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The Offense: Interpreting the Indictment Requirement in 21 U.S.C. § 851

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NOTE

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TABLE OF CONTENTS

INTRODUCTION

Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("the Act")[1] to unify and rationalize its treatment of drug offenses.[2] The Act was an enormous piece of legislation, requiring months of congressional hearings before it was passed.[3] To-

* I would like to thank Peter Westen for comments on an earlier draft and Michael Heller for three years of support and advice.

1. 21 U.S.C. §§ 801-971 (1994).

2. *See* Act of Oct. 27, 1970, Pub. L. No. 91-513, 1970 U.S.C.C.A.N. (84 Stat. 1236) 4566, 4567; *see also* United States v. Santana, No. 95-10284-PBS-008, 1997 WL 258599, at *2 (D. Mass. Mar. 11, 1997) (quoting same) ("[T]he legislative policy of the Comprehensive Drug Abuse Prevention and Control Act of 1970 [was] to 'deal in [a] comprehensive fashion with the growing menace of drug abuse in the United States' in part by 'providing for an overall balanced scheme of criminal penalties for offenses involving drugs.' " (third alteration added)).

day, the Act encompasses over 150 sections of title 21 of the U.S. Code and regulates behavior ranging from manufacturing[4] and mislabeling[5] to prescribing[6] controlled substances. Like any piece of complex legislation, the Act has spawned its share of litigation.[7] One controversy has defied satisfactory resolution: the meaning of the innocuous phrase, "the offense," in section 851(a)(2).[8]

The statute's structure is relatively straightforward. In 21 U.S.C. § 841, the Act proscribes individual drug trafficking.[9] Section 841 further provides different mandatory minimum penalties for offenders based on the type and quantity of drugs being sold and also on the defendant's criminal history. Most importantly for purposes of this Note, section 841 doubles a defendant's mandatory minimum sentence if he has a prior drug-related conviction.[10] The availability of this doubling provision, however, is limited by procedural requirements in 21 U.S.C. § 851, including that the offense for which such increased punishment may be imposed must have proceeded by indictment or waiver of indictment.[11]

Defendants with prior felony drug convictions from state courts have sometimes argued that their sentences cannot be doubled because their prior state court convictions proceeded by criminal information and not by indictment or waiver of indictment.[12] Most courts

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3. *See generally* ROBERT L. BOGOMOLNY ET AL., A HANDBOOK ON THE 1970 FEDERAL DRUG ACT 17-20 (1975).

4. *See* 21 U.S.C. § 842.

5. *See* 21 U.S.C. § 825.

6. *See* 21 U.S.C. § 829.

7. Over 20,000 federal court decisions have considered 21 U.S.C. § 841 alone.

8. 21 U.S.C. § 851(a)(2). Section 851(a) reads in relevant part:

> (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.... (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.

Id.

9. *See* 21 U.S.C. § 841(a). The Act's definition of individual drug trafficking is "[T]o manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance...." 21 U.S.C. § 841(a).

10. *See* 21 U.S.C. § 841(b)(1)(A)-(C).

11. 21 U.S.C. § 851(a)(2).

12. *See* McKee v. United States, 167 F.3d 103 (2d Cir. 1999); United States v. Ortiz, 143 F.3d 728 (2d Cir. 1998); United States v. Collado, 106 F.3d 1097 (2d Cir. 1997); United States v. Harden, 37 F.3d 595 (11th Cir. 1994); United States v. Trevino-Rodriguez, 994 F.2d 533 (8th Cir. 1993); United States v. Burrell, 963 F.2d 976 (7th Cir. 1992); United States v. Adams, 914 F.2d 1404 (10th Cir. 1990); United States v. Espinosa, 827 F.2d 604 (9th Cir.

reaching the issue have held that "the offense" in section 851(a)(2) refers to the present offense.[13] Therefore, according to these cases, defendants' mandatory minimum sentences for their present offenses should be doubled regardless of whether their prior convictions proceeded by indictment or criminal information.

In 1997, the Second Circuit addressed this issue for the first time in *United States v. Collado*[14] and found that section 851(a)(2) was ambiguous.[15] The court reasoned that it would be irrational to distinguish between prior convictions from states that use an indictment system and those that do not. But on the other hand, the court found: "All federal felony prosecutions are required to proceed by indictment. Accordingly . . . it would have been redundant for Cogress to require that the instant offense be prosecuted by indictment or waiver thereof when it is impossible for the offense to be prosecuted any other way."[16] Unable to determine the legislative intent behind section 851(a)(2), the *Collado* court applied the principle of lenity — requiring ambiguous statutes to be interpreted in favor of defendants — and held that section 851(a)(2) refers to the prior offense.[17] Therefore, the defendant's prior conviction from state court that did not proceed by indictment or waiver of indictment could not trigger a sentence enhancement.

1987); United States v. Santana, No. 95-10284-PBS-008, 1997 WL 258599 (D. Mass. Mar. 11, 1997). The nature of prosecuting by indictment is discussed *infra* note 26.

13. *See Espinosa*, 827 F.2d at 617 (rejecting an interpretation of the statute that would require excluding prior convictions from states that "happen to use a felony complaint system rather than a grand jury indictment system"); *see also* United States v. Coleman, 151 F.3d 1034 (7th Cir. 1998); United States v. Ortega, 150 F.3d 937 (8th Cir. 1998); *Ortiz*, 143 F.3d at 730; *Harden*, 37 F.3d 595 (11th Cir. 1994); *Trevino-Rodriguez*, 994 F.2d 533 (8th Cir. 1993); *Burrell*, 963 F.2d 976 (7th Cir. 1992); *Adams*, 914 F.2d 1404 (10th Cir. 1990); Daniels v. United States, Nos. CIV.A.98-969, CRIM.A.95-369, 1998 WL 355527, at *4 (E.D. Pa. June 29, 1998); Eubanks v. United States, 11 F. Supp. 2d 455, 466 (S.D.N.Y. 1998); United States v. Spells, 994 F. Supp. 585, 586 (M.D. Pa. 1998); *Santana*, 1997 WL 258599 (D. Mass. Mar. 11, 1997).

14. 106 F.3d 1097 (2d Cir. 1997), *overruled by Ortiz*, 143 F.3d at 729.

15. The Second Circuit found the competing interpretations unsatisfying both expressly, *see Collado*, 106 F.3d at 1103 ("We conclude, based on the foregoing analysis, that there is absent with respect to § 851(a)(2) an obvious intention of the legislature." (internal quotations omitted)), and implicitly, by applying the principle of lenity. The principle of lenity is appropriate only when no clear statutory meaning can be discerned. *See* Chapman v. United States, 500 U.S. 453, 463 (1991) ("The rule of lenity . . . is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act . . . such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute." (internal quotations and alterations omitted)).

16. *Collado*, 106 F.3d at 1103.

17. *See Collado*, 106 F.3d at 1103. The principle of lenity "requires the sentencing court to impose the lesser of two penalties where there is an actual ambiguity over which penalty should apply." United States v. Fisher, 58 F.3d 96, 99 (4th Cir. 1995). In *Collado*, the defendant had a prior conviction from a state court that had not proceeded by indictment. Applying lenity, therefore, meant applying the § 851 indictment requirement to Collado's prior state conviction, thus preventing his sentence from being doubled pursuant to § 841.

Since *Collado*, the Second Circuit reversed its position in *United States v. Ortiz*.[18] *Ortiz* identified a class of federal prosecutions that do not proceed by indictment or waiver of indictment: namely, prosecutions in Guam, the Virgin Islands, and the Panama Canal Zone. Thus, according to *Ortiz*, section 851(a)(2) was intended to exclude from the section 841 doubling provisions prosecutions in these United States territories. *Ortiz,* for the first time, addressed directly the deeper problem of statutory construction lurking within section 851(a)(2): whether prior or present, which prosecutions were the indictment requirement meant to exclude as triggers for a sentence enhancement? And if not prior state prosecutions, then what present — and necessarily federal — prosecutions do not proceed by indictment or waiver of indictment? According to *Ortiz,* the indictment requirement represents a congressional effort to prevent sentences from being doubled by reason of prosecutions in the Caribbean.

The Second Circuit's brief nonconformity between 1997 and 1998 was more than an accidental hiccup. *Collado* raised critical interpretive questions that no court, including the *Ortiz* court, has yet to resolve.[19] The new conformity between the circuits merely disguises a statutory ambiguity that may subject many defendants to penalties twice as severe as they deserve. If "the offense" refers to the prior offense, then courts will have to distinguish in their sentencing between prior convictions from states that proceed by indictment and those from states that do not. On the other hand, according to the pre-*Ortiz* courts which found that all federal prosecutions proceed by indictment, "the offense" is mere surplusage if it refers to the present offense. The *Ortiz* interpretation salvages the statute, demonstrating that the indictment requirement is not superfluous as applied to federal prosecutions. But *Ortiz* is also unsatisfying. It too fails to "rationalize" drug sentences, offering no reason why Congress would have intended special treatment for felony drug prosecutions in the Caribbean.

This Note follows the *Ortiz* decision by rejecting the conflicting line of cases which argue that section 851(a)(2) refers either to the

18. 143 F.3d 728 (2d Cir. 1998). The basis for *Ortiz* is discussed *infra* Section II.A. The *Ortiz* decision substantially advances interpretations of § 851(a)(2) by offering one plausible explanation for the indictment requirement. Nevertheless, the *Collado* opinion is still relevant and important because it demonstrates the statutory ambiguity at the heart of the controversy. It is interesting and perhaps important to note that Judge Leval, who authored the opinion in *Ortiz* overruling *Collado*, was a member of the panel in *Collado* and joined in its majority opinion.

19. Prior to its reversal, courts commented on *Collado*'s careful reasoning. *See, e.g., Santana*, 1997 WL 258599, at *1 ("Defendant's argument finds support in a thoughtful Second Circuit opinion."). At least one district court granted habeas relief to a federal prisoner because of the *Collado* decision. *See* McKee v. United States, 167 F.3d 103 (2d Cir. 1999) (reversing a district court's unpublished order vacating defendant's sentence pursuant to *Collado*).

present or to the prior offense. This Note focuses instead on developing an affirmative interpretation of the indictment requirement, identifying another and more compelling class of federal prosecutions that do not proceed by indictment or waiver of indictment: *juvenile* convictions, which proceed by criminal information. Thus, the section 851(a)(2) indictment requirement should be interpreted to prevent sentence enhancements for defendants with prior juvenile convictions.

Part I of this Note examines the two strongest arguments courts have raised in support of their respective positions: (1) that Congress's goal of enacting a comprehensive sentencing structure for drug offenses is undermined if some prior state convictions are included, while others are excluded, as triggers for a sentence enhancement, and (2) that section 851(a)(2) is mere surplusage if it refers to the present offense. Part II examines the *Ortiz* decision and argues that its Caribbean interpretation of the indictment requirement is unsupported by the Act's legislative history, congressional concerns, or by any of the Act's other statutory provisions. Part II instead proposes that Congress intended in section 851(a)(2) to exclude juvenile felony convictions from triggering section 841 sentence enhancements. With the strongest counterarguments overcome, Part II returns to the original statutory ambiguity and demonstrates that the Act's language and structure are most internally consistent if "the offense" refers to the prior offense and, specifically, excludes prior juvenile convictions from section 841's doubling provisions. The Note concludes that courts should interpret "the offense" in section 851(a)(2) as referring to a defendant's prior juvenile convictions and should not prohibit prior state court convictions, whether proceeding by indictment or criminal information, from triggering the Act's doubling provisions.

I. COMPREHENSIVENESS AND SURPLUSAGE: TWO UNCONVINCING RATIONALES

This Part considers and refutes the two strongest rationales courts have employed to resolve whether "the offense" in section 851(a)(2) is the present or the prior offense. Section I.A considers the argument that "the offense" must refer to the present offense, or courts will have to distinguish between prior convictions from states that happen to use an indictment system and prior convictions from states that do not. Section I.B addresses the argument that section 851(a)(2) must refer to the prior offense, or the section is mere surplusage. Part I concludes that neither argument explains the section 851 indictment requirement and that an affirmative interpretation of the statute, like that provided by *Ortiz*, is required.

A. *Distinguishing Between Prior Convictions from Indictment and Non-Indictment States*

If section 851(a)(2) refers to the prior conviction, then prior foreign or state convictions from non-indictment prosecutions will not trigger a sentence enhancement. The sentencing anomalies that would result from such an interpretation are a strong reason not to interpret section 851(a)(2) as referring to prior convictions.

Presently, approximately one-third of the states require the use of an indictment in felony prosecutions.[20] Interpreting "the offense" as the prior offense would require courts to distinguish between, for example, a defendant with a prior drug conviction from New Hampshire which proceeded by indictment and a defendant with a prior conviction for the same crime from Vermont who was prosecuted by criminal information. The defendant with a prior conviction from New Hampshire would be subjected to twice the mandatory minimum penalty as would be imposed on the defendant with a prior conviction from Vermont.

A court has reasoned that "it would have been incongruous for Congress to have amended the statute to permit prior state convictions to be used for sentencing enhancements only in the indictment states."[21] If section 851(a)(2) refers to the prior conviction, prosecutions from states or foreign countries that prosecute by criminal information would not trigger a section 841 sentence enhancement.[22] This is an unprincipled basis upon which to distinguish between prior convictions.[23]

The Second Circuit in *Collado* tried to diminish the strength of this argument, writing: "[I]t is not clear whether Congress was looking to expand the scope [of section 841(b) prior convictions] to include all state and foreign convictions or to include just those where the person either waived or was afforded prosecution by indictment."[24] Therefore, according to the *Collado* court, it may not have been incongruous for Congress to have included an indictment requirement for prior

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20. *See Santana*, 1997 WL 258599, at *2 (citing 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 208, at 15 (13th ed. 1990)); *see also* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 686-87 (2d ed. 1992).

21. *Santana*, 1997 WL 258599, at *2.

22. *See* United States v. Espinosa, 827 F.2d 604, 617 (9th Cir. 1987) (finding that such an interpretation "would exclude from the statute's ambit prior convictions in those states or foreign countries that happen to use a felony complaint system rather than a grand jury indictment system").

23. For a discussion of indictment's inadequacy as a procedural safeguard, see *infra* note 26.

24. *Collado*, 106 F.3d at 1102.

convictions. The indictment requirement potentially "provides an appropriate safeguard, namely, that the prior conviction, which is the basis for a substantial increase in the number of years a defendant is incarcerated, was the result of an indictment by a grand jury."[25]

Although the *Collado* court was correct in that nothing in the Act's legislative history resolves this issue decisively, the procedural safeguard argument lacks force. Few, if any, commentators today suggest that indictment provides a defendant with any significant protection.[26] Indictment, at the least, is not such a core constitutional protection that it must be incorporated against the states. It has been well settled since the nineteenth century that states can develop their own methods of criminal prosecution without offending due process.[27] Absent clear legislative history to the contrary, indictment's shielding function does not justify distinguishing between prior convictions from different states. A recidivist heroin dealer with a properly prosecuted prior conviction for selling drugs should have his mandatory minimum sentence doubled whether the prior conviction was from New Hampshire or Vermont. Courts are rightly unwilling to adopt an interpretation of section 851(a)(2) which dramatically increases criminal penalties based on such an arbitrary distinction between states.

Moreover, the Act's legislative history manifests Congress's clear intention to rationalize and make appropriately proportionate the criminal penalties for drug offenses.[28] As enacted in 1970, the Act provided a comprehensive sentencing system for drug offenses which was tied directly to the specific narcotic involved and the criminal history of the defendant.[29] Against this backdrop of grading drug of-

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25. *Collado*, 106 F.3d at 1103.

26. *See* LAFAVE & ISRAEL, *supra* note 20, at 693 ("In recent years, almost all of the commentary in legal periodicals has been critical of grand jury screening."). Historically, the indictment system was meant to act as both a sword and a shield: a sword that it provided the prosecution with a valuable investigative tool, and a shield to the extent that it protected defendants from wrongful prosecutions. *See, e.g.*, Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 262-63 (1995). Today, the role of the grand jury as a shield has been almost entirely eclipsed by its role as an investigative tool. *See* Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 67 (1995); *see also* Leipold, *supra*, at 263 ("The grand jury is frequently criticized for failing to act as a meaningful check on the prosecutor's charging decisions; according to the clichés it is a 'rubber stamp,' perfectly willing to 'indict a ham sandwich' if asked to do so by the government."). In recent years, grand juries have returned indictments in over 99.5% of the cases charged. *See id.* at 274.

27. *See* Hurtado v. California, 110 U.S. 516 (1884) (declining to incorporate the indictment requirement against the states).

28. *See, e.g.*, BOGOMOLNY ET AL., *supra* note 3, at 5 ("The Comprehensive Drug Abuse Prevention and Control Act of 1970 is considered by many to be a major advance in bringing some coherence and rationality into a highly diffuse area").

29. *See* Act, Pub. L. No. 91-513, 84 Stat. 1236 (providing mandatory minimum sentences depending on the schedule designation of the narcotics involved, and providing for doubled mandatory minimum sentences for defendants with prior drug-related convictions).

fenses, Congress provided the most serious penalties, and the only mandatory minimum penalties, for drug traffickers.[30] Especially long sentences were provided for defendants convicted of selling drugs to minors,[31] and a second conviction for drug trafficking doubled the mandatory minimum penalty pursuant to section 841.

Nevertheless, as originally enacted the Act narrowly circumscribed the prior offenses that triggered section 841's doubling provisions, limiting them to prior *federal* felony drug convictions.[32] Thus, the Act in its original form did not distinguish between prosecutions from the various states. Congress substantially amended the Act in 1984. Among the many changes to the Act, the amendment permitted prior state and foreign felony drug convictions to double mandatory minimum sentences.[33] It did not amend section 851, however, and the Act's overall restructuring in 1984 should not be read to create distinctions between states' methods of prosecution where none originally existed. The 1984 amendments reinforced Congress's goal of providing a "more rational penalty structure"[34] for drug offenses, a goal which would be undermined by forcing courts to distinguish between practically indistinguishable prior convictions.

Barring an alternative interpretation of the statute,[35] this argument against inconsistency in the treatment of prior state convictions is a strong reason for *not* interpreting section 851(a)(2) as referring to the prior offense. While this argument is compelling for eliminating an anomalous result, it is ultimately unsatisfactory. A better interpreta-

30. *See* S. REP. NO. 91-613 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576 (referring to § 408, later codified as § 841: "This section . . . is the only provision of the bill providing minimum mandatory sentences, and is intended to serve as a strong deterrent to those who otherwise might wish to engage in the illicit traffic, while also providing a means for keeping those found guilty of violations out of circulation").

31. *See* 21 U.S.C. § 859 (1994).

32. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 401, 84 Stat. 1260, 1260-62; 1984 U.S.C.C.A.N. at 3438 (doubling mandatory sentences "if the offender has previously been convicted of a Federal drug offense"); 1970 U.S.C.C.A.N. at 4614; *see also* United States v. Beasley, 12 F.3d 280, 284 (1st Cir. 1993) (finding that sentence enhancements under § 841, as enacted in 1970, could not be triggered by prior state law drug convictions); United States v. Gates, 807 F.2d 1075, 1082 (D.C. Cir. 1986) (interpreting the 1970 Act's doubling provisions to be triggered only by prior federal convictions). The only prior convictions that triggered a sentence enhancement were those "punishable under this subsection, or for a felony under another provision of this title or of title III or other law of the United States relating to narcotic drugs." Act, Pub. L. No. 91-513, § 401, 84 Stat. 1260 (amended 1984).

33. *See* Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, 98 Stat. 2068 (amending the description of prior convictions that trigger the § 841 doubling provisions to read, "an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs"). This change is particularly important for the discussion in *infra* Section I.B.

34. 1984 U.S.C.C.A.N. at 3437.

35. *See infra* Part II.

tion would both avoid the anomaly and provide a reason why Congress included the indictment requirement at all.

B. *Interpreting "The Offense" to Refer to the Present Offense Renders the Statute Mere Surplusage*

Several courts have found that interpreting section 851(a)(2) as referring to the present conviction renders the statute mere surplusage.[36] Superficially, this provides a strong reason why the section 851(a)(2) indictment requirement should not refer to the present offense. This argument, however, offers no independent justification for holding that section 851(a)(2) refers to the prior offense.

Courts and commentators have observed — incorrectly — that all federal prosecutions proceed by indictment or waiver of indictment.[37] Accordingly, the requirement that the present conviction — which is necessarily a federal conviction — must have proceeded by indictment appears to render section 851(a)(2) surplusage. If these courts' and commentators' premise were correct, it would be a strong reason to reject applying the indictment requirement to the present offense. It is the "first principle of statutory construction" that statutes be interpreted not to render any section mere surplusage.[38] As Judge Winter observed in his concurrence in *Collado*, "[T]he government's reading of Section 851 [that it refers to the present offense] creates a redundancy that makes virtually no sense."[39] Judge Winter agreed with the majority's outcome in *Collado* but objected to its reliance on the principle of lenity. He reasoned:

> If the language [in section 851(a)(2)] refers only to the offense charged in the particular case, the language is entirely superfluous because that Section applies to offenses that can be prosecuted only by indictment or waiver thereof.... Where an ambiguity admits of two interpretations, one of which creates an inexplicable redundancy and the other of which

36. *See* United States v. Collado, 106 F.3d 1097, 1103 (2d Cir. 1997) (finding the mere surplusage argument appealing); United States v. Burrell, 963 F.2d 976, 992-93 (7th Cir. 1992) (finding that the surplusage argument "is not without its appeal"); United States v. Harden, 37 F.3d 595, 601 (11th Cir. 1994) (agreeing with *Burrell*).

37. *See supra* note 36; LAFAVE & ISRAEL, *supra* note 20, at 686.

38. *See* California v. Department of Justice, 114 F.3d 1222, 1226 (D.C. Cir. 1997); *see also* Exxon Corp. v. Hunt, 475 U.S. 355, 369 n.14 (1986).

39. *Collado*, 106 F.3d at 1105 (Winter, J., concurring). While the majority in *Collado* ultimately rested its holding on the principle of lenity, it found the mere surplusage argument appealing. *See Collado*, 106 F.3d at 1103. The *Santana* court found that the Second Circuit's approach "merits a close look at the statutory scheme," United States v. Santana, No. 95-10284-PBS-008, 1997 WL 258599, at *2 (D. Mass. Mar. 11, 1997), but ultimately declined to follow the Second Circuit. The Seventh and Eleventh Circuits also considered and agreed with the surplusage argument but found that it was not dispositive. *See Burrell*, 963 F.2d at 993; *Harden*, 37 F.3d at 601.

makes sense, I see no need to revert to the rule of lenity to resolve the ambiguity.[40]

Judge Winter's argument is unpersuasive for two reasons. First, not all federal prosecutions proceed by indictment.[41] Second, even on Judge Winter's own terms, his argument proves too much. A close look at the Act's legislative history reveals that section 851(a)(2) was surplusage as enacted whether it refers to the present or the prior offense.

Between the Act's enactment in 1970 and its amendment in 1984, only prior federal felony convictions triggered a sentence enhancement pursuant to section 841. Therefore, whether "the offense" in section 851(a)(2) was referring to the prior offense or the present offense, it was referring to a *federal* felony prosecution. According to those courts and commentators who argue that all federal felony prosecutions proceed by indictment, section 851's indictment requirement was superfluous whether it was referring to the present or the prior offense. The logical conclusion of Judge Winter's concurrence, in light of the Act's legislative history, is that the indictment requirement was meaningless as enacted, providing no insight into the offense to which it was referring. It also reveals the second statutory challenge hidden within section 851(a)(2): Which prosecutions did Congress mean to exclude with its indictment requirement?

The two strongest arguments courts have proposed in support of their interpretations are ultimately inconclusive. The argument for consistency of sentences between indictment and non-indictment states has practical force but fails to provide any meaning for the indictment requirement in section 851(a)(2). The surplusage argument fails in the face of legislative history. Neither argument provides an affirmative interpretation of the Act.[42]

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40. *Collado*, 106 F.3d at 1105 (Winter, J., concurring).

41. This realization is the basis for the opinion in *Ortiz* and is considered *infra* Part II.

42. Until *Ortiz*, courts interpreting § 851(a)(2) have argued only in the negative, relying on what Congress must *not* have meant. *See Collado*, 106 F.3d at 1101-03 (rejecting all arguments as unpersuasive and applying the rule of lenity in the absence of an obvious intention of the legislature); *Harden*, 37 F.3d at 600-01 (rejecting the mere surplusage argument and finding that § 851(a)(2) must refer to the present conviction or it would necessitate an impermissible ex post facto increase in punishment); United States v. Trevino-Rodriguez, 994 F.2d 533, 536 (8th Cir. 1993) (agreeing with *Espinosa* and the Seventh and Tenth Circuits); *Burrell*, 963 F.2d at 992 (agreeing with *Espinosa* and finding that § 851(a)(2) must refer to the present offense or it would implicate ex post facto concerns); United States v. Adams, 914 F.2d 1404, 1407 (10th Cir. 1990) (agreeing with *Espinosa* and finding that § 851(a)(2) must refer to the present offense or it would implicate ex post facto concerns); United States v. Espinosa, 827 F.2d 604 (9th Cir. 1987) (holding that § 851(a)(2) must refer to the present offense because of the anomalous situation that would result from a contrary interpretation); *Santana*, 1997 WL 258599, at *2 (finding that § 851(a)(2) must refer to the present offense or it would subvert the congressional goal of dealing with drug offenses in a comprehensive fashion). The unpersuasive ex post facto argument is considered *infra* note 69.

II. AFFIRMATIVE INTERPRETATIONS

Part I of this Note demonstrated the difficulty courts have had interpreting section 851(a)(2). Courts developed reasons why not to adopt particular interpretations but, until *Ortiz*, had not suggested what effect the indictment requirement was intended to have. In fact, the Act's legislative history combined with the *Collado* court's analysis suggest that section 851(a)(2) was surplusage as enacted and has no meaning at all.[43] It is, however, a basic tenet of statutory construction to give effect to every word and every section of a statute.[44] The interpretive challenge, then, is clear: to develop an affirmative interpretation of section 851(a)(2) that does not render it superfluous, but also does not force courts to distinguish between prior convictions from indictment and non-indictment states. In *Ortiz*, the Second Circuit made a significant step in the right direction but ultimately failed to provide a compelling interpretation.

Section II.A first reviews the Second Circuit's opinion in *Ortiz* and demonstrates how it avoids the surplusage argument raised in *Collado*. This Section approves of the approach in *Ortiz* but disagrees with its conclusion. Instead, Section II.B argues that section 851(a)(2)'s indictment requirement was meant to prohibit the use of juvenile convictions to trigger a sentence enhancement. This Section examines the Act's legislative history from 1970 and finds clear congressional concern about the increase of drug use among juveniles. This Section further demonstrates that interpreting the indictment requirement to prevent sentence enhancements for juvenile prosecutions coheres with several of the Act's other provisions that show leniency for juvenile defendants. Section II.C returns to the original statutory ambiguity and argues, in light of its new interpretation, that "the offense" refers to prior juvenile convictions. Part II concludes that section 851(a)(2) must refer to juvenile convictions because it is the only meaningful interpretation that gives positive effect to the statutory section without requiring courts to distinguish between prior convictions from indictment and non-indictment states.

A. *The Virgin Islands and the Panama Canal Zone*

In *United States v. Ortiz*, the Second Circuit revisited its holding in *Collado* and reversed its prior decision. In *Ortiz,* the Second Circuit made the first judicial attempt to provide the kind of affirmative reading of the indictment requirement advocated by this Note. By identifying a class of federal prosecutions that did not proceed by indictment — prosecutions in the Virgin Islands and Panama Canal

43. *See supra* Section I.B.

44. *See supra* note 38 and accompanying text.

Zone — the *Ortiz* court avoided the surplusage argument advanced by *Collado* and held that "the offense" refers to the present offense. The *Ortiz* opinion, however, fails to suggest why Congress would choose to distinguish prosecutions in some United States territories from other federal prosecutions.

Ortiz rehearses the *Collado* opinion and demonstrates why the *Espinosa* line of cases remains unsatisfying.[45] *Ortiz* recognizes that "[t]he [*Collado*] panel could find no basis for deciding whether [section 851(a)(2)] was meant to apply to the instant or prior prosecution."[46] Instead of criticizing the earlier panel, *Ortiz* relies on "new information"[47] to argue that section 851 was meant to refer to the present offense.

> [A]t the time § 851(a)(2) was formulated in 1970, federal felony narcotics violations were prosecutable without indictment in the Virgin Islands, and the Panama Canal Zone. Moreover, in Guam, federal prosecutions proceeded without indictment until 1968.[48]

Therefore, *Ortiz* held that a defendant's sentence may not be enhanced if his federal felony conviction originated in one of these three territories because it would not have proceeded by indictment. The federal indictment requirement is not mere surplusage. According to the implicit assumption motivating *Ortiz,* section 851(a)(2) was meant to prohibit doubling the sentences of defendants prosecuted in the Virgin Islands and the Panama Canal Zone because of a prior drug conviction.

While logically sound, the interpretation offered by *Ortiz* finds no support in the Act's legislative history or in any intelligible congressional concerns. There is no evidence from the Act's legislative history that Congress intended to deal differently with convictions proceeding in the Virgin Islands or the Panama Canal Zone than with convictions proceeding in any of the fifty states.[49] The court in *Ortiz* offers no principled reason why Congress might have provided for such differential treatment. Absent a meaningful rationale, the *Ortiz* holding undercuts Congress's goal of rational sentencing in its treatment of the various United States territories.

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45. *See* United States v. Ortiz, 143 F.3d 728, 731 (2d Cir. 1998).

46. *Ortiz,* 143 F.3d at 731.

47. *Ortiz,* 143 F.3d at 731. The "new information" included territorial statutes from the 1960s brought to the court's attention for the first time in *Ortiz.*

48. *Ortiz,* 143 F.3d at 731.

49. An exhaustive search of the Act's legislative history reveals no references to any United States territories. This Note also ignores Judge Leval's reference to Guam because, by his own admission, federal prosecutions in Guam did proceed by indictment by the time the Act was enacted.

B. *Preventing Juvenile Convictions from Triggering a Sentence Enhancement: A Convincing Interpretation of Section 851(a)(2)*

There is a meaningful class of federal felony prosecutions that does not proceed by indictment or waiver of indictment: juvenile prosecutions, which proceed by criminal information.[50] Legislative history and other statutory provisions demonstrating congressional concern about juvenile sentencing support this reading of the statute.

The Code, in 18 U.S.C. § 5032, provides for jurisdiction in district court over juvenile respondents in specific situations, including for violations of section 841.[51] In cases where a United States district court does have jurisdiction over a juvenile, "[t]he Attorney General shall proceed by information . . . ."[52] The use of criminal information for juvenile prosecutions under section 841 means that section 851(a)(2) does not need to refer only to territorial prosecutions to avoid superfluity. If the indictment requirement excludes juvenile prosecutions, it proscribes the use of a meaningful class of federal felony prosecutions as triggers for a sentence enhancement.[53]

This interpretation also aligns with congressional concern for juvenile drug defendants. Prior to the Act's enactment in 1970, Congress devoted significant time to considering the effect of new sentencing

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50. *See* 18 U.S.C. § 5032 (1994).

51. 18 U.S.C. § 5032 provides for surrender of juvenile defendants to state courts:

> [u]nless the Attorney General, after investigation, certifies to the appropriate district court of the United States that (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency . . . or (3) the offense charged is a crime of violence that is a felony or an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841) . . . .

18 U.S.C. § 5032. In other words, section 5032 provides explicitly for federal jurisdiction over a juvenile charged under 21 U.S.C. § 841. In 1970, when the Act was enacted, federal juvenile prosecutions were governed by the Juvenile Delinquency Act. *See* 52 Stat. 764. Although this earlier juvenile statute was substantially different from the present Juvenile Delinquency Act, it still provided expressly for juvenile prosecutions to proceed by information instead of indictment. *See id.*; *see also* Barnes v. Pescor, 68 F. Supp. 127, 127 (W.D. Mo. 1946) (interpreting the information requirement).

52. 18 U.S.C. § 5032. The relevant section states in its entirety: "The Attorney General shall proceed by information or as authorized under section 3401(g) of this title, and no criminal prosecution shall be instituted for the alleged act of juvenile delinquency except as provided below." 18 U.S.C. § 5032 (Supp. 1995-98). Section 3401(g) is concerned only with magistrate trials of juveniles charged with a petty offense.

53. The actual number of federal juvenile prosecutions is extremely small. Since 1989, no more than 70 juveniles have been prosecuted in federal court for drug violations in any one year. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-163066, SPECIAL REPORT: JUVENILE DELINQUENTS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1997). Despite its small size, however, the class remains meaningful; there are many reasons why Congress would have provided leniency for juvenile defendants. *See infra* Section II.C. Furthermore, the Act was enacted partly in response to the increase in juvenile drug defendants. *See infra* notes 54-63 and accompanying text. In 1970, Congress may not have known whether federal juvenile prosecutions would become far more frequent.

provisions on juveniles.[54] Concerned with the consequences of unduly harsh criminal sanctions, Congress was hesitant to pass a statute that would "make felons of one of every five college students."[55] As Congress found, more people would be convicted if they faced lighter sentences because of prosecutors' increased willingness to bring charges and judges' increased willingness to impose the sentences.[56] Furthermore, unduly severe penalties fostered in juveniles a distrust of the legal system and a general skepticism towards authority.[57]

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54. In 1969, President Nixon wrote a letter to Congress urging congressional action on the growing threat of drugs in the United States. This letter, cited in many committees and on the floor of the House and Senate, began with statistics concerning juvenile arrests involving the use of drugs. *See, e.g., Controlled Dangerous Substances, Narcotics and Drug Control Laws: Hearing Before the House Comm. on Ways and Means*, 91st Cong. 195 (1970) [hereinafter *Ways and Means Hearing*] (letter from Richard Nixon, President of the United States) ("Between the years 1960 and 1967, juvenile arrests involving the use of drugs rose by almost 800 percent; half of those now being arrested for the illicit use of narcotics are under 21 years of age."). Congressional concern with drug abuse amongst juveniles is evident throughout the Act's legislative history. *See, e.g., Ways and Means Hearing, supra*, at 245 (statement of Michael R. Sonnenreich, Deputy Chief Counsel, Bureau of Narcotics and Dangerous Drugs) ("[W]e are concerned about the fact that you are dealing in one of the largest state offense categories other than drunkenness, and that most of the people who come before the courts are young people with an average age of 20 years and have never come into a confrontation with the criminal justice system before."); 116 CONG. REC. 33,297 (1970) (statement of Rep. Smith of California) ("[I]t is clear enough that the United States faces a serious drug problem, particularly with respect to our young people."); *Drug Abuse Amendments, 1970: Hearings on H.R. 11701 & H.R. 13743 Before the Subcomm. on Pub. Health & Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong. 64 (1970) [hereinafter *Interstate and Foreign Commerce Hearing*] (statement of Rep. Harold T. Johnson of California) ("[Abuse of drugs] is taking its greatest toll among the youth of our Nation."); *Interstate and Foreign Commerce Hearing, supra*, at 179 (statement of Dr. Stanley F. Yolles, Director, National Institute of Mental Health) ("It seems that today, if a chemical can be abused, it will be.... One further identifiable ominous trend is the indulgence in drugs of abuse by younger and younger age groups.").

55. *Interstate and Foreign Commerce Hearing, supra* note 54, at 69-70 (finding that 20 percent of college students polled admitted to using marijuana and suggesting that this was a "gross underestimation").

56. *See Interstate and Foreign Commerce Hearing, supra* note 54, at 81 ("The greatest enforcement problem with the existing penalty structure is that it is too severe in relation to the culpability of the user and the dangers of the drugs. Also, the severity of the penalties, given the violation, are out of step with the rest of the Federal Criminal sanctions in the U.S. Code. The result has been a reluctance on the part of prosecutors to prosecute and judges to sentence offenders under the existing penalty structure."); *id.* at 144 (statement of John E. Ingersoll, Director, Bureau of Narcotics and Dangerous Drugs, Department of Justice) ("I think that we are going to get more convictions because of the greater flexibility that is provided to the courts in sentencing.... The existing penalties are really out of proportion to penalties that are contained in other parts of the Federal law.").

57. *See Interstate and Foreign Commerce Hearing, supra* note 54, at 144 (statement of Rep. Satterfield of Virginia) ("I am quite concerned for example, about letters that I get from school children who pose the question to me as to what I think of a law against marijuana that makes criminals out of so many people."); *see also Ways and Means Hearing, supra* note 54, at 449 (statement of Mrs. Edward F. Ryan, Chairman for Legislation, National Congress of Parents & Teachers (quoting P.T.A. testimony in respect to Drug Abuse Education Act)) ("The situation is made more dangerous in our view, because the feeling of injustice in respect to the disproportionate penalties in present law distracts the attention of youth from the dangers of drugs. It is the nature of youth to overreact to pressure

With these concerns in mind, Congress included several provisions in the original Act that specifically treated first-time juvenile respondents differently than other defendants. For example, 21 U.S.C. § 844 provided that defendants convicted of simple possession shall be placed on probation for not more than one year. This reflects a policy described by Representative Rogers from Florida, who said,

> The committees which have considered this legislation do not seek . . . to make felons of our young men and women who come into contact with drugs on a first occasion, but nor should we condone such action, and surely we must not encourage its repetition. The penalty structure and approach of this legislation carries out that intent. A first offense of possession of controlled drugs is made a misdemeanor, except where the possession is for the purpose of distribution to others.[58]

Juveniles convicted for the first time of simple possession had their records expunged of the conviction after one year,[59] providing additional protection for the juvenile defendant that is not provided to an adult.[60]

This particular concern for juveniles is also reflected in the provisions of the Act dealing with dangerous special drug offenders. In 21 U.S.C. § 859, the Act provides that a defendant may face substantially higher penalties for distributing narcotics to people under the age of twenty-one.[61] These provisions, however, only apply to defendants who are over eighteen years old.[62] Juveniles are exempted from the statute's higher penalties. The legislative approach was well summarized by Representative Dwyer from New Jersey who said: "By arming the Justice Department with laws to concentrate on the vendors and purveyors of hard narcotics and at the same time providing the courts discretion in dealing with first offenders and minors, it strikes hardest at those who threaten our society most."[63]

In summary, Congress demonstrated its concern for juvenile drug defendants by providing a clean record for juveniles convicted of sim-

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they feel unjust; thus they are even more likely to use drugs in bravado, and the situation is unnecessarily worsened.").

58. See 116 CONG. REC. 33,304 (1970).

59. *See* Act, Pub. L. No. 91-513 § 404, 84 Stat. 1264 (repealed by Pub. L. No. 98-473, 98 Stat.2027 (1984)).

60. *See Ways and Means Hearing*, *supra* note 54, at 349 (statement of Rep. Biaggi of New York) ("[This] provision would permit special judicial consideration of first offenders under 18 years of age. Too often youngsters are taken up into the drug scene by unscrupulous adults out of their own financial gain or by the pressures from companions to be 'part of the crowd' or by a natural youthful curiosity. It would be unequitable to treat these offenders with the same severity as a hardened criminal.").

61. *See* 21 U.S.C. § 859 (1994).

62. *See* 21 U.S.C. § 859.

63. 116 CONG. REC. 33,306-07 (1970).

ple possession and exempting juveniles from the enhanced sentences of dangerous special drug offenders. These specific statutory provisions and the various findings in the congressional record evidence Congress's clear concern for juvenile drug offenders. Interpreting section 851(a)(2)'s indictment requirement as prohibiting juvenile drug convictions from triggering a sentence enhancement is entirely consistent with these statutory sections, and with Congress's explicit legislative concerns.[64]

C. *Prior or Present Juvenile Convictions?*

Even if "the offense" in section 851(a)(2) refers to a juvenile conviction, the question remains whether it refers to a prior or present juvenile conviction. That is to say, the question remains whether all prior juvenile convictions are proscribed from triggering a sentence enhancement, or whether the indictment requirement only prohibits a sentence enhancement for defendants who are still juveniles at the time of the present offense.

In revisiting the original crux of this controversy, it is essential to remember that the strongest arguments proposed by each side of the one-time circuit split are no longer applicable. Whether section 851(a)(2) refers to the present or to the prior offense, courts will not have to distinguish between prior convictions from indictment and non-indictment states or territories, and there is no danger of the stat-

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64. One possible counterargument that could be raised turns on the distinction between drug use and drug trafficking. Congress was manifestly concerned with leniency for juvenile defendants convicted of drug use. *See supra* text accompanying notes 54-63. Congress drew a sharp distinction between provisions for drug users and drug traffickers. *See Ways and Means Hearing*, *supra* note 54, at 244 (quoting the exchange among Mr. Vanick, Attorney General Mitchell, and Mr. Sonnenreich)

> MR. VANICK. Your bill treats the possession of a first offender as a misdemeanor. Does this apply to both the user and the seller who is a first offender?
>
> ATTORNEY GENERAL MITCHELL. It does with respect to the user. The seller, of course, can have possession and be brought in under some of the other penalties contained there, particularly in the conspiracy aspect of it.
>
> MR. SONNENREICH. The intent of that provision, sir, is to cover simple possession for one's own use. It does not cover the possession with intent to sell.

Id.; see also Ways and Means Hearing, *supra* note 54, at 352 (statement of Rep. Biaggi of New York) ("If he is not a seller, of course, a simple individual who uses [drugs] and is caught and is under 18, should be dealt with separately."). Since § 841, and consequently § 851, deals exclusively with drug trafficking, one could argue that Congress did not intend to show the same leniency in these sections as it did in the statutory sections dealing with juvenile drug users. There is evidence, however, that Congress viewed the *juvenile* drug trafficker as a victim of the adult pusher. *See Ways and Means Hearing*, *supra* note 54 (statement of Rep. Horton of New York) ("Addicts, too many of them teenagers and young men and women in their early twenties, desperately need money to support their habit, and they turn to crime to support it. For the victim of addiction, we must extend compassion, understanding and treatment."). Congress drew a distinction between the drug user and trafficker by providing mandatory minimum sentences for the trafficker. Leniency for the juvenile drug trafficker still amounts to a prison sentence, just not a doubled prison sentence.

ute becoming mere surplusage. Therefore, arguments that might have seemed weak before, compared with the seemingly decisive arguments discussed above in Part I, are now relatively strong by comparison.

1. *Not-So-Plain Language*

Courts have reasoned to contradictory conclusions from the language of the statute and the referent of "the offense" in other parts of the statute. Section 851 requires the United States Attorney to file an information with the court "stating in writing the previous convictions to be relied upon,"[65] thus providing the defendant with an opportunity to object to the validity of any prior conviction.[66]

Several courts, including the court in *Espinosa*, have used the plain language of section 851 to argue that "the offense" must refer to the present offense. The *Espinosa* court found that "the two other usages of the term 'offense' in § 851 refer to the current offense."[67] The *Espinosa* court also found that section 851 consistently refers to the prior offense as "prior convictions" and "previous convictions," and concluded that "[h]ad Congress intended [the defendant's interpretation], it seems that the phrase simply would have read 'prosecution by indictment in the prior conviction.' "[68]

Relying on the same "plain" language of the statute, the court in *Collado* reached the opposite conclusion. The *Collado* court argued that, within section 851, Congress always refers to the present offense as "an offense under this part,"[69] meaning an offense under the

65. 21 U.S.C. § 851(a)(1).

66. *See* 21 U.S.C. § 851(b).

67. United States v. Espinosa, 827 F.2d 604, 617 (9th Cir. 1987).

68. *Espinosa*, 827 F.2d at 617. *Espinosa* also relied on an unpersuasive argument implicating ex post facto and double jeopardy concerns. "[A]lthough one may not be punished twice for the same crime, punishment for a second crime may be enhanced by reason of a second conviction .... Hence, a common-sense reading of the phrase 'offense for which such increased punishment may be imposed' is the current, or latest, offense." *Espinosa*, 827 F.2d at 617; *see also* United States v. Adams, 914 F.2d 1404, 1407 (10th Cir. 1990) ("Obviously the punishment for a *past, prior offense* cannot be subsequently increased *ex post facto*. But the punishment for the current offense in the case at bar can appropriately be enhanced and made more severe because the current offense is not the appellant's first violation of the criminal law ...."). The language of § 851 contradicts this interpretation directly. "[T]he offense for which such increased punishment may be imposed" could also mean, "the offense by reason of which" or "the offense because of which" such increased punishment is being imposed. *See Adams*, 914 F.2d at 1407. Section 851 itself later provides, "[I]f 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." 21 U.S.C. § 851(d)(1) (emphasis added). Since sentences can be enhanced by reason of a prior conviction without implicating double jeopardy concerns, *see, e.g.*, Witte v. United States, 515 U.S. 389 (1995), the double jeopardy and ex post facto arguments are an unconvincing basis from which to conclude that "the offense" must refer to the present offense.

69. *See* United States v. Collado, 106 F.3d 1097, 1102 (2d Cir. 1997) (referring to 21 U.S.C. § 851(a)(1), (e) (1994))

Comprehensive Drug Abuse Prevention and Control Act of 1970.[70] In section 851(a)(2), Congress refers not to "an offense under this part," but to "the offense for which such increased punishment may be imposed."[71] As Justice Scalia has noted, "[w]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."[72] Accordingly, "the offense for which such increased punishment may be imposed," is a different offense from "an offense under this part." If Congress had meant to refer to the present offense, it would have said simply, "an offense under this part."[73]

The Ninth Circuit's interpretation of "the offense" as the "present offense" is flawed for yet another reason. Although unmentioned by the Second Circuit, the *Espinosa* court was incorrect when it observed that "[s]ection 851 consistently uses the terms 'prior conviction[s]' and 'previous convictions' to denote the prior conviction."[74] Section 851 refers to the prior conviction several times without calling it the "prior conviction" or the "previous conviction."[75] In contrast, section 851 only refers to the present conviction twice, and each time explicitly as "an offense under this part."[76]

Inevitably, courts examining section 851(a)(2) begin their discussions with the statutory language, trying to tease out support for their conclusions from the Act's unhelpful language. No court, however, has rested its holding on the statute's plain language, since that language appears to support contradictory holdings. Weighed carefully, the Act's language favors interpreting the indictment requirement as referring to the prior offense; but if this argument were compelling on its face, there would have been no statutory ambiguity giving rise to the present controversy. Ultimately, the statute's plain language remains inconclusive but favors, if only slightly, interpreting "the offense

70. *See, e.g.*, 21 U.S.C. § 851(a) ("No person who stands convicted of an *offense under this part* [21 USCS §§ 841 et seq.] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial . . . the United States attorney files an information with the court" (emphasis added)).

71. 21 U.S.C. § 851(a)(2).

72. O'Gilvie v. United States, 519 U.S. 79, 96 (1996) (Scalia, J., dissenting) (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.07 (5th ed. 1992 & Supp. 1996)).

73. *See Collado*, 106 F.3d at 1102 ("[I]t is an equally valid observation that had Congress intended to refer to the instant offense, it seems it would have referred to 'an offense under this part,' or simply to 'the offense.' ").

74. United States v. Espinosa, 827 F.2d 604, 617 (9th Cir. 1987) (second alteration in original).

75. For example, § 851 refers to the prior conviction as: "any conviction alleged," 21 U.S.C. § 851(c)(1), "a conviction alleged in the information," 21 U.S.C. § 851(c)(2), and "the convictions to be relied upon," 21 U.S.C. § 851(c)(1).

76. 21 U.S.C. § 851(a), (e).

for which such increased punishment may be imposed" as the prior offense.

2. *Structural Consistency*

The Act's structure also provides some support for interpreting "the offense" as referring to the prior offense. Section 851 limits the *prior* convictions that can trigger a sentence enhancement. Therefore, section 851(a)(2) is most consistent with the overall statutory scheme if "the offense" refers to the prior offense.

Broadly read, section 851 limits the application of section 841 sentence enhancements based on prior convictions. Congress intended these procedural safeguards in section 851 to provide several ways in which a prior conviction would be an invalid trigger for a sentence enhancement. As originally enacted, prior state and foreign convictions were invalid triggers.[77] A conviction obtained in violation of the Constitution of the United States was similarly invalid.[78] A defendant could also object to the existence of any alleged prior convictions on factual grounds.[79] Because each of these limitations refers to the prior offense, the further requirement that "the offense" must have been prosecuted by indictment or waiver of indictment seems more consistent with the Act's overall structure if it too refers to the prior offense.

CONCLUSION

Courts have debated whether "the offense" in section 851(a)(2) refers to the present or the prior offense. Their arguments have been unable to offer a satisfying interpretation of the statute. They have relied only on what Congress must not have meant, instead of providing an explanation of what Congress did mean to accomplish with the section 851(a)(2) indictment requirement. In *Ortiz,* the Second Circuit finally proposed an affirmative interpretation of the indictment requirement, discovering one class of federal felony prosecutions that proceeds by criminal information. *Ortiz,* however, provides no reason why Congress might have been especially concerned with non-indictment prosecutions in the Virgin Islands or the Panama Canal

77. *See supra* text accompanying note 34.

78. *See* 21 U.S.C. § 851(c)(2) (providing the procedure for objecting to a prior conviction on the grounds that it was "obtained in violation of the Constitution of the United States").

79. *See* 21 U.S.C. § 851(c)(1) (providing the defendant with an opportunity to deny any allegation in the information filed with the court, and providing further that "the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact"). With these requirements, § 851 "prescribes the procedure for establishing prior convictions so as to authorize imposition of an increased penalty upon a subsequent conviction." 1970 U.S.C.C.A.N. at 4618.

Zone. Looking at the Act's history, section 851(a)(2) is better interpreted to prohibit juvenile convictions from triggering a sentence enhancement.

This interpretation of section 851(a)(2) aligns with the Second Circuit's approach in *Ortiz*. It avoids the *Collado* court's surplusage argument by recognizing that not all federal felony prosecutions proceed by indictment or waiver of indictment and resolves the Ninth Circuit's unwillingness to distinguish between prior convictions from various state courts. Interpreting section 851(a)(2) as referring to juvenile convictions makes such distinctions unnecessary. All prior adult convictions, whether federal or from any state or foreign court, will trigger a sentence enhancement.

Furthermore, this interpretation of section 851(a)(2) aligns with several other of the Act's specific statutory provisions providing more lenient treatment for juvenile defendants. The Act's indictment requirement should be interpreted to prevent prior juvenile felony drug convictions from doubling a defendant's mandatory minimum sentence pursuant to section 841.