06-4871-cr(L)

To Be Argued By:
ALEX V. HERNANDEZ

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 06-4871-cr(L)
06-4957-cr(XAP)

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

-vs-

JOHN FOSTER,
Defendant-Appellant-Cross-Appellee.

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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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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STATEMENT OF JURISDICTION

The district court (Alan H. Nevas, J.) had subject matter jurisdiction over this criminal case under 18 U.S.C. § 3231. The district court resentenced the defendant on September 19, 2006. Judgment entered on October 19, 2006, and on September 26, 2006 the defendant had previously filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court err when it denied the defendant's challenge to a Connecticut Superior Court narcotics conviction used to enhance his statutory minimum term of imprisonment pursuant to 21 U.S.C. §§ 841(b)(1)(A) and 851?

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Preliminary Statement

Defendant John Foster challenges the decision and order of the district court denying his constitutional challenge to a prior felony narcotics conviction which resulted in his being sentenced to a statutorily mandated 20 year term of imprisonment for violating 21 U.S.C.

§§ 841(b)(1)(A) and 846. For the reasons that follow, the district court's judgment should be affirmed.

Statement of the Case

On February 3, 2000, a federal grand jury in Connecticut returned a First Superseding Indictment against numerous defendants alleged to be involved with drug trafficking activity in Bridgeport, Connecticut, including among others the defendant-appellant John Foster. Count One of the First Superseding Indictment charged Foster and others with unlawfully conspiring to distribute heroin, cocaine and cocaine base, in violation of 21 U.S.C. § 846. Defendant's Appendix, page 4.[1]

On November 7, 2000, the grand jury returned a Second Superseding Indictment charging, among others, the defendant-appellant with conspiring from January 1997 to February 24, 2000, to distribute one kilogram or more of heroin, five kilograms or more of cocaine, and 50 grams or more of cocaine base. A-13.

Prior to jury selection on November 7, 2000, the government filed a Notice pursuant to 21 U.S.C. § 851, that in the event of conviction, the defendant would be subject to the enhanced sentencing provisions of 21 U.S.C. § 841(b)(1). A-13, 62-4.

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[1] Hereinafter, references to the Defendant's Appendix are designated "A-" followed by the relevant page number(s). References to the Defendant's Special Appendix are designated "SPA-" followed by the relevant page number(s).

The district court (Alan H. Nevas, Senior U.S. District Judge) severed the trials of some of the co-defendants and jury selection commenced on November 8, 2000, for the trial of Foster and his co-defendants on the conspiracy charged in Count One of the Second Superseding Indictment. A-13. *See United States v. Jones*, 381 F.3d 114 (2d Cir. 2004).

On November 13, 2000, the government began presentation of its trial evidence, and the trial continued to November 30, 2000, when the district court gave final instructions to the jury. A-14, 16. On December 4, 2000, the jury rendered a guilty verdict on the conspiracy count against defendant Foster and others. A-16.

On June 18, 2001, the district court sentenced Foster to a term of 324 months of imprisonment, to be followed by a term of five years of supervised release. On June 27, 2001, Foster filed a timely notice of appeal. A-20.

On October 5, 2004, this Court affirmed the judgment and sentence of the district court, but withheld its mandate pending the decision of the United States Supreme Court in *United States v. Booker*, 125 S. Ct. 738 (2005). *See United States v. Lewis*, 386 F.3d 475 (2d Cir. 2004), *United States v. Lewis*, 2004 WL 2242588 (2d Cir. 2004) (unpublished decision and order), *cert. denied*, 543 U.S. 1170 (2005).

On March 11, 2005, this Court ordered a limited remand on consent of the Government in light of *Booker*, and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005),

to determine if the sentencing court would have imposed a non-trivially different sentence if the Guidelines had been purely advisory.

On January 6, 2006, the district court issued an order finding that it would have imposed a non-trivially different sentence if the Guidelines had been purely advisory and directing that the defendant be re-sentenced. A-24, 29.

On April 4, and July 14, 2006, the defendant filed with the district court his challenges to the government's Section 851 Notice on the grounds that his guilty plea which formed the basis of his prior Connecticut Superior Court narcotics conviction was obtained in violation of the United States Constitution. A-25, 48, 50. The district court rejected the defendant's challenge to the prior conviction and resentenced him on September 19, 2006 to the statutorily mandated 20 year term of imprisonment. A-277, SPA-2, 3, 19. Judgment was entered on October 19, 2006. A-26-27. On September 26, 2006, the defendant had previously filed a timely Notice of Appeal. A-26, 292.

On October 24, 2006, the government timely filed its Notice of Appeal. A-27.

On November 14, 2006, the district court denied by written decision the defendant's challenge to the government's Section 851 Notice. A-27, SPA-19.

By way of motion dated February 16, 2007, the government has moved to withdraw its Notice of Appeal. That motion is pending before this Court.

The defendant is presently serving the sentence imposed by the district court.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

On November 7, 2000, prior to jury selection, the government filed with the district court and served on defendant John Foster, an Information pursuant to 21 U.S.C. § 851 alerting him that if he were convicted after trial, the enhanced penalties of 21 U.S.C. § 841(b)(1) would apply due to the fact that he had previously been convicted of a felony narcotics offense. Based on this notice, if convicted, Foster faced a minimum penalty of twenty years' imprisonment. A-13, 62.

Defendant John Foster was convicted after trial by a jury which completed a special verdict form finding that he conspired to possess with intent to distribute and did distribute 50 grams or more of cocaine base or "crack" cocaine, 5 kilograms or more of cocaine and 1,000 grams or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846.[2] A-16.

The district court calculated Foster's Guidelines at lifetime imprisonment, but departed from the imprisonment range and imposed a sentence of 324 months. A-20. This Court affirmed the judgment and

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[2] The facts of the underlying offense, which are not in dispute, are set forth at *Lewis*, 386 F.3d 475; *Lewis*, 2004 WL 2242588; and *Jones*, 381 F.3d 114.

sentence, *Lewis*, 386 F.3d 475; *Lewis*, 2004 WL 2242588, but subsequent to *Booker*, remanded the case pursuant to *Crosby*.

The district court determined that it would have imposed a materially different sentence under an advisory Guidelines regime, and thus held a resentencing hearing on September 19, 2006. A-26, 29, 159-289. The district court denied the defendant's challenge to the information filed by the government before jury selection pursuant to 21 U.S.C. § 851, which served to increase the statutory minimum 10 year term of imprisonment to 20 years. A-27, SPA-19. The court imposed a non-Guidelines sentence of 240 months, equivalent to the statutorily mandated 20 year term of imprisonment. A-277.

The sole issue raised by the defendant on appeal is whether the sentencing court properly rejected his challenge to the Section 851 information which increased his mandatory minimum term of imprisonment.

On this point, the district court reviewed the transcript of the defendant's state court guilty plea and found that he entered his plea knowingly and voluntarily, with a full understanding of the consequences of pleading guilty and the elements of the offense. The full text of the district court's decision denying the defendant's challenge to the Section 851 Information is set forth at pages 5 through 19 of the Defendant's Special Appendix.

SUMMARY OF ARGUMENT

The district court carefully reviewed and considered the transcript of the defendant's state court guilty plea before finding it constitutionally sufficient and denying the defendant's challenge to the government's Section 851 Information. The factual findings of the district court are amply supported by the transcript and are not clearly erroneous. Reviewing *de novo* the district court's application of the law to the facts, the district court correctly applied the "totality of the relevant circumstances" standard in evaluating the voluntariness of the subject guilty plea. Thus, there was no error when the court denied the defendant's challenge to the subject guilty plea.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S CHALLENGE TO A PRIOR FELONY NARCOTICS CONVICTION USED TO ENHANCE HIS SENTENCE FOR A FEDERAL NARCOTICS TRAFFICKING OFFENSE

A. Relevant Facts

On November 7, 2000 and prior to the commencement of jury selection, the government filed a Notice pursuant to Title 21, United States Code, Section 851 stating that in the event the defendant were convicted after trial, it

intended to use his prior felony narcotics conviction to enhance the penalties applicable at sentencing. A-13, 62.

Count One of the Second Superseding Indictment charged that the defendant "did knowingly and intentionally combine, conspire, confederate and agree together and with one another, to possess with intent to distribute and to distribute 1,000 grams or more of a mixture or substance containing a detectable amount of heroin . . . 5,000 grams or more of a mixture or substance containing a detectable amount of cocaine, and 50 grams or of a mixture or substance containing a detectable amount of cocaine base or 'crack' cocaine."

In accordance with the practice adopted after the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the district court instructed the jury to make specific determinations concerning the quantity of narcotics agreed to by each defendant as part of the conspiracy. On December 4, 2000, the jury returned its verdict against Foster. The special verdict form included findings that "John Foster's agreement to possess with intent to distribute and to distribute narcotics involved" 1,000 grams or more of heroin, 5,000 grams or more of cocaine, and 50 grams or more of cocaine base.

On June 18, 2001, the district court sentenced Foster to 324 months' imprisonment and he timely filed a Notice of Appeal. A-20. His conviction and the sentence of the district court were affirmed on appeal. This Court, however, later remanded the case for resentencing in accordance with its guidance in *Crosby*.

The defendant filed a response to the government's Section 851 Notice prior to the scheduled date for resentencing. A-25, 48, 50. The district court held another sentencing hearing on September 19, 2006 during which it found that the defendant had failed to prove that his prior Connecticut Superior Court felony narcotics conviction was constitutionally infirm. A-277.

In light of the trial evidence, the sentencing court credited the presentence report's drug quantity calculations of 40.5 kilograms of crack cocaine and 140.4 kilograms of heroin. A-165. This resulted in a base offense level of 38 under U.S.S.G. § 2D1.1(c)(1). The court increased Foster's base offense level by three levels for his managerial role, *see* U.S.S.G. § 3B1.1(b), by two levels for the use of a minor in connection with the offense, *see* U.S.S.G. § 3B1.4, and by two levels because of his use of a firearm in connection with the offense, *see* § 2D1.1(b)(1). As a result, the district court calculated a final offense level of 43, with a criminal history category III, corresponding to a lifetime term of imprisonment. A-233, 234.

Rather than imposing a sentence of life imprisonment, the district court imposed a non-Guidelines sentence on the basis of a combination of perceived mitigating factors, and sentenced the defendant to the statutory minimum 20 year term of imprisonment prescribed by 21 U.S.C. §§ 841(b)(1)(A) and 851. A-255, 265-67, 277-78.

This appeal and the government's cross-appeal followed. The government has since moved to withdraw its appeal.

B. Governing Law and Standard of Review

Pursuant to 21 U.S.C. § 851, the government may seek an enhanced sentence of a person convicted of a drug offense when that person has been previously convicted of one or more drug offenses by filing prior to trial an information stating the previous convictions to be relied upon at sentencing. According to this statute, if a defendant denies any allegation in the information, he must file a written response to the information. The statute further states that "[t]he court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment." 21 U.S.C. § 851(c)(1). The statute requires that if a defendant contends that a conviction was obtained unconstitutionally, the defendant "shall set forth his claim, and the factual basis therefor, with particularity in his response to the information." § 851(c)(2). For any constitutional claims raised by the defendant, the statute provides that he "shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response." *Id.*

In *United States v. Mikell*, 102 F.3d 470 (11th Cir. 1996) the Eleventh Circuit held that Section 851 permits a defendant to challenge the constitutionality of an earlier conviction which forms the basis for a Title 21 sentencing enhancement, and a defendant may assert any constitutional challenge to that earlier conviction. *Id.* at

477. *United States v. Sanchez*, 138 F.3d 1410, 1416 (11th Cir. 1998) (quoting statute as providing that a defendant shall "set forth his claim, and the factual basis therefor, with particularity in his response to the information."). A defendant challenging a prior felony conviction under Section 851, however, bears a heavy burden as state court judgments are accorded a presumption of regularity. *Parke v. Raley*, 506 U.S. 20, 29 (1992).

A trial judge is required to make a record that affirmatively discloses that the defendant's guilty plea is intelligent and voluntary. *Brady v. United States*, 397 U.S. 742, 747 n.4 (1970) (noting that *Boykin v. Alabama*, 395 U.S. 238 (1969) stands for the proposition that the "record [on appeal] must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily"). This obligation, however, does not require the judge "to engage in any particular interrogatory 'catechism' akin to that required of federal courts by Federal Rule of Criminal Procedure 11." *Hanson v. Phillips*, 442 F.3d 789, 798 (2d Cir. 2006) (citing *Siegel v. New York*, 691 F.2d 620, 626 (2d Cir.1982)).

In determining whether a state court plea allocution satisfies the requirements of the Constitution, a reviewing federal court must examine the "totality of the relevant circumstances" surrounding the plea. *Hanson*, 442 F.3d at 798; *Willbright v. Smith*, 745 F.2d 779, 780 (2d Cir.1984) (per curiam) (citing *Brady*, 397 U.S. at 749). In *Hanson*, this Court recognized that it has

> stated previously that a significant factor in determining whether a plea is intelligently and voluntarily entered is whether it was based on the advice of competent counsel. . . . The "affirmative disclosure" requirement may be met if the record shows that the defendant consulted with his attorney about the consequences of a guilty plea. *See North Carolina v. Alford*, 400 U.S. 25, 29 n.3, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) (stating that *Boykin* was satisfied because the record from the state court hearing on post-conviction relief affirmatively disclosed that "Alford had been fully informed by his attorney as to his rights on a plea of not guilty and as to the consequences of a plea of guilty").

Id. at 800-801 (first quotation marks and citation omitted).

On appeal, a district court's factual determinations will not be disturbed unless they are clearly erroneous. *United States v. Valdovinos-Soloache*, 309 F.3d 91, 93 (2d Cir. 2002) (per curiam). Where the district court's decision is based upon mixed findings of fact and law, this Court reviews the district court's decision *de novo*. *United States v. Fernandez-Antonia*, 278 F.3d 150, 156 (2d Cir. 2002) (mixed questions of law and fact reviewed *de novo*).

C. Discussion

On appeal, as before the district court, the defendant offers two reasons why his prior Connecticut Superior Court felony narcotics conviction may not be used to enhance his 10 year statutory minimum term of

imprisonment to 20 years. He asserts that the transcript of the subject guilty plea "(1) fails to demonstrate a knowing, voluntary and intelligent plea, and (2) fails to establish a factual basis for that conviction[.]" Def. Brief, 10. The district court disagreed. After carefully reviewing the transcript of the subject guilty plea and applying the correct legal standard, the district court found the defendant failed to prove by a preponderance of the evidence that the prior conviction relied on in the Section 851 information was constitutionally invalid. SPA-8.

The defendant does not assert – because he cannot – that the district court misconstrued or misapplied the correct legal standard. The district court properly found that "[t]he standard for determining the constitutionality of a guilty plea is the 'totality of the relevant circumstances.' *Hanson v. Phillips*, 442 F.3d 789, 798 (2d Cir. 2006) (citing *Willbright v. Smith*, 745 F.2d 779, 780 (2d Cir. 1984) (*per curiam*) and *Brady v. United States*, 397 U.S. 742, 749 (1970))." SPA-8-9.

The district court dealt with each of the defendant's claims in turn.

1. The Defendant's Plea Was Knowing and Voluntary

First, the court found that, "[t]he transcript demonstrates that the superior court judge adequately determined that Foster understood the charge against him." SPA-9. This finding was amply supported by the

transcript of the subject guilty plea. The district court relied on the following portion of the transcript:

> [PROSECUTOR]: And with regard to docket number CR97-0133012, the State's filing a substitute information. To the substitute information of possession of narcotics with intent to sell on September 30th, 1997 in violation of 21a-277a, how do you plea sir; guilty or not guilty?
>
> MR. FOSTER: Guilty.
>
> * * * *
>
> THE COURT: Have you had an opportunity to fully discuss these matters with your attorney?
>
> MR. FOSTER: Yes.
>
> THE COURT: Has he explained to you the elements, that is what the State would have to prove to convict you of violation of probation, possession of narcotics with intent to sell, weapon in a motor vehicle, and failure to appear in the 1st degree? Did he go over that with you?
>
> MR. FOSTER: Yes, sir.

SPA-9-10 (quoting state court transcript). In other words, the defendant confirmed that his attorney had reviewed the charges against him and explained to him the elements of the charges. Thus, the district court's finding that the

defendant understood the underlying narcotics charge to which he pleaded guilty cannot be said to have been clearly erroneous. *See Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) ("[T]he constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel.").

The defendant also asserted below that the state court judge rendered the guilty plea constitutionally infirm when it failed to address the defendant personally and inform him of the elements of the offense to which he was pleading guilty. The district court similarly rejected this claim finding as follows:

> Contrary to Foster's claims, due process is not offended because the state court did not describe the elements of the charge, and instead ascertained whether Foster's attorney had explained to him the nature of the charge. While a defendant's plea "would indeed be invalid if he had not been aware of the nature of the charges against him, including the elements of the [crimes] to which he pleaded guilty," *Bradshaw v. Stumpf*, 545 U.S. 175, 182-83 (2005), the Constitution does not require the court to explain to the defendant the elements of a charged crime. "Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were

explained to the defendant by his own, competent counsel." *Id*. at 183.

SPA-10.

The defendant also argues that the plea colloquy reflects that he was asked to respond to a number of compound questions about different charges, such that it is not clear that the defendant understood the nature of the charges against him. Relying on *Hanson*, 442 F.3d 789, he argues that the plea colloquy was invalid because the court's inquiry about the facts was phrased as a compound question. The district court rejected this argument finding as follows:

> The exchange between Foster and the state court does not suffer from the infirmities addressed in *Hanson*. In Foster's case, the relevant exchange began where the state prosecutor asked Foster how he wished to plead to the narcotics charge. Foster responded, "Guilty." Later in the proceeding, the court asked Foster whether his counsel had explained the elements of the four charges, including the sale of narcotics charge. Before Foster could answer that question, the court asked, "Did he go over that with you?" Unlike *Hanson*, where the judge asked two different questions in succession, the state court's second question to Foster merely reiterated and summarized the first question. When the state court judge asked Foster if counsel went over "that" with him, the judge was referring to the elements of the charges, i.e., the

> "violation of probation, possession of narcotics with intent to sell, weapon in a motor vehicle and, failure to appear in the 1st degree." Foster's response, "Yes, sir," indicated to the state court (and this court) that counsel had reviewed the elements of the four charges with him. . . . Foster has not demonstrated any other circumstances that undermine what the transcript demonstrates – that Foster voluntarily pleaded guilty to the narcotics charge after discussing the nature of the charge with his counsel prior to the plea allocution. *See* 21 U.S.C. § 851(c)(2).

SPA-13, 14.

On appeal, the defendant has offered nothing to call the district court's factual findings into question. The district court's findings, moreover, are amply supported by the relevant transcript and are not clearly erroneous. Neither has he called into question the "totality of the relevant circumstances" standard applied by the district court. The district court applied the correct standard. Thus, its finding that the subject guilty plea was knowing and voluntary is free of error.

2. There Was a Factual Basis for the Defendant's Plea

The defendant also asserted that the Connecticut Superior Court judge failed to insure that there was a factual basis for the guilty plea. The district court found

this claim to be without merit relying on the following portion of the plea transcript:

> [PROSECUTOR]: He failed to appear on December 9th, 1997, when he was supposed to be considering the offer of five, two, three on the underlying possession of narcotics with intent to sell, which stemmed from an incident where he was observed throwing down some drugs which the officers were able to retrieve and field tested positive back on September 30th, 1997.
>
> * * * *
>
> THE COURT: Now with regard to the narcotics and failure to appear, you heard the prosecutor recite the facts, is that basically what happened? You were in possession or – custody – is this an Alford plea?
>
> [FOSTER'S COUNSEL]: I thought we waived the reading of the facts?
>
> THE COURT: Oh, no, no. But I've got to ask him. You heard the facts on that particular case; is that basically what happened? You didn't show up and you had some narcotics in which you were in possession, in custody, or control of a sufficient amount to indicate possession with intent to sell; was that basically it? You've got to say yes or no?
>
> MR. FOSTER: Yes, sir.

SPA-15 (quoting state court transcript).

Based on the foregoing, the district court found that the state court judge "insisted on eliciting for the record Foster's agreement with the facts as described by the prosecutor. Thus, in successive questions, the judge asked Foster if he agreed with the prosecutor's recitation of the facts supporting those charges." SPA-16. Accordingly, the district court disagreed with the defendant that the state court failed to insure a factual basis for the guilty plea, and on appeal, the district court's finding cannot be said to be clearly erroneous.

The defendant also asserts that the plea was factually inadequate because the court failed to inform him of the nature and quantity of narcotics allegedly involved in the offense. The district court also rejected this claim:

> But the failure to canvass Foster about the type and quantity of narcotics does not, by itself, invalidate Foster's plea. As the Second Circuit has stated, a state court's failure to question a defendant about the factual basis for his plea does not constitute a due process violation because a "factual basis inquiry . . . is merely one way of satisfying the constitutional requirement that a plea be voluntary and intelligent." *Willbright v. Smith*, 745 F.2d 779, 781 (2d Cir. 1984) (per curiam). It is Rule 11, not due process, "that requires federal courts to conduct a factual inquiry before accepting a guilty plea." *Id*. at 780 (citing *McCarthy v. United States*, 394 U.S. 459, 465 (1969)).

* * *

> Having already determined that Foster was aware of the charge against him, the court finds no reason to doubt that under the totality of the circumstances Foster was afforded due process simply because the state court did not canvass Foster as to the quantity and type of narcotics underlying the charge to which he pled guilty.

SPA-16-17.

The district court further found that Foster had been represented by competent counsel, had denied in open court that anyone had threatened him to plead guilty and had stated that he was pleading guilty freely and voluntarily. SPA-17-18. These findings were likewise based upon the district court's review of the totality of the subject plea transcript, and cannot be said to be clearly erroneous.

Finally, the district court found suspect the circumstances under which the defendant advanced his claims. The district court observed as follows:

> Rather than challenge the validity of his plea and conviction on appeal or in a habeas petition, Foster waited seven years and challenges it for the first time in response to the government's efforts to enhance his sentence in this case. *See Willbright*, 745 F.2d at 781 (finding a guilty plea to be intelligent and voluntary because, among other

> things, the defendant did not assert that he was not guilty until four years after he pleaded guilty, and only then, in a resentencing proceeding). Indeed, Foster could have moved to withdraw his guilty plea in state court, even after it was accepted for the exact reasons he now asserts. *See* Conn. Super. Ct. R. § 39-27 (permitting the state court to revoke a defendant's plea agreement after its acceptance for a number of reasons, including "[t]he plea . . . was entered without knowledge of the nature of the charge" or "[t]here was no factual basis for the plea").

SPA-18.

Notably, as with the first prong of his voluntariness claim, the defendant does not assert on appeal that the district court's factual findings were clearly erroneous. They were not. Neither does he dispute that the district court applied the correct legal standard. It did.

The district did not err when it found the defendant's state guilty plea was knowingly and voluntarily entered. The defendant's claim on appeal should be rejected.

CONCLUSION

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

Dated: February 21, 2007

Respectfully submitted,

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ADDENDUM

21 U.S.C. § 841 – **Prohibited Acts**

(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--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(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) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

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.

* * *

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 except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the

request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

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

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

had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

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