No.

in the

Supreme Court

of the

United States

Term,

MARK ANTHONY BROWN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

The plain language of 21 U.S.C. § 851 requires the United States to, "before trial," file an "information" if it intends to seek enhanced statutory penalties under 21 U.S.C. § 801 *et al.* The Sixth Circuit has read an exception into this pretrial notice requirement in cases where the United States is "surprised" at trial by a jury verdict for a lesser included misdemeanor offense. Does § 851 allow the United States to be excused from the notice requirement when it receives an unexpected and disfavorable result after trial?

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The Petitioner, Mark Brown, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on June 15, 2018.

OPINION BELOW

The Sixth Circuit's opinion in this matter was unpublished, and is attached hereto in Appendix 1. The district court's order allowing imposition of enhanced penalties was also unpublished, and is attached as Appendix 2.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on June 15, 2018. A petition for rehearing *en banc* was denied on August 28, 2018. (Appendix 3) This petition is

timely filed. The Court's jurisdiction in invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

21 U.S.C. § 851 provides in part:

> **(a) Information filed by United States Attorney**
>
> (1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, *unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.* Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

In On June 19, 2015, Columbus, Ohio police officer Steven Foe responded to a call from a friend relating to a domestic disturbance. This eventually led the officer to the home of Petitioner Mark Anthony Brown. Brown was allegedly holding a woman against her will, and was armed. Because of these allegations, officer Foe mobilized several officers to assist. Once backup officers arrived, Foe and others approached the residence. Brown answered the door, but refused to leave the residence. He was therefore forcibly removed by officers and placed handcuffed in the back of a cruiser. Officers then entered the home, and retrieved the woman (later determined to be Brown's girlfriend). While in the home, one of the officers noticed what appeared to be narcotics sitting on a table in the living room. The house was then secured until a warrant could be obtained. Upon a full search of the home, two firearms were located in different portions of the house, as well as 1.35 grams of cocaine base. In addition to Brown, numerous other persons lived at the residence.

As a result of the search, Brown was named in an indictment charging him with: two counts of possession of a firearm and/or ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g), and one count of possession with the intent to distribute cocaine base, in violation of 21 U.S.C. § 841. Brown plead not guilty, and proceeded to trial. At the end of the United States case, the defense requested, and the court granted, a jury instruction on the lesser-included offense of simple

possession of cocaine base. The jury acquitted Brown on all counts, with the exception of the simple possession count, for which Brown was found guilty.

After the jury verdict, a PSR was prepared. The PSR suggested that even though Brown's simple possession count carried a statutory range of 0 to 12 months incarceration (and was a misdemeanor), that because Brown had a proper qualifying conviction under 21 U.S.C. § 844, his statutory range could be increased to 15 days to 2 years incarceration pursuant to 21 U.S.C. § 851.

At sentencing held on April 27, 2017, the defense objected to the statutory enhancement, arguing that in order for this increase to occur, the United States was required, prior to trial, to file an enhancement notification under 21 U.S.C. § 851. The United States countered that they were not required to file a notice, as they were taken by surprise at trial as to the simple possession lesser included offense instruction. The United States alternatively argued that Brown was actually aware of his prior conviction, and that the conviction relied upon was mentioned in the indictment (as part of the 18 U.S.C. § 922 charges). The district court accepted these arguments, and increased the statutory range. The court then imposed a sentence of 18 months incarceration, to be followed by 1 year supervised release.

Petitioner Brown appealed his conviction and sentence to the Sixth Circuit Court of Appeals, raising the following issues:

I. THE DISTRICT COURT IMPOSED AN ILLEGAL SENTENCE ABOVE THE PERMISSIBLE STATUTORY MAXIMUM

II. THE COURT SHOULD NOT HAVE PERMITTED THE GOVERNMENT TO AMEND THE INDICTMENT DURING TRIAL

III. THE GOVERNMENT PRESENTED INSUFFICIENT EVIDENCE AS TO BROWN'S KNOWING POSSESSION OF NARCOTICS

IV. OFFICER VASS SHOULD NOT HAVE BEEN PERMITTED TO TESTIFY AS AN EXPERT WITNESS

The Sixth Circuit denied the appeal in its entirety on June 15, 2018. As pertains to the issue addressed in this petition, the Sixth Circuit found:

> Brown cannot argue that the government's failure to file a pretrial information deprived him of the "substance" § 851 requires. *Layne*, 192 F.3d at 576 (quoting *King*, 127 F.3d at 489). He does not argue, for example, that he was surprised that the government knew of his earlier drug conviction, and made outcome-altering decisions on that basis. Brown could not so argue, of course, because his prior conviction was included in the indictment as the predicate for the weapons charges on which he went to trial. Neither does Brown argue that he lacked the opportunity to challenge the old conviction's validity, or to otherwise contest the enhancement. Nor could he. First, the presentence investigation report (PSIR) listed Brown's prior drug conviction as specified in the indictment, and indicated that Brown's priors rendered him eligible for an enhanced sentence under the terms of § 844. Second, the government's sentencing memorandum informed Brown that the government was seeking an enhanced penalty, and reiterated the predicate conviction. Brown's counsel objected to the PSIR's maximum-penalty calculation, filed a responsive sentencing memorandum arguing against the government's proposed enhancement, and continued vigorously contesting the matter at the sentencing hearing. This is not a case in which the defendant lacked "reasonable notice and an opportunity to be heard regarding the possibility of an enhanced sentence."

Boudreau, 564 F.3d at 438 (quoting *Pritchett*, 496 F.3d at 548). Our cases are explicit that these are "all that due process and Section 851(a) require." *Id.* Because this is what Brown received, we affirm his sentence.

(Appendix 1, pp.12-13)

REASONS FOR GRANTING THE WRIT

21 U.S.C. § 851 requires that the United States, "before trial", file a notification if it wishes to seek enhanced statutory penalties in a controlled substances case. The United States did not do so in this case – in fact, it never filed the required notification at any point prior to or during trial. Yet at sentencing it sought, and the district court imposed, enhanced statutory penalties. This violates the requirements of the statute. Further, the fact that Petitioner Brown was aware of his prior conviction did not obviate the need for the United States to file such a notification.

A. The plain language of the statute requires a notice to be filed "before trial"

21 U.S.C. § 851 requires that a notification be filed "before trial." The United States did not file any notification before, during, or after trial. The United States did not evince its intent to seek enhanced penalties until filing the sentencing memorandum, some 5 and ½ months after the jury verdict. This does not satisfy the plain meaning and intent of the statute, and Petitioner Brown should not have been sentenced to statutory enhanced penalties as a result.

"In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'" *Artis v. D.C.*, -- U.S. ---, 138 S. Ct. 594, 603 (2018) (internal citation omitted). "[O]ur inquiry into the meaning of the statute's text ceases when 'the statutory language is unambiguous

and the statutory scheme is coherent and consistent.'" *Matal v. Tam*, 137 S. Ct. 1744, 1756, 198 L. Ed. 2d 366 (2017), citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002). "When a term [in a statute] is undefined, we give it its ordinary meaning." *United States v. Santos*, 553 U.S. 507, 511, 128 S. Ct. 2020, 2024, 170 L. Ed. 2d 912 (2008).

21 U.S.C. § 851 provides that "[n]o person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." The phrase "before trial" is not further defined in the statute. However, its ordinary meaning certainly excludes notices filed after the jury's verdict.

The various Circuits have determined that, at a minimum, the ordinary meaning of the phrase "before trial" means that the notice must be filed prior to the initial presentation of evidence by the United States. The Circuits differ on whether a notice filed before or after jury selection begins may suffice (see *United States v. Beasley*, 495 F.3d 142, 149 (4th Cir. 2007)(allowing an § 851 notification filed after jury selection but before swearing in of the jury) compared to *United States v. Robinson*, 110 F.3d 1320, 1327 (8th Cir. 1997)("We have held that, for purposes of section 851, the government must file its information before jury selection begins");

but it is uncontested that the "deadline" for filing a notification passes after the case in chief begins. This is a reasonable reading of the ordinary meaning of the phrase "before trial."

Certainly, the phrase "before trial" does not extend as far as a sentencing memorandum filed 5 ½ months after the jury's verdict in this case. But that is what the Sixth Circuit held in this case. This is directly contrary to the plain language of the statute, and puts the Sixth Circuit at odds with every other Circuit's interpretation of this phrase. On this basis, certiorari should issue.

B. Brown's "knowledge" of the existence of his prior conviction is irrelevant, as the main purpose of 21 U.S.C. § 851's notice provision is to inform the parties and the court that the United States is seeking enhanced penalties

The Sixth Circuit determined that even though the United States did not file a 21 U.S.C. § 851 notification, Brown's "actual knowledge" of his prior convictions was sufficient, such that the United States' failure constituted "harmless error."[1]

This rationale misses the entire point behind § 851(a)'s notice requirement.

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1 The Sixth Circuit also relied on its "substantial compliance" caselaw, contending that "So long as the defendant had reasonable notice of the government's intent to rely on a particular conviction to seek an enhancement, as well as the opportunity to contest the enhancement, we have regularly affirmed enhanced sentences despite the government's fumbling of the § 851(a) requirements." (Appendix 1, p.11) This argument is easily disposed of; as such "substantial compliance" actually requires the filing of a notification, which the United States did not do in this case. Further, substantial compliance cases normally relate to 21 U.S.C. § 851 subsection (b) errors. See, for example, *United States v. Garcia*, 954 F.2d 273, 277 (5th Cir. 1992).

"Although the information in the indictment and PSI might serve to inform Dodson of the government's knowledge of his prior conviction, it does not accomplish the main purpose of § 851 which is to inform the defendant that the government intends to seek a sentencing enhancement based on that conviction." *United States v. Dodson*, 288 F.3d 153, 159 (5th Cir. 2002). "One of the primary purposes of the § 851 notification requirement is to inform the defendant that the Government intends to seek an enhancement before the defendant decides whether to enter a guilty plea or go to trial so that the defendant can make an informed decision as to his or her option." *United States v. Isaac*, 655 F.3d 148, 156 (3d Cir. 2011). "There are two purposes for this provision and the subsequent proceedings set forth in section 851. The first is to allow the defendant to contest the accuracy of the information. The second is to allow defendant to have ample time to determine whether to enter a plea or go to trial and plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." *United States v. Williams*, 59 F.3d 1180, 1185 (11th Cir. 1995).

Here, at no point prior to preparation of the PSR did Brown know that the United States was seeking a statutory enhancement of his sentence. His knowledge of his criminal history does not soften this blow. Certainly, after trial, there was no opportunity for Brown to adjust his trial or plea strategy. Brown's knowledge of his prior convictions is not a basis to ignore the duties placed upon the United States by 21 U.S.C. § 851(a). As the Eleventh Circuit has noted: "[e]ven when the defendant is

not surprised by the enhanced sentence, was aware from the outset that his previous conviction could lead to an enhanced sentence, never challenged the validity of the prior conviction, and admitted it at the sentencing hearing, the statute prohibits an enhanced sentence unless the government first seeks it by properly filing an information prior to trial." *United States v. Weaver*, 905 F.2d 1466, 1481 (11th Cir. 1990). The Sixth Circuit could not rely on Brown's knowledge of his prior criminal history to negate the requirements of 21 U.S.C. § 851(a).

C. The Sixth Circuit's erroneous interpretation of 21 U.S.C. § 851 matters in this and other cases

Finally, certiorari should issue in this case to not only correctly an illegally imposed sentence which exceeds the statutory maximum, but also to prevent this erroneous interpretation of the statute to be utilized by the United States in the future.

This Court has long held that the Constitution "does not permit a defendant to be 'expose[d] ... to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Alleyne v. United States*, 570 U.S. 99, 126, 133 S. Ct. 2151, 2169, 186 L. Ed. 2d 314 (2013). Indeed, the Circuit courts have held that a punishment imposed in excess of the statutory maximum is *per se* reversible error. See *United States v. Thomas*, 274 F.3d 655 (2nd Cir. 2001); *United States v. Gonzales*, 236 Fed. Appx. 1,7 (5th Cir. 2007) ("[a] sentence which exceeds the statutory maximum is an illegal sentence, its imposition

constituting reversible plain error . . ."); *United States v. Nichols*, 897 F.3d 729,733 (6th Cir. 2018) ("[M]ust vacate any sentence that falls outside statutory bounds"); *United States v. Rogers*, 528 Fed. Appx. 641,643 (7th Cir. 2013) ("Must reverse the prison sentence . . . because it was based on a plain error of law and resulted in a sentence in excess of the statutory maximum."); *United States v. Hergott*, 562 F.3d 968 (8th Cir. 2009); *United States v. Goodbear*, 676 F.3d 904,912 (9th Cir. 2012) (Holding there was plain error in sentencing defendant to a "sentence [that] exceeds the statutory maximum") *United States v. Barwig*, 568 F.3d 852,858 (10th Cir. 2009) ("A sentence that exceeds the statutory maximum is an illegal sentence . . . and an illegal sentence is per se reversible even under plain error review."); *United States v. Moriarty*, 429 F.3d 1012,1025 (11th Cir. 2005) (General sentences that exceed "the maximum allowable sentence on one of the counts . . . are per se illegal . . . and require a remand."); *United States v. Watson*, 476 F.3d 1020,1024-1025 (D.C. Cir. 2007) (The district court's error in sentencing above the statutory maximum was plain error and prejudicial, causing reversal of the district court's sentence).

Here, the punishment imposed (18 months incarceration along with a term of supervised release) far exceeds the maximum permitted by the jury's findings in this case, and thus is *per se* reversible error. However, even more crucial is the fact that the sentence imposed was for a felony, not the misdemeanor supported by the jury's verdict.

"The historical distinction between felonies and misdemeanors is more than semantic. Traditionally, dire sanctions have attached to felony convictions which have not attached to misdemeanor convictions." *United States v. Chovan*, 735 F.3d 1127, 1145 (9th Cir. 2013), citing *McLaughlin v. City of Canton, Miss.*, 947 F.Supp. 954, 975 (S.D.Miss.1995). As Judge Nelson noted in *United States v. Sharp*, 12 F.3d 605 (6th Cir. 1993), "[i]t is a serious matter, obviously, to deprive an American citizen of civil rights as important as the right to vote, the right to keep and bear arms, and the right to engage in a chosen business or profession" by imposition of a felony. *Id.* at 608. "[T]here are nationwide nearly 50,000 federal and state statutes and regulations that impose penalties, disabilities, or disadvantages on convicted felons." *United States v. Nesbeth*, 188 F. Supp. 3d 179, 184 (E.D.N.Y. 2016). It is therefore very meaningful (aside from the extra six months in prison and time spent on supervised release) to Brown that he stands convicted of a felony, and not a misdemeanor.

Finally, the Sixth Circuit's decision will have repercussions beyond the instant case. The Sixth Circuit found that "even if the government had failed to comply with § 851, the harmless-error statute and the rules that bind this court would oblige us to 'disregard[]" the error unless Brown could demonstrate prejudice.'" (Appendix 1 p.14). What this means is, that if a criminal defendant is aware of his criminal history, the United States can lie in wait until after the jury verdict to seek a statutorily enhanced sentence under 21 U.S.C. § 841. A defendant thinking he or

she is risking 5 to 40 years in prison may, after the jury's verdict, face a mandatory life sentence, all because he or she knew going into trial that he had a prior conviction, regardless of whether or not the United States, his or her own counsel, or the district court warned them of this possibility. In essence, the notification provision of 21 U.S.C. § 851(a) becomes superfluous after the Sixth Circuit's ruling. This is contrary to this Court's admonition that "[i]t is our duty 'to give effect, if possible, to every clause and word of a statute.'" *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 2125, 150 L. Ed. 2d 251 (2001).

However much the Sixth Circuit would like to negate the plain language of the statute to benefit the United States under the facts of this case, "[c]ongress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074, 201 L. Ed. 2d 490 (2018). "It is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 270, 130 S. Ct. 2869, 2886, 177 L. Ed. 2d 535 (2010). Even though, in this case, the United States may have been caught "off guard" by the jury's verdict, this does not excuse compliance with the statute. The failure to file an § 851 notice "before trial" prevented the United States from seeking enhanced penalties in this

case.

CONCLUSION

Brown requests that this Court grant certiorari, reverse the Sixth Circuit's decision, and remand for resentencing, instructing that Brown should be sentenced to the unenhanced penalty provisions of 21 U.S.C. § 844.

Respectfully submitted,

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APPENDIX

1. COURT OF APPEALS ORDER June 15, 2018
2. DISTRICT COURT ORDER May 10, 2017
3. COURT OF APPEAL EN BANC ORDER August 28, 2018

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 18a0303n.06

No. 17-3468

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARK ANTHONY BROWN, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Before: SILER and LARSEN, Circuit Judges; BLACK, District Judge.*

LARSEN, Circuit Judge. A jury found Mark Brown guilty of possessing cocaine base, in violation of 21 U.S.C. § 844(a). He appeals his conviction, contending that the trial court allowed an impermissible amendment to the indictment, that the jury lacked sufficient evidence to convict, and that the trial court erroneously permitted expert testimony from a lay witness. Brown also appeals his eighteen-month sentence, arguing that he should not have received an enhancement for a prior drug offense because the government failed to comply with the procedural requirements of 21 U.S.C. § 851(a). We AFFIRM Brown's conviction and his sentence.

* The Honorable Timothy S. Black, United States District Judge for the Southern District of Ohio, sitting by designation.

I.

In 2015, Columbus police arrested Brown in his home after receiving a phone call about an altercation there. While sweeping the house for other occupants, officers noticed several items in plain view atop a coffee table, some ten feet from the front door: a digital scale, an open box of plastic sandwich bags, and approximately one gram of crack cocaine in a plastic sandwich bag. After obtaining a warrant to search the home for evidence of drug trafficking, police recovered opened mail addressed to Brown, also located on the living room coffee table, as well as weapons, ammunition, and drug paraphernalia found throughout the house.

Brown was charged with possessing cocaine base with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2). The indictment identified a prior Ohio conviction for drug trafficking as the predicate offense for the latter charges.

On the first day of trial, the court granted the government's request to correct the offense date in the indictment, which mistakenly identified the day of Brown's arrest as "on or about May 16, 2015," rather than June 19, 2015. Brown argued that the correction would prejudice his constitutional rights, but the court disagreed, observing that the offense date proved by the evidence need be only "reasonably near" the date given in the indictment, as "on or about" preceded the date presented to the grand jury. The court accordingly instructed the jury that the government was obliged to prove that Brown committed the alleged crimes "on or about June 19," and explained that "on or about" means "reasonably close to."

Just before closing arguments, defense counsel asked the court to allow the jury to consider the lesser included offense of simple drug possession, 21 U.S.C. § 844(a), as an alternative to

possession with intent to distribute. The judge agreed, and the jury found Brown guilty of simple possession alone.

A conviction for simple possession carries a maximum sentence of one year's imprisonment, but a prior drug conviction can boost that to two years if the government seeks a recidivism enhancement. 21 U.S.C. § 844(a). In its post-trial sentencing memorandum, the government expressed its intent to pursue the enhancement, with Brown's prior state drug conviction serving as the predicate offense. In his response memorandum, and again at the subsequent sentencing hearing, Brown argued that the government's failure to file a pretrial information announcing its plans to seek the enhancement, as 21 U.S.C. § 851(a) requires, foreclosed the increased penalty. The district court rejected this argument, concluding that Brown had been given reasonable notice of the possible enhancement, as well as an opportunity to be heard on the subject. It sentenced him to eighteen months' imprisonment.

II.

Brown first claims that the district court allowed an impermissible amendment to the indictment. We review that claim de novo. *United States v. Manning*, 142 F.3d 336, 339 (6th Cir. 1998). An amendment manifests "when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them." *United States v. Ford*, 872 F.2d 1231, 1235 (6th Cir. 1989) (citation omitted). If "the charging terms of an indictment are effectively altered, the accused is held answerable for a charge not levied through the protective device of a grand jury." *Id.* This abrogates the Fifth Amendment's guarantee of a grand jury's indictment, as well as the two additional constitutional rights that this guarantee safeguards: fair notice of criminal charges, and security from double jeopardy. *United States v. Combs*, 369 F.3d 925, 935 (6th Cir. 2004).

But not every change to an indictment implicates the Fifth Amendment. An alteration that "is merely a matter of form" and does not affect the document's charging terms, does not violate the Constitution. *Russell v. United States*, 369 U.S. 749, 770 (1962) (noting that this is "the settled rule in the federal courts"). An adjustment to the indictment's offense date is "merely a matter of form," *id.*, where the offense date is not "an important element of the charged offense," the "evidence shows that the offense was the one charged," and the evidence demonstrates that the defendant committed the charged offense "on a date before the indictment and within the statute of limitations," *United States v. Barnett*, 89 F. App'x 906, 907 n.1 (6th Cir. 2003) (per curiam) (quoting *United States v. Leichtnam*, 948 F.2d 370, 376 (7th Cir. 1991)); *see United States v. Rosenbaum*, 628 F. App'x 923, 929 (6th Cir. 2015) (upholding the correction of an indictment's offense date from April 2008 to August 2007 because the wrong date was "a clerical error" and the defendant had notice of the correct date).

Here, the district court adjusted the indictment's offense date by thirty-five days, from "on or about May 16, 2015," to "on or about June 19, 2015." This is a mere change of form not affecting the indictment's charging terms. The precise date on which the police arrested Brown and found the cocaine is not "an important element of the charged offense." *Barnett*, 89 F. App'x at 907 n.1. The correct offense date preceded the indictment, and no statute-of-limitations issue is in play. *See id.* All the evidence presented at trial concerned the right date, June 19, including the testimony of each witness who described the events of that day. *See id.*

Brown received ample notice of the correct date through the testimony presented at a pretrial evidentiary hearing, as well as what his counsel described as "a significant amount of discovery identifying the June date." Thus, the alteration of the offense date neither affected the

indictment's charging terms nor implicated Brown's right to fair notice of the charges against him. *See Combs*, 369 F.3d at 935.

III.

At the close of the government's proof, and again at the end of the trial, Brown moved for acquittal, arguing that the government had not established actual or constructive possession of the cocaine found in his house. On appeal, Brown persists that the jury had insufficient evidence to find him guilty of simple drug possession—a claim we review de novo. *United States v. Tocco*, 200 F.3d 401, 424 (6th Cir. 2000).

When determining whether the government met its burden of proof, we view the evidence "in the light most favorable to the prosecution." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We recall that the jury "may draw any reasonable inferences from direct, as well as circumstantial, proof." *Id.* Indeed, "[c]ircumstantial evidence alone" can provide a sufficient buttress for a conviction. *United States v. Spearman*, 186 F.3d 743, 746 (6th Cir. 1999) (quoting *United States v. Vannerson*, 786 F.2d 221, 225 (6th Cir. 1986)). We will uphold the jury's verdict if we conclude that "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Tocco*, 200 F.3d at 424 (quoting *Jackson*, 443 U.S. at 319).

To establish simple possession under 21 U.S.C. § 844, the government was obliged to prove beyond a reasonable doubt that Brown "(1) knowingly or intentionally, (2) possess[ed], (3) a controlled substance." *United States v. Colon*, 268 F.3d 367, 375 (6th Cir. 2001). Possession "need not be exclusive" and may be constructive, meaning that the defendant "knowingly ha[d] the power and the intention at a given time to exercise dominion and control over" the controlled substance. *United States v. Jenkins*, 593 F.3d 480, 484 (6th Cir. 2010) (quoting *United States v. Hadley*, 431 F.3d 484, 507 (6th Cir. 2005)).

Here, the evidence established that, while Brown was not the leaseholder of the house in which the police found the cocaine, he paid the rent and lived there full time. Three other people also lived there and had access to the common areas. When police entered the house, Brown was the only person home, other than his then-girlfriend, who was upstairs and appeared "kind of passed out," unable to stand or "really talk." Police noticed the cocaine atop a coffee table in the living room, about ten feet from the front door where they met Brown. On the table alongside the drugs were several letters, opened and addressed to Brown.

Brown contends that his mere residence in the house, and the cocaine's location beside his personal mail, is inadequate to support a possession conviction, but "[c]ircumstantial evidence alone" can be enough for a rational jury to find the elements of a crime beyond a reasonable doubt. *Spearman*, 186 F.3d at 746. Here, a rational jury could draw the inference that Brown had "the power and the intention at a given time to exercise dominion and control" over the cocaine. *Jenkins*, 593 F.3d at 484 (quoting *Hadley*, 431 F.3d at 507). We have frequently upheld guilty verdicts where, as here, no direct evidence tied the defendant to drugs, but the defendant lived in or had unlimited access to the place in which police spotted drugs in plain sight. For example, we have found sufficient evidence to uphold possession convictions where drugs were located in plain view in the apartment the defendant "occupied and controlled," *United States v. Carter*, 486 F.2d 1027, 1028 (6th Cir. 1973) (per curiam); where drugs were located in plain sight in an apartment that the defendant had just exited, outside of which he sold drugs and to which he had unlimited access, *United States v. Gibbs*, 182 F.3d 408, 424–25 (6th Cir. 1999); and where drugs were interspersed with the defendant's personal papers in the house where he lived part time, *Jenkins*, 593 F.3d at 484.

Brown protests that other people had access to the house, so he was not the sole possible owner of the cocaine. But it was not the prosecution's burden to prove him so, as shared possession is also culpable. *See Hadley*, 431 F.3d at 507. Alternative culprits existed in *Carter*, *Gibbs*, and *Jenkins*, too. Yet, in those cases, we held that a rational jury could reasonably infer constructive possession from evidence that the defendant had "[u]nlimited access to a particular area" in which the police found drugs "in plain sight." *Gibbs*, 182 F.3d at 424–25 (citing *United States v. Kincaide*, 145 F.3d 771, 782 (6th Cir. 1998)). So too here.

IV.

Brown next argues that Robert Vass, a Columbus police officer whom the government called as a lay witness under Federal Rule of Evidence 701, improperly offered expert testimony. We review the district court's admission of Officer Vass's testimony for plain error, as defense counsel did not object at trial.[1] *United States v. Warman*, 578 F.3d 320, 345 (6th Cir. 2009). For us to find plain error, Brown must show the occurrence of an obvious or clear error that affected his substantial rights and the trial's fairness, integrity, or public reputation. *Id.* In order to show that the error affected his substantial rights, Brown must show that the error was prejudicial, "which means that there must be a reasonable probability that the error affected the outcome of

[1] Although Brown insists that defense counsel did object at trial, the record belies this assertion. The government initially sought to introduce Officer Vass as an expert witness, to which defense counsel successfully objected because the government had not complied with the disclosure requirements of Federal Rule of Criminal Procedure 16. The parties then agreed at sidebar that Officer Vass would testify as a lay witness. Defense counsel stated, "Then our only concern is that [the government] would stay within the restrictions under 701 and not go beyond that and cross into 702." The court concluded the sidebar by advising defense counsel, "[I]f there is an objection, . . . you will let me know, and we will discuss it at side-bar." Officer Vass testified at some length. At no point did defense counsel object that the nature of his testimony exceeded the scope of a lay witness.

the trial." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (citing *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004); *United States v. Olano*, 507 U.S. 725, 734–35 (1993)).

A non-expert witness's opinion testimony "is limited to" those opinions that are "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge." Fed. R. Evid. 701. When an officer gives "opinions that rely on the agent's specialized training as a law enforcement officer," as opposed to "personal knowledge of a particular investigation," he gives expert testimony. *United States v. Kilpatrick*, 798 F.3d 365, 384 (6th Cir. 2015). We have said that police testimony that draws on extensive training and experience to describe the practices of drug traffickers and identify artifacts common to the drug trade constitutes "specialized knowledge" exceeding the average juror's experience. *United States v. Lopez-Medina*, 461 F.3d 724, 742–44 (6th Cir. 2006); *see also United States v. White*, 492 F.3d 380, 403–04 (6th Cir. 2007) (holding that investigators gave expert testimony where they explained exhibits of which the "average lay person would be incapable of making sense," using "specialized knowledge acquired over years of experience" to "clarify and link together [evidence] on the basis of the 'reasoning process' employed daily in their highly specialized jobs" (citation omitted)).

At trial, Officer Vass testified to his extensive experience investigating drug trafficking as an officer with the Columbus Division of Police's gang unit. He related that he has orchestrated "[h]undreds" of controlled drug buys to gain intelligence on trafficking operations and is accordingly familiar with cocaine's appearance and packaging, as well as the weight and price of one hit. Officer Vass also testified to traffickers' frequent use of digital scales, such as the one found beside the cocaine in Brown's home, to measure out cocaine for sale. Officer Vass explained

how to cook crack cocaine using baking soda, which officers also found in Brown's house, as well as how to smoke cocaine utilizing scouring pads and pen stems such as those police seized from the home. And Officer Vass noted that traffickers often require their buyers to smoke the product in the place of sale to avoid detection.

Assuming that these statements plainly constituted expert testimony, Brown has not shown that their admission affected his substantial rights. *See Marcus*, 560 U.S. at 262. Officer Vass's testimony, from his extensive experience in narcotics investigations, as to how traffickers cook, smoke, weigh, package, and price crack cocaine—as well as how drug traffickers commonly use the equipment found in Brown's residence to accomplish these ends—manifestly related to the trafficking charge of which the jury *acquitted* Brown. The jury convicted Brown of simple possession alone. And Officer Vass provided no evidence relevant to that charge. He did not testify as to whether Brown had "[u]nlimited access" to the home, for example, or whether Brown paid rent, or had to walk past the cocaine "in plain sight" to meet the arresting officers at the door. *Gibbs*, 182 F.3d at 424–25 (citing *Kincaide*, 145 F.3d at 782). Officer Vass could not have so testified because, unlike the government's other police witnesses, he did not participate in the search of the home, interview its occupants, or even enter until the officers had already removed Brown. As Officer Vass's testimony could have played no role in Brown's simple possession conviction, Brown cannot show that the testimony's admission constituted plain error.

V.

Finally, we review de novo Brown's contention that he is entitled to resentencing because the government failed to comply with the notice provisions of 21 U.S.C. § 851(a) before seeking a sentence enhancement. *United States v. Boudreau*, 564 F.3d 431, 436 (6th Cir. 2009). Brown's conviction for simple possession of cocaine base carries "a term of imprisonment of not more than

1 year"; but where the defendant has a prior drug conviction, the statute imposes a mandatory minimum of fifteen days and raises the maximum to two years. 21 U.S.C. § 844(a). The court may not impose this increased sentence "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." *Id.* § 851(a)(1). After a guilty verdict, the court must ask the defendant to affirm or deny the prior conviction, and inform him that any challenge to that conviction's validity must precede imposition of sentence. *Id.* § 851(b).

Here, it is undisputed that the government did not, prior to trial, file a § 851 information announcing its intent to seek an enhancement and indicating the predicate conviction to support it. The government contends that a recidivism enhancement would not have made sense for the charge on which Brown went to trial: drug trafficking under 21 U.S.C. § 841(b)(1)(C). Unlike simple possession under § 844, drug trafficking under § 841(b)(1)(C) does not impose a mandatory minimum when the defendant has a prior drug conviction; the statute instead boosts the maximum sentence from twenty to thirty years. The government explains that it did not file a pretrial information because it did not plan to seek the maximum sentence, let alone a ten-year enhancement—indeed, the government observes that Brown's realistic Guidelines range on the trafficking charge was merely twenty-seven to thirty-three months.

The monkey wrench materialized immediately before closing arguments, when Brown successfully requested that the court charge the jury to consider the lesser included offense of § 844 possession, the only charge on which Brown was convicted. In its subsequent sentencing memorandum, filed with the court and served upon Brown, the government announced that it would seek twenty-one months' imprisonment, and indicated that Brown's Ohio drug

conviction—previously included in the indictment as the predicate felony for the weapons charges—would serve as the predicate conviction for the enhanced penalty. Brown contends that this was too little, too late for compliance with the mandatory notice requirements of § 851(a).

This court's jurisprudence has traditionally "emphasized 'the importance of interpreting § 851's notice requirements so as to avoid elevating form over substance.'" *United States v. Layne*, 192 F.3d 556, 576 (6th Cir. 1999) (quoting *United States v. King*, 127 F.3d 483, 489 (6th Cir. 1997)). It is "well-settled precedent in this Circuit and its sister circuits that section 851 'was designed to satisfy the requirements of due process and provide the defendant with reasonable notice and an opportunity to be heard regarding the possibility of an enhanced sentence for recidivism.'" *United States v. Pritchett*, 496 F.3d 537, 548 (6th Cir. 2007) (quoting *King*, 127 F.3d at 489). We have held that the "proper inquiry" in evaluating the government's compliance with § 851 is whether the defendant had the benefit of this "substance." *King*, 127 F.3d at 488–89. So long as the defendant had reasonable notice of the government's intent to rely on a particular conviction to seek an enhancement, as well as the opportunity to contest the enhancement, we have regularly affirmed enhanced sentences despite the government's fumbling of the § 851(a) requirements. *See, e.g.*, *United States v. Kelsor*, 665 F.3d 684, 699–700 (6th Cir. 2011) (holding that errors in the § 851 information did not deprive the defendant "of reasonable notice or a meaningful opportunity to be heard," and noting that the defendant did not contest the validity of the predicate conviction itself); *Boudreau*, 564 F.3d at 436–38 (holding that the government's failure to docket a § 851 information did not demand resentencing where the defendant received actual notice that he was subject to an enhanced penalty); *Pritchett*, 496 F.3d at 548 (holding that the government's failure to file a § 851 information before the guilty plea did not require resentencing where the defendant did "not dispute that he had notice" of a possible

enhancement or "that he had an opportunity to challenge the validity of his prior convictions"); *Layne*, 192 F.3d at 575–76 (affirming the sentence despite errors in the § 851 information, because the defendant did "not contend that it failed to provide him with adequate notice of prior convictions" or show that it denied him a "reasonable opportunity to be heard").

United States v. Williams, 899 F.2d 1526, 1529 (6th Cir. 1990), one of the exceedingly rare instances in which we have remanded for resentencing because of a § 851 problem, presents a counterexample. There, until the imposition of sentence, the defendant "had absolutely no notice of [the possibility of] an enhanced sentence" for a prior conviction—he did not even "know that the government considered him a prior felony offender." *Id.* at 1527, 1529. To make matters worse, the defendant argued that the predicate conviction for the enhancement did not constitute a valid "conviction" under the relevant state's law—but he did not receive an opportunity to contest that conviction's validity before it was too late. *Id.* at 1529 n.3.

Unlike the successful claimant in *Williams*, Brown cannot argue that the government's failure to file a pretrial information deprived him of the "substance" § 851 requires. *Layne*, 192 F.3d at 576 (quoting *King*, 127 F.3d at 489). He does not argue, for example, that he was surprised that the government knew of his earlier drug conviction, and made outcome-altering decisions on that basis. Brown could not so argue, of course, because his prior conviction was included in the indictment as the predicate for the weapons charges on which he went to trial. Neither does Brown argue that he lacked the opportunity to challenge the old conviction's validity, or to otherwise contest the enhancement. Nor could he. First, the presentence investigation report (PSIR) listed Brown's prior drug conviction as specified in the indictment, and indicated that Brown's priors rendered him eligible for an enhanced sentence under the terms of § 844. Second, the government's sentencing memorandum informed Brown that the government was seeking an

enhanced penalty, and reiterated the predicate conviction. Brown's counsel objected to the PSIR's maximum-penalty calculation, filed a responsive sentencing memorandum arguing against the government's proposed enhancement, and continued vigorously contesting the matter at the sentencing hearing. This is not a case in which the defendant lacked "reasonable notice and an opportunity to be heard regarding the possibility of an enhanced sentence." *Boudreau*, 564 F.3d at 438 (quoting *Pritchett*, 496 F.3d at 548). Our cases are explicit that these are "all that due process and Section 851(a) require." *Id.* Because this is what Brown received, we affirm his sentence.

We note that there is another way to look at the matter, too, apart from this court's customary, purpose-based approach to the interpretation of § 851. It stems from the "well-established principle" that, while a defendant is entitled to fairness, he is not entitled to perfection—and will rarely experience it, as "error-free" proceedings are "not humanly possible." *United States v. Segines*, 17 F.3d 847, 851 (6th Cir. 1994) (quoting *United States v. Hasting*, 461 U.S. 499, 508 (1983)). Congress accordingly requires us to review most kinds of error for harmlessness. 28 U.S.C. § 2111 mandates: "On the hearing of any appeal . . . in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." Federal Rule of Criminal Procedure 52(a) similarly provides: "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

Brown's argument all along has been simply that the government is bound to follow the letter of § 851, no matter what. It did not do that here; therefore, Brown demands relief. Our cases interpreting § 851 have not taken this approach to the problem, looking instead to whether the statute's purpose has been satisfied. But even an approach more focused on the text would not

give Brown the relief he seeks. For even if the government had failed to comply with § 851, the harmless-error statute and the rules that bind this court would oblige us to "disregard[]" the error unless Brown could demonstrate prejudice. 28 U.S.C. § 2111; Fed. R. Crim. P. 52(a). He could not do so, for the same reasons we outlined above. Brown knew the government was aware of his prior conviction. Once the government decided to seek an enhancement based on that conviction, he received reasonable notice of that intention.[2] Brown has not contended that the conviction was an invalid basis for enhancement. He did not lack opportunity to make his case against an enhanced sentence before the trial court. He certainly could not posit that, if only the government had dotted its i's and crossed its t's, he would *not* have received an enhancement. There could be no harm to Brown's substantial rights on these facts. *See United States v. Hill*, 142 F.3d 305, 313 (6th Cir. 1998) (holding that the district court's failure to engage the defendant in a § 851(b) colloquy was harmless error, because the defendant did not contest the validity of his prior convictions, despite repeated opportunities to do so). Brown's claim would accordingly fail under harmless-error analysis just as it does under our cases interpreting the requirements of § 851.[3]

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[2] Granted, Brown did not receive notice before trial—but how could he, seeing that the government had no reason to seek the enhancement until after Brown himself moved for the jury to consider a new charge? Brown suggests that, if the government wanted to ensure the possibility of a sentence over twelve months, it should have filed a § 851 information before trial *just in case* Brown later asked the court to charge the jury to consider the lesser included offense of simple possession. Certainly, the government could have done so. It could even do so as a matter of course. But this move would result in routine increased sentencing exposure for defendants—here, it would have raised Brown's maximum sentence on the trafficking charge by ten years—even in cases, like this one, in which the government did not believe such exposure warranted.

[3] Brown argues that a failure to comply with § 851 would constitute structural error. But the Supreme Court has recognized a small set of errors that fall into this category. They are characterized either by the Court's inability to gauge their effect on the outcome, or by the Court's certainty that such errors will almost always adversely affect the outcome, such that it is not efficient to conduct the analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 307–10 (1991) (explaining that errors whose effect may "be quantitatively assessed in the context of other evidence" are subject to review for harmlessness, as opposed to "structural defects" whose "evidentiary impact" "def[ies] analysis by 'harmless-error' standards"); *see also Neder v. United*

* * *

For the foregoing reasons, we AFFIRM Brown's conviction and sentence.

States, 527 U.S. 1, 7–8 (1999) (recognizing that harmless-error analysis does not apply to errors "so intrinsically harmful as to require automatic reversal . . . without regard to their effect on the outcome"). A failure to comply with the notice requirements of § 851 fits neither category: we are able to determine whether a defendant was harmed by a failure to receive a § 851 notification before trial, and the incidence of harm is not so overwhelmingly frequent that it is not worth making the assessment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 2:16-cr-95
CHIEF JUDGE EDMUND A. SARGUS, JR.

v.

MARK ANTHONY BROWN,

Defendant.

OPINION AND ORDER

This matter is before the Court on an objection that Defendant Mark Anthony Brown raises regarding his presentence investigation report ("PSR") and the Government's Sentencing Memorandum [ECF No. 60]. (Resp. to Gov't Sentencing Mem. at 1–4 [ECF No. 61].) Defendant objects to the application of a sentencing enhancement under 21 U.S.C. § 844(a) applicable to individuals convicted of possessing a controlled substance after having been convicted of a prior drug-related crime. (*See id.*) For the following reasons, and for those reasons stated on the record during the sentencing hearing in this matter, Defendant's objection is **OVERRULED**.

I.

On April 28, 2016, Defendant was indicted for possessing 2 live rounds of 9mm ammunition and a Bryco arms model 25-CA, 25 caliber pistol, loaded with 4 live rounds of ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (Indictment at 1 [ECF No. 1].) Defendant was also indicted under 18 U.S.C. § 924(d)(1), which mandates the forfeiture of the firearms and ammunition involved in the alleged offense: the Bryco arms pistol and ammunition as well as a Hi Point model C-9, 9mm pistol, loaded with 2 live rounds of 9mm ammunition. (*Id.* at 2.)

The Government filed a Superseding Indictment against Defendant on October 6, 2016. The Government added two counts to its original indictment: (i) possession of two rounds of 9mm ammunition in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2) and (ii) knowing and intentional possession with intent to distribute a mixture of substance containing a measurable amount of cocaine base, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). (Superseding Indictment at 2 [ECF No. 29].)

The case proceeded to trial on November 3, 2016. During the jury charging conference, Defendant requested that the Court submit a lesser included offense to the jury: possession of cocaine base in violation of 21 U.S.C. § 844(a). The Government objected the inclusion of the lesser included offense. The Court overruled the objection and added the charge to the jury instructions and verdict forms.

The jury returned a verdict on November 7, 2016. The jury found Defendant not guilty of (Count 1) possessing a firearm, .25 caliber ammunition, or both; not guilty of (Count 2) possessing 9mm ammunition; not guilty of (Count 3) possessing with intent to distribute cocaine base; and guilty of the lesser included offense of possessing cocaine base. (Verdict Forms at 1–4 [ECF No. 52].)

Section 844(a), which prohibits possession of controlled substances such as cocaine base, provides for statutory sentencing enhancements when an offender has prior convictions for a drug-related offense:

> Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, *except that if he commits such offense after a prior conviction under this subchapter or subchapter II, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500,* except, further, that if he commits such offense after two or more convictions under this subchapter or

> subchapter II, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offense have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000.

21 U.S.C. § 844(a) (emphasis added). A separate statutory provision, however, limits a court's ability to impose an enhanced sentence under § 844(a). Under 21 U.S.C. § 851(a)(1):

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

(emphasis added).

In advance of Defendant's sentencing hearing, the parties each filed a sentencing memorandum. Defendant argued in his memorandum that his possession of cocaine base, in violation of § 844(a), subjects him to no more than one year of imprisonment given that the Government did not file an information regarding his prior convictions as required under § 851(a)(1). (*See* Resp. to Gov't Sentencing Mem. at 2–4 [ECF No. 61].)

In its arguments to the Court, the Government took the position that Defendant can be subjected to an enhanced sentence under § 844(a) (i.e., incarceration of not less than 15 days but not more than 2 years) because Defendant had actual notice, via the Superseding Indictment, that one of his prior drug-related convictions might be used to enhance his sentence. (*See* Gov't Sentencing Mem. at 1–3 [ECF No. 60].)[1] Count 1 of the Superseding Indictment stated in relevant part:

> [T]he defendant, Mark Anthony Brown, having been convicted of at least one crime punishable by imprisonment for a term exceeding one year, that is: on or

[1] The PSR proposes that Defendant can be subjected to incarceration of not less than 90 days but not more than 3 years given that Defendant has been convicted of two or more drug-related offenses. (*See* Resp. to Gov't Sentencing Mem. at 3.) The Government, however, has not asked the Court to adopt this position.

> about February 15, 2011, in the Franklin County Court of Common Pleas, Trafficking in Crack Cocaine, in case number 10CR-07-4161; . . . did knowingly and unlawfully possess [a] firearm and ammunition that had previously traveled in interstate commerce . . . .

(Superseding Indictment at 1 [ECF No. 29] (emphasis deleted).)[2]

II.

The Court held Defendant's sentencing hearing on April 27, 2017. The Court questioned the parties on their positions, analyzed the issue, and ultimately determined, as explained on the record and further elucidated below, that § 844(a)'s sentencing enhancement, for one prior drug-related conviction, applies to Defendant.

The situation here is not entirely analogous to any cases on § 851(a)(1) previously decided by the Sixth Circuit. Prior cases have involved situations where the government filed an information under § 851(a)(1) and the defendant then challenged the adequacy of the information because, for example, it was filed late or it failed to include certain content. *See, e.g.*, *United States v. Odeneal*, 517 F.3d 406, 415 (6th Cir. 2008) (explaining that although "[t]he 'Notice' . . . was not titled an 'information,' . . . that does not render the notice inadequate"); *United States v. Melton*, 239 F. App'x 192, 193–94 (6th Cir. 2007) (concluding that the government's information met the requirements of § 851(a)(1) even though it did not contain an express statement of the government's intent to rely on the prior convictions to enhance the defendant's sentence); *United States v. Pritchett*, 496 F.3d 537, 539–40 (6th Cir. 2007) (concluding that the government satisfied the requirements of § 851(a)(1) where the government filed its information shortly after the defendant entered a guilty plea). Here, by contrast, the Government did not file a § 851(a)(1) information—not even belatedly.

[2] In Count 2 of the Superseding Indictment, the Government again referenced Defendant's February 15, 2011 conviction for Trafficking in Crack Cocaine. (Superseding Indictment at 2.)

This is not to say, though, that previous cases on § 851(a)(1) do not provide important guidance on how the Court should resolve the present objection.

The Sixth Circuit has stated that "the requirements delineated in section 851(a)(1) are mandatory and that a district court cannot enhance a defendant's sentence based on a prior conviction unless the government satisfies them." *Pritchett*, 496 F.3d at 548. But as that court has also explained, it is "well-settled precedent in this Circuit and its sister circuits that section 851 'was designed to satisfy the requirements of due process and provide the defendant with reasonable notice and an opportunity to be heard regarding the possibility of an enhanced sentence for recidivism.'" *Id.* (quoting *United States v. King*, 127 F.3d 483, 489 (6th Cir. 1997) (internal quotation marks omitted)); *see also United States v. Boudreau*, 564 F.3d 431, 437 (6th Cir. 2009) ("[W]e have regularly held that actual notice satisfies the requirements of Section 851(a)."). Indeed, the Sixth Circuit has indicated that fulfilling due process requirements is "the central purpose" of § 851. *United States v. Soto*, 8 F. App'x 535, 539 (6th Cir. 2001). And the Sixth Circuit has, moreover, emphasized "'the importance of interpreting § 851's notice requirements so as to avoid elevating form over substance.'" *Pritchett*, 496 F.3d at 548 (quoting *United States v. Layne*, 192 F.3d 556, 576 (6th Cir. 1999) (internal quotation marks omitted)).

A focus on form rather than substance would likely lead to the unreasonable conclusion that the Government could not have complied with § 851(a)(1) in this case even if it had filed an information as early as possible. That is, the Government could not have filed an information before trial, as required under § 851(a)(1), because the § 844(a) possession count was only added to the case during the jury charging conference, which was held after the start of trial.

A focus on form rather than substance might also lead to the conclusion that because the Government did not file—even after the start of the trial—an information regarding Defendant's prior convictions, the Court cannot give Defendant an enhanced sentence under § 844(a).

However, in line with Sixth Circuit precedent, the Court eschews an overly technical interpretation of § 851(a)(1) and looks instead to whether Defendant had reasonable notice and an opportunity to be heard regarding the possibility of an enhanced sentence. Under that analysis, the Government has complied with § 851(a)(1)'s requirements.

Defendant had reasonable notice that the Government might use one of his prior drug-related convictions to enhance his sentence. As noted above, the Superseding Indictment—filed on October 6, 2016, before the start of the trial—explicitly alleged that Defendant had been convicted in the Franklin County Court of Common Pleas of Trafficking in Crack Cocaine. (Superseding Indictment at 1–2 [ECF No. 29].) Defendant, moreover, has had ample opportunity to be heard regarding the possibility of an enhanced sentence. Defendant acknowledges that he has known about the intention to pursue enhanced penalties since at least the filing of the probation officer's initial PSR. (*See* Resp. to Gov't Sentencing Mem. at 3 [ECF No. 61].) Since that time, Defendant has filed a well-reasoned Response to the Government's Sentencing Memorandum in which Defendant contends that the § 844(a) sentencing enhancement should not apply to him given the Government's failure to comply with § 851(a)(1). (*Id.* at 2–4.) Defense counsel also adroitly argued during the April 27 sentencing hearing against the application of the enhancement. Under these circumstances, where Defendant had reasonable notice of the prior conviction that might enhance his sentence and where Defendant does not challenge the existence or drug-related nature of the prior conviction, Defendant's due process rights have been satisfied, and the Government has adequately met the requirements of § 851(a)(1).

III.

For these reasons, and for the reasons stated on the record during the April 27, 2017 sentencing hearing, the Court concludes that the § 844(a) sentencing enhancement, for one prior drug-related conviction, applies to Defendant. Accordingly, Defendant's objection to the application of the enhancement is **OVERRULED**.

IT IS SO ORDERED.

5-10-2017
DATE

EDMUND A. SARGUS, JR.
CHIEF UNITED STATES DISTRICT JUDGE

No. 17-3468

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARK ANTHONY BROWN, Defendant-Appellant.	)	ORDER

BEFORE: SILER and LARSEN, Circuit Judges; BLACK, District Judge.*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*The Honorable Timothy S. Black, United States District Judge for the Southern District of Ohio, sitting by designation.