Supreme Court, U.S.
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No. 09-244

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MIKOLA BOWDEN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION

Randolph P. Murrell
Federal Public Defender
Gwendolyn Spivey
Counsel of Record
Assistant Federal Public
Defender
FEDERAL PUBLIC
DEFENDER
FOR THE NORTHERN
DISTRICT OF FLORIDA
227 N. Bronough Street,
Suite 4200
Tallahassee, Florida
32301
(850) 942-8818

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

When the government files an information under 21 U.S.C. § 851(a), but misstates the statutory enhancement and the date of the prior conviction, and the defendant fails to object in the district court and the defendant's plea does not waive his right to appeal, is the standard of review on a subsequent appeal *de novo* or instead plain error?

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BRIEF IN OPPOSITION

RELEVANT STATUTORY PROVISION

21 U.S.C. § 851(a)(1) provides in relevant part:

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

STATEMENT

Federal law conditions a court's power to impose an enhanced statutory penalty for certain repeat drug offenders on the Government providing notice to the court and the defendant, before trial or the entry of a guilty plea, of the prior convictions on which it will rely. 21 U.S.C. § 851(a)(1) ("Section 851"). In this case, the Government timely submitted a notice, but it was inaccurate. Respondent expressed confusion regarding the sentence but his counsel did not formally object, and the district court imposed the enhanced sentence. In an unpublished opinion, the Eleventh Circuit applied *de novo* review and held that the Government had violated Section 851. In two subsequent decisions, the Eleventh Circuit has found no violation of Section 851 on similar facts and has

pointedly recognized that the unpublished ruling in this case has no precedential value.

1. Under federal law, any person who manufactures, distributes, or possesses with the intent to manufacture or distribute fifty grams or more of crack cocaine is subject to a sentence of between ten years and life imprisonment. 21 U.S.C. § 841(a)(1); *id.* § 841(b)(1)(A)(iii). The Government may request an enhanced statutory penalty for repeat drug offenders. *Id.* § 841(b)(1)(A). A defendant with two prior felony drug convictions is subject to a mandatory term of life imprisonment. *Id.*

The imposition of an enhanced sentence is conditioned, however, on the Government's compliance with the simple notice procedure of 21 U.S.C. § 851(a)(1). The Government must, before trial or entry of a guilty plea, "file[] an information with the court (and serve[] a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1). If the Government needs more time to obtain the facts regarding a prior conviction, it may request a postponement of the trial or guilty plea. In addition, "[c]lerical mistakes in the information may be amended at any time prior to the pronouncement of sentence." *Id.*

2. In May 2006, respondent Mikola Bowden was indicted on one count of possessing with intent to distribute fifty grams or more of crack cocaine. Pet. App. 6a-7a. On July 5, 2006, the Government filed an information pursuant to Section 851 seeking an enhanced sentence. Pet. App. 10a-11a. The Government later stated that it had intended its notice to allege two prior felony drug convictions and to seek

a mandatory life sentence under 21 U.S.C. § 841(b)(1)(*A*). In fact, however, in two separate places, the information instead stated that "the defendant is subject to the increased penalty provisions" of 21 U.S.C. § 841(b)(1)(*B*), which authorize a sentencing range from ten years to life imprisonment. Pet. App. 10a. Nowhere did the information indicate that the Government sought mandatory life imprisonment. Further, the information misstated the date of one of respondent's two prior drug convictions. As the Government later acknowledged, its notice in this case "contained significant errors that made it ambiguous." Br. for United States at 38, *United States v. Anthony*, No. 08-14370, 2009 U.S. App. LEXIS 20194 (11th Cir. Sept. 10, 2009) (describing the notice in this case).

The Government did not amend the notice to correct either error. Both the plea agreement and the plea colloquy contained unclear guidance regarding the possible sentence. Pet. App. 18a-20a, 34a-36a; Resp. C.A. Br. 6-7, 19-21. During his sentencing hearing, respondent in turn expressed his confusion about the enhancement. Pet. App. 48a-49a. The Government acknowledged his confusion. Pet. App. 48a. But respondent's counsel did not object to the notice or enhancement.[1] The district court entered a guilty plea to the single count in the indictment, sentencing respondent to life imprisonment.

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[1] Other documents in the case referred to the Section 841(b)(1)(A) sentencing enhancement, and one document stated the correct date of convictions. Pet. App. 18a, 34a-35a; PSR paras. 3, 38.

3. Respondent's guilty plea did not contain a waiver of his right to appeal, and he challenged the sentencing enhancement in the Eleventh Circuit. Respondent's initial appeal, however, was dismissed as untimely. He then filed a motion under 28 U.S.C. § 2255, arguing that his counsel's failure to timely appeal was constitutionally ineffective. The district court granted the motion and entered a new judgment from which respondent sought to appeal.

Respondent argued in this later appeal that the defects in the information violated Section 851, such that his sentencing enhancement was invalid. In response, the Government argued that its errors were not significant enough to constitute failure to comply with Section 851 under the Eleventh Circuit's decision in *Perez v. United States*, 249 F.3d 1261, 1266-67 (11th Cir. 2001). U.S. C.A. Br. 19. According to the Government, because the text of the statute does not mandate that the information cite the specific statutory basis for the sentencing enhancement, it should follow that the information's citation to the *wrong* statutory provision is irrelevant, even if the incorrectly cited provision calls for a different sentence. *Id.* Similarly, the Government argued, the recitation of an incorrect date of conviction was too insignificant an error to violate Section 851.

The Government did not argue to the panel that the Eleventh Circuit's holding in *Harris v. United States*, 149 F.3d 1304 (11th Cir. 1998), that Section 851 is a jurisdictional statute has been superseded by this Court's subsequent precedent, including *United States v. Cotton*, 535 U.S. 625 (2002). *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) ("[A] prior panel's holding is binding on all subsequent

panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court . . . ."). Thus, the panel operated from the premise that respondent could challenge the notice in his case, notwithstanding that he did not formally object in the district court. Pet. App. 2a.

In an unpublished, nonprecedential opinion, the court of appeals agreed with respondent that the Government had violated Section 851. The panel reasoned that because the Section 851 notice in this case "did not unambiguously signal to [respondent] that it sought mandatory life imprisonment" and "failed to clearly indicate 'the previous convictions to be relied upon'," the notice of enhancement "did not strictly comply with §851(a)(1)." Pet. App. 1a-3a. The panel vacated respondent's conviction and remanded for resentencing without the enhancement.

On August 26, 2009, respondent was resentenced to a term of 294 months. He will not be released from prison until he is 55 years old. The Government acquiesced to that sentence by not appealing.

4. The Government sought reconsideration in the Eleventh Circuit. It argued for panel rehearing on the ground that the errors in the notice did not violate Section 851 under the Eleventh Circuit's decision in *Perez*. U.S. Pet. Reh'g 6-7.

As noted, the Government could have asked the panel to hold that *Harris* had been superseded by this Court's intervening decisions. But it did not do so. Instead, the Government invited the full court of appeals to sit en banc and overrule *Harris*. The Government acknowledged, however, that the Eleventh Circuit had not overturned a single sentence

under *Harris* in the decade prior to its unpublished opinion in this case. U.S. Pet. Reh'g 8 n.3.

The petition was denied, with no judge requesting that the court be polled on rehearing en banc. Pet. App. 4a.

5. Subsequently, the Eleventh Circuit decided two cases on similar facts, ruling for the Government in each. On September 10, 2009, the court held in another unpublished opinion that, even under *de novo* review, a Section 851 information was sufficient despite failing to identify the date of the prior conviction or the relevant statutory provision supporting the enhancement. *United States v. Anthony*, No. 08-14370, 2009 U.S. App. LEXIS 20194, at *1 (11th Cir. Sept. 10, 2009), *reprinted in* App., *infra* BIO App. 1a. The panel relied on that court's ruling in *Perez*, *supra*, and stated that the unpublished ruling in the instant case was not precedential authority. *Anthony*, BIO App. 13a-14a.

Two weeks later, another panel that included two of the judges who decided the instant case (Anderson and Marcus, JJ.), held, also on the basis of *Perez*, that an incorrect penalty citation in a Section 851 notice is a harmless "technical error" when the correct enhancement provision was listed in the plea agreement and was acknowledged by the defendant at his plea hearing and sentencing. *United States v. Brown*, No. 08-15488, 2009 U.S. App. LEXIS 21370, at *1 (11th Cir. Sept. 25, 2009), *reprinted in* App., *infra* 15a.

ARGUMENT

The Government seeks review of an unpublished, interlocutory ruling that presents only the second time

the Eleventh Circuit has ever overturned a sentencing enhancement under Section 851 applying *de novo* review, and the only such decision in more than a decade. This Court's intervention is unwarranted. The question is not only insignificant, but two intervening decisions demonstrate that the court of appeals' precedent is unsettled. It remains entirely possible that the Eleventh Circuit will reconsider its position. The Government has successfully urged this Court to deny review of the question presented, and no intervening development undercuts the wisdom of that position.

Certiorari should be denied for a number of further reasons as well. This case is a poor vehicle in which to decide the question presented, as the principal issue in the case is the threshold question whether Section 851 was violated at all. If it was not, then the Court would have no cause to decide the statute's "jurisdictional" status. Nor is there any basis for the Government's argument that the judgment should be summarily reversed, a suggestion that only highlights the weakness of its case for plenary review.

I. The Question Presented Does Not Merit This Court's Attention.

A. The Question Whether Section 851 Is A "Jurisdictional" Provision Affects Almost No Cases.

The Government seeks review of a question of startling insignificance. Perhaps the petition's most telling feature is that the Section ostensibly devoted to explaining why "[t]he Question Presented is important," Pet. Part C, actually contains no

discussion of that critical element of this Court's certiorari calculus. Though it has filed briefs in this Court on this issue three times – each time opposing review, *see infra* at 12-13 – the Government has never before suggested that the question has any recurring significance. That is because it does not.

The Government complains that the Eleventh Circuit alone applies *de novo* review to erroneous Section 851 notices when the error was not noted in the district court. But respondent appears to be the only individual whose sentencing enhancement has been overturned by the Eleventh Circuit on that basis in the decade since its decision in *Harris v. United States*, 149 F.3d 1304 (11th Cir. 1998). Indeed, *Harris* and this case appear to be the only two rulings in the entire history of the Eleventh Circuit in which the court of appeals invalidated a sentence for noncompliance with Section 851 on a ground that had not previously been presented to the district court.

The reason the question presented almost never arises is readily apparent. The Eleventh Circuit's published precedent holds that technical violations of Section 851 do not invalidate sentencing enhancements. *See Perez v. United States*, 249 F. 3d 1261, 1266 (11th Cir. 2001) (holding that a timely filed notice that "unambiguously signal[s] the government's intent to rely upon a specific" prior conviction satisfies the requirements of Section 851 regardless of minor errors in content); *infra* at 16 (discussing additional recent rulings). In such cases, the question whether

Section 851 imposes a "jurisdictional" requirement never arises.[2]

Thus, a defendant generally can receive relief under Eleventh Circuit precedent only when both (a) the Government fails to file the required notice, and (b) the defendant fails to raise the error in the district court. But a defendant in that circumstance can in any event receive relief from the courts – rendering the "jurisdictional" status of Section 851 irrelevant – through a claim of ineffective assistance of counsel. In fact, in the very case that the Government now applauds for engaging in a "careful analysis" of Section 851 and concluding that the statute is not "jurisdictional," Pet. 16, the First Circuit actually concluded that "because the section 851(a)(1) claim was a clear winner and presenting it would have risked nothing, counsel's eschewal of it amounted to constitutionally deficient performance." *Prou v.*

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[2] Eleventh Circuit precedent is consistent with decisions of other courts of appeals on the question of whether minor defects invalidate a Section 851 notice. *See, e.g.*, *United States v. Curiale*, 390 F.3d 1075, 1076-77 (8th Cir. 2004) (per curiam) ("An information complies with the requirements of § 851(a) even if it contains an error in its contents as long as the information serves to convey the Government's intent to seek an enhancement based on a particular earlier conviction." (citing *Perez*, 249 F.3d at 1265)); *United States v. Weaver*, 267 F.3d 231, 247 (3d Cir. 2001) ("Accordingly, '[o]ur inquiry must be whether the information which was filed provided [the defendant] reasonable notice of the government's intent to rely on a particular conviction and a meaningful opportunity to be heard.'" (quoting *Perez*, 249 F.3d at 1266)).

United States, 199 F.3d 37, 48 (1st Cir. 1999) (granting relief under 28 U.S.C. § 2255).

Furthermore, the Government's complaint that the Eleventh Circuit's application of *de novo* review recognizes errors that other circuits would overlook on plain error review ignores that, given the clear and simple terms of Section 851, those other circuits in fact may deem such errors to be "plain." *See, e.g.*, *United States v. Hardin*, 108 Fed. Appx. 74, 79 (4th Cir. 2004) (unpublished) ("[I]t was plain error for the district court . . . to rely on offenses not noticed in the information filed by the government."); *see also Prou*, 199 F.3d at 48-49 (finding on collateral review that, when the government filed the Section 851 notice nineteen days after the jury was empaneled, "the government's blunder was manifest" and prejudicial to the defendant). Any disagreement among the circuits is thus inconsequential.

B. The Government Itself Can Ensure The Proper Application Of Section 851.

The question presented also lacks significance because it need *never* arise. Compliance with Section 851 lies completely within the control of the Government. So long as the prosecution follows the statutory requirements in the district court, the question whether its provisions are "jurisdictional" for purposes of appeal is entirely academic. That is significant because the requirement imposed by the statute is so straightforward and easy to comply with. The Government need only notify the court and the defendant of the prior convictions on which it relies in seeking an enhanced sentence. 21 U.S.C. § 851(a)(1). The Government may freely secure postponement of

the trial or guilty plea colloquy if it needs additional time. *Id.* Further, the prosecution may correct errors in the notice at any point before sentencing. *Id.*

Even when the Government does violate Section 851, the defendant's sentence is generally resolved by the terms of the plea agreement. Such an agreement regularly includes a waiver of the defendant's right to appeal the sentence to which he has just agreed. The position of the Government, supported by the only court of appeals to decide the question, is that such a waiver extinguishes the defendant's right to challenge the Section 851 notice on appeal. *See* Br. of United States at 20, No. 08-15488, *United States v. Brown*, 2009 U.S. App. LEXIS 21370 (citing *United States v. Rodriguez*, 137 Fed. Appx. 682 (5th Cir. 2005); *United States v. Anguiano*, 197 Fed. Appx. 342 (5th Cir. 2006)).

The Seventh Circuit recently summarized most of these points, in a characteristically blunt opinion by Judge Posner which demonstrates that the answer to the Question Presented lies in the hands of the Government itself:

> The government takes a risk by sloppy compliance (or perhaps it is not compliance at all) with section 851(a)(1): the risk that either the court will hold that the government failed to provide the defendant with adequate notice or that the defendant will have a claim that by failing to interpret a confusing notice correctly his lawyer rendered ineffective assistance of counsel. For these reasons and to spare us pointless appeals, the U.S. Attorney's office that prosecuted this case would be well advised to get its act together and comply strictly with

> section 851. It might also be wise for the Department of Justice to notify all the U.S. Attorneys of the importance of strict compliance, as the problem of non-compliance or sloppy compliance seems to be widespread, judging from the number of cases. And it is not as if strict compliance were difficult.

United States v. *Williams*, No. 09-1924, 2009 U.S. App. LEXIS 22496, at *13-*14 (7th Cir. Oct. 14, 2009).[3]

C. As The Government Has Previously Argued, This Court's Intervention Is Unwarranted Because The Law Of The Eleventh Circuit Is Unsettled.

It is difficult to conceive of a worse allocation of this Court's scarce time than to review an issue that affects only a single individual in the entire country once every ten years, particularly when the Government can address its concerns by following the simple terms of the statute and when the "relief" to which the Government objects is (as in this case) the imposition of a lengthy twenty-five-year term of imprisonment. Instead, this Court should follow the view consistently advanced by the Government in

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[3] There is no inconsistency between Judge Posner's point that appeals under Section 851 arise with some regularity and respondent's point that defendants almost never receive relief even under the *de novo* standard adopted by the Eleventh Circuit in *Harris*. Instead, the fact that the issue continues to arise even in the Seventh Circuit (which applies the rule endorsed by the Government) illustrates that the application of plain error review does not reduce the number of appeals filed by defendants and thus does not produce any greater efficiency.

"oppos[ing] petitions for a writ of certiorari in several cases presenting this issue," Pet. 18, until it lost this one case in an unpublished opinion: this question does not require this Court's intervention. *See* Br. in Opp. at 13-14, *Beasley v. United States*, 128 S. Ct. 1471 (2008) (No. 07-548);[4] *see also* Br. in Opp. at 8-9, *Severino v. United States*, 540 U.S. 837 (2003) (No. 02-10095); Br. in Opp. at 7-8, *Quintanilla v. United States*, 538 U.S. 926 (2003) (No. 02-7455).

Among other things, the Government has correctly and successfully urged this Court to allow the Eleventh Circuit to reconsider its decision in *Harris* in light of this Court's intervening precedents. Nothing about the ruling in this case changes that calculus. If the Government's arguments in its petition have merit, the Eleventh Circuit panel would have been fully empowered to reconsider *Harris*. *See, e.g.*, *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993) ("It is the law of this Circuit that a subsequent panel is not obligated to follow a prior panel's decision where an intervening Supreme Court decision establishes that the prior panel decision is wrong."). In fact, other circuits have reconsidered this very issue without resorting to en banc review. *See, e.g.*, *United States* v.

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[4] The Government's opposition in *Beasley* asserted, at 7-8, that the case was an inappropriate vehicle to decide the question presented because the defendant's sentence did not depend on an enhancement under Section 851. Subsequently, however, the Solicitor General withdrew that argument, recognizing that it was erroneous. *See* Letter from Paul D. Clement, Solicitor Gen., to William K. Suter, Clerk of the Supreme Court of the U.S. (Feb. 19, 2008), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/02/beasley-correction-letter.pdf.

Flowers, 464 F.2d 1127, 1130 n.1 (10th Cir. 2006); *United States* v. *Ceballos*, 302 F.3d 679, 692 n.4 (7th Cir. 2002). But for reasons known only to itself, the Government chose *not* to make that request, either in its initial briefing or in its petition for rehearing.

The Government instead only invited en banc review of the vitality of *Harris*, which was denied. But that creates no inference that the Eleventh Circuit's position is settled. Given the utter triviality of the issue, *see supra*, it is not surprising that the full court decided that the issue did not warrant its attention, given that the opinion in this case is unpublished and nonprecedential, and a later panel remains free to reconsider the question if and when – in another decade or so – another defendant could receive relief on the basis of *de novo* review.

The Government's contrary assertion that "[t]he Eleventh Circuit has repeatedly declined invitations to reconsider its position," Pet. 18, is a significant overstatement and somewhat revisionist history. The Government apparently filed rehearing requests only a decade ago in *Harris* (prior to the decisions of this Court on which the Government relies) and in the unpublished ruling in this case. As discussed above, the Government has repeatedly (and successfully) urged the denial of certiorari on precisely the ground that the Eleventh Circuit has *not* been provided with an appropriate opportunity to reassess *Harris*. Given the Government's curious failure to put that question before the panel in this case, its prior consistent position that this Court's intervention would be premature remains entirely sound.

For related reasons, the Government's newfound assertion in this Court that Eleventh Circuit precedent

is fixed is also an overstatement. In opposing review in *Beasley*, *supra*, the Solicitor General found it noteworthy that the Eleventh Circuit had only even "restated" the holding of *Harris* in a published ruling "in *dicta*." Br. in Opp. 14 n.7. Of particular note, the Government continues to maintain in its briefs in the Eleventh Circuit that the court of appeals' *existing* precedent provides that objections to notices under Section 851 that are not first raised in the district court are nonetheless "review[ed] . . . for plain error." Br. of United States at 24-25, No. 08-15488, *United States v. Brown*, 2009 U.S. App. LEXIS 21370 (citing *United States v. King*, 73 F.3d 1564, 1572 (11th Cir. 1996)). Thus, in this Court, the Government urges review by broadly characterizing *Harris* as holding that "the government's failure to file a notice *in full compliance* with the requirements of 21 U.S.C. 851(a) divests a district court of 'jurisdiction' to impose an enhanced sentence on a recidivist drug offender." Pet. 11 (emphasis added). But in the Eleventh Circuit itself, the Government reads *Harris* as much more narrowly limited to circumstances in which "the prosecutor filed the § 851 notice after the plea hearing, not before it," such that whenever the notice is timely filed (*even if erroneous*), "*Harris* does not provide support for [the] Defendant's argument." Br. of United States at 29, No. 08-15488, *United States v. Brown*, 2009 U.S. App. LEXIS 21370. Thus, in cases involving alleged errors in the substance of the notice as opposed to its timely filing, "[b]ecause there is no clear statutory or precedential authority which clearly states that the Government's notice would not be sufficient, the district court cannot be found to have plainly erred." *Id.* at 30.

Cases handed down since the Government filed its petition only reinforce the wisdom of awaiting further developments in the Eleventh Circuit. That court's two most recent rulings on the question narrowly construe a defendant's right to relief under Section 851 and note the unsettled state of its precedents, indicating that this case is arguably anomalous. In *United States v. Anthony*, an Eleventh Circuit panel applied *Perez* to hold that a Section 851 notice was sufficient despite its failure to identify the date of the prior conviction or the relevant statutory provision supporting the enhancement. The panel notably deemed the defendant's reliance on the decision in the instant case to be "misplaced" because the circuit is "not bound by unpublished opinions." BIO App. 13a.

Another Eleventh Circuit panel – which included two of the judges from this case – then also applied *Perez* to uphold a Section 851 notice on facts similar to the present case, reasoning that the Government's erroneous citation of a penalty provision was a "technical error," and that the Government's intent remained unambiguous because the correct enhancement provision was listed in the plea agreement and was acknowledged by the defendant at his plea hearing and sentencing. *United States v. Brown*, BIO App. 28a-29a.

Notably, those same judges recognized the "thorny jurisdictional and waiver issues" that arise in cases involving Section 851, and took care to note that the Eleventh Circuit had "not had an opportunity" to consider the effect, if any, of *Harris* because the court's determination that a technical error does not invalidate the statutory notice meant that the

defendant's appeal "lack[ed] merit in any event." BIO App. 27a.

II. This Is A Poor Vehicle In Which To Decide The Question Presented.

Even if it were appropriate in some case to grant certiorari to decide the Question Presented, this is a uniquely poor vehicle in which to do so. There is a very real prospect that the Court would never reach the issue of whether Section 851 is a "jurisdictional" statute.

The Government's principal position throughout this case has been that it never violated Section 851 in the first place. In the Eleventh Circuit, the Government argued that the "enhancement information satisfied the requirements of 21 U.S.C. § 851(a)(1)." U.S. C.A. Br. 13. The citation of the wrong sentencing enhancement, the Government argued, was not a violation because "section 851(a)(1) does not require an enhancement information to provide notice of the penalty provisions of section 841." U.S. C.A. Br. 19. The incorrect date of respondent's conviction was merely a technical error, the Government continued, because the information still unambiguously signaled the government's intent and did not confuse respondent about which convictions were being relied upon. U.S. C.A. Br. 19; *see Perez v. United States*, 249 F.3d 1261, 1266-67 (11th Cir. 2001).

As discussed above, rulings in the Eleventh Circuit in the wake of the unpublished decision in this case suggest considerable sympathy for the Government's view of the narrow class of errors that will invalidate an enhanced sentence under Section 851. If this Court were to agree with those more

recent Eleventh Circuit rulings, that narrow ground of decision would make it unnecessary for this Court to reach the Question Presented: whether challenges to notices under Section 851 are subject to *de novo* or instead plain error review when not first raised in the district court. As the Government has forthrightly acknowledged, the precise circumstances in which a notice comports with Section 851 has "no importance beyond the particular circumstances of th[e] case and therefore does not warrant this Court's review." Br. in Opp., *Severino*, *supra*, at 12.

The Government's petition relies heavily on the facts supporting its central argument that "the defects in the information" did not violate Section 851. Pet. 23. But even if the Government itself attempted to limit its own argument to the question whether Section 851 is a "jurisdictional" statute, there is every reason to believe that the Court would appropriately first consider the narrower ground of decision on which the Government principally relied below – namely, whether the statute was violated in the first instance. *Cf. United States v. Resendiz-Ponce*, 549 U.S. 102, 103-04 (2007) (where the Government sought to present only the question whether errors in an indictment are subject to harmless error analysis, deciding the case instead on the narrower ground that the indictment in fact contained no error). And in analogous circumstances, the Solicitor General has successfully opposed review of the Question Presented when the determination that "the government did comply with the requirements of Section 851(a)," made it "unnecessary to decide 'whether a section 851(a) error can be waived or forfeited.'" Br. in Opp. *Severino*, *supra*, at 8 (citation omitted).

Instead, the Court should decide the Question Presented, if ever, when it is presented in a case that does not raise a substantial issue regarding the antecedent question whether Section 851 was violated at all. Such a case would arise when the Government either fails to provide notice of the enhancement, or fails to do so "before trial [or] before entry of a plea of guilty." 21 U.S.C. § 851(a)(1). Such a case would squarely present the question of whether that error should be reviewed *de novo*.

Granting review in such a case, unlike this one, would also have the benefit of resolving a circuit conflict over the consequences of an untimely Section 851 information. In *Prou v. United States*, 199 F.3d 37 (1st Cir. 1999), the First Circuit held that the government's failure to file the information until nineteen days after the jury had been empaneled was prejudicial error, and granted relief under 28 U.S.C. § 2255. In contrast, the Fifth Circuit held in *United States v. Dodson,* 288 F.3d 153 (5th Cir.), *cert. denied*, 537 U.S. 888 (2002), that the Government's failure to file any notice at all did not even amount to plain error, and denied the defendant relief on direct appeal.

Finally, the procedural posture in this case adds a further layer of complication that makes it an undesirable vehicle. After his initial sentencing, respondent failed to file a timely appeal. Only after he succeeded in a motion under 28 U.S.C. § 2255 arguing that his counsel was constitutionally ineffective was respondent able to appeal to the Eleventh Circuit, resulting in the decision below. This adds an additional element of uncertainty regarding the appropriate standard of review in this particular case.

III. The Eleventh Circuit's Decision Was Correct On The Merits.

A. This Court's Recent Precedents Support The Eleventh Circuit's Decision And Demonstrate That Summary Reversal Is Inappropriate.

Implicitly recognizing the triviality of its request for plenary review, the Government invites the Court to summarily reverse the court of appeals' unpublished ruling. Summary reversal, however, is "usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). *See also Spears v. United States,* 129 S. Ct. 840, 845 (2009) (Roberts, C.J., dissenting) (referring to summary reversal as "bitter medicine"); *Brosseau v. Haugen*, 543 U.S. 194, 207 (2004) (Stevens, J., dissenting) (calling it an "extraordinary remedy"). The Government is wrong to request such a potent potion here because no decision of this Court dictates the outcome of this case.

The Government bases that request on the erroneous assertion that the Eleventh Circuit's approach is out of step with an inexorable trend toward a singular, narrow definition of "jurisdictional." Pet. 12-15. In fact, this Court's precedent – particularly *Bowles v. Russell*, 551 U.S. 205 (2007) – supports the ruling below. *Bowles* is this Court's most on-point recent decision, yet it receives no mention in the Government's petition. In *Bowles*, the Court held that a party's filing of a notice of appeal outside the prescribed time limit of Federal Rule of Appellate

Procedure 4(a)(1)(A) and 28 U.S.C. § 2107(a) was a jurisdictional defect. The Court drew a "distinction between court-promulgated rules and limits enacted by Congress," finding the latter jurisdictional in nature. 551 U.S. at 211-12.

Section 851 necessarily falls on the statutory – and therefore jurisdictional – side of the ledger. Indeed, the logic behind this Court's holding in *Bowles* applies here. In both cases, Congress exercised its authority to establish procedural prerequisites to the invocation of a court's powers. In both cases, the failure to follow that requirement ran contrary to the statutory purpose of providing proper notice to opposing parties. As this Court recognized, "[b]ecause Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Bowles*, 551 U.S. at 212-13. In adopting Section 851, Congress allowed courts to issue significantly enhanced punishments, but *only* upon the proper filing of an accurate information by the prosecutor. In other words, Section 851 embodies Congress's ability to determine "under what conditions" federal courts can hear cases and was therefore properly determined by the Eleventh Circuit to be jurisdictional.

Similarly, in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), another case the Government ignores, the Court held that 28 U.S.C. § 2501, a statute of limitations governing the Court of Federal Claims, requires a court to raise *sua sponte* the timeliness of a lawsuit. The Court relied on the strict language in the provision, which mandates that all claims over which the Court of Federal Claims "has jurisdiction shall be barred" unless filed within six

years. 552 U.S. at 755. The Court further noted that such absolute time limits – which can also serve broader goals such as "facilitating the administration of claims" or "promoting judicial efficiency" – were sometimes referred to as "jurisdictional." *Id.* at 753.

It would be particularly inappropriate and unfair to invoke the bitter medicine of summary reversal in this case, subjecting respondent to a life in prison, when the Solicitor General has elected not to discuss in the petition either of the two cases that most undercut the Government's position – *Bowles* and *John R. Sand & Gravel Co.* – thereby depriving respondent of any opportunity to address the Government's view of those central decisions.

The precedents that the Government does discuss – *Kontrick v. Ryan*, 540 U.S. 443 (2004), *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam), and *United States v. Cotton*, 535 U.S. 625 (2002) – all predate both *Bowles* and *John R. Sand & Gravel Co.* and are distinguishable from this case. In *Kontrick*, this Court held that Bankruptcy Rules 4004 and 9006 – which do not have a statutory origin – are not jurisdictional. 540 U.S. at 453-54 (noting that the rules are court-prescribed, and holding that they are "claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate"). *Eberhart* merely follows *Kontrick*, again holding that non-statutory-based rules – Federal Rules of Criminal Procedure 33 and 45 – were non-jurisdictional. 546 U.S. at 15 ("The Rules we construed in *Kontrick* closely parallel those at issue here."). *Bowles* thus highlights that recent decisions – including *Kontrick* and *Eberhart* – have "recognized the jurisdictional significance" of a statutory origin. 551 U.S. at 210.

The Court's decision in *Cotton* similarly does not dictate the outcome of this case. This case involves a heightened statutory requirement governing the prosecutor's conduct. In *Cotton*, on the other hand, this Court considered whether, in the wake of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a deficient indictment could lead to an enhanced sentence. The defendants in *Cotton* were charged under the wrong section of 21 U.S.C. § 841, which delineates penalty levels for drug crimes. 535 U.S. at 627-28. However, the prosecutors in that case failed to meet the Court-ordered requirements of *Apprendi* – not the terms of the statute itself. Section 851, by contrast, establishes congressionally created mandates governing the content to be included in an information. The mere fact that all of the cases cited by petitioner contain language guarding against the overuse of the term "jurisdictional" is of no moment. The term is properly applied here.

Summary disposition of this case would be particularly inappropriate because of its potential to undercut the doctrinal clarity that has emerged in the wake of this Court's ruling in *Bowles*. The line of demarcation drawn by this Court has been widely noted and embraced in the lower courts. *See, e.g., Dill v. Gen. American Life Ins. Co.*, 525 F.3d 612, 617 (8th Cir. 2008) (citing *Bowles* for the proposition that "[t]ime limits prescribed by statute are jurisdictional"); *United States v. Griffin*, 524 F.3d 71, 84 (1st Cir. 2008) (citing *Bowles* and holding that Federal Rule of Criminal Procedure 35(a) is jurisdictional because it is incorporated into a statute); *United States v. Frias*, 521 F.3d 229, 233 (2d Cir. 2008) (holding that Federal Rule of Criminal Procedure 4(b) is not jurisdictional

because its origins are not statutory); *United States v. Garduño*, 506 F.3d 1287, 1290-91 (10th Cir. 2007) (same).

By contrast, the Government is unable to identify any question of broader significance that the summary disposition of this case would help to resolve, or any other reason to believe that a ruling in its favor would be useful to the lower courts. The Government asserts that the isolated result in this case "conflicts with basic principles of fairness and efficiency in judicial practice." Pet. 21. But that type of complaint is not a recognized basis for this Court's intervention. *See* S. Ct. R. 10.

There is thus a striking contrast between the appropriate disposition of this case and *Eberhart*, the illustrative summary reversal cited by the Government. Pet. 23. *Eberhart* addressed whether noncompliance with Federal Rule of Criminal Procedure 33's deadline for new trial motions was "jurisdictional." *See* 546 U.S. at 13. That issue is of surpassing importance: it has the potential to arise in the wake of *any* federal criminal conviction. By contrast, as noted, respondent is the only defendant to whom the Eleventh Circuit has granted relief on the ground that Section 851 is a jurisdictional statute in the past decade. Further, the Seventh Circuit in *Eberhart* had all but invited summary reversal, noting that the vitality of its own precedent was doubtful but stating that it was bound to follow it "'until expressly overruled by the Supreme Court.'" *Id.* at 14-15 (quoting *United States v. Eberhart*, 388 F.3d 1043, 1049 (7th Cir. 2004)). Here, by contrast, the status of the Eleventh Circuit's precedent is uncertain and there remains a substantial prospect that the court of

appeals will later revisit its position. Finally, in *Eberhart*, there was a "close[] parallel" between the relevant rules of criminal procedure and the bankruptcy rules at issue in *Kontrick*. *Eberhart*, 546 U.S. at 15. No such parallel exists here. Unlike *Eberhart* and *Kontrick*, this case involves a statutory mandate, which under *Bowles* amounts to a jurisdictional requirement.

B. The Eleventh Circuit's Decision Properly Comports With The Statute's Plain Language And Congressional Intent.

The Eleventh Circuit's decision to "require strict compliance" with the procedural and substantive requirements of the statute, Pet. App. 2a, conforms to the statutory text, as well as the purpose of Section 851. Congress expressly prohibited courts from issuing an enhanced statutory penalty unless "the United States attorney files an information with the court . . . stating in writing the previous convictions *to be relied upon*." 21 U.S.C. § 851(a)(1) (emphasis added). By incorrectly citing both the applicable sentencing enhancement *and* respondent's relevant prior conviction, the prosecution failed to satisfy that statutory requirement.

This Court has long recognized that improper notice can trigger a due process violation. *See Oyler v. Boles*, 368 U.S. 448, 452 (1962) (holding that in a criminal proceeding, due process guarantees the "right to reasonable notice and opportunity to be heard" regarding sentence enhancements); *see also Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the

Due Process Clause."). The notice provision in Section 851 was installed as a bulwark against precisely these concerns, as multiple courts of appeals have expressly recognized. *See, e.g.*, *United States v. Morales*, 560 F.3d 112, 116 (2d Cir. 2009) ("[I]gnoring a misleading government statement of potential penalties would create serious due process issues if it interfered with the defendant's preparation for trial or caused him or her not to plea bargain for a lesser sentence."); *United States v. Mayfield*, 418 F.3d 1017, 1020 (9th Cir. 2005) ("Section 851(a) was enacted to fulfill the due process requirements of reasonable notice and an opportunity to be heard with regard to the prior conviction." (citing *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1485 (10th Cir. 1994)); *United States v. Curiale*, 390 F.3d 1075, 1076 (8th Cir. 2004) ("The statute aims to give the defendant notice to comply with due process." (citing *United States v. Weaver*, 267 F.3d 231, 247 (3d Cir. 2001)). Considering the strict requirements of Section 851 – and the grave underlying constitutional considerations – the Eleventh Circuit rightly recognized and disallowed the potential for faulty notice in cases such as this one where the prosecution commits multiple errors.

Congress had broad, systemic goals in enacting Section 851. The provision struck a balance between the authority of prosecutors to seek enhanced statutory penalties – penalties that can dramatically increase a defendant's term of imprisonment – and the need to provide procedural protections to defendants. But by enacting this law and "eliminating some of the difficulties" faced by prosecutors, H.R. Rep. No. 91-1444, at 4576 (1970), Congress in turn required the

Government to comply with the exacting language of the new provision.

In this case, the Eleventh Circuit's decision corrects the prosecution's failure to uphold its end of the statutory bargain. The Government has expressly recognized that its "notice contained significant errors that made it ambiguous." Br. for United States at 38, No. 08-14370, *United States v. Anthony*, 2009 U.S. App. 20194 (11th Cir. Sept. 10, 2009). Sustaining the notice in the face of that ambiguity would have displaced the careful balance that Congress struck and, in effect, permitted a sentence to be imposed in a manner that Congress forbade. Strict observance of the requirements of Section 851 is required to give effect to Congress's determination that the decision whether to seek an enhancement belongs to the prosecution and not to the courts. As the Fifth Circuit recognized thirty-five years ago in *United States v. Noland*, 495 F.2d 529, 533 (5th Cir. 1974), "[i]n granting this discretion to the prosecution, Congress imposed a strict condition on its exercise." Both the extent of that discretion and the strict limits on how it may be exercised demonstrate Congress's intent that executive branch compliance with Section 851 be necessary to trigger the jurisdiction of the courts. *See United States v. Cespedes*, 151 F.3d 1329, 1333-34 (11th Cir. 1998).

This Court has held that the decision to provide notice under Section 851 is similar to a charging decision. That is, the "discretion [to determine whether a particular defendant will be subject to the enhanced statutory maximum] is an integral feature of the criminal justice system." *United States v. LaBonte,* 520 U.S. 751, 762 (1997); *see also Cespedes*, 151 F.3d

at 1333. A court has no greater jurisdiction to enter an enhanced statutory sentence based on a defective information from the prosecution than it would have to enter a judgment of conviction in the absence of a criminal charge. Like charging decisions, the decision to file a Section 851 notice is within the discretion of the executive branch, and courts cannot exercise jurisdiction to undermine that discretion. *See In re Ellis*, 356 F.3d 1198, 1209-10 (9th Cir. 2004). The government's contention that Section 851 "does not affect a court's power to entertain the case," Pet. 12, is thus far too sweeping to be accurate, and is a product of the Government's artificially narrow concept of "jurisdiction." Section 851 directly affects the court's power to entertain cases where the prosecutor must first meet the mandatory threshold of filing a timely and accurate information – a prerequisite that was not met here.

Congress knowingly raised the stakes for both sides by implementing Section 851. The Eleventh Circuit's current precedent allows the court to vindicate the importance of the notice function of Section 851 while appropriately distinguishing cases where that function was not undermined. *See United States v. Brown*, BIO App. 29a (finding that "[d]espite the citation error, Brown was fully aware" of the proper penalty provisions); *United States v. Anthony*, BIO App. 14a (noting that the defendant indicated "that he was not confused by the failure to list" the proper statutory provision in the information). The Eleventh Circuit's fact-bound ruling in this case properly comports with Congressional intent and the plain language of this statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Randolph P. Murrell
Federal Public Defender
Gwendolyn Spivey
Counsel of Record
Assistant Federal Public Defender
FEDERAL PUBLIC DEFENDER FOR THE NORTHERN DISTRICT OF FLORIDA
227 N. Bronough Street,
Suite 4200
Tallahassee, Florida 32301
(850) 942-8818

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