No. _____

SUPREME COURT OF THE UNITED STATES

David Kendrick,

Petitioner,

vs.

United States of America,

Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Michael E. DeMatt, Esquire
Attorney for Petitioner
TURIN & DEMATT, P.C.
115 N. Main Street
Greensburg, PA 15601
(724) 838-1400
mdematt@bwc-law.com
Attorney I.D. No. PA85881

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2282

UNITED STATES OF AMERICA

v.

DAVID KENDRICK,
Appellant

(W.D. Pa. No. 2-17-cr-00143-004)

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, RENDELL and FISHER[1], *Circuit Judges.*

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant, David Kendrick in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT:

s/ D. Michael Fisher
Circuit Judge

Dated: December 9, 2020
LML/cc: All counsel of record

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[1] Judges Rendell and Fisher's votes are limited to panel rehearing only.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2282

UNITED STATES OF AMERICA

v.

DAVID KENDRICK,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2-17-cr-00143-004)
District Judge: Honorable Joy Flowers Conti

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
April 22, 2020

Before: HARDIMAN, RENDELL and FISHER, *Circuit Judges*.

(Filed: October 15, 2020)

OPINION*

FISHER, *Circuit Judge*.

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

David Kendrick pleaded guilty to conspiring to possess with intent to distribute 28 grams or more of crack cocaine. Before sentencing, however, he moved to withdraw the plea. The District Court denied the motion and sentenced him to 130 months of imprisonment. Kendrick now appeals both that denial and his sentence. We will affirm.[1]

Kendrick argues that under our decision in *United States v. Rowe*,[2] and the Supreme Court's related decision in *Alleyne v. United States*,[3] the Government needed to (and could not) prove that he conspired to possess with intent to distribute 28 grams or more of crack at a single time in order to trigger the enhanced penalties of 21 U.S.C. § 841(b)(1)(B), as incorporated by 21 U.S.C. § 846.[4] We recently rejected a similar argument in *United States v. Williams*.[5] Drug quantity, we held there, is not a *mens rea* element under § 846 for purposes of the (b)(1)(A) and (b)(1)(B) penalties, and *Alleyne* and *Rowe* are consistent with our decision in *United States v. Gori*.[6] Because Kendrick's situation is in all relevant respects the same as that of *Gori*, the District Court did not err in denying Kendrick's motion to withdraw his guilty plea.

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[1] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291.
[2] 919 F.3d 752 (3d Cir. 2019).
[3] 570 U.S. 99 (2013).
[4] We review denials of a motion to withdraw a guilty plea for abuse of discretion. *United States v. James*, 928 F.3d 247, 253 (3d Cir. 2019).
[5] *United States v. Williams*, No. 17-2111, __ F.3d __, 2020 WL 5422788 (3d Cir. Sept. 10, 2020).
[6] 324 F.3d 234, 237 (3d Cir. 2003) (holding that the drug quantities from multiple transactions involving the same defendant may be aggregated for sentencing purposes under § 846); *see Williams*, 2020 WL 5422788, at *24-26.

Kendrick challenges his sentence on two grounds. First, he contends that the 21 U.S.C. § 851 information filed prior to his plea provided constitutionally inadequate notice of the Government's intent to rely upon an April 1998 state drug felony conviction as the basis of a possible sentencing enhancement.[7] In determining whether a § 851 information passes constitutional muster, we ask "whether [it] . . . provided [the defendant] reasonable notice of the government's intent to rely on a particular conviction and a meaningful opportunity to be heard."[8] If that standard is satisfied, any errors in the information are considered "[c]lerical mistakes," which, § 851 declares, "may be amended at any time prior to the pronouncement of sentence."[9] We have said that this applies to "inaccurate descriptions of prior convictions."[10]

The two errors here fall squarely into the category of clerical mistakes. The information identified the 1998 felony's court of conviction as the "Allegheny County Court of Common Please,"[11] erroneously adding an "e" to the end of the name. It also listed the statute of conviction as 18 Pa. Cons. Stat. § 13(a)(16), which does not exist, rather than 35 Pa. Stat. § 780-113(a)(30). However, the information correctly identified the date of conviction and sentence, the docket number, and the term of imprisonment

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[7] We review de novo the sufficiency of the notice provided by a § 851 information. *United States v. Weaver*, 267 F.3d 231, 246 (3d Cir. 2001).
[8] *Id.* at 247 (second alteration in original) (citation and internal quotation marks omitted).
[9] 21 U.S.C. § 851(a)(1).
[10] *United States v. Rivas*, 493 F.3d 131, 142 (3d Cir. 2007).
[11] Suppl. App. 10.

imposed. Even if, therefore, the erroneous statutory citation failed to notify Kendrick of the conviction upon which the Government was relying, several indicators—including the minor misspelling of the court's name—would have conveyed reasonable notice of the Government's intentions.[12] Moreover, the Government corrected both errors before sentencing, thus "compl[ying] with § 851(a)(1)'s requirements for the amendment of clerical errors."[13]

In his second sentencing challenge, Kendrick asserts that the District Court's application of the § 851 information's sentencing enhancement encompassed factual findings that are unconstitutional under the rules announced in *Alleyne* and *Apprendi v. New Jersey*.[14] Because Kendrick did not raise this argument before the District Court, our review is for plain error.[15] Both *Alleyne* and *Apprendi* made clear that they did not "revisit" the holding of *Almendarez-Torres v. United States*,[16] and we have said that

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[12] *See Weaver*, 267 F.3d at 247-49 (finding sufficient notice despite the incorrect identification of a prior conviction and the combination of two prior convictions into a single, nonexistent offense); *see also United States v. Higgins*, 710 F.3d 839, 844 (8th Cir. 2013). We note too that a presentence report filed prior to both Kendrick's plea and the initial § 851 information included accurate details of the 1998 felony conviction. *See, e.g.*, *United States v. Wallace*, 759 F.3d 486, 496 (5th Cir. 2014) (noting that, despite a misstatement in the § 851 information, "the government correctly characterized [the defendant's] prior conviction on several other occasions").

[13] *Weaver*, 267 F.3d at 248.

[14] 530 U.S. 466 (2000).

[15] *See United States v. Olano*, 507 U.S. 725, 732 (1993).

[16] 523 U.S. 224, 226-27 (1998) (holding that the fact of a prior conviction is not an element of an offense even when it increases a defendant's statutory maximum term of imprisonment); *see Alleyne*, 570 U.S. at 111 n.1; *Apprendi*, 530 U.S. at 489-90.

"*Almendarez-Torres* is [still] good law."[17] As a result, the District Court's factual finding of the prior conviction, pursuant to the § 851 information, was not error. Further, even assuming, as Kendrick argues, the First Step Act's additional factual requirements for finding a "serious drug felony" led the District Court to run afoul of *Alleyne* and *Apprendi*,[18] we decline to notice the error.[19] The evidence of those facts was "overwhelming," and the issue "was essentially uncontroverted" before the District Court "and has remained so on appeal."[20]

For these reasons, we will affirm the judgment of the District Court.

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[17] *United States v. Johnson*, 899 F.3d 191, 201 (3d Cir. 2018).
[18] *See* 21 U.S.C. § 802(57).
[19] *See Puckett v. United States*, 556 U.S. 129, 135 (2009) ("[I]f the [first] three prongs [of plain-error review] are satisfied, the court of appeals has the *discretion* to remedy the error—discretion which ought to be exercised only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" (emphasis and third alteration in original) (quoting *Olano*, 507 U.S. at 736)).
[20] *Johnson v. United States*, 520 U.S. 461, 470 (1997).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
vs.	)	Criminal No. 17-143-4
	)	
	)	
DAVID KENDRICK,	)	
	)	
Defendant.		

MEMORANDUM OPINION

Defendant David Kendrick ("Kendrick") filed a motion captioned "supplemental objection to presentence investigation report" (ECF No. 368). The caption is misleading -- the substance of the motion is a request to withdraw his guilty plea, or to convert his plea to a lesser included offense. Kendrick argues that, based on the recent decision in *United States v. Rowe*, No. 18-1192, 2019 WL 1446807 (3d Cir. April 2, 2019), there is no factual basis to find him guilty of conspiracy to distribute and possess with intent to distribute 28 grams or more of crack cocaine, in violation of 21 U.S.C. § 846, as charged in the indictment. Kendrick argues that although the total amount of crack cocaine discussed in the wiretaps was more than 28 grams, the wiretaps do not prove that he possessed 28 grams or more of crack cocaine at any one time. (ECF No. 368 at 2). The government filed a response in opposition to the motion (ECF No. 392) and it is ripe for disposition.

Standard of Review

There is no absolute right to withdraw a guilty plea. *United States v. Ho-Man Lee*, 664 F. App'x 126, 127–28 (3d Cir. 2016) (citing *United States v. Vallejo*, 476 F.2d 667, 669 (3d Cir. 1973)). A defendant faces a "substantial burden" in demonstrating that withdrawal should be

allowed. *Id.* (citing *United States v. Siddons*, 660 F.3d 699, 703 (3d Cir. 2011)). Federal Rule of Criminal Procedure 11(d)(2)(B) states, "[a] defendant may withdraw a plea of guilty ... after the court accepts the plea, but before it imposes sentence if ... the defendant can show a fair and just reason for requesting the withdrawal."

The court applies the three "*Jones* factors" to evaluate whether a defendant has articulated a "fair and just reason" to withdraw his plea: (1) whether the defendant asserts his innocence; (2) the strength of the defendant's reasons for withdrawing the plea; and (3) whether the government would be prejudiced by the withdrawal. *Id.* (citing *United States v. Jones*, 336 F.3d 245, 252 (3d Cir. 2003)). To satisfy the first factor, a defendant must make a credible showing of innocence, supported by a factual record. *Id.* A "blanket assertion of innocence" will not suffice. In analyzing the second factor, a defendant must give "strong reasons" to justify withdrawing what the court has described as a "solemn admission" of guilt. *Id.* (citing *United States v. Isaac*, 141 F.3d 477, 485 (3d Cir. 1998)). A "shift in defense tactics, a change of mind, or the fear of punishment are not adequate reasons" to withdraw a guilty plea.

Legal Analysis

Kendrick argues, based on the new precedent in *Rowe*, that he cannot be guilty of conspiracy to distribute 28 grams or more of crack cocaine unless there is proof that he possessed 28 grams or more on a single occasion. In *Rowe*, the defendant was charged in a one-count indictment with distribution and possession with intent to distribute 1000 grams of heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). The court of appeals held that the evidence was insufficient to meet the 1000 gram threshold. Each unlawful "distribution" is a separate offense, as opposed to a continuing crime, and the government conceded that it did not present

evidence of any single distribution involving 1000 grams. *Id.* at *4. Unlike distribution, possession with intent to distribute a controlled substance is a continuing offense, i.e., "a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy." *Id.* at *5. In *Rowe*, the government conceded and the court held that the drug quantity threshold cannot be met by combining multiple distributions and discontinuous possessions during the indictment period. *Id.* The evidence in the case was insufficient to allow a rational juror to conclude that the defendant possessed with intent to distribute 1000 grams of heroin at any one time. *Id.* at *6.

Rowe did not involve a conspiracy conviction and did not purport to overrule binding Third Circuit precedent about how to calculate drug quantity for a conspiracy conviction. As explained in *Hardwick v. United States*, No. CV 12-7158, 2018 WL 4462397, at *14 (D.N.J. Sept. 18, 2018):

> [i]n drug conspiracy cases, *Apprendi* requires the jury to find only the drug type and quantity element as to the conspiracy as a whole, and not the drug type and quantity attributable to each co-conspirator. The finding of drug quantity for purposes of determining the statutory maximum is, in other words, to be an offense-specific, not a defendant-specific, determination. The jury must find, beyond a reasonable doubt, the existence of a conspiracy, the defendant's involvement in it, and the requisite drug type and quantity involved in the conspiracy as a whole.
>
> *United States v. Whitted*, 436 F. App'x 102, 105 (3d Cir. 2011) (quoting *United States v. Phillips*, 349 F.3d 138 142-43 (3d Cir. 2003), vacated and remanded on other grounds sub nom. *Barbour v. United States*, 543 U.S. 1102 (2005).

Because the drug quantity for the crime of conspiracy is an offense-specific determination involving the quantity involved in the entire conspiracy, it necessarily follows that those drugs need not be possessed by any one conspirator at one specific time. *United States v. Woodley*, No. 13-113, 2016 WL 4523924, at *5 (W.D. Pa. Aug. 22, 2016) (citing *United States v. Garvey*, 588 Fed. Appx. 184, 188 (3d Cir. 2014) ("With respect to the amount of controlled substance, a

finding must be made as to the drug type and quantity involved in the conspiracy as a whole, not the quantity attributable to each co-conspirator").

The court maintains a clear distinction between conspiracy and substantive drug offenses in how to calculate drug quantity. The essence of the crime of conspiracy is an agreement to commit an unlawful act – such an agreement is a distinct evil which may be punished whether or not the substantive crime ensues. *Whitted*, 436 F. App'x at 104 (rejecting a challenge to drug quantity). The court stated: "Whitted confuses the relevance of evidence for a substantive offense, versus that for a conspiracy offense, which requires no completed act." *Id.* In *Garvey*, the court rejected a challenge to drug quantity and explained that the defendant conflated the substantive drug possession and conspiracy offenses. 588 F. App'x at 189. The court noted that even though a charge of possession of 10 pounds of marijuana in September 2009 was dismissed, he could still be found guilty of conspiracy to distribute those 10 pounds of marijuana. *Id.* at 188. *Accord United States v. Gori*, 324 F.3d 234, 237 (3d Cir. 2003) (the rules "disallowing aggregation of multiple drug transactions for § 841(b) purposes did not extend to multiple drug transactions as part of a conspiracy"). In summary, calculation of the drug quantity for a conspiracy crime is not governed by the recent decision in *Rowe*. Kendrick may be held responsible for the reasonably foreseeable quantity of crack cocaine involved in the conspiracy as a whole. *United States v. Braddy*, 722 F. App'x 231, 237 (3d Cir. 2017) (defendant is responsible for "all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook") (*quoting United States v. Perez*, 280 F.3d 318, 353 (3d Cir. 2002)).

Application of the Jones Factors

Because the court concludes that *Rowe* does not apply to conspiracy crimes, application of the *Jones* factors is straightforward. Kendrick asserts his innocence as a matter of law, not fact. He admits that he engaged in a conspiracy to distribute and possess with intent to distribute crack and powder cocaine and he admits that the drug quantities attributable to him were 97 grams of crack cocaine and 427 grams of powder cocaine. PIR ¶ 14; ECF No. 352. Kendrick disputes only the issue of whether he possessed more than 28 grams of crack cocaine at one time. Based on the analysis set forth above, defendant's reasons for withdrawing his guilty plea are not strong. The court's recent decision in *Rowe* does not apply to conspiracy crimes. The third *Jones* factor regarding prejudice to the government is neutral and does not weigh in favor of either granting or not granting the motion. The government's claim of prejudice is somewhat weak because Kendrick would still enter a guilty plea to a lesser offense and be sentenced. On the other hand, the government is generally entitled to rely on the enforceability of a guilty plea entered by a defendant.

Conclusion

After considering all the factors, the court finds that Kendrick did not meet the substantial burden to withdraw his guilty plea. Defendant's motion to withdraw his guilty plea (ECF No. 368), is DENIED.

An appropriate order follows.

May 17, 2019

BY THE COURT:

/s/ Joy Flowers Conti
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
vs.	)	Criminal No. 17-143-4
	)	
	)	
DAVID KENDRICK,	)	
	)	
Defendant.		

ORDER OF COURT

AND NOW this 17th day of May, 2019, in accordance with the foregoing opinion, it is hereby ORDERED that Defendant's motion to withdraw his guilty plea (ECF No. 368), is DENIED.

BY THE COURT:

/s/ Joy Flowers Conti
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
v.	)	Criminal No. 17-143
DAVID KENDRICK,	)	
Defendant	)	

TENTATIVE FINDINGS AND RULINGS CONCERNING THE APPLICABLE ADVISORY GUIDELINE RANGE

CONTI, Senior District Judge.

On January 3, 2019, defendant David Kendrick ("Kendrick" or "defendant") pleaded guilty to conspiracy to distribute and possess with intent to distribute a quantity of cocaine and 28 grams or more of crack cocaine, from January to May 2016, in violation of 21 U.S.C. § 846, as charged in count 1 of the indictment at criminal action number 17-143. The Probation Office filed a Final Presentence Investigation Report ("PIR") on March 12, 2019 (ECF No. 338) and an addendum on April 1, 2019.[1] Pursuant to Local Rule 32C.4, counsel for Kendrick and for the government each had an opportunity to submit objections to the PIR prepared by the Probation Office and to state any anticipated grounds for a departure or variance. Several sentencing disputes are pending.

A. Amount of crack cocaine

The government raised one objection to the PIR, regarding the amount of crack cocaine attributed to Kendrick. (ECF No. 355). The government maintains that the amount of crack cocaine should be 196 to 280 grams, as stated in PIR ¶ 13, because Kendrick's "default" order

[1] The probation office prepared a pre-plea investigation report (ECF No. 227) on April 6, 2018, which was disclosed to defense counsel.

was for crack cocaine. The probation office concluded that some of the intercepted calls were ambiguous about whether Kendrick was seeking crack or powder cocaine, and made the assumption (favorable to Kendrick) that the ambiguous calls involved powder cocaine. The probation office calculated that Kendrick was responsible for 97 grams of crack cocaine and 427 grams of powder cocaine. PIR ¶ 14. The defense agrees with the calculation in PIR ¶ 14. (ECF No. 352).

The court need not resolve this dispute. Pursuant to Federal Rule of Criminal Procedure 32(i)(3)(B), the court "must--for any disputed portion of the presentence report or other controverted matter--rule on the dispute **or determine that a ruling is unnecessary because the matter will not affect sentencing**. (Emphasis added). As will be explained below, because the PIR correctly calculated an adjusted offense level based upon Kendrick's career offender status pursuant to U.S.S.G. § 4B1.1, the base offense level based on the quantity of crack cocaine does not affect the advisory guideline range. The government's objection is denied as moot.

B. Motion to Amend § 851 Notice

The government filed a motion to amend its information charging a prior conviction as a basis to increase Kendrick's sentence pursuant to 21 U.S.C. § 851 ("§ 851 information"). (ECF No. 362). Defendant filed a response in opposition to the motion. (ECF No. 363).

The original § 851 information in this case was filed approximately one week prior to Kendrick's guilty plea, on December 26, 2018. It provided, in relevant part, that Kendrick was previously convicted of "felony drug offenses, to wit: That DAVID KENDRICK was convicted on or about April 28, 1998, in the Allegheny County Court of Common Please [sic], at Docket No. 2729-1997 of violations of **Title 18**, Pennsylvania Consolidated Statutes, Section **13(a)(16)**,

and was thereafter sentenced on April 28, 1998 to a term of imprisonment of three to ten years." (ECF No. 307, emphasis added). It is undisputed that this notice contained multiple errors: (1) it misspelled the name of the court of conviction; (2) it cited the wrong title of the Pennsylvania Consolidated Statutes; and (3) it cited the wrong subsection of the Controlled Substance, Drug, Device and Cosmetic Act. As reflected in the certified copy of Kendrick's conviction, he was actually convicted at count 1 of Docket No. 2729-1997, of a violation of Title 35 Pa.Stat. § 780-113, section (a)(30). (ECF No. 362-1).[2] This offense constitutes a qualifying "serious drug offense" to enhance his sentence because a maximum term of imprisonment of ten years or more is prescribed by law. 21 U.S.C. § 841(b); 18 U.S.C. § 924(e)(2). As the § 851 information correctly stated, Kendrick was sentenced to three to ten years' imprisonment.

Section 851(a)(1) provides (emphasis added):

> 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 government argues that its errors are clerical, which it is entitled to correct prior to sentencing under the plain text of § 851. Defendant argues that these errors go beyond mere clerical mistakes. In particular, Kendrick argues that the § 851 information references a substantively different offense, i.e., misdemeanor simple possession under (a)(16) that does not

[2] At Docket No. 2729-1997, Kendrick was also charged with and pleaded guilty to: at count 2, misdemeanor possession of a controlled substance, in violation of section (a)(16); and at count 3, misdemeanor 3 possession of drug paraphernalia, in violation of section (a)(32). (ECF No. 362-1: PIR ¶ 34).

trigger an enhanced mandatory minimum sentence, rather than felony possession with intent to distribute cocaine under (a)(30) that does trigger an enhanced mandatory minimum sentence.

The only decision defendant cites is *United States v. Weaver*, 267 F.3d 231, 247 (3d Cir. 2001), in which the court rejected a defendant's similar challenge to the government's correction of a clerical error. The court explained that the purpose of § 851(a)(1) is to provide a defendant with sufficient notice to satisfy due process. The "inquiry must be whether the information which was filed provided [the defendant] reasonable notice of the government's intent to rely on a particular conviction and a meaningful opportunity to be heard." *Id.* (quoting *Perez v. United States*, 249 F.3d 1261, 1266 (11th Cir. 2001)). Courts must be careful not to elevate form over substance; the question is whether any of the government's errors rendered the notice constitutionally lacking. *Id.*

In *Weaver*, as in this case, the § 851 information contained multiple errors: (1) it stated that Weaver was convicted of involuntary manslaughter rather than voluntary manslaughter; (2) it referred to another conviction as being for "armed robbery," an offense that did not exist under Pennsylvania law at that time; and (3) it stated the government was relying on a single conviction on November 21, 1977, when in actuality Weaver had two different convictions on that date, one of which did not constitute a "strike" for sentencing purposes. *Id.* at 248-49. The amended notice continued to refer erroneously to an "armed robbery" conviction. *Id.* at 249. The court concluded that the § 851 information provided appropriate notice, because it alerted Weaver to the convictions the government would rely on as strikes and gave him the opportunity to challenge their use. *Id.* at 249-50.

Other courts view similar errors as "clerical" and permit correction under § 851. In

United States v. Higgins, 710 F.3d 839 (8th Cir. 2013), the court rejected the defendant's challenge where the § 851 information mislabeled his conviction as possession within 1000 feet of a school, rather than possession with intent to distribute. The court noted that the information included the correct date, case number and county of origin for the conviction. *Id.* at 844. *Accord United States v. Curiale*, 390 F.3d 1075, 1077 (8th Cir. 2004) (description of "earlier crime as being for sale rather than possession of illegal drugs was a clerical mistake capable of correction by amendment under § 851(a)(1)"). In *United States v. Segura*, 209 F. App'x 128, 135-36 (3d Cir. 2006), the court rejected defendant's challenge to a § 851 information that cited the wrong statutory provision, explaining that there was ample evidence that the defendant knew he was facing an enhanced mandatory minimum sentence when he chose to proceed to trial. *Accord United States v. Campbell*, 980 F.2d 245, 251-52 (4th Cir. 1992) (allowing government to amend § 851 information that cited wrong subsection of statute). Kendrick did not cite any decisions in which the government was barred from correcting similar errors and the court did not locate any such decisions in its independent research.

In this case, Kendrick had ample notice that he was facing an enhanced mandatory minimum sentence when he chose to plead guilty. The original § 851 information contained the correct court (despite the minor misspelling), docket number, date of conviction, and sentence of three to ten years. Kendrick also had the benefit of a pre-plea investigation report. The court specifically discussed the government's intent to seek a § 851 enhancement with Kendrick during the plea colloquy and reviewed the enhanced penalties he faced, including a mandatory minimum of ten years imprisonment and a maximum of life. In sum, Kendrick received adequate notice and his due process rights would not be violated by allowing the government to

correct its clerical errors. The government's motion to correct the clerical errors in the original § 851 information (ECF No. 362) is granted.

C. Kendrick's Objections to the PIR

Defendant raised objections to: (1) his classification as a career offender; and (2) use of the § 851 information to increase his offense level,[3] and the resulting guideline calculations. (ECF Nos. 352, 359). The probation office adhered to its determination that Kendrick is properly classified as a career offender and deferred to the court regarding the § 851 information. (ECF No. 361). Kendrick also clarified that he stopped using marijuana in 1997 rather than 2010, to which the probation office had no objection.

The gist of Kendrick's argument is that the government failed to meet its burden to show that he was the same individual who was convicted of the crimes set forth in ¶¶ 33 and 34 of the PIR. Although the convictions bear his name, one does not list a social security number and the other refers to a different social security number. Kendrick provided his social security card to the probation officer.

The government has the burden to establish Kendrick's criminal history and career offender status under the guidelines by a preponderance of the evidence. *United States v. Grier*, 475 F.3d 556, 568 (3d Cir. 2007) (en banc); U.S.S.G. § 6A1.3. Kendrick points out, correctly, that the government's burden with respect to the § 851 information is beyond a reasonable doubt. 21 U.S.C. § 851(c) ("the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact").

The probation office explained in the addendum that Kendrick's criminal history was

[3] Even if Kendrick is deemed a career offender, the § 851 information increases his maximum punishment to life, which increases his offense level from 34 to 37. U.S.S.G. § 4B1.1(b).

confirmed and cross-referenced in an ATLAS report. (ECF No. 361). According to the probation office, an ATLAS report contains numerous items of personal information, including fingerprints, a state identification number, an FBI identification number, a defendant's date of birth, a defendant's full name and aliases, and OTN cross-references. The variance in the social security numbers appears to be another regrettable clerical error. Eight of the nine digits are identical (*** - *4 - **** versus *** - *6 - ****).[4] The probation office maintains that Kendrick's ATLAS report contains both social security numbers referenced above; the convictions at ¶¶ 33 and 34 are listed on Kendrick's ATLAS report; and there is no conceivable basis to believe that those convictions were committed by a different David Lamont Kendrick. The government will have the opportunity to establish at the sentencing hearing beyond a reasonable doubt that Kendrick was the same individual who was convicted of the crimes set forth in ¶¶ 33 and 34 of the PIR.

In summary, defendant's objections about his criminal history are taken under advisement. If the government meets its burden, Kendrick will face an enhanced sentence under § 851 and the PIR correctly imposed an adjusted offense level of 34 and criminal history category VI.

In light of the United States Supreme Court's holding in United States v. Booker, 543 U.S. 220 (2005), the United States Sentencing Guidelines are advisory and no longer mandatory in the federal courts. The court is directed to sentence criminal defendants in accordance with the factors set forth in 18 U.S.C. § 3553(a). One of the factors enumerated in § 3553(a) that the court must consider is "the kinds of sentence and the sentencing range established for under the

[4] The full social security numbers are not set forth in this opinion to protect Kendrick's information.

United States Sentencing Guidelines." 18 U.S.C. § 3553(a)(4). In fact, the United States Supreme court stated that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." Booker, 543 U.S. at 264. Accordingly, the court's tentative findings reflect the advisory Guidelines range for defendant's offense. At the time of sentencing, the court will impose the defendant's sentence in consideration of all the factors set forth in § 3553(a).

The court tentatively finds as follows, if the government meets its burden regarding defendant's criminal history:

1. **Base Offense Level**: The guideline for 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B)(iii) offenses is found in U.S.S.G. §2D1.1 of the guidelines. Section §2D1.1(a)(5) specifies that the offense level be determined by using the Drug Quantity Table set forth in Subsection (c). The defendant is responsible for 97 grams of cocaine base (commonly known as crack) and 427 grams of cocaine. Based upon the drug equivalency tables listed in U.S.S.G. § 2D1.1, Application Note 8(B) and (D), the conversions to marijuana equivalency would be as follows: Cocaine base would be 346,387 grams (97.0 x 3,571) or 346.39 kilograms (346,387 x 1,000). Cocaine would be 85,400 grams (427.0 x 200) or 85.4 kilograms (85,400 x 1,000). These marijuana equivalencies combine for a total of 431.79 kilograms of marijuana., which calls for a base offense level of 26. U.S.S.G. §2D1.1(c)(7). The base offense level is 26.

2. **Chapter Four Enhancement**: The defendant has convictions of Criminal Homicide (Docket number CP 11625-1997), Possession With Intent to Deliver Cocaine (Docket number CP 2729-1997), and Delivery of Cocaine (Docket number CP 486-1995). The defendant

meets the requirements that he was at least eighteen years old at the time the of the instant offense; the instant offense is a felony that is a controlled substance offense; and he has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S.S.G. §4B1.1(a). Therefore, the defendant is a career offender. The offense level for a career offender is 37 because the statutory maximum term of imprisonment is life. U.S.S.G. §4B1.1(b)(1).

3. Defendant clearly demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by 2 levels. U.S.S.G. § 3E1.1(a).

4. Defendant assisted authorities in the investigation or prosecution of defendant's own misconduct by timely notifying authorities of the intention to enter a plea of guilty. Accordingly, the offense level is decreased by 1 additional level. U.S.S.G. § 3E1.1(b).

5. The total offense level is 34.

Criminal History

6. The subtotal criminal history score based on defendant's convictions is nine. The defendant committed the instant offense while under a criminal justice sentence for Criminal Homicide at docket number CP 11625-1997; therefore, two points are added. U.S.S.G. §4A1.1(d). 39. The total criminal history score is 11. According to the sentencing table in U.S.S.G. Chapter 5, Part A, a criminal history score of 11 establishes a criminal history category of V. Due to the defendant's convictions of Criminal Homicide (Docket number CP 11625-1997), Possession With Intent to Deliver Cocaine (Docket number CP 2729-1997), and Delivery of Cocaine (Docket number CP 486-1995), the defendant meets the requirements that he was at least eighteen years old at the time the of the instant offense; the instant offense is a felony that is

a controlled substance offense; and he has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S.S.G. §4B1.1(a). Therefore, the defendant is a career offender; to which the criminal history category is VI. U.S.S.G. §4B1.1(b). Thus, the defendant's criminal history category is **VI**.

Imprisonment

7. The minimum term of imprisonment is 10 years and the maximum term is life. 21 U.S.C. §§ 846, 841(b)(1)(B)(iii), and 851.

8. Based upon a total offense level of 34 and a criminal history category of VI, the guideline imprisonment range is 262 months to 327 months. U.S.S.G. Sentencing Table.

Supervised Release

9. The court must impose a minimum term of supervised release of not less than 8 years. 21 U.S.C. §§ 841(b)(1)(A)(iii) and 851.

10. Since the offense is a Class A Felony, the guideline range for a term of supervised release is 2 years to 5 years, but in no event less than the mandatory minimum required by statue, which is 8 years. U.S.S.G. §§ 5D1.2(a)(1) & (c).

Probation

11. The defendant is ineligible for probation because it is expressly precluded by statute. 21 U.S.C. § 841(b)(1)(B)(iii); U.S.S.G. §5B1.1(b)(2).

Fines

12. The maximum fine is $8,000,000. 21 U.S.C. § 841(b)(1)(B)(iii)

13. The fine range for this offense is $35,000 to $8,000,000. If the defendant is convicted under a statute authorizing (A) a maximum fine greater than $500,000, or (B) a fine

for each day of violation, the court may impose a fine up to the maximum authorized by the statute. U.S.S.G. §§5E1.2(c)(3) and (c)(4).

14. A special assessment of $100 is mandatory. 18 U.S.C. § 3013.

Restitution

15. Restitution is not applicable.

Forfeiture

16. Forfeiture is not applicable.

Kendrick filed: (1) a supplemental objection to the PIR, which the court construes as a motion to withdraw his guilty plea regarding the drug quantity (ECF No. 368); and (2) a motion to continue the sentencing hearing (ECF No. 358), so that he can complete the Go Further program at NEOCC, which focuses on life planning and reentry. He reports that the program will run for approximately 11 to 15 more weeks. The government opposes a delay in sentencing. The court will address these motions at the hearing on April 18, 2019.

BY THE COURT:

/s/ Joy Flowers Conti
Joy Flowers Conti
Senior United States District Judge

Dated: April 12, 2019