No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MIKOLA BOWDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress has provided for enhanced statutory penalties for drug offenders with one or more prior felony drug convictions. See, *e.g.*, 21 U.S.C. 841(b)(1). Section 851(a) of Title 21 provides that no defendant may be sentenced to such enhanced penalties unless, before trial or the entry of a guilty plea, the government files and serves an information "stating in writing the previous convictions to be relied upon." 21 U.S.C. 851(a).

The question presented is whether the notice requirements of Section 851(a) are "jurisdictional," such that they must be noticed on appeal or collateral review regardless whether the defendant preserved the claim in the district court.

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2009. A petition for rehearing en banc was denied on March 30, 2009. (App., *infra*, 4a-5a). On June 19, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 28, 2009. On July 20, 2009, Justice Thomas further

extended the time to August 27, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 851 of Title 21 of the United States Code is reproduced in the appendix to this petition. App., *infra*, 53a-55a.

STATEMENT

Following a guilty plea, respondent was convicted in the United States District Court for the Northern District of Florida of possessing with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1). App., *infra*, 27a-42a. Respondent was sentenced to a mandatory term of life imprisonment because he had two prior felony drug convictions. *Id.* at 49a. See 21 U.S.C. 841(b)(1)(A)(iii). Concluding that the statutory requirements for imposition of the recidivism enhancement are "jurisdictional," the court of appeals vacated respondent's sentence and remanded for resentencing without the enhancement. App., *infra*, 1a-3a.

1. On April 9, 2006, officers responded to a traffic accident near an intersection in Springfield, Florida. Eyewitnesses told the officers that one of the drivers involved in the accident, later identified as respondent, fled the scene on foot carrying a small bag. A nearby resident reported to police that a male meeting the description of the fleeing driver had forded a canal and had then run through his yard while soaking wet. Presentence Report para. 6 (PSR).

A short time later, police arrested respondent inside a mobile home approximately three blocks from the site of the accident. Officers found a wet knapsack next to a broken window outside the home. A search of the knap-

sack revealed three plastic bags containing 31.8 grams of cocaine base, commonly known as crack. PSR para. 8.

Following his arrest, respondent asked to speak with federal law enforcement agents. In that conversation, respondent stated that he had been selling crack in the area for the past several months and that he typically received from his supplier four to six "cookies" of crack weighing approximately 18 grams each. He further stated that, on the day of his arrest, he had received six cookies of crack (totaling approximately 108 grams) and that he had sold all of it earlier that day except for the 31.8 grams police found in his knapsack. PSR para. 10.

2. On May 17, 2006, a federal grand jury in the Northern District of Florida returned an indictment charging respondent with one count of possessing with intent to distribute 50 grams or more of cocaine base. The indictment cited, among other provisions, 21 U.S.C. 841(b)(1)(A)(iii), which sets forth the relevant penalties for that offense. Under Section 841(b)(1)(A), a defendant with no prior convictions is subject to a statutory range of between ten years and life in prison; a defendant with a single prior conviction for a felony drug offense is subject to a statutory range of 20 years to life; and a defendant with two or more prior convictions for a felony drug offense "shall be sentenced to a mandatory term of life imprisonment without release." 21 U.S.C. 841(b)(1)(A)(iii).

3. Respondent has an extensive adult criminal history and a number of prior convictions, including two felony convictions for possession of cocaine. The first of those two convictions occurred on October 2, 2001, and the second occurred on February 6, 2003. Both were entered in the Circuit Court for Bay County, Florida. PSR paras. 38, 39.

On July 5, 2006, the government filed an information pursuant to 21 U.S.C. 851(a)(1) seeking a mandatory life sentence based on respondent's prior felony drug convictions. App., *infra*, 10a-11a. Section 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.

The information was entitled "Notice of Enhancement" and contained three paragraphs. The first paragraph stated that the information served to "notif[y] the Court and the defendant * * * that the defendant is subject to the increased penalty provisions of Title 21, United States Code, Section 841(b)(1)(B), because of a previous conviction." The second paragraph identified respondent's prior convictions, stating that he "was convicted in the Circuit Court in Bay County, Florida, of the offense of Possession of a Controlled Substance (Cocaine) on two separate occasions in Case Number 01-1339 on January 21, 2003 and in Case Number 02-3149 on February 6, 2003." The third paragraph concluded by stating that "notice is given of the intention of the United States to invoke the increased penalty provisions under Title 21, United States Code, Section 841(b)(1)(B), against this defendant because of his prior felony convictions as outlined above." App. *infra*, 10a-11a.

The information contained two defects. First, it misstated the date of the first of respondent's two prior

drug convictions. The information listed that date as January 21, 2003, which was in fact the date on which respondent's home confinement was revoked for the offense. PSR para. 38. The correct date of the conviction is October 2, 2001. *Ibid.* Second, in the first and third paragraphs, the information incorrectly cited the enhanced penalty provisions in 21 U.S.C. 841(b)(1)(B), rather than 21 U.S.C. 841(b)(1)(A).

4. Respondent agreed to plead guilty to the single count in the indictment. App., *infra*, 17a-24a. On July 13, 2006, in anticipation of respondent's guilty plea, the government filed a pleading entitled "Statement of Facts and Elements of the Offenses," setting forth the factual basis for respondent's guilty plea, the elements of the offense, and the applicable penalties. *Id.* at 12a-16a. The "Penalties" section of that document correctly stated: "Enhanced possible penalties, based upon 2 prior felony cocaine convictions, are minimum mandatory life imprisonment, fine of up to $8 million; 10 years of Supervised Release, and a $100 [special monetary assessment]." *Id.* at 15a.

The same day, respondent signed a plea agreement and entered a guilty plea in open court. App., *infra*, 17a-25a. The written plea agreement documented that respondent had agreed to plead guilty to one count of possessing with intent to distribute 50 grams or more of crack "in violation of Title 21, United States Code, Section 841(b)(1)(A)(iii)." *Id.* at 18a. The plea agreement also specified that "[i]f the Court determines that [respondent] has two prior qualifying felony drug convictions under 21 U.S.C. §§ 841 and 851, * * * he faces a minimum mandatory term of Life imprisonment," among other penalties. *Ibid.*

During the plea hearing, the district court reviewed the penalties applicable to respondent's offense. The following exchange took place:

THE COURT: All right, Mr. Bowden, I need to now go over with you the maximum sentence that could be imposed. And you understand that if the government establishes that you have two prior convictions for felony drug offense, that you are looking at an enhanced sentence.

[RESPONDENT]: Yes, sir.

THE COURT: If the government can establish enhancement for two prior convictions of felony drug offense, the maximum penalty would be a mandatory term of life imprisonment without release, and a term of supervised release of at least ten years, a fine in the amount of $8 million, a special monetary assessment of $100, and forfeiture of all forfeitable assets to the United States. Do you understand that that is the maximum sentence that could be imposed.

[RESPONDENT]: Yes, sir.

App., *infra*, 34a-35a. Following additional discussion, the district court accepted respondent's guilty plea, finding it freely and voluntarily made with the advice of

competent counsel, and adjudicated him guilty. *Id.* at 39a-40a. Before the proceeding concluded, however, the court confirmed once more that respondent was aware of, and had discussed with his lawyer, the fact "that the government has filed a notice of enhancement in this case because it contends that you have two prior felony drug convictions." *Id.* at 40a.

5. The probation office prepared a presentence investigation report identifying respondent's prior convictions, including the two drug felony convictions the government had cited in the information it filed pursuant to Section 851(a). PSR para. 43. Paragraph 38 of the PSR described the first of those two convictions, stating that respondent had "[p]leaded nolo contendere, adjudicated guilty as to all counts" on "10/2/01." PSR para. 38. That paragraph also stated that, on "1/21/03," respondent had his "community control" (*i.e.*, house arrest) revoked and was sentenced to an additional four years of probation.

The PSR recounted that "[o]n July 5, 2006, the government filed a Notice of Enhancement advising the government's intent to seek enhanced penalties for [respondent], detailing his convictions for two prior felony drug offenses." PSR para. 3. Describing that notice, the PSR stated that "[t]he enhancement exposes [respondent] to a minimum mandatory term of Life imprisonment, ten (10) years supervised release, an $8,000,000 fine, and a $100 special monetary assessment." *Ibid.* The PSR then set out the applicable penalties to "reflect the enhancement information filed by the government," noting that "[t]he minimum term of imprisonment for the offense of conviction is Life Imprisonment, pursuant to 21 U.S.C. § 841(b)(1)(A)." PSR para. 67. Respondent did not file any objections to the PSR.

6. At the outset of respondent's sentencing proceeding on October 11, 2006, the court confirmed that respondent's counsel had no objections to the PSR. App., *infra*, 45a-46a. The court then asked respondent if he had "any questions about that report or any objections which [he] would like to state," to which respondent replied "[n]o, sir." *Id.* at 46a. After hearing from counsel, *id.* at 46a-47a, the court advised respondent of the "need to have a conversation now about the notice of enhancement," *id.* at 47a. Respondent reiterated that he was "aware" the enhancement had been filed. *Ibid.* The court then explained that it would ask respondent either to affirm or deny the fact of his prior convictions. *Ibid.*; see 21 U.S.C. 851(b) (stating that, in cases where an information is filed, "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"). Respondent stated that he understood, App., *infra*, 47a, at which point the following exchange took place:

> THE COURT: Now the notice of enhancement states that you were convicted in the Circuit Court for Bay County on two separate occasions of the offense of possession of a controlled substance, cocaine, in case No. 01-1339, on January 21, 2003, and in case 02-3149 on February 6th, 2003. Now, do you deny or do you af-

firm that you were in fact convicted on those two occasions as stated?

[RESPONDENT]: Sir, you say February 3, 2006?

THE COURT: February 6th, 2003.

[RESPONDENT]: I was in jail then.

[COUNSEL]: Your Honor, if I could have a minute, please.

Id. at 48a. Following a conversation off the record between respondent and his counsel, the prosecutor suggested that

> what may be confusing is [respondent] got a—in the original case, reflected in the presentence report at paragraph 38, he originally got placed on community control and then he violated that. And then January 21st of '03 his community control was revoked and he got 40 months of Department of Corrections. And then the following month, February 6th of '03, is when he pled nolo to the other possession of cocaine charge, but those were separate offenses, separate dates, and that may be what confused him.

Ibid.

The court asked respondent whether he was "satisfied" and that he "understand[s] now what we're talking about," to which respondent replied "[y]es, sir." App., *infra*, 48a-49a. The court then asked respondent "[d]o you admit or do you deny that you were convicted as stated on those two prior occasions?" *Id.* at 49a. Respondent answered, "I admit." *Ibid.*

The district court sentenced respondent to life imprisonment. App., *infra*, 49a. After the court pro-

nounced that sentence, it asked counsel if there were "any objections to [its] ultimate findings of fact or conclusions of law relating to this sentence." *Id.* at 51a. Respondent's counsel stated that he had "[n]o objections" but requested that the court recommend to the Bureau of Prisons that respondent be placed in a long-term substance abuse program. *Ibid.* Counsel again reiterated that he had no objections to the manner in which the court imposed sentence, *id.* at 52a, and the hearing concluded, *ibid.*

7. On appeal, respondent argued for the first time that, as a result of the date and citation errors in the Section 851(a) information, "the district court did not have jurisdiction to impose an enhanced sentence of mandatory life imprisonment." Resp. C.A. Br. 11.[1]

The court of appeals agreed, vacating respondent's sentence and remanding for resentencing without the enhancement from his prior convictions. App., *infra*, 1a-3a. The court determined that the information filed by the government "did not strictly comply" with the requirements of Section 851(a). *Id.* at 1a. The court then held, in accord with circuit precedent, that as a result of the government's non-compliance with Section 851(a) "the district court lacked jurisdiction to enhance [respondent's] sentence." *Id.* at 3a.; see *Harris* v. *United*

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[1] Respondent did not file a notice of appeal from the judgment of conviction within the time allotted. See Fed. R. App. P. 4(b)(1)(A). Several months later, respondent filed a notice of appeal, which the court of appeals dismissed as untimely. Respondent then filed a motion under 28 U.S.C. 2255, claiming in part that he had instructed his trial counsel to file a timely notice of appeal and that counsel's failure to do so was constitutionally ineffective. The district court granted that motion and entered a new judgment, from which respondent timely appealed. Gov't C.A. Br. 2-3.

States, 149 F.3d 1304 (11th Cir. 1998) (holding that a district court lacks jurisdiction to impose an enhanced sentence when the government fails to comply with Section 851).

The government filed a petition for rehearing en banc, arguing that, in light of recent decisions of this Court, the court of appeals should revisit and overrule its precedents treating the requirements of Section 851(a) as "jurisdictional." The Eleventh Circuit denied that petition. App., *infra*, 4a-5a.

REASONS FOR GRANTING THE PETITION

In the decision below, the court of appeals applied its holding in *United States* v. *Harris*, 149 F.3d 1304 (1998), 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. That decision conflicts with the decisions of all eight other courts of appeals to address the issue. Those courts have held that Section 851(a)'s requirements are not "jurisdictional" and thus, like other procedural rights, may be forfeited or waived if not timely asserted by the defendant. The decision below also conflicts with decisions of this Court—most notably *United States* v. *Cotton*, 535 U.S. 625 (2002)—that have clarified and limited the meaning of the term "jurisdictional." Because the question presented is an important and recurring one in federal prosecutions and is squarely presented in this case, this Court's review is warranted.

A. The Decision Of The Court Of Appeals Is Incorrect

The court of appeals erred in adhering to its view that the requirements of Section 851(a) are "jurisdictional" and therefore must be noticed on appeal or col-

lateral review regardless whether they were timely raised in the district court. Because Section 851(a) does not affect a court's power to entertain the case, its notice requirements are properly characterized as claim-processing rules that the defendant may forfeit by failing to make a contemporaneous objection in the district court.

1. This Court has recently clarified that the term "jurisdictional" carries a limited and specific meaning. In *United States* v. *Cotton*, *supra*, the Court held that defects in an indictment, including the omission of an element of the offense, do not constitute "jurisdictional" error. The Court overruled its previous decision in *Ex parte Bain*, 121 U.S. 1 (1887), to the extent that it held otherwise. *Cotton*, 535 U.S. at 630. The Court reasoned that *Bain* rested on an "elastic concept of jurisdiction [that] is not what the term 'jurisdiction' means today." *Ibid.* The modern, correct understanding of that term, the Court explained, refers only to a federal court's "statutory or constitutional *power* to adjudicate the case.'" *Ibid.* (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). The court observed that, in the criminal context, a federal court acquires such power by statutory authorization over offenses against the United States, see 18 U.S.C. 3231, and the court does not lose "jurisdiction" because of an error in the institution of the proceeding. *Cotton*, 535 U.S. at 631 (citing *United States* v. *Williams*, 341 U.S. 58, 66 (1951)).

Later decisions have reaffirmed that the term "jurisdiction" refers to a court's power to hear a dispute. In *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), the Court explained that, for many years, federal courts "ha[d] been less than meticulous" in their use of the word, "more than occasionally us[ing] the term 'jurisdictional' to de-

scribe emphatic time prescriptions in rules of court." *Id.* at 454; see *ibid.* ("'Jurisdiction,' the Court has aptly observed, 'is a word of many, too many, meanings.'") (quoting *Steel Co.*, 523 U.S. at 90). The Court drew a distinction between "claim-processing rules" that govern the conduct of litigation and true "jurisdictional" rules that "delineate what cases * * * courts are competent to adjudicate" in the first instance. *Ibid.*

The Court emphasized that the imprecise use of the term "jurisdictional" overlooked a central feature of that concept. *Kontrick*, 540 U.S. at 456. "[A] court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Ibid.* Because of that "critical difference," *ibid.*, the Court observed that, in the future, "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Id.* at 455.

In *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam), this Court applied *Kontrick* to summarily reverse a court of appeals decision treating as "jurisdictional" the time limits in Federal Rule of Criminal Procedure 33 for seeking a new trial. The Court again noted the "less than meticulous uses of the term 'jurisdictional' in [its] earlier cases," observed that "recent decisions have attempted to brush away [the] confusion introduced" by those rulings, and reemphasized *Kontrick*'s admonition that courts should reserve the "jurisdictional" label for limitations on the "classes of cases"

or "persons" within the court's power to adjudicate. *Id.* at 16. Applying those precepts, the Court reasoned that, because Rule 33 is a "claim-processing" rule rather than a "jurisdictional" one, the government could not oppose a new trial motion on untimeliness grounds where it had failed to assert that rule at the appropriate time. *Id.* at 19.

2. Under *Cotton*, *Kontrick*, and *Eberhart*, the notice requirements in Section 851(a) are not "jurisdictional" requirements as that term is properly understood. The jurisdiction of district courts to hear criminal cases rests on 18 U.S.C. 3231. Once a district court has acquired such jurisdiction, neither that statute nor any other purports to divest it of jurisdiction simply because of a statutory or rule violation in adjudicating the case. Just as a court does not lose power to adjudicate a case because of an error in the indictment initiating the proceeding, see *Cotton*, so too the court does not lose power to impose a sentence because of a defect in an information filed under Section 851(a). As every court of appeals other than the Eleventh Circuit to address the issue has concluded, "[Section] 851 simply 'has nothing to do with [a court's] subject-matter jurisdiction' over a criminal case or a court's general power to impose a sentence." *Sapia* v. *United States*, 433 F.3d 212, 217 (2d Cir. 2005) (quoting *United States* v. *Ceballos*, 302 F.3d 679, 692 (7th Cir. 2002), cert. denied, 537 U.S. 1136, 537 U.S. 1137, 538 U.S. 926, and 538 U.S. 939 (2003)); see pp. 16-18, *infra*.

The purposes of Section 851 underscore that it is not a jurisdictional requirement. Section 851 is principally intended to provide a defendant with notice and an opportunity to be heard respecting a recidivist enhancement, in part so that he can challenge any prior convic-

tion on which it is based. *United States* v. *Pritchett*, 496 F.3d 537, 548 (6th Cir. 2007); *United States* v. *Jackson*, 121 F.3d 316, 319 (7th Cir. 1997). Section 851 "allows the defendant ample time to determine whether he should enter a plea or go to trial, and to plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." *Prou* v. *United States*, 199 F.3d 37, 44 (1st Cir. 1999) (quoting *United States* v. *Johnson*, 944 F.2d 396, 407 (8th Cir.), cert. denied, 502 U.S. 1008 (1991), 502 U.S. 1078, and 504 U.S. 977 (1992)). Section 851 thus protects a defendant's individual rights; it does not serve to limit the class of cases over which a court has cognizance.

Because Section 851 is not jurisdictional, its requirements are subject to the ordinary rule that a defendant can waive or forfeit the protections of a statutory or regulatory provision by failing to assert them at the appropriate time. See, *e.g.*, *New York* v. *Hill*, 528 U.S. 110 (2000) (Interstate Agreement on Detainers statute); *United States* v. *Mezzanatto*, 513 U.S. 196 (1995) (plea bargaining statements under Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410). See *Prou*, 199 F.3d at 47 ("Because [S]ection 851(a)(1)'s temporal requirements exist for the defendant's benefit, it makes perfect sense to give the defendant the power to waive (and the obligation not to forfeit) strict compliance with them."); see also *Cotton*, 535 U.S. at 631 ("Freed from the view that indictment omissions deprive a court of jurisdiction, we proceed to apply the plain-error test of Federal Rule of Criminal Procedure 52(b) to respondents' forfeited claim.").

B. The Court Of Appeals' Decision Solidifies An Existing Conflict Among The Circuits

The decision below entrenches a conflict between the Eleventh Circuit and eight other courts of appeals on the question presented. The Eleventh Circuit's refusal to reconsider its erroneous position in light of the overwhelming weight of contrary authority warrants this Court's intervention.

1. Before this Court's decision in *Cotton*, the law in the courts of appeals was unsettled on the consequences of the government's non-compliance with Section 851(a). At least three courts of appeals—the Sixth, Seventh, and Tenth Circuits—agreed with the Eleventh Circuit's view in *Harris* that "a district court lacks jurisdiction to enhance a sentence unless the government strictly complies with the procedural requirements of [Section] 851." *Harris*, 149 F.3d at 1306; see *United States* v. *Hill*, 142 F.3d 305, 312 (6th Cir.) ("Section 851(a)(1) imposes a jurisdictional requirement granting the district court jurisdiction to enhance a defendant's sentence."), cert. denied, 525 U.S. 898 (1998); *United States* v. *Belanger*, 970 F.2d 416, 418 (7th Cir. 1992) ("Failure to file the notice prior to trial deprives the district court of jurisdiction to impose an enhanced sentence."); *United States* v. *Wright*, 932 F.2d 868, 882 (10th Cir.) ("Failure to file the information prior to trial deprives the district court of jurisdiction to impose an enhanced sentence."), cert. denied, 502 U.S. 962, and 502 U.S. 972 (1991).

The First Circuit, by contrast, squarely rejected the Eleventh Circuit's position after careful analysis. Acknowledging the confusion in the case law over the proper characterization of Section 851(a), the First Circuit held in *Prou* v. *United States*, *supra*, that the "jurisdictional" characterization was incorrect. 199 F.3d at

41-45. The court of appeals reasoned that, regardless of whether the government complies with Section 851(a), "a federal district court plainly possesses subject-matter jurisdiction over drug cases" under 18 U.S.C. 3231, including the power to impose penalties, and "[o]nce subject-matter jurisdiction has properly attached, courts may exceed their authority or otherwise err without loss of jurisdiction." *Prou*, 199 F.3d at 45.

2. Following the decision in *Cotton*, every court of appeals to consider the issue has aligned itself with the First Circuit and disagreed with the Eleventh. Based on this Court's recent precedents, the Sixth, Seventh, and Tenth Circuits have "expressly overrule[d]" their previous decisions adopting the Eleventh Circuit's view. *United States* v. *Flowers*, 464 F.3d 1127, 1130 (10th Cir. 2006) (holding that, because Section 851 is not jurisdictional, it can be waived or forfeited by the defendant); see *Ceballos*, 302 F.3d at 692 ("[T]oday we hold that [Section] 851(a)'s procedural requirements are not jurisdictional, and our prior cases holding otherwise are expressly overruled on that issue"; reasoning that "[Section] 851 has nothing to do with subject-matter jurisdiction, as the Supreme Court has defined that term in *Cotton*."); *Pritchett*, 496 F.3d at 544-547 (same). The Second, Fourth, Fifth, and Eighth Circuits also agree that Section 851 does not concern the district court's "jurisdiction" to impose an enhanced sentence. See *United States* v. *Beasley*, 495 F.3d 142, 147-148 (4th Cir. 2007) (concluding that a forfeited claim of error under Section 851 is reviewable on appeal only for plain error because the requirements of that statute are not "jurisdictional"), cert. denied, 128 S. Ct. 1471 (2008); *Sapia*, 433 F.3d at 216-217 (holding that, because Section 851 is not jurisdictional, it could be procedurally defaulted); *Uni-*

ted States v. *Dodson*, 288 F.3d 153, 159-160 & n.9 (5th Cir.) (reviewing unpreserved Section 851 claim for plain error after concluding that the statute is not jurisdictional), cert. denied, 537 U.S. 888 (2002); *United States* v. *Mooring*, 287 F.3d 725, 726-728 (8th Cir.) (applying rules of procedural default to Section 851 claim raised for the first time on collateral review), cert. denied, 537 U.S. 864 (2002); see also *United States* v. *Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996) (rejecting the "jurisdictional" label and concluding that the filing of an information is "simply a necessary condition" to imposition of enhanced sentence).[2]

Accordingly, the Eleventh Circuit now stands alone among the courts of appeals in adhering to its pre-*Cotton* view that compliance with Section 851(a) is a "jurisdictional" requirement. See, *e.g.*, *Pritchett*, 496 F.3d at 546 ("The only circuit holding that the [S]ection 851(a)(1) requirements are jurisdictional is the Eleventh.") (citing *Harris*, 149 F.3d at 1306).

3. The Eleventh Circuit has repeatedly declined invitations to reconsider its position. The government filed a petition for rehearing en banc in *Harris*, asking the full court to review the issue at that time, but the petition was denied. The government filed another petition for rehearing en banc in this case, which was also denied.

The government has opposed petitions for a writ of certiorari in several cases presenting this issue on the

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[2] Neither the Ninth Circuit nor the Third Circuit has squarely addressed the proper characterization of Section 851(a). The latter court has noted, however, that "a majority of courts to have considered the issue have found that the requirements of § 851 are not 'jurisdictional.'" *United States* v. *Bryant*, 187 Fed. Appx. 134 (3d Cir. 2006), cert. denied, 549 U.S. 1293 (2007).

ground that, after *Cotton*, the courts of appeals could be expected to resolve the conflict on their own. See Br. in Opp., *Severino* v. *United States*, 540 U.S. 837 (2003) (No. 02-10095); Br. in Opp., *Quintanilla* v. *United States*, 538 U.S. 926 (2003) (No. 02-7455). Most recently, in opposing certiorari in *Beasley* v. *United States*, 128 S. Ct. 1471 (2008), the government noted that although the Eleventh Circuit had not yet joined the position adopted by its sister circuits, that court "should be given an opportunity to reconsider its ruling in *Harris* before this Court grants review on this issue." Br. in Opp. at 13-14, *Beasley*, *supra* (No. 07-548).

The government's petition for rehearing en banc in this case gave the Eleventh Circuit that opportunity. By denying en banc review, the Eleventh Circuit has made clear that it is unwilling to revisit its interpretation of Section 851(a). This Court's intervention is therefore now necessary.

C. The Question Presented Is Important And Squarely Implicated In This Case

1. The question presented is important to the administration of the federal criminal justice system. Whether the requirements of Section 851(a) are deemed "jurisdictional" determines the applicable legal framework in the situation exemplified by this case: A defendant fails in the district court to allege noncompliance with Section 851(a), is sentenced to an enhanced term, then attempts for the first time on appeal or collateral review to invoke the requirements of that provision as a basis for invalidating the enhanced sentence.

a. Under the majority position, which treats the requirements of Section 851(a) like other procedural rules subject to forfeiture and procedural default, a defen-

dant's failure to preserve a challenge to the information significantly limits his ability later to attack his sentence. Review on appeal would be for plain error under Federal Rule of Criminal Procedure 52(b), and the defendant could therefore prevail only if, among other things, the defect in the information affected his "substantial rights." *United States* v. *Olano*, 507 U.S. 725 (1993). Similarly, on collateral review, a defendant pressing an unpreserved claim of error under Section 851(a) would be required to demonstrate "both 'cause' for not raising the claim at trial, and 'prejudice' from not having done so." *Sanchez- Llamas* v. *Oregon*, 548 U.S. 331, 351 (2006) (quoting *Massaro* v. *United States*, 538 U.S. 500, 504 (2003)); *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982).

Under the Eleventh Circuit's rule, by contrast, settled principles of forfeiture, waiver, and procedural default would not apply. Because subject-matter jurisdiction "involves a court's power to hear a case," "defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." *Cotton*, 535 U.S. at 630; see *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Accordingly, in the Eleventh Circuit, a defendant can obtain automatic invalidation of an enhanced sentence based on a technical defect in the information raised for the first time on appeal or habeas, without justifying his failure to raise the issue in the district court or showing that the error prejudiced him in any way. Indeed, that is precisely what happened in this case. See *Harris*, 149 F.3d at 1308-1309 (granting relief under 28 U.S.C. 2255 based on previously unasserted claim of non-compliance with Section 851(a); rea-

soning that jurisdictional errors cannot be waived, forfeited, or defaulted on collateral review).

b. That result conflicts with basic principles of fairness and efficiency in judicial practice. The plain-error standard on direct review and rules of procedural default on collateral review serve important functions: They further the public interest in the finality of criminal judgments, see *Frady*, 456 U.S. at 166, "induce the timely raising of claims and objections," provide the district court with "the opportunity to consider and resolve" disputes it is in the best position to adjudicate, permit the court and the parties to "correct or avoid the mistake so that it cannot possibly affect the ultimate outcome," and prevent a litigant from "'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor," *Puckett* v. *United States*, 129 S. Ct. 1423, 1428 (2009); see *Reed* v. *Ross*, 468 U.S. 1, 10 (1984) (procedural default rules "channel[], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently").

The Eleventh Circuit's characterization of Section 851(a)'s requirements as "jurisdictional" frustrates each of those objectives. Indeed, the concerns animating contemporaneous objection rules are particularly acute in this context. The government can readily correct errors in an information if those defects are brought to light at the appropriate time, because Congress specifically provided in Section 851(a) that "[c]lerical mistakes in the information may be amended at any time prior to the pronouncement of sentence." 21 U.S.C. 851(a)(1). The government has no recourse, however, if an appellate or habeas court invalidates on purportedly "jurisdictional"

grounds an enhanced sentence imposed years earlier. Under the decision below, a defendant therefore may permanently escape enhanced punishment under 21 U.S.C. 841(b)(1) simply by remaining silent at sentencing and raising a defect in an information for the first time on appeal or in a habeas petition.

The Eleventh Circuit's position also runs contrary to congressional intent. By authorizing higher statutory penalties for recidivist offenders, Congress provided the federal government with an important tool in combating drug trafficking. Congress conditioned the imposition of those increased sentences upon notice by the government pursuant to the procedures set forth in Section 851(a). But there is no reason to believe that Congress intended to vitiate that scheme when, because of prosecutorial oversight, an information filed under Section 851(a) contains easily corrected errors that cause the defendant no prejudice and to which he did not object. Indeed, the provision in Section 851(a)(1) permitting amendment of "clerical mistakes in the information * * * at any time" prior to sentencing (and thus after adjudication of guilt) strongly suggests that Congress did not intend that result. 21 U.S.C. 851(a)(1).

2. This case squarely presents the conflict among the courts of appeals on the question presented. Although respondent raised his claim under Section 851(a) for the first time on appeal, the Eleventh Circuit did not apply plain-error review, but instead invalidated respondent's enhanced sentence on the ground that "the district court lacked jurisdiction" to impose it. App., *infra*, 1a. The outcome and analysis would have been different in the courts of appeals that do not treat the requirements of Section 851(a) as "jurisdictional." Those courts would have applied plain-error review, requiring respon-

dent to show, *inter alia*, that the alleged defects in the information "affec[ted his] substantial rights" by causing him prejudice and also "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732.

Respondent could not satisfy either of those showings. He cannot establish prejudice because he was correctly and repeatedly advised—by the government and the court, orally and in writing, before and after his guilty plea—that he faced a mandatory life sentence if the court found that he had two prior felony drug convictions. Despite the defects in the information, respondent acknowledged that he understood that possibility. And, at sentencing, respondent admitted the fact of his two prior convictions and confirmed his awareness that those convictions were the basis for his enhanced sentence. See pp. 8-9, *supra*. For those reasons, the defects in the information also did not "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732. As in *Cotton*, the "real threat" to the fairness and integrity of the proceedings is the outcome in the court of appeals, which required that respondent receive a sentence far less than that mandated by law because of a non-prejudicial error that he never raised in the district court. *Cotton*, 535 U.S. at 634.

3. This Court may wish to consider summary reversal as an alternative to plenary review. The decision below is clearly incorrect and rests on a position that conflicts with decisions of this Court. This Court's decision in *Eberhart*, which confirmed the distinction between "jurisdictional" and "claim-processing rules" that controls this case, was itself a summary disposition. In view of the unanimity among the other courts of appeals

to address this question, summary reversal may be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted. The court may also wish to consider summary reversal of the judgment below.

Respectfully submitted.

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