death ... results from the use of such substance.” In addition to the plain language, the court focused on the context in which the language was used and surveyed other federal statutes, identifying “numerous instances in which Congress explicitly included proximate-cause language in statutory penalty enhancements.” The court agreed with the defendant that proximate cause “inject[s] a foreseeability element into a statute”; however, it found Congress intended to omit a proximate cause requirement for the “death results” enhancement. Therefore, the district court did not err in rejecting the defendant’s jury instruction.

69 Id.
70 Id.
71 Id.
72 Id. at 611.
73 Id. at 614. (emphasis in original). See United States v. Hatfield, 591 F.3d 945, 948 (7th Cir. 2010) (“Beyond that minimum causation ... it is not clear what ‘results from’ might mean.”).
74 Burkholder, 816 F.3d at 615. See also Camacho v. L.C. Ward, No. 15-CV 388-JDP, 2016 WL 10679358, at *3 (W.D. Wis. Sept. 12, 2016) (Petitioner argued that the district court violated Burrage by unconstitutionally applying a sentencing enhancement by “considering the victim’s death a ‘foreseeable’ event of the petitioner and his associates’ joint criminal activity.” However, the Western District of Wisconsin determined the “foreseeability” element was unrelated to Burrage, and the petitioner did not identify any other statutory interpretation case that would retroactively apply to the issue).
75 Burkholder, 816 F.3d at 613.
76 Id. at 621. Unlike the majority, the dissent was not convinced that the
B. Treating the enhancement as an element of the offense, rather than as a sentencing factor, heightens the burden of proof, benefitting the defense.

The higher the burden of proof, the more and stronger evidence the Government must present to meet its burden. In United States v. Booker, the Supreme Court held Federal Sentencing Guidelines are subject to jury trial requirements of the Sixth Amendment. For instance, in Booker, the defendant was convicted in the Western District of Wisconsin of possession with intent to distribute at least 40 grams of cocaine base. Under the Federal Sentencing Guidelines, the defendant faced a sentence of 210 to 262 months in prison. At the sentencing hearing, the judge found additional facts by a preponderance of the evidence, which resulted in a mandatory sentence between 360 months and life. The judge treated the additional facts as sentencing factors, ultimately imposing a thirty-year sentence. On appeal, the Seventh Circuit held the defendant’s sentence conflicted with Apprendi v. New Jersey, which held a 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.

“results from” language of 21 U.S.C. § 841(b)(1) “unambiguously reveals Congress’s intent to ‘forgo a proximate-cause requirement’ and impose strict liability on criminal defendants.” Burkholder, 816 F.3d at 621 (Briscoe, J., dissenting). The dissent expressed its concern that the majority’s holding was inconsistent with Supreme Court precedent. Id. See also United States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978) (holding “strict-liability criminal offenses are generally disfavored and . . . far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.”).

78 Id. at 227.
79 Id.
80 Id.
81 Id. at 221.
doubt. The “statutory maximum” identified in Apprendi referred to the maximum sentence a judge could impose based “solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”

The Seventh Circuit applies the Supreme Court’s analysis to each element of the “death results” enhancement, requiring a jury to find, beyond a reasonable doubt, that the defendant committed a drug offense and death or serious bodily injury resulted from the use of the drug. In United States v. Lawler, the defendant was convicted of distributing heroin and conspiracy to possess heroin with intent to distribute. The case went to the Supreme Court, which affirmed in part, vacated in part, and remanded in light of Alleyne v. United States. The defendant’s sentence was reduced, but he again appealed to the Seventh Circuit, challenging his sentence. The defendant was charged with thirty other defendants in a single-count indictment alleging a large-scale heroin distribution conspiracy, which contributed to five overdose deaths. The defendant was considered a “low-level member of the conspiracy.” While the indictment, to which the defendant pled guilty, did reference the overdoses, the Government did not prove that any particular defendant was responsible for any particular death. Relying on Alleyne, the Seventh Circuit held that an element of the “death results” enhancement should be treated as part of the offense, and proved beyond a reasonable doubt.

---

83 Booker, 543 U.S. at 221.
84 818 F.3d 281, 282 (7th Cir. 2016).
85 Id. (citing Alleyne v. United States, 570 U.S. 99, 103 (2013) (holding facts that increase a mandatory minimum sentence must be submitted to the jury and proven beyond a reasonable doubt)).
86 Lawler, 818 F.3d at 282.
87 Id.
88 Id.
89 Id. at 283.
90 Id. at 284.
“Beyond a reasonable doubt” is a significantly higher burden of proof than “preponderance of the evidence”; a higher burden favors the defense. 91 By treating the sentencing enhancement as an element of the offense, rather than as a sentencing factor, the defendant can rely on the Government’s failure to meet its burden as a defense to the imposition of a sentence. The higher burden therefore offsets the fact that the Government is not required to prove proximate cause, tipping the scales from being largely in the Government’s favor to a more balanced analysis.

**THE NEED FOR DISCRETIONARY DEPARTURE STEMS FROM SENTENCING DISPARITIES FOR CASES WITH SIMILAR FACT PATTERNS**

There are cases where the “death results” enhancement clearly should apply, whether or not death was foreseeable. However, there are also cases where a twenty-year sentence would be a miscarriage of justice. In addition, the fact that foreseeability is crucial to sentencing in drug conspiracy cases, yet not required for simple drug distribution, results in significant sentencing discrepancies between similar fact patterns.

A. *Cases where the “death results” enhancement should apply, whether or not death was foreseeable.*

Whether a sentence is a miscarriage of justice should be determined by separating unlawful conduct from otherwise innocent conduct. 92 In *Pr evatte v. Merlak*, the petitioner was convicted for detonating a pipe bomb that destroyed property and resulted in the death of an innocent bystander. 93 If the pipe bomb had not caused a death, the maximum sentence the petitioner could have received was

---

91 Id.
93 865 F.3d 894, 895 (2017).
ten years. However, because the judge found that the bomb did cause the victim’s death, the petitioner was sentenced to forty-four years’ imprisonment on that count. The petitioner filed a writ for habeas corpus relief claiming that under Burrage, the jury, and not the judge, should have made the finding that the bomb was the but-for cause of the victim’s death. The district court dismissed the petitioner’s claim for lack of jurisdiction and he appealed. The Seventh Circuit agreed that the petition should be dismissed, but also found the evidence as to causation was unrebutted at trial. Thus, the petitioner’s enhanced sentence was neither illegal nor a miscarriage of justice.

In United States v. McDuffy, the defendant, charged with bank robbery, moved for the district court to recognize a specific intent mens rea requirement after the court sought to impose a “death results” enhancement. The district court denied this request. The defendant was convicted and sentenced to life imprisonment for a bank robbery resulting in death. Similar to the “death results” enhancement for drug offenses, a defendant faces a mandatory minimum sentence if death results from a bank robbery. Here, the Ninth Circuit held the only mens rea requirement for the sentencing enhancement was the mens rea necessary to commit the underlying bank robbery. Therefore, in McDuffy’s case, the enhancement applied even if the death was an accident. Similar to § 841(b)(1)(C), this statutory provision did not contain an explicit mens rea

---

94 Id.
95 Id.
96 Id.
97 Id.
98 Id.
100 Id.
101 Id.
102 Id.
103 Id. at 800.
104 Id.
requirement. Still, the defendant urged the district court to read the requirement into the statute. The Ninth Circuit looked to *Staples v. United States* and determined courts must read a *mens rea* requirement into a statute only when it “is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” In addition, the Ninth Circuit reasoned, “it is unusual to impose criminal punishment for the consequences of purely accidental conduct. But it is not unusual to punish individuals for the unintended consequences of their unlawful acts.”

When the defendant is responsible for directly distributing drugs that result in death, there is little question that the “death results” enhancement does and should apply. Courts have been less confident in their decision to apply the “death results” enhancement to defendants higher up in the drug distribution chain because foreseeability of a specific user’s death appears less and less likely.

**B. Cases where a 20-year mandatory minimum is a miscarriage of justice.**

Sometimes, the defendant is not the cliché: not the typical “bad guy” you see in movies. Sometimes, the defendant and the drug-user had a positive, healthy relationship; they were friends or married. In the midst of grieving, these defendants are forced to face the reality that life as they know it is about to change—they face decades in prison. In *Krieger v. United States*, the defendant was convicted for

---

106 *McDuffy*, 890 F.3d at 801.
107 *Id.*
108 *Id.* at 799-800 (citing *Staples v. United States*, 511 U.S. 600, 606 (1994)).
109 *McDuffy*, 890 F.3d at 799-800.
110 *Id.*; *United States v. Easter*, 553 F.3d 519, 524 (7th Cir. 2009) (holding the Government, in a drug conspiracy case, did not have to prove the defendant intended to create a substantial risk of harm, warranting a higher sentence, when the defendant reached for his gun during flight).
112 *Id.*
distribution of fentanyl.\textsuperscript{113} The defendant received a twenty-year sentence because her friend died after chewing a fentanyl patch provided by the defendant.\textsuperscript{114} During sentencing, the defendant objected to the manner in which the Government sought the “death results” sentencing enhancement.\textsuperscript{115} The Government argued it was a sentencing factor, which must be proven by a preponderance of the evidence, rather than an element, which must be proven beyond a reasonable doubt.\textsuperscript{116} After finding by a preponderance of the evidence that death resulted from the fentanyl, the court concluded it was obligated to impose the mandatory minimum sentence.\textsuperscript{117} The district court expressed “discomfort with its lack of discretion and the fact that it appeared that [the defendant] was being sentenced for homicide despite having been convicted only of distributing fentanyl.”\textsuperscript{118} Notably, without the enhancement, the maximum penalty for distributing small amounts of fentanyl would have been twenty years, with no minimum penalty.\textsuperscript{119} The defendant’s presentence investigative report recommended a sentencing range of ten to sixteen months, which is significantly shorter than the twenty-year mandatory minimum imposed by the “death results” enhancement.\textsuperscript{120}

Between the time of the defendant’s sentencing and appeal, the Supreme Court issued several decisions that touched on the issues Krieger raised.\textsuperscript{121} In Alleyne, the Supreme Court held that facts that

\textsuperscript{113} 842 F.3d 490, 492 (7th Cir. 2016).
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 495.
\textsuperscript{119} Id.
\textsuperscript{120} Id. (“The average length of incarceration for defendants convicted under 21 U.S.C. § 841 for distribution of fentanyl where death has not resulted was seven months”). Id.
\textsuperscript{121} Id. at 496. In collateral review, the Seventh Circuit heard arguments as to whether the Government had sufficient evidence to prove, by a preponderance of the evidence, that “death resulted”. The district court was persuaded that the Government proved this element by a preponderance of the evidence, but believed
increase a mandatory minimum sentence must be submitted to the jury and proven beyond a reasonable doubt. Therefore, if the defendant in Krieger were to be sentenced post-Alleyne, she could not receive the “death results” enhancement unless the indictment charged, and the jury found beyond a reasonable doubt, that the fentanyl caused her friend’s death. Then, in Burrage, the Court held a defendant cannot receive the “death results” enhancement unless the drug the defendant distributed was a but-for cause of death.

In evaluating the Krieger appeal, the Seventh Circuit noted the “murkiness of causation”. It went on to apply the Supreme Court decisions in Alleyne and Burrage, determining the Government was required to show that the fentanyl patch, which Krieger provided, was the but-for cause of her friend’s death. Krieger’s sentence was thereafter vacated and remanded to the district court for resentencing. The district court judge expressed his discomfort with imposing a twenty year sentence, stating the sentence was “one of the most difficult decisions [he has] had to make, and it’s a decision that [he did] not agree with . . . in [his] opinion, 20 years [wa]s too harsh.”

Another area of concern is ineffective assistance of counsel. The imposition of a twenty-year mandatory minimum sentence is unjust if the defendant’s defense attorney does not effectively challenge its application or hold the Government to its burden. For example, in Gaylord v. United States, the defendant pled guilty to conspiracy to distribute and distribution of oxycodone. A drug user ingested pills the Government could not have proven “death resulted” beyond a reasonable doubt.

122 Krieger, 842 F.3d at 496.
123 Id.
124 Id. at 501.
125 Id.
126 Id.
127 Id. at 505.
128 Krieger, 628 F.3d at 862.
129 829 F.3d 500, 503 (7th Cir. 2016).
distributed by the defendant, as well as cocaine from another source, and died. The defendant was sentenced to twenty years based on the “death results” enhancement. The defendant later brought a 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence, arguing that as a result of ineffective assistance of counsel, the “death results” enhancement was inappropriately applied to his case. Specifically, the defense attorney did not contend that the Government failed to prove the oxycodone was the but-for cause of the drug user’s death. Approximately two years after the defendant was sentenced, the Supreme Court held that but-for causation must be shown for the “death results” enhancement to apply. In this defendant’s case, there was no evidence that the oxycodone the defendant distributed was the but-for cause of death. As a result, the Seventh Circuit vacated the district court’s judgment and remanded the case for an evidentiary hearing on the defendant’s claim of ineffective assistance of counsel.

Another area of concern is when a drug user intends to overdose because a drug user’s intentions are irrelevant in an analysis of the drug dealer’s liability. In Perrone v. United States, the defendant moved to alter or vacate his sentence for unlawful drug distribution, challenging the district court’s application of the “death results”

---

130 Id.
131 Id.
132 This motion is filed when the defendant believes his or her sentence was imposed in violation of the Constitution or laws of the United States or when the defendant believes his or her sentence is more than the maximum penalty authorized by law. 28 U.S.C. § 2255 (Westlaw through Pub. L. No. 115-231).
133 Gaylord, 829 F.3d at 504.
134 Id.
135 Id.
136 Id. at 507.
sentencing enhancement.\textsuperscript{138} In \textit{Perrone}, the victim died after the defendant injected her with 7.5 grams of cocaine, part of a suicide pact gone wrong.\textsuperscript{139} The defendant pled guilty to a single count of unlawful drug distribution and stipulated that his distribution caused the victim’s death.\textsuperscript{140} On appeal, he claimed that if he knew the enhancement required the Government to show his cocaine was the but-for cause of the user’s death, he would have sought to withdraw his plea.\textsuperscript{141} The day before the defendant was sentenced, the Seventh Circuit decided \textit{United States v. Hatfield}, which held the “death results” enhancement requires the Government prove the ingestion of the defendant’s drugs was a but-for cause of the death.\textsuperscript{142} The Seventh Circuit also looked to \textit{Davis v. United States}, which held that “when a subsequent statutory interpretation narrows the elements of a crime, revealing that the petitioner has been convicted and sentenced for ‘an act that the law does not make criminal,’ the petitioner has suffered ‘a complete miscarriage of justice,’ that justifies relief under § 2255.”\textsuperscript{143} The Seventh Circuit concluded the defendant asserted a cognizable claim under § 2255; however, the evidence before the court did not suggest the defendant’s sentence was increased by the application of an enhancement of which he was “actually innocent”.\textsuperscript{144} Therefore, he was not entitled to an evidentiary hearing on his claims.\textsuperscript{145}

Like the Seventh Circuit’s holding in \textit{Perrone}, the Ninth Circuit has ruled a defendant can be held responsible for a death that is an unforeseeable suicide. In \textit{United States v. Houston}, the Ninth Circuit held: (1) the government need not prove it was foreseeable that the
recipient of methadone might suffer death or serious bodily injury in order for the court to impose the “death results” enhancement; and (2) the district court’s error in instructing the jury that proximate cause was necessary to impose the sentencing enhancement was harmless. On appeal, the defendant argued she was being held responsible for a death that was an unforeseeable suicide. Essentially, the defendant advocated for proximate cause. The user was found dead in her home with numerous controlled substances in her blood and urine. The defendant’s name was on a prescription bottle found at the scene. The Ninth Circuit determined that there were some crimes where proving proximate cause was unnecessary because foreseeability was “implicit in the common understanding of the crime.” These crimes include, but are not limited to, involuntary manslaughter, conspiracy to assault, and drug conspiracy. However, this understanding did not apply to the charge at issue: drug distribution. Despite acknowledging the inconsistent decision to require foreseeability in some, but not all, drug cases, the Ninth Circuit agreed with its sister circuits that the plain language of the “death results” enhancement did not require proximate cause. It also placed weight on the Fourth Circuit’s decision in United States v. Patterson, which observed that: “The statute puts drug dealers and users on clear notice that their sentences will be enhanced if people die from using the drugs they distribute.” As to the defendant’s argument regarding the incorrect jury instruction, the Ninth Circuit determined it “inured to the benefit

---

146 406 F.3d 1121, 1123 (9th Cir. 2005).
147 Id. at 1122.
148 Id.
149 Id.
150 Id. at 1123.
151 Id.
152 Id.
153 Id.
154 Id. at 1124 (citing United States v. Patterson, 38 F.3d 139, 145-46 (4th Cir. 1994)).
of the defendant because it placed a higher burden of proof on the Government than [was] required by law.”

The application of the “death results” enhancement is not contingent upon the quantity of drugs distributed or manufactured, meaning the defendants receiving the enhancement are not necessarily large-scale distributors. This dilemma appeared in United States v. Rebmann, where the Sixth Circuit considered whether “the Government may convert a defendant’s plea of guilty to only the distribution of 1/1000th of an ounce of heroin into a homicide case by asserting that the defendant’s husband died from an overdose of heroin she sent him.” The Sixth Circuit concluded the district court was correct in rejecting the Government’s motion for the “death results” enhancement. Notably, its rationale was not based on causation, but on the burden of proof. The court held the Government was required to demonstrate beyond a reasonable doubt, rather than by a preponderance of the evidence, that the death of an individual, to whom the defendant distributed heroin, was a result of the distribution. The Sixth Circuit looked to the Supreme Court’s recent ruling in Apprendi, and determined the “death results” provisions were more than “a mere sentencing factor.” Because the district court applied the sentencing enhancement to the defendant in this case based solely on its finding by a preponderance of the evidence that death resulted from the crime, the Sixth Circuit vacated the sentence and remanded the case for a determination that the death was caused by the

155 Houston, 406 F.3d at 1125.
156 321 F.3d 540, 541 (6th Cir. 2003). On appeal, the Government argued that even if it was unsuccessful in bringing the mandatory-minimum through the “death results” enhancement, it could use the fact that death resulted as the basis for an “enhancement for relevant conduct”, pursuant to U.S.S.G. § D1.1, which can still lead to a twenty-year sentence. The court rejected the Government’s ability to circumvent its burden by this nature. Id. at 543.
157 Id. at 544.
158 Id. at 545.
159 Id. at 541.
160 Id.
distribution of heroin beyond a reasonable doubt. Thus, Rebmann represents an occasion where a defendant was first “sentence[d] for a homicide under the guise of a guilty plea to the distribution of a very small quantity of drugs.”

If one makes the argument that death is always a foreseeable result of illegal drug distribution, then “not only would the individual who produced the [drug] receive the twenty-year sentence, but every person connected with the conspiracy in any way—from the lowliest lookout on the corner to the boss—would all receive the same twenty-year penalty.” This result is overly broad. At the same time, strict liability makes sure that “a kingpin who finances and controls a drug distribution operation cannot escape liability for the ‘death resulting’ penalty simply because he never personally sold to costumers.”

Think of it this way: 21 U.S.C. § 841 makes it illegal to “distribute” but not “share” heroin. If two friends are physically together when they buy and use heroin for their personal use, there is arguably no distribution. If one of the two friends dies from an overdose, the other friend is not accountable for the death under the plain language of § 841. However, the Government could prosecute

---

161 Id.
162 Id. at 545; McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986) (holding it is doubtful that Congress would have intended such a steep sentencing enhancement to be contingent on judicial fact-finding); Harris v. United States, 536 U.S. 545, 554 (2002) (holding a fact that steeply alters the defendant’s punishment is “not usually associated with sentencing factors.”).
164 Walker, 721 F.3d at 839.
165 Katherine Daniels and Carol M. Bast, Difficulties in Investigating and Prosecuting Heroin Overdose Cases, 41 CRIM. LAW. LAW BULLETIN 5 (2005).
166 Id.
167 Id.
the person who sold them the drugs and then the court would be required to apply the “death results” enhancement.\footnote{168}{Id. There is also a risk that a sentencing enhancement constitutes a constructive amendment of the indictment when the court instructs the jury on the death results provision without such offense being set forth in the indictment. United States v. Whitfield, 695 F.3d 288, 309 (4th Cir. 2012).}

C. The Government may be required to prove foreseeability when a sentencing enhancement is applied in drug conspiracy cases. This application is inconsistent with simple drug distribution cases.

Foreseeability is heavily litigated in the context of drug conspiracy sentencing; however, courts have found these arguments have no place in their analysis for simple distribution cases. The Fourth Circuit, in United States v. Patterson, refused to analogize case law from drug conspiracy cases, in which the defendants contested application of the “death results” enhancement, to simple distribution cases because in simple distribution cases the court is only concerned with the individual defendant’s conduct.\footnote{169}{38 F.3d 139, 145 (4th Cir. 1994).} In Patterson, the defendants had hoped to apply the foreseeability requirement to their simple distribution case.\footnote{170}{Id.} The defendants pled guilty to unlawful distribution of morphine sulfate and meperidine, which resulted in an individual’s death, and to aiding and abetting that offense.\footnote{171}{Id. at 142.} The Fourth Circuit held the evidence supported the “death results” sentencing enhancement.\footnote{172}{Id. at 145.} A defendant brought controlled substances to a party and traded several pills in exchange for a tattoo.\footnote{173}{Id.} At some point in the night, the host of the party discussed her intentions to take drugs.\footnote{174}{Id.} The defendant subsequently left to obtain syringes from his home.\footnote{175}{Id. Upon his return, the host told the defendant that another person who had been with her the previous night had texts on her phone identifying him as a Vicodin distributor, and the host wanted to obtain more drugs to sell.\footnote{176}{Id.} The defendant, in turn, obtained the syringes from his home and subsequently sold the drugs.\footnote{177}{Id.} When the court instructed the jury on the death results provision, the defendant argued that the jury should have been instructed that the victim must have been a victim of the conspiracy, a claim that was not made in the indictment.}\footnote{178}{Id. at 146.}
guest was giving the host the defendant’s pills all night. Still, the defendant, host and others injected morphine, which the defendant melted down. When the friends woke up the next morning, they found the host dead. The facts of this case supported simple distribution, not a conspiracy, and established that the defendant’s actions directly contributed to the host’s death. Thus, the Fourth Circuit refused to analogize a foreseeability requirement in drug conspiracy cases to simple distribution cases, making the defendant’s case law irrelevant.

The Third Circuit’s analysis in United States v. Robinson parallels the Seventh Circuit’s reasoning in Harden. At the defendant’s sentencing hearing, the district court found that “based on their previous drug dealings, it was reasonably foreseeable to [the] defendant that [a co-conspirator] would deliver drugs to others.” The court also found: 1) the delivery of the heroin by the co-conspirator to drug users was in furtherance of a conspiracy in which the defendant was a member; and 2) the delivery was reasonably foreseeable to the defendant in connection with the criminal activity he agreed to undertake. The Third Circuit looked to the Fourth Circuit’s holding in United States v. Patterson, which relied on the plain language of § 841(b)(1) to determine the enhancement has no reasonable foreseeability of death requirement. The Third Circuit agreed that the court should give effect to Congress’s intent. Therefore, because Congress’ language was plain and unambiguous, the court applied the statute as written.

---

176 Id.
177 Id.
178 Id.
179 Id.
180 Id. at 145-6.
181 167 F.3d 824, 828 (3d Cir. 1999).
182 Id.
183 Id. at 830 (citing United States v. Patterson, 38 F.3d 139 (4th Cir. 1994)).
184 Robinson, 167 F.3d at 830.
185 Id. at 830-31.
reasonably foreseeable that the defendant’s co-conspirator would distribute the drugs to a third-party.\textsuperscript{186} This was not only reasonably foreseeable, but “it was the very purpose of the conspiracy.”\textsuperscript{187} Thus, the defendant was subject to the minimum twenty-year sentence.\textsuperscript{188}

The First Circuit, in \textit{United States v. Soler}, emphasized that the charge and the nature of the defendant’s conduct within a conspiracy shapes whether the Government has to prove death was reasonably foreseeable to a particular defendant.\textsuperscript{189} In \textit{Soler}, the defendant argued the “death results” enhancement was inapplicable because the key event leading to the death—the drug user snorting heroin under the misimpression that it was cocaine—was not reasonably foreseeable, and that the death itself could not be foreseeable.\textsuperscript{190} Like in \textit{Robinson}, the First Circuit placed weight on the fact that the statute did not speak to the defendant’s state of mind, which undercut the defendant’s argument that the court should impose a foreseeability test.\textsuperscript{191} While the defendant cited several cases that imposed a reasonable foreseeability requirement, those cases involved liability of one co-conspirator for the acts of others.\textsuperscript{192} In contrast, “When a defendant’s own conduct has caused the harm, those cases are inapposite” and strict liability applies.\textsuperscript{193} Therefore, because the defendant was not charged in a drug conspiracy, and in turn, did not argue that he was being sentenced based on a co-conspirator’s conduct, conspiracy case law supporting the foreseeability of death requirement was inapposite.

\textsuperscript{186} \textit{Id.} at 831.
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.} at 832. The defendant cited U.S.S.G. § 1B1.3(a)(3), which the court determined was consistent with its result. The section includes as relevant conduct a “jointly undertaken criminal activity . . . whether charged as a conspiracy, all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.” \textit{Id.}
\textsuperscript{189} 275 F.3d 146, 152 (1st Cir. 2002).
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Id.}
\textsuperscript{192} \textit{Id.}
\textsuperscript{193} \textit{Id.}
Even when courts do comment on whether a drug user’s death was reasonably foreseeable to a particular defendant, the question before the court is whether the distribution of drugs was foreseeable, not whether the death was foreseeable. In *United States v. Swiney*, two members of a heroin conspiracy appealed the application of the mandatory minimum sentence to their convictions.\(^{194}\) The Government filed a cross-appeal, arguing that all of the defendants should have received at least twenty years because death resulted from the use of heroin that was distributed by members of their conspiracy.\(^{195}\) The district court found no proof linking these defendants to the death, using a “critical proximate cause inquiry.”\(^{196}\) On appeal, the Government argued that all of the defendants should be held accountable for the death under the *Pinkerton* theory of vicarious liability.\(^{197}\) The Sixth Circuit rejected the Government’s theory of accountability “because the scope of conduct for which a defendant can be held accountable under the Sentencing Guidelines is narrower than the conduct encompassed by conspiracy law.”\(^{198}\) The court concluded, “In the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction” shall be considered during sentencing pursuant to U.S.S.G. § 1B1.3(a)(1)(B).\(^{199}\) Thus, before any of the defendants in *Swiney* could be subject to the sentence enhancement of 21 U.S.C. § 841(b)(1), the district court had to find that he or she was part of the distribution chain that led to a user’s death and that a conspiracy member’s distribution of heroin was “reasonably foreseeable” to other members

---

\(^{194}\) 203 F.3d 397, 399 (6th Cir. 2000).

\(^{195}\) *Id.*

\(^{196}\) *Id.*

\(^{197}\) *Id.* (citing *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946)).

\(^{198}\) *Swiney*, 203 F.3d at 399.

\(^{199}\) *Id.* at 402 (emphasis added).
of the conspiracy, as defined in U.S.S.G. § 1B1.3(a)(1)(B). The foreseeability requirement, while required for the sentencing enhancement, was still connected to the drug distribution rather than foreseeability of death.

The defendant in *United States v. McIntosh* argued the Eighth Circuit should apply the reasoning in *Swiney* to his case. The court refused, finding *Swiney* is only applicable to cases where a conspiracy defendant played no direct part in manufacturing the drug or in immediately distributing the drug that caused the death or serious bodily injury. Instead, the court quoted the Third Circuit’s holding in *United States v. Robinson*, which stated “the risk is inherent in distributing [a controlled substance] and thus, [Congress] provided that persons who distribute it do so at their peril.” *McIntosh* was therefore subject to the enhancement based on his direct role in manufacturing the drug ingested by the user.

In 2013, the Seventh Circuit heard as a matter of first impression arguments as to whether a district court has to make specific factual findings determining whether each defendant’s conduct was part of the distribution chain that caused a user’s death. *United States v. Walker* concerned the overdose deaths of five individuals who died after using heroin distributed by a large-scale drug trafficking organization.

---

200 *Id.* at 406.
201 *Id.*
202 236 F.3d 968, 974 (8th Cir. 2001).
203 *Id.* See *United States v. Smith*, 223 F.3d 554, 567 (7th Cir. 2000) (“The question whether the actions of others were reasonably foreseeable to the particular defendants . . . is a factual one. Those facts will exist in some hub-and-spokes style conspiracies, especially when the culpability of individuals near the hub is at stake. They are the people who can predict what their counterparts are doing, even if they have no direct knowledge”).
204 *McIntosh*, 236 F.3d at 972 (quoting *United States v. Robinson*, 167 F.3d 824, 831 (3rd Cir. 1999)).
205 *McIntosh*, 236 F.3d at 974.
207 *Id.*
The defendants in *Walker* pled guilty to possession with intent to distribute and conspiracy to distribute heroin.\(^{208}\) The district court interpreted § 841 as requiring a twenty-year mandatory minimum sentence for all members of the conspiracy because the drug organization as a whole caused the deaths of several customers, essentially concluding the defendants should be held strictly liable.\(^{209}\) On appeal, the defendants argued this was an error, and the Seventh Circuit agreed, holding “a defendant can only be subject to the enhancement if the distribution of heroin that ultimately led to a victim’s death was ‘reasonably foreseeable.’”\(^{210}\) There is unanimity across the circuits that a defendant involved in a drug conspiracy should only be sentenced for conduct foreseeable to him—the trouble is, defendants like Donald Harden believe the result of their conduct should also have to be foreseeable in order for the sentencing enhancement to apply.

*United States v. Harden was correctly decided*

In the morning of September 5, 2014, Fred Schnettler was found dead in his bedroom at his parents’ home.\(^{211}\) Upon arrival, officers observed a needle and spoon on the floor.\(^{212}\) Donald Harden was later charged with distributing the heroin that resulted in Schnettler’s death.\(^{213}\) At trial, the Government argued Schnettler purchased 0.1

\(^{208}\) Id.

\(^{209}\) Id. at 833.

\(^{210}\) Id. at 835; *United States v. Stoddard*, 892 F.3d 1203 (D.C. Cir. 2018) (in a matter of first impression, the D.C. Circuit held district courts must make an individualized finding as to quantity of drugs foreseeable to an individual defendant before applying a mandatory minimum sentence). *See also* *United States v. Haines*, 803 F.3d 713, 741 (5th Cir. 2015) (holding a defendant may be subject to a mandatory minimum sentence based on the quantity of drugs he distributed as well as the quantity distributed conspiracy-wide if the quantity was reasonably foreseeable).

\(^{211}\) *United States v. Harden*, 893 F.3d 434, 439 (7th Cir. 2018).

\(^{212}\) Id.

\(^{213}\) Id.
grams of heroin from Kyle Peterson the night before he died.\textsuperscript{214} Peterson testified that he purchased the heroin from Brandi Kniebes-Larsen, who in turn testified she received the heroin from Harden.\textsuperscript{215} The Government presented a timeline to establish that Harden’s heroin reached Schnettler between 7:30 p.m. and 8 p.m. on September 4, 2014.\textsuperscript{216} The Government argued Schnettler overdosed on the heroin shortly after 10 p.m.; the defense presented a conflicting timeline.\textsuperscript{217} Kniebes-Larsen, who testified as a cooperating witness, provided crucial testimony regarding whether Harden was aware of the quality, and danger of, the heroin he distributed.\textsuperscript{218} On direct-examination, Kniebes-Larsen testified that when she purchased the heroin, Harden told her she “needed to be very careful because apparently there were bodies on this heroin.”\textsuperscript{219}

Furthermore, at the end of the trial, the jury received two special verdict questions: (1) whether the United States has established, beyond a reasonable doubt, that Frederick Schnettler died as a result of the use of a controlled substance; and (2) whether the conspiracy involved 100 grams or more of a mixture and substance containing heroin.\textsuperscript{220} With respect to the first special verdict question, the jury instruction said:

\begin{itemize}
  \item \textsuperscript{214} \textit{Id.} at 440-41.
  \item \textsuperscript{215} \textit{Id.} at 442-43
  \item \textsuperscript{216} \textit{Id.}
  \item \textsuperscript{217} \textit{Id.}
  \item \textsuperscript{218} \textit{Id.}
  \item \textsuperscript{219} \textit{Id.} While the credibility of witnesses is important to every criminal prosecution, it is especially taxing in cases involving drug overdose deaths because the key witnesses tend to either be addicts themselves or have prior convictions. Katherine Daniels and Carol M. Bast, \textit{Difficulties in Investigating and Prosecuting Heroin Overdose Cases}, 41 CRIM. LAW. LAW BULLETIN 5 (2005). In \textit{Harden}, the court found that Kniebes-Larsen was credible and ultimately relied on her testimony to suggest Schnettler’s death was foreseeable to Harden, despite Kniebes-Larsen being a heroin addict. \textit{Harden}, 893 F.3d at 443-44.
  \item \textsuperscript{220} \textit{Id.}
\end{itemize}
The United States does not have the burden of establishing that the defendant intended that death resulted from the distribution or the use of the controlled substance. Nor does the United States have the burden of establishing that the defendant knew, or should have known, that death would result from the distribution of the controlled substance by the defendant.221

The jury convicted Harden of conspiracy to distribute 100 grams or more of heroin, resulting in death, pursuant to 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846.222 The court applied the “death results” enhancement, and Harden was sentenced to life in prison.223

The sentencing enhancement required that the Government prove beyond a reasonable doubt that: (1) Harden conspired to distribute 100 grams or more of heroin; and (2) death or serious bodily injury resulted from the use of the heroin.224 On appeal, Harden did not dispute that the Government presented sufficient evidence to prove the first element.225 However, Harden did contest the sufficiency of the evidence as to the second element.226 Harden’s sufficiency claim

221 Id. (emphasis added). At the end of Harden’s trial, the district court judge inquired into whether either party had any objections to the jury instructions or the verdict forms. Id. On the Government’s recommendation, the court adjusted the verdict form to tie the death of Mr. Schnettler to Harden. Id. The form read as follows: “Did the death of Frederick Schnettler result from the use of heroin provided by the Defendant, Donald S. Harden?” Id. Aside from this adjustment, neither party requested any additional instructions. Id. Thus, Harden waived any challenge regarding jury instructions, including his later argument that the jury should have been instructed regarding foreseeability. Id. at 450.

222 Id. at 445.

223 Id.

224 Id. The second element is derived from Burrage’s holding that the “death results” enhancement of § 841 is an element that must be submitted to the jury and proved beyond a reasonable doubt. Id.

225 Id. at 446.

226 Id.
hinged on his interpretation of the “death results” language. Harden argued the “death results” language requires proximate-cause. This would require the Government show Schnettler’s death was a reasonably foreseeable result of Harden’s drug dealing. Every other circuit that has addressed this issue has held the “death results” enhancement does not require proximate cause, and therefore the government need not prove foreseeability.

However, Harden argued that principles of co-conspirator liability compel a proximate cause requirement in this context. Harden relied on *Pinkerton v. United States*, where the Supreme Court held a defendant may only be found liable for a co-conspirator’s criminal act if it was reasonably foreseeable. The Seventh Circuit refused to apply this reasoning to Harden’s case because Harden did not claim he was sentenced based on a co-conspirator’s unforeseeable criminal act. Instead, he argued that the “consequence of his own criminal act—Schnettler’s death—was not reasonably foreseeable.” Thus, the issue presented did not implicate *Pinkerton’s* limitations.

---

227 *Id.* at 446-47.
228 *Id.* at 447.
229 *Id.*
230 *Id.* at 447-48; United States v. Burkholder, 816 F.3d 607, 618 (10th Cir. 2016); United States v. Webb, 655 F.3d 1238, 1250 (11th Cir. 2011); United States v. De La Cruz, 514 F.3d 121, 137 (1st Cir. 2008); United States v. Houston, 406 F.3d 1121, 1124-25 (9th Cir. 2005); United States v. Carbajal, 290 F.3d 277, 284 (5th Cir. 2002); United States v. McIntosh, 236 F.3d 968, 972 (8th Cir. 2001); United States v. Robinson, 167 F.3d 824, 832 (3d Cir. 1999); United States v. Patterson, 38 F.3d 139, 145 (4th Cir. 1994).
231 United States v. Harden, 893 F.3d 434, 449 (7th Cir. 2018). “Even the Government believed it bore that burden, alleging in the indictment that Schnettler’s death resulted from the use of heroin distributed by Harden and his co-conspirators, that was reasonably foreseeable to him.” Appellant’s Br. 28 (Oct. 19, 2017).
232 *Harden*, 893 F.3d at 449.
233 *Id.*
234 *Id.* (emphasis in original). On appeal, defense counsel argued that “Schnettler’s death, which allegedly resulted from his taking 0.1 grams of heroin that another user described as ‘junk’, occurred after the heroin passed four links down the
The Seventh Circuit also looked to the statutory language of the enhancement, which does not require proof of proximate cause.\textsuperscript{236} The sentencing enhancement is triggered if “death or serious bodily injury \textit{results from} the use of such substance.”\textsuperscript{237} The use of the phrase “results from” is noteworthy because “resulting in death and causing death are not equivalents.”\textsuperscript{238} The Seventh Circuit identified numerous instances where Congress explicitly included the proximate cause language in sentencing enhancements.\textsuperscript{239} The court found that if Congress wanted to require proximate cause it would have explicitly done so.\textsuperscript{240} The court also considered the policy implications of its decision.\textsuperscript{241} “Due to the extremely hazardous nature of drug distribution, a policy of strict liability when death occurs fits the statutory language and its evident purpose.”\textsuperscript{242} By treating the enhancement as a matter of strict liability, the courts are \textit{de facto} categorizing the death as foreseeable, regardless of whether a particular defendant foresaw or should have foreseen such a result.\textsuperscript{243}

\textbf{POST-\textit{HARDEN}: HOW THE SEVENTH CIRCUIT’S DECISION WILL MAKE A LASTING IMPACT}

Defendants appealing their sentences to the Seventh Circuit have begun citing \textit{Harden} hoping the court will impose a foreseeability causal chain from \textit{Harden} was not reasonably foreseeable.” Appellant’s Br. 23 (Oct. 19, 2017).

\textsuperscript{235} \textit{id.}
\textsuperscript{236} \textit{id. at 448.}
\textsuperscript{237} \textit{id.}
\textsuperscript{238} \textit{id.}
\textsuperscript{239} \textit{id.}
\textsuperscript{240} \textit{id.}
\textsuperscript{241} \textit{id.}
\textsuperscript{242} \textit{id.}
\textsuperscript{243} \textit{id.}
requirement for the resulting death. At the same time, district courts are relying on the Seventh Circuit’s reasoning in Harden to justify why the Government need not prove foreseeability. While statutory interpretation explains outright why Harden was correctly decided, the Supreme Court should consider hearing a case where the application of the twenty-year mandatory minimum sentence is not easily rationalized. The occasional discomfort of district court judges, when imposing the “death results” enhancement without the option of exercising discretion, will likely result in a Supreme Court opinion suggesting a need for legislative reform. This is the only way district court judges will be able to depart from this mandatory minimum sentence. Clarity across the board will encourage prosecutors to ask for the sentencing enhancement, which will have a positive impact on the opioid crisis.

For example, in United States v. Shanks, the defendant relied on Harden to argue the “death results” enhancement could not apply because the death was not reasonably foreseeable. In Shanks, the defendant was charged with a variety of drug related offenses, including conspiracy to distribute and possessing with intent to distribute controlled substances, as well as knowingly distributing controlled substances, resulting in the deaths of two individuals, and serious bodily harm of another, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). The defendant moved for an in camera inspection of psychological treatment records of one of the victims. He argued the records may contain exculpatory evidence, including evidence the victim died as a result of suicide, which he contended would release

---


245 Id.

246 The Federal Sentencing Guidelines are enacted and amended by Congress. U.S. Const. art. I, § 1. Congress has the constitutional power to make laws. Id. The Supreme Court may only interpret them. U.S. Const. art. III, § 1.

247 No. 18-CR-18, 2018 WL 3439639, at *1.

248 Id.

249 Id.
him of any liability for the user’s death. The Government argued that the “death results” enhancement is a strict liability offense. The district court found it was unclear how the user’s psychological records were material to his cause of death. Even if the user was suicidal at the time of his death, and the defendant could show the user intentionally took the drugs to commit suicide, that would not negate the but-for causation requirement. As to the defendant’s argument that the records would show the user’s death was unforeseeable, the court held “reasonable foreseeability is not required for the ‘death results’ enhancement. Stated differently, once the Government shows the ‘but for’ causal connection between the drug and the resulting death, criminal liability attaches without the need to prove foreseeability.” The court looked to the Seventh Circuit’s analysis in Harden and concluded “strict liability creates an incentive for a drug dealer to warn his customer about the strength of a particular batch of drugs being sold and to refuse to supply drugs to a particularly vulnerable people.”

The Seventh Circuit continues to recognize that strict liability has limits when applied to the “death results” enhancement. For example, on a conspiracy charge, “it is not sufficient for the Government to prove that a defendant participated in an overall conspiracy in which a drug user died.” The Government must prove a particular defendant responsible for a particular death. Essentially, the Government “need not prove that the death was reasonably foreseeable for the ‘death results’ enhancement to apply in a case where a defendant directly distributes drugs or uses intermediaries to distribute drugs that

250 Id. at *2.
251 Id.
252 Id.
253 Id.
254 Id. at *3.
255 Id.
256 Id. (quoting United States v. Hatfield, 591 F.3d 945, 951 (7th Cir. 2010)).
257 Shanks, 2018 WL 3439639, at *3.
258 Id.
result in death.\textsuperscript{259} However, in a conspiracy [case], the Government must prove that the defendant’s relevant conduct encompasses the drugs linked to the death.”\textsuperscript{260} In \textit{Shanks}, the defendant was not only charged as part of a conspiracy, but he also faced a substantive count of knowingly distributing drugs to the decedent.\textsuperscript{261} Therefore, the foreseeability requirement in the context of conspiracy need not apply, and the elements of the “death results” sentencing enhancement were proven on the basis of the substantive count.\textsuperscript{262}

Recently, the Third Circuit has gone so far as to allow a jury instruction on proximate cause in a case involving a “death resulted” sentencing enhancement. In \textit{United States v. Gonzalez}, the defendants were convicted of conspiracy to commit interstate stalking and cyberstalking, resulting in death.\textsuperscript{263} The defendants appealed to the Third Circuit, challenging the district court’s “death resulted” instruction, which was supplied to the jury to determine whether the defendants qualified for the sentencing enhancement.\textsuperscript{264} The Government argued that under the instructions there were two theories of liability: (1) the death resulted from the defendants’ personal actions if the defendant’s actions were the actual and proximate cause of the individual’s death; or (2) the defendants were responsible for the death under co-conspirator liability.\textsuperscript{265} The district court permitted the proximate cause theory, observing that its instruction held the jury to a higher standard than the law required.\textsuperscript{266} The court thought of it as a “necessary safeguard for the defendants’ rights”.\textsuperscript{267} Thus, on appeal, the Third Circuit determined that the district court did not err because the “actual cause” part of the instruction tracked but-for causation, and

\textsuperscript{259} \textit{Id.}
\textsuperscript{260} \textit{Id.}
\textsuperscript{261} \textit{Id.} at *1.
\textsuperscript{262} \textit{Id.} at *3.
\textsuperscript{263} 905 F.3d 165, 174 (3d Cir. 2018).
\textsuperscript{264} \textit{Id.} at 179.
\textsuperscript{265} \textit{Id.} at 188.
\textsuperscript{266} \textit{Id.} at 190.
\textsuperscript{267} \textit{Id.} at 188.
the “proximate cause” part of the instruction provided an even more stringent finding than required.268

A. The Supreme Court should consider whether a discretionary departure is appropriate for the “death results” enhancement.

The Federal Sentencing Guidelines permit downward departures “from the prescribed sentencing range in cases in which the judge finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”269 Still, departures are not available in every case, and “in fact are unavailable in most.”270 There is no case law to support the idea that 18 U.S.C. § 3553 permits a judge to sentence below the mandatory minimum in the “death results” enhancement. In fact, court opinions where judges express their desire for discretion suggest the contrary. The Federal Sentencing Guidelines are set forth by Congress.271 Because it is unlikely that members of Congress will advocate on behalf of this discretionary departure, since it could be framed as convicted criminals serving less time, the Supreme Court will have to lead the charge. If the Supreme Court were to take issue with the district court’s lack of discretion, it can critique potential due process violations all it wants, but it must ultimately call for the legislature to amend § 841.

Congress’ goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.272 Uniformity “does not consist simply of similar sentences for those convicted of violations of the same statute . . . It consists, more importantly, of similar relationships between sentences and real

268 Id. at 189.
271 Id. at 253.
272 Id.
conduct, relationships that Congress’ sentencing statutes helped to advance.”  

Granting a district court judge discretion in a downward departure will not inhibit narcotics prosecutions and may in fact improve the opioid crisis. Courts will still be bound by the mandatory minimum sentence if death results from drug distribution or manufacturing. Prosecutors will not have to prove the death was foreseeable. A defendant whose case teeters on the line between accidental and criminal conduct will have an avenue to request relief. A defendant whose case warrants a twenty-year sentence will get one. A defendant whose case does not can be directed to addiction programs or assist law enforcement in pursuing his or her supplier. There is “growing and wholly justified” concern about the “proliferation and variety of drug crimes”, but perhaps the best way to reduce these crimes is to not feel settled in the status quo.  

\^273 Id. at 253-54.  
\^274 Id. at 235.