No. 09-244

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MIKOLA BOWDEN

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

PETITION FOR A WRIT OF CERTIORARI

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
DAVID A. O'NEIL
Assistant to the Solicitor General
MICHAEL A. ROTKER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Congress has provided for enhanced statutory penalties for drug offenders with one or more prior felony drug convictions. See, *e.g.*, 21 U.S.C. 841(b)(1). Section 851(a) of Title 21 provides that no defendant may be sentenced to such enhanced penalties unless, before trial or the entry of a guilty plea, the government files and serves an information "stating in writing the previous convictions to be relied upon." 21 U.S.C. 851(a).

The question presented is whether the notice requirements of Section 851(a) are "jurisdictional," such that they must be noticed on appeal or collateral review regardless whether the defendant preserved the claim in the district court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and rules:

Statutes and rules—Continued: Page

In the Supreme Court of the United States

No. 09-244

UNITED STATES OF AMERICA, PETITIONER

v.

MIKOLA BOWDEN

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

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2009. A petition for rehearing en banc was denied on March 30, 2009. (App., *infra*, 4a-5a). On June 19, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 28, 2009. On July 20, 2009, Justice Thomas further

extended the time to August 27, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 851 of Title 21 of the United States Code is reproduced in the appendix to this petition. App., *infra*, 53a-55a.

STATEMENT

Following a guilty plea, respondent was convicted in the United States District Court for the Northern District of Florida of possessing with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1). App., *infra*, 27a-42a. Respondent was sentenced to a mandatory term of life imprisonment because he had two prior felony drug convictions. *Id.* at 49a. See 21 U.S.C. 841(b)(1)(A)(iii). Concluding that the statutory requirements for imposition of the recidivism enhancement are "jurisdictional," the court of appeals vacated respondent's sentence and remanded for resentencing without the enhancement. App., *infra*, 1a-3a.

1. On April 9, 2006, officers responded to a traffic accident near an intersection in Springfield, Florida. Eyewitnesses told the officers that one of the drivers involved in the accident, later identified as respondent, fled the scene on foot carrying a small bag. A nearby resident reported to police that a male meeting the description of the fleeing driver had forded a canal and had then run through his yard while soaking wet. Presentence Report para. 6 (PSR).

A short time later, police arrested respondent inside a mobile home approximately three blocks from the site of the accident. Officers found a wet knapsack next to a broken window outside the home. A search of the knap-

sack revealed three plastic bags containing 31.8 grams of cocaine base, commonly known as crack. PSR para. 8.

Following his arrest, respondent asked to speak with federal law enforcement agents. In that conversation, respondent stated that he had been selling crack in the area for the past several months and that he typically received from his supplier four to six "cookies" of crack weighing approximately 18 grams each. He further stated that, on the day of his arrest, he had received six cookies of crack (totaling approximately 108 grams) and that he had sold all of it earlier that day except for the 31.8 grams police found in his knapsack. PSR para. 10.

2. On May 17, 2006, a federal grand jury in the Northern District of Florida returned an indictment charging respondent with one count of possessing with intent to distribute 50 grams or more of cocaine base. The indictment cited, among other provisions, 21 U.S.C. 841(b)(1)(A)(iii), which sets forth the relevant penalties for that offense. Under Section 841(b)(1)(A), a defendant with no prior convictions is subject to a statutory range of between ten years and life in prison; a defendant with a single prior conviction for a felony drug offense is subject to a statutory range of 20 years to life; and a defendant with two or more prior convictions for a felony drug offense "shall be sentenced to a mandatory term of life imprisonment without release." 21 U.S.C. 841(b)(1)(A)(iii).

3. Respondent has an extensive adult criminal history and a number of prior convictions, including two felony convictions for possession of cocaine. The first of those two convictions occurred on October 2, 2001, and the second occurred on February 6, 2003. Both were entered in the Circuit Court for Bay County, Florida. PSR paras. 38, 39.

On July 5, 2006, the government filed an information pursuant to 21 U.S.C. 851(a)(1) seeking a mandatory life sentence based on respondent's prior felony drug convictions. App., *infra*, 10a-11a. Section 851(a)(1) provides in relevant part:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

The information was entitled "Notice of Enhancement" and contained three paragraphs. The first paragraph stated that the information served to "notif[y] the Court and the defendant * * * that the defendant is subject to the increased penalty provisions of Title 21, United States Code, Section 841(b)(1)(B), because of a previous conviction." The second paragraph identified respondent's prior convictions, stating that he "was convicted in the Circuit Court in Bay County, Florida, of the offense of Possession of a Controlled Substance (Cocaine) on two separate occasions in Case Number 01-1339 on January 21, 2003 and in Case Number 02-3149 on February 6, 2003." The third paragraph concluded by stating that "notice is given of the intention of the United States to invoke the increased penalty provisions under Title 21, United States Code, Section 841(b)(1)(B), against this defendant because of his prior felony convictions as outlined above." App. *infra*, 10a-11a.

The information contained two defects. First, it misstated the date of the first of respondent's two prior

drug convictions. The information listed that date as January 21, 2003, which was in fact the date on which respondent's home confinement was revoked for the offense. PSR para. 38. The correct date of the conviction is October 2, 2001. *Ibid.* Second, in the first and third paragraphs, the information incorrectly cited the enhanced penalty provisions in 21 U.S.C. 841(b)(1)(B), rather than 21 U.S.C. 841(b)(1)(A).

4. Respondent agreed to plead guilty to the single count in the indictment. App., *infra*, 17a-24a. On July 13, 2006, in anticipation of respondent's guilty plea, the government filed a pleading entitled "Statement of Facts and Elements of the Offenses," setting forth the factual basis for respondent's guilty plea, the elements of the offense, and the applicable penalties. *Id.* at 12a-16a. The "Penalties" section of that document correctly stated: "Enhanced possible penalties, based upon 2 prior felony cocaine convictions, are minimum mandatory life imprisonment, fine of up to $8 million; 10 years of Supervised Release, and a $100 [special monetary assessment]." *Id.* at 15a.

The same day, respondent signed a plea agreement and entered a guilty plea in open court. App., *infra*, 17a-25a. The written plea agreement documented that respondent had agreed to plead guilty to one count of possessing with intent to distribute 50 grams or more of crack "in violation of Title 21, United States Code, Section 841(b)(1)(A)(iii)." *Id.* at 18a. The plea agreement also specified that "[i]f the Court determines that [respondent] has two prior qualifying felony drug convictions under 21 U.S.C. §§ 841 and 851, * * * he faces a minimum mandatory term of Life imprisonment," among other penalties. *Ibid.*

During the plea hearing, the district court reviewed the penalties applicable to respondent's offense. The following exchange took place:

> THE COURT: All right, Mr. Bowden, I need to now go over with you the maximum sentence that could be imposed. And you understand that if the government establishes that you have two prior convictions for felony drug offense, that you are looking at an enhanced sentence.
>
> [RESPONDENT]: Yes, sir.
>
> THE COURT: If the government can establish enhancement for two prior convictions of felony drug offense, the maximum penalty would be a mandatory term of life imprisonment without release, and a term of supervised release of at least ten years, a fine in the amount of $8 million, a special monetary assessment of $100, and forfeiture of all forfeitable assets to the United States. Do you understand that that is the maximum sentence that could be imposed.
>
> [RESPONDENT]: Yes, sir.

App., *infra*, 34a-35a. Following additional discussion, the district court accepted respondent's guilty plea, finding it freely and voluntarily made with the advice of

competent counsel, and adjudicated him guilty. *Id.* at 39a-40a. Before the proceeding concluded, however, the court confirmed once more that respondent was aware of, and had discussed with his lawyer, the fact "that the government has filed a notice of enhancement in this case because it contends that you have two prior felony drug convictions." *Id.* at 40a.

5. The probation office prepared a presentence investigation report identifying respondent's prior convictions, including the two drug felony convictions the government had cited in the information it filed pursuant to Section 851(a). PSR para. 43. Paragraph 38 of the PSR described the first of those two convictions, stating that respondent had "[p]leaded nolo contendere, adjudicated guilty as to all counts" on "10/2/01." PSR para. 38. That paragraph also stated that, on "1/21/03," respondent had his "community control" (*i.e.*, house arrest) revoked and was sentenced to an additional four years of probation.

The PSR recounted that "[o]n July 5, 2006, the government filed a Notice of Enhancement advising the government's intent to seek enhanced penalties for [respondent], detailing his convictions for two prior felony drug offenses." PSR para. 3. Describing that notice, the PSR stated that "[t]he enhancement exposes [respondent] to a minimum mandatory term of Life imprisonment, ten (10) years supervised release, an $8,000,000 fine, and a $100 special monetary assessment." *Ibid.* The PSR then set out the applicable penalties to "reflect the enhancement information filed by the government," noting that "[t]he minimum term of imprisonment for the offense of conviction is Life Imprisonment, pursuant to 21 U.S.C. § 841(b)(1)(A)." PSR para. 67. Respondent did not file any objections to the PSR.

6. At the outset of respondent's sentencing proceeding on October 11, 2006, the court confirmed that respondent's counsel had no objections to the PSR. App., *infra*, 45a-46a. The court then asked respondent if he had "any questions about that report or any objections which [he] would like to state," to which respondent replied "[n]o, sir." *Id.* at 46a. After hearing from counsel, *id.* at 46a-47a, the court advised respondent of the "need to have a conversation now about the notice of enhancement," *id.* at 47a. Respondent reiterated that he was "aware" the enhancement had been filed. *Ibid.* The court then explained that it would ask respondent either to affirm or deny the fact of his prior convictions. *Ibid.*; see 21 U.S.C. 851(b) (stating that, in cases where an information is filed, "the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence"). Respondent stated that he understood, App., *infra*, 47a, at which point the following exchange took place:

> THE COURT: Now the notice of enhancement states that you were convicted in the Circuit Court for Bay County on two separate occasions of the offense of possession of a controlled substance, cocaine, in case No. 01-1339, on January 21, 2003, and in case 02-3149 on February 6th, 2003. Now, do you deny or do you af-

firm that you were in fact convicted on those two occasions as stated?

[RESPONDENT]: Sir, you say February 3, 2006?

THE COURT: February 6th, 2003.

[RESPONDENT]: I was in jail then.

[COUNSEL]: Your Honor, if I could have a minute, please.

Id. at 48a. Following a conversation off the record between respondent and his counsel, the prosecutor suggested that

> what may be confusing is [respondent] got a—in the original case, reflected in the presentence report at paragraph 38, he originally got placed on community control and then he violated that. And then January 21st of '03 his community control was revoked and he got 40 months of Department of Corrections. And then the following month, February 6th of '03, is when he pled nolo to the other possession of cocaine charge, but those were separate offenses, separate dates, and that may be what confused him.

Ibid.

The court asked respondent whether he was "satisfied" and that he "understand[s] now what we're talking about," to which respondent replied "[y]es, sir." App., *infra*, 48a-49a. The court then asked respondent "[d]o you admit or do you deny that you were convicted as stated on those two prior occasions?" *Id.* at 49a. Respondent answered, "I admit." *Ibid.*

The district court sentenced respondent to life imprisonment. App., *infra*, 49a. After the court pro-

nounced that sentence, it asked counsel if there were "any objections to [its] ultimate findings of fact or conclusions of law relating to this sentence." *Id.* at 51a. Respondent's counsel stated that he had "[n]o objections" but requested that the court recommend to the Bureau of Prisons that respondent be placed in a long-term substance abuse program. *Ibid.* Counsel again reiterated that he had no objections to the manner in which the court imposed sentence, *id.* at 52a, and the hearing concluded, *ibid.*

7. On appeal, respondent argued for the first time that, as a result of the date and citation errors in the Section 851(a) information, "the district court did not have jurisdiction to impose an enhanced sentence of mandatory life imprisonment." Resp. C.A. Br. 11.[1]

The court of appeals agreed, vacating respondent's sentence and remanding for resentencing without the enhancement from his prior convictions. App., *infra*, 1a-3a. The court determined that the information filed by the government "did not strictly comply" with the requirements of Section 851(a). *Id.* at 1a. The court then held, in accord with circuit precedent, that as a result of the government's non-compliance with Section 851(a) "the district court lacked jurisdiction to enhance [respondent's] sentence." *Id.* at 3a.; see *Harris* v. *United*

[1] Respondent did not file a notice of appeal from the judgment of conviction within the time allotted. See Fed. R. App. P. 4(b)(1)(A). Several months later, respondent filed a notice of appeal, which the court of appeals dismissed as untimely. Respondent then filed a motion under 28 U.S.C. 2255, claiming in part that he had instructed his trial counsel to file a timely notice of appeal and that counsel's failure to do so was constitutionally ineffective. The district court granted that motion and entered a new judgment, from which respondent timely appealed. Gov't C.A. Br. 2-3.

States, 149 F.3d 1304 (11th Cir. 1998) (holding that a district court lacks jurisdiction to impose an enhanced sentence when the government fails to comply with Section 851).

The government filed a petition for rehearing en banc, arguing that, in light of recent decisions of this Court, the court of appeals should revisit and overrule its precedents treating the requirements of Section 851(a) as "jurisdictional." The Eleventh Circuit denied that petition. App., *infra*, 4a-5a.

REASONS FOR GRANTING THE PETITION

In the decision below, the court of appeals applied its holding in *United States* v. *Harris*, 149 F.3d 1304 (1998), that the government's failure to file a notice in full compliance with the requirements of 21 U.S.C. 851(a) divests a district court of "jurisdiction" to impose an enhanced sentence on a recidivist drug offender. That decision conflicts with the decisions of all eight other courts of appeals to address the issue. Those courts have held that Section 851(a)'s requirements are not "jurisdictional" and thus, like other procedural rights, may be forfeited or waived if not timely asserted by the defendant. The decision below also conflicts with decisions of this Court—most notably *United States* v. *Cotton*, 535 U.S. 625 (2002)—that have clarified and limited the meaning of the term "jurisdictional." Because the question presented is an important and recurring one in federal prosecutions and is squarely presented in this case, this Court's review is warranted.

A. The Decision Of The Court Of Appeals Is Incorrect

The court of appeals erred in adhering to its view that the requirements of Section 851(a) are "jurisdictional" and therefore must be noticed on appeal or col-

lateral review regardless whether they were timely raised in the district court. Because Section 851(a) does not affect a court's power to entertain the case, its notice requirements are properly characterized as claim-processing rules that the defendant may forfeit by failing to make a contemporaneous objection in the district court.

1. This Court has recently clarified that the term "jurisdictional" carries a limited and specific meaning. In *United States* v. *Cotton*, *supra*, the Court held that defects in an indictment, including the omission of an element of the offense, do not constitute "jurisdictional" error. The Court overruled its previous decision in *Ex parte Bain*, 121 U.S. 1 (1887), to the extent that it held otherwise. *Cotton*, 535 U.S. at 630. The Court reasoned that *Bain* rested on an "elastic concept of jurisdiction [that] is not what the term 'jurisdiction' means today." *Ibid.* The modern, correct understanding of that term, the Court explained, refers only to a federal court's "statutory or constitutional *power* to adjudicate the case.'" *Ibid.* (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). The court observed that, in the criminal context, a federal court acquires such power by statutory authorization over offenses against the United States, see 18 U.S.C. 3231, and the court does not lose "jurisdiction" because of an error in the institution of the proceeding. *Cotton*, 535 U.S. at 631 (citing *United States* v. *Williams*, 341 U.S. 58, 66 (1951)).

Later decisions have reaffirmed that the term "jurisdiction" refers to a court's power to hear a dispute. In *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), the Court explained that, for many years, federal courts "ha[d] been less than meticulous" in their use of the word, "more than occasionally us[ing] the term 'jurisdictional' to de-

scribe emphatic time prescriptions in rules of court." *Id.* at 454; see *ibid.* ("'Jurisdiction,' the Court has aptly observed, 'is a word of many, too many, meanings.'") (quoting *Steel Co.*, 523 U.S. at 90). The Court drew a distinction between "claim-processing rules" that govern the conduct of litigation and true "jurisdictional" rules that "delineate what cases * * * courts are competent to adjudicate" in the first instance. *Ibid.*

The Court emphasized that the imprecise use of the term "jurisdictional" overlooked a central feature of that concept. *Kontrick*, 540 U.S. at 456. "[A] court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Ibid.* Because of that "critical difference," *ibid.*, the Court observed that, in the future, "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Id.* at 455.

In *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam), this Court applied *Kontrick* to summarily reverse a court of appeals decision treating as "jurisdictional" the time limits in Federal Rule of Criminal Procedure 33 for seeking a new trial. The Court again noted the "less than meticulous uses of the term 'jurisdictional' in [its] earlier cases," observed that "recent decisions have attempted to brush away [the] confusion introduced" by those rulings, and reemphasized *Kontrick*'s admonition that courts should reserve the "jurisdictional" label for limitations on the "classes of cases"

or "persons" within the court's power to adjudicate. *Id.* at 16. Applying those precepts, the Court reasoned that, because Rule 33 is a "claim-processing" rule rather than a "jurisdictional" one, the government could not oppose a new trial motion on untimeliness grounds where it had failed to assert that rule at the appropriate time. *Id.* at 19.

2. Under *Cotton*, *Kontrick*, and *Eberhart*, the notice requirements in Section 851(a) are not "jurisdictional" requirements as that term is properly understood. The jurisdiction of district courts to hear criminal cases rests on 18 U.S.C. 3231. Once a district court has acquired such jurisdiction, neither that statute nor any other purports to divest it of jurisdiction simply because of a statutory or rule violation in adjudicating the case. Just as a court does not lose power to adjudicate a case because of an error in the indictment initiating the proceeding, see *Cotton,* so too the court does not lose power to impose a sentence because of a defect in an information filed under Section 851(a). As every court of appeals other than the Eleventh Circuit to address the issue has concluded, "[Section] 851 simply 'has nothing to do with [a court's] subject-matter jurisdiction' over a criminal case or a court's general power to impose a sentence." *Sapia* v. *United States*, 433 F.3d 212, 217 (2d Cir. 2005) (quoting *United States* v. *Ceballos*, 302 F.3d 679, 692 (7th Cir. 2002), cert. denied, 537 U.S. 1136, 537 U.S. 1137, 538 U.S. 926, and 538 U.S. 939 (2003)); see pp. 16-18, *infra*.

The purposes of Section 851 underscore that it is not a jurisdictional requirement. Section 851 is principally intended to provide a defendant with notice and an opportunity to be heard respecting a recidivist enhancement, in part so that he can challenge any prior convic-

tion on which it is based. *United States* v. *Pritchett*, 496 F.3d 537, 548 (6th Cir. 2007); *United States* v. *Jackson*, 121 F.3d 316, 319 (7th Cir. 1997). Section 851 "allows the defendant ample time to determine whether he should enter a plea or go to trial, and to plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." *Prou* v. *United States*, 199 F.3d 37, 44 (1st Cir. 1999) (quoting *United States* v. *Johnson*, 944 F.2d 396, 407 (8th Cir.), cert. denied, 502 U.S. 1008 (1991), 502 U.S. 1078, and 504 U.S. 977 (1992)). Section 851 thus protects a defendant's individual rights; it does not serve to limit the class of cases over which a court has cognizance.

Because Section 851 is not jurisdictional, its requirements are subject to the ordinary rule that a defendant can waive or forfeit the protections of a statutory or regulatory provision by failing to assert them at the appropriate time. See, *e.g.*, *New York* v. *Hill*, 528 U.S. 110 (2000) (Interstate Agreement on Detainers statute); *United States* v. *Mezzanatto*, 513 U.S. 196 (1995) (plea bargaining statements under Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410). See *Prou*, 199 F.3d at 47 ("Because [S]ection 851(a)(1)'s temporal requirements exist for the defendant's benefit, it makes perfect sense to give the defendant the power to waive (and the obligation not to forfeit) strict compliance with them."); see also *Cotton*, 535 U.S. at 631 ("Freed from the view that indictment omissions deprive a court of jurisdiction, we proceed to apply the plain-error test of Federal Rule of Criminal Procedure 52(b) to respondents' forfeited claim.").

B. The Court Of Appeals' Decision Solidifies An Existing Conflict Among The Circuits

The decision below entrenches a conflict between the Eleventh Circuit and eight other courts of appeals on the question presented. The Eleventh Circuit's refusal to reconsider its erroneous position in light of the overwhelming weight of contrary authority warrants this Court's intervention.

1. Before this Court's decision in *Cotton*, the law in the courts of appeals was unsettled on the consequences of the government's non-compliance with Section 851(a). At least three courts of appeals—the Sixth, Seventh, and Tenth Circuits—agreed with the Eleventh Circuit's view in *Harris* that "a district court lacks jurisdiction to enhance a sentence unless the government strictly complies with the procedural requirements of [Section] 851." *Harris*, 149 F.3d at 1306; see *United States* v. *Hill*, 142 F.3d 305, 312 (6th Cir.) ("Section 851(a)(1) imposes a jurisdictional requirement granting the district court jurisdiction to enhance a defendant's sentence."), cert. denied, 525 U.S. 898 (1998); *United States* v. *Belanger*, 970 F.2d 416, 418 (7th Cir. 1992) ("Failure to file the notice prior to trial deprives the district court of jurisdiction to impose an enhanced sentence."); *United States* v. *Wright*, 932 F.2d 868, 882 (10th Cir.) ("Failure to file the information prior to trial deprives the district court of jurisdiction to impose an enhanced sentence."), cert. denied, 502 U.S. 962, and 502 U.S. 972 (1991).

The First Circuit, by contrast, squarely rejected the Eleventh Circuit's position after careful analysis. Acknowledging the confusion in the case law over the proper characterization of Section 851(a), the First Circuit held in *Prou* v. *United States*, *supra*, that the "jurisdictional" characterization was incorrect. 199 F.3d at

41-45. The court of appeals reasoned that, regardless of whether the government complies with Section 851(a), "a federal district court plainly possesses subject-matter jurisdiction over drug cases" under 18 U.S.C. 3231, including the power to impose penalties, and "[o]nce subject-matter jurisdiction has properly attached, courts may exceed their authority or otherwise err without loss of jurisdiction." *Prou*, 199 F.3d at 45.

2. Following the decision in *Cotton*, every court of appeals to consider the issue has aligned itself with the First Circuit and disagreed with the Eleventh. Based on this Court's recent precedents, the Sixth, Seventh, and Tenth Circuits have "expressly overrule[d]" their previous decisions adopting the Eleventh Circuit's view. *United States* v. *Flowers*, 464 F.3d 1127, 1130 (10th Cir. 2006) (holding that, because Section 851 is not jurisdictional, it can be waived or forfeited by the defendant); see *Ceballos*, 302 F.3d at 692 ("[T]oday we hold that [Section] 851(a)'s procedural requirements are not jurisdictional, and our prior cases holding otherwise are expressly overruled on that issue"; reasoning that "[Section] 851 has nothing to do with subject-matter jurisdiction, as the Supreme Court has defined that term in *Cotton*."); *Pritchett*, 496 F.3d at 544-547 (same). The Second, Fourth, Fifth, and Eighth Circuits also agree that Section 851 does not concern the district court's "jurisdiction" to impose an enhanced sentence. See *United States* v. *Beasley*, 495 F.3d 142, 147-148 (4th Cir. 2007) (concluding that a forfeited claim of error under Section 851 is reviewable on appeal only for plain error because the requirements of that statute are not "jurisdictional"), cert. denied, 128 S. Ct. 1471 (2008); *Sapia*, 433 F.3d at 216-217 (holding that, because Section 851 is not jurisdictional, it could be procedurally defaulted); *Uni-*

ted States v. *Dodson*, 288 F.3d 153, 159-160 & n.9 (5th Cir.) (reviewing unpreserved Section 851 claim for plain error after concluding that the statute is not jurisdictional), cert. denied, 537 U.S. 888 (2002); *United States* v. *Mooring*, 287 F.3d 725, 726-728 (8th Cir.) (applying rules of procedural default to Section 851 claim raised for the first time on collateral review), cert. denied, 537 U.S. 864 (2002); see also *United States* v. *Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996) (rejecting the "jurisdictional" label and concluding that the filing of an information is "simply a necessary condition" to imposition of enhanced sentence).[2]

Accordingly, the Eleventh Circuit now stands alone among the courts of appeals in adhering to its pre-*Cotton* view that compliance with Section 851(a) is a "jurisdictional" requirement. See, *e.g.*, *Pritchett*, 496 F.3d at 546 ("The only circuit holding that the [S]ection 851(a)(1) requirements are jurisdictional is the Eleventh.") (citing *Harris*, 149 F.3d at 1306).

3. The Eleventh Circuit has repeatedly declined invitations to reconsider its position. The government filed a petition for rehearing en banc in *Harris*, asking the full court to review the issue at that time, but the petition was denied. The government filed another petition for rehearing en banc in this case, which was also denied.

The government has opposed petitions for a writ of certiorari in several cases presenting this issue on the

---

[2] Neither the Ninth Circuit nor the Third Circuit has squarely addressed the proper characterization of Section 851(a). The latter court has noted, however, that "a majority of courts to have considered the issue have found that the requirements of § 851 are not 'jurisdictional.'" *United States* v. *Bryant*, 187 Fed. Appx. 134 (3d Cir. 2006), cert. denied, 549 U.S. 1293 (2007).

ground that, after *Cotton,* the courts of appeals could be expected to resolve the conflict on their own. See Br. in Opp., *Severino* v. *United States*, 540 U.S. 837 (2003) (No. 02-10095); Br. in Opp., *Quintanilla* v. *United States*, 538 U.S. 926 (2003) (No. 02-7455). Most recently, in opposing certiorari in *Beasley* v. *United States*, 128 S. Ct. 1471 (2008), the government noted that although the Eleventh Circuit had not yet joined the position adopted by its sister circuits, that court "should be given an opportunity to reconsider its ruling in *Harris* before this Court grants review on this issue." Br. in Opp. at 13-14, *Beasley*, *supra* (No. 07-548).

The government's petition for rehearing en banc in this case gave the Eleventh Circuit that opportunity. By denying en banc review, the Eleventh Circuit has made clear that it is unwilling to revisit its interpretation of Section 851(a). This Court's intervention is therefore now necessary.

C. The Question Presented Is Important And Squarely Implicated In This Case

1. The question presented is important to the administration of the federal criminal justice system. Whether the requirements of Section 851(a) are deemed "jurisdictional" determines the applicable legal framework in the situation exemplified by this case: A defendant fails in the district court to allege noncompliance with Section 851(a), is sentenced to an enhanced term, then attempts for the first time on appeal or collateral review to invoke the requirements of that provision as a basis for invalidating the enhanced sentence.

a. Under the majority position, which treats the requirements of Section 851(a) like other procedural rules subject to forfeiture and procedural default, a defen-

dant's failure to preserve a challenge to the information significantly limits his ability later to attack his sentence. Review on appeal would be for plain error under Federal Rule of Criminal Procedure 52(b), and the defendant could therefore prevail only if, among other things, the defect in the information affected his "substantial rights." *United States* v. *Olano*, 507 U.S. 725 (1993). Similarly, on collateral review, a defendant pressing an unpreserved claim of error under Section 851(a) would be required to demonstrate "both 'cause' for not raising the claim at trial, and 'prejudice' from not having done so." *Sanchez- Llamas* v. *Oregon*, 548 U.S. 331, 351 (2006) (quoting *Massaro* v. *United States*, 538 U.S. 500, 504 (2003)); *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982).

Under the Eleventh Circuit's rule, by contrast, settled principles of forfeiture, waiver, and procedural default would not apply. Because subject-matter jurisdiction "involves a court's power to hear a case," "defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." *Cotton*, 535 U.S. at 630; see *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Accordingly, in the Eleventh Circuit, a defendant can obtain automatic invalidation of an enhanced sentence based on a technical defect in the information raised for the first time on appeal or habeas, without justifying his failure to raise the issue in the district court or showing that the error prejudiced him in any way. Indeed, that is precisely what happened in this case. See *Harris*, 149 F.3d at 1308-1309 (granting relief under 28 U.S.C. 2255 based on previously unasserted claim of non-compliance with Section 851(a); rea-

soning that jurisdictional errors cannot be waived, forfeited, or defaulted on collateral review).

b. That result conflicts with basic principles of fairness and efficiency in judicial practice. The plain-error standard on direct review and rules of procedural default on collateral review serve important functions: They further the public interest in the finality of criminal judgments, see *Frady*, 456 U.S. at 166, "induce the timely raising of claims and objections," provide the district court with "the opportunity to consider and resolve" disputes it is in the best position to adjudicate, permit the court and the parties to "correct or avoid the mistake so that it cannot possibly affect the ultimate outcome," and prevent a litigant from "'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor," *Puckett* v. *United States*, 129 S. Ct. 1423, 1428 (2009); see *Reed* v. *Ross*, 468 U.S. 1, 10 (1984) (procedural default rules "channel[], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently").

The Eleventh Circuit's characterization of Section 851(a)'s requirements as "jurisdictional" frustrates each of those objectives. Indeed, the concerns animating contemporaneous objection rules are particularly acute in this context. The government can readily correct errors in an information if those defects are brought to light at the appropriate time, because Congress specifically provided in Section 851(a) that "[c]lerical mistakes in the information may be amended at any time prior to the pronouncement of sentence." 21 U.S.C. 851(a)(1). The government has no recourse, however, if an appellate or habeas court invalidates on purportedly "jurisdictional"

grounds an enhanced sentence imposed years earlier. Under the decision below, a defendant therefore may permanently escape enhanced punishment under 21 U.S.C. 841(b)(1) simply by remaining silent at sentencing and raising a defect in an information for the first time on appeal or in a habeas petition.

The Eleventh Circuit's position also runs contrary to congressional intent. By authorizing higher statutory penalties for recidivist offenders, Congress provided the federal government with an important tool in combating drug trafficking. Congress conditioned the imposition of those increased sentences upon notice by the government pursuant to the procedures set forth in Section 851(a). But there is no reason to believe that Congress intended to vitiate that scheme when, because of prosecutorial oversight, an information filed under Section 851(a) contains easily corrected errors that cause the defendant no prejudice and to which he did not object. Indeed, the provision in Section 851(a)(1) permitting amendment of "clerical mistakes in the information * * * at any time" prior to sentencing (and thus after adjudication of guilt) strongly suggests that Congress did not intend that result. 21 U.S.C. 851(a)(1).

2. This case squarely presents the conflict among the courts of appeals on the question presented. Although respondent raised his claim under Section 851(a) for the first time on appeal, the Eleventh Circuit did not apply plain-error review, but instead invalidated respondent's enhanced sentence on the ground that "the district court lacked jurisdiction" to impose it. App., *infra*, 1a. The outcome and analysis would have been different in the courts of appeals that do not treat the requirements of Section 851(a) as "jurisdictional." Those courts would have applied plain-error review, requiring respon-

dent to show, *inter alia*, that the alleged defects in the information "affec[ted his] substantial rights" by causing him prejudice and also "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732.

Respondent could not satisfy either of those showings. He cannot establish prejudice because he was correctly and repeatedly advised—by the government and the court, orally and in writing, before and after his guilty plea—that he faced a mandatory life sentence if the court found that he had two prior felony drug convictions. Despite the defects in the information, respondent acknowledged that he understood that possibility. And, at sentencing, respondent admitted the fact of his two prior convictions and confirmed his awareness that those convictions were the basis for his enhanced sentence. See pp. 8-9, *supra*. For those reasons, the defects in the information also did not "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732. As in *Cotton*, the "real threat" to the fairness and integrity of the proceedings is the outcome in the court of appeals, which required that respondent receive a sentence far less than that mandated by law because of a non-prejudicial error that he never raised in the district court. *Cotton*, 535 U.S. at 634.

3. This Court may wish to consider summary reversal as an alternative to plenary review. The decision below is clearly incorrect and rests on a position that conflicts with decisions of this Court. This Court's decision in *Eberhart*, which confirmed the distinction between "jurisdictional" and "claim-processing rules" that controls this case, was itself a summary disposition. In view of the unanimity among the other courts of appeals

to address this question, summary reversal may be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted. The court may also wish to consider summary reversal of the judgment below.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
DAVID A. O'NEIL
Assistant to the Solicitor General
MICHAEL A. ROTKER
Attorney

AUGUST 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-11935
Non-Argument Calendar

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MIKOLA MAURICE BOWDEN, DEFENDANT-APPELLANT

Jan. 7, 2009

PER CURIAM:

Appellant Mikola Maurice Bowden appeals his sentence of mandatory life imprisonment based on his conviction for possession with intent to distribute more than 50 grams of a mixture and substance containing cocaine base, 21 U.S.C. § 841(a)(1), (b)(1)(A)(iii), and 2 prior felony drug convictions, 21 U.S.C. §§ 841(b)(1)(A), 851(a)(1). On appeal, Bowden argues that the district court lacked jurisdiction to enhance his sentence because the government's notice of enhancement did not strictly comply with the requirements of 21 U.S.C. § 851(a)(1), because it listed one wrong conviction date and the wrong enhancement statute.[1]

---

[1] Bowden's additional argument that the U.S. Supreme Court wrongly decided *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), fails but remains preserved. *See United*

We review the adequacy of a 21 U.S.C. § 851 notice of enhancement *de novo*. *United States v. Ramirez*, 501 F.3d 1237, 1239 (11th Cir. 2007). Section 851(a)(1) states in part:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.
>
> Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

21 U.S.C. § 851(a)(1).

We require strict compliance with the procedural and substantive requirements of § 851(a)(1) notices. *See United States v. Rutherford*, 175 F.3d 899, 904 (11th Cir. 1999); *United States v. Olson*, 716 F.2d 850, 852-53 (11th Cir. 1983); *United States v. Noland*, 495 F.2d 529, 530 (5th Cir. 1974).[2] When a notice of enhancement contains

---

States v. Lindsey, 482 F.3d 1285, 1294 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 438 (2007).

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

minor errors we will find § 851 compliance as long as the notice, despite the errors, unambiguously signal the government's intent. *See Perez v. United States,* 249 F.3d 1261, 1266-67 (11th Cir. 2001).

Here, the record demonstrates that the government's information did not unambiguously signal to Bowden that it sought mandatory life imprisonment when the information cited a statute that imposed only a ten-year mandatory minimum term of imprisonment. *See* 21 U.S.C. § 841(b)(1)(A)-(B); *Perez,* 249 F.3d at 1266-67. In addition, the government failed to clearly indicate "the previous convictions to be relied upon" when it listed as Bowden's first Possession of a Controlled Substance conviction date not the actual date of conviction, but rather a date on which another adverse action was taken against Bowden in the same-numbered case. *See* 21 U.S.C. § 851(a)(1). Therefore, the notice of enhancement did not strictly comply with § 851(a)(1) and the district court lacked jurisdiction to enhance Bowden's sentence. We vacate and remand for re-sentencing without the enhancement.

AFFIRMED in part, VACATED AND REMANDED in part.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-11935-EE

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MIKOLA MAURICE BOWEN, DEFENDANT-APPELLANT

[Filed: Mar. 30, 2009]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BEFORE: DUBINA, MARCUS and ANDERSON, Circuit Judges

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

(Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ ILLEGIBLE
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

5:06cr46/RS

UNITED STATES OF AMERICA

v.

MIKOLA MAURICE BOWDEN

[Filed: May 17, 2006]

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

That on or about April 9, 2006, in the Northern District of Florida, the defendant,

MIKOLA MAURICE BOWDEN,

did knowingly and intentionally possess with intent to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), and that this offense involved fifty (50) grams or more of a mixture and

substance containing cocaine base, commonly known as "crack cocaine," in violation of Title 21, United States Code, Section 841(b)(1)(A)(iii).

Returned in open court pursuant to Rule 6(f)
5-17-06
Date

/s/ MIKE DAVIS

CRIMINAL FORFEITURE

The allegations contained in Count One of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of Title 21, United States Code, Section 853.

From his engagement in the violation alleged in Count One of this Indictment, punishable by imprisonment for more than one year, the defendant,

MIKOLA MAURICE BOWDEN,

shall forfeit to the United States, pursuant to Title 21, United States Code, Section 853(a)(1) and (2), all of his interest in:

A. Property constituting or derived from any proceeds the defendant obtained directly or indirectly as the result of such violation; and

B. Property used in any manner or part to commit or to facilitate the commission of such violation.

If any of the property subject to forfeiture as a result of any act or omission of the defendant:

A. cannot be located upon the exercise of due diligence;

B. has been transferred or sold to, or deposited with, a third person;

C. has been placed beyond the jurisdiction of this Court;

D. has been substantially diminished in value; or

E. has been co-mingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendant up to the value of the above forfeiture property.

All in violation of Title 21, United States Code, Section 853.

A TRUE BILL:

[Redacted per Privacy Policy]
FOREPERSON

5/16/06
DATE

GREGORY R. MILLER
GREGORY R. MILLER
United States Attorney

RANDALL J. HENSEL
RANDALL J. HENSEL
Assistant United States Attorney

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

Case Number: 5:06CR46/RS

UNITED STATES OF AMERICA

v.

MIKOLA MAURICE BOWDEN

July 5, 2006

NOTICE OF ENHANCEMENT

COMES NOW the United States of America, by and through the undersigned Assistant United States Attorney, and pursuant to Title 21, United States Code, Section 851, files this enhancement information, hereby notifying the Court and the defendant, that the defendant is subject to the increased penalty provisions of Title 21, United States Code, Section 841(b)(1)(B), because of a previous conviction. In support thereof, the United States alleges as follows:

Mikola Maurice Bowden, the defendant, was convicted in the Circuit Court in Bay County, Florida, of the offense of Possession of Controlled Substance (Cocaine) on two separate occasions in Case Number 01-1339 on January 21, 2003 and in Case Number 02-3149 on February 6, 2003.

WHEREFORE, notice is given of the intention of the United States to invoke the increased penalty provisions under Title 21, United States Code, Section 841(b)(1)(B), against this defendant because of his prior felony convictions as outlined above.

RESPECTFULLY SUBMITTED this 5th day of July 2006, at Pensacola, Florida.

GREGORY R. MILLER
United States Attorney

/s/ RANDALL J. HENSEL
RANDALL J. HENSEL
Florida Bar No. 301604
Asst. U.S. Attorney
21 East Garden Street, Suite 400
Pensacola, FL 32502-5675
Phone: (850) 444-4000
Fax: (850) 434-0329

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing pleading has been sent to Christopher Patterson, attorney for Defendant Mikola Maurice Bowden, via the Northern District of Florida Case Management/Electronic Case Filing (CM/ECF) program or mailed to 335 Magnolia Avenue, Panama City, Florida, 32401 on this 5th day of July 2006.

/s/ RANDALL J. HENSEL
RANDALL J. HENSEL
Assistant U.S. Attorney

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

CASE: 5:06cr46/RS

UNITED STATES OF AMERICA

v.

MIKOLA MAURICE BOWDEN

June 22, 2006

STATEMENT OF FACTS AND ELEMENTS OF THE OFFENSES

COUNT ONE:

On April 9, 2006, defendant, Mikola Bowden, was a driver of one of the vehicles involved in a traffic crash near the intersection of Transmitter Road and East 4th Street in Springfield, a suburb of Panama City. Springfield Police Department Officers responded to the 911 report of the crash and on arrival, learned from eye witnesses that one of the drivers of one of the vehicles, later identified as the defendant, Mikola Bowden, has fled the scene on foot, carrying a small type bag. Officers received a 911 emergency services call from a nearby 4th Street resident, who advised a black male meeting the

description of the fleeing driver officers had received, had ran through his yard after fording a nearby canal and was soaking wet.

A short time later, Springfield Police Department (SPD) received another 911 call from a young female, reporting she was home alone and someone had broken into her mobile home through a glass window, and at the time of the phone call, she was hidden inside a closet in the trailer, unaware of how many and where the intruders were located. SPD officers responded to the scene, lot 35, 700 Transmitter Road, located approximately 3 blocks from the site of the traffic crash. SPD officers found a broken window at the rear of the mobile home and inside, a wet black nap sack by the broken window. The officers cleared the residence, escorting the 911 caller from her hiding place. The officers then heard sounds from a second locked bedroom in the trailer, and after receiving no response from the occupant to open the door, forcibly entered and found the defendant, Mikola Bowden, in the process of changing clothing. Wet clothing recovered from the floor of the bedroom where Bowden was found matched the description of what the fleeing driver was wearing.

SPD officers collected the black nap sack and found it contained three plastic bags of crack cocaine. The crack cocaine field tested positive for cocaine and has been submitted to the DEA lab for analysis and weighs 31.8 grams. SPD officers retrieved $350 from the nap sack, as well as an additional $124 from the wet trousers found in the bedroom when Bowden was apprehended. Investigation determined Bowden shared the mobile home with his girlfriend, Angela Monford, and it was her car he was operating at the time of the traffic crash.

Recorded statements from witnesses to the auto crash were taken by SPD officers. According to the witnesses statements after the crash, when the dust had settled and the smoke cleared, witnesses approached defendant to see if he was alright, and when he exited his car, he reached in the car and got a black nap sack, and walked down the sidewalk as if to check on the occupants of the other car involved in the accident, but walked on past it, down the sidewalk and then began running away. The wet clothing recovered from the bedroom was taken back to eye witnesses at the scene, and was positively identified as the clothing they had seen the driver wearing at the time he fled.

According to DEA Task Force Officer Robert Duncan, after Bowden's arrest on April 9, 2006, Bowden conveyed through a Panama City narcotic's investigator that the defendant wanted to talk to the "feds." Task Force Officer Duncan, accompanied by Ryan Robbins—another Bay County narcotics investigator—interviewed the defendant at the jail on April 19, 2006. Per Duncan, after confirming the defendant's desire to talk to them and him executing a waiver of rights form, Bowden admitted to Duncan that since the week after Thanksgiving, he had been receiving usually four cookies weighing approximately 18 grams of crack from his source of supply which Bowden was selling in the Panama City area. Bowden admitted on some occasions, he received six cookies at a time, and had obtained six 18 gram cookies from his source of supply on the day of his arrest, and what was seized from the nap sack was what Bowden had left of those six cookies from sales earlier in the day.

ELEMENTS OF THE OFFENSES:

Count One:

Under ECCA Jury Instruction 85, a violation of 21 U.S.C. 841 (a)(1), possession with intent to distribute cocaine in excess of 50 grams, requires proof of the following facts beyond a reasonable doubt:

1. That the defendant knowingly and willfully possessed cocaine base as charged;
2. That the defendant possessed the substance with intent to distribute it; and
3. The weight of the cocaine base possessed by the defendant was in excess of the 50 grams of the cocaine base, as charged.

PENALTIES:

Count One:

Possession with intent to distribute cocaine base over 50 grams in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(A)(iii). Penalties are 10 to life imprisonment, fine up to $2 million, up to 5 years of Supervised Release; and a $100 SMA. Enhanced possible penalties, based upon 2 prior felony cocaine convictions, are minimum mandatory life imprisonment, fine of up to $8 million; 10 years of Supervised Release, and a $100 SMA.

Respectfully submitted this 22nd day of June, 2006

GREGORY R. MILLER
United States Attorney

/s/ RANDALL J. HENSEL
RANDALL J. HENSEL
Assistant United States Attorney
Florida Bar # 301604
21 East Garden Street, Suite 400
Pensacola, FL 32501
(850) 444-4000

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHEN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

CASE: 5:06cr46/RS

UNITED STATES OF AMERICA

v.

MIKOLA MAURICE BOWDEN

[Filed: July 13, 2006]

PLEA AND COOPERATION AGREEMENT

---

1. PARTIES TO AGREEMENT

This agreement is entered into by and between MIKOLA MAURICE BOWDEN, Christopher Patterson, Esq., attorney for MIKOLA MAURICE BOWDEN,

and,

the United States Attorney for the Northern District of Florida. This agreement specifically excludes and does not bind any other state or federal agency, including other United States Attorneys and the Internal Revenue Service, from asserting any civil, criminal or administrative claim against MIKOLA MAURICE BOWDEN.

2. TERMS

The parties agree to the following terms:

a. MlKOLA MAURICE BOWDEN will plead guilty to Count One of the Indictment. Count One charges defendant with possession with the intent to distribute a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(l), and that this offense involved fifty (50) grams or more of a mixture and substance containing cocaine base, commonly known as "crack cocaine," in violation of Title 21, United States Code, Section 841(b)(1)(A)(iii).

If the Court determines that the defendant has two prior qualifying felony drug convictions under 21 U.S.C. §§841 and 851, on Count One he faces minimum mandatory term of Life imprisonment, $8,000,000 fine, ten year terms of supervised release, and a $100 special monetary assessment. If the Court determines that defendant does not have a prior qualifying felony drug conviction under 21 U.S.C. § §841 and 851, on Count One he faces ten years to Life imprisonment, five years supervised release, $4,000,000.00 fine, and $100 special monetary assessment. MIKOLA MAURICE BOWDEN agrees to pay the special monetary assessment on or before the date of sentencing.

b. Defendant is pleading guilty because MIKOLA MAURICE BOWDEN is in fact guilty of the charges contained in Count One in the Indictment. In pleading guilty to this offense, defendant acknowledges that were this case to go to trial, the government could present evidence to support those charges beyond a reasonable doubt as outlined in the attached written statement of

facts which has been reviewed by the defendant and his counsel.

c. Upon the District Court's adjudication of guilt of MIKOLA MAURICE BOWDEN for those charges contained in Count One of the indictment, the United States Attorney, Northern District of Florida, will not file any further criminal charges against MIKOLA MAURICE BOWDEN arising out of the same transactions or occurrences to which MIKOLA MAURICE BOWDEN has pled.

d. Nothing in this agreement shall protect the defendant in any way from prosecution for any offense committed after the date of this agreement. Should the defendant be charged with any offense alleged to have occurred after entry into this agreement, any statements, information or other evidence disclosed to the Government during the defendant's cooperation may be used against MIKOLA MAURICE BOWDEN in any such prosecution.

e. The parties agree that the sentence to be imposed is left solely to the discretion of the District Court, which is required to consult the United States Sentencing Guidelines and take them into account when sentencing the defendant. The parties further understand and agree that the District Court's discretion in imposing sentence is limited only by the statutory maximum sentence and any mandatory minimum sentence prescribed by statute for the offense charged in Count One.

f. The United States Attorney agrees not to recommend a specific sentence. However, the United States Attorney does reserve the right to advise the District Court and any other authorities of its version of the cir-

cumstances surrounding the commission of the offense by the defendant, including correcting any misstatements by defendant or defendant's attorney, and reserves the right to present evidence and make arguments pertaining to the application of the sentencing guidelines and the considerations set forth in Title 18, United States Code, Section 3553(a).

g. MIKOLA MAURICE BOWDEN agrees to cooperate fully and truthfully with the United States Attorney and her designated representatives and with agencies identified by the United States Attorney. Such cooperation shall include but is not limited to providing complete and truthful debriefings and testimony at grand jury, trial, and as otherwise requested, involving any matter under investigation.

h. MIKOLA MAURICE BOWDEN specifically waives any Fifth Amendment privilege and any other privilege inconsistent with the cooperation required by this agreement.

i. Defendant and his attorney agree to allow defendant to be interviewed as part of his cooperation under this agreement by the government or its state and/or local designees without prior notice or the presence of counsel, to include testimony in all necessary proceedings related to the information provided as part of the defendant's cooperation.

j. If all terms and conditions of this agreement are satisfied and there exists no cause for revocation as outlined in Section 3, any statements made by MIKOLA MAURICE BOWDEN pursuant to this agreement will be treated by the United States as given under Rule 11(f), Federal Rules of Criminal Procedure, Rule 410,

Federal Rules of Evidence and Sentencing Guideline Section 1B1.8.

k. The United States Attorney agrees to make known his opinion as to the nature and extent of the defendant's cooperation.

3. REVOCATION

a. The parties agree that the United States Attorney may revoke this agreement upon showing, by a preponderance of the evidence, any of the following:

1. that defendant has refused to cooperate as required by this agreement;

2. that defendant's statements or testimony has been untruthful or incomplete;

3. that defendant has failed to comply with any of the terms of this agreement;

4. that defendant has any criminal liability for homicide; or

5. that defendant has engaged in further criminal conduct after entering into this agreement.

b. If this agreement is revoked,

1. The plea of guilty entered by MIKOLA MAURICE BOWDEN pursuant to this agreement and any judgment entered thereon shall remain in full force and effect and will not be the subject of legal challenge by the defendant.

2. The United States may file charges without limitation by this agreement.

3. All statements, information and other evidence provided by MIKOLA MAURICE BOWDEN pursuant to this agreement or under Rule 11, Federal Rules of Criminal Procedure, may be used against the defendant in any proceeding in this or any other action.

4. The defendant, regardless of cooperation, and at the sole discretion of the United States Attorney, may be deemed not to have provided substantial assistance.

4. SENTENCING

a. If, in the sole discretion of the United States Attorney, MIKOLA MAURICE BOWEN is deemed to have provided substantial assistance in the investigation or prosecution of other persons who have committed offenses, if MIKOLA MAURICE BOWDEN has otherwise complied with all terms of this agreement, and if this assistance is prior to sentencing or within the time provided by Rule 35, Federal Rules of Criminal Procedure, then the United States Attorney will file a substantial assistance motion. Determination whether the defendant has provided substantial assistance will not depend upon charges being filed or convictions being obtained as a result of defendant's cooperation. Should a substantial assistance motion be filed, the granting of relief and the extent of relief is left solely to the discretion of the District Court.

b. Defendant understands that any prediction of the sentence which may be imposed is not a guarantee or binding promise. Because of the variety and complexity of issues which may arise at sentencing, the sentence is not subject to accurate prediction. The Court is not lim-

ited to consideration of the facts and events provided by the parties. Adverse rulings, or a sentence greater than anticipated shall not be grounds for withdrawal of defendant's plea.

c. The parties reserve the right to appeal any sentences imposed.

5. FORFEITURE

a. Prior to sentencing, the defendant shall accurately and completely identify every asset which is either owned by the defendant or is under the defendant's control. All property shall be identified, whether forfeitable or not.

b. Defendant agrees to fully and truthfully disclose all facts which could tend to make any interest which defendant owns or controls in property forfeitable under the laws of any jurisdiction, including property which may be forfeitable as substitute assets.

c. Defendant agrees to forfeit all forfeitable assets to the United States or to agencies designated by the United States. Defendant shall take all steps necessary to transfer forfeitable assets to the United States, including but not limited to executing any documents, consenting in any form or cause of action required by the United States, providing information and supporting documentation within the defendant's possession or control, and inducing persons holding property on the defendant's behalf to transfer such property to the United States. These transfers shall be completed prior to sentencing.

d. At his sole discretion, the United States Attorney may decline to forfeit assets where the value, or level of

equity, or interests not subject to forfeiture, or costs, or other factors make profitable forfeiture impractical.

CONCLUSION

There are no other agreements between the United States Attorney, Northern District of Florida and MIKOLA MAURICE BOWDEN, and MIKOLA MAURICE BOWDEN enters this agreement knowingly, voluntarily and upon advice of counsel.

GREGORY R. MILLER
United States Attorney

/s/ CHRISTOPHER PATTERSON
CHRISTOPHER PATTERSON, ESQ.
Attorney for Defendant

[7-13-2006]
Date

/s/ RANDALL J. HENSEL
RANDALL J. HENSEL
Florida Bar No. 301604
Assistant U.S. Attorney
Northern District of Florida
21 E. Garden Street, Suite 400
Pensacola, Florida 32502
850-444-4000

[7-13-06]
Date

/s/ MIKOLA MAURICE BOWDEN
MIKOLA MAURICE BOWDEN

[7-13-2006]
Date

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

5:06CR46/RS

UNITED STATES OF AMERICA, PLAINTIFF

v.

MIKOLA MAURICE BOWDEN, DEFENDANT

July 13, 2006
10:30 a.m.

TRANSCRIPT OF REARRAIGNMENT
BEFORE THE HONORABLE RICHARD SMOAK
UNITED STATES DISTRICT JUDGE

APPEARANCE:

FOR THE GOVERNMENT:

GREGORY R. MILLER
United States Attorney
BY: EDWIN FRANK KNIGHT
Assistant U.S. Attorney
21 E. Garden St., Suite 400
Pensacola, Florida 32501-4972

FOR THE DEFENDANT:

CHRISTOPHER N. PATTERSON
Attorney at Law
P.O. Box 9474
Panama City, Florida 32417

PROCEEDINGS

[2]

(Call to Order of the Court)

MR. PATTERSON: Good morning, Your Honor.

THE COURT: Good morning. All right, we are here for a change of plea in United States vs. Mikola Bowden, 6CR46.

Counsel, if you're ready, state your appearances.

MR. PATTERSON: Your Honor, Chris Patterson, on behalf of Mr. Bowden.

MR. KNIGHT: Ed Knight for the United States.

THE COURT: Okay. Mr. Bowden, this hearing has been scheduled because I understand that you want to change your plea from not guilty to guilty to Count 1 of the indictment.

THE DEFENDANT: Yes, sir.

THE COURT: You don't have to plead guilty, but before I am able to accept your change of plea, I am required to talk to you to make sure that you understand what you're doing, that you understand the consequences of pleading guilty, and that the facts do support a guilty plea. So I'll need to ask you some questions.

Before we do that, the clerk will swear you in under oath. And that's going to require that you tell the truth. If you answer any of my questions falsely, that could be the basis for another prosecution for perjury, or making a false statement. Do you understand that?

THE DEFENDANT: Yes, sir.

DEPUTY CLERK: Please raise your right hand.

(Defendant duly sworn.)

[3]

DEPUTY CLERK: Please state your full name and spell your last name for the record.

THE DEFENDANT: Mikola Maurice Bowden, B-O-W-D-E-N.

THE COURT: Mr. Bowden, how old are you now?

THE DEFENDANT: Twenty-nine.

THE COURT: Tell me about your education.

THE DEFENDANT: I went to Bay High School—I mean, I went through all the grades and then in the 11th I got a GED after attending Bay High School. I took a vocational small gasoline engine certified, and I took a dental assistance, but I didn't finish.

THE COURT: You are able to read and write satisfactorily then?

THE DEFENDANT: Yes, sir.

THE COURT: Are you married?

THE DEFENDANT: No sir.

THE COURT: Where are you from originally?

THE DEFENDANT: Panama City.

THE COURT: Panama City. Do you have family here in Panama City?

THE DEFENDANT: Yes sir.

THE COURT: What kind of work were you doing before you were taken into custody?

[4]

THE DEFENDANT: Delivering produce.

THE COURT: I'm sorry, what?

THE DEFENDANT: Delivering produce.

THE COURT: Who were you working for?

THE DEFENDANT: Adam produce, Crestview Produce.

THE COURT: Have you been treated for any emotional or mental illness or addiction to drugs?

THE DEFENDANT: No, sir.

THE COURT: Are you currently under the influence of any legal or illegal drug, prescription or nonprescription medicine or alcoholic beverage?

THE DEFENDANT: No, sir.

THE COURT: Have you taken any drug, medicine or alcohol in the last 24 hours?

THE DEFENDANT: No, sir.

THE COURT: I now need to talk to you about rights that you have, and listen carefully, because by pleading guilty, you will give up most of these rights.

Now you don't have to plead guilty. You have the right to plead not guilty. And if you do, the government would have the burden of proving your guilt to the jury by a standard of proof known as beyond a reasonable doubt. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: There is no burden on you to prove that [5] you are innocent because the law presumes that you are innocent until the government proves you guilty. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: You have the right to remain silent. And if you were to plead not guilty and go to trial, you could testify if you wanted to. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: You have the right to confront witnesses. That means you have the right to see, to hear, and to cross-examine any witness that would testify against you at trial. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: And you have the right to compel the attendance of witnesses for you, and to have those witnesses present and testify on your behalf at trial. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: You have the right to a trial by jury, and to have that jury determine if you are guilty or innocent. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: And you have the right to present evidence at trial. And the government would have to present [6] all of its evidence in open court at trial. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: And you have the right to be represented by an attorney at all stages of the case. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, I want to talk to you a little bit more specifically about pleading guilty. Do you understand the difference between a plea of guilty, which admits the truth of the charge against you, and a plea of not guilty, which denies the charge? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now if you plead guilty, you will give up all of the rights that I have just gone over except the right to be represented by an attorney. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, if you plead guilty and I accept your plea, there will not be a trial. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: If you plead guilty and I accept your plea, you will give up any defense you might have to the charge against you. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: And if you plead guilty, there are certain issues that may be appealed and other issues that cannot be appealed. Now if you don't like my sentence, you may or you may not be able to get an appellate court to review it. But you will not be able to take back your guilty plea. That's a final decision. You understand?

THE DEFENDANT: Yes, sir.

[7]

THE COURT: All right, I want to go over, Mr. Bowden, the charge against you in the indictment. And Count 1 says that on or about April 9th, 2006, in the Northern District of Florida, that you knowingly and intentionally possessed with intent to distribute a controlled substance in violation of 21 U.S. Code, section 841(a)(1); and that the offense involved 50 grams or more of a mixture and substance containing cocaine base, commonly known as crack cocaine, in violation of 21 U.S. Code, section 841(b)(1)(A)(iii). The indictment also calls for you to forfeit to the United States, pursuant to 21 U.S. Code, section 853(a)(1) and (2), all of your interest in property constituting or derived from any proceeds that you obtained directly or indirectly from your violation in Count 1, and property used in any manner to commit or facilitate the commission of that crime.

Now, are you aware of this charge and this claim for forfeiture in the indictment?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you understand that if you were to persist in your plea of not guilty, that the government would have the burden of proving each element of the charge beyond a reasonable doubt?

THE DEFENDANT: Yes, sir.

THE COURT: Now, it would require the government to [8] prove the following facts beyond a reasonable doubt:

First, that you knowingly and willfully possessed cocaine based as charged; second, that you possessed the substance with intent to distribute it; and third, that the weight of the cocaine base possessed by you was in excess of 50 grams of cocaine base. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I understand that we have a statement of facts and elements of the offenses that bears Mr. Hensel's signature?

MR. KNIGHT: That's correct, Your Honor. I believe that's been filed with the clerk's office.

MR. PATTERSON: Your Honor, we have received that. We've had that for several weeks, and we have no objections to the facts as offered by the government as to what they intend to prove.

MR. KNIGHT: Your Honor, if that's not been filed, I have a copy.

THE COURT: If you would let Mr. Bowden see a copy. Mr. Bowden, that is the statement of facts that the government has filed. Have you had an opportunity to go over that document with Mr. Patterson?

THE DEFENDANT: Yes, sir.

THE COURT: Are the facts that are set forth in that document true?

[9]

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you understand that the facts in the statement, which you have admitted are true, are sufficient for the jury to find you guilty on Count 1?

THE DEFENDANT: Yes, sir.

THE COURT: All right, Mr. Bowden, I need to now go over with you the maximum sentence that could be imposed. And you understand that if the government establishes that you have two prior convictions for felony drug offense, that you are looking at an enhanced sentence?

THE DEFENDANT: Yes, sir.

THE COURT: If the government can establish enhancement for two prior convictions of felony drug offense, the maximum penalty would be a mandatory term of life imprisonment without release, and a term of supervised release of at least ten years, a fine in the amount of $8 million, a special monetary assessment of $100, and forfeiture of all forfeitable assets to the Uni-

ted States. Do you understand that that is the maximum sentence that could be imposed?

THE DEFENDANT: Yes, sir.

THE COURT: Now you've heard that the sentence includes supervised release. Did you not?

THE DEFENDANT: Yes, sir.

THE COURT: You understand what supervised release is?

THE DEFENDANT: Yes, sir.

[10]

THE COURT: It's like being on probation after you're released from prison. If you were to be released from prison, you would be required to serve under the supervision of the probation office a period of supervised release. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And if you were to violate the terms of the supervised release, you understand that it could result in you being sent back to prison?

THE DEFENDANT: Yes, sir.

THE COURT: I want to talk to you now about the sentencing guidelines because those have a large bearing on how you're going to be sentenced. Have you heard about the sentencing guidelines?

THE DEFENDANT: Yes, sir.

THE COURT: Under the Sentencing Reform Act of 1984, the United States Sentencing Commission has

issued guidelines for judges to consider in determining the sentence in a criminal case such as this. Now in determining your sentence, I will calculate the applicable sentencing guideline, possible departures under the, guidelines and other sentencing factors under the law. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, have you talked to Mr. Patterson about how the guidelines will apply to you?

[11]

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you understand that neither Mr. Patterson nor the attorney for the government know how I may interpret and apply the guidelines in your case?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that? Now, do you understand that the actual sentence that I impose could be different than what your attorney is predicting? You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you also understand that the—that parole has been abolished, and if you are sentenced to prison, you will not be released on parole? You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do we have a plea and cooperation agreement?

MR. KNIGHT: Yes, Your Honor.

THE COURT: Give that to Mr. Bowden.

Mr. Bowden, you are being handed the plea and cooperation agreement. Did you read that document carefully and then sign your name to it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you have sufficient opportunity to talk to Mr. Patterson about that agreement before you signed [12] it?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about the agreement before we have it filed in the record?

THE DEFENDANT: No, sir.

THE COURT: Now, does the plea and cooperation agreement represent your entire agreement with the government?

THE DEFENDANT: Yes, sir.

THE COURT: Are you counting on any secret promise made to you that is not written in the plea agreement?

THE DEFENDANT: No, sir.

THE COURT: Do you understand the terms of the plea and cooperation agreement?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone made any promise to you other than what is written in that agreement to induce you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anybody threatened you, used force or intimidation to induce your plea of guilty?

THE DEFENDANT: No, sir.

THE COURT: Are you pleading guilty of [*sic*] your own free will because you are guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Now, you have received a copy of [13] the indictment, have you not?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had adequate time to talk to your attorney about the charge in the indictment?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had adequate time to discuss your case with Mr. Patterson and have him explain to you all of the possible defenses you might have?

THE DEFENDANT: Yes, sir.

THE COURT: Has he answered all of your questions?

THE DEFENDANT: Yes, sir.

THE COURT: Are you fully satisfied with the advice given to you in this case by your attorney, Mr. Patterson?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any complaints about your lawyer?

THE DEFENDANT: No, sir.

THE COURT: Mr. Patterson, have you had adequate time to discuss the case with Mr. Bowden and to advise him?

MR. PATTERSON: Yes, Your Honor, I have.

THE COURT: Do you have any complaints?

MR. PATTERSON: No, sir.

THE COURT: Can you assure me that Mr. Bowden's plea is freely and voluntarily made, and can you assure me that insofar as you know, no assurances, promises or understandings [14] have been given to Mr. Bowden about the disposition of the case which are any different or contrary to what I have just discussed with him and made a matter of record in open court?

MR. PATTERSON: I so certify.

THE COURT: And can the government give the same assurances?

MR. KNIGHT: Yes, Your Honor.

THE COURT: All right. Mr. Bowden, knowing the rights that you will waive, and considering what we've talked about this morning, how do you now plead to the charge against you in Count 1 of the indictment, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Are you pleading guilty because you have committed that offense?

THE DEFENDANT: Yes, sir.

THE COURT: The court finds that you, Mikola Maurice Bowden, are now alert and intelligent, that you understand the charge against you, that you appreciate the consequences of pleading guilty, that you are fully competent and capable of entering an informed plea, that your decision to plead guilty is freely and voluntarily made, and that you have had the advice of a competent lawyer with whom you are satisfied.

I find the facts that the government is prepared to prove and the facts that you have admitted and stated under oath in open court are sufficient to sustain a finding of guilt [15] on each element of Count 1 of the indictment. I therefore accept your plea of guilty to Count 1 and I adjudicate you guilty on Count 1 of the indictment.

Mr. Bowden, you are aware that the government has filed a notice of enhancement in this case because it contends that you have two prior felony drug convictions?

THE DEFENDANT: Yes, sir.

THE COURT: And you've talked about that with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Now, the probation office will prepare a written presentence investigation report to help me in determining your sentence. And you will be required to meet with the probation officer and give information to assist the officer in developing the presentence report. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now you have the right to have your attorney present with you when you meet with the probation officer if you desire. Now it's important that you tell the probation officer about any facts that you want me to consider in determining your sentence, and that will include the names of people you want the probation officer to interview. You understand?

THE DEFENDANT: Yes, sir.

[16]

THE COURT: Now you and your attorney will have the right to review the presentence investigation report and file any objections to that report before the sentencing hearing. But there are pretty tight deadlines to file objections to the report. So when you get the report, you need to review it promptly and thoroughly, and let Mr. Patterson know if there's anything that you are concerned that may be incorrect in that report so he can file objections before the deadline. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions?

THE DEFENDANT: No, sir.

THE COURT: All right, sentencing is scheduled for October 11th at 9:30 a.m. here in Panama City. Is there anything else that we need to take up for Mr. Bowden's case?

MR. KNIGHT: Yes, Your Honor. I misspoke earlier when I indicated to the court that the statement of facts and elements of the offense had been electronically filed. It has not. So I would like for the pleading

that's title "Statement of Facts and Elements of the Offense" to be incorporated into the record. It's the same pleading that the defendant reviewed during the course of the colloquy.

MR. PATTERSON: That's correct, Your Honor.

THE COURT: It will be made part of the record.

MR. KNIGHT: Thank you, Your Honor.

[17]

THE COURT: Anything further?

MR. KNIGHT: No, sir.

MR. PATTERSON: No, sir.

THE COURT: That will conclude this hearing.

(Proceeding concluded at 10:58 a.m.)

* * * * *

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

5:06CR46/RS

UNITED STATES OF AMERICA, PLAINTIFF

v.

MIKOLA MAURICE BROWN, DEFENDANT

Oct. 11, 2006
9:30 a.m.

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE RICHARD SMOAK
UNITED STATES DISTRICT JUDGE

APPEARANCE:

FOR THE GOVERNMENT:

GREGORY R. MILLER
United States Attorney
BY: RANDALL J. HENSEL
Assistant U.S. Attorney
21 E. Garden St., Suite 400
Pensacola, Florida 32501-4972

FOR THE DEFENDANT:

CHRISTOPHER N. PATTERSON
Attorney at Law
P.O. Box 9474
Panama City, Florida 32417

[2]

PROCEEDINGS

(Call to order of the Court)

THE COURT: Good morning. Our first case is United States vs. Bowden. Are you ready?

MR. PATTERSON: Good morning, Your Honor.

THE COURT: Good morning.

MR. HENSEL: Morning, sir.

THE COURT: Mr. Patterson, how are you doing?

MR. PATTERSON: I am well, sir. How are you, sir?

THE COURT: Good. Are we ready?

MR. PATTERSON: Yes, sir, we are.

THE COURT: Counsel, if you would state your names for the record, please.

MR. PATTERSON: Chris Patterson, counsel of record for the defendant, Mikola Bowden.

MR. HENSEL: Randy Hensel, Assistant United States Attorney, for the government.

THE COURT: Mr. Bowden, this is the hearing for your sentencing. And the way we'll conduct this is that I will hear from your attorney, Mr. Patterson, about his review of the presentence investigations report and determine if there are any outstanding objections. I will hear from the United States Attorney.

I will then hear from both attorneys about what they believe an appropriate sentence should be, and I will give you [3] an opportunity to speak also if you desire. You don't have to say anything, but you have that right. And if you have something you would like to say, I will certainly listen to it.

I am going to have the clerk swear you in, if you do want to say anything.

DEPUTY CLERK: Please raise your right hand.

(Defendant duly sworn.)

DEPUTY CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Mikola Maurice Bowden, B-O-W-D-E-N.

THE COURT: Mr. Patterson, have you had an opportunity to review the presentence investigation report with Mr. Bowden?

MR. PATTERSON: I have, Your Honor, on several occasions.

THE COURT: Are there any unresolved objections at this time?

MR. PATTERSON: No sir. We do not make any objection, legal objection, to the presentence report as prepared.

THE COURT: Okay. Mr. Hensel, does the government have any objections to the presentence report?

MR. HENSEL: No, we do not, Judge.

THE COURT: Mr. Bowden, did you review the presentence investigation report?

THE DEFENDANT: Yes, sir.

[4]

THE COURT: Do you have any questions about that report or any objections which you would like to state?

THE DEFENDANT: No, sir.

THE COURT: Okay. Mr. Patterson, would you like to make some comments about sentencing?

MR. PATTERSON: Your Honor, if I may, the—my client, Mr. Bowden, upon his arrest, began providing assistance to law enforcement, which led to, at least in part, the arrest and subsequent plea of a codefendant, Mr. J.C. Williams before this court. Mr. Bowden stands ready to continue his cooperation pursuant to the plea agreement that he signed with the government, and looks forward to providing further assistance to the government after today.

We understand that there is no motion for a substantial assistance that has been filed as of today, but I want the court, and obviously Mr. Hensel, to be on no-

tice that we stand ready to continue with our cooperation and pledge to do so.

THE COURT: Mr. Hensel, do you have any comments?

MR. HENSEL: Judge, he has been cooperating to date. It has not risen to the level of substantial assistance justifying me filing a motion today.

And as far as the sentence he's facing, as the court is aware, I did file a notice of enhancement. He does have two prior qualifying felonies that are reflected in his presentence [5] report at paragraphs 38 and 39. And as a result, based on the amount of drugs, he's facing mandatory life. So he certainly should be ready to continue his cooperation.

THE COURT: Mr. Bowden, you and I need to have a conversation now about the notice of enhancement. Are you aware that the government filed a notice of enhancement in the case because of your two prior convictions?

THE DEFENDANT: Yes, sir.

THE COURT: Now I need to ask you about your two prior convictions, whether you affirm or deny that you have been previously convicted as alleged. And the reason this is important, if you deny that you were convicted as stated in the enhancement, you must state that now or you will not be permitted to raise that issue later to attack your sentence on appeal. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now the notice of enhancement states that you were convicted in the Circuit Court for Bay County on two separate occasions of the offense of possession of a controlled substance, cocaine, in case No. 01-1339, on January 21, 2003, and in case 02-3149 on February 6th, 2003. Now, do you deny or do you affirm that you were in fact convicted on those two occasions as stated?

THE DEFENDANT: Sir, you say February 3, 2006?

THE COURT: February 6th, 2003.

[6]

THE DEFENDANT: I was in jail then.

MR. PATTERSON: Your Honor, if I could have a minute, please.

(Defendant and counsel conferring.)

THE DEFENDANT: Okay.

MR. HENSEL: Judge, I think what may be confusing is he got a—in the original case, reflected in the presentence report at paragraph 38, he originally got placed on community control and then he violated that. And then January 21st of '03 his community control was revoked and he got 40 months of Department of Corrections. And then the following month, February 6th of '03, is when he pled nolo to the other possession of cocaine charge, but those were separate offenses, separate dates, and that may be what confused him.

THE COURT: Mr. Bowden, are you satisfied that you understand now what we're talking about?

THE DEFENDANT: Yes, sir.

THE COURT: Do you admit or do you deny that you were convicted as stated on those two prior occasions?

THE DEFENDANT: I admit.

THE COURT: Counsel, is there anything else that anyone needs to say before we proceed with sentencing?

MR. HENSEL: No, sir, Judge.

MR. PATTERSON: No, Your Honor.

THE COURT: All right. I have previously adjudicated [7] Mikola Maurice Bowden guilty as charged in Count 1 of the indictment in accordance with his plea of guilty. I determine that the presentence investigation report is accurate and I order the findings of the report to be incorporated into the following sentence:

Pursuant to the Sentencing Reform Act of 1984, and all amendments, it is the judgment of the court that defendant, Mikola Maurice Bowden, is hereby committed to the custody of the Bureau of Prisons for a term of life imprisonment. Upon review of all factors properly considered under 18 U.S. Code, section 3553(a), and taking into account the advisory nature of the United States Sentencing Guidelines, I conclude that this sentence, which is required by statute, and is within the restricted guideline range, is appropriate. This sentence is sufficient. A lower sentence would not be sufficient, and a greater sentence is not necessary to comply with the statutorily defined purposes of sentencing.

In making this sentencing decision, I have consulted the U.S. Sentencing Guidelines and have calculated the applicable restricted advisory range to be mandatory life imprisonment, and this is based upon a base offense level of 32, and this is for a least 50 grams, but less than 150 grams, of cocaine base.

There is an upward adjustment of 37 for career offender provision, a downward adjustment of 3 for acceptance [8] of responsibility. This results in a total offense level of 34 and a criminal history category of 6.

I then determined whether pursuant to the sentencing commission's policy statements if any departures or variances from the advisory guideline range were clearly appropriate. In this case a departure or variance from the guideline range is not warranted.

I find that Mr. Bowden does not have the financial ability to pay a fine in any amount, therefore imposition of a fine is waived. However, it is ordered that Mr. Bowden shall pay a special monetary assessment in the amount of $100, as required by 18 U.S. Code, section 3013. The special monetary assessment shall be duty immediately.

Upon release from imprisonment, Mr. Bowden shall be placed on supervised release for a term of ten years. The term of supervised release shall be under the standard conditions of supervision adopted for use in the Northern District of Florida and the following special conditions:

Defendant shall not own or possess, either directly or constructively, a firearm, ammunition, dangerous weapon or destructive device.

Defendant shall provide the probation officer with all requested financial information, both business and personal.

Defendant shall submit to testing to determine if he is using drugs or alcohol.

[9]

Defendant shall participate in a program of substance abuse treatment.

Defendant shall cooperate with the probation department and/or the appropriate state agency in the establishment and enforcement of child support payments and shall make all required child support payments.

Defendant shall cooperate with the probation office in the collection of DNA samples as required by 42 U.S. Code, section 14135(a).

Total sentence is life imprisonment, ten years' supervised release and $100 special monetary assessment.

Counsel, are there any objections to my ultimate findings of fact or conclusions of law relating to this sentence?

MR. PATTERSON: No objections, but we would ask the court to consider Mr. Bowden while in the Bureau of Prisons for the intensive drug treatment program there, believing if he is otherwise eligible, he could benefit by participating in that program.

MR. HENSEL: No objections.

THE COURT: I will make that recommendation that the Bureau of Prisons consider placing Mr. Bowden in its long term residential substantial abuse program.

Are there any objections to the manner in which I pronounced sentence?

[10]

MR. PATTERSON: No, sir.

MR. HENSEL: No, sir.

THE COURT: Mr. Bowden, you are advised that you have the right to appeal this sentence. If you are unable to afford the cost of an appeal, you may apply for leave to appeal informa pauperis. Any notice of appeal must be filed within ten days. If you request, the court clerk will immediately file a notice of appeal on your behalf. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Mr. Bowden will remain in custody until he is delivered to the Bureau of Prisons. Anything further?

MR. HENSEL: No sir, Judge.

MR. PATTERSON: No, Your Honor.

THE COURT: That will conclude this hearing.

(Proceeding concluded at 9:40 a.m.)

APPENDIX I

1. Section 851 of Title 21 of the United States Code provides:

Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether

he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information

before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.