

# 07-3619-cr

*To Be Argued By:*  
H. GORDON HALL

=====

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-3619-cr

UNITED STATES OF AMERICA,

*Appellee,*

-vs-

MICHAEL HARDING,

*Defendant-Appellant.*

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

=====

**BRIEF FOR THE UNITED STATES OF AMERICA**

=====

NORA R. DANNEHY  
*Acting United States Attorney*  
*District of Connecticut*

H. GORDON HALL  
*Assistant United States Attorney*  
KAREN L. PECK  
*Assistant United States Attorney (of counsel)*

## TABLE OF CONTENTS

Table of Authorities.....	iv
Statement of Jurisdiction.....	ix
Statement of Issues Presented for Review.....	x
Preliminary Statement.....	1
Statement of the Case.....	2
Statement of Facts and Proceedings Relevant to this Appeal.....	3
A. The Offense Conduct.....	3
B. Harding’s Prosecution and Guilty Plea.....	4
C. Harding’s Sentencing.....	9
Summary of Argument.....	12
Argument.....	15
I. The district court did not commit plain error in not specifically inquiring of Harding prior to sentencing whether he affirmed or denied prior narcotics convictions alleged by the government as the basis for its enhancement notice filed and in not advising him of his limited opportunity to challenge the convictions pursuant to 21 U.S.C. § 851.....	15

A. Relevant facts. . . . .	15
B. Governing law and standard of review. . . . .	15
1. Section 851. . . . .	15
2. The plain error standard of review. . . . .	18
C. Discussion. . . . .	19
II. The district court did not misapprehend its authority in denying Harding’s request for a reduction for role in the offense. . . . .	26
A. Relevant facts. . . . .	26
B. Governing law and standard of review. . . . .	27
1. Governing law. . . . .	27
2. Standard of review. . . . .	28
C. Discussion. . . . .	28
III. The district court possessed jurisdiction over the offense of conviction. . . . .	32
A. Relevant facts. . . . .	32
B. Governing law and standard of review. . . . .	32
C. Discussion. . . . .	33

Conclusion..... 35

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

Addendum

## TABLE OF AUTHORITIES

### CASES

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.

<i>Harris v. United States</i> , 149 F.3d 1304 (11th Cir. 1998). . . . .	17
<i>Johnson v. United States</i> , 520 U.S. 461 (1977). . . . .	19
<i>Prou v. United States</i> , 199 F.3d 37 (1st Cir. 1999). . . . .	17
<i>United States v. Barnes</i> , 244 F.3d 331 (2d Cir. 2001). . . . .	19
<i>United States v. Belanger</i> , 970 F.2d 416 (7th Cir. 1992). . . . .	17
<i>United States v. Cevallos</i> , 538 F.2d 1122 (5th Cir. 1976). . . . .	17, 18
<i>United States v. Colon</i> , 220 F.3d 48 (2d Cir. 2000). . . . .	28
<i>United States v. Craft</i> , 495 F.3d 259 (6th Cir. 2007). . . . .	18, 25

<i>United States v. Dickerson</i> , 514 F.3d 60 (1st Cir. 2008).....	18, 25
<i>United States v. Doe</i> , 297 F.3d 76 (2d Cir. 2002).....	19
<i>United States v. Dominguez-Benitez</i> , 542 U.S. 74 (2004).....	18
<i>United States v. Ellis</i> , 326 F.3d 593 (4th Cir. 2003).....	18
<i>United States v. Garcia</i> , 926 F.2d 125 (2d Cir. 1991).....	11
<i>United States v. Garcia</i> , 954 F.2d 273 (5th Cir. 1992).....	18
<i>United States v. Goodman</i> , 165 F.3d 169 (2d Cir. 1999).....	30
<i>United States v. Harwood</i> , 998 F.2d 91 (2d Cir. 1993).....	18, 25
<i>United States v. Jeffers</i> , 329 F.3d 94 (2d Cir. 2003).....	27
<i>United States v. Jordan</i> , 810 F.2d 262 (D.C. Cir. 1987).....	17
<i>United States v. Mata</i> , 491 F.3d 237 (5th Cir. 2007).....	18

<i>United States v. Olano</i> , 507 U.S. 725 (1993). . . . .	19
<i>United States v. Rahman</i> , 189 F.3d 88 (2d Cir. 1999). . . . .	28
<i>United States v. Ramsey</i> , 655 F.2d 398 (D.C. Cir. 1981). . . . .	17
<i>United States v. Ravelo</i> , 370 F.3d 266 (2d Cir. 2004). . . . .	27, 28
<i>United States v. Regalado</i> , 518 F.3d 143 (2d Cir. 2008). . . . .	19
<i>United States v. Romero-Carrion</i> , 54 F.3d 15 (1st Cir. 1995). . . . .	18, 25
<i>United States v. Sapia</i> , 433 F.3d 212 (2d Cir. 2005). . . . .	17, 26
<i>United States v. Shonubi</i> , 998 F.2d 84 (2d Cir. 1993). . . . .	27
<i>United States v. Vanness</i> , 85 F.3d 661 (D.C. Cir. 1996). . . . .	20

<i>United States v. Vaval</i> , 404 F.3d 144 (2d Cir. 2005). . . . .	19
<i>United States v. Vonn</i> , 535 U.S. 55 (2002). . . . .	18, 19
<i>United States v. Yu</i> , 285 F.3d 192 (2d Cir. 2002). . . . .	27, 28
<i>Vadas v. United States</i> , 527 F.3d 16 (2d Cir. 2007). . . . .	17

**STATUTES**

18 U.S.C. § 3231. . . . .	ix, 33, 34
18 U.S.C. § 3553. . . . .	2
18 U.S.C. § 3742. . . . .	ix
21 U.S.C. § 812. . . . .	32, 34
21 U.S.C. § 841. . . . .	<i>passim</i>
21 U.S.C. § 851. . . . .	<i>passim</i>

**RULES**

Fed. R. App. P. 4. . . . .	ix
Fed. R. Crim. P. 52. . . . .	18



## **GUIDELINES**

U.S.S.G. § 1B1.3. ....	10, 29
U.S.S.G. § 2D1.1. ....	8
U.S.S.G. § 3B1.2. ....	10, 13, 27, 28, 29

## **STATEMENT OF JURISDICTION**

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on August 22, 2007. Appendix (“A”) 15. On August 21, 2007, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A 15. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

**STATEMENT OF ISSUES  
PRESENTED FOR REVIEW**

1. Did the district court commit plain error in not specifically inquiring of the defendant prior to sentencing whether the defendant affirmed or denied a prior narcotics conviction alleged by the government as the basis for the enhancement notice it filed and in not advising the defendant of his limited opportunity to contest the conviction pursuant to 21 U.S.C. § 851(b)?
2. Did the district court apprehend its discretion whether or not to afford the defendant a downward departure for his role in the offense of conviction?
3. Did the district court possess subject matter jurisdiction over the offense of conviction?

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 07-3619-cr**

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UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

MICHAEL HARDING,  
*Defendant-Appellant.*

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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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### **Preliminary Statement**

Michael Harding was indicted along with fifteen co-defendants on May 4, 2006, and charged with conspiracy to possess with intent to distribute at least five kilograms of cocaine. Harding pleaded guilty to the lesser included offense of conspiracy to possess with intent to distribute cocaine, without a specific quantity, on February 2, 2007. Harding was sentenced on August 21, 2007. At sentencing, the district court (Stefan R. Underhill, J.) found that 479 grams of cocaine was appropriately

attributable to Harding, denied a requested reduction for role in the offense, and calculated that Harding was subject to an advisory Guidelines range of 84 to 105 months, based in part on Harding's falling into Criminal History Category VI and a two-point adjustment for acceptance of responsibility. The district court then found that Harding's criminal history category substantially over-represented the seriousness of his criminal history, and departed to Criminal History Category V, for a sentencing range of 77 to 96 months. After considering the remaining 18 U.S.C. § 3553(a) factors, the district court sentenced Harding to a sentence of 77 months of imprisonment, explaining that he arrived at that sentence through his departure authority and consistent with his view of what was a fair and just sentence.

### **Statement of the Case**

On May 4, 2006, a federal grand jury in the District of Connecticut returned an Indictment charging Michael Harding in connection with a conspiracy to possess and distribute cocaine. Harding was named in Count One of the Indictment, which charged conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(ii), and 846. A 16-28. Harding was arrested on May 24, 2006, and was detained by order of the court. A 3. He has been incarcerated since that date.

On February 2, 2007, Harding pleaded guilty to Count One of the Indictment charging him with conspiracy to possess with intent to distribute cocaine in violation of 21

U.S.C. §§ 841(a)(1), 841(b)(1)(C) and 846 pursuant to a written plea agreement. A 13, 34-40, 41-79. Before the plea was offered, the government filed a second offender information pursuant to 21 U.S.C. § 851(a), in which the government alleged that Harding previously had been convicted of two narcotics felonies. A 13, 30-33. After a Presentence Report was prepared by the United States Probation Office, a sentencing hearing was held before the district court (Stefan R. Underhill, J.) on August 14, 2007. A 15, 89-140. The district court sentenced Harding principally to 77 months of incarceration. A 141-143. Judgment entered on August 22, 2007. A 15.

On August 21, 2007, Harding filed a timely notice of appeal. A 15, 144. He is currently serving his 77-month sentence at Allenwood United States Penitentiary, Pennsylvania.

## **STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL**

### **A. The Offense Conduct**

On May 4, 2006, Harding and fifteen others were indicted for conspiracy to possess with intent to distribute at least 5 kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(ii) and 846. A 16-28. The conspiracy transpired over about one year, between June 2005 and April 2006. A 17. During the course of the charged conspiracy, several key defendants would obtain redistribution quantities of cocaine powder, which they would repackage and sell in smaller redistribution

quantities to individuals in the Bridgeport, Connecticut area, including Harding. Harding and other defendants would then distribute the drugs to their local customers. A 69-72. During the investigation, the government intercepted scores of drug-related telephone calls among the conspirators, including calls between Harding and one of the principal distributors. In those calls, Harding used coded language to arrange for the purchase of cocaine, which would be provided to him on consignment, and for which he would pay after he had distributed it. A 70-71. The government also made covert, court-authorized video recordings of Harding receiving quantities of cocaine from one of the principal distributors. A 70. Had the case gone to trial, the evidence available to the government was sufficient to establish that in excess of 500 grams of cocaine was directly attributable to Harding based on his offense conduct. A 106.

#### **B. Harding's Prosecution and Guilty Plea**

Following his indictment and arrest, Harding, who was already in state custody on unrelated matters, was denied bond. A 2-3.

On February 2, 2007, Harding, along with several of his codefendants, appeared for jury selection before the district court. Prior to the initiation of *voir dire*, Harding entered into a written plea agreement and agreed to offer a guilty plea to Count One of the Indictment charging him with conspiracy to possess with intent to distribute 500 grams or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(ii) and 846. A 13. The plea

agreement pursuant to which Harding agreed to enter a guilty plea did not contain an agreement as to the quantity of cocaine involved in the conspiracy. A 34-35. Prior to the entry of the guilty plea, government counsel filed an information pursuant to 21 U.S.C. § 851, which alleged prior felony narcotics convictions of the defendant in Connecticut Superior Court on December 5, 2003 and August 9, 1995 as the basis for the government's claim in the notice that the defendant had at least one prior narcotics felony conviction. A 30-33. The plea agreement contained a stipulation of the parties to the two prior convictions. A 37.

During the plea hearing and at the direction of the district court, government counsel recited that

[i]n light of the fact that the defendant has prior felony drug convictions and the government intends to file a second offender information pursuant to 21 United States Code Section 851, a second offender enhancement will apply in Mr. Harding's case increasing his maximum term of imprisonment to 30 years, his fine to potentially as much as \$2 million, his term of supervised release would increase to at least six years and as much as life.

A 48. Following the recitation, the following colloquy took place:



THE COURT: All right. Mr. Harding, do you have any question about what the sentence could be if you plead guilty to Count One today?

THE DEFENDANT: Yes, it's – with the, with the Title 21, 851(b) filed, what is my – does that double my minimum –

THE COURT: Mr. Smart? [government counsel]

THE DEFENDANT: Does that have anything to do with the minimum sentence that I can receive of imprisonment?

THE COURT: My belief, doublechecking – my belief is there is no mandatory minimum, that there is – it affects your maximum. That is, your maximum goes from 20 years to 30 years, but because you're pleading to the quantity that you're pleading to, there is no mandatory minimum sentence of imprisonment.

THE DEFENDANT: Okay.

MR. SCHAFFER: Judge, I think logically it is because the mandatory minimum is zero and anything times zero is zero, so even if it's doubled, it's still zero.

THE COURT: Fair enough.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: Are you all set?

THE DEFENDANT: Yes.

A 49-50. Subsequently, and again at the direction of the district court, government counsel summarized the written plea agreement for the defendant. In doing so, he stated:

The next provision, Your Honor, concerns the 851 enhancement. Mr. Harding is stating his agreement and his understanding that his conviction carries an enhanced penalty because of his prior criminal record. And he agrees that that enhancement and the fact that he has a qualifying criminal record need not have been indicted or proven beyond a reasonable doubt, and further states his agreement that his stipulation that he has, in fact, been

previously convicted in the Connecticut Superior Court of qualifying felony drug offenses which did cause an enhancement of his penalty range under 21 United States Code 841(b)(1)(c) and 851.

A 65.

At the time Harding pleaded guilty, he correctly understood that he faced up to 30 years of imprisonment due to the charge to which he proposed to enter a plea and the fact that he had prior narcotics felony convictions. A 48-49. The Probation Office's Presentence Report ("PSR") calculated Harding's adjusted offense level to be 26. PSR 16. This calculation included a base offense level of 26 pursuant to U.S.S.G. § 2D1.1(c)(7), based on an attribution of 950 grams of cocaine. After a two-level reduction for acceptance of responsibility,<sup>1</sup> the PSR calculated an offense level of 24, a Criminal History Category of VI, and a Guideline range of 100 to 125 months of imprisonment.<sup>2</sup>

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<sup>1</sup> The government declined to move for an additional one-level reduction pursuant to U.S.S.G. § 3E1.1(b), notwithstanding the reference to a three-level reduction in the PSR at page 16. A 112.

<sup>2</sup> Again, the PSR included an additional one-level reduction for which the government did not move, so its final range calculation was 92 to 115 months. PSR 26.

### **C. Harding's Sentencing**

On August 14, 2007, Harding appeared before the district court (Stefan R. Underhill, J.) for sentencing. Prior to sentencing, Harding had submitted to the court a sentencing memorandum in which he objected to the drug attribution contained in the PSR; sought a Guideline reduction for his role in the offense; and requested a downward departure or non-Guidelines sentence under a "log jam" theory and based on his assertion that his criminal history over-represented the seriousness of his prior criminal conduct. A 80-88. Harding did not pursue any other objections to the PSR, and interposed no objection whatsoever to the recitation in the document of the two prior narcotics felonies on which the government based its 851 information. A 91.

At the hearing, the district court heard the arguments of the parties as to each of the issues raised by Harding. With respect to the drug attribution, the government adopted the recommendation of the Office of Probation that an appropriate attribution would be 950 grams of cocaine. A 92-94. Harding took the position that the evidence relied upon by the government and Probation to establish the appropriate attribution was insufficient to sustain the government's burden on the issue. A 94-99. The district court resolved the issue by reviewing investigative reports, crediting some and discounting others, and arriving at an attribution of 479 grams of cocaine. A 118-119.

With respect to the requested role reduction, Harding took the position that he was entitled to a reduction

because he considered himself to be less culpable than other members of the conspiracy. A 112-115. The government argued, and the district court accepted, that since the defendant was being held accountable for a quantity of cocaine which the court had found that he purchased and sold himself, he should be afforded no downward role adjustment. A 114-116. In making its determination, the district court relied on Application Note 3 to U.S.S.G. § 3B1.2, which provided in pertinent part that

[a] defendant who is accountable under § 1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is *not precluded* from consideration for an adjustment under this guideline. [Emphasis added].

From this language, the district court inferred that “the guideline principally applies when the defendant is being charged with conduct beyond personal involvement.” A 114. The district court went on to state that

here he’s only being charged with what he personally was involved with, *and although it’s not impossible to get a reduction*, I think the implication of the note is that *it will be a rare case when you have a limited or minor role with respect to what you actually did*.

*And so I'm suggesting to you that it may not apply in this case. [emphasis added].*

A 115. Later in the proceedings, the district court denied the requested reduction, not as inapplicable or beyond his authority, but as inappropriate in Harding's case. A 119. The court then calculated Harding's applicable Guidelines using a base offense level of 24, with a two-level reduction for acceptance of responsibility.

The district court then turned to the departure grounds urged by Harding. As to the requested "log jam" departure,<sup>3</sup> the district court found that it was simply unwarranted on the facts in this case, as Harding was one of a group of the last defendants to plead guilty. A 134.

The district court then granted Harding's request for a downward departure for an over-representative criminal history, and departed horizontally one Criminal History Category to Category V. This brought the court to a Guideline range of 77 to 96 months of imprisonment based on an adjusted offense level of 22. A 119-120. The district court then imposed a sentence of 77 months of imprisonment, at the bottom of the calculated Guideline range. A 136.

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<sup>3</sup> This is a reference to *United States v. Garcia*, 926 F.2d 125 (2d Cir. 1991), in which the district court had afforded a downward departure to one of the defendants because his early guilty plea had led to guilty pleas by other defendants, thereby breaking the "log jam."

## SUMMARY OF ARGUMENT

I. The district court did not commit plain error in not asking Harding personally whether he admitted or denied the prior felonies alleged by the government in its 851 information and in not advising Harding of his right to challenge the alleged convictions under certain circumstances. While there is a split in the Circuits as to whether strict compliance with 21 U.S.C. § 851(b) is required or whether substantial compliance is sufficient, the standard in the Second Circuit appears to be that substantial compliance can suffice. Here, the record establishes that there was substantial compliance with the requirements of the statute.

In the written plea agreement executed by Harding and the government, Harding stipulated to the two prior drug convictions relied upon by the government in the Section 851 information filed at the time of the plea and agreed on the effect those prior convictions would have on his sentencing exposure. The fact and effect of the 851 information and the prior convictions referred to therein was explained at length during the plea proceeding, and Harding specifically referred to the enhancing effect of the 851 information during the plea colloquy. Harding acknowledged his understanding of the provisions of the plea agreement (including the aforementioned stipulation) and the applicable enhanced penalties. He posed no objections to the prior convictions set forth in the PSR, and given the date of one of his prior drug convictions from 1995, Harding would not have been able to challenge that conviction in any event. *See* 21 U.S.C. § 851(e).

Moreover, given the sentence imposed, there is no indication that the court relied on the enhancement when fashioning the sentence. Considering all the foregoing, an additional canvass of the defendant by the district court on these matters would have added nothing to the fidelity of the proceedings. Accordingly, the substantial compliance with Section 851(b) reflected in the record establishes that the court did not commit plain error on this issue. In any event, as any challenge to one of the two convictions relied upon by the government was time-barred by Section 851(e), the defendant's sentence was not affected by the filing of the enhancement information. Consequently, even assuming error by the district court, it was clearly harmless.

II. The record establishes that the district court properly apprehended its authority to afford Harding a Guideline reduction for role in the offense, but chose in its discretion not to do so. The court made specific reference to Application Note 3(A) to U.S.S.G. § 3B1.2 which plainly indicates that a defendant in Harding's situation is not precluded from receiving a role reduction. The court went on to state that, while such a reduction for a defendant in Harding's position is not "impossible," such a reduction would be "rare." There is nothing in the record to indicate that the district court misapprehended its authority on this issue.

Because the district court attributed to Harding a quantity of cocaine which in its view represented only the quantity of drugs with which Harding was personally and directly involved, and because the court found that



Harding distributed those drugs for his own account, the court was well within its discretion in denying the requested role reduction.

III. Contrary to Harding's claim that Congress did not confer federal jurisdiction over drug cases like his, the plain language of 21 U.S.C. §§ 841(a)(1) and 846 makes it a federal offense to conspire to possess with intent to distribute a controlled substance such as cocaine. In turn, the plain language of 21 U.S.C. § 841(b)(1)(C) prescribes a penalty of up to 20 years of imprisonment, among other things, for such a violation, except as provided in Subsections A, B and D, which prescribe penalties for offenses involving threshold amounts of particular drugs, including cocaine. There is no authority to suggest – and Harding cites none – that the district court did not have jurisdiction over the offense for which it accepted Harding's guilty plea.

## ARGUMENT

- I. **The district court did not commit plain error in not specifically inquiring of Harding prior to sentencing whether he affirmed or denied prior narcotics convictions alleged by the government as the basis for its enhancement notice filed and in not advising him of his limited opportunity to challenge the convictions pursuant to 21 U.S.C. § 851.**

### A. Relevant facts

The facts pertinent to this issue are set forth in the *Statement of Facts* above.

### B. Governing law and standard of review

#### 1. Section 851

Title 21, Section 841(b)(1)(C) provides for enhanced penalties for defendants with prior felony narcotics convictions:

If any person commits [a violation of 21 U.S.C. § 841(a)(1)] 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 . . . .

Title 21, Section 851(a)(1) provides in pertinent part that

[n]o person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States Attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

The statute goes on to require that, prior to imposing sentence, the court shall

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.

21 U.S.C. § 851(b).

The purposes of the notice requirement of Section 851 are two-fold: first, to advise the defendant of the government's intention to rely on the specified convictions as the basis for a sentence enhancement, and to give the defendant an opportunity to challenge the specified conviction; and second, to give the defendant an opportunity to decide whether to offer a guilty plea or

proceed to trial with full knowledge of the consequences of a potential guilty verdict. *See Vadas v. United States*, 527 F.3d 16, 22-23 (2d Cir. 2007). Some courts of appeal have held that compliance with Section 851(a) is jurisdictional, and that a failure of strict compliance with that section’s notice requirements defeats the jurisdiction of the court to enhance a sentence. *See, e.g., Harris v. United States*, 149 F.3d 1304, 1306 (11th Cir. 1998) (“a district court lacks jurisdiction to enhance a sentence unless the government strictly complies with the procedural requirements of § 851(a)”); *United States v. Belanger*, 970 F.2d 416, 418 (7th Cir. 1992) (“Failure to file the [§ 851] notice prior to trial deprives the district court of jurisdiction to impose an enhanced sentence.”). However, a majority of courts of appeal, including this Court, have embraced the view that compliance with § 851(a) is not jurisdictional, but “simply a condition precedent to a court’s authority to impose a statutorily enhanced sentence.” *United States v. Sapia*, 433 F.3d 212, 217 (2d Cir. 2005) (collecting cases); *see also Prou v. United States*, 199 F.3d 37, 45 (1st Cir. 1999).

With regard to Section 851(b), the courts of appeal are also split as to whether strict compliance with its canvass requirements is necessary. Some courts have held that it is. *See United States v. Jordan*, 810 F.2d 262, 269 (D.C. Cir. 1987) (failure of the district court to inquire requires remand for re-sentencing); *United States v. Ramsey*, 655 F.2d 398, 400 n. 7 (D.C. Cir. 1981) (§ 851(b) requires strict, not substantial, compliance); *see also United States v. Cevallos*, 538 F.2d 1122, 1126-27 (5th Cir. 1976). Others, including this Court, have concluded that strict

compliance is not required. *See United States v. Harwood*, 998 F.2d 91, 101 (2d Cir. 1993) (where at sentencing defendant was asked by court, defendant replied through lawyer that he did not dispute convictions, ““That is all the statute requires.””) (citing *United States v. Harris*, 592 F.2d 1058, 1061 (9th Cir. 1979)); *United States v. Garcia*, 954 F.2d 273, 276-77 (5th Cir. 1992) (over-ruling *Cevallos*).

## **2. The plain error standard of review**

This Court has not enunciated the appropriate standard of review for claimed violations of Section 851(b). However, where objection has been preserved in the district court, most courts of appeal have held that such claims are subject to “harmless error” analysis. *See United States v. Romero-Carrion*, 54 F.3d 15, 18 (1st Cir. 1995) (collecting cases). In the absence of an objection in the district court, as in this case, plain error review applies. *See United States v. Dickerson*, 514 F.3d 60, 65 (1st Cir. 2008) (citing *United States v. Craft*, 495 F.3d 259, 265 (6th Cir. 2007); *United States v. Mata*, 491 F.3d 237, 244 (5th Cir. 2007); *United States v. Ellis*, 326 F.3d 593, 598 (4th Cir. 2003)).

In the analogous situation where a defendant challenges the validity of his guilty plea for the first time on appeal, this Court employs a plain error analysis. *See Fed. R. Crim. P. 52(b)*; *United States v. Dominguez-Benitez*, 542 U.S. 74 (2004) (citing *United States v. Vonn*, 535 U.S. 55, 63 (2002)) (defendant who seeks reversal of conviction after guilty plea on ground that district court

violated Rule 11 must establish plain error); *United States v. Vaval*, 404 F.3d 144, 151 (2d Cir. 2005) (where appellant fails to object to Rule 11 violation, Court reviews for plain error); *United States v. Barnes*, 244 F.3d 331, 333 (2d Cir. 2001) (per curiam) (where defendant “did not argue the point to the district court, we review the trial judge’s acceptance of the plea for plain error”).

The defendant bears the burden of establishing plain error. *See Vaval*, 404 F.3d at 151 (citing *Vonn*, 535 U.S. at 59). To establish plain error, the defendant must demonstrate (1) an error, (2) that is plain, and (3) that affects substantial rights. *United States v. Regalado*, 518 F.3d 143, 147 (2d Cir. 2008); *Vaval*, 404 F.3d at 151 (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). “If an error meets these initial tests, the Court engages in a fourth consideration: whether or not to exercise its discretion to correct the error. The plain error should be corrected only if it ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Doe*, 297 F.3d 76, 82 (2d Cir. 2002) (citing *Johnson v. United States*, 520 U.S. 461, 466-67 (1977)).

### **C. Discussion**

Harding claims error in the district court, not in the filing or content of the Section 851 information pursuant to Section 851(a),<sup>4</sup> but in the court’s failure to ask him

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<sup>4</sup> Harding makes no claim that the government’s filing  
(continued...)

whether he affirmed or denied the convictions alleged in the information, and to advise him that he could only challenge the convictions until sentencing, pursuant to Section 851(b). The record does not support Harding's claim of error.

Prior to the entry of the guilty plea, government counsel filed an information pursuant to 21 U.S.C. § 851, which alleged prior felony narcotics convictions of the defendant in Connecticut Superior Court on December 5, 2003 and August 9, 1995 as the basis for the government's claim in the notice that the defendant had at least one prior narcotics felony conviction. A 30-33.

The written plea agreement into which Harding entered in open court on February 2, 2007 correctly recited the enhanced penalties he faced upon conviction, and

---

<sup>4</sup> (...continued)

was untimely, or that the convictions recited in it did not pertain to him or were subject to challenge. Neither does he claim any other defect in the information. It should be noted that, because the information had been drafted in contemplation of a conviction under 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(ii) and 846, its recitation of the enhanced penalties flowed from those statutes. In fact, Harding entered a plea to the lesser included offense of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(c) and 846, which carried different penalties after enhancement. In any event, Section 851(a) contains no requirement that the enhanced penalties be recited in the information. *See United States v. Vanness*, 85 F.3d 661, 663-64 (D.C. Cir. 1996) (misstatement of enhanced penalties in § 851 information "a harmless error").

specifically described them as enhanced penalties triggered by the government's filing of a Section 851 information based on prior felony narcotics convictions.

A 35. Harding also stipulated in the agreement

that he has been previously convicted in Connecticut Superior Court of: (1) possession of narcotics, for which he was sentenced to a term of imprisonment of 4 years, execution suspended, on or about December 5, 2003; and (2) sale of a controlled substance, for which he was sentenced to a term of imprisonment of 18 months, execution suspended, on or about August 9, 1995, and that these were felony drug offenses for purposes of 21 U.S.C. §§ 841(b)(1)(C) & 851.

A 37.

On four occasions during the plea proceeding, the government's reliance on the specified convictions to enhance the penalties Harding faced was discussed. Government counsel referred to the prior convictions, the filing of the information, and the effect it would have on Harding's exposure during his oral summary of the penalties Harding would face. A 48. Following the summary, the district court asked Harding directly to explain the maximum term of imprisonment he would face if his plea were accepted. Making specific reference to the enhancement information, Harding responded:



THE DEFENDANT: With or without the –

THE COURT: Well, let's do it with because I think the government intends to file an 851 notice.

THE DEFENDANT: Thirty years.

THE COURT: And what is the maximum term of supervised release that you face?

THE DEFENDANT: Life.

A 48-48. Immediately thereafter, the following colloquy took place.

THE COURT: All right. Mr. Harding, do you have any question about what the sentence could be if you plead guilty to Count One today?

THE DEFENDANT: Yes, it's – with the, with the Title 21, 851(b) filed, what is my – does that double my minimum –

THE COURT: Mr. Smart? [government counsel]

THE DEFENDANT: Does that have anything to do with the minimum sentence that I can receive of imprisonment?

THE COURT: My belief, doublechecking – my belief is there is no mandatory minimum, that there is – it affects your maximum. That is, your maximum goes from 20 years to 30 years, but because you're pleading to the quantity that you're pleading to, there is no mandatory minimum sentence of imprisonment.

THE DEFENDANT: Okay.

MR. SCHAFFER: Judge, I think logically it is because the mandatory minimum is zero and anything times zero is zero, so even if it's doubled, it's still zero.

THE COURT: Fair enough.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: Are you all set?

THE DEFENDANT: Yes.

A 49-50. Finally, at the direction of the court, government counsel summarized the written plea agreement, making specific reference to Harding's agreement that, by virtue of the specified prior convictions and the filing of the information, he faced enhanced penalties, and to Harding's stipulation to the specified convictions as enhancement qualifiers under 21 U.S.C. §§ 841(b)(1)(C) and 851. A 65. Thereafter, the district court addressed Harding directly:

THE COURT: Mr. Harding, was there anything Mr. Smart said when he was describing the plea agreement letter that either surprised you or was different from what you think the letter says?

THE DEFENDANT: No, sir.

A 67.

On this record, it is clear that Harding knew that the government intended to rely on one or the other of the two prior drug felony convictions set forth in the information and in the plea agreement. Further, he knew that the filing of the information would have the effect of raising his maximum incarceration exposure from twenty years to thirty years. Finally, he stipulated to having been convicted of the two specified prior offenses, and that both qualified as a basis for the enhanced penalty set forth in 21

U.S.C. §§ 841(b)(1)(C) and 851. Accordingly, all of the notice functions of Section 851(a) were complied with, and Harding's stipulation to the prior convictions affirmed them and waived any challenge to them, in substantial compliance with Section 851(b). *See United States v. Harwood*, 998 F.2d at 101.

Another factor is that one of the two specified prior convictions occurred on August 9, 1995, which was well beyond the five years Harding had to challenge it. 21 U.S.C. § 851(e). "The failure to conduct a § 851(b) colloquy is harmless when all of the prior convictions contained in the information are more than five years old. And if the error is harmless, it cannot be plain." *Dickerson*, 514 F.3d at 65 (citing *Romero-Carrion*, 54 F.3d at 18 and *Craft*, 495 F.3d at 265-66). Since only one of the two convictions recited in the enhancement information was necessary for the district court to be authorized to enhance Harding's exposure, and one of them was not subject to challenge, the failure of the district court to engage formally in an 851(b) canvass was not plain error.

Finally, there is no indication in the record, nor is there any assertion by Harding, that the increase in the maximum penalty Harding faced had any effect whatsoever on the sentence imposed by the district court. The court did not mention, let alone explore, the upper reaches of the authorized sentencing range, except in advising Harding. Rather, the court started with the range calculated by the Probation Office, discounted it for drug quantity, granted a downward departure for over-

representative Criminal History Category, and sentenced Harding to the bottom of the resulting Guideline range. There is nothing in the record to suggest that the district court would not have sentenced Harding as it did regardless of the applicable statutory maximum, nor is there any basis for believing that the court would alter the sentence it imposed if the case were remanded. Under these circumstances, remand is not warranted. *See Sapia v. United States*, 433 F.3d 212, 218-19 (2d Cir. 2005).

Given that substantial compliance with the provisions of Section 851(b) may satisfy the obligations it imposes on the district court, Harding has not demonstrated error on this issue. He has not identified anything in the record which suggests that his sentence was in any way affected by the filing of the Section 851 information, let alone that the failure of the district court to engage in the formal 851(b) colloquy affected his substantial rights. He has never contested either conviction recited in the information and, in fact, he has stipulated to both. The fourth consideration in plain error analysis, whether any error found should be corrected, simply does not arise.

## **II. The district court did not misapprehend its authority in denying Harding’s request for a reduction for role in the offense**

### **A. Relevant facts**

The facts pertinent to this issue are set forth in the “Statement of Facts” above.

## **B. Governing law and standard of review**

### **1 . Governing law**

Section 3B1.2(b) advises a sentencing court as follows:

Based on the defendant’s role in the offense,  
decrease the offense level as follows:

\* \* \* \*

- (b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.

U.S.S.G. § 3B1.2(b). Such an adjustment “is warranted only if the defendant is ‘substantially less culpable than the average participant.’” *United States v. Ravelo*, 370 F.3d 266, 269 (2d Cir. 2004) (quoting *United States v. Jeffers*, 329 F.3d 94, 103 (2d Cir. 2003), quoting U.S.S.G. § 3B1.2 cmt. n. 3(A)(2002)) (internal quotations omitted). To obtain such a reduction, the burden is on the defendant to establish that he qualifies for the adjustment by a preponderance of the evidence. *See United States v. Yu*, 285 F.3d 192, 200 (2d Cir. 2002). A district court making this “highly fact-specific” determination, *Ravelo*, 370 F.3d at 269 (citing *United States v. Shonubi*, 998 F.2d 84, 90 (2d Cir. 1993)), must consider factors such as “the nature of the defendant’s relationship to other participants, the importance of the defendant’s actions to the success of the venture, and the defendant’s awareness of the nature and scope of the criminal enterprise.” *Ravelo*, 370 F.3d at 270 (citing *Yu*, 285 F.3d at 200) (internal quotations

omitted). The defendant must show more than that he “played a lesser role than his co-conspirators; to be eligible for a reduction the defendant’s conduct must be ‘minor’ . . . as compared to the average participant in such a crime.” *Yu*, 285 F.3d at 200 (quoting *United States v. Rahman*, 189 F.3d 88, 159 (2d Cir. 1999)) (internal quotations omitted).

## **2. Standard of Review**

This Court reviews a district court’s determination as to the defendant’s role in the offense for clear error, and reverses the district court’s conclusion only for abuse of discretion. *See Ravelo*, 370 F.3d at 269; *United States v. Colon* 220 F.3d 48, 51 (2d Cir. 2000).

## **C. Discussion**

Harding claims that the district court did not apprehend its authority to afford him a two-level reduction for minor role pursuant to U.S.S.G. § 3B1.2(b). In the alternative, he claims that the court held him to an erroneously high standard of proof on the role issue. The record does not support his claim on either count.

In the PSR, the Office of Probation took the position that Harding had been a regular purchaser of cocaine from co-defendant Robles, who was a multi-kilogram cocaine distributor, at the rate of approximately 150 grams per month from January through April 2006, and that he had purchased additional quantities of 200 grams on one occasion and 125 grams on each of two other occasions,

for a total of approximately 950 grams. PSR 15. The estimate provided in the PSR was based on “a review of the Government’s file material, in addition to interviews with the assistant U.S. attorney, the case agent and the defendant.” PSR 2.

At sentencing, Harding asked the district court not to credit the information on drug quantity on which the PSR was based, A 94-102, and, with respect to role in the offense, took the position that he was less culpable than the “average” defendant in the case. A 82.

The government argued that Harding was buying and selling a substantial amount of drugs. A 116. Further, the government argued that, where a defendant’s base level is determined on only the drugs he personally purchased and sold, he should not be afforded a reduction for minor role. A 116.

The district court adopted the government’s position, and relied on Application Note 3(A) to U.S.S.G. § 3B1.2, which provided in pertinent part that

[a] defendant who is accountable under § 1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is *not precluded* from consideration for an adjustment under this guideline. [Emphasis added].



From this language, the district court inferred that “the guideline principally applies when the defendant is being charged with conduct beyond personal involvement.” A 114. The district court went on to state that

here he’s only being charged with what he personally was involved with, *and although it’s not impossible to get a reduction, I think the implication of the note is that it will be a rare case when you have a limited or minor role with respect to what you actually did. And so I’m suggesting to you that it may not apply in this case.* [emphasis added].

A 115.

The district court went on to attribute to Harding only the drugs which the court found him to have purchased and sold and, on that basis, denied the requested role reduction.

Because the court only attributed to Harding, not the multiple kilograms of cocaine that others in the conspiracy had purchased and sold, but only the cocaine the court found him to have purchased and sold, the court was correct in denying the requested role reduction. *See United States v. Goodman*, 165 F.3d 169, 175 (2d Cir. 1999) (where defendant’s base offense level was calculated on the basis of her limited role, the further benefit of a minor role reduction was not warranted).

In any event, the district court adopted the findings of fact in the PSR as its own, except as to quantity, without notable objection from Harding. A 119. These findings establish that Harding's offense conduct was not minor even when directly compared directly to that of his co-defendants. As to fifteen of the sixteen defendants in the case, these findings were to the effect that co-defendants Robles, Reyes, Pabon, Martinez, Robin Persad, Ryan Persad, and Carlos Baez all were involved with purchasing and selling kilogram quantities of cocaine. Harrison, Davis and Harding were found to be substantial customers of Robles, Reyes and Pabon. Matos, Vargas and Vasquez sold cocaine for Harrison at the street level, or were otherwise involved in his cocaine business. Rivera and Pagan were customers of Harrison's operation. PSR 2-15.

Accordingly, had the district court engaged in the type of comparison advocated by Harding, the court still would have been well within its discretion in denying the role reduction, as the basis for the reduction was not established by a preponderance of the evidence.

The record establishes that the district court did not commit clear error, or any error, on this issue, and did not abuse its discretion in denying the role reduction.

The record also establishes that the district court was aware that, if it found such a reduction to be warranted, it could afford one. The court simply found that the reduction was not warranted.

### **III. The district court possessed jurisdiction over the offense of conviction**

#### **A. Relevant facts**

The facts pertinent to consideration of this issue are set forth in the “Statement of Facts” above.

#### **B. Governing law and standard of review**

Title 21, United States Code, Section 841(a)(1) makes it a crime for an individual to possess with intent to distribute a controlled substance. Title 21, United States Code, Section 846 makes it a crime to conspire to do so. Title 21, United States Code, Section 812(c) lists cocaine and related compounds as Schedule II controlled substances. Title 21 United States Code, Section 841(b)(1)(C) provides penalties for certain violations of Section 841 and 846 in part as follows:

In the case of a controlled substance in schedule I or II, [and other specified drugs], 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 . . . . 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 . . . .

Title 18, United States Code, Section 3231 provides in pertinent part that

[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the United States.

### **C. Discussion**

Harding makes what he concedes is the novel claim that the district court did not have jurisdiction over the offense of conviction, as Congress purportedly did not intend for offenses involving quantities below the threshold amounts set forth in Section 841(b)(1)(A), (B) and (D) to be punishable under 21 U.S.C. § 841(b)(1)(C). Harding cites no authority for this proposition, and the government has been unable to locate any such authority. We are thus left with the plain language of the statutes cited above from which to divine Congress' intent in this regard.

In Section 841(b)(1)(A) through (D), Congress provided the penalties that would apply to violations of Section 841(a). Section 841(b)(1)(A) establishes mandatory minimum sentences for cases involving quantities at or above specified threshold levels for certain controlled substances. Section 841(b)(1)(B) also establishes mandatory minimum sentences for specified quantities – lower than those listed in (b)(1)(A) – of the controlled substances mentioned in Section 841(b)(1)(A). Section 841(b)(1)(C) prescribes penalties for Schedule I

and II controlled substances in amounts that do not meet the thresholds listed in the two prior sections. There are no mandatory minimum sentences set forth in Section 841(b)(1)(C), given the lower quantities at issue in such cases. And Section 841(b)(1)(D) establishes penalties for Schedule III controlled substances and for marijuana and hashish in quantities lower than those listed in the earlier provisions. The text and framework of these statutory provisions make plain that Congress intended to criminalize conduct involving controlled substances, including cocaine as a Schedule II controlled substance, *see* 21 U.S.C. § 812, in quantities that do not meet the thresholds set forth in the other provisions and provided in Section 841(b)(1)(C) for specific penalties in cases like Harding's. In Title 18, United States Code, Section 3231, Congress granted jurisdiction over all criminal offenses, including this one, to the district courts. There is thus no question that the district court in this case had jurisdiction over Harding's offense. His argument to the contrary has no support and no merit.

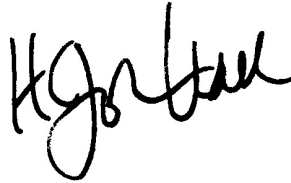
## CONCLUSION

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

Dated: July 22, 2008

Respectfully submitted,

NORA R. DANNEHY  
ACTING UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

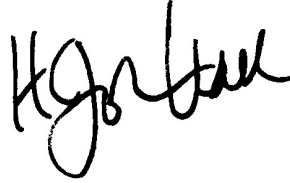
A handwritten signature in black ink, appearing to read "H. Gordon Hall". The signature is written in a cursive style with a large, prominent "H" and "G".

H. GORDON HALL  
ASSISTANT U.S. ATTORNEY

Karen L. Peck  
Assistant United States Attorney (of counsel)

**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 7,414 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

A handwritten signature in black ink, appearing to read "H. Gordon Hall". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

H. GORDON HALL  
ASSISTANT U.S. ATTORNEY

## **ADDENDUM**



**18 U.S.C. § 3553. Imposition of a sentence**

**(a) Factors to be considered in imposing a sentence.**

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed --
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;

- (4)** the kinds of sentence and the sentencing range established for --
  - (A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --
    - (i)** issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
    - (ii)** that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
  - (B)** in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into

amendments issued under section 994(p) of title 28);

- (5) any pertinent policy statement–
  - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
  - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

\* \* \*

**(c) Statement of reasons for imposing a sentence.**  
The court, at the time of sentencing, shall state in open

court the reasons for its imposition of the particular sentence, and, if the sentence --

- (1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
- (2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the

Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

**21 U.S.C. § 841. Prohibited acts A**

(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

\* \* \*

(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)** 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);

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

**(iv)** 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

**(v)** 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

**(vi)** 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

**(vii)** 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

**(viii)** 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

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.

**(B)** In the case of a violation of subsection (a) of this section involving--

**(i)** 100 grams or more of a mixture or substance containing a detectable amount of heroin;

**(ii)** 500 grams 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);

**(iii)** 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

**(iv)** 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

**(v)** 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

**(vi)** 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

**(vii)** 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

**(viii)** 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years 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 \$2,000,000 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 which may not be less than 10 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 \$4,000,000 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 imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 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 Hillary 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. Attempt and conspiracy**

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.

**21 U.S.C. § 851. Proceedings to establish prior convictions**

(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.

(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.

**U.S.S.G. § 3B1.2. (2005) Mitigating Role**

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.

In cases falling between (a) and (b), decrease by **3** levels.

*Application Notes:*

*3. Applicability of Adjustment.—*

*(A) Substantially Less Culpable than Average Participant.—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant.*

*A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who*

*performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.*