

10-732

To Be Argued By:
ROBERT M. SPECTOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-732

UNITED STATES OF AMERICA,
Appellee,

-vs-

BENIGO MALAVE,
Defendant,

MILTON ROMAN, aka Justice,
Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

**REDACTED BRIEF FOR
THE UNITED STATES OF AMERICA**

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Statement of Jurisdiction

This is an appeal from a judgment entered on February 18, 2010 in the District of Connecticut (Peter C. Dorsey, J.) after the defendant pleaded guilty to conspiracy to possess with the intent to distribute and to distribute five kilograms or more of a mixture and substance containing a detectable amount of cocaine and fifty grams or more of a mixture and substance containing a detectable amount of cocaine base. Appendix (“A”)13-A14, A17, A124-A126. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on February 24, 2010, A17, and this Court has appellate jurisdiction over the defendant’s challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

- I. Did the district court commit plain error requiring a remand for re-sentencing in failing to comply with the notice requirements of 21 U.S.C. § 851(b) at the time of the defendant's guilty plea when the record reflects that the defendant knew about his right to challenge his prior convictions?

- II. Did the district court commit plain error in not articulating its calculation of the guidelines range when the defendant was sentenced to the mandatory minimum sentence?

- III. Does the defendant's *pro se* challenge to the Government's second offender notice have merit?

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BENIGO MALAVE,

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**REDACTED BRIEF FOR
THE UNITED STATES OF AMERICA**

Preliminary Statement

From October 2005 through and July 2006, the defendant, Milton Roman, operated a lucrative powder and crack cocaine enterprise in Meriden, Connecticut and the surrounding area, during which time he obtained large quantities of powder cocaine from various sources, much of which he converted to crack cocaine for resale to others. The defendant sold powder and crack cocaine in a variety

of different quantities to a customer base of approximately 35 individuals in and around Meriden. Although the defendant was incarcerated on unrelated state charges from January 2006 through April 2006, he continued to operate his business from prison, directing others to make drug deliveries and collect drug proceeds for him.

In October 2006, the defendant and thirty-four other individuals were charged in a twenty-two count indictment with a variety of narcotics offenses. The defendant pleaded guilty to one count of conspiracy to distribute in excess of five kilograms of powder cocaine and fifty grams of crack cocaine. Prior to the entry of the guilty plea, the Government filed a second offender notice under 21 U.S.C. § 851, which indicated that the defendant faced enhanced penalties based on the allegation that he had sustained at least one prior felony drug offense in state court. At sentencing, after rejecting the defendant's challenge to the second offender notice, the district court imposed a non-guideline sentence of 240 months, which was the mandatory minimum required by statute and 120 months below the bottom of the guideline range set forth in the Pre-Sentence Report.

In this appeal, the defendant claims that the district court erred in three respects. First, he asserts for the first time that the district court violated 21 U.S.C. § 851(b) by failing at the time of the guilty plea to notify him of his right to challenge the second offender notice. Second, he argues, also for the first time, that the district court failed to resolve guidelines disputes with sufficient clarity to allow for meaningful appellate review. Third, in a *pro se*

brief, he claims that the district court erred in concluding that he had a prior felony drug offense and, therefore, was subject to the enhanced penalties set forth under 21 U.S.C. § 841(b). For the reasons set forth below, these claims lack merit.

Statement of the Case

On November 20, 2007, a federal grand jury sitting in New Haven returned a Superseding Indictment against the defendant and others charging him in Count One with conspiracy to distribute fifty grams or more of cocaine base and five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846; in Counts Three and Five with distribution of five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B); in Counts Four, Six and Seven with distribution of fifty grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A); and, in Count Eight with possession with the intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). A20-A24.

On December 4, 2007, the Government filed a second offender notice pursuant to 21 U.S.C. § 851. A13, A25. The notice advised the defendant that, as a result of any one of four listed drug felony convictions, if convicted of Count One, he faced enhanced penalties under 21 U.S.C. § 841(b), including a maximum incarceration term of life, a mandatory minimum incarceration term of twenty years, a maximum supervised release term of life, and a

mandatory minimum supervised release term of ten years. A25-A27.

On December 13, 2007, the defendant changed his plea to guilty as to Count One of the Superseding Indictment. A13-A14, A35. On February 17, 2010, the district court (Peter C. Dorsey, J.) sentenced the defendant to 240 months' imprisonment and 10 years' supervised release. A17, A124. Judgment entered on February 18, 2010. A17.

On February 24, 2010, the defendant filed a timely notice of appeal. A17 (docket entry). The defendant has been incarcerated in federal custody since December 19, 2006 and is currently serving his sentence. *See* Pre-Sentence Report ("PSR") ¶ 2.

Statement of Facts

A. The offense conduct

Had the case against the defendant gone to trial, the Government would have presented the following facts, which were set forth almost verbatim in the Government's February 16, 2010 sentencing memorandum (Government's Appendix ("GA")1-GA22) and the PSR¹ (sealed appendix):

In October 2005, the Federal Bureau of Investigation ("FBI") began an investigation into a Drug Trafficking Organization ("DTO") operating in Meriden, Connecticut.

¹ The Government will cite the PSR directly.

See PSR ¶ 10. Using a cooperating witness, the FBI engaged in several controlled purchases of multi-ounce quantities of cocaine base from a variety of different sources, including the defendant. *See* PSR ¶ 10. In total, the cooperating witness purchased approximately 20 ounces (560 grams) of crack cocaine from the defendant over the course of five separate controlled purchases. *See* PSR ¶ 10. Through these controlled purchases, the FBI identified the defendant as a primary source of supply for cocaine base in Meriden. *See* PSR ¶ 11.

From January 2006 through April 2006, while the defendant was incarcerated in state custody on unrelated charges, he continued to operate his DTO through other co-defendants, providing one of them with his cellular telephones, some cocaine base and directions to service his customers during his period of incarceration. *See* PSR ¶ 11.

When the defendant was released from incarceration in April 2006, he took over operation of his DTO. *See* PSR ¶ 12. At the same time, the FBI received authority from the district court to begin intercepting communications over his two cellular telephones. *See* PSR ¶ 12. The wiretap investigation as to the defendant concluded in June 2006 and established that the defendant distributed cocaine and cocaine base to a customer base of approximately 35 individuals. *See* PSR ¶ 12.

On July 13, 2006, after observing the defendant and one of his associates meet with their source of supply, law enforcement officers stopped their vehicle and seized

approximately 360 grams of powder cocaine. *See* PSR ¶ 13. The officers identified an apartment that the defendant was using as a stash house, obtained a state search warrant for the apartment and seized approximately four ounces of cocaine, drug packaging materials, one Mossberg Shotgun, one Baretta 7.65 caliber pistol with a loaded clip, and one Bahmische Waffenfabrik 7.65 .32 caliber pistol. *See* PSR ¶ 14.

Based on the intercepted telephone calls with his suppliers and customers, it was apparent that the defendant purchased large quantities of powder cocaine and converted these quantities to crack cocaine for redistribution to others. *See* PSR ¶ 15. He also sold various quantities of powder cocaine to his customers. *See* PSR ¶ 15. Over the course of the narcotics conspiracy, the defendant purchased well in excess of five kilograms of powder cocaine and converted it to cocaine base for redistribution to others, so that, based on all of the evidence, which included recorded wiretap conversations, recorded prison conversations, controlled purchases, law enforcement surveillance, and testimony by five cooperating co-defendants, the defendant redistributed well in excess of five kilograms of crack cocaine. *See* PSR ¶ 15.

B. The second offender notice

On December 4, 2007, the Government filed a second offender notice which advised the defendant that it was relying on one of the defendant's prior felony drug convictions to enhance the penalties he faced as a result of

a conviction of Count One of the Superseding Indictment. A25. In the notice, the Government indicated that it would rely on any one of the following convictions: a June 24, 2002 conviction for Attempted Third Degree Criminal Possession of a Controlled Substance, in violation of New York Penal Law § 220.16(1); an October 4, 2000 conviction for Possession of Narcotics, in violation of Conn. Gen. Stat. § 21a-279(a); an October 2, 2000 conviction for Sale of Narcotics, in violation of Conn. Gen. Stat. § 21a-277(a); and a February 20, 1997 conviction for Possession of Narcotics, in violation of Conn. Gen. Stat. § 21a-279(a). A25-A26. The notice explained that, as a result of any one of these prior convictions, the penalties for a conviction of Count One of the Superseding Indictment would increase to a maximum term of life in prison, a mandatory minimum term of twenty years in prison, a maximum fine of eight million dollars, and a supervised release term of at least ten years and as much as life. A26.

C. The guilty plea

The defendant changed his plea to guilty as to Count One of the Superseding Indictment on December 13, 2007. A13-A14, A35. At the time of the guilty plea, the defendant entered into a written plea agreement. A28. As part of the plea agreement, the parties agreed that, as a result of the Government's filing of the second offender notice, the defendant faced, *inter alia*, mandatory minimum penalties of twenty years' incarceration and ten years' supervised release, and maximum terms of life for prison and supervised release. A29. The defendant

specifically reserved his right “to challenge application of the enhanced penalties as a result of the filing of the second offender notice, under 21 U.S.C. § 851(c).” A29. The parties did not enter into a guideline stipulation or a factual stipulation. A28-A34. The parties also reserved their respective appeal rights as to the court’s sentence, and the Government agreed to move to dismiss Counts One through Six of the Indictment, and Counts Three through Eight of the Superseding Indictment after sentencing in this case. A30, A33.

The district court, during the Rule 11 plea colloquy, insured that the defendant had reviewed the plea agreement carefully with his counsel. A49. The court also advised the defendant of the maximum penalties that would apply based on the filing of the second offender notice. A49-A50. The district court did not advise the defendant of his right to challenge the second offender notice.

D. The sentencing proceeding

The PSR found that the defendant distributed in excess of 4.5 kilograms of cocaine base, resulting in a base offense level of 38. *See* PSR ¶ 22. In addition, the PSR found that a four-level role enhancement was appropriate based on the defendant’s supervisory role in his drug trafficking operation and, specifically, his reliance on others to operate his DTO for him which he was incarcerated from January 2006 through April 2006. *See* PSR ¶ 24. The PSR also concluded that a two-level enhancement was appropriate under U.S.S.G.

§ 2D1.1(b)(2) for possession of a firearm in connection with the offense. *See* PSR, Second Addendum. After a three-level reduction for acceptance of responsibility, the defendant's adjusted offense level was 41. *See* PSR, Second Addendum. Having accumulated 28 criminal history points, the defendant fell into Criminal History Category VI and faced a guideline incarceration range of 360 months to life. *See* PSR ¶¶ 46, 84, Second Addendum.

The PSR listed all of the defendant's prior convictions, including the four that were identified in the Government's second offender notice. *See* PSR ¶¶ 31-45. For these convictions, as with all of the convictions, the PSR listed the arrest date, the statutory violation, the court where the conviction occurred, the docket number, the conviction date, and the specific sentence. *See* PSR ¶¶ 36, 42, 43, 44. For the October 2, 2000 sale of narcotics conviction and the October 4, 2000 possession of narcotics conviction, the PSR also set out the specific offense conduct. *See* PSR ¶¶ 42, 43. In addition, the PSR noted that the defendant had reserved his right to challenge "the application of the enhanced penalties as a result of the filing of the second offender notice." *See* PSR ¶ 7.

On February 16, 2010, the Government submitted its sentencing memorandum. GA1-GA22. In that memorandum, the Government indicated that, at the time of the guilty plea, the defendant had reserved his right to challenge the second offender notice under 21 U.S.C. § 851(c). GA3. The Government also characterized the parties' plea agreement as follows:

The parties did not enter into a factual stipulation or a guideline stipulation, and both sides reserved their respective appeal rights. Essentially, the only thing that the parties have agreed to, at this point, is that the defendant faces a mandatory minimum sentence of ten years in jail by virtue of his guilty plea in this case and, more specifically, by virtue of his admission, under oath, that he was involved in a conspiracy to distribute in excess of 50 grams or more of cocaine base and 5 kilograms or more of cocaine.

GA3.

The Government then addressed the defendant's anticipated challenge to the second offender notice by analyzing each of the four convictions listed in the notice. GA12. It agreed with part of the defendant's position and conceded that two of the listed convictions would not count as prior felony drug convictions. Specifically, the Government stated:

The 1997 conviction for possession of narcotics in violation of Conn. Gen. Stat. § 21a-279(a) cannot form the basis for a § 851 enhancement because the guilty plea transcript does not reveal what controlled substance was possessed. Although the defendant pleaded guilty to the offense and freely accepted responsibility for it, at no point did anyone recite the facts underlying the conviction. At this juncture, the 2000 conviction for sale of narcotics in violation of Conn. Gen. Stat. § 21a-

277(a) also does not count because the Government has not yet obtained a transcript of the guilty plea transcript for that case, and the sentencing transcript does not reveal what controlled substance was involved in the defendant's criminal conduct.

GA12. In making this concession, the Government took the position that it was necessary to use the modified categorical approach discussed in *United States v. Shepard*, 544 U.S. 13, 24-26 (2005) to analyze whether any violation of Conn. Gen. Stat. § 21a-277(a) or § 21a-279(a) qualified as a felony drug offense because those statutes criminalized the possession of a few narcotics that were not criminalized under the federal drug statutes. GA10-GA12.

As to the other two listed convictions, however, the Government argued that either of them would qualify as a prior felony drug offense. In the memorandum, the Government claimed:

[T]he 2000 conviction for possession of narcotics in violation of Conn. Gen. Stat. § 21a-279(a) does count under 21 U.S.C. § 851 because the guilty plea transcript reveals that the defendant pleaded guilty without relying on the *Alford* doctrine and that he agreed to the prosecutor's factual basis which included a statement that quantities of crack cocaine and PCP were seized from the defendant's vehicle.

As to the New York conviction, it qualifies, categorically, as a narcotics felony, as that term is defined under 21 U.S.C. § 851 because the New York narcotics statute does not suffer from the same problems as the Connecticut narcotics statutes, and the statute of conviction in the New York case was a “felony drug offense,” as that term is defined by 21 U.S.C. § 802(44).

GA12-GA13.

In the end, the Government asked the Court to “adopt the findings set forth in the PSR, find that the guideline range is 360 months to life, and [conclude] that the Government’s second offender notice was properly filed, so that the defendant face[d] a statutory mandatory minimum sentence of 240 months’ incarceration.” GA21. The Government pointed out that the defendant engaged in this offense “while on parole and, during a four month period, while incarcerated.” GA20. It also argued that “at every sentencing for his prior narcotics felony convictions, the defendant appeared contrite and promised the court that he would stop selling drugs. Instead, the defendant’s criminal conduct became more and more serious, leading up to his criminal conduct in this case.” GA20. Finally, the Government stated that the defendant had “accumulated an astonishing 28 criminal history points and has sustained felony convictions for controlled substance offenses, burglary, and assault” and “has repeatedly violated the terms of his probation and parole” GA20.

On February 17, 2010, the defendant submitted a lengthy sealed sentencing memorandum which challenged several of the guideline calculations set forth in the PSR, emphasized many relevant aspects of the defendant's personal history and characteristics and sought to invalidate the Government's second offender notice. GA23-GA46.² As to the second offender notice, the defendant argued:

Simple possession of drugs is excluded from the category of "controlled substance offense." *U.S. v. Neal*, 27 F.3d 90 (4th Cir. 1994). In order for prior conviction enhancement to be appropriate, it must be demonstrated that Mr. Roman was convicted of a narcotics offense that involved an intent to distribute, which is required for the application of Guidelines § 2K2.1(a)(4)(A). Simple possession is not a qualifying predicate for enhancement based upon a prior conviction. *Id.* at 92 (4th Cir. 1994); *U.S. v. Vea-Gonzales*, 999 F.2d 1326, 1329 (9th Cir. 1993); *U.S. v. Gaitin*, 954 F.2d 1005, 1011 (5th Cir. 1992); *U.S. v. Galloway*[,] 937 F.2d 542 (11th Cir. 1991).

Mr. Roman asserts respectfully to this Court that none of his convictions qualify as a predicate for

² The Government has included the defendant's sentencing memorandum, without its attachments, in its appendix and has filed the appendix under seal because the defendant filed the sentencing memorandum under seal before the district court.

sentence enhancement in accordance with 21 U.S.C. § 851. Accordingly, Mr. Roman contends that he is subject to a 10 year mandatory minimum sentence versus a 20-year mandatory minimum sentence.

GA40.

In the end, the defendant argued that “a term of imprisonment in the range of between ten and twenty years is appropriate given the totality of the circumstances.” GA41.

At the start of the sentencing hearing, the district court attempted to summarize the general nature of the issues it was confronting at sentencing, explaining that “it would be very easy to regard Mr. Roman, for sentencing purposes, as simply a major drug distributor subject to a significant penalty for engaging in conduct which, by virtue of the magnitude of the drug distribution over which he presided, merits a very substantial sentence because of the negative impact that is has imposed on the community.” A80. But, “maybe there is a good deal more than meets the eye, as far as Mr. Roman is concerned, maybe he is a demolished person psychologically, in many respects, [and] . . . his present posture, as reflected in his letter that accompanied your memorandum, and his discussion with the psychiatrist who did the examination and evaluation, is indeed a recognition on his part of a very substantial mental health problem going back many, many years” A79-A80. The court wanted to insure that it “impose[d] a sentence that does deal with the seriousness of his drug

distribution involvement but, at the same time, also ensures that in the course of his period of incarceration he is provided and required to participate in, a psychiatric counseling and therapy program that will deal with the situation as particularly described not only in his letter, but in the report of the evaluating psychiatrist.” A82-A83.

At that point, the court attempted to summarize the parties’ positions as to the applicable maximum penalties and sentencing guideline range. The court stated:

I’m a little unclear as to the position that each of you is taking with respect to the guideline calculation. If you go to the real extreme, as the Government has some tendency to do, we’d be dealing with a minimum sentence of 360 months and a maximum of life, with a mandatory minimum of 20 years.

Then, if we eliminate two or three of the prior convictions on the basis that they do not constitute a basis for an enhancement because of the question about the drugs that were involved, in view of the way the state butchered the sentencing scheme, you get to a point where you’d be dealing with a mandatory minimum sentence of ten years, and that would go with a guideline sentencing range that I’m not sure about.

GA84. Defense counsel then replied, “Well, Your Honor, I have to say notwithstanding the Court’s comments, I thought our position was pretty clear in the memorandum

and that is we believe that what is applicable is a ten-year mandatory minimum, not the 20, and for the reasons that we specified in the memorandum; that is, essentially that there's no predicate for the enhancement because of the simple possession and because of the lack of clarity, if you will, with the state statutes, Your Honor." A84-A85.

At the Government's suggestion, before continuing to discuss the disagreement as to the statutory penalties, the court clarified that the defendant had read the PSR, had no objections to the factual statements contained in it, and did not want any information added to it. A85-A86. The Government likewise indicated that it had reviewed the PSR and its addenda and had no objections to any of the information contained therein. A86.

The Government then addressed the court's question regarding the applicable statutory penalties. It argued:

As to the 851 issue, Your Honor, I don't think it's a close call, and the reason for that is because I have a sentencing transcript from October 4th, 2000 which establishes the type of drug involved, and the offense was a felony drug offense of possession of narcotics. It's one of the four convictions that I listed on the 851 notice.

As Your Honor knows, under the statute, 21 U.S. Code, Section 851, the definition of a drug – or a narcotics felony offense – or a “felony drug offense” does not include the element of

distribution. That is only applicable in determining whether somebody is a career offender.

I've already conceded the issue that Mr. Roman is not a career offender, despite the fact that he has prior convictions for third degree burglary, second degree assault, . . . attempted possession of a controlled substance in the third degree in New York, which includes the element of distribution, and sale of narcotics, . . . because of the lack of specificity in the transcripts, or . . . the lack of transcripts

But as to the 851 issue, . . . [t]here are two convictions which count. One is the New York felony conviction from 2002 because the New York statutes do not suffer . . . the same problems that the Connecticut statutes suffer from, so that the fact of the conviction categorically will qualify him under 851, and the second conviction would be the October 4th, 2000 conviction

A87-A88. The Government submitted, as exhibits, the court transcripts for the three Connecticut convictions listed in the second offender notice. A88; Exs. 1-3.

The Government also addressed the guideline calculation, pointing out that the defendant had decided to concede that the two-level gun enhancement applied to him, arguing that the PSR's role enhancement was appropriate based on evidence that the defendant had used others to run his DTO for him while he was in prison, and

discussing the evidence establishing the quantity of cocaine base attributable to the defendant's conduct. A88-A93. As to quantity, the Government indicated that, even if the court considered only the amounts of crack cocaine that the defendant himself sold to the cooperating witness (560 grams) and to his co-defendants (1400 grams), the total amount of crack cocaine would exceed 1.5 kilograms, so that the guideline incarceration range of 360 months to life would not change. A92-A93.

The defendant confirmed his agreement that the gun enhancement was appropriate and even conceded, in a lengthy colloquy with the court, that he had left his cellular telephones with an associate to keep his business operational while he was in jail.³ A93, A98.

At that point, the court turned to defense counsel and asked,

[H]ow does this play out in terms of the sentencing guidelines? Mr. Spector says that with all that has been said, that there is evidence that a sufficient amount of drugs were being processed as to invoke a 360 [months] . . . to life for the sentencing

³ In supporting the PSR's conclusion that a four-level role enhancement was appropriate, the Government pointed out, "He didn't just give him the phones. He gave him 180 grams of crack." A99. The Government also submitted as an exhibit approximately twenty pages from a wiretap affidavit which detailed the content of the prison calls wherein the defendant directed others to run his business. A99; Ex. 4.

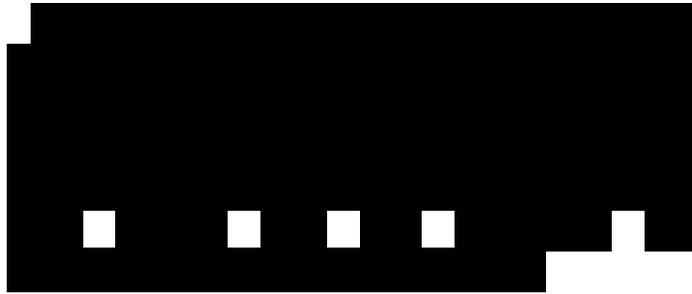
guideline range, and that based upon the amount of drugs that were being shown, and the instances of previous dealing with the gun warrants a 240 [month] mandatory minimum. Why not? That's what he argues.

A100. Defense counsel replied, "Well, Your Honor, with respect to the mandatory minimum, as I have suggested to the Court, we rely on our memorandum which indicates that there's not a prerequisite. . . . We don't agree with the Government. That should be no surprise to the Court. That's a decision, obviously, the Court has to make." A101.

Defense counsel then stated, "There's a couple of things that I'd like to just emphasize, and that's the section I drafted regarding [REDACTED].

[REDACTED]

[REDACTED]



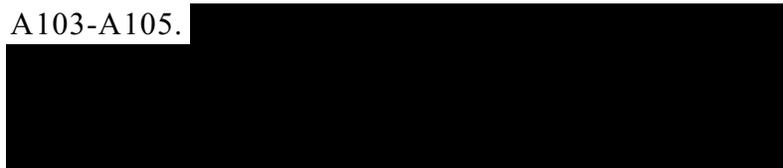
* * *



* * *



A103-A105.



[REDACTED]

When the court asked for more information, the Government explained:

[REDACTED]

[REDACTED]

[REDACTED]

Based on its review of the sentencing memoranda and the PSR, as well as its consideration of the comments made by the Government, defense counsel and the defendant himself, who addressed the court at length during the sentencing hearing, the court determined that a non-guideline sentence of 240 months' incarceration was

appropriate. A117. In explaining its reasoning, the court stated as follows:

Now, I should note that the reason for my departure from the guideline calculation to a 20-year sentence in the first place, is the floor is set by the mandatory minimum, but I would not that the Defendant has demonstrated in the record,

[REDACTED]

Further, I would note that he has, to a degree, on his own, accomplished an element of rehabilitation.

I will note that he has a mental health problem with a diminished capacity.

I will note that he has dependents whose benefit he is subject to.

I would note that the length of his detention was more stressful than would be normally appropriate in a period of incarceration.

I would note that his upbringing gave him far less of an ability to develop the character and strengths of personality that would have helped him to develop a sense of moral responsibility that might very well have alleviated some of the predisposition that got him into trouble with the conduct for which he stands convicted here.

However, I note that the 20-year mandatory minimum of – which prevails under Section 18 – 851 is not something that any of the grounds of departure avoid.

A120-A121.

The court then asked if it “missed” anything, and the Government replied, “Your Honor, I think it would make sense for Your Honor to just find that the Defendant qualifies as a second offender. . . . I know you implicitly found it, but I think just so the record’s clear for the appeal, that you found that he has sustained a prior drug felony conviction.” A121-A122. In response, the court stated, “Well, that’s why I said that the requirement of any departure was subject to the mandatory minimum as provided by Section 851, which does prevail, okay? Any question, Mr. Bansley?” A122. Defense counsel replied, “No sir.” A122.

In the written judgment, the district court indicated that the sentence was “imposed pursuant to the Sentencing Reform Act of 1984,” but offered no additional justification for the reduction. A124. In the Amended Statement of Reasons, signed by the court on June 8, 2010, the court adopted the PSR “without change,” indicated that it was imposing a mandatory minimum sentence, and found that the guideline incarceration range was 360 months to life. A127. The Statement of Reasons also represented that the court imposed a non-guideline sentence and cited to 18 U.S.C. §§ 3553(a)(1), 3553(a)(2)(A), 3553(a)(2)(B), 3553(a)(2)(C),

3553(a)(2)(D) and 3553(a)(6). A128-A129. In explaining its justification for imposing a non-guideline sentence, the court stated:

The Court cites several reasons for imposing a sentence below the advisory guideline range, including: [REDACTED]; a degree of rehabilitation demonstrated by the defendant during his detention; the defendant's mental health conditions; his dependents in the community; the length of the defendant's pretrial detention; and the issues related to the defendant's childhood.

A129.

Summary of Argument

I. The district court did not commit plain error in failing to advise the defendant prior to sentencing, in accordance with 21 U.S.C. § 851(b), that he had the right to challenge his status as a second offender. Although the court did not comply with § 851(b), this failure to comply did not substantially prejudice the defendant. The defendant expressly reserved his right to challenge the second offender notice in the written plea agreement. He certainly understood that he had the right to challenge the second offender notice and did so in advance of sentencing. He also maintained this position at sentencing. Thus, any failure to advise the defendant of his rights

under § 851(b) did not substantially prejudice him or impact the fairness of the judicial proceedings.

II. The district court did not commit plain error in failing to explain its reasons for its sentence and failing to calculate the guideline range. The court explicitly found that the defendant was a second offender and gave specific, detailed reasons for imposing a sentence that was far below the guideline range. In explaining its sentence, the district court provided reasons and justifications that reveal a serious consideration of the factors set forth under 18 U.S.C. § 3553(a). Moreover, any alleged procedural error was harmless because the defendant received the statutory mandatory minimum sentence, which was the lowest sentence he could have received regardless of the guideline calculation and the resolution of any of the disputed adjustments.

III. The defendant's *pro se* challenge to the Government's second offender notice fails because it ignores the fact that one of the prior Connecticut convictions listed in the notice did not result from an *Alford* plea and involved criminal conduct, *i.e.*, the possession of crack cocaine and PCP, which qualified the offense as a felony drug offense under 21 U.S.C. § 802(44).

Argument

I. The district court did not commit plain error in failing to inform the defendant of his right to challenge the convictions set forth in the second offender notice.

The defendant claims for the first time on appeal that the district court violated 21 U.S.C. § 851(b) by failing to inform him prior to sentencing that he had the right to challenge the convictions set forth in the second offender notice. The parties do not dispute that the district court failed to comply with § 851(b); the question to resolve is whether this failure substantially prejudiced the defendant. *See* Def.’s Brief at 13-14.

A. Relevant facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing law and standard of review

1. Section 851

“Congress established a specific, multistep procedure to be followed before an enhanced sentence is imposed based on a prior felony drug conviction.” *United States v. Espinal*, 634 F.3d 655, 662 (2d Cir. 2011). First, the Government must “file and serve on the defendant, before trial or guilty plea, an information ‘stating in writing the previous convictions to be relied upon.’” *Id.* (quoting 21

U.S.C. § 851(a)(1)). “If the defendant is then found guilty of, or pleads guilty to, the underlying offense, the court must ask the defendant, after conviction but before sentence is imposed, ‘whether he affirms or denies that he has been previously convicted as alleged in the information.’” *Id.* (quoting 21 U.S.C. § 851(b)). Although there is no requirement that “the court make this inquiry at the plea proceeding, or at any other particular time,” *Espinal*, 634 F.3d at 663 n.4, “[s]ection 851 clearly requires that before a sentence is imposed, the court must ask the defendant personally to affirm or deny whether he has been previously convicted as set forth in the information.” *Id.* at 663. The court must also tell the defendant “that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.” *Id.* at 662 (quoting 21 U.S.C. § 851(b)). “The purpose of § 851(b) is to place the procedural onus on the district court to ensure defendants are fully aware of their rights.” *Id.* at 665 (internal quotation marks omitted).

If a defendant wants to challenge “any allegation of the information,” he must “file a written response to the information.” *Espinal*, 634 F.3d at 662 (quoting 21 U.S.C. § 851(c)(1)). The district court must then “hold a hearing to determine any issues raised by the response which would exempt the person from increased punishment.” *Id.* (quoting 21 U.S.C. § 851(c)(1)). At any hearing, the Government has “the burden of proof beyond a reasonable doubt on any issue of fact.” *Id.* (quoting 21 U.S.C. § 851(c)(1)). Any person claiming that the prior conviction “was obtained in violation of the Constitution”

must state the basis for his claim “with particularity in his response to the information” and “shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response.” 21 U.S.C. § 851(c)(2).

“Failure to adhere to the letter of § 851’s procedures does not automatically invalidate the resulting sentence.” *Espinal*, 634 F.3d at 665. Violations of § 851’s requirements are subject to harmless error review. *Id.* “[T]here is no reason why non-prejudicial errors in complying with the procedural requirements of § 851 should require reversal.” *Id.*

2. Plain error

A defendant may – by inaction or omission – forfeit a legal claim, for example, by simply failing to lodge an objection at the appropriate time in the district court. Where a defendant has forfeited a legal claim, this Court engages in “plain error” review pursuant to Fed. R. Crim. P. 52(b). Applying this standard, “an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an ‘error’; (2) the error is ‘clear or obvious, rather than subject to reasonable dispute’; (3) the error ‘affected the appellant’s substantial rights, which in the ordinary case means’ it ‘affected the outcome of the district court proceedings’; and (4) ‘the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009)); *see also Johnson v. United States*, 520

U.S. 461, 467 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir.), *cert. denied*, 130 S. Ct. 2394 (2010).

“To be plain, the error must be clear or obvious . . . at the time of appellate review.” *United States v. Villafrerte*, 502 F.3d 204, 209 (2d Cir. 2007) (internal citations omitted). “In fact, the threshold is high enough that the Supreme Court has stated that the error must be so plain that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant’s timely assistance in detecting it.” *Id.* (internal quotation marks omitted).

To “affect substantial rights,” an error must have been prejudicial and affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, “[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” *Id.*

This Court has made clear that “plain error” review “is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings.” *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted).

This Court has yet to decide whether plain error review applies when a defendant does not object to the district court's failure to comply with § 851. *See Espinal*, 634 F.3d at 665 n.7. The Court did not decide this issue in *Espinal* because the Government had not argued for plain error review. *Id.* The Court noted, however, that several other courts had applied plain error review in this context, although "at least one sister court ha[d] argued that the logic behind reviewing unpreserved claims for plain error . . . does not apply to § 851(b) procedural deficiencies, because one purpose of § 851(b) is to ensure that the defendants are fully aware of their rights." *Id.* (citing cases).

In this case, this Court should review for plain error. Here, there is no question that the defendant was fully aware of his rights under § 851. Unlike the defendant in *Espinal*, the defendant in this case specifically reserved his right to challenge the Government's second offender notice in the written plea agreement. In that agreement, the parties cited to 21 U.S.C. § 851(c) in explaining that the defendant was reserving his right to challenge his status as a second offender and, as a result, application of 21 U.S.C. § 841(b)'s enhanced penalties. A29. Moreover, the defendant explicitly challenged his status as a second offender in his written sentencing memorandum. GA40. Thus, this defendant certainly understood his rights under § 851 and exercised those rights prior to sentencing. For this reason, the plain error standard should apply. *See United States v. Dickerson*, 514 F.3d 60, 65 (1st Cir. 2008) (holding that plain error review applies where defendant fails to object to § 851 procedural deficiencies below);

United States v. Craft, 495 F.3d 259, 265 (6th Cir. 2007) (same); *United States v. Mata*, 491 F.3d 237, 244 (5th Cir. 2007) (same); *United States v. Ellis*, 326 F.3d 593, 598 (4th Cir. 2003) (same); *but see United States v. Baugham*, 613 F.3d 291, 295-96 (D.C. Cir. 2010) (declining to apply plain error review), *cert. denied*, 131 S. Ct. 1510 (2011). *See also Puckett*, 129 S. Ct. at 1429 (noting that Supreme Court has “repeatedly cautioned” against expanding the authority to correct forfeited errors beyond what is provided by the Rules).

C. Discussion

There is no dispute that the district court failed to comply with the strict requirements of § 851(b). The court did not inform the defendant at any time prior to the imposition of sentence that he had the right to challenge the allegations set forth in the second offender notice. The only issue to resolve on appeal, therefore, is whether this failure prejudiced the defendant.⁴

The district court’s failure to comply with § 851(b) did not prejudice the defendant because the record reflects that he was fully aware of his rights under that statute. First, the defendant explicitly reserved his right to challenge the

⁴ Should the Court conclude that plain error review is appropriate, the operative question would be whether the defendant has sustained his burden of showing that the district court’s error in failing to comply with § 851(b) substantially prejudiced him and seriously impacted the fairness of the judicial proceedings.

second offender notice in the written plea agreement – an agreement he stated he had read and understood. *See* A49. Indeed, in the agreement, the parties explicitly referenced 21 U.S.C. § 851(c), showing that the defendant was well aware of his right to challenge the second offender notice when he pleaded guilty. A29.

Second, the PSR stated that the defendant was challenging the validity of the second offender notice and provided specific details about each of the four convictions that were set forth in the notice. *See* PSR ¶ 7. At sentencing, the court confirmed that the defendant had had a chance to read and review the PSR. A85-A86.

Third, the Government filed a written sentencing memorandum which stated that, under the written plea agreement, the parties had not agreed on whether the defendant was a second offender and on whether the enhanced penalties under 21 U.S.C. § 841(b) applied. GA3. The Government analyzed each of the convictions set forth in the second offender notice to determine whether any qualified as prior drug felony offenses and determined that, under the modified categorical approach, the defendant's 2000 Connecticut conviction for possession of narcotics qualified, and, under the categorical approach, the defendant's 2002 New York conviction for attempted third degree criminal possession of a controlled substance qualified. GA10-GA13. At the same time, the Government conceded that neither the defendant's Connecticut 1997 conviction for possession of narcotics, nor his 2000 conviction for sale of narcotics counted as felony drug offenses. GA12.

Fourth, the defendant challenged the allegations in the second offender notice in his written sentencing memorandum, which was filed prior to sentencing. A17, GA40. In that memorandum, the defendant did not deny the existence of any of the four convictions or allege that he had not sustained them, but instead argued that none of the convictions qualified as a felony drug offense, as that term is defined by 21 U.S.C. § 802(44). GA40. The crux of the defendant's argument was that the prior convictions did not involve the distribution of narcotics and therefore could not be used to enhance his statutory penalties. GA40.

Finally, at the sentencing hearing, the district court specifically addressed the defendant as to the applicable statutory penalties, and the defendant twice repeated the position he had taken in his sentencing memorandum that he was not a second offender and that the Government's second offender notice should be rejected. A84-A85, A101.

In short, the court's failure to comply with § 851(b) did not prejudice the defendant because the record shows that he knew about this right, reserved his right to exercise it at the time of his guilty plea, and then exercised it by challenging the second offender notice in his written sentencing memorandum and in his oral statements at sentencing.

In his brief, the defendant fails to address whether the district court's non-compliance with § 851(b) prejudiced him. The Court's decision in *Espinal*, however, made clear

that this inquiry is essential.⁵ In *Espinal*, the Court held that strict compliance with § 851 was not required, and that only those errors in the § 851 procedures that prejudiced a defendant required reversal. 634 F.3d at 665. On the facts of the case before it, the *Espinal* Court found that a district court’s failure to comply with § 851(b) *did* prejudice the defendant and, therefore, required a remand to allow the defendant to challenge the second offender notice. *See Espinal*, 634 F.3d at 666-667.

The facts in *Espinal* are distinguishable from the facts in this case. In *Espinal*, the defendant claimed on appeal that the Government had failed to establish beyond a reasonable doubt the existence of the sole conviction listed in the second offender notice. *See id.* at 661. In particular, he argued that “the proof was insufficient to establish that he was the defendant in the Massachusetts case set forth in the Prior Felony Information.” *Id.* (internal quotation marks and alteration omitted). In analyzing this claim, this Court stated:

We acknowledge that the evidence is not beyond question. The rap sheet states on its face that it has not been verified by a fingerprint search, the personal information in the Massachusetts documents does not exactly match [the defendant’s], and the record says nothing about

⁵ The defendant filed his brief four days after this Court decided *Espinal*, although the case is not discussed in his brief. The defendant subsequently submitted a letter notifying the Court of the *Espinal* decision and its relevance to this appeal.

how the government came to associate those documents with [this defendant].

Id. The Court then faulted the district court for failing to hold an evidentiary hearing to determine whether the defendant did sustain the conviction listed in the second offender notice. *Id.* In particular, the Court explained that it could not review the sufficiency of the evidence submitted to establish the prior conviction because the Government had not had “a fair opportunity to gather and present its proof.” *Id.* at 662.

With this backdrop, the Court concluded that the district court’s failure to comply with the procedural requirements of § 851 were prejudicial. *See id.* at 666. In short, the Court was concerned that the defendant’s failure to file a written challenge to the Government’s information – a failure possibly caused by the court’s failure to follow the procedures outlined in § 851 – impacted the burden of proof that the district court applied in finding that the defendant was a second offender and truncated the factual hearing that the district court should have conducted to resolve the issue. *See id.* at 666-667.

Here, there is no evidence that the defendant was prejudiced at all by the district court’s noncompliance with § 851(b). To the contrary, the defendant clearly knew his right to challenge the allegations contained in the second offender notice because he explicitly reserved that right in the written plea agreement. Moreover, the defendant did challenge the allegations set forth in the notice. Although he acknowledged that he had sustained the convictions set

forth in the notice and the PSR, he maintained that these convictions did not qualify as felony drug offenses. Indeed, the Government conceded, in response to this challenge, that two of the four convictions listed in the notice would not qualify. In other words, unlike in *Espinal*, there is no argument in this case that a remand with direction to the district court to provide the notice required under § 851(b) would achieve any benefit for the defendant or produce any other result. Indeed, the defendant does not even identify any arguments that he would have made to challenge his convictions had the district court fully complied with § 851(b).

In sum, in the absence of some showing that the district court's failure to strictly comply with § 851(b) prejudiced the defendant, there is no basis for reversal here.

II. The district court's alleged failure to make explicit findings on the guidelines calculations was not plain error because the defendant was sentenced to the mandatory minimum term of imprisonment.

The defendant claims for the first time on appeal that the district court's factual findings as to various guideline calculations and as to the defendant's objection to the second offender notice were not sufficiently specific to allow for meaningful appellate review. *See* Def.'s Brief at 14. This claim has no merit.

A. Relevant facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). *See Booker*, 543 U.S. at 243. The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. *See id.* at 245. As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines “effectively advisory.” *Booker*, 543 U.S. at 245.

After the Supreme Court’s holding in *Booker* rendered the Sentencing Guidelines advisory rather than mandatory, a sentencing judge is required to: “(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence.” *See United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

Consideration of the guidelines range requires a sentencing court to calculate the range and put the

calculation on the record. *See Fernandez*, 443 F.3d at 29. The requirement that the district court consider the section 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Id.*; *Rita v. United States*, 551 U.S. 338, 356-59 (2007) (affirming a brief statement of reasons by a district judge who refused downward departure; judge noted that the sentencing range was “not inappropriate”). There is no “rigorous requirement of specific articulation by the sentencing judge.” *Crosby*, 397 F.3d at 113. And although the judge must state in open court the reasons behind the given sentence, 18 U.S.C. § 3553(c), “robotic incantations” are not required. *See, e.g., United States v. Goffi*, 446 F.3d 319, 321 (2d Cir. 2006). “As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, [this Court] will accept that the requisite consideration has occurred.” *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005).

This Court reviews a sentence for reasonableness. *See Rita*, 551 U.S. at 341; *Fernandez*, 443 F.3d at 26-27. Reasonableness review has generally been divided into procedural and substantive reasonableness. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). For a sentence to be procedurally reasonable, the sentencing court must calculate the guideline range, treat the guideline range as advisory, and consider the range along with the other § 3553(a) factors. *Id.* at 190. Where

a defendant fails to object at the time of sentencing to the district court's alleged procedural error in not fully considering the § 3553(a) factors or in making a mistake in the guideline calculation, this Court reviews the claim for plain error. *See Villafuerte*, 502 F.3d at 208.

In some cases, a “significant procedural error,” may require a remand to allow the district court to correct its mistake or explain its decision, *see Cavera*, 550 F.3d at 190, but when this Court “identif[ies] procedural error in a sentence, [and] the record indicates clearly that ‘the district court would have imposed the same sentence’ in any event, the error may be deemed harmless, avoiding the need to vacate the sentence and to remand the case for resentencing.” *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (quoting *Cavera*, 550 F.3d at 197), *cert. denied*, 130 S. Ct. 1149 (2010) and *cert. denied*, 130 S. Ct. 2128 (2010). Indeed, this Court has held that where the district court imposes a statutory mandatory minimum sentence which “represented the lowest term of incarceration permitted by law[,]” any claimed procedural error would be “necessarily harmless as it could not have supported any lesser sentence.” *United States v. Parker*, 577 F.3d 143, 147-148 (2d Cir. 2009); *see also United States v. Sharpley*, 399 F.3d 123, 127 (2d Cir. 2005); *United States v. Feldman*, 647 F.3d 450, 458 (2d Cir. 2011) (noting that under *Parker*, an error in the guidelines calculation is harmless if “it could not have supported any lesser sentence” (quoting *Parker*, 577 F.3d at 147-48)).

C. Discussion

The defendant argues, for the first time on appeal, that the district court did not “make any specific rulings on the issues raised, nor did he state that he was accepting the factual conclusions of the Presentence Report.” Def.’s Brief at 14-15. Specifically, he claims that the district court failed to make specific findings as to the disputed issues of the defendant’s role in the offense, the quantity of narcotics attributable to the defendant, the firearms enhancement, and the defendant’s status as a second offender. *See* Def.’s Brief at 15-16.

First, on some of these points, the defendant mis-reads the record. The defendant specifically conceded the application of the two-level firearms enhancement, and withdrew his challenge to that enhancement. A93. In light of this concession, the district court had no obligation to “resolve” a non-issue. And after conceding the issue below, the defendant should not be heard in this Court to complain about the district court’s failure to resolve the “dispute.” *See United States v. Quinones*, 511 F.3d 289, 321 (2d Cir. 2007) (“The law is well established that if, as a tactical matter, a party raises no objection to a purported error, such inaction constitutes a true waiver which will negate even plain error review.”) (internal quotation marks omitted).

In addition, the district court explicitly rejected the defendant’s challenge to the second offender notice both in its oral statement of reasons supporting its sentencing decision and in response to the Government’s question at

the conclusion of the sentencing hearing as to the court's ruling on the second offender issue. A120-A122. To be sure, the district court did not specifically identify which of the two convictions it found qualified as prior felony drug offenses to enhance the defendant's sentence under § 851, *see* Def.'s Brief at 15, but given the arguments before it, there was no reason to do so. The defendant's *only* challenge to the convictions listed in the second offender notice was an argument that applied to *all* of the convictions, *i.e.*, that mere possession offenses did not qualify as prior felony drug offenses under 21 U.S.C. § 841. *See* GA40. The defendant offered no reason to distinguish the two convictions that the Government relied upon to enhance his sentence, and thus there was no need for the court to do so. Accordingly, when the district court stated that the defendant was subject to a 240-month mandatory minimum sentence based on the second offender notice, the court necessarily rejected the defendant's arguments with respect to *both* prior convictions. Put another way, the district court found that both of his prior convictions – his 2000 Connecticut conviction for possession of narcotics and his 2002 New York conviction for attempted third degree criminal possession of a controlled substance – qualified as prior felony drug offenses.

The defendant correctly notes, however, that, in its oral statements at sentencing, the district court did not make explicit findings as to the quantity of crack cocaine involved in the offense, the defendant's role in the offense, or the ultimate guideline incarceration range. A fair reading of the record suggests, however, that the district

court concluded that the guideline incarceration range was 360 months to life and that the mandatory minimum incarceration term was 240 months – the precise terms outlined in the PSR.⁶ The district court found that the mandatory minimum applied as a result of the filing of the second offender notice. A120-A121. It referenced the second offender notice in explaining its sentence and then clarified, in response to a question by the Government, that it had found the defendant to be a second offender. A121-A122. In addition, it referred to its ultimate sentence as a “departure from the guideline calculation to a 20-year sentence.” A120. Further, in its Amended Statement of Reasons, the court indicated that the guideline incarceration range was 360 months to life and characterized the ultimate sentence as one imposed outside of the advisory guideline range. A127.

Even more important, the court provided several specific reasons to support its ultimate sentencing decision that the mandatory minimum term was appropriate. It referenced the defendant’s [REDACTED], his rehabilitation, his mental health issues, his family responsibilities, the stress of his pretrial detention, and his

⁶ In fact, when the court directly asked defense counsel at sentencing if he agreed with the Government’s position that the guideline range was 360 months to life and the mandatory minimum incarceration term was 240 months, defense counsel replied that he was maintaining his objection to the second offender notice, but, raised no additional objection to the guideline range and simply chose, at that point, to argue in support of a downward departure. A100-A101.

difficult childhood. A120-A121. These are all factors that can be, and should be, taken into account under 18 U.S.C. § 3553(a). In providing this explanation for its sentence, the district court certainly gave this Court a sufficient factual record to allow for meaningful appellate review.

To the extent that the court made any procedural error in failing to adopt the factual findings contained in the PSR or in failing to explicitly articulate the guideline range, those errors were harmless and had absolutely no impact on the ultimate sentence. As noted above, the court imposed the statutory mandatory minimum sentence in this case. Any alleged error in the guideline calculation, or in the failure to make more explicit findings about the guideline range, was entirely irrelevant and could not have supported a sentence lower than the sentence imposed. Even if, on remand, the district court were to find explicitly in the defendant's favor on the issues he now raises, he could achieve a sentence no lower than 240 months' incarceration, which was the court's sentence and is the mandatory minimum sentence required by statute.

In *Parker*, 577 F.3d 143, this Court addressed an analogous situation where the defendant, who was sentenced to a mandatory minimum term, claimed that the district court erred in calculating the criminal history category based on its alleged improper consideration of a prior marijuana conviction. *See id.* at 147. The Court affirmed the sentence without addressing the claimed error because the challenged sentence was below the guideline range and at the mandatory minimum set by statute so that "any error in the calculation of Parker's criminal history was

necessarily harmless as it could not have supported any lesser sentence.” *Id.* at 148; *compare Parker*, 577 F.3d at 147-148, *and Sharpley*, 399 F.3d at 127 (declining to review procedural error claim because any error in guideline calculation could not have impacted mandatory minimum sentence) *with United States v. Folkes*, 622 F.3d 152, 158 (2d Cir. 2010) (per curiam) (remanding case for re-sentencing where there was no mandatory minimum and the district court’s plain error in miscalculating guideline range “seriously affect[ed] the fairness of [the] judicial proceedings” by leading to a calculation “that was more than twice the correct range”).

III. The defendant’s *pro se* challenge to his second offender notice lacks merit.

The defendant submitted a supplemental *pro se* brief challenging the convictions underlying the Government’s second offender notice. Essentially, this brief argues that none of the Connecticut narcotics convictions listed in the second offender notice are felony drug offenses under 21 U.S.C. § 841(b).

A. Relevant facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing law and standard of review

Pursuant to the penalty provisions set forth in 21 U.S.C. § 841(b)(1), enhanced penalties – including

increased mandatory minimum and maximum terms of imprisonment – apply if the offense of conviction was committed after the defendant sustained a conviction for a “felony drug offense.” Under the applicable definitions section of the Controlled Substances Act (“CSA”), the term “felony drug offense” has the following meaning:

The term “felony drug offense” means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

21 U.S.C. § 802(44). Each category of substance included in the definition is itself a defined category of substance under the CSA. For example, the term “narcotic drug” is defined as follows:

The term “narcotic drug” means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

- (A) Opium, opiates, derivatives of opium and opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such

- isomers, esters, ethers, and salts is possible within the specific chemical designation
- (B) Poppy straw and concentrate of poppy straw.
 - (C) Coca leaves
 - (D) Cocaine
 - (E) Ecgonine . . .
 - (F) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subparagraphs (A) through (E).

21 U.S.C. § 802(17); *see also* 21 U.S.C. §§ 802(16) (defining marihuana), 802(41) (defining anabolic steroid), 802(9) (defining depressant or stimulant substance (which includes substances with a potential for abuse due to their hallucinogenic effect)). These categories of substance are controlled in various places within the federal Schedules of Controlled Substances. *See, e.g.*, 21 C.F.R. § 1308.12 (listing as Schedule II controlled substances “opium” and “opiate,” substances specifically identified in the definition of “narcotic drug” in the CSA).

In light of the Sixth Amendment concerns discussed in *Shepard v. United States*, 544 U.S. 13, 24-26 (2005), the categorical and modified categorical approaches developed by courts for analyzing sentencing enhancements under the Armed Career Criminal Act and the Sentencing Guidelines should be employed in determining whether a prior conviction constitutes a predicate offense for second offender enhancements under 21 U.S.C. §§ 841(b)(1) and 851. Courts start with a

“categorical approach” in determining whether a prior conviction qualifies as a predicate offense, looking first to the “fact of conviction” and “the statutory definition of the prior offense of conviction rather than to the underlying facts of that offense.” *Folkes*, 622 F.3d at 157. However, when the state statute criminalizes both conduct included in the relevant federal statute and conduct not covered by the federal statute, courts conduct a second inquiry, using a “modified” categorical approach to examine certain sources beyond the mere fact of conviction. *See Taylor v. United States*, 495 U.S. 575, 602 (1990) (where trial has taken place, court may look to documents such as indictment, information and jury instructions); *see also United States v. Savage*, 542 F.3d 959, 964 (2d Cir. 2008). In cases that are resolved short of trial, to prove that the prior conviction qualifies as a predicate offense, the Government may rely upon court documents such as “the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or . . . some comparable judicial record of this information.” *Shepard*, 544 U.S. at 26; *see also Savage*, 542 F.3d at 966.

Conn. Gen. Stat. § 21a-277(a) makes it a felony offense to engage in conduct with respect to two categories of substance on Connecticut’s Controlled Substances Schedules: “hallucinogenic substance[s] other than marijuana” and “narcotic substance[s].” *Id.* The primary question with respect to the categorical analysis in this matter is whether these two categories at the time of defendant’s conviction included substances not covered by

the categories of federally controlled substances enumerated in the definition of felony drug offense at 21 U.S.C. § 802(44). The answer, in short, is that at the time of the defendant's convictions, Conn. Gen. Stat. § 21a-277(a) was over-inclusive in relation to 21 U.S.C. § 802(44). In other words, Connecticut law criminalized conduct relating to substances that were not covered by federal law. This was so because in May 1986, in an effort to conform its controlled substance schedules to federal law, the State of Connecticut listed on its Controlled Substance Schedule I two obscure chemicals, thenylfentanyl and benzylfentanyl, which it categorized as "narcotic substances," but these substances have not been controlled as narcotics under federal law since November 29, 1986, when DEA's temporary, emergency scheduling of them expired as a matter of law.⁷

⁷ In 1985, the DEA added those two chemicals (and others) on a temporary, emergency basis to the federal Schedule of Controlled Substances – and those additions were published in the Federal Register. In May 1986, the Connecticut legislature added all of the newly scheduled chemicals to its own list, to ensure that state and federal law tracked each other. Based on later federal testing, however, it was determined that the two drugs were not pharmacologically active, and so on November 29, 1986, their emergency listing was allowed to expire. That expiration was not flagged in the Federal Register or the Code of Federal Regulations, and so Connecticut never removed those two chemicals from their own listings. Consequently, despite a pronounced overall trend in Connecticut's regulation of controlled substances toward conformance with federal scheduling, and notwithstanding that
(continued...)

The same is true for Connecticut convictions under § 21a-279(a), which statute makes it a felony offense to engage in conduct with respect to “any narcotic substance.” *Id.* As summarized above, the modified categorical approach is necessary for offense conduct after November 29, 1986, which was the expiration date of the federal temporary listing of the State-controlled “narcotics” thenylfentanyl and benzylfentanyl.

A district court’s decision involving primarily an issue of fact will be reviewed for clear error, and a district court’s decision involving primarily an issue of law will be reviewed *de novo*. See *United States v. Vasquez*, 389 F.3d 65, 75-76 (2d Cir. 2004).

C. Discussion

Because the Connecticut statutes at issue criminalize conduct involving substances not covered by federal law, the court must apply the modified categorical approach to determine whether the defendant’s convictions qualified as prior felony drug offenses under § 841(b). To this end, as the Government explained in its sentencing memorandum, it had obtained the certified copies of

⁷ (...continued)

these obscure substances have in all likelihood never served as the basis of a single prosecution or conviction, categorical reliance on a conviction under Conn. Gen. Stat. § 21a-277(a) is precluded because of the abstract theoretical possibility that he might have been convicted of conduct relating to thenylfentanyl and benzylfentanyl.

conviction, the guilty plea transcripts and/or the sentencing transcripts for the three Connecticut convictions listed in the second offender notice. GA12; Exs. 1-3.

After reviewing those documents, the Government concluded – and explained to the court – that the defendant’s 1997 conviction for possession of narcotics, in violation of Conn. Gen. Stat. § 21a-279(a), could not form the basis for a § 851 enhancement because the guilty plea transcript did not reveal what controlled substance was possessed. GA12. The 2000 conviction for sale of narcotics, in violation of Conn. Gen. Stat. § 21a-277(a), also could not support the enhancement because the Government was unable to obtain a transcript of the guilty plea colloquy for that case, and the sentencing transcript did not reveal what controlled substance was involved in the defendant’s criminal conduct. GA12.

Although the Government could not prove that two of the defendant’s prior convictions qualified as prior felony drug offenses under § 841(b), it faced no such issues with respect to the defendant’s other *two* convictions. Specifically, the defendant’s 2000 conviction for possession of narcotics, in violation of Conn. Gen. Stat. § 21a-279(a), qualified as a prior felony drug offense under 21 U.S.C. § 841. The guilty plea transcript for that conviction revealed that the defendant pleaded guilty without relying on the *Alford* doctrine and that he agreed to the prosecutor’s factual basis which included a statement that quantities of crack cocaine and PCP were seized from the defendant’s vehicle. Ex. 3; GA47; *see Savage*, 542 F.3d at 966 (holding that, where a defendant

enters an *Alford* plea and refuses to admit to his participation in the crime, the government cannot rely on his factual admissions during the plea colloquy to establish the nature of a predicate offense). This transcript is a reliable court document under *Shepard* and can serve as the basis for a finding, under the modified categorical approach, that a particular conviction qualifies as a felony drug offense.

Moreover, the defendant does not challenge the fourth conviction in the second offender notice, which was for attempted third degree criminal possession of a controlled substance, in violation of New York Penal Law § 220.16(1). That conviction qualified under the categorical approach because the statute of conviction in the New York case was a “felony drug offense,” as that term is defined by 21 U.S.C. § 802(44), and did not suffer from the same overbreadth problems as the Connecticut narcotics statutes. The fact of the conviction was set forth in the PSR, and the defendant never challenged it.

Thus, because two of the four convictions listed in the Government’s second offender notice qualified as prior felony drug convictions, the defendant was properly classified and treated as a second offender and thereby exposed to the enhanced penalties under 21 U.S.C. § 841(b).

Conclusion

For the foregoing reasons, this court should affirm the judgment of the district court as to this defendant.

Dated: September 21, 2011

Respectfully submitted,

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Certification per Fed. R. App. P. 32(a)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,244 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

A handwritten signature in cursive script that reads "Robert M. Spector".

ROBERT M. SPECTOR
ASSISTANT U.S. ATTORNEY

ADDENDUM

21 U.S.C. § 851.
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 exempt 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.