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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff - Appellee,</p> <p style="text-align: center;">v.</p> <p>TODD ANTHONY HERNANDEZ,</p> <p style="text-align: center;">Defendant - Appellant.</p>
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No. 07-10428

D.C. No. CR-05-00196-SOM
District of Hawaii,
Honolulu

ORDER

Before: REINHARDT, BRUNETTI and THOMAS, Circuit Judges.

The memorandum disposition filed February 24, 2009, is hereby amended as follows:

- At page 4, line 3, after <drug offense.>, insert footnote 1. The text of the footnote shall read: <Because the statute of limitations has run, *see* 21 U.S.C. § 851(e), Hernandez may not now “den[y] any allegation of the information of prior conviction, or claim[] that any conviction alleged is invalid.” 21 U.S.C. § 851(c). Hernandez nonetheless may argue that his prior conviction, as a matter of law, does not constitute a conviction of a “felony drug offense.” For the reason set forth above, we disagree. We do not, moreover, despite defendant’s suggestion, apply the “beyond a reasonable doubt” standard applicable to factual findings under 21 U.S.C. § 851(c).>

With this amendment, the panel has unanimously voted to deny the petition for panel rehearing. Judges Reinhardt and Thomas have voted to deny the petition for rehearing en banc, and Judge Brunetti has so recommended. The full court has

been advised of the petitions for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

No subsequent petition for rehearing or for rehearing en banc may be filed in this matter.