UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 05-10093-I

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

MAURICE DAVON CAWTHON
Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLANT

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NO. 05-10093-I

United States v. Maurice Davon Cawthon

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

1. Maurice Davon Cawthon, Defendant-Appellant

2. Robert Gardner Davies, Assistant United States Attorney, Appellate Counsel for the United States

3. Honorable Miles Davis, United States Magistrate Judge

4. William Mallory Kent, Appellate Counsel for Cawthon

5. Christopher L. Rabby, District Court Counsel for Cawthon

6. Thomas P. Swaim, Assistant United States Attorney, Counsel for the United States at the District Court

7. Honorable Roger Vinson, United States District Judge

STATEMENT REGARDING ORAL ARGUMENT

Cawthon requests oral argument.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the appeal in this cause under 28 U.S.C. § 1291, which provides for an appeal from a final order of a district court. This appeal was timely filed within ten days of entry of judgment and sentencing.

STATEMENT OF THE ISSUES

I. The Court Erred in Denying Cawthon a Hearing to Challenge the Constitutional Validity of The Prior Conviction Alleged in the Government's Enhancement Information Filed Under 21 U.S.C. § 851, When Cawthon Alleged Sufficient Specific Facts to Show that the Prior Conviction Was Obtained in Violation of His Right to Effective Assistance of Counsel and That He Was Actually Innocent of the Charge.

STATEMENT OF THE CASE

Maurice Davon Cawthon ("Cawthon" of the "Defendant" or "Appellant") was charged in a four count superseding indictment July 21, 2004 with (count one) possession of five grams or more of crack cocaine with intent to distribute in violation of 21 U.S.C. § 841 [punishable by a minimum mandatory five years up to forty years imprisonment], (count two) knowingly used and carried a sawed-off shotgun during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A) and (B)(i) [punishable by a minimum mandatory ten years up to life imprisonment], (count three) possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g) [punishable by up to ten years imprisonment], and (count four) possession of an unregistered short-barreled shotgun in violation of 26 U.S.C. § 5861(d) and § 5871 [punishable by up to ten years imprisonment]. [R14]

August 26, 2004 the government filed an enhancement information under 21 U.S.C. § 851 alleging that Cawthon had a Florida conviction from February 7, 2001 for possession of a controlled substance. [R30]

August 30, 2004 Cawthon entered a guilty plea to all four counts of the superseding indictment. [R32; R33] During the change of plea colloquy Cawthon's counsel advised the district court with respect to the government's enhancement information:

3 MR. RABBY [Defense counsel]: That's correct. I have discussed

4 addressing those issues at sentencing with Mr. Swaim.

5 There is also the enhancement question that we hope

6 to resolve between now and time of sentence.

[R54-4]

Subsequently on December 16, 2004 Cawthon filed a motion for continuance of sentencing in which he set forth in detail his objections to the validity of the prior conviction alleged in the § 851 notice, and requested additional time to obtain documentary evidence to be able to corroborate his claims concerning his actual innocence and ineffective assistance of counsel as to this prior conviction:

> 1. That the defendant was set for sentencing on December 8, 2004, and that at that time several issues came to the attention of court and counsel, regarding the Enhancement Information filed in this case.
>
> 2. That a main issue involved the defendants prior drug conviction for the possession of a Tylenol III/Hydrocodone.
>
> 3. That the Defendant will testify that he had a prescription for that medication and should not have been convicted of that charge.
>
> 4. That the Defendant timely executed the proper releases to obtain his medical records and prescription records to support his testimony.
>
> 5. That the dentist, Dow Bryan, 5599 Stewart Street, Milton Florida, was a victim of Hurricane Ivan. His office has a FEMA blue roof and there is a sign on the front door indicating that the office is closed until further

> notice. Additionally, the voice mailbox at the dentist office (850-623-3696) is full of messages and will not records any further attempts to reach the doctor.
>
> 6. That the Pharmacy that filled the Defendant's prescription has changed ownership since his prescription was filled. The records from the previous owner are not onsite,
> and will take two weeks to obtain.
>
> 7. As a result the Defendant has not had sufficient time to obtain the necessary documentation to proceed to sentencing at this time.

[R38]

Cawthon also filed a formal written denial of the § 851 enhancement, challenging the validity of the prior conviction. [R40] In his denial Cawthon expressly alleged that the controlled substance he had been convicted of possessing in the underlying case was Tylenol with Codeine, for which he alleged he had had a prescription. He alleged that he should not, therefore, have been convicted of possession of a controlled substance. He further asserted that the plea and conviction on the underlying charge was the result of ineffective assistance of counsel, because his counsel on that case had done no investigation or discovery and that the conviction was obtained in violation of his Sixth Amendment right to effective assistance of counsel. [R40]

The government objected to Cawthon's requested continuance [R38] and the district court denied the request the following day without explanation. [R41]

The sentencing took place December 17, 2004. [R42]

The issue of the right to challenge the constitutional validity of the prior conviction was addressed at the very start of the proceedings, with the district judge ruling that Cawthon had no right to bring such a challenge in federal court - except perhaps by way of a later habeas - and denied Cawthon the right to challenge the constitutional validity of the prior conviction in the federal proceeding. Instead, according to the district judge and the government, this would have to be done if at all by Cawthon bringing a challenge first in state court:

> THE COURT: Well, we continued the proceeding to allow you to do some research with respect to a challenge to the state court conviction for purposes of the enhancement information. I have received the government's memorandum,[1] and I have received a motion for continuance from you, Mr. Rabby.
>
> MR. RABBY: Judge, I have discussed the motion to continue this morning with the U.S. Attorney in this matter, and it's an interesting question, interesting position. It's the government's position that it's irrelevant whether or not Mr. Cawthon had a prescription, because it's become a final judgment in state court. And if that is the court's position, then it would -- if the court adopts that position, then it would make moot the motion to continue, whether he had a prescription or not.
>
> THE COURT: Well, it's irrelevant, certainly, to the issue of what I have to decide. The only thing that could possibly change this for purposes of the enhancement is if the state court should vacate or annul its conviction.
>
> MR. SWAIM: That's correct, Your Honor.
>
> THE COURT: Or expunge it. And I think the route, if

[1] The government's memorandum does not appear to be in the record.

you are gonna do that, is obviously in state court, not in this court.

MR. SWAIM: That's correct, Your Honor.

THE COURT: I think that's pretty well settled.

[R54-2-3]

There followed some discussion of an unrelated objection to the enhancement, that is, the detail or lack of detail in the notice regarding the prior conviction, which is not relevant to this appeal. After this the district court reverted to Cawthon's attempt to challenge the constitutional validity of the prior conviction, and repeated its ruling that Cawthon was not allowed to do so in the federal sentencing proceeding, citing *United States v. Custis* and a memorandum from the government that is not in the record:

[COURT] That gets us back to the -- to the question of whether the underlying conviction can somehow be collaterally attacked. And, again, I have advised you, Mr. Cawthon, that any -- any challenge to the validity of that state court conviction upon which the enhancement is based must be made before sentence is imposed in this court, in federal court, or you will be prohibited from hereafter challenging that. Now, there is an exception, I understand, that it's possible that this may be the subject of a habeas corpus petition.

Have you seen that, counsel?

MR. SWAIM: Yes, Your Honor.

MR. RABBY: Yes, sir.

THE COURT: And, of course, that's a separate matter, and whether it is or is not, I'm not ruling now. I'm simply saying that there is a possibility that that can take place.

For purposes of the enhancement, that is a valid

conviction. It's been final now since June of 2001, and I find that it is a proper enhancement conviction for purposes of Section 851.

Let me also note that the Supreme Court in the *Custis* case, which is cited by counsel,[2] 511 U.S. 485, which is a 1994 decision, but it specifically approves the -- the 851 procedure for challenging a conviction, unlike the one which had been found under 924. So it said if Congress wanted to, it could set out specifically how to authorize collateral attacks on

prior convictions, and it was referencing this one specifically.

MR. RABBY: (Nodded affirmatively).

THE COURT: So the Supreme Court has said this is a -- this is certainly a constitutional and an adequate way to proceed.

With that, I think there remains one sentencing issue, and that is whether the --

MR. RABBY: Judge --

THE COURT: -- relevant conduct includes the ten grams.

[R54-8-9]

The district court proceeded to impose the minimum mandatory ten year sentence on count one based on the prior conviction alleged in the government's § 851 notice, which Cawthon had attempted to challenge. [R54-16]

This appeal proceeded in a timely manner thereafter with the filing of Cawthon's notice of appeal on December 27, 2004. [R44] Cawthon is in custody at Texarkana

[2] This citation apparently was in the government's memorandum which apparently did not make it into the record.

FCI. [http://www.bop.gov/iloc2/LocateInmate.jsp]

STANDARDS OF REVIEW

Cawthon presented a timely objection to the constitutional validity of the prior conviction set forth in the government's § 851 enhancement information upon which his sentence on count one was enhanced from a minimum mandatory five years imprisonment to a minimum mandatory ten years imprisonment, was presented to the court, yet the district court denied Cawthon the right to challenge the constitutional validity of the prior conviction at his federal sentencing. Therefore because of the timely objection, the district court's error in denying Cawthon the right to challenge the prior conviction is subject to harmless error review under Rule 52(a), Federal Rules of Criminal Procedure. The underlying question - - the right to raise a challenge to the constitutional validity of a prior conviction alleged in an information under 21 U.S.C. § 851 at the federal sentencing - - is a pure question of law subject to *de novo* review.

SUMMARY OF ARGUMENTS

I. The Court Erred in Denying Cawthon a Hearing to Challenge the Constitutional Validity of The Prior Conviction Alleged in the Government's Enhancement Information Filed Under 21 U.S.C. § 851, When Cawthon Alleged Sufficient Specific Facts to Show that the Prior Conviction Was Obtained in Violation of His Right to Effective Assistance of Counsel and That He Was Actually Innocent of the Charge.

The government filed an information under 21 U.S.C. § 851 alleging that Cawthon had a prior Florida felony conviction for possession of a controlled substance, Tylenol with Codeine, upon which basis the government sought to enhance Cawthon's sentence from a five year minimum mandatory sentence to a ten year minimum mandatory sentence for violation of possession of five grams or more of crack cocaine with intent to distribute in violation of 21 U.S.C. § 841.

Cawthon filed an objection to the enhancement, alleging that he was actually innocent of the Florida crime because it had charged him with possession of a prescription controlled substance for which he had possessed a valid prescription. Cawthon also alleged that his guilty plea to that charge was the result of ineffective assistance of counsel as a result of that counsel's failure to investigate and prepare the prescription defense. Cawthon sought a continuance of the sentencing date to obtain evidentiary proof of the matters he asserted explaining that because of the recent hurricane, the drug store which had issued the prescription was damaged and closed

and the business and records sold to another pharmacy creating difficulty in obtaining documentary proof of his claim.

The district court denied the requested continuance and both the district court and the government insisted at sentencing that Cawthon had no right under 21 U.S.C. § 851 to a hearing to challenge the constitutional validity of the prior conviction. Instead said the district court and the government, this challenge, if it were to be made, could only be made in the Florida state courts. The district court proceeded to impose the enhanced ten year minimum mandatory sentence based on the prior conviction which Cawthon had sought to challenge.

The district court erred in denying Cawthon the right to challenge the constitutional validity of his prior conviction under 21 U.S.C. § 851(c). This Court requires strict compliance with the statutory procedures under § 851, and failure to comply with the statutory procedures can and in this case did constitute plain error.

Cawthon's pleading was sufficient to entitle him to an evidentiary hearing and if Cawthon had established his assertions at that hearing the district court would not have been permitted to rely upon this conviction to enhance his sentence. The error resulted in a sentence five years in excess of what the law permitted. Cawthon is entitled to have this sentence vacated and to be remanded for resentencing at which time he would be permitted an evidentiary hearing to challenge the prior conviction.

ARGUMENT

I. The Court Erred in Denying Cawthon a Hearing to Challenge the Constitutional Validity of The Prior Conviction Alleged in the Government's Enhancement Information Filed Under 21 U.S.C. § 851, When Cawthon Alleged Sufficient Specific Facts to Show that the Prior Conviction Was Obtained in Violation of His Right to Effective Assistance of Counsel and That He Was Actually Innocent of the Charge.

Title 21, United States Code, § 851(c) provides in pertinent part:

(c) Denial; written response; hearing

(1) *If the person* denies any allegation of the information of prior conviction, or *claims that any conviction alleged is invalid, he shall file a written response to the information*. A copy of the response shall be served upon the United States attorney. *The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment.* The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. *The hearing shall be before the court without a jury and either party may introduce evidence.* Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. *At the request of either party, the court shall enter findings of fact and conclusions of law.*

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

a timely challenge.

21 U.S.C. § 851(c)(1) and (2) (emphasis supplied).

The law is well settled that a defendant has the right to challenge the constitutional validity of a prior conviction the government intends to rely upon for an enhanced sentence under 21 U.S.C. § 851.

> Under the scheme created by §§ 851(b), the district court must then ask the defendant whether he affirms or denies his prior convictions. [FN2] *If he denies any allegation of the information or challenges the constitutionality of any conviction alleged in the information, the court must hold a hearing on the matter. See 21 U.S.C. §§ 851(c).* In sum, the district court may impose an enhanced sentence only after determining (1) that the prosecutor timely filed a proper information, (2) that the government served a copy of the information on the defendant or his counsel, and (3) that the defendant does not contest or failed to contest successfully the convictions in the information.

United States v. Cespedes, 151 F.3d 1329, 1334 (11th Cir. 1998) (emphasis supplied).

This is not a new or novel interpretation of § 851(c). This Court has followed this interpretation for at least the past thirty years:[3]

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[3] The procedure involved was instituted under the Comprehensive Drug Abuse Prevention and Control Act of 1970.

"The purpose [of the new § 851 provision] was to eliminate 'the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences.' [FN3] Mandatory minimum sentencing was abolished to permit greater prosecutorial and judicial flexibility. FN3. The House Committee on Interstate and Foreign Commerce, in reporting on the House bill, the version ultimately passed, explained the reasons for revising the penalty structure:

> Following remand the district court appointed counsel to represent Cevallos and set a hearing for resentencing, at which he admitted that he had been convicted of a prior drug-related offense as alleged in the information. The court then ruled that *the only question before it was the validity of the prior conviction and determined, following a hearing, that*

> The foregoing sentencing procedures (penalties revised by the Act) give maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case.
>
> The severity of existing penalties, involving in many instances minimum mandatory sentences, have led in many instances to reluctance on the part of the prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. In addition, severe penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain. The committee feels, therefore, that making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences.

H.Rep.No.91-1444, 91 St.Cong., 2d Sess., 1970 U.S.Code Cong. & Admin.News, pp. 4566, 4576., quoted in *United States v. Noland,* 495 F.2d 529, 533 (5th Cir. 1974).

Ironically Congress is now moving in exactly the opposite direction with the pending *Booker* "fix" before the House of Representatives which will establish a new broad range of minimum mandatory sentences.

the conviction was valid . . .

United States v. Cevallos, 574 F.2d 854, 855 (5th Cir. 1978) citing *United States v. Cevallos*, 538 F.2d 1122 (5th Cir. 1076) (emphasis supplied).

This circuit has insisted upon strict compliance with the mandatory language of the procedural requirements of section 851(a) and (b). *United States v. Noland,* 495 F.2d 529, 533 (5th Cir.), *cert. denied,* 419 U.S. 966, 95 S.Ct. 228, 42 L.Ed.2d 181 (1974); *United States v. Cevallos,* 538 F.2d 1122, 1126-27 (5th Cir.1976), *United States v. Weaver,* 905 F.2d 1466, 1481 (11th Cir.1990). Compliance with subsection (c) is of even greater importance, because it impacts the very validity of the conviction being relied upon for enhancement. "Significantly, "[t]he doctrine of harmless error does not apply" with respect to failures to follow the statutory scheme of §§ 851. *United States v. Olson,* 716 F.2d 850, 852 (11th Cir.1983)." cited in *United States v. Weaver*, 905 F.2d 1466, 1481 (11th Cir. 1990).

Cawthon's counsel filed a presentencing objection on December 17, 2004 to the prior conviction the government sought to rely upon for the enhancement, an objection going to the constitutional validity of the conviction. Cawthon alleged that the underlying conviction for possession of a controlled substance was invalid because the controlled substance in question was a prescription controlled substance for which he had had a prescription, and that he had been denied effective assistance of counsel

under the Sixth Amendment by the failure of his counsel on the underlying conviction to properly prepare and defend the case. [R40]

In a motion for continuance of the sentencing to allow Cawthon sufficient time to prepare to challenge the prior conviction and sufficient time to obtain needed evidence, Cawthon alleged:

> 1. That the defendant was set for sentencing on December 8, 2004, and that at that time several issues came to the attention of court and counsel, regarding the Enhancement Information filed in this case.
>
> 2. That a main issue involved the defendants prior drug conviction for the possession of a Tylenol III/Hydrocodone.
>
> 3. That the Defendant will testify that he had a prescription for that medication and should not have been convicted of that charge.
>
> 4. That the Defendant timely executed the proper releases to obtain his medical records and prescription records to support his testimony.
>
> 5. That the dentist, Dow Bryan, 5599 Stewart Street, Milton Florida, was a victim of Hurricane Ivan. His office has a FEMA blue roof and there is a sign on the front door indicating that the office is closed until further notice. Additionally, the voice mailbox at the dentist office (850-623-3696) is full of messages and will not records any further attempts to reach the doctor.
>
> 6. That the Pharmacy that filled the Defendant's prescription has changed ownership since his prescription was filled. The records from the previous owner are not onsite, and will take two weeks to obtain.
>
> 7. As a result the Defendant has not had sufficient time to obtain the necessary documentation to proceed to sentencing at this time.

[Doc. 38]

In response, the district court and government told Cawthon that he had no right to challenge the prior conviction:

> THE COURT: Well, we continued the proceeding to allow you to do some research with respect to a challenge to the state court conviction for purposes of the enhancement information. I have received the government's memorandum, and I have received a motion for continuance from you, Mr. Rabby.
>
> MR. RABBY: Judge, I have discussed the motion to continue this morning with the U.S. Attorney in this matter, and it's an interesting question, interesting position. It's the government's position that it's irrelevant whether or not Mr. Cawthon had a prescription, because it's become a final judgment in state court. And if that is the court's position, then it would -- if the court adopts that position, then it would make moot the motion to continue, whether he had a prescription or not.
>
> THE COURT: *Well, it's irrelevant, certainly, to the issue of what I have to decide. The only thing that could possibly change this for purposes of the enhancement is if the state court should vacate or annul its conviction.*
>
> *MR. SWAIM: That's correct, Your Honor.*
>
> *THE COURT: Or expunge it. And I think the route, if you are gonna do that, is obviously in state court, not in this court.*
>
> *MR. SWAIM: That's correct, Your Honor.*
>
> *THE COURT: I think that's pretty well settled.*[4]

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[4] Appellate counsel for Cawthon has experienced this response from experienced district judges and experienced government prosecutors on several occasions. Typically the court and government counsel are confusing the teaching

[R54-2-3; emphasis supplied]

This Court has held that substantial compliance is required under § 851(a) and § 851(b):

> Concerning petitioner's second allegation of error, the Government concedes (and the transcript of the sentencing hearing, A. at 66-83, confirms) that the District Court at sentencing never asked petitioner whether he had been previously convicted as alleged in the information and never informed him that he could not challenge the prior conviction after sentencing, even though both tasks are required by s 851(b) prior to imposing an enhanced sentence. The Government urges, however, that unlike the strict compliance which we require for the filing portion of the enhancement statute (§ 851(a)(1)), see *United States v. Noland*, supra, substantial compliance with the requirements of § 851(b) should be sufficient.[FN8]
>
> FN8. The Government goes on to argue that the petitioner confirmed his identity in the prior conviction by acquiescence and similarly never challenged his previous conviction in any way prior to sentencing, in effect shifting the burden of compliance with §s 851(b) onto petitioner.
>
> In *United States v. Garcia*, 5 Cir., 1976, 526 F.2d 958, decided after oral argument in this case, we held that it was doubtful that substantial rather

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of *Custis v. United States,* 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994), and the cases following it, with the statutory grant of authority to broadly challenge the constitutionality of prior convictions at a sentencing under § 851(c) - two different things. This was the problem here as well. The district court expressly cited *Custis* in denying the hearing - apparently in reliance upon a memorandum of law from the government which led the court astray. [R54-8]

> than strict compliance with § 851(b)'s statutory ritual would suffice. In *Garcia* the non-compliance with s 851(b) was much less egregious [FN9] than the complete failure to comply with § 851(b) in the case before us. On the doubtful possibility that substantial compliance with § 851(b) would suffice, there was no such compliance here. In sentencing petitioner the District Court completely failed to comply with § 851(b), which is a prerequisite to the imposition of an enhanced sentence.
>
> FN9. Garcia testified at his trial that he had been convicted of a narcotics offense in 1967, and the prior conviction cited in the information was a 1967 narcotics offense. But because the Court addressed counsel rather than the defendant to establish that in fact these two convictions were one and the same, we held that § 851(b) had not been complied with.

United States v. Cevallos, 538 F.2d 1122, 1126 -1127 (5th Cir. 1976).

Judge Roney, writing for this Court in *United States v. Rutherford*, 175 F.3d 899, 904 (11th Cir. 1999) reiterated the need for and requirement of strict statutory compliance under § 851:

> [W]e have required strict compliance with 21 U.S.C. section 851(a)(1). *See United States v. Weaver,* 905 F.2d 1466, 1481 (11th Cir.1990), *cert. denied sub nom.* 498 U.S. 1091, 111 S.Ct. 972, 112 L.Ed.2d 1058 (1991). We have ruled, for example, that the government's failure to file a timely section 851(a)(1) notice precludes enhancement even if the defendant knew before trial that he was subject to a sentence enhancement based on prior convictions. *See United States v. Olson,* 716 F.2d 850, 852 (11th Cir.1983); *United States v. Noland,* 495 F.2d 529, 533 (5th Cir.), *cert. denied,* 419 U.S. 966, 95 S.Ct. 228, 42 L.Ed.2d 181 (1974). We have also ruled that the government's failure to file a timely section 851(a)(1) notice precludes enhancement even if the defendant does not challenge the validity of his prior convictions. *See Noland,* 495 F.2d at 533.
>
> [what the government did and the Court accepted] is inconsistent with

> strict compliance. There is no good reason why the uncertainty that will continue to pervade the procedure under the *Belanger* analysis should not be eliminated by simply requiring the government to comply with the requirements of the statute. Strict compliance would seem to be an easy thing for the government to do.

United States v. Rutherford, 175 F.3d 899, 904 (11th Cir. 1999).

This Court was presented with a very similar set of facts under § 851(c) involving confusion over the defendant's right to mount a constitutional challenge to an underlying conviction at sentencing in *United States v. Sanchez*, 138 F.3d 1410 (11th Cir. 1998):

> In his Objections to the Presentence Investigation Report, Duran challenged the notice as defective on its face and argued that one of the underlying convictions upon which the government relied was based on a constitutionally invalid plea. Specifically, Duran argued that he did not have effective assistance of counsel at the time of the plea; there was an insufficient factual basis for the no contest plea; and that he is actually innocent of the charges so that maintenance of the plea is a manifest injustice. At the sentencing hearing, defense counsel, the government and the court all expressed some confusion or doubt about the appropriate procedure in the face of such a challenge. Defense counsel expressed his intention to attack both the Illinois and the Florida convictions as constitutionally infirm and requested a continuance to develop the facts.. The government objected to such an attack, declaring that it amounted to a collateral attack provided for under 28 U.S.C. § 2254, and that a federal court cannot review a state conviction within these sentencing proceedings. The district court agreed.
>
> *Contrary to the understanding of the government and the court, if the defendant files a written response claiming that a conviction is invalid, a hearing like that contemplated under section 2254 is exactly what section 851 requires . . .*

United States v. Sanchez, 138 F.3d 1410, 1416-1417 (11th Cir. 1998) (emphasis supplied).

> The procedure for establishing prior convictions in 21 U.S.C. §§ 851 requires that the United States Attorney file an information with the court and serve a copy to defendant or his counsel stating in writing the previous convictions to be relied upon. §§ 851(a)(1). Once the information is filed, the court shall, after conviction but before sentencing, inquire of the defendant whether he affirms or denies that he had been previously convicted as alleged in the information and inform defendant that any challenge to a prior conviction must be made before sentence is imposed. §§ 851(b). To challenge the validity of any conviction, defendant must file a written response to the information. Once the response is filed and served on the government, the court must hold a hearing to determine any issues raised by the response that would except the defendant from any increased punishment. The United States attorney has the burden of proof beyond a reasonable doubt on any issue of fact, and at the request of either party, the court shall enter findings of fact and conclusions of law. §§ 851(c)(1).
>
> If defendant claims that a conviction alleged in the information was obtained unconstitutionally, he shall "set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response." Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived, unless good cause is shown for the failure to make a timely challenge. §§ 851(c)(2). The language of the statute is mandatory, requiring strict compliance with the procedural requirements of sections 851(a) and (b). *See United States v. Weaver,* 905 F.2d 1466, 1481 (11th Cir.1990), *cert. denied sub nom. Sikes v. United States,* 498 U.S. 1091, 111 S.Ct. 972, 112 L.Ed.2d 1058 (1991).

United States v. Sanchez, 138 F.3d 1410, 1416 (11th Cir. 1998).

Had Cawthon been allowed the hearing he was entitled to under § 851(c) he

would have been able to establish that the prior conviction for possession of a controlled substance the government relied upon to enhance his sentence from a five year minimum mandatory sentence to a ten year minimum mandatory sentence was constitutionally infirm.

Cawthon alleged in his objection to the prior conviction and in greater detail in his motion for continuance, that the controlled substance was Tylenol with Codeine, a prescription drug for which he possessed a valid prescription. This was not a crime under Florida law.[5] Florida law contains an express exemption for possession of a

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[5] *Cf. United States v. Leigh*, 487 F.2d 286 (5th Cir. 1973) (charge of possession or distribution of controlled substance under federal statute does not include medical doctor's prescription of controlled substance). *See* 21 U.S.C. § 829; *United States v. Moore*, 423 U.S. 122, 96 S.Ct. 335 (1975) (doctor may be prosecuted for distribution of prescription medication if not done within the usual course of medical profession). *See also United States v. Outler*, 659 F.2d 1306 (5th Cir. 1981) (indictment of doctor under 21 U.S.C. § 841 defective for failing to allege that the prescriptions lacked legitimate medical reasons). *United States v. Betancourt*, 734 F.2d 750 (11th Cir. 1984) (licensed medical doctor registered with DEA is authorized to dispense controlled substances in the usual course of professional practice for legitimate medical reasons).

controlled substance that was obtained by legitimate prescription:

> (6)(a) It is unlawful for any person to be in actual or constructive possession of a controlled substance *unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice* . . .

Florida Statutes, § 893.13(6)(a) (emphasis supplied).

Cawthon's assertion in his denial of the government's information filed under 21 U.S.C. § 851 that he possessed the prescription controlled substance by virtue of a valid prescription, constituted a claim of actual innocence, with a gateway claim of ineffective assistance of counsel. *Schlup v. Delo*, 513 U.S. 298, 317, 115 S.Ct. 851, 862 (1995).

There was binding precedent in the controlling Florida district court of appeal at the time of Cawthon's state conviction that possession of a controlled substance that was ordinarily available by prescription did not establish probable cause. *Campbell v. State*, 423 So.2d 608 (Fla. 1st DCA 1982) (affidavit was insufficient to justify issuance of search warrant where there was no allegation or evidence to indicate presence of a "controlled buy" and at time of crime, controlled substance involved had accepted

medical use).[6]

Additionally, prior to Cawthon's underlying state conviction, Florida's Supreme Court had expressly held unconstitutional a Florida Statute which had attempted to criminalize possession of a prescription controlled substance other than in the original packaging. Thus it was lawful as a matter of Florida Constitutional law for Cawthon to possess a prescription controlled substance not in the original prescription bottle, assuming that to have been the case. *State v. Walker*, 461 So.2d 108 (Fla. 1984), affirming decision of Judge Grimes in *State v. Walker*, 444 S.2d 1137 (Fla. 2nd DCA 1984).

For Cawthon's court appointed state defense counsel to not have investigated and presented this defense was ineffective assistance of counsel depriving Cawthon of the counsel guaranteed him under the Sixth and Fourteenth Amendments to the United States Constitution. Florida's criminal system is an open discovery system. *See* Rule 3.220, Florida Rules of Criminal Procedure. Cawthon's state defense counsel had the statutory tools available to investigate and establish this defense but failed to do so.

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[6] Cawthon's prior conviction arose out of Milton, in Santa Rosa County, Florida, which is within the jurisdiction of Florida's First District Court of Appeal. [PSR, paragraph 36; Florida First District Court of Appeal official website, History of the Court page, found at http://www.1dca.org/History.html]

Given the settled state of the law in Cawthon's favor, it was ineffective assistance of counsel to have failed to do so. *Strickland v. Washington*, 466 U.S. 68, 104 S.Ct. 2052 (1984).

The Supreme Court held in *McMann v. Richardson*, supra, 397 U.S. 759, 770, 771, 90 S.Ct. 1441, 1448, 1449 (1970), that a guilty plea can be attacked based on inadequate legal advice if that counsel was not "a reasonably competent attorney" and the advice he gave relative to the defense and plea to the case was not "within the range of competence demanded of attorneys in criminal cases." *See also Cuyler v. Sullivan*, *supra*, 446 U.S. 335, 344, 100 S.Ct. 1708, 1716 (1980). When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Strickland v. Washington,* 466 U.S. 668, 687-688, 104 S.Ct. 2052,2064 (1984). Cawthon's allegations, if the Court had allowed the required hearing would have established ineffective assistance. The prior conviction was constitutionally invalid based on Cawthon's claim and should not have been used to enhance his sentence.

Standard of Review - Substantial *and* Plain Error

Cawthon's pleading in denial of the government's § 851 information as supplemented in his motion for continuance requesting additional time to develop the evidence to support his assertions, was sufficient to entitle Cawthon to an evidentiary

hearing under § 851(c). The denial of that hearing in the face of Cawthon's pleadings was error. *Sanchez, supra.*

The error in this case is not harmless, under Rule 52(a), Federal Rules of Criminal Procedure. An error must be disregarded as not "affect[ing] substantial rights," Fed.R.Crim.P. 52(a), if the error is "harmless beyond a reasonable doubt," *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The error in this case increased Cawthon's sentence on the drug charge from a sentencing range of 46-57 months with a five year minimum mandatory penalty, to ten years. Therefore the error affected susbtantial rights - the right to not be wrongly imprisoned for an additional five years beyond the penalty correctly called for.

Cawthon presented his position to the district court - he sought to challenge the constitutionality of the prior conviction but was denied that right by the district court. Therefore, Cawthon need only establish that the error was not harmless.

However even were this appeal to be subject to a plain error standard under Rule 52(b) - which it is not - Cawthon's sentencing meets even a plain error test. To establish plain error, (1) there must be error, (2) that was plain, (3) that seriously affected substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *See Johnson v. United States,* 520 U.S. 461, 117 S.Ct. 1544, 1548-49, 137 L.Ed.2d 718 (1997).

We have shown that the refusal to allow Cawthon a right to challenge his prior conviction was error under *Sanchez*.

An error meets the "plain" requirement - - the second prong - - if it is "obvious" or "clear under current law." *United States v. Olano,* 507 U.S. 725, 734, 113 S.Ct. 1770, 1777 (1993). There was thirty years of precedent on this point culminating with a case squarely on point a good six years before Cawthon's sentencing. Thus the error was clear under current law.

The error affected substantial rights because it caused Cawthon's sentence on the drug count to be improperly increased from a minimum mandatory five years to a minimum mandatory ten years - a substantial error by any reckoning.

Finally, the error seriously affects the fairness, integrity, or public reputation of judicial proceedings, because it resulted in the imposition of an illegal sentence. "Inasmuch as our prior precedents have held that the trial court's failure to strictly comply with the enhanced sentencing procedures results in an illegal sentence, see *United States v. Cevallos*, 538 F.2d 1122, 1127-28 (5th Cir. 1976), the trial court's error here resulted in the imposition of an illegal sentence which we conclude is cognizable under the plain error rule. " *United States v. Lippner*, 676 F.2d 456, 468 (11th Cir. 1982).

Cawthon complied with the requirement of § 851(c) by setting forth in full the

factual basis for his challenge to the underlying conviction, such that if the facts alleged were proven, he would be entitled to relief.[7]

Remedy

Sanchez held that the proper remedy was to vacate the sentence and remand for the hearing required under § 851(c):

> We think it appropriate, however, to vacate the sentence and remand to the district court so that the proper papers can be filed, and a hearing held in accordance with what the statute requires.

United States v. Sanchez, 138 F.3d 1410, 1417 (11th Cir. 1998).

The same is required in Cawthon's case. We respectfully request this honorable Court vacate Cawthon's sentence and remand his case for resentencing in compliance with § 851(c) at which time Cawthon would be permitted to present his challenge to the underlying conviction relied upon for the § 851 enhancement.

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[7] Cawthon's case is not analogous to those in which a defendant has waited until appeal to raise an objection to a prior conviction. *Cf.* Judge Gregory's partial dissent in *United States v. Ellis*, 326 F.3d 593, 600-601 (4th Cir. 2003).

CONCLUSION

Appellant Maurice Davon Cawthon respectfully requests this honorable Court vacate his judgment and sentence as to count one and remand for resentencing at which time Cawthon would be allowed an evidentiary hearing to challenge the constitutional validity of his prior Florida conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing have been furnished toRobert Gardner Davies, Esquire, Assistant United States Attorney, Office of the United States Attorney, 21 East Garden Street, Suite 400, Pensacola, Florida 32502, by United States Postal Service, first class mail, postage prepaid, this May 2nd, 2005.

_____
William Mallory Kent

Certificate of Compliance

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains approximately *** words.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant Cawthon certifies that the size and style of type used in this brief is 14 point Times New Roman.