

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4
5 August Term, 2010

6
7 (Submitted: January 18, 2011 Decided: March 7, 2011)

8
9 Docket No. 09-4344-cr
10

11
12 UNITED STATES OF AMERICA,

13
14 *Appellee,*

15
16 — v. —

17
18 JOSE D. ESPINAL, also known as NANO, CESAR DAVID VALDEZ-CASTRO, also known as
19 DAVID, also known as CESAR D. VALDEZ-CASTRO, also known as MALICIA,

20
21 *Defendants,*

22
23 SANTO LAIZ, also known as MARTIN,

24
25 *Defendant-Appellant.**

26
27 *B e f o r e:*

28
29 WALKER, STRAUB, AND LYNCH, *Circuit Judges.*
30

31 Defendant-appellant Santo Laiz pled guilty to conspiring to distribute and
32 possessing with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a) and 846,

* The Clerk of the Court is directed to amend the official caption to conform with the caption above. The official caption of the case, utilized in the briefs of both parties, has heretofore stated the defendant-appellant's name as Santa Laiz. The text of the briefs, however, and all other references in the record, refer to him as Santo Laiz.

1 and was sentenced principally to twenty years' imprisonment. He appeals his conviction,
2 contending that his plea was involuntary, and also challenges his sentence, arguing that
3 the prosecution failed to prove beyond a reasonable doubt the facts underlying a prior
4 felony information used to enhance his sentence under 21 U.S.C. § 851. We conclude
5 that Laiz's guilty plea was voluntary; however, we vacate his sentence and remand for
6 resentencing.

7 VACATED AND REMANDED.

8 _____
9 ROBERT J. BOYLE, New York, New York, *for Defendant-Appellant.*

10 DANIEL A. SPECTOR, SUSAN CORKERY, Assistant United States
11 Attorneys, *for* PREET BHARARA, United States Attorney for the
12 Southern District of New York, *for Appellee.*
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14

15
16 GERARD E. LYNCH, *Circuit Judge:*

17 Santo Laiz pled guilty in the Eastern District of New York (Arthur D. Spatt, *J.*) to
18 possessing with intent to distribute cocaine, and conspiring to do so, in violation of 21
19 U.S.C. §§ 841(a) and 846, and was sentenced principally to twenty years' imprisonment.
20 He appeals his conviction, contending that his plea was involuntary. He also challenges
21 his sentence, arguing that the prosecution failed to prove beyond a reasonable doubt the
22 facts underlying a prior felony information used to enhance his sentence under 21 U.S.C.
23 § 851. We find that Laiz's guilty plea was voluntary, and therefore affirm his conviction.
24 However, for the reasons discussed below, we vacate his sentence and remand for
25 resentencing.

1 **I. Conviction**

2 Laiz argues that his guilty plea was rendered involuntary because he received
3 confusing and misleading information about the immigration consequences of his
4 conviction. The argument is unavailing.

5 Immediately prior to jury selection on October 11, 2006, with Magistrate Judge E.
6 Thomas Boyle presiding, Laiz and his co-defendant, Jose D. Espinal, pled guilty to the
7 charges in the superseding indictment. At the beginning of the plea proceeding, the court
8 asked Laiz and Espinal whether they were United States citizens. Each said “no.” The
9 following colloquy then ensued:

10 COURT: The crimes that you are going to be pleading guilty
11 to here . . . carry what is called mandatory deportation. That
12 means it is certain, it’s automatic, because of the nature of the
13 crimes to which you are pleading guilty. Have you discussed
14 that with your respective attorneys?
15

16 DEFENDANT ESPINAL: Yes, sir.
17

18 DEFENDANT LAIZ: Yes, sir.
19

20 COURT: And you understand that that is a mandatory
21 consequence of any plea that is entered to the charges before
22 this Court?
23

24 DEFENDANT ESPINAL: Yes, your honor.
25

26 DEFENDANT LAIZ: Yes.
27

28 Later in the same proceeding, the prosecutor noted that Laiz faced different
29 statutory penalties than Espinal – specifically, that the mandatory minimum sentence
30 applicable to Laiz was twenty years in prison, rather than ten – because a prior felony
31 information had been filed against him. The transcript reflects that in the course of this

1 discussion, the prosecutor stated that “[t]he deportation penalty the Court articulated also
2 doesn’t apply to Mr. Laiz.” That was incorrect, because Laiz is not a United States
3 citizen and the deportation penalty therefore did apply to him, as the court had previously
4 stated.

5 In a submission filed and served on Laiz before sentencing, the prosecutor pointed
6 out the mistake, suggesting that it was a “typographical error” in the transcript. Laiz did
7 not respond. Again at the sentencing proceeding, the prosecutor called attention to the
8 apparent error, stating that although he did not have a perfectly clear recollection of the
9 plea proceeding, “I believe that’s a typographical error and I believe as is indicated earlier
10 in the transcript Mr. Laiz was apprised of the deportation penalty. But I want to raise this
11 so there’s no issue and that the defendant obviously understands that deportation is
12 mandatory in this case.” The court stated, “Well, I don’t know what, at this late stage,
13 what you are going to do, except correct the record. That’s all. I’m not going to get into
14 that.” Laiz again failed to respond in any way. Neither the government nor defense
15 counsel addressed the issue further.

16 Laiz argues on appeal that his conviction should be vacated because he received
17 contradictory information about the immigration consequences of his conviction, in
18 violation of Rule 11 of the Federal Rules of Criminal Procedure, rendering his plea
19 involuntary. Because Laiz never sought to withdraw his plea, and did not object at any
20 time or in any way to the alleged Rule 11 violation in the district court, we review for
21 “plain error.” United States v. Vaval, 404 F.3d 144, 151 (2d Cir. 2005). “In the context

1 of a Rule 11 violation, to show plain error, a defendant must establish that the violation
2 affected substantial rights and that there is ‘a reasonable probability that, but for the error,
3 he would not have entered the plea.’” Id., quoting United States v. Dominguez Benitez,
4 542 U.S. 74, 76 (2004). Absent a finding of fact by the district court that the transcript
5 was incorrect, we assume for purposes of this appeal that the transcript accurately
6 reported the prosecutor’s words. See 28 U.S.C. § 753(b) (“The transcript in any case
7 certified by the reporter . . . shall be deemed prima facie a correct statement of the
8 testimony taken and proceedings had.”); Abatino v. United States, 750 F.2d 1442, 1445
9 (9th Cir. 1985) (“The reporter’s transcript of a trial is presumed to be accurate.”).

10 Laiz cannot show that but for the prosecutor’s mistake he would not have pled
11 guilty. He argues that he entered his plea reluctantly, and that if he had clearly
12 understood the immigration consequences of his conviction, he would not have pled,
13 because deportation would separate him from his family. But this argument is
14 unpersuasive in the face of the actual record below. When the court apprised him of the
15 deportation penalty at the outset of the plea proceeding, he said that he understood that
16 deportation was mandatory and that he had discussed the issue with his attorney, and he
17 expressed no reluctance to go forward. After the plea had been entered but before
18 sentence was imposed, the government twice noted its erroneous statement during the
19 plea colloquy – once in its sentencing submission and once at the sentencing proceeding.
20 Nevertheless, Laiz never gave the slightest indication that he was surprised by this
21 information, or that he had relied in any way on the prosecutor’s misstatement, and he

1 never sought to withdraw his plea. On these facts, we cannot say that there is a
2 reasonable probability that Laiz would not have pled guilty absent the prosecutor's
3 misstatement. We therefore affirm his conviction.

4 **II. Sentence**

5 Laiz next argues that we should vacate his sentence and strike the prior felony
6 information used to enhance it, because the government failed to prove beyond a
7 reasonable doubt that he had the requisite prior conviction. That claim is not so easily
8 dismissed.

9 A. Background

10 Laiz was indicted on November 16, 2005. On September 7, 2006, the government
11 advised him that if he did not plead guilty by September 15, it would file a prior felony
12 information pursuant to 21 U.S.C. § 851(a). Filing such an information would, among
13 other things, enhance the applicable mandatory minimum sentence from ten years in
14 prison to twenty.¹ Laiz did not plead guilty by the government's deadline, and on
15 October 3, 2006, the government filed the prior felony information, alleging that Laiz had
16 been convicted of a felony drug offense under the name "Jose Luis Lai" in Lawrence,

¹ Laiz pled guilty to violating 21 U.S.C. § 841. That crime carries a mandatory minimum sentence of ten years' imprisonment in most cases, but if the defendant is convicted "after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years." 21 U.S.C. § 841(b). The maximum sentence for such a crime is life imprisonment in either case. The procedures that must be followed before the enhanced sentence may be imposed are set forth in 21 U.S.C. § 851.

1 Massachusetts, on November 8, 1993. As discussed above, Laiz nevertheless did
2 eventually plead guilty. During the guilty plea proceeding, the magistrate judge advised
3 Laiz of the prior felony information, and made sure that Laiz understood that by virtue of
4 its filing, he faced an enhanced mandatory minimum sentence. However, while the
5 magistrate judge elicited Laiz's admission that he was guilty of the offense to which he
6 was pleading guilty, the magistrate judge did not ask whether Laiz admitted to having
7 previously been convicted. After the plea was entered, a sentencing date was scheduled.

8 Prior to sentencing, Laiz and his attorney made separate submissions raising
9 various legal challenges to the propriety of the prior felony information, but neither
10 submission clearly denied the information's allegation that Laiz had in fact been
11 convicted of the prior narcotics felony. Apparently concerned that the record was
12 somewhat ambiguous with respect to Laiz's position concerning the prior felony, the
13 prosecutor sought clarification, initially stating his "understanding that the defendant . . .
14 is not challenging, as a factual matter, the [prior] conviction." When the court asked
15 defense counsel if that understanding was correct, counsel responded that he had "no
16 grounds to believe that Mr. Laiz was not convicted," but that he had not verified the
17 conviction himself, and that he was "taking the word of the government . . . [and] of the
18 probation department."

19 At that point in the proceeding, Laiz still had not been asked formally to affirm or
20 deny the conviction. Rather than make that inquiry, upon hearing defense counsel's

1 response, the district court asked the prosecutor how the government knew of the
2 defendant's prior conviction. The prosecutor responded by handing up two documents.
3 The first, a Massachusetts rap sheet, states on its face that because it is "not supported by
4 fingerprints," the reader should "check that the name referenced below matches the name
5 and date of birth of the person requested." The rap sheet indicated that one "Jose Luis
6 Lai," also known as "Jose Pichardo," "Santo Ramon Laz," "Elias DeJesus," and "Santo
7 Ramon Laiz," with a birthdate of December 3, 1964, had been convicted in Massachusetts
8 on November 8, 1993, for distributing cocaine, possessing heroin with the intent to
9 distribute, and conspiracy to distribute controlled substances. The government also
10 produced a Massachusetts docket sheet indicating a conviction, on the same date and for
11 similar offenses, of an individual named "Jose Pichardo," also known as "Jose Luis Laz,"
12 "Santo Ramon Laz," and "Elias DeJesus Alberto," with the same birthdate.

13 The personal information on these documents is not entirely consistent with that
14 attributed to Laiz in the presentence report ("PSR"). Although the rap sheet and the
15 Massachusetts docket sheet give birthdates of December 3, 1964, the PSR gives Laiz's
16 birthdate as January 1, 1965. While three of the aliases listed in the Massachusetts
17 documents – Santo Ramon Laz, Santo Ramon Laiz, and Jose Pichardo – are similar (but
18 not identical) to names that the PSR says Laiz has used,² four others – Jose Luis Lai, Jose

² According to the PSR, the appellant, who was indicted as Santo Laiz, was born "Jose Pichado." The name "Santa" Laiz, which appears in the original caption of the case in this Court, and is used on the cover of both parties' briefs without comment by either side, appears nowhere in the record.

1 Luis Laz, Elias DeJesus, and Elias DeJesus Alberto – are not similar to names identified
2 with Laiz in the indictment or PSR. The government did not state on the record how it
3 came to associate the rap sheet and docket sheet with Laiz, and the documents contain no
4 fingerprints, photographs, descriptions, or biographical data connecting them to Laiz.

5 The court examined the documents, indicating at several points that it was having
6 difficulty reading or understanding portions of them. After reviewing the documents, and
7 without making any finding as to what they did or did not prove, the court addressed
8 defense counsel, again asking whether counsel was “raising any question about the fact
9 that your client was convicted of this felony in 1993.” Once again, defense counsel
10 explained that he was “relying on the government’s information” as to whether Laiz had
11 been convicted “of the type of crime that would double his sentence,” noting that
12 although Laiz admitted that he had been convicted and served time in prison, he “[didn’t]
13 know from felonies, misdemeanors, drug cases as opposed to other cases, . . . different
14 forms of drug cases, and so forth.”

15 Up to that time, Laiz still had never been asked formally to affirm or deny whether
16 he had indeed previously been convicted of a narcotics felony as charged in the prior
17 felony information. But after the above colloquy, the prosecutor noted that the statute
18 required that the defendant be asked to make such an affirmation or denial, see 21 U.S.C.
19 § 851(b), and requested that the district court make the inquiry called for by the statute.
20 However, when the district court finally asked him to affirm or deny the prior felony
21 information allegations, Laiz, on his attorney’s advice to remain silent, did neither.

1 The prosecutor asked the court to consider Laiz’s silence an affirmance. But the
2 court stated, “I can’t say that I will call that an affirmance. I call that a denial of whether
3 to affirm or deny, a refusal, if you will, on constitutional grounds.” The court made clear
4 that it did not believe that Laiz had a right to “refuse to affirm or deny on constitutional
5 grounds,” and announced an intention to “proceed with th[e] sentencing” after a lunch
6 recess.

7 After lunch, the judge overruled Laiz’s written objections to the applicability of
8 the enhanced minimum sentence, found that sentence applicable, and sentenced Laiz to
9 the minimum term of twenty years in prison, explicitly noting that he “ha[d] no choice for
10 this sentence.” While it is clear that the court believed that the enhanced minimum
11 applied, it never explicitly found that Laiz was in fact the person named in the
12 Massachusetts rap sheet and docket sheet. In the post-recess session, the court noted,
13 without objection, that it had “already made a finding that there was a prior felony which
14 could bring forth the prior felony information.” But it is not clear from the record that the
15 court had made such a finding. The closest thing to a fact finding was the following
16 remark by the court, in the course of rejecting Laiz’s claim of a constitutional right not to
17 affirm or deny the conviction:

18 But from what I see here, which I will put into evidence as an
19 exhibit in this sentencing, namely the record given to me by
20 the probation officer of this crime and the guilty finding as of
21 November 8, 1993, and the types of crimes involved, I’m
22 going to rule that notwithstanding the defendant’s refusal to
23 either affirm or deny, I’m going to proceed with this
24 sentencing.

1 B. Discussion

2 1. Laiz's Sufficiency Argument

3 On appeal, Laiz argues that “[t]he proof was insufficient to establish that [he] was
4 the defendant in the Massachusetts case set forth in the Prior Felony Information.” We
5 acknowledge that the evidence is not beyond question. The rap sheet states on its face
6 that it has not been verified by a fingerprint search, the personal information in the
7 Massachusetts documents does not exactly match Laiz’s, and the record says nothing
8 about how the government came to associate those documents with Laiz. It is hardly
9 inconceivable that two drug dealers might have adopted the same or similar names. Still,
10 in light of the deference due to a district court’s determination of the facts, and the “heavy
11 burden” an appellant faces in a sufficiency challenge, see United States v. Abu-Jihaad,
12 630 F.3d 102, 135 (2d Cir. 2010) (internal quotation marks omitted), we would be hard
13 pressed to find the evidence insufficient had the district court made a clear finding, after
14 an evidentiary hearing, that Laiz was indeed the person convicted in Massachusetts in
15 1993. As noted above, however, the district court did not clearly make such a finding,
16 nor is it clear that the court undertook to hold a hearing.

17 Moreover, to the extent that the evidentiary record does not conclusively establish
18 that Laiz had been convicted of a felony, it is not clear that the government had a full and
19 fair opportunity to present its best evidence to the sentencing court. Before the
20 sentencing proceeding, Laiz had not explicitly challenged the fact of the prior conviction,
21 and the government was not on notice that it would have to prove the fact of the

1 conviction on that day. Only when the government asked the court to clarify whether
2 Laiz disputed the prior felony did the court ask the government for its evidence on the
3 spot, before establishing whether Laiz denied the conviction. While the government
4 managed to produce some evidence, it did not have a fair opportunity to gather and
5 present its proof. Absent such an opportunity, we do not think it appropriate to decide the
6 sufficiency of the government’s evidence on this appeal. Nevertheless, we conclude that
7 the sentence may not stand, and the case must be remanded for resentencing, because the
8 procedures undertaken here fell short in several respects of those required by 21 U.S.C.
9 § 851.

10 2. Procedural Defects

11 Congress established a specific, multistep procedure to be followed before an
12 enhanced sentence is imposed based on a prior felony drug conviction. Pursuant to the
13 statute, for an enhanced sentence to be imposed, the government must first file and serve
14 on the defendant, before trial or guilty plea, an information “stating in writing the
15 previous convictions to be relied upon.” 21 U.S.C. § 851(a)(1). If the defendant is then
16 found guilty of, or pleads guilty to, the underlying offense, the court must ask the
17 defendant, after conviction but before sentence is imposed, “whether he affirms or denies
18 that he has been previously convicted as alleged in the information.” Id. § 851(b). At the
19 same time, the court also “shall inform [the defendant] that any challenge to a prior
20 conviction which is not made before sentence is imposed may not thereafter be raised to
21 attack the sentence.” Id.

1 At the next step in the procedure, if the defendant “denies any allegation of the
2 information of prior conviction, or claims that any conviction alleged is invalid, he shall
3 file a written response to the information.” Id. § 851(c)(1). Following receipt of that
4 response, the court must “hold a hearing to determine any issues raised by the response
5 which would except the person from increased punishment.” Id. At that hearing, the
6 government “shall have the burden of proof beyond a reasonable doubt on any issue of
7 fact.”³ Id.; see also Alsol v. Mukasey, 548 F.3d 207, 211 (2d Cir. 2008).

8 The court did not follow these procedures meticulously. The government timely
9 filed and served a prior felony information in advance of Laiz’s guilty plea. At his guilty
10 plea proceeding, although the magistrate judge advised him of the pendency of the
11 information and of the enhanced potential sentence that it triggered, the court did not ask
12 Laiz to affirm or deny the accuracy of the allegation that he had previously been
13 convicted of a narcotics felony.⁴ Although it might have been expected that Laiz would

³ Section 851(c)(2) further requires a person “claiming that [the alleged prior] conviction . . . was obtained in violation of the Constitution” to state the factual basis for his claim “with particularity in his response to the information.” In such cases the defendant “shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response.” 21 U.S.C. § 851(c)(2). Since Laiz does not contest the constitutionality of the alleged prior conviction, this provision has no application here.

⁴ The statute does not require the court to make this inquiry at the plea proceeding, or at any other particular time, so long as the inquiry is made “after conviction but before pronouncement of sentence.” 21 U.S.C. § 851(b). Since the inquiry was eventually made before sentence was pronounced, the district court complied with this requirement. As the eventual confusion in this case illustrates, however, it would seem preferable not to postpone the inquiry until the scheduled sentencing date. While challenges to the prior felony may be infrequent, if the defendant denies the conviction at that time, and invokes his statutory right to make a written objection and put the government to its proof, an

1 have denied the existence of the prior conviction in his general sentencing submission if
2 he did not believe the charge was accurate, we cannot say that his failure to do so at that
3 stage waived his objection; under the statute, Laiz was not required to make a formal
4 response to the prior felony information until after the inquiry contemplated by the statute
5 was made by the court. Thus, on the date set for sentencing, some ambiguity remained as
6 to the full extent of Laiz's objections to the applicability of the enhanced penalty
7 provision.

8 Section 851 clearly requires that before a sentence is imposed, the court must ask
9 the defendant personally to affirm or deny whether he has been previously convicted as
10 set forth in the information. In conjunction with this inquiry, the defendant is entitled to a
11 warning that any challenge to the fact of his conviction must be made before sentence is
12 imposed and that any objection not made before sentencing will be precluded. 21 U.S.C.
13 § 851(b). If the defendant denies the conviction, he must serve a written response on the
14 government setting forth his objection. *Id.* § 851(c). The court is then positioned to hold
15 a hearing at which the government can present its proof. *Id.*

16 Here, however, the court did not make the required inquiry until considerable
17 confusion about Laiz's position had already been generated. Laiz was never advised of

unexpected adjournment is nearly inevitable. Ascertaining whether the defendant intends to make such a challenge in advance of the sentencing date would therefore seem to be the better approach. Moreover, given that the defendant will have been served with the prior felony information in advance of trial, there is no obvious reason why the defendant cannot be asked to affirm or deny the prior conviction as part of the plea allocution, or, in the case of trial, immediately after receipt of the guilty verdict, before a sentencing date is set.

1 the need to object on pain of forfeiting his objection, or given the opportunity to elaborate
2 his objections in writing. Moreover, instead of the hearing contemplated by the statute, at
3 which the issues would be clearly posed by the defendant's written position and for which
4 the government would have the opportunity to prepare to meet the objections raised, the
5 only "hearing" here was an impromptu inquiry – held before the defendant had even been
6 asked to take a formal position – in which the court reviewed certain documents provided
7 by the government, without addressing the obvious discrepancies in those documents,
8 which the court itself noted in the course of reading them, or giving the defendant an
9 opportunity to review and comment on them. The court did not specify whether it applied
10 the beyond-a-reasonable-doubt standard specified in the statute in finding that Laiz in fact
11 had a prior narcotics conviction, or whether it applied some lesser standard in light of
12 Laiz's failure properly to deny the conviction or to set forth his objection clearly in
13 writing. Indeed, the court did not explicitly make any finding at all that Laiz was the
14 person whose prior conviction was reflected in the government's documents.

15 To be sure, Laiz himself caused much of the confusion here. Neither he nor his
16 attorney made clear in advance of the sentencing that they intended to challenge the fact
17 of the prior conviction. When the court did finally ask the defendant to respond formally
18 to the prior felony information, Laiz, on his attorney's advice, declined to answer.

19 The statute does not contemplate this approach, and gives no guidance on the
20 procedures to be followed when a defendant refuses to affirm or deny. It could be argued
21 that by not affirming the prior conviction Laiz effectively denied it. The inquiry required

1 by § 851(b) could be analogized to an arraignment on a criminal charge. At the
2 arraignment, the defendant is asked to respond to the charge by pleading guilty or not
3 guilty; if he refuses to enter a plea, under Rule 11(a)(4), “the court must enter a plea of
4 not guilty.” Fed. R. Crim. P. 11(a)(4). Unlike Rule 11(a)(4), however, § 851(b) does *not*
5 expressly provide that a refusal to plead shall be treated as equivalent to a denial of the
6 prior felony information. To the contrary, it requires a defendant who wishes to deny the
7 information to set forth his position in writing in advance of any hearing – a procedure
8 quite different from that by which the issues raised by a not-guilty plea are resolved.

9 Moreover, the constitutional background to the two situations is quite distinct.
10 When the government charges a defendant with a crime, the defendant has a
11 constitutional right to stand mute, and the government is constitutionally required to
12 prove the charge beyond a reasonable doubt – a burden of which it is relieved only if the
13 defendant pleads guilty in a proceeding to which stringent protections are applied. See
14 Fed. R. Crim. P. 11(b) (setting forth procedural requirements for guilty pleas). Anything
15 less than a guilty plea, including an ambiguous answer or a refusal to plead, does not
16 relieve the government of its burden of proof. In contrast, “where a statute provides for
17 an enhanced penalty based on a defendant’s prior convictions, the fact of those
18 convictions is a sentencing factor to be determined by the court rather than a jury,” United
19 States v. Snype, 441 F.3d 119, 148 (2d Cir. 2006), and – as far as the Constitution is
20 concerned – sentencing factors “can be proved to a judge at sentencing by a
21 preponderance of the evidence.” United States v. O’Brien, 130 S. Ct. 2169, 2174 (2010).

1 See generally *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).⁵ While
2 § 851(c)(1) requires the government to prove contested facts relating to the prior felony
3 beyond a reasonable doubt, that burden is triggered only where the defendant denies the
4 prior felony and submits a written response raising a factual issue. 21 U.S.C. § 851(c)(1).
5 The statute, moreover, specifically requires the court to warn the defendant that failure to
6 challenge the fact of the prior conviction before sentencing waives any such challenge
7 thereafter. Id. § 851(b). We therefore do not assume that ambiguous answers or refusals
8 to answer a § 851 inquiry should be treated as tantamount to a denial.

9 Nevertheless, on the facts of this case, we are loath to find that Laiz’s failure to
10 enter a proper denial waived his right to challenge the prior felony. Once the court asked
11 Laiz to affirm or deny the prior conviction, the statute required the court to give him the
12 opportunity to enter a written objection, and to advise him that any objection not made
13 before sentence was imposed could not be raised thereafter. The court did neither. We
14 are not persuaded by the government’s argument that it was up to Laiz to raise his factual
15 objections to the information in advance of the sentencing hearing. The statute does not
16 require a defendant to respond to the prior felony information sua sponte. Rather, § 851
17 specifically requires that a defendant first be asked to affirm or deny the allegations in the
18 information, and *then* be given an opportunity to file objections, after a specific advice of

⁵ As a matter of constitutional law, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Although “the continued viability of *Almendarez-Torres* has been questioned,” we have held that *Apprendi* “preserved the holding in *Almendarez-Torres*.” *Snype*, 441 F.3d at 148.

1 the consequences of failing to act. “The purpose of § 851(b) is to place the procedural
2 onus on the district court to ensure defendants are fully aware of their rights.” United
3 States v. Baugham, 613 F.3d 291, 296 (D.C. Cir. 2010).

4 In addition, the impromptu hearing held by the court fell short of the type of
5 hearing contemplated by § 851. Section 851 contemplates that prior to a hearing, a
6 defendant’s written response to the information will notify the government what facts are
7 disputed, thus giving the government an opportunity to prepare for a hearing on those
8 facts. The government had no such notice here, because the court gave Laiz no
9 opportunity to file a written response. Instead, the court had already examined the
10 government’s evidence before formally inquiring whether Laiz affirmed or denied the
11 prior conviction, without giving either party an opportunity to address the manifest
12 ambiguities in the documents proffered by the government, or clearly advising the parties
13 that a “hearing” was being held. That procedure does not accord with the statute.⁶

14 Failure to adhere to the letter of § 851’s procedures does not automatically
15 invalidate the resulting sentence. Those of our sister circuits that have addressed the issue
16 have concluded that § 851(b) and (c) procedural deficiencies are subject to harmless error
17 review. See, e.g., United States v. Henderson, 613 F.3d 1177, 1184 (8th Cir. 2010);
18 Baugham, 613 F.3d at 296; United States v. Henry, 519 F.3d 68, 74 (1st Cir. 2008);
19 United States v. Ellis, 326 F.3d 593, 599 (4th Cir. 2003); United States v. Williams, 298

⁶ We are sympathetic to the challenges the district court faced here in trying to comply with § 851’s procedures. Neither the statute nor controlling precedent gives clear guidance when a defendant refuses to affirm or deny an alleged prior conviction. In the absence of guidance, the district court appears to have made its best efforts to proceed with the sentencing, which was already underway, fairly and expeditiously.

1 F.3d 688, 693 (7th Cir. 2002); United States v. Hill, 142 F.3d 305, 313 (6th Cir. 1998);
2 United States v. Lopez-Gutierrez, 83 F.3d 1235, 1246 (10th Cir. 1996); United States v.
3 Fragoso, 978 F.2d 896, 902-03 (5th Cir. 1992). We follow their lead in concluding that
4 there is no reason why non-prejudicial errors in complying with the procedural
5 requirements of § 851 should require reversal.⁷

6 At the same time, however, the procedures set forth in the statute are not
7 insignificant, and failure to apply them can result in considerable prejudice to a
8 defendant. As the Fifth Circuit has noted:

9 One purpose of § 851(b) is to insure that a defendant
10 knowingly and voluntarily waives his right to challenge the
11 previous conviction used to enhance his sentence before that
12 conviction becomes immune from challenge by operation of
13 the enhancement statute. The ritual required by § 851(b) is a
14 functional one, and its omission can result in very real
15 prejudice to a defendant who learns only after he attempts to
16 challenge the prior conviction that that conviction has become
17 unassailable.

18 United States v. Cevallos, 538 F.2d 1122, 1128 (5th Cir. 1976). We cannot say that the

⁷ Some of our sister circuits have held that only plain error review is available where the defendant has not objected to § 851 procedural deficiencies below. See, e.g., United States v. Dickerson, 514 F.3d 60, 65 (1st Cir. 2008), citing United States v. Craft, 495 F.3d 259, 265 (6th Cir. 2007); United States v. Mata, 491 F.3d 237, 244 (5th Cir. 2007); Ellis, 326 F.3d at 598. Laiz does not appear to have objected to the procedural deficiencies, so it might be appropriate to review for plain error. But the government does not so argue. And at least one sister court has argued that the logic behind reviewing unpreserved claims for plain error – preventing parties from wasting judicial resources by holding possible trial errors in reserve in hopes of raising them on appeal – does not apply to § 851(b) procedural deficiencies, because one purpose of § 851(b) is to ensure that the defendants are fully aware of their rights. Baugham, 613 F.3d at 296 (“To penalize a defendant for not alerting the district court to its failure to alert him would pervert the statute and get it exactly backward.”). Since the government has not contended that only plain error review is appropriate, we do not decide the standard of review, and proceed to address solely whether the errors in the proceeding were prejudicial or harmless.

1 procedural defects here were harmless. The court’s determination that Laiz had a prior
2 felony drug conviction added ten years to Laiz’s statutory mandatory minimum sentence.
3 And the defects in the § 851 procedures that led to that determination potentially affected
4 the determination in at least two significant ways.

5 First, the failure to provide the statutorily required warning of the effect of failing
6 to make a proper challenge to the prior felony information may well have influenced
7 Laiz’s unusual choice not to affirm or deny the allegations in the information. This in
8 turn may well have affected the burden of proof to which the government was or should
9 have been held. We cannot know what Laiz would have done had he received an
10 opportunity to submit a written response to the information and been warned about the
11 consequences of failing to do so, but given Laiz’s ambiguous position at the sentencing
12 proceeding, and his attorney’s evident failure to anticipate the issue, it is at least possible
13 that, had he been given the proper opportunity and warning, he would have filed a written
14 response. Such a response would have necessitated proof by the government of any
15 contested fact issue beyond a reasonable doubt. See 21 U.S.C. § 851(c)(1). As noted
16 above, it is not clear that the district court found beyond a reasonable doubt that Laiz was
17 the person convicted of a narcotics felony in Massachusetts in 1993, and it is an open
18 question whether, in the absence of a proper denial, the enhanced burden of proof
19 applied.⁸

⁸ We have never decided what burden of proof applies in that unusual situation (and we have found no case in which any other court has passed on the issue). In Alsol v. Mukasey, 548 F.3d 207 (2d Cir. 2008), we stated that “[i]f a defendant *does not admit* his prior conviction, the government must prove the existence of the prior conviction beyond a reasonable doubt.” Id. at 211 (emphasis added). But that was dictum in a case that did

1 Because we remand for resentencing, we need not decide whether § 851’s
2 requirement of proof beyond a reasonable doubt applies when a defendant neither affirms
3 nor denies a prior conviction. It suffices to note that we cannot discern what standard of
4 proof the district court applied. If the failure to follow the procedures set forth in the
5 statute caused Laiz to fail to file a written response that would clearly have triggered the
6 beyond-a-reasonable-doubt standard, the potential prejudice from that failure is clear.

7 Second, the failure to follow the statutory procedure compromised the reliability
8 and thoroughness of the “hearing” conducted by the district court. Because Laiz had no
9 opportunity to file a written response, neither he nor the government was prepared for the
10 impromptu hearing that the court held. That procedure undermined the reliability of the
11 resulting findings. The court based its conclusion not on a careful inquiry into whether
12 Laiz was indeed the man convicted in the prior Massachusetts case, but merely on
13 whatever evidence the government happened to have on hand – documents the defense
14 may not even have seen in advance of the hearing, and on which Laiz was given no real
15 opportunity to comment.⁹ The district court’s inexplicit finding at the end of this

not turn on what burden of proof applied when a defendant neither affirms nor denies an
alleged prior conviction.

⁹ In addition to potentially harming Laiz, the impromptu procedure also denied the
government a fair opportunity to prove Laiz’s alleged prior conviction at a hearing of the
sort that § 851 contemplates. The government had no notice of the hearing here, because
the court immediately requested the government’s evidence when Laiz refused to admit
the prior conviction. If specific facts had been put in issue by the statutorily contemplated
denial and written objection, additional follow-up on the documents on hand in
anticipation of a hearing might well have produced more definitive proof that Laiz in fact
was – or was not – the person convicted in Massachusetts. Without notice that the fact of
the prior conviction would be put in issue, the government did not have a fair opportunity
to gather and present its best evidence of Laiz’s prior conviction.

1 truncated hearing that Laiz had a prior felony conviction may or may not be sustainable,
2 if that is all the evidence that the government can present at a proper hearing after
3 appropriate notice to both sides. But in view of the poor quality of the government's
4 evidence, that decision was a close one that is not beyond question. Thus, the failure to
5 follow the required procedure resulted in a less-than-rigorous presentation of the evidence
6 that undermines our confidence in the result. Considering that a ten-year sentencing
7 enhancement turns on the outcome of the § 851 procedure, the failure to comply fully
8 with the statute's procedural requirements should not casually be deemed harmless error.

9 Accordingly, instead of affirming the decision reached by the district court after
10 undertaking defective § 851 procedures and reviewing somewhat shaky evidence (as the
11 government requests), or finding the evidence insufficient, striking the prior felony
12 information, and remanding for imposition of a ten-year sentence (as Laiz demands), we
13 think the proper course is to vacate Laiz's sentence and to remand for resentencing. On
14 remand, the proper procedures can be followed. If Laiz persists in refusing to affirm or
15 deny the prior conviction, he should be advised of the consequences of failing to raise any
16 objection that he has. If he denies the prior conviction, he should be given an opportunity
17 to file a written response, and if that response raises issues of fact to be resolved at a
18 hearing, the government should have the chance to marshal and present its best evidence
19 to prove the disputed facts beyond a reasonable doubt.¹⁰

¹⁰ Of course, it is possible that, having had a fair opportunity to reflect on the allegations in the prior felony information, and possibly having his memory refreshed by the government's evidence, Laiz may now recall, and might therefore choose to affirm, his prior conviction.

CONCLUSION

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For the foregoing reasons, the judgment of conviction is affirmed, and his sentence

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is vacated and remanded for further proceedings consistent with this opinion.