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EDWARD NOLAN NORWOOD, DEF. # 2

UNITED STATES DISTRICT COURT

DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

EDWARD NOLAN NORWOOD,

Defendants.

Case No. CR 13-388-JVS-2

DEFENDANT'S REPLY TO GOVERNMENT'S OPPOSIITION TO DEFENDANT'S MOTION TO DISMISS INFORMATION FILED PURSUANT TO 21 U.S.C. § 851 [CR-104]; EXHIBIT D-E

Date: November 30, 2015
Time: 9:00a.m.
Courtroom: 10C

The defendant, Edward Nolan Norwood, by and through his counsel of record, David S. McLane, hereby files this Reply to the Government's Opposition to Defendant's Motion to Dismiss Information Filed Pursuant to 21 U.S.C. §851.

Defendant's Reply is based on the attached Memorandum of Points and Authorities, all pleadings and papers on file in this action, and such other evidence and argument as may be presented on behalf of Defendant at the hearing on this Motion.

DATED: November 16, 2015

Respectfully submitted,

KAYE, McLANE, BEDNARSKI & LITT, LLP

By: */s/DAVID S. McLANE*_____
DAVID S. McLANE

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I. INTRODUCTION

The government seeks to use a prior misdemeanor conviction for simple possession of 7 grams of crack cocaine, to double to 10 years the potential mandatory minimum sentence in the instant case involving 33 grams of crack cocaine. Essentiality, the government is advocating for a minimum of one year incarceration for every 4 grams of crack cocaine involved if Mr. Norwood is convicted. The government takes this position despite the clear language of the California statute, a well-reasoned opinion on all fours to the contrary issued by Hon. Judge Virginia Phillips, and the ground swell of public policy and opinion condemning the draconian mandatory minimums arbitrarily foisted upon young African-Americans like Mr. Norwood in cases involving crack cocaine. It also maintains this position despite the fact that it must concede anyone convicted of the identical possession offense in California today will only receive a misdemeanor (and thus no §851) and despite the fact that under federal law simple possession of narcotics is a misdemeanor. *See*, 21 U.S.C. § 844.

Consistent with the recent opinion in *United States v. Sumney*, this Court should dismiss the Information alleging Mr. Norwood's prior felony drug conviction.

II. ARGUMENT

A. *UNITED STATES V. NORBURY* IS NOT CONTROLLING

The government appears to concede that *United States v. Sumney* 15-00625-VAP (Sept. 30, 2015 C.D. Cal.) is the only persuasive authority in this Circuit directly on point. Conspicuously absent from the government's opposition, however, is any real analysis of Judge Phillip's thorough and well-reasoned opinion. Rather, the *Sumney* opinion is relegated to a single footnote in the

government's brief where it claims the case was "wrongly decided" and it "is evaluating whether to seek review." *See*, Gov. Opp. at p. 7, fn. 4.

Instead, the government relies heavily on *United States v. Norbury* 492 F.3d 1012 (9th Cir. 2007)(Gov. Opp at p. 4), a case that never addresses Proposition 47 and in fact was decided seven years before its passage. Specifically, the government bases its argument on the following passage:

> An expunged or dismissed state conviction qualifies as a prior conviction if the expungement or dismissal does not alter the legality of the conviction or does not represent that the defendant was actually innocent of the crime.

Norbury, 492 F.3d at 1015, citing *Dickerson v. New Banner Institute,* Inc., 460 U.S. 103 (1983)(Gov. Opp. at p. 5).

Dickerson provided the original language quoted above. *Dickerson*, 460 U.S. at 1015. At issue in *Dickerson* was whether a defendant who had complied with Iowa's "expunction provisions" -- by which a defendant pleads guilty, is placed on probation, has final judgment "deferred," and, having completed probation, is discharged, *Id*. at 107-08 -- had sustained a prior offense within the meaning of the federal firearms statutes. In holding that he had, *Dickerson* held:

> But, in contrast, expunction does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty. Expunction in Iowa means no more than that the State has provided a means for the trial court not to accord a conviction certain continuing effects under state law.

Id. at 115. This is manifestly not the case here. California actually reaches back in time and "redesignates" the offense a misdemeanor, and not a felony. It is not a mere resentencing or "expungement" -- California actually legally changes the conviction. As is clear from the Minute order attached to Defendant's Motion as Exhibit B, the court actually amended the original *information* or charging

document in Mr. Norwood's case to a misdemeanor. *Id. (*"The Court orders information deemed amended to allege count 1 as a misdemeanor…").

Thus, Mr. Norwood is deemed legally to never been charged, or convicted, of a felony. To still attempt to classify his misdemeanor drug possession conviction as a felony flies in the face of California law, the will of the California people, the deference under 18 U.S.C. §§ 841 and 851which rely on state law, not federal law, to define what is, and what is not, a federal felony drug conviction.

The Proposition distinguished between a "resentenced" and "changed" conviction, not merely a changed or reduced offense: "no offender who has committed a specified severe crime could be resentenced or have their conviction changed." California General Election: Tuesday, November 4, 2014, Officer Voter Information Guide, California Secretary of State, "Prop 47," at 36 (emphasis added).

Similarly, the offense is not expunged or reduced or dismissed, it is literally "changed" from a misdemeanor to a felony "for all purposes": certain offenders can apply "to have their felony conviction *changed* to a misdemeanor." Id. (emphasis added). Further, there is no "legal" felony conviction as the offense has changed into a misdemeanor; therefore, as mentioned by *Dickerson* and *Norbury*, the "legality" of the conviction itself has changed. The prior felony conviction is no longer valid.

Additionally, to the extent that California has now explicitly reclassified Nr. Norwood's prior offense as a misdemeanor, *Dickerson*'s rule requiring interpretation as a matter of federal law has no application because, for purposes of § 841(b), Congress has defined the term 'felony' to mean any state offense classified by applicable law as a felony. 21 U.S.C. §802(13). Given the plain

language of Proposition 47, the misdemeanor status of Mr. Norwood's prior offense would control. *United States v. McAllister*, 29 F.3d 1180, 1185 (7 Cir. 1994)(recognizing that § 841(b)(1)(B) relies on the state law to determine the difference between a felony and a misdemeanor).

The government also cites *Norbury* for the proposition that expunged or dismissed cases do not impact the legality of the conviction under 21 U.S.C. § 841. (Gov. Opp. at p. 10) Unlike *Norbury*, however, Mr. Norwood does not contend the state court's action constitutes a "dismissal" of his 2007 prior. To the contrary, he agrees that he remains, to this day, "convicted" of the section 11350(a) offense, and contends instead that his 2007 conviction is no longer a "felony" within the meaning of section 841. Because *Norbury* construed a term not at issue in this case—"conviction"—it is inapposite.

California does not refer to Proposition 47's operative mechanism as an expungement or dismissal: the defendant petitions to have his felony conviction "designated" a misdemeanor. California Penal Code §1170.18 (b) (3) (f); *see also* subsection (g) ("the court shall designate the felony offense or offenses as a misdemeanor). The term "designate," being unique, must mean something different than what is meant by "expungement," "dismissal," "reduction," etc., all of which are terms that California uses in other sections in the California Penal Code. Subsequent dismissals and expungements are post-conviction decisions: a "designation" for all purposes, one that is retroactive in that it reaches defendants whose convictions are final, whose sentences are served, and whose parole period has expired, reaches back to the very act of conviction, and "redesignates" the offense as a misdemeanor. Thus, Mr. Norwood was convicted of a misdemeanor drug offense.

B. MR. NORWOOD'S STATUS AT THE TIME HE COMMITTED THE CHARGED OFFENSE IS NOT CONTROLLING

The Government cites a host of decisions which stand, generally speaking, for the proposition that a defendant's status at the time he "committed the charged federal drug offense" is dispositive for purposes of federal sentencing, regardless of any subsequent developments. None of the government's citations, however, actually speaks to the issue in Mr. Norwood's case. Instead, the government is grasping at straws to maintain Mr. Norwood's misdemeanor drug possession is still a felony when it simply is not. The rationale behind those cases simply do not apply to the situation we have here: Proposition 47 retroactively reclassified Mr. Norwood's' drug conviction as a misdemeanor, both in charge and conviction.

The government maintains that *U.S. v. McGlory*, 968 F.2d 309 (3rd Cir. 1992), supports its position even after this argument was soundly rejected in by the court in *Sumney*. In *McGlory* the defendant received a felony conviction for violating a statute that was later repealed. *Id.* at 348. The statute, Pa. Stat. Ann. § 780-113 (a) (16), (b) (1977 and Supp. 1991) makes the possession of a controlled substance, here cocaine, a misdemeanor. In the Controlled Substance, Drug, Device and Cosmetic Act of April 14, 1972 (now codified in Pa. Stat. Ann. §§ 780-101 et seq.) Pennsylvannia *repealed* the original statute under which McGlory was convicted. *McGlory*, 968 F.2d at 348. It is was not "reduced to a misdemeanor" nor was in "redesignated" as it would be under California's Proposition 47.

In short, McGlory was convicted of statute A (in which cocaine possession was a felony), but subsequently Pennsylvania repealed that statute, creating a new statute B (in which cocaine possession was a misdemeanor). McGlory then claimed, essentially, that his conviction for the repealed statute should not be considered a felony because that statute no longer existed, and was replaced by a

new statute in which the crime is a misdemeanor. *McGlory*, 968 F.2d at 348. There is no argument in *McGlory* that Pennsylvania decided to "redesignate" prior felony possession cases as "misdemeanors for all purposes" similar to Proposition 47. *McGlory* notes the confusion that would result if the federal courts had to analyze which statutes in which states were replaced by other statutes, and that the repeal of a statute "is not applied retroactively to final judgments." *McGlory* at 350. Here, the rationale of *McGlory* does not apply. There is no such confusion: the "redesignation" of felonies as misdemeanors is written into the statutes and reflected by the orders of the court in which the conviction appears. Moreover, California Penal Code § 1170.19(k) is expressly retroactive in "redesignating" old felony possession cases as misdemeanors. Finally, there was no provision in Pennsylvania law that prior offenses for the felony drug possession of which McGlory was convicted either were, or could be, transformed into a misdemeanor offense by the repeal of the old statute and the enactment of the new one. *McGlory* is distinguishable since Pennsylvania did not apply its statute retroactively to redesignate the conviction, while California is exactly the opposite: the statute itself provides for that with full retroactivity. As the court noted in *Sumney*, "the government's strongest authority for its position [*McGlory*] explicitly distinguished itself from cases like the one presently before the court." *Sumney* at p.10; Exhibit C.

The same is true for *McNeill v. United States*, 131 S. Ct. 2218, 2220-21 (2011), an ACCA case in which the defendant similarly sought relief based on a favorable change in North Carolina law that had no effect on the underlying state court judgment. In fact, *McNeill* expressly declined to address the effect in federal court where a "State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants

previously convicted and sentenced for that offense." *Id.* at 2224 n.1.

This case is also different from *United States v. Salazar-Mojica*, 634 F.3d 1070 (9th Cir. 2011) and *United States v. Yepez*, 704 F.3d 1087 (9th Cir. 2012) (*enbanc*). Those cases address the effect on the United States Sentencing Guidelines if a prior state court judgment is modified subsequent to the commission of the federal offense. *See Id.* In *Salazar-Mojica*, this Court held that "[t]here is no indication in the Guidelines that § 2L1.2(b)(1) is intended to entertain changes in felony status that occur after the deportation." 634 F.3d at 1074. Similarly in *Yepez*, the *en banc* Court held that "[b]y its plain language, [U.S.S.G. § 4A1.1(d)] looks to a defendant's status at the time he commits the federal crime." 704 F.3d at 1090. Unlike these Guidelines provisions, however, Title 21 *expressly* permits challenges to prior convictions based on subsequent developments. *See* 21 U.S.C. § 851(c)(2). Indeed, the Court need look no further than *United States v. McChristian*, 47 F.3d 1499 (9th Cir. 1995) where the Court held that "the district court erred in precluding [the defendant] from showing that his 1982 conviction had been invalidated" based on a change to his state court prior obtained *after* the federal indictment issued. 47 F.3d at 1502, 1504. Whatever the import of the Government's cases under the ACCA or the Guidelines[1], Mr. Norwood is entitled to relief under Title 21.

This case is also distinguishable from the reduction of "wobblers" in California to which the government desperately attempts to analogize. (Gov. Opp. at p. 7). Wobblers permit California judges to treat serious conduct as a felonious

[1] There are examples where the Ninth Circuit has held prior convictions which are subsequently challenged *not on the basis of legality or "actual innocence"* do not count as prior convictions under the career offender provisions of USSG 4B1.1. *See, e.g. United States v. Hidalgo,* 932 F.2d 905 (9th Cir. 1991)(holding that prior robbery conviction "set aside" pursuant to California Welfare and Institutions Code §1772(a) did not count as a prior crime of violence).

unless and until the defendant, through good conduct, demonstrates that he merits more lenient treatment. A California court's decision to reduce a wobbler to a misdemeanor thus reflects a discretionary judgment that "the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in a state prison as a felon." *People v. Park*, 56 Cal. 4th 782, 790 (2013). *See also People v. Banks*, 53 Cal. 2d 370, 388 (1959), superseded by statute on other grounds as stated in *Park*, 56 Cal. 4th 782 (2013) (recognizing presumption that where a wobbler was initially treated as a felony, the defendant would "remain classified as one convicted of a felony . . . until and unless the . . . offense was reduced to a misdemeanor by imposition of appropriate sentence or until defendant successfully completed probation and received the statutory rehabilitation provided for by . . . the Penal Code"). Viewed in this light, it makes sense for wobblers to be treated as felonies while they're still felonies, but later, to be treated as misdemeanors "for all purposes," once the defendant convinces the court he merits a more lenient judgment. The reduction has nothing to do with the classification of the conviction or what the defendant was convicted, but is based on post-offense conduct. Here, reclassification goes to the nature of the conviction.

Proposition 47 is different. It reflects the collective will of the People of California that certain offenses, including simple possession of drugs in violation of section 11350(a), are categorically "nonserious, nonviolent crimes" which merit a misdemeanor designation "unless the defendant has prior convictions for specified violent or serious crimes." See 2014 Cal. Legis. Serv. Prop. 47 §3(3). So too, Proposition 47 demands that it "shall be liberally construed to effectuate its purposes." Id. §18. Under these provisions, and in contrast to wobblers, Proposition 47 reflects a judgment by California voters that section 11350(a) was

never serious enough to warrant a felony classification, absent aggravating priors. Viewed in this light, the government is incorrect that there is no indication that the voters intended retroactive application of Proposition 47's remedy. (Gov. Opp. at p. 8.) To the contrary, Proposition 47 reflects an electoral determination that section 11350(a)'s prior felony classification was, essentially, a legislative error that (a) never should have occurred, and (b) required correction. Accordingly, there is every reason to believe that Proposition 47 was intended to—and does—reach back in time to right the wrongs of the past.[2]

Finally, the government cites to *People v. Perez*, 190 Cal.Rptr.3d 738 (2015) *petition for review filed* September 3, 2015 (S229046)(Gov. Opp. at p.8) which held that because a defendant was facing a felony charge when he failed to appear, the subsequent reduction of the underlying drug charge had no effect on the defendant's felony failure to appear charge. *Id.* at 743-44. As noted by the government the defendant in that case has petitioned for review and Mr. Norwood would submit it is at odds with *People v. Buycks*, 194 Cal.Rptr.3d 33 (2015) where the defendant committed a felony narcotics offense (H&s 11350)(the "first case") and while out on bail committed two additional felony offenses (the "second case."). *Id.* at 34. At sentencing, the court imposed a sentencing enhancement under PC §12022.1 for committing the second case while on bail for a felony in the first case. *Id.* The defendant subsequently reduced the felony drug possession in the first case to a misdemeanor under Prop 47 but the judge refused to strike the

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[2] The Government's reliance on Penal Code §1170.18(n) does not affect this conclusion. (Gov. Opp. at p.8). As the Government notes, section 1170.18(n) provides that "[n]othing in this section is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." SAB 22, *quoting* Cal. Penal Code §1170.18(n). Whatever the import of subsection (n) in other cases, it has no application here, because Mr. Norwood's case fell within the purview of the act, just as the Superior Court ruled.

enhancement in the second case despite the fact that it was no longer committed while on bail for a prior felony. *Id.* The Appellate Court reversed, holding "voters intended to treat a defendant whose primary offense is reduced to a misdemeanor under Proposition 47—which thereafter "shall be considered a misdemeanor for all purposes" (§ 1170.18, subd. (k))—like the other categories of defendants excluded from the on-bail enhancement based on the disposition of their offenses, and thereby exclude them from eligibility for the on-bail enhancement at resentencing on the secondary offense." *Id.* at 38.

C. THE GOVERNMENT'S POSITION VIOLATES MR. NORWOOD'S EQUAL PROTECTION RIGHTS

Under the government theory, due only to unfortunate timing, Mr. Norwood will forever have a "felony," albeit a felony conviction that was later "designated" as a misdemeanor, and will forever be subject to the enhanced sentence by means of a § 851 information. This is true even though persons convicted under the same statute after Proposition 47 would only be convicted of misdemeanors that could not support such enhancements. The government's contention violates Mr. Norwood's equal protection rights: persons convicted of exactly the same state offense receive different
treatment in federal court.

For challenges made on constitutional equal protection grounds, the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate government interest. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985); *Von Robinson v. Marshall*, 66 F.3d 249, 251 (9th Cir.1995); *United States v. Harding*, 971 F.2d 410, 412 (9th Cir.1992). A sentencing scheme that does not disadvantage a suspect class or infringe upon the exercise of a fundamental right, as is the case here, is subject only to rational basis scrutiny. *See Harding*, 971 F.2d

at 412. It can be disturbed only if the defendant can prove "that there exist no legitimate grounds to support the classification." *Id*. at 413, *citing Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

There is no rational basis for the distinction here. As reflected in the Proposition's language, the drafters', and the voters', interest in passing a liberally construed, broadly reaching, and fully retroactive statute was intense:

"This act shall be liberally construed to effectuate its purposes." The Safe Neighborhoods and Schools Act (Proposition 47), Section 18. Given the immense popular mandate in California to "redesignate" certain felonies as misdemeanors, and given the non-ambiguous language in the proposition -- "[r]equire misdemeanors instead of felonies," *Id*. at Section 3. Purpose and Intent, Sub-Section (5) (emphasis added), what federal interest could there be in treating offenses that have been reduced to misdemeanors, and that currently are misdemeanors, as felonies? This is particularly true when the crime of drug possession is itself a misdemeanor under federal law. See 21 U.S.C. §844.

Mr. Norwood submits this is also consistent with the recent November 9, 2015 letter written by Yale Law School professor Kate Stith to the Hon. Loretta E. Lynch, Attorney General of the United States attached hereto as Exhibit D. The letter asks the United States Attorney "to reiterate and enhance compliance" with former Attorney General Eric Holder's September 2014 Memorandum instructing U.S. Attorney's not to "leverage" 21 U.S.C. § 851 enhancements to induce defendants to plead guilty. *Id.* The letter was prompted by comments from Steven Cook of the NAAUSA stating the Holder Memo has been interpreted differently by individual prosecutors, sometimes in the same office and data analysis by students at Yale Law School revealing inconsistent application of the Holder

memos. *Id.;* Exhibit E, September 24, 2014 Memorandum from former Attorney General Eric Holder.

Mr. Norwood submits that it is in the interest of consistency and uniformity that his prior conviction for simple possession of narcotics be treated the same any other defendant with the identical offense in California after November 2014 or under the federal possession statute 21 U.S.C. §844. To do otherwise is irrational and violates Mr. Norwood's equal protection rights.

III. CONCLUSION

For the foregoing reasons, Mr. Norwood respectfully requests that the Court grant Mr. Norwood's motion and dismiss the Information filed pursuant to §851.

DATED: November 16, 2015

Respectfully submitted,

KAYE, McLANE, BEDNARSKI & LITT, LLP

By: */S/DAVID S. McLANE*_____
DAVID S. McLANE

EXHIBIT D

Yale Law School

KATE STITH *Lafayette S. Foster Professor of Law*

November 9, 2015

Hon. Loretta E. Lynch
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

Dear Attorney General Lynch:

We write to urge you to issue renewed guidance to all U.S. Attorneys to reiterate and enhance compliance with former Attorney General Eric Holder's September 2014 Memorandum ("Holder Memo") instructing U.S. Attorneys not to leverage 21 U.S.C. § 851 enhancements to induce defendants to plead guilty. Recent statements by Steven H. Cook, head of the National Association of Assistant United States Attorneys (NAAUSA), as well as field research being conducted by students at Yale Law School, suggest that at least some federal prosecutors are not consistently complying with this policy. This creates prosecutor-driven disparities that are plainly unwarranted.

As you are well aware, § 851 enhancements dramatically increase mandatory minimum sentences for drug offenses: if a defendant convicted of selling a threshold amount of drugs has one prior felony drug conviction (in state or federal court) and the prosecutor has so informed the court pursuant to § 851, the mandatory statutory range doubles from ten-years-to-life to twenty-years-to-life. If the prosecutor has filed a § 851 notice of two prior felony drug convictions, the statutory range increases to a mandatory life-without-parole sentence. The definition of a "prior felony drug offense" is extremely broad, including even crimes that are classified as misdemeanors under state law, convictions that do not result in jail time, and offenses so old that they are not even calculated as part of the defendant's criminal history under the Sentencing Guidelines, as long as the offense potentially carried a sentence of more than one year in prison. Once a prosecutor files a § 851 enhancement, the sentencing judge has no discretion to impose a sentence below the enhanced mandatory minimum.

In August 2013 (following up on the Department's charging policy announced in May 2010), former Attorney General Holder issued a Memorandum urging prosecutors to decline to file an information pursuant to § 851 "unless the defendant is involved in conduct that makes the case appropriate for severe sanctions" based on six criteria. In September 2014, the former Attorney General clarified that "[w]hether a defendant is pleading guilty is ***not*** one of the factors" prosecutors should consider when assessing whether to file an enhancement (emphasis added). Recognizing the risk that the threat of severe mandatory sentencing terms can create excessive pressure on a defendant to forgo constitutionally protected rights, former Attorney General Holder stated directly that an "§ 851 enhancement should not be used in plea

negotiations for the sole or predominant purpose of inducing a defendant to plead guilty . . . . A practice of routinely premising the decision to file an § 851 enhancement solely on whether a defendant is entering a guilty plea . . . is inappropriate and inconsistent with the spirit of the [May 2010] policy."

Despite these directives, there is mounting evidence that at least some U.S. Attorneys still consider it appropriate to routinely threaten to file § 851 enhancements if defendants exercise their right to go to trial. Last week, the Washington Post reported that Steven Cook of NAAUSA "said the rates of cooperation have not changed in part because mandatory sentences are still in play as leverage in negotiations. The Holder memo, he said, has been interpreted differently by individual prosecutors, sometimes in the same office. Defense attorneys 'understand that this tool is still in our pocket.'"

Though the study is still ongoing, preliminary inquiries and data analysis by students at Yale Law School likewise reveal inconsistent application of the Holder Memos. Moreover, prosecutors in many districts continue to wield the explicit or implicit threat of § 851 enhancements to induce defendants to plead guilty. In numerous districts across the country, it is common knowledge that a prosecutor will almost certainly file an enhancement if a defendant elects to go to trial. Such practices contravene the spirit and letter of the Holder Memos.

We urge you to issue renewed guidance to all U.S. Attorneys in order to ensure compliance with and consistent application of the August 2013 and September 2014 Holder Memos. Additionally, in order to foster and facilitate consistent application of federal sentencing laws nationwide, we recommend that you (1) include these policies in the U.S. Attorneys' Manual, and (2) require U.S. Attorneys to report when they file § 851 enhancements, and their reasons for doing so pursuant to the Holder Memos.

Sincerely,

Kate Stith
Lafayette S. Foster Professor of Law
Yale Law School

Douglas Berman
Robert J. Watkins/Procter & Gamble Professor of Law
The Ohio State University Moritz College of Law

Mark Osler
Robert and Marion Short Professor of Law
University of St. Thomas (MN)

EXHIBIT E

Office of the Attorney General
Washington, D. C. 20530

September 24, 2014

TO: DEPARTMENT OF JUSTICE ATTORNEYS

FROM: THE ATTORNEY GENERAL

RE: Guidance Regarding § 851 Enhancements In Plea Negotiations

The Department of Justice's charging policies are clear that in all cases, prosecutors must individually evaluate the unique facts and circumstances and select charges and seek sentences that are fair and proportional based upon this individualized assessment. "Department Policy on Charging and Sentencing," May 10, 2010. The Department provided more specific guidance for charging mandatory minimums and recidivist enhancements in drug cases in the August 12, 2013, "Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases." That memorandum provides that prosecutors should decline to seek an enhancement pursuant to 21 U.S.C. § 851 unless the "defendant is involved in conduct that makes the case appropriate for severe sanctions," and sets forth factors that prosecutors should consider in making that determination. Whether a defendant is pleading guilty is not one of the factors enumerated in the charging policy. Prosecutors are encouraged to make the § 851 determination at the time the case is charged, or as soon as possible thereafter. An § 851 enhancement should not be used in plea negotiations for the sole or predominant purpose of inducing a defendant to plead guilty. This is consistent with long-standing Department policy that "[c]harges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned to arrive at a plea bargain that does not reflect the seriousness of the defendant's conduct." "Department Policy on Charging and Sentencing," May 19, 2010.

While the fact that a defendant may or may not exercise his right to a jury trial should ordinarily not govern the determination of whether to file or forego an § 851 enhancement, certain circumstances -- such as new information about the defendant, a reassessment of the strength of the government's case, or recognition of cooperation -- may make it appropriate to forego or dismiss a previously filed § 851 information in connection with a guilty plea. A practice of routinely premising the decision to file an § 851 enhancement solely on whether a defendant is entering a guilty plea, however, is inappropriate and inconsistent with the spirit of the policy.