Preventing and Challenging an Enhanced Sentence Under Section 851

Amy Baron-Evans, Dec. 16, 2018, revised Jan. 21, 2019

This memo is about § 851's procedural provisions, including as they relate to the new definitions of enhancing prior convictions under the First Step Act. It cites some relevant cases but you should update the research and check your circuit's law. Preserve the issues even if your circuit's law is unfavorable.

You can also raise substantive challenges under the Due Process Clause and/or the Eighth Amendment to a sentence enhanced under § 851; you can email me at abaronevans@gmail.com for a power point regarding those challenges.

The full statute is appended. This memo starts with § 851's key requirements. It then discusses what subsection (e) means (and what it does not mean) and other avenues to avoid or attack an enhanced sentence. It then discusses some constitutional and other issues that may arise under subsections (b), (c)(2), and (d)(2).

Key Requirements

The prior conviction must have "become final" before the defendant "commit[ted]" the instant offense. 21 U.S.C. § 841(b)(1)(A)-(C).

The government must, "before trial, or before entry of a plea of guilty," and not later, "file[] an information with the court (and serve[] a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1).

An information "may not be filed" if the "increased punishment" that may be imposed exceeds three years "unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed." *Id*. § 851(a)(2). (Unfortunately, this refers to the instant offense.)

If the government files an information, "the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence." *Id*. § 851(b).

> Note that the statute "does not require a defendant to respond to the prior felony information sua sponte. Rather, § 851 specifically requires that a defendant first be asked to affirm or deny the allegations in the information, and *then* be given an opportunity to file objections, after a specific advice of the consequences of failing to act." *United States v. Espinal*, 634 F.3d 655, 665 (2d Cir. 2011); *see also United States v. Baugham*, 613 F.3d 291, 296 (D.C.Cir.2010). [But this is all unconstitutional – read on.]

"If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response," and the court "shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment." 21 U.S.C. § 851(c)(1). "Except as otherwise provided in" §851(c)(2), the government "shall have the burden of proof

beyond a reasonable doubt on any issue of fact," and "the court shall enter findings of fact and conclusions of law" at the request of either party. *Id.* § 851(c)(1).[1]

A "person claiming that a conviction alleged in the information was obtained in violation of the Constitution . . . shall set forth his claim, and the factual basis therefor, with particularity in his response to the information," and "shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response." *Id.* § 851(c)(2). "Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge." *Id.* [Courts have held that this waiver provision applies only to constitutional claims that could have been raised under 851(e) – read on.]

If the court determines that the person "has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an [interlocutory] appeal from that determination," and the defendant "may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered." (The defendant gets no interlocutory appeal.) *Id.* § 851(d)(2). [The purpose of this has ceased to exist and it is unconstitutional – read on.]

Section 851(e), entitled "Statute of limitations," provides: "No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction." [this is addressed first]

Section 851(e)

Section 851(e) means one thing only: it *allows* the defendant to collaterally attack *at sentencing* the *validity* of a prior conviction (*i.e.*, it was obtained in violation of the Constitution), but only if it occurred no more than five years before the information was filed. It does not *bar* anything but a challenge to the validity of a conviction at sentencing of a prior conviction that is more than five years old. It does not bar a challenge to the validity of a prior conviction at sentencing if it is not more than five years old. It does not bar any other kind of challenge at sentencing to a conviction regardless of how old it is (*e.g*, the prior has been vacated so no longer exists, someone else was convicted, the conviction was not final when the defendant committed the instant offense, he did not waive indictment or was not afforded prosecution by indictment). It does not bar *any* kind of challenge to a prior conviction regardless of how old it is in any other forum (*e.g.*, direct appeal, § 2255 motion to re-open after vacatur in state court, § 2255 on any ground, § 2241 if § 2255 inadequate or ineffective).

Before the First Step Act, there was no staleness limit on prior convictions. After the First Step Act, there is still no staleness limit on a prior conviction for a "serious violent felony," but a prior conviction for a "serious drug felony" counts only if the defendant was released from imprisonment for the prior conviction

[1] Issues of fact as to which the government bears the burden of proof beyond a reasonable doubt include that any prior conviction alleged exists and has become final, the defendant is the person convicted of the prior offense, and the prior offense satisfies the statutory definition of a qualifying offense. *See, e.g.*, *United States v. Kellam*, 568 F.3d 125, 141-45 (4th Cir. 2009).

within 15 years of commencement of instant offense. Either way, there will be many convictions that occurred more than five years after the information was filed, so be aware of what § 851(e) does and does not mean.

Background

Well before § 851 was enacted in 1970, it was unconstitutional for a sentence to be enhanced based on a prior conviction that was obtained in violation of the defendant's constitutional rights.[2] By the time § 851 was enacted, defendants had a right to challenge the validity of an enhancing prior conviction at sentencing,[3] a right to challenge an enhanced sentence together with the validity of an enhancing prior through federal habeas corpus,[4] and a right to challenge an enhanced sentence through federal habeas corpus after having the prior conviction vacated.[5] Under the predecessor to § 851, only prior federal convictions could be used to enhance penalties for drug trafficking offenses,[6] and the validity of prior convictions could be attacked at sentencing, and under 28 U.S.C. § 2255 (or through a writ of *coram nobis*) together with the federal sentence.[7]

It is presumed "that Congress was thoroughly familiar with . . . important precedents from [the Supreme Court] and other federal courts and that it expected its enactment to be interpreted in conformity with them."[8] When Congress enacted § 851 in 1970, it explicitly allowed collateral challenges to the "validity"

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[2] *See Johnson v. Zerbst*, 304 U.S. 458, 465-66 (1938); *Boykin v. Alabama*, 395 U.S. 238 (1969).

[3] *See, e.g., Burgett v. Texas*, 389 U.S. 109, 111-15 (1967).

[4] *See, e.g., Townsend v. Burke*, 334 U.S. 736, 740-41 (1948).

[5] *See, e.g., Tucker v. United States*, 299 F. Supp. 1376 (N.D. Cal. 1969) (on petitioner's § 2255 after state court invalidated prior convictions relied upon at federal sentencing, district court denied relief, finding the error harmless); *Tucker v. United States*, 431 F.2d 1292 (9th Cir. 1970) (reversing harmless error finding and remanding for resentencing without consideration of invalidated convictions); *United States v. Tucker*, 404 U.S. 443, 445, 447-49 (1972) (affirming Ninth Circuit's judgment).

[6] Narcotic Control Act of 1956, ch. 629, 70 Stat. 567, 568-69 (1956) (codified at 26 U.S.C. § 7237(c)(2)) (repealed 1970). The statutory range was 5-20 years for a first conviction and 10-40 years for any subsequent conviction. *Id.*, 70 Stat. at 568 (codified at 26 U.S.C. § 7237(b)) (repealed 1970).

[7] *See Martinez v. United States*, 464 F.2d 1289 (10th Cir. 1972) (under § 2255, vacating enhanced federal sentence imposed in 1966 because the prior 1956 federal conviction upon which it was based pursuant to 26 U.S.C. § 7237 was "invalid" and "void" under retroactive Supreme Court law); *Perez v. United States*, 445 F.2d 791 (5th Cir. 1971) (relying on general authority to challenge invalid prior convictions as stated in 1964 circuit law, vacating, on writ of *coram nobis*, 1960 enhanced federal sentence because the prior 1950 conviction upon which it was based pursuant to 26 U.S.C. § 7237 was "invalid" under retroactive Supreme Court law); *Taylor v. United States*, 472 F.2d 1178 (8th Cir. 1973) (under § 2255, vacating 1967 enhanced federal sentence because the prior 1948 and 1949 federal convictions were invalid); *see generally United States v. Morgan*, 346 U.S. 502 (1954) (discussing the writ of *coram nobis* and its availability to challenge validity of prior federal conviction used to enhance state sentence).

[8] *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979).

of prior convictions *at sentencing*, but not if the conviction was more than five years old.[9] The purpose of the five-year limit was to avoid problems federal sentencing courts might have in obtaining old or destroyed state court records,[10] in a narrow set of cases in which a prior state conviction that might be more than five years old could be used to enhance a federal sentence under a since-repealed provision.[11]

Section 851(e) said nothing to curtail the right to challenge a federal sentence that was enhanced based on an invalid prior conviction through a later § 2255 motion. It requires "a clear statement of congressional intent to repeal habeas jurisdiction."[12] A "serious Suspension Clause issue would be presented" if § 851(e) were read to "have withdrawn [the] power [to issue a writ of habeas corpus] from federal judges and provided no adequate substitute for its exercise."[13] *See Arreola*-Castillo *v. United States*, 889 F.3d 378, 390 (7th Cir. 2018); *Vizcaino v. United States*, 981 F. Supp. 2d 104, 108-09 (D. Mass. 2013). And it said nothing to curtail a defendant's ability to file an action in state court to vacate any prior conviction. *See Arreola-Castillo*, 889 F.3d at 386 ("It would be extraordinary for a federal statute to forbid a person from going to state court and properly filing an action that the state court is prepared to entertain.").

Just over a year after § 851 was enacted, the Supreme Court affirmed what the lower courts had been doing all along, holding in a § 2255 case that a federal sentence that had been imposed in reliance on state convictions that had since been vacated had to be remanded for resentencing.[14] In a series of decisions under the ACCA and the guidelines from 1994 to 2005, the Supreme Court held that defendants are "entitled" to re-open a federal sentence under § 2255 after having an enhancing prior conviction vacated.[15]

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[9] Pub. L. No. 91-513, § 409(e)(1), 84 Stat. at 1236, 1267 (1970).

[10] *See United States v. Arango-Montoya*, 61 F.3d 1331, 1338 (7th Cir. 1995); *United States v. Davis*, 36 F.3d 1424, 1438 (9th Cir. 1994); *United States v. Henderson*, 320 F.3d 92, 104 (1st Cir.2003); *United States v. Reed*, 141 F.3d 644, 652 (6th Cir. 1998); *United States v. Prior*, 107 F.3d 654, 661 (8th Cir. 1997); *United States v. Gonzales*, 79 F.3d 413, 426 (5th Cir. 1996); *United States v. Williams*, 954 F.2d 668, 673 (11th Cir. 1992).

[11] Section 849(e)(1) was the only provision that permitted increased sentences based on prior state convictions. It required two prior convictions, state or federal, for "dealing in a controlled substance," to increase the maximum to 25 years. It had a five-year staleness limit which applied only to the last prior conviction; thus, it was possible that the earlier conviction could be more than 5 years old. Because § 841 increased the maximum to 30 years based on one prior federal conviction, prosecutors would only have used § 849(e)(1) if the defendant had no prior federal conviction and only two or more state convictions. Thus, as a practical matter, the five-year staleness provision in § 849(e)(1) could apply only to state convictions. Section 849(e) was repealed in 1984. We have found no case in which § 849(e)(1) was ever used.

[12] *I.N.S. v. St. Cyr*, 533 U.S. 289, 289 (2001).

[13] *Id*. at 305.

[14] *See United States v. Tucker*, 404 U.S. 443, 445, 447-49 (1972) (resentencing was required where district court imposed a discretionary sentence in reliance on prior convictions later vacated).

[15] *Johnson v. United States*, 544 U.S. 295, 303 (2005) (A "defendant who successfully attacked his state conviction in state court or on federal habeas review [can] then 'apply for reopening of any federal sentence enhanced by the state sentences.'"); *id*. at 312-13 (Kennedy, dissenting) (agreeing with majority that defendants may challenge enhanced federal sentences under § 2255 after a prior conviction is vacated); *Daniels v. United States*, 532 U.S. 374, 380, 382-83 (2001); *Custis v. United States*, 511 U.S. 485, 497 (1994).

Thus, a defendant may challenge in state court or under § 2254 the constitutional infirmity of any prior conviction that was used to enhance his federal sentence,[16] and is "entitled to a reduction" in his federal sentence under § 2255 "if the earlier conviction is vacated."[17]

In sum, § 851(e) allows the defendant to collaterally attack *at sentencing* the *constitutional validity* of a prior conviction but only if it occurred no more than five years before the information was filed. It does not prohibit a federal prisoner from obtaining a vacatur of any prior conviction and presenting it at sentencing to dispute the "fact" (not the "validity") of the prior conviction, or from obtaining a vacatur after sentencing and moving to re-open the sentence under § 2255. Nor does it prohibit a challenge on any ground to any enhancing prior conviction on direct appeal or collateral review.

Caselaw

Section 851(e) is not the exclusive avenue through which defendants may challenge a prior conviction and thus avoid an enhanced sentence, or challenge an enhanced sentence that was imposed.

Vacatur of prior conviction

-A defendant may have a prior conviction, no matter how old, vacated and present the vacatur at sentencing to show the conviction does not exist. *See United States v. McChristian*, 47 F.3d 1499 (9th Cir. 1995); *Arreola*-Castillo *v. United States*, 889 F.3d 378, 386, 389, 391 (7th Cir. 2018) (relying in part on *McChristian* to hold § 851(e) does not bar a future § 2255 based on vacatur); *see also United States v. Gabriel*, 599 Fed. Appx. 407, 407-08 (2d Cir. 2015) (recognizing § 851(e) prohibits only a "challenge [to] the validity (as opposed to the fact) of [a] prior felony conviction [when] it occurred more than five years before the filing of the prior felony information").

You should not need this, but the First Step Act defines "serious drug felony" to "mean[]" in part "an offense described in section 924(e)(2)." A conviction described in section 924(e)(2) that "has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20). The ACCA was amended to prohibit consideration of vacated convictions almost sixteen years after § 851 was enacted in 1970. *See* Pub. L. No. 91-513, 84 Stat. 1269 (codified at 21 U.S.C. § 851); Pub. L. No. 99-308, 100 Stat. 449 (codified at 18 U.S.C. § 921(a)(20)). It could be said to displace § 851(e) for purposes of a "serious violent felony" under the First Step Act.

-A defendant may move to have his federal drug sentence vacated, set aside or corrected under § 2255 on the ground that a prior conviction used to enhance his sentence, no matter how old, has been vacated. *See Arreola-Castillo v. United States*, 889 F.3d 378 (7th Cir. 2018); *Vizcaino v. United States*, 981 F. Supp. 2d 104 (D. Mass. 2013); *Clay v. United States*, 2009 WL 1657095 (N.D. Ga. 2009). *See also Johnson v. United States*, 544 U.S. 295 (2005).

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[16] *Daniels*, 532 U.S. at 380, 382.

[17] *Johnson*, 544 U.S. at 303; *see also Tucker*, 404 U.S. at 445, 447-48.

-Note that a defendant is constitutionally entitled to attack a prior conviction on the ground that it was obtained without counsel in any proceeding—at the federal sentencing, in a § 2255 challenging both the federal sentence and the prior conviction, or in a § 2255 re-opening the federal sentence after the prior conviction is vacated.[18] Accordingly, notwithstanding § 851(e), defendants may collaterally attack at sentencing a prior conviction that is more than five years old on the ground that it was obtained without counsel. *See, e.g.*, *United States v. Davis*, 36 F.3d 1424, 1438 (9th Cir. 1994); *United States v. Ramon-Rodriguez*, 492 F.3d 930, 939 (8th Cir. 2007); *United States v. Gonzales*, 79 F.3d 413, 427 (5th Cir. 1996).

They may also have a state conviction vacated on that basis before sentencing and use it to show the conviction does not exist, or after sentencing and file a § 2255 under *Johnson* 2005. Other bases to have a conviction vacated include ineffective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984), failure to ensure that the defendant knowingly, intelligently and voluntarily pled guilty, *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969), or the defendant did not knowingly plead to one offense and thought that he was pleading to another, *Vizcaino*, 981 F.Supp.2d at 105.

-Only the Eleventh Circuit in an unpublished cursory decision with no attempt to analyze the text, and a district court in an opinion that makes no sense, have held that § 851(e) bars a defendant from reopening his federal sentence after a state court vacated a prior conviction used to enhance the federal sentence. *See St. Preux v. United States*, 539 Fed. Appx. 946 (11th Cir. 2013),[19] *United States v. Roberson*, 684 F. Supp. 2d 179 (D. Mass. 2010).[20] The Seventh Circuit has criticized and rejected *St. Preux* and *Roberson*. *See Arreola-Castillo*, 889 F.3d at 388-89, 390-91.

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[18] *See Custis v. United States*, 511 U.S. 485, 494-96 (1994); *Daniels v. United States*, 532 U.S. 374, 382 (2001); *United States v. Tucker*, 404 U.S. 443, 450 (1972); *Burgett v. Texas*, 389 U.S. 109, 115 (1967); *Johnson v. Zerbst*, 304 U.S. 458, 465-66 (1938).

[19] St. Preux did not challenge the "validity" of his 8-year-old prior state conviction, but argued that it was not a "conviction" because adjudication had been withheld. The district court sentenced him to mandatory life, which was upheld on appeal in February 2011. St. Preux immediately challenged the conviction in state court. The state court dismissed the charges in May 2011, and stated in an order that the sentence was *void ab initio* and the charges should have been dismissed in 1998 when he completed a drug program. St. Preux filed a § 2255 seeking reduction of his mandatory life sentence to 20 years, but the district court denied the motion, and the Eleventh Circuit affirmed, holding that any challenge to St. Preux's federal sentence was forever foreclosed by subsection (e). St. Preux is serving mandatory life based on charges that are void and never resulted in a conviction.

[20] Roberson did exactly what § 851 and Supreme Court law told him to do. He did not challenge the "validity" of his 8-year-old prior conviction at sentencing, though he raised other challenges not barred by (e). Instead, he moved to vacate the prior conviction in state court while his direct appeal was pending, thus complying with *Johnson v. United States*, 544 U.S. 295 (2005), which held that if a defendant acts with due diligence to get a prior conviction vacated after entry of judgment in the federal case, he is entitled to resentencing in a § 2255 proceeding. The state court vacated the conviction as having been unconstitutionally obtained under *Boykin v. Alabama*, 395 U.S. 238 (1969), and Roberson filed his § 2255. The district court read § 851 to preclude relief under § 2255 for reasons that make no sense. The court said that § 851(c)(2)'s requirement that "any challenge" not raised before sentence is imposed "shall be waived unless good cause be shown" must include challenges that may not be raised before sentence is imposed under subsection (e); otherwise, the waiver provision would be "meaningless." *Id*. at 186-87. In any event, subsection (e) is "absolute." Thus, "prior convictions that are more than five years old will stand as unchallengeable and will be used as a basis for enhancing the otherwise applicable mandatory minimum sentence." *Id*. at 187. "Roberson's existing prior state conviction, being more than five years old at the time, was . . .

Other Grounds

-A defendant may challenge his federal drug sentence on direct appeal on the basis that a prior conviction used to enhance his sentence, no matter how old, does not qualify as a "felony drug offense," or after the First Step Act as a "serious drug felony" or a "serious drug offense." *See, e.g.*, *United States v. Elder*, 840 F.3d 455, 458, 461 (7th Cir. 2016); *Simmons v. United States*, 649 F.3d 237 (4th Cir. 2011) (en banc); *United States v. Haltiwanger*, 637 F.3d 881 (8th Cir. 2011); *United States v. Brooks*, 751 F.3d 1204 (10th Cir. 2014); *US v. Valencia-Mendoza*, __ F.3d __, 2019 WL 149827 (9th Cir. Jan. 10, 2019).

-A defendant may challenge his federal drug sentence on collateral review on the basis that a prior conviction used to enhance his sentence, no matter how old, does not qualify as a "felony drug offense," or after the First Step Act as a "serious drug felony" or a "serious drug offense." *See* 28 U.S.C. § 2255(a) (for a first § 2255); *United States v. Wheeler*, 886 F.3d 415, 430-33 (4th Cir. 2018) (under § 2241 when § 2255 is inadequate or ineffective because § 2255(h) does not allow a second or successive motion based on a rule of statutory construction).

-Obviously, a defendant may challenge an enhanced federal sentence on direct appeal or collateral review when a prior conviction used to enhance the sentence is void under *Johnson* 2015. This is now relevant because the First Step Act requires enhancement for a "serious violent felony," defined in part as any offense that "by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense." 18 U.S.C. § 3559(c)(2)(F)(ii).

-*See also United States v. Holyfield*, 2011 WL 1322298 *2 (D. Colo. Apr. 6, 2011) (magistrate judge erred by refusing on the basis of § 851(e) to allow defendant to challenge the legal effect of his 1993 conviction by arguing that he was convicted of a misdemeanor, not a felony, which was not an attack on the "validity" of the conviction); *United States v. Sanchez*, 2011 WL 1885348 (D. Conn. May 18, 2011) (treating claim in § 2255 motion that conviction was not for a "felony" as not barred by § 851(e)); *United States v. Martin*, 834 F. Supp. 2d 115, 130-32 (E.D.N.Y. Nov. 9, 2011 (same); *United States v. Harris*, 369 F.3d 1157, 1167-68 (10th Cir. 2004) (Section 851(e) does not apply to an argument that does not challenge the "validity" but the legal effect of prior convictions); *United States v. Geer*, 320 F. Supp. 2d 1335, 1343-44 (S.D. Fla. 2004) (Section 851(e) does not apply to challenges to legal effect of, or factual allegations regarding, prior convictions); *United States v. Cirillo*, 666 F. Supp. 613, 614-16 (S.D.N.Y. 1987) (where defendant filed § 2255 attacking the validity of a 45-year-old conviction used to enhance his federal sentence on a variety of grounds, district court treated § 851(e) as precluding such claims only at sentencing and denied the claims on the merits).

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conclusively presumed valid by dint of the limitations provision in § 851(e)." *Id*. at 189. Further, the court held, Roberson "has waived any subsequent challenge" by "failing to challenge the validity of the prior conviction prior to sentencing," *id*., but at the same time the court's failure to advise him that he would waive any challenge not made prior to sentencing as required by subsection (b) was harmless because he could never challenge the validity of the prior conviction under subsection (e). *Id*. at 187 n.9. The court acknowledged that its attempt "to understand congressional intent" was "not a certain thing," and that what "Congress might have said or done" if *Custis*, *Daniels*, and *Johnson* "had been decided when it enacted § 851 was pure speculation." *Id*. at 186 n.6, 188. But, as noted above, the Supreme Court and lower courts were already exercising habeas jurisdiction in the manner Roberson requested when § 851 was enacted, Congress is presumed to know that, and it requires "a clear statement of congressional intent to repeal habeas jurisdiction." *I.N.S. v. St. Cyr*, 533 U.S. 289, 289 (2001).

Procedural Considerations for 2255s

When your § 2255 seeks to re-open the sentence because a prior conviction has been vacated, you can rely on the statute of limitations at § 2255(f)(4), which allows filing within a year of the date on which the "facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." "[T]he period begins when a petitioner receives notice of the order vacating the prior conviction, provided that he has sought it with due diligence in state court, after entry of judgment in the federal case with the enhanced sentence." *Johnson v. United States*, 544 U.S. 295, 298 (2005). The government forfeits any statute of limitations argument by not raising it until appeal. *See Arreola-Castillo*, 889 F.3d at 382-84.

Such a motion is not second or successive within the meaning of § 2255(h) because the claim was not ripe until the conviction was vacated. *See generally Panetti v. Quartermain*, 551 U.S. 930, 947 (2007). For cases in this context, *see Stewart v. United States*, 646 F.3d 856, 863, 865 (11th Cir. 2011); *In re Weathersby*, 717 F.3d 1108 (10th Cir. 2013); *United States v. Hairston*, 754 F.3d 258, 262 (4th Cir. 2014); *Arreola*-Castillo *v. United States*, 889 F.3d 378, 381 (7th Cir. 2018) (noting that district court ruled 2255 motion was not second or successive because claim "did not become ripe until his state convictions were vacated"). For cases in other contexts, *see Purvis v. United States*, 662 F.3d 939, 944-45 (7th Cir. 2011); *United States v. Obeid*, 707 F.3d 898 (7th Cir. 2013); *Johnson v. Wynder*, 408 F. App'x 616, 619 (3d Cir. 2010); *Leal Garcia v. Quarterman*, 573 F.3d 214, 222-24 (5th Cir. 2009); *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010); *Morgan v. Javois*, 744 F.3d 535 (8th Cir. 2013); *United States v. Buenrostro*, 638 F.3d 720, 725-26 (9th Cir. 2011).

If you encounter an insurmountable procedural hurdle, and the prior conviction was a "serious violent felony" as defined in 18 U.S.C. § 3559(c)(2), you can try invoking the statutory right to resentencing for such convictions. Only § 851(a) applies, *id*. § 3559(c)(4), and there is a statutory right to resentencing with no procedural bars:

> If the conviction for a serious violent felony . . . that was a basis for sentencing under this subsection is found, pursuant to any appropriate State or Federal procedure, to be unconstitutional or is vitiated on the explicit basis of innocence, or if the convicted person is pardoned on the explicit basis of innocence, the person serving a sentence imposed under this subsection shall be resentenced to any sentence that was available at the time of the original sentencing.

18 U.S.C. § 3559(c)(7).

Section 851(b) & (c)(2)

The "inquiry" required by § 851(b) is unconstitutional under subsequent Supreme Court law.

Subsection (b) requires the court to "inquire" whether the defendant "affirms or denies that he has been previously convicted as alleged in the information," and to simultaneously "inform him that any challenge

to a prior conviction which is not made before the sentence is imposed may not thereafter be raised to attack the sentence." In other words, the defendant must answer—incriminating himself and relieving the government of its burden of proof if he affirms[21]—or, he is told, he has waived "any" challenge.

Almost thirty years after § 851 was enacted, the Supreme Court held in *Mitchell v. United States*, 526 U.S. 314 (1999), a federal sentencing case, that defendants have the right to claim their Fifth Amendment privilege against self-incrimination regarding sentencing factors, that no negative inference may be drawn from their silence, and that this rule applies whether the defendant was convicted by a jury or by guilty plea. *Id*. at 317, 320-21, 323-25. The Court rejected the government's contention that it could put the defendant on the stand at sentencing to see if she would admit a sentencing fact—just as § 851(b) requires. "The result would be to enlist the defendant as an instrument in his or her own condemnation, undermining the long tradition and vital principle that criminal proceedings rely on accusations proved by the Government, not on inquisitions." *Id*. at 324-25. "The concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing," where "the central purpose of the privilege-to protect a defendant from being an unwilling instrument of his or her own condemnation-remains of vital importance." *Id*. at 329. *See also Estelle v. Smith*, 451 U.S. 454, 462 (1981) ("The essence of this basic constitutional principle is the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.").

Subsection (c)(1) requires the government to prove beyond a reasonable doubt that the defendant was convicted as alleged in its information, but subsection (b) enlists the defendant in proving that he was, and if he does not answer, he is told, he waives "any" challenge. This violates the Fifth Amendment.

851(b) and (c)(2)'s waiver provisions are either unconstitutional or do not effect a waiver.

Section 851(b) requires the district court to "inform [the defendant] that any challenge to a prior conviction which is not made before the sentence is imposed may not thereafter be raised to attack the sentence."

Section 851(c)(2), which applies to a "challenge" to a prior conviction on the basis that it "was obtained in violation of the Constitution of the United States," goes on to say that "[a]ny challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge."

A waiver is "an intentional relinquishment or abandonment of a known right," and must be "knowing and intelligent." *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938).

The D.C. Circuit described § 851(b) as "plac[ing] the onus on the district court to ensure defendants are fully aware of their rights." *United States v. Baugham*, 613 F.3d 291, 296 (D.C. Cir. 2010). But it actually requires the court to (unconstitutionally) interrogate the defendant and warn him that "any" challenge not raised before sentence is imposed is waived "thereafter." It does not require the court to advise the defendant that he has the right to challenge a prior conviction, on what basis, or any other rights. While subsection (d)(2) reveals that the court might determine that the defendant "has not been convicted as

[21] The government bears the "burden of proof beyond a reasonable doubt on any issue of fact." 21 U.S.C. § 851(c)(1).

alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law," there is no requirement in subsection (b) or anywhere else in the statute that the court advise the defendant that he has the right to challenge an alleged prior conviction on these or any other bases.

The provision effects an involuntary waiver because it is automatically imposed by statute. The automatic waiver is not knowing and intelligent because the court is not required to advise the defendant that he has the right to challenge a prior conviction or on what basis.

Moreover, neither the court nor the defendant can know that the defendant can challenge a prior conviction at sentencing on a basis that did not yet exist, such as newly discovered evidence, a change in statutory or constitutional law, or a vacatur that has not been entered.

Well-reasoned decisions find that § 851(c)(2)'s waiver provision applies only to a full-blown collateral attack at sentencing on a prior conviction that is more than five years old on the ground that it was obtained in violation of the Constitution. *See United States v. McChristian*, 47 F.3d 1499, 1503 (9th Cir. 1995); *Arreola*-Castillo *v. United States*, 889 F.3d 378, 385-86 (7th Cir. 2018); *Vizcaino v. United States*, 981 F. Supp. 2d 104, 109-10 (D. Mass. 2013).

Consequences of court's failure to comply with § 851(b)

When the district court did not comply with § 851(b), the defendant cannot be deemed to have waived (on direct appeal) or procedurally defaulted (on collateral review) any objection or challenge to a prior conviction. *See United States v. Ocampo-Estrada*, 873 F.3d 661, 666-67 (9th Cir. 2017); *United States v. Espinal*, 634 F.3d 655, 664-65 (2d Cir. 2011). Put another way, the court's failure to comply ought to be deemed "good cause."

The First Circuit, however, has applied plain error review because the defendant failed to object, *see United States v. Dickinson*, 514 F.3d 60, 64-65 (1st Cir. 2008), thus "penaliz[ing] a defendant for not alerting the district court of its failure to alert him." *Baugham*, 613 F.3d at 296.

According to the Fifth Circuit, the "ritual required by § 851(b) is a functional one, and its omission can result in very real prejudice to a defendant who learns only after he attempts to challenge the prior conviction that that conviction has become unassailable." *United States v. Cevallos*, 538 F.2d 1122, 1128 (5th Cir. 1976). Such prejudice is impossible for a court of appeals to know and easy to discount in hindsight. *Id*.

Nonetheless, the error is often held harmless, but courts of appeals have held that the error was not harmless in at least three cases. *See United States v. Rodriguez*, 851 F.3d 931, 946-48 (9th Cir. 2017); *United States v. Espinal*, 634 F.3d 655, 665-67 (2d Cir. 2011); *United States v. Cevallos*, 538 F.2d 1122, 1126-28 (5th Cir. 1976); *see also United States v. Lopez*, 907 F.3d 537, 548 (7th Cir. 2018) ("Although we find harmless error, we emphasize that the availability of the harmless error analysis is not a license to skirt mandatory procedures. We remind district courts to follow the detailed procedures set forth in § 851 to ensure the integrity and fairness of the sentencing process. This is not our first time saying this.").

Section 851(d)(2)

Section 851(d)(2) provides that if the court determines that the person "has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination," and the defendant "may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered." The defendant gets no interlocutory appeal.

Should the government claim the right to an interlocutory appeal, the court should reject it. The purpose of this provision has ceased to exist. When § 851 was enacted, the government did not have the right to appeal a sentence if it was within statutory limits, but the Sentencing Reform Act gave both parties a right to appeal. *See* 18 U.S.C. § 3742.

Moreover, giving the government a right to an interlocutory appeal, but not the defendant, is unconstitutional. Once an appeal right is established by Congress, it "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); s*ee also Johnson v. Avery*, 393 U.S. 483 (1969). *Cf. Halbert v. Michigan*, 545 U.S. 605, 610 (2005) ("[A] State may not 'bolt the door to equal justice' to indigent defendants."). There is no reason for the government to have a right to the extraordinary remedy of an interlocutory appeal, while the defendant has no such right.

Appendix - Section 851

(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.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

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

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

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations. No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.