06-5361-cr

To Be Argued By:
FELICE M. DUFFY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-5361-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

MARTIN TORRES,
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Ellen Bree Burns, Senior U.S. District Judge) had subject matter jurisdiction under 18 U.S.C. § 3231. Following a November 9, 2006 decision denying defendant Martin Torres's request for resentencing pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), a final judgment entered on November 15, 2006. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on November 17, 2006. This Court has appellate jurisdiction over the challenge to the defendant's sentence pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether an indictment that alleged specific quantities of cocaine of five or more kilograms were attributable to the defendant as overt acts in the conspiracy sufficiently charged the defendant with that amount as an element under 21 U.S.C. § 841(b)(1)(A).

2. Whether a prior felony conviction triggering a statutory sentencing enhancement under 21 U.S.C. § 841 is an element of the offense that needs to be pleaded in the indictment.

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Preliminary Statement

Defendant-appellant Martin Torres was involved in a large-scale drug-trafficking organization that distributed large quantities of cocaine in the Greater Norwalk, Connecticut, area in the late 1990s. A federal grand jury indicted Torres and numerous co-defendants for their roles in this organization, and Torres ultimately pleaded guilty to Count One of the First Superseding Indictment, which

charged him with conspiring to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846.

At sentencing, the district court concluded that in light of the defendant's prior felony drug conviction, he was subject to a mandatory minimum term of twenty years' imprisonment under 21 U.S.C. § 841(b)(1)(A). After granting a departure under Sentencing Guideline § 5K1.1 for the defendant's cooperation with the government, the district court sentenced him to 120 months' imprisonment.

In this appeal, the defendant challenges the sufficiency of the indictment. He argues that the indictment did not sufficiently allege the element of drug quantity to trigger the pre-departure twenty-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A). In addition, he claims that because the indictment failed to allege his prior conviction, that conviction could not be used to enhance his sentence. As explained more completely below, the defendant's first argument is foreclosed by the facts of this case (i.e., the indictment contained sufficient allegations of drug quantity), and his second argument is foreclosed by binding precedent from the Supreme Court and this Court. The judgment should be affirmed.

Statement of the Case

On June 3, 1999, a federal grand jury in the District of Connecticut returned a First Superseding Indictment (the "indictment") in the case of *United States v. Segura*, 3:99CR85(EBB). Joint Appendix ("JA") 5. Count One of the indictment charged the defendant Martin Torres and

others with engaging in a conspiracy to possess with intent to distribute and distribute cocaine and cocaine base throughout 1998 and up to and including May 25, 1999, in violation of 21 U.S.C. §§ 841(a)(1) and 846. JA 19-25.

On January 12, 2000, the government filed a second offender information pursuant to 21 U.S.C. § 851 placing the defendant on notice that he was subject to an enhanced mandatory minimum penalty of twenty years' imprisonment based on his prior drug felony conviction pursuant to 21 U.S.C. § 841(b)(1)(A). JA 9, 35.

On January 14, 2000, Torres pleaded guilty to Count One of the indictment charging him with conspiring to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846, and entered into a plea and cooperation agreement with the government. JA 9, 39-45.

Prior to sentencing, the government filed a motion pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) based on Torres's cooperation. JA 86, 94, 97.

On November 13, 2001, Judge Burns sentenced the defendant. She noted that he was subject to a twenty-year mandatory minimum term of imprisonment, JA 97, but granted the government's § 5K1.1 motion, downwardly departed, and imposed a sentence of 120 months' imprisonment. JA 99, 104.

Torres appealed, JA 105, and on February 27, 2004, this Court summarily affirmed the district court's sentence, JA 106. On January 24, 2005, the Supreme Court granted

Torres's petition for a writ of certiorari and remanded for further consideration in light of *United States v. Booker*, 543 U.S. 220 (2005). JA 109. On March 16, 2005, this Court ordered a limited remand in light of *Booker* and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). JA 110.

In an opinion dated August 24, 2006, the district court held that a non-trivially different sentence would not be imposed under the now-advisory Guidelines. JA 16, 134-36. Due to an error in the court's electronic notification system, Torres did not receive notice of the ruling. Accordingly, on November 9, 2006, the district court vacated its order and re-issued its original order finding that a non-trivially different sentence would not be imposed under the advisory Sentencing Guidelines. JA 16, 137-40. Judgment entered on November 15, 2006, JA 16, and on November 17, 2006, Torres filed a timely notice of appeal, JA 16, 141. Torres is presently serving his sentence.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. The Indictment

On June 3, 1999, a federal grand jury in the District of Connecticut returned a First Superseding Indictment charging that from 1998 to May 25, 1999, defendant Martin Torres and others participated in a large-scale drug trafficking organization that distributed large quantities of cocaine base in South Norwalk, Connecticut. JA 5, 18-34.

As relevant to this case, Count One of the indictment charged Torres and others with engaging in a conspiracy to possess with intent to distribute and distribute cocaine and cocaine base throughout 1998 and up to and including May 25, 1999, in violation of 21 U.S.C. §§ 841(a)(1) and 846. JA 19-25.

According to the allegations of Count One, defendant Rodolfo Segura distributed cocaine to two mid-level dealers, defendants Carlos Davila and William Lopez, who then distributed the cocaine to at least nine street-level sellers in South Norwalk. JA 20 (¶ 2). From 1998 through May 1999, Segura "continuously and routinely" supplied Lopez, Davila and others with "kilogram quantities of cocaine." JA 20 (¶ 3).

The indictment further alleged that Segura received his cocaine from several sources, including defendant Torres. JA 21 (¶ 5). Torres, in turn, received his cocaine from a number of individuals, including defendants Jose Pena, Cielo Melendez, Hector Barrientos, Jimmy Restrepo, and Norman Ramirez. JA 21 (¶ 6). The indictment specifically alleged that at times, Torres traveled to "New Jersey to inspect and purchase quantities of cocaine from [Melendez] and [Pena], which he then, at times purchased and distributed to [Segura]." JA 21 (¶ 6). Similarly, the indictment alleged that at times Melendez and Pena traveled to Connecticut to deliver quantities of cocaine (intended for Torres and Segura) to Torres and to collect payment from Torres for past shipments of cocaine which had been distributed to Torres and Segura "on credit." JA 21-22 (¶ 6).

In addition, the indictment alleged that Segura "routinely supplied" four other defendants – Thomas Smalls, Daniel Marra, Joseph Cappellieri, and Robert Vadas – with "significant quantities of cocaine which he had obtained from [Torres] and [defendant John Elejalde]." JA 22 (¶ 7). According to the indictment, Segura "expended substantial effort and time collecting and attempting to collect sums of money from [Smalls, Marra, Cappellieri, Vadas, Davila, Lopez,] and others to pay [Torres] and [Elejalde] for quantities of cocaine previously supplied to him." JA 22 (¶ 7).

After setting forth this background, the indictment identified several overt acts in furtherance of the conspiracy. As relevant to this appeal, the indictment alleged as follows:

- that on or about on November 21, 1998, Segura distributed 250 grams or more of cocaine to Lopez, JA 23(¶ 10);

- that on or about February 15, 1999, Elejalde drove from New York to Connecticut and distributed approximately two kilograms of cocaine to Segura, JA 24 (¶ 12);

- that on or about February 19, 1999, "[Torres] traveled to New Jersey to meet [Pena] and [Melendez]," and that "[a]t that time, [Pena] and [Melendez] displayed to [Torres] 12 kilograms of cocaine which they offered to sell and distribute to [Torres]," JA 24 (¶ 13);

- that on February 23, 1999, Elejalde provided three kilograms of cocaine to Segura, JA 24 (¶ 15);

- that on or about March 20, 1999, Torres traveled to New Jersey from Connecticut "at which time [Pena] and [Melendez] distributed and provided [Torres] with approximately 5 kilograms of cocaine," JA 24-25 (¶ 16);

- that on or about March 26, 1999, Elejalde traveled to Norwalk from New York to meet with Segura, and at that time provided him with two kilograms of cocaine, JA 25 (¶ 17); and

- that on or about April 6, 1999, Pena traveled to Norwalk from New Jersey "at which time [Martin Torres] provided [Pena] with $28,000," a partial payment for narcotics previously provided and sold by Pena to Torres and Segura, JA 25 (¶ 18).

In addition to the conspiracy count, Torres was charged with three other counts in the indictment. Count Eleven alleged that on February 10, 1999, Torres attempted to possess with intent to distribute six kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846. JA 29. Count Seventeen alleged that on March 20, 1999, Torres possessed with intent to distribute five kilograms or more of cocaine in violation of §§ 841(a)(1) and (b)(1)(A). JA 31. Finally, Count Nineteen alleged that Torres engaged in a continuing criminal enterprise and that he occupied a position of organizer or manager in violation of 21 U.S.C. § 848. JA 31-32.

On January 12, 2000, the government filed a second offender information pursuant to 21 U.S.C. § 851 placing the defendant on notice that he was subject to enhanced mandatory minimum penalties. JA 9, 35. The information cited 21 U.S.C. § 841(b)(1)(A) and noted that the penalty for a violation of §§ 841(a)(1) and 846, as alleged in Count One, is a mandatory minimum of ten years if the offense involves more than five kilograms of cocaine, but that this penalty is increased to a mandatory minimum of twenty years' imprisonment if the offense is committed by a person after a prior felony drug conviction. JA 35-36. With this background, the information provided notice to Torres that because he had been convicted of a felony drug offense in Connecticut on July 20, 1993, and because the amount of cocaine attributable to him in this offense exceeded five kilograms, he was subject to a mandatory minimum of twenty years' imprisonment under 21 U.S.C. § 841(b)(1)(A). JA 36.

B. The Guilty Plea

On January 14, 2000, Torres pleaded guilty to Count One of the indictment and entered into a plea and cooperation agreement with the government. JA 9, 39-45. In the plea agreement, the defendant agreed to plead guilty to Count One, in exchange for the government's agreement to dismiss the remaining counts of the indictment at sentencing. JA 39.

The plea agreement recorded the parties' understanding that the defendant was subject to a twenty-year mandatory minimum term of imprisonment. Specifically, the

agreement noted the parties' agreement that more than five kilograms of cocaine were attributable to the defendant from his participation in the offense and the defendant's understanding that his prior felony drug offense subjected him to a twenty-year mandatory minimum term of imprisonment. JA 41.

At the change of plea hearing, Torres stated under oath that he had spoken about the plea agreement with his attorney, JA 49, that he understood the charges against him, JA 50, and that he understood that he was charged with conspiracy to possess with the intent to distribute and distribute powder cocaine, JA 51. The district court advised Torres that the offense to which he pleaded guilty carried with it a mandatory minimum penalty of twenty years of imprisonment due to his prior drug offense. JA 57; *see also* JA 61.

The court also addressed the quantity of cocaine attributable to the defendant, stating as follows:

> Furthermore, you and the Government have agreed, sir, that the amount of cocaine attributable to you is more than 5 kilograms.
>
> . . . [A] person who is a member of a conspiracy is responsible not only for the cocaine which he personally handled or distributed, but he's also responsible for any cocaine which his fellow coconspirators may have distributed which he could reasonably anticipate they would have

> distributed. So, that's why the amount here is more than 5 kilograms. . . .
>
> * * *
>
> Members of a conspiracy are responsible for all of the cocaine handled by the conspiracy that they might have reasonably been expected to know about, not just what they have themselves.

JA 64.

Torres responded, "I understand that." JA 64. Defense counsel added, "I would state for the record, your Honor, that in this case that figure reflects direct involvement by Mr. Torres." JA 64-65.

C. The 5K1.1 Motion

Prior to sentencing, the government filed a motion for downward departure pursuant to U.S.S.G. § 5K1.1, which allowed the district court to depart from the guideline imprisonment term of 240 months, and 18 U.S.C. § 3553, which allowed the district court to depart from the statutory mandatory minimum term of imprisonment. JA 86, 94, 97.

D. The District Court's Imposition of Sentence

At the November 13, 2001 sentencing hearing, defense counsel expressed no objection to the pre-departure twenty-year mandatory minimum term of imprisonment. Indeed, counsel stated that:

> we had no objections to the presentence report, and what that means, therefore, is absent a basis for departure, Mr. Torres, because of his criminal record and because of his conduct in this particular case, would have been looking at a sentence of twenty years or more in prison under the sentencing guidelines alone. Without the mandatory minimum sentence that applies, Mr. Torres would have been looking at a sentence of eight to ten years.

JA 83.

With no objections, the district court noted that the defendant faced a mandatory minimum term of twenty years' imprisonment, but that because the government had filed the § 5K1.1 motion, the court had the "latitude in determining what the appropriate sentence is going to be." JA 97-98. After considering remarks by the defendant, the defendant's family, the defendant's lawyer, and the prosecutor, the court stated that "I believe that the appropriate sentence would be to give you half of what you otherwise would receive, so I will sentence you to 120 months in the custody of the Bureau of Prisons." JA 99.

E. The Initial Appeal and *Crosby* Remand

Torres appealed, arguing that the indictment was insufficient to trigger the mandatory minimum sentence under § 841(b)(1)(A) because it did not charge quantity as an element of the offense in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). JA 119, 106-07. On February 27, 2004, this Court summarily affirmed the district court's sentence. JA 106-07. On January 24, 2005, the Supreme Court granted Torres's petition for a writ of certiorari and remanded for further consideration in light of *Booker*, 543 U.S. 220. JA 109.

On March 16, 2005, this Court ordered a limited remand in this case in light of *Booker* and *Crosby*. JA 110. On September 27, 2005, the district court issued an Order inviting simultaneous briefing from the parties on the question whether it would have imposed a non-trivially different sentence in the case if the Sentencing Guidelines had been advisory. JA 111. In his brief, Torres argued that the indictment did not allege a specific drug quantity as an object of the conspiracy and, thus, Torres was not initially subject to the mandatory minimum sentence of twenty years' imprisonment. JA 118.

On August 24, 2006, Judge Burns ruled on the briefs. JA 134-36. She specifically rejected the defendant's argument that the indictment contained insufficient allegations of drug quantity to invoke the mandatory minimum sentence under § 841(b)(1)(A):

> [T]he overt acts alleged in Count One to have been committed in furtherance of the conspiracy refer, in the aggregate, to at least 25 kilograms of cocaine and 13 grams of cocaine base. (overt acts 10-13, 15-17). Specifically with respect to defendant Torres, overt act 11 [sic] alleged that he travelled (sic) to New Jersey where two co-defendants displayed 12 kilograms of cocaine which they offered to sell to him and overt act 16 alleged that he again travelled (sic) to New Jersey, met with the same co-defendants and received 5 kilograms of cocaine from them. The indictment was therefore sufficient, together with the defendant's prior felony drug conviction, to trigger the mandatory minimum sentence mandated by 21 U.S.C. § 841(b)(1)(A).

JA 135.

After resolving this issue, the district court determined that the original sentence imposed was appropriate given "the nature of the offense and the need for the sentence to reflect its seriousness, to promote respect for the law and to provide just punishment, to deter criminal conduct, to protect the public and to avoid unwarranted disparities (18 U.S.C. § 3553(a)), while also giving due consideration to the government's motion." JA 136. Therefore, the dustrict court ruled that "[a] non-trivially different sentence should not be imposed." JA 136.

Due to an error in the district court's electronic notification system, Torres did not receive notice of the

court's ruling. Therefore, on November 9, 2006, the district court vacated its order and re-issued its decision finding that a non-trivially different sentence would not be imposed under the advisory Sentencing Guidelines. JA 16, 137-40. This appeal followed.

SUMMARY OF ARGUMENT

I. The indictment sufficiently alleged the specific quantity of five or more kilograms of cocaine to trigger the mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A). The overt act section in Count One of the indictment specifically alleged that approximately seventeen kilograms of cocaine were directly attributable to Torres. Those allegations, along with others, were sufficient to put Torres and the grand jury on notice that Torres was charged with conspiring to possess with intent to distribute and distribute five or more kilograms of cocaine. Even if there were error in the indictment, however, this error did not affect Torres's substantial rights because he had ample notice of the enhanced penalty provisions applicable to his case.

II. Under Supreme Court and Second Circuit precedent, a prior felony conviction triggering a statutory sentencing enhancement under 21 U.S.C. § 841(b)(1)(A) is not an element of the offense and does not need to be pleaded in the indictment.

ARGUMENT

I. THE INDICTMENT SUFFICIENTLY PLEADS DRUG QUANTITY AS AN ELEMENT OF THE OFFENSE

A. Relevant Facts

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

B. Governing Law and Standard of Review

1. Sufficiency of the Indictment

"'The sufficiency of the indictment is a matter of law that is reviewed *de novo*.'" *United States v. Geibel*, 369 F.3d 682, 698 (2d Cir. 2004) (quoting *United States v. Pirro*, 212 F.3d 86, 92 (2d Cir. 2000)).

An "indictment . . . must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). This requirement "fulfills the Sixth Amendment right 'to be informed of the nature and cause of the accusation;' it prevents a person from being subject to double jeopardy as required by the Fifth Amendment; and it serves the Fifth Amendment protection against prosecution for crimes based on evidence not presented to the grand jury." *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999). *See also Pirro*, 212 F.3d at 92 ("An indictment that fails to allege the essential elements of the crime charged offends

both the Fifth and Sixth Amendments.") (citing *Russell v. United States,* 369 U.S. 749, 760-61 (1962)).

"It is well-established that '[a]n indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events.'" *Walsh,* 194 F.3d at 44 (quoting *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992)). *See also United States v. De La Pava*, 268 F.3d 157, 162 (2d Cir. 2001) (citing *United States v. Goodwin*, 141 F.3d 394, 401 (2d Cir. 1997)).

"An indictment, however, need not be perfect, and common sense and reason are more important than technicalities." *De La Pava*, 268 F.3d at 162; *see also Goodwin*, 141 F.3d at 401 ("'[T]he precision and detail formerly demanded are no longer required, imperfections of form that are not prejudicial are disregarded, and common sense and reason prevail over technicalities.'") (quoting Charles Alan Wright, *Federal Practice and Procedure: Criminal 2d* § 123, at 347 (1982)); *Stavroulakis,* 952 F.2d at 693 ("Certainly, precision and proper notice to the defendant cannot be sacrificed for the sake of brevity, but we have noted that common sense must control, and that an indictment must be read to include facts which are necessarily implied by the specific allegations made.") (internal quotation marks and alterations omitted).

With respect to an indictment for conspiring to commit an offense, this Court has explained that "'it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy.'" *United States v. Wydermyer*, 51 F.3d 319, 325 (2d Cir. 1995) (quoting *Wong Tai v. United States*, 273 U.S. 77, 81 (1927)). In other words,

> [t]he indictment need only put the defendants on notice that they are being charged with a conspiracy to commit the underlying offense or in the context relevant here, apprise the grand jury in essential terms of the object of the conspiracy. Thus, to prevail on their belated claim that the conspiracy count was insufficient, defendants must show that the indictment, liberally construed, was not "sufficient to identify the offense which the defendant conspired to commit."

Id. at 325-26 (quoting *Wong Tai,* 273 U.S. at 81). *See also United States v. LaSpina*, 299 F.3d 165, 177 (2d Cir. 2002).

Moreover, when the argument that an indictment fails to state an offense is "'urged for the first time on appeal, indictments . . . are construed more liberally . . . and every intendment is then indulged in support of the sufficiency.'" *United States v. Davila,* 461 F.3d 298, 308 (2d Cir. 2006) (quoting *United States v. Sutton*, 961 F.2d 476, 479 (4th Cir. 1992)). *See also United States v. Sabbeth*, 262 F.3d 207, 218 (2d Cir. 2001) ("The scrutiny

given to an indictment depends, in part, on the timing of a defendant's objection to that indictment. . . . Where a defendant raises an objection after a verdict has been rendered, we have held that an indictment should be interpreted liberally, in favor of sufficiency.") (citing *Goodwin*, 141 F.3d at 401; *Wydermyer*, 51 F.3d at 324).

Because Torres did not challenge the sufficiency of the indictment in the district court at his original sentencing, his argument is reviewed for plain error.[1] *United States v. Cotton*, 535 U.S. 625, 631 (2002) (finding plain error review applicable to omission of drug quantity from indictment when raised for the first time after trial); *United States v. Klein*, 476 F.3d 111, 113 (2d Cir. 2007); *United States v. Thomas*, 274 F.3d 655, 666 (2d Cir. 2001) (en banc) (holding that plain error review applies to a challenge to an indictment raised for the first time on appeal)).

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[1] Torres argues that his claim is not subject to plain error review because he raised his argument during the *Crosby* remand proceedings. The sole authority he cites for this proposition is *United States v. Cordoba-Murgas*, 422 F.3d 65, 69 (2d Cir. 2005), but that case is distinguishable. There, the defendant did not challenge the sufficiency of the indictment during his initial sentencing proceeding, but after his sentence was vacated on appeal, he raised the argument *during his new sentencing proceeding* before the district court. *Id.* at 67-69. On this second appeal, this Court found that he had preserved the issue for appellate review. *Id.* at 69. Here, however, there was no new sentencing proceeding; Torres was before the district court only on a *Crosby* remand.

A trilogy of decisions by the Supreme Court interpreting Fed. R. Crim. P. 52(b) has established a four-part plain error standard. *See Cotton*, 535 U.S. at 631-32; *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732 (1993). Under plain error review, before an appellate court can correct an error not raised below, there must be (1) error, (2) that was "plain" (which is "synonymous with 'clear' or equivalently 'obvious'"), *see Olano*, 507 U.S. at 734; and (3) that affected the defendant's substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-67.

2. Title 21 Sections 841 and 846: The Statutory Scheme

Title 21 U.S.C. § 841(a) provides that "it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Any person who violates this section, or conspires to violate it, *see* 21 U.S.C. § 846, is subject to penalties enumerated in § 841(b)(1). That subsection establishes a system of graduated penalties that provide for progressively higher sentences according to the quantity of narcotics involved in the offense and the defendant's criminal history.

As relevant here, three subsections establish penalties for defendants who traffic in cocaine after a prior conviction for a felony drug offense. Under § 841(b)(1)(C), a defendant whose offense involves an unspecified quantity of cocaine faces a maximum penalty of thirty years' imprisonment. For an offense involving 500 grams or more of cocaine, § 841(b)(1)(B) mandates a sentence of not less than ten years and not more than life imprisonment, and for an offense involving five kilograms or more of cocaine, § 841(b)(1)(A) mandates a sentence of not less than twenty years and not more than life imprisonment. *See also United States v. Gonzalez,* 420 F.3d 111, 124 (2d Cir. 2005) ("This court has recognized the addition of a drug quantity element to a § 841(a) offense . . . result[s] in a different criminal charge from the same offense pleaded without regard to quantity.").

Drug quantity is an element of the offense charged under 21 U.S.C. § 841 and must be pleaded in the indictment and found by a jury beyond a reasonable doubt or admitted by the defendant. *United States v. Cordoba-Murgas,* 422 F.3d 65, 69-70 (2d Cir. 2005); *Gonzalez*, 420 F.3d at 125. Thus, when an indictment does not specify the quantity of drugs, "the District Court cannot impose a sentence above the statutory maximum for an indeterminate quantity of drugs, even if the defendant later allocutes to a particular quantity." *Cordoba-Murgas,* 422 F.3d at 72.[2]

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[2] Both Torres's sentence of 120 months' imprisonment and the initial pre-departure guideline sentence of 240 months' (continued...)

C. Discussion

Torres contends that because the indictment failed to allege that the object of the conspiracy involved a particular quantity of cocaine, he was convicted of an offense involving an indeterminate quantity of drugs and thus his conviction and sentence under § 841(b)(1)(A) violated his Fifth Amendment right to be prosecuted by a grand jury.

This argument fails because the indictment contained sufficient allegations of cocaine quantity to satisfy § 841(b)(1)(A). But even if the quantity allegations were insufficient, this error did not affect the defendant's substantial rights.

1. The Indictment Sufficiently Alleged Drug Quantity

Torres's challenge to the sufficiency of the indictment fails because a common sense reading of the indictment reveals that it properly alleged drug quantity sufficient to invoke the penalty provisions in § 841(b)(1)(A).[3]

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[2] (...continued)
imprisonment were less than the statutory maximum sentence of thirty years' imprisonment for an unquantified amount of cocaine with the prior felon enhancement. 21 U.S.C. § 841(b)(1)(C).

[3] To the extent the defendant alleges that the indictment (continued...)

An indictment must allege the essential elements of the crime charged. *Pirro*, 212 F.3d at 92. When determining whether a count sufficiently alleges an element, the court must look at the totality of the count, including the caption, to determine whether the element can be inferred from the text. *See, e.g.*, *United States v. Hernandez*, 980 F.2d 868, 871 (2d Cir. 1992) (holding indictment on narcotics conspiracy charge was sufficient to allege "with intent to distribute," where it did not contain such phrase, but where caption of count, citation to statute allegedly violated, and large quantity of cocaine alleged in count gave defendant adequate notice of the nature of the charge). In other words, "'[i]t is not necessary to spell out each element, [so long as] each element [is] present in context.'" *United States v. Westmoreland*, 240 F.3d 618, 633 (7th Cir. 2001) (quoting *United States v. Smith*, 233 F.3d 554, 571 (7th Cir. 2000)). *See also United States v. Doe*, 297 F.3d 76, 85 (2d Cir. 2002) (describing *Hernandez* and noting that Court had allowed statutory citation to charge element of offense when "a reading of

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[3] (...continued)
is insufficient because it failed to include a specific statutory reference to § 841(b)(1)(A), that argument is misplaced. As long as the allegations sufficiently informed the defendant of the charges against him, the absence of a statutory citation does not require reversal of a conviction. *See* Fed. R. Crim. P. 7(c)(3) ("Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to . . . reverse a conviction."); *United States v. Vaglica*, 720 F.2d 388, 391 (5th Cir. 1983) (upholding indictment where language included specific drug quantity but failed to cite relevant statutory provision).

the indictment in its entirety allowed inference of the final element.").

Thus, for example, in *Hernandez*, the indictment charged that the defendant and three others engaged in a conspiracy to possess 100 grams or more of heroin in violation of 21 U.S.C. § 841(a)(1). 980 F.2d at 870. The defendant argued that this language was insufficient because it failed to allege an element of the offense, namely that the possession was with intent to distribute. This Court rejected this challenge to the indictment, noting that the indictment in its entirety provided sufficient facts such that the element of "intent to distribute" could be inferred. Specifically, the Court noted that the caption contained a reference to "intent to distribute," the count cited the relevant statute allegedly violated, and the count alleged a conspiracy relating to a large quantity of heroin "from which, even among four individuals, one may infer an intent to distribute." *Id.* at 871-72. *See also Westmoreland*, 240 F.3d at 633-34 (indictment sufficient to allege quantity element where no quantity in text, but count alleged a year of cocaine distribution activity in a large area and contained the statutory reference to the penalty provision § 841(b)(1)(A)).

Applying this standard in this case, the allegations of Count One, read in context, contained sufficient allegations of drug quantity to invoke the penalty provisions of § 841(b)(1)(A). Count One contained specific references to quantities with respect to Torres and was pleaded with sufficient detail to inform Torres and the grand jury that he was being charged with conspiring to

possess with intent to distribute or distribute five or more kilograms of cocaine.

In the introductory paragraphs of the indictment, incorporated by reference into Count One, JA 22 (¶ 8), the indictment alleged that Torres was supplied with kilogram quantities of cocaine (from multiple co-defendants), which he then sold and distributed to Segura. JA 21 (¶¶ 5-6). The introductory paragraphs further alleged that at times, Torres would travel to New Jersey to inspect and purchase cocaine from Melendez and Pena, which he would then distribute to Segura. JA 21 (¶ 6). Finally, the introductory paragraphs alleged that from June 1998 through May 25, 1999, Segura supplied at least four individuals with "significant quantities" of cocaine that he had obtained from Torres and Elejalde. JA 22 (¶ 7).

Similarly, the "overt acts" section of Count One contained two specific drug quantity allegations that tie Torres to drug quantities exceeding the five kilogram threshold for the enhanced penalties under § 841(b)(1)(A). First, paragraph 13 alleged that on February 19, 1999, Torres traveled to New Jersey to meet Melendez and Pena and that at that time, Melendez and Pena displayed twelve kilograms of cocaine to Torres which they offered to sell him. JA 24 (¶ 13). Second, paragraph 16 alleged that on March 20, 1999, Torres again traveled to New Jersey where Melendez and Pena distributed "approximately 5 kilograms of cocaine" to him. JA 24-25 (¶ 16). Taken together, these paragraphs alleged that Torres was personally tied to seventeen kilograms of cocaine, well in

excess of the five kilogram threshold under § 841(b)(1)(A).

With respect to these allegations, Torres contends that ¶ 16, relating to "approximately 5 kilograms" of cocaine is insufficient to trigger the penalties under § 841(b)(1)(A) for quantities involving "5 kilograms or more" of cocaine. Brief at 16. That allegation, however, must be read in conjunction with the allegations of ¶ 13 tying Torres to an additional twelve kilograms of cocaine. Taken together, these allegations more than suffice to establish the drug quantity element required for § 841(b)(1)(A). *See United States v. Pressley*, 469 F.3d 63, 64 (2d Cir. 2006) ("[W]e hold that for the purposes of 21 U.S.C. § 841(b), a conspiracy is 'a violation' that 'involv[es]' the aggregate quantity of narcotics attributable to the defendant throughout the entire conspiracy, even if that sum total was transacted in a series of smaller sales."), *cert. denied*, 127 S. Ct. 1859 (2007).

Torres further argues that the allegation regarding the twelve kilograms in ¶ 13 "does not suffice to charge Mr. Torres with agreeing to possess with intent to distribute 12 kilograms of cocaine." Brief at 16. Torres explains that "[t]here is no claim in the indictment that Mr. Torres agreed to buy or take possession of the 12 kilograms. Mr. Torres is not accountable under § 841(b)(1)(A) for quantities of drugs that others merely offer to sell him and which he does not agree to take." Brief at 16. The criminal act in a conspiracy, however, is the agreement itself. The well-established law of the Second Circuit holds that actual consummation of a sale of narcotics is not

necessary for a defendant to have committed the crime of conspiracy to possess with intent to distribute or distribute narcotics. *United States v. Labat*, 905 F.2d 18, 21 (2d Cir. 1990) ("Since the essence of conspiracy is the agreement and not the commission of the substantive offense that is its objective, the offense of conspiracy may be established even if the collaborators do not reach their goal."); *United States v. Tejada*, 956 F.2d 1256, 1264 (2d Cir. 1992) ("Because the agreement defines the conspiracy, the parties' failure to complete the transaction does not shrink the conspiracy's scope."). The co-conspirators' actions in showing twelve kilograms of cocaine to Torres for possible purchase, whether or not Torres agreed to buy or take possession of the kilograms, is evidence of an agreement to possess with intent to distribute or distribute five or more kilograms of cocaine. That allegation alone is sufficient. Moreover, when read in the context of an indictment that alleged that these same co-conspirators supplied Torres with quantities of cocaine, such allegations are more than sufficient to put a defendant and the grand jury on notice of an agreement to possess with intent to distribute more than five kilograms of cocaine.

Other allegations in Count One bolster the inference that the conspiracy had as its object a drug quantity in excess of five kilograms of cocaine. Specifically, in addition to the allegations of overt acts tying approximately seventeen kilograms of cocaine directly to Torres, other overt acts specifically identified transactions between co-conspirators involving 7.25 kilograms of cocaine. *See* JA 23-25 (¶¶ 10, 12, 15, 17). Those allegations were sufficient to put Torres and the grand jury

on notice that the conspiracy involved at least 7.25 kilograms and that those kilograms might be attributable to Torres as a member of that conspiracy. *See United States v. Studley*, 47 F.3d 569, 573 (2d Cir. 1995) ("[I]f a defendant participates in 'jointly undertaken criminal activity,' he or she may be sentenced based on criminal acts committed by other participants if the acts were committed in furtherance of the jointly undertaken activity and could reasonably have been foreseen by the defendant.").

Torres argues that these allegations regarding drug quantities distributed by other individuals may not be attributed to him because the indictment did not allege that those quantities "were within the scope of the defendant's agreement and were reasonably foreseeable to him." Brief at 16-17. He cites *United States v. Martinez*, 987 F.2d 920, 926 (2d Cir. 1993), and *United States v. Adams*, 448 F.3d 492, 500 (2d Cir. 2006), but neither case holds that a conspiracy indictment must allege specific drug quantities were reasonably foreseeable to the defendant. But even assuming *arguendo* that there were such a requirement, in a conspiracy indictment, "'it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy.'" *Wydermyer*, 51 F.3d at 325 (quoting *Wong Tai*, 273 U.S. at 81). Here, the indictment alleged drug quantity and thus, liberally construed, the indictment was "'sufficient to identify the offense which the defendant conspired to commit.'" *Id.* at 326 (quoting *Wong Tai*, 273 U.S. at 81).

In sum, when construed liberally, the indictment contained sufficient facts such that the drug quantity element of more than five kilograms of cocaine could be inferred. The text of Count One identified seventeen kilograms of cocaine attributable to Torres and an additional 7.25 kilograms of cocaine attributable to co-conspirators. These specific references to significant quantities of cocaine, along with references to the "continuous[] and routine[]" distribution of "kilogram quantities of cocaine" between co-conspirators, JA 20 (¶ 3), and the references to a year-long drug distribution scheme, JA 19-20, all support an inference that the object of the conspiracy involved the possession with intent to distribute more than five kilograms of cocaine. *See Westmoreland*, 240 F.3d at 633-34 (allegation of year-long drug distribution scheme lends "context" to drug quantity in indictment); *Hernandez*, 980 F.2d at 871 (references to large quantity of heroin allow inference of intent to distribute).

Furthermore, these allegations in the indictment serve to distinguish this case from those where this Court has found that an indictment contained insufficient allegations of drug quantity. In *Doe*, for example, the indictment's only reference to drug quantity was a parenthetical reference to a statutory penalty provision that provided for enhanced penalties based on drug quantity. 297 F.3d at 85. And in *Thomas* and *Cordoba-Murgas*, the indictments did not even do that. In those cases, the indictments contained no specific drug quantities and no specific statutory citations imposing penalties based on drug quantity. *Thomas*, 274 F.3d at 660; *Cordoba-Murgas*, 422

F.3d at 67. In all of these cases, this Court found that the respective indictments failed to sufficiently allege drug quantity. *Doe*, 297 F.3d at 85-86; *Thomas*, 274 F.3d at 663-64; *Cordoba-Murgas*, 422 F.3d 65. Here, by contrast, the indictment contained multiple allegations of specific drug quantities, and thus *Doe*, *Thomas*, and *Cordoba-Murgas* are simply inapposite.[4]

Accordingly, using common sense and reason, Count One of the indictment identified the offense which Torres conspired to commit – possession with intent to distribute and distribution of five or more kilograms of cocaine. When read as a whole and in context, the allegations of Count One of the indictment reflect consideration by the grand jury of drug quantity and provide notice to Torres that he was subject to the enhanced penalties of § 841(b)(1)(A).

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[4] Moreover, the Fourth Circuit Court of Appeals held that the indictment was not sufficient when it failed to charge any specific quantity, even though the overt acts alleged specific quantities without reference to the defendant. *United States v. Carrington*, 301 F.3d 204, 206 (4th Cir. 2002). Unlike in *Carrington*, however, the overt acts here mention Torres by name with respect to 17 kilograms of cocaine. That, in the context of the introductory paragraphs, is sufficient to distinguish the indictment here from the indictment in *Carrington.*

2. Even If the Court Found Plain Error, It Did Not Affect Torres's Substantial Rights

Assuming *arguendo* that the indictment erroneously failed to allege drug quantity, and that this error was "plain" under existing law, it does not require reversal of Torres's conviction because it did not affect his substantial rights.

This Court addressed an analogous question in *Doe*. There, the Court concluded that the indictment erroneously failed to allege drug quantity and that this error was plain. 297 F.3d at 85-87. Turning to the third prong of plain error analysis, the Court noted that it "must look to the actual impact of this indictment's flaw on this defendant to decide whether the error violated [his] substantial rights." *Id.* at 87.

The Court's analysis revealed no impact on Doe's substantial rights, primarily because Doe "clearly had notice of the quantity-based penalty provisions to which he was subject." *Id.* at 87. For example, Doe's cooperation agreement with the government identified the penalties he faced (including maximum and minimum penalties) and expressly referenced the enhanced, quantity-specific penalty provision. During his plea hearing, he was advised again of these provisions, and again these were tied to the quantity-specific penalty provision at issue. Moreover, he expressly acknowledged an estimated sentencing

guidelines range that would have permitted sentencing above the statutory maximum for an offense based on an unspecified quantity of drugs. As this Court observed, "[t]hese statements in the cooperation agreement and at the plea hearing, even absent a proper charge in the indictment, assured that prior to entry of his guilty plea, Doe understood that his punishment was not governed by the provision for undetermined quantities of cocaine, but by the more stringent, quantity-based standard noted parenthetically in his indictment." *Id.* Thus, this Court concluded that because "Doe was alerted to these distinctions repeatedly before entering his guilty plea, we find that the purposes of the indictment, notice and protection from double jeopardy, were served, preventing the plain error in his indictment from affecting Doe's substantial rights." *Id.* at 87-88.

Other courts have reached similar conclusions. *See United States v. Duarte*, 246 F.3d 56, 62-63 (1st Cir. 2001) (where indictment failed to specify drug amounts, assumed error had no impact on substantial rights where defendant admitted responsibility for specified amount of drugs, defendant received notice of the government's intent to seek higher penalties based on drug quantity, plea agreement identified maximum penalties that exceeded maximum available for unspecified quantity of drugs, and defendant received a term of imprisonment under the maximum which his own drug-quantity admission exposed him"); *United States v. Carrington*, 301 F.3d 204, 210 (4th Cir. 2002) (where quantity was not sufficiently alleged, court held did not affect substantial rights, because where the six overt acts in the indictment alleged specific

quantities but did not specifically name the defendant, the defendant "was given legally sufficient notice of the aggravated drug charges that he faced, including the level of drug quantities for which he might be found responsible as a co-conspirator.").

Torres, like Doe, "received the benefits of notice of quantity that the indictment should have provided." *Doe*, 297 F.3d at 88 n.12. Specifically, Torres received notice in the following ways:

- The § 851 notice set forth that Torres was subject to an enhanced mandatory minimum penalty of twenty years' imprisonment based on an offense involving more than five kilograms of cocaine and his prior drug felony conviction pursuant to 21 U.S.C. § 841(b)(1)(A), JA 9, 35;

- The plea agreement contained the penalties for a violation of § 841(b)(1)(A), JA 39;

- The plea agreement set forth the parties' agreement that more than five kilograms of cocaine were attributable to the defendant as a result of his participation in this offense, JA 41;

- At the plea hearing, Torres stated that he understood the charges against him, JA 50, and Judge Burns informed him of the penalties for a violation of 21 U.S.C. § 841(b)(1)(A), JA 57;

- At the plea hearing, Judge Burns informed Torres that he and the government agreed that the amount attributable to Torres was more than five kilograms of cocaine, JA 64;

- At the plea hearing, Judge Burns informed Torres that he could be held responsible for quantities of cocaine distributed by his co-conspirators if he could have reasonably anticipated the distribution, JA 64;

- At the plea hearing, defense counsel stated that the more than five kilograms attributable to Torres "reflects direct involvement by Mr. Torres," JA 65;

Thus, as in *Doe*, Torres "was alerted" to the quantity-based penalty provisions applicable to his case "repeatedly before entering his guilty plea." 297 F.3d at 87. On these facts, "the purposes of the indictment, notice and protection from double jeopardy, were served," thus ensuring that any plain error did not affect Torres's substantial rights. *Id.* at 87-88. Torres was on notice that he was being charged with five or more kilograms of

cocaine and any error in the indictment did not affect his substantial rights.[5]

II. A DEFENDANT'S PRIOR FELONY DRUG OFFENSE IS NOT AN ELEMENT OF THE OFFENSE UNDER § 841

Torres argues that his prior conviction is an element of the offense because it increases a mandatory minimum sentence under § 841(b)(1(A) and must be pleaded in the indictment. As Torres himself acknowledges, however, this Court has recently rejected this argument, reaffirming in the wake of *Booker* that a prior conviction is not an element of the offense. *United States v. Estrada*, 428 F.3d 387, 391 (2d Cir. 2005). As this Court explained in *Estrada*, this conclusion is mandated by the Supreme Court's decisions in *Almendarez-Torres v. United States,* 523 U.S. 224 (1998), and *Harris v. United States*, 536 U.S. 545 (2002). *Estrada*, 428 F.3d at 391. Thus, unless and

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[5] This Court in *Doe* also held that "[e]ven if Doe's substantial rights were violated by the error in the indictment, we would decline to exercise our discretion to remedy the error." *Doe*, 297 F.3d at 88. The Court reasoned that "[b]ecause Doe demonstrated – in his cooperation agreement, at his plea hearing, and at sentencing – full awareness of the potential sentencing implications of his guilty plea, we do not believe that the fairness, integrity, or public reputation of judicial proceedings were affected by the indictment error in this case." *Id.* For the same reasons, set forth above, the fairness, integrity, or public reputation of judicial proceedings would not be affected by any error with respect to the drug quantity in Torres's indictment.

until the Supreme Court revisits those decisions, Torres's argument must fail. *See United States v. Santiago*, 268 F.3d 151, 155 n.6 (2d Cir. 2001) ("It is not within our purview to anticipate whether the Supreme Court may one day overrule its existing precedent. '[I]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.'") (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: July 10, 2007

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 8069 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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Addendum

21 U.S.C. § 841

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

* * *

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person

shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of

Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Rule 52, Federal Rules of Criminal Procedure

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.