No: 18-9738

In the
Supreme Court of the United States

FRANCISCO GONZALEZ JOSE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Francisco Gonzalez Jose
Register Number: 73951-067
FCI Oakdale II
P.O. Box 5010
Oakdale, LA 71463

QUESTIONS PRESENTED FOR REVIEW

When a juror cannot continue deliberations and an alternate juror is empaneled, Fed. R. Crim. P. 24(c)(3) dictates proceedings to follow. Does the Third Circuit's decision in *United States v. Sotelo*, 707 F. App'x 77 (3d Cir. 2017) conflict with Fed. R. Crim. P. 24(c)(3), in that it does not required that the juror be instructed that he/she must start deliberations a new as Rule 24(c)(3) requires.

PARTIES TO THE PROCEEDINGS
IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case. The United States Court of Appeal for the Third Circuit and the United States District Court for the Eastern District of Pennsylvania.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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ON PETITION FOR WRIT OF CERTIORARI
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FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Francisco Gonzalez Jose, ("Gonzalez Jose") the Petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit, denying Gonzalez Jose's Title 28 U.S.C. § 2255 whose judgment is herein sought to be reviewed, is an unpublished opinion *United States v. Gonzalez Jose,* Docket 18-2848, dated February 21, 2019, and is reprinted as Appendix A to this Petition.

The denial of Gonzalez Jose's Title 28 U.S.C. § 2255 in the District Court whose judgment is being reviewed was entered on *United States v. Gonzalez Jose,* 2018 U.S. Dist. LEXIS 105456 (E.D. Pa. June 25, 2018) and was entered on June 25, 2018, and is reprinted as Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which

> District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id. Sixth Amendment U.S. Constitution

Title 28 U.S.C. § 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Id. Title 28 U.S.C. § 2255

Federal Rule of Criminal Procedure, Rule 24 provides in relevant part:

> (a) Examination.
>
> (1) In General. The court may examine prospective jurors or may permit the attorneys for the parties to do so.

(2) Court Examination. If the court examines the jurors, it must permit the attorneys for the parties to:

(A) ask further questions that the court considers proper; or

(B) submit further questions that the court may ask if it considers them proper.

(b) Peremptory Challenges. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.

(1) Capital Case. Each side has 20 peremptory challenges when the government seeks the death penalty.

(2) Other Felony Case. The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.

(3) Misdemeanor Case. Each side has 3 peremptory challenges when thedefendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

(c) Alternate Jurors.

(1) In General. The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.

(2) Procedure.

(A) Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror.

(B) Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors.

(3) Retaining Alternate Jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

(4) Peremptory Challenges. Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below. These additional challenges may be used only to remove alternate jurors.

(A) One or Two Alternates. One additional peremptory challenge is permitted when one or two alternates are impaneled.

(B) Three or Four Alternates. Two additional peremptory challenges are permitted when three or four alternates are impaneled.

(C) Five or Six Alternates. Three additional peremptory challenges are permitted when five or six alternates are impaneled.

Id. Fed. R. Crim. P. 24.

STATEMENT OF THE CASE

A. Course of Proceedings in the Lower Courts

A grand jury returned a Superseding Indictment against a Mexico-based Laredo Drug Trafficking Organization ("DTO"). The grand jury charged Gonzalez Jose as one of the Philadelphia-based heroin distributors, responsible for distributing and selling multi-kilogram quantities of heroin and with collecting and concealing hundreds of thousands of dollars intended to be secretly returned to the Laredo DTO in Mexico.

After eight days of evidence adduced at trial, the matter was submitted to the jury for deliberation. After approximately ninety minutes of deliberation, a juror notified the court of an illness preventing him from continuing. Outside the presence of the jury, the court spoke with counsel on the record regarding the ill juror. After questioning the ill juror regarding his condition, the juror was excused the juror without objection.

After replacing the ill juror with an alternate, the court instructed the jury:

> Ladies and gentlemen, I -- I appreciate your extraordinary efforts. As you may know, we have replaced one -- Juror Number 10 with an

> alternate and I appreciate the alternate's service. Under the law the selection of a foreperson remains. I don't need to know that. The selection of a foreperson remains, but with a new alternate that person has to be brought up to speed on any decisions, determinations and you have to, sort of -- so I don't want to know this. But by way of example if you had a sheet of paper and you went through Questions 1 and 2 or 1(A) or whatever you did, you'd have to ask that person their view just like -- just like they were in the room. So you have to start over at one and say -- I don't know the person's name - - I don't know the person's name, let's say it's Bill or Sue -- Sue, you know, what do you think about -- what do you think about one? What do you think about two? You know that kind of thing you have [to] review. And then if your minds change because of what Bill or Sue says then you have to revisit the issue. And if you've taken a vote -- this is the most important -- if you've taken a vote on any issue already that has resulted in a number -- that resulted in something on the piece of paper then you have to revote that number. Okay.

Gonzalez Jose's counsel did not object to the instruction. The reconstituted jury then deliberated for approximately two hours and fifteen minutes and found Gonzalez Jose guilty of conspiracy to distribute one kilogram or more of heroin; conspiracy to import one kilogram or more of heroin; two counts of possession with the intent to distribute one kilogram or more of heroin; aiding and abetting; and conspiracy to commit money laundering.

A motion for a new trial was denied and Gonzalez Jose was sentenced to 220 imprisonment, five years supervised release a $ 10,000 fine and $ 500 special assessment. On appeal, Gonzalez Jose argued

that the court erred in not instructing the jury to "begin its deliberations anew" as required by Federal Rule of Criminal Procedure 24. The United States Court of Appeals for the Third Circuit rejected this argument.

Gonzalez Jose filed a Title 28 U.S.C. § 2255, this time alleging that the error was based on counsel's failure to object to the missing jury instruction requirement, thus causing the Third Circuit to review his appeal under the plain error standard of review. This Court addressed the perils of the plain error standard in *Rosales-Mireles v. United States,* 138 S. Ct. 1897 (2018). (First, there must be an error that has not been intentionally relinquished or abandoned. Second, the error must be plain—that is to say, clear or obvious. Third, the error must have affected the defendant's substantial rights. To satisfy this third condition, the defendant ordinarily must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different. Once those three conditions have been met, the court of appeals should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.) *Id.* at 1900. The District Court denied the

request, mostly relying on the Third Circuit's prior decision in *United States v. Sotelo*, 707 F.App'x 77 (3d Cir. 2017) (A violation of the established criminal procedure is not sufficient in itself to create a constitutional violation, and the specific wording of Fed. R. Crim. P. 24 does not hold talismanic value.) Sotelo allows a district court's instruction to the jury upon the substitution of an alternate is the functional equivalent of an instruction to begin deliberations anew, there is no violation of the defendant's constitutional rights.

After the District Court denied the Title 28 U.S.C. § 2255, Gonzalez Jose proceeded to the Third Circuit Court of Appeals requesting permission to appeal the District Court's decision via a Certificate of Appealability. ("Title 28 U.S.C. § 2253"). The Third Circuit denied the request. This timely petition is required for relief.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT HAS INTERPRETED A FEDERAL STATUTES IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10
CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a)When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b)When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

WHEN A JUROR CANNOT CONTINUE DELIBERATIONS AND AN ALTERNATE JUROR IS EMPANELED, FED. R. CRIM. P. 24(C)(3) DICTATES PROCEEDINGS TO FOLLOW. DOES THE THIRD CIRCUIT'S DECISION IN *UNITED STATES V. SOTELO*, 707 F. APP'X 77 (3D CIR. 2017) CONFLICT WITH FED. R. CRIM. P. 24(C)(3), IN THAT IT DOES NOT REQUIRED THAT THE JUROR BE INSTRUCTED THAT HE/SHE MUST START DELIBERATIONS A NEW AS RULE 24(C)(3) REQUIRES.

Gonzalez Jose proceeded to trial. After the jury started deliberations, an alternate juror was empaneled since a regular juror fell ill and could not continue. The District Court replaced the sick juror with an alternate and advised the new jury panel to "start again. The court did not advise the juror's to "begin its deliberations anew" as provided in Federal Rule of Criminal Procedure 24(c)(3). The mere "start again" instruction, with a brief explanation, is all that was provided.

To complicate matters, trial counsel did not object to the improper instruction, so Gonzalez Jose was required to address the error under this court's infective assistance of counsel reasoning previously explained in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Under the Strickland standard, Gonzalez Jose alleged his attorney was ineffective for not objecting, however, also alleged under

Title 28 U.S.C. § 2255, that the District Court committed a structural error when it did not properly follow Rule 24. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1504 (2018) ("structural" error; when present, such an error is not subject to harmless-error review. *McKaskle v. Wiggins,* 465 U.S. 168, 104 S. Ct. 944 (1984); *United States v. Gonzalez-Lopez,* 548 U.S. 140, 126 S. Ct. 2557 (2006); *Waller v. Georgia,* 467 U.S. 39, 104 S. Ct. 2210 (1984). An error is structural if it is not designed to protect defendants from erroneous conviction, but instead protects some other interest, such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). The District Court denied the § 2255 under both theories. Eventually, the Third Circuit denied the request for a certificate of appealability following prior reasoning, whose conclusions have come into question in light of this Court's decision in *McCoy supra.*

The Third Circuit in *United States v. Sotelo*, 707 F. App'x 77 (3d Cir. 2017) determined that "a violation of the established criminal procedure is not sufficient in itself to create a constitutional violation and the specific wording of Fed. R. Crim. P. 24 does not hold talismanic value."

That decision is contrary to Fed. R. Crim. P. 24 and *McCoy*. Rule 24 is explicit in that the court ***must*** *instruct the jury to begin its deliberations anew.*" The question before this court is whether the word "must" as written into Fed. R. Crim. P. 24, is the equivalent of a mandatory directive that if not followed creates a structural error as such. This case is very different from the prior wording of Rule 24 where the District Court's were given more latitude.

Prior to the 1999 amendment of Rule 24(c)(3) required instructions to begin anew only where the Court found it to be speculation to assume the jurors did not begin deliberations anew. *United States v. Evans,* 635 F.2d 1124, 1128 (4th Cir. 1980) ("Jury was only told to continue its deliberations, and not specifically to begin them entirely anew. Yet no objection was raised as to the point. Nothing precluded the jury from starting from the very beginning all over again. The speculative assertion of prejudice from the unexceptional instruction, to which no objection was raised, was insufficient to justify reversal.") After the wording post Rule 24's amendment Rule 24's wording became mandatory and the failure to follow such wording structural.

Here the District Court told the jurors that "with a new alternate that person has to be brought up to speed with any decisions, determinations." The trial judge gave the jury an example: "If you had a sheet a paper and you went through Questions 1 and 2 or 1(a) or whatever you did, you'd have to ask that person their view just like they were in the room. So you have to start over at one and say ... you know, what do you think about one? What do you think about two?" The Judge continued, "and then if you minds change because of what (the new juror) says then you have to revisit the issue." Further, "the most important" thing was that if a vote had already been taken, "you have to revote" that issue. That instruction is not the same as explained in the directives of Rule 24. Many alternatives to starting anew were left for the jury. For example, the district court instructs the jury that they should "put all the previous deliberations out of their minds." *United States v. Helms*, 897 F.2d 1293, 1299 (5th Cir. 1990) (The trial judge questioned each of the eleven jurors, individually. Each juror stated that he or she could "wipe out all of the previous deliberations . . . and start again with those deliberations.) Only such an instruction, had it

been given in this case, would have eliminated that argument that this was error direct or structural.

Here absent the lack of objection, the error would have rendered different results in the lower court. Had trial counsel made the appropriate and timely objection to the error the Government would have the burden of proving the error was not prejudicial. The guise of the plain error hurdle precludes relief for Gonzalez Jose. In the alternative, a structural error guarantees relief. The interpretation of Rule 24, hinges on the relief sought. The wording of Rule 24' s "must" requirement mandates the mandatory nature of the use of the rules wording. The failure to follow the mandatory wording affected the structural nature of Gonzalez Jose's criminal proceedings. *McCoy* at 1504.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand order the Court of Appeals for the Third Circuit.

Done this 16, day of May 2019.

Francisco Gonzalez Jose

Francisco Gonzalez Jose
Register Number: 73951-067
FCI Oakdale II
P.O. Box 5010
Oakdale, LA 71463

Appendix A

ALD-106 February 21, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-2848**

UNITED STATES OF AMERICA

v.

FRANCISCO GONZALEZ JOSE, Appellant

(E.D. Pa. Crim. No. 2-14-cr-00652-010)

Present: MCKEE, SHWARTZ, and BIBAS, Circuit Judges

Submitted is Appellant's motion for a certificate of appealability pursuant to 28 U.S.C. § 2253(c) in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's motion for a certificate of appealability is denied as he has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c). The District Court denied Appellant's motion to vacate sentence pursuant to 28 U.S.C. § 2255. For substantially the reasons stated by the District Court, Appellant has not shown that reasonable jurists would find its assessment of his claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

By the Court,

s/ Patty Shwartz
Circuit Judge

Dated: February 28, 2019
SLC/cc: Burton A. Rose, Esq.
Nelson S.T. Thayer, Jr., Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

United States v. Jose

United States District Court for the Eastern District of Pennsylvania

June 25, 2018, Decided; June 25, 2018, Filed

CRIMINAL ACTION NO. 14-652-10

Reporter
2018 U.S. Dist. LEXIS 105456 *; 2018 WL 3117642

UNITED STATES OF AMERICA v. ***FRANCISCO GONZALEZ JOSE***

Subsequent History: Reconsideration denied by *United States v. Jose, 2018 U.S. Dist. LEXIS 132396 (E.D. Pa., Aug. 7, 2018)*

Prior History: *United States v. Sotelo, 2016 U.S. Dist. LEXIS 103062 (E.D. Pa., Aug. 4, 2016)*

Core Terms

heroin, juror, instruction of a jury, court of appeals, deliberations, instructions, Co-conspirator, alternate, trial counsel, distribute, ledger, kilogram, anew, replacing, argues, instruct a jury, plain error, conspiracy, laundering, sentence, words, new trial, alternate juror, ineffective, memorandum, post-trial, motions, picked, probability, challenges

Counsel: **[*1]** For GABRIEL VARGAS, Defendant: ROLAND B. JARVIS, LEAD ATTORNEY, JARVIS LAW & ASSOCIATES PC, PHILADELPHIA, PA.

For OSMAR FLORES, Defendant: ANGELA HALIM, LEAD ATTORNEY, LAW OFFICES OF ANGIE HALIM LLC, PHILADELPHIA, PA; HOPE C. LEFEBER, LEAD ATTORNEY, LAW OFFICES HOPE C. LEFEBER, LLC, PHILADELPHIA, PA.

For ALEJANDRO SOTELO, A/K/A "ALEX", Defendant: ANDREW F. ERBA, LEAD ATTORNEY, WILLIAMS CUKER & BEREZOFSKY, PHILADELPHIA, PA; VINCENT E. SOLANO, LEAD ATTORNEY, PRO HAC VICE, THE LAW OFFICES OF VINCENT E. SOLANO, LISLE, IL.

For ENOC LAREDO-BARRIOS, A/K/A "JOSE ROSALES", Defendant: ROBERT J. DANIELS, KILLIAN & GEPHART LLP, HARRISBURG, PA.

For CONFESOR MONTALVO, Defendant: JEFFREY C. ZUCKER, LEAD ATTORNEY, DAVID W. SUFRIN, ZUCKER STEINBERG & WIXTED, CAMDEN, NJ.

For MIGUEL IRIZARRY, A/K/A "CHISITO", Defendant: SHEVELLE MCPHERSON, LEAD ATTORNEY, MCPHERSON LAW OFFICES LLC, PHILADELPHIA, PA; JOSE LUIS ONGAY, PLYMOUTH MEETING, PA.

For JOSE RUIZ, A/K/A "DRAMA", Defendant: SARA M. WEBSTER, LEAD ATTORNEY, Webster Law P.C., DOYLESTOWN, PA.

For EDWIN VIDAL, Defendant: RHONDA PANTELLAS LOWE, LEAD ATTORNEY, THE LAW OFFICES OF RHONDA PANTELLAS LOWE, NEWTOWN SQUARE, PA.

For LUIS VASQUEZ, A/K/A "CHUPEE", Defendant: **[*2]** KATHRYN COVIELLO CACCIAMANI, LEAD ATTORNEY, PHILADELPHIA, PA.

For FRANK CHRISTIAN PERALTA, A/K/A "COJO", Defendant: GUY R. SCIOLLA, GUY R. SCIOLLA ATTORNEY AT LAW, PHILADELPHIA, PA.

For ARIEL RODRIGUEZ, A/K/A "EL PURO", Defendant: WAYNE R. MAYNARD, LEAD

ATTORNEY, THE BELLEVUE, PHILADELPHIA, PA.

For JOEL PERALTA-REYES, Defendant: LAURENCE A. NARCISI, III, LEAD ATTORNEY, PHILADELPHIA, PA.

For JHONNY MENA-MARIANO, Defendant: SALVATORE C. ADAMO, LEAD ATTORNEY, HELLERTOWN, PA.

For MELVIN PAGAN, Defendant: PETER C. BOWERS, LEAD ATTORNEY, PETER C. BOWERS & ASSOC., PHILADELPHIA, PA.

For JOHANA LASALS, Defendant: STEPHEN J. BRITT, LEAD ATTORNEY, BLUE BELL, PA.

For JOSE LUIS ROJAS-HERNANDEZ, Defendant: ALTHIA O. BENNETT, LEAD ATTORNEY, LAW OFFICES OF ALTHIA O. BENNETT, LLC, PHILADELPHIA, PA.

For JACQUELINE DELGADO, Defendant: CARLOS A. MARTIR, LEAD ATTORNEY, MARTIR & ASSOC, NEWTOWN, PA.

For IVET MANRIQUE BANDA, Defendant: ALLAN L. SODOMSKY, LEAD ATTORNEY, SODOMSKY & NIGRINI, READING, PA.

For EDGAR R. CHAVELAS-MANRIQUE, Defendant: JAY MICHAEL NIGRINI, LEAD ATTORNEY, SODOMSKY AND NIGRINI, READING, PA.

For ORTENCIA HERRERA, Defendant: SHARIF N. ABAZA, LEAD ATTORNEY, LAW OFFICE OF SHARIF N. ABAZA, DOYLESTOWN, **[*3]** PA; ELLIOT M. COHEN, SAVINO, LOUIS T. & ASSOC., PHILA, PA.

For CARMELINA SOTELO, Defendant: ANDREW F. ERBA, LEAD ATTORNEY, WILLIAMS CUKER & BEREZOFSKY, PHILADELPHIA, PA.

For ANGEL P. MASCORRO, Defendant: RICHARD J. FUSCHINO, JR., LEAD ATTORNEY, LAW OFFICE OF RICHARD J. FUSCHINO, PHILADELPHIA, PA.

For YANDELIZ RENTERIA, Defendant: PAUL J. HETZNECKER, LEAD ATTORNEY, PHILADELPHIA, PA.

For PRISCILLA BUSTAMANTE, A/K/A "PRISCILLA LAREDO", Defendant: CATHERINE O'DANIEL, LEAD ATTORNEY, PRO HAC VICE, CHICAGO, IL; MICHAEL DROSSNER, LEAD ATTORNEY, THE LAW OFFICE OF MICHAEL, PHILADELPHIA, PA.

For USA, Plaintiff: JORDAN L. STRAUSS, JOSEPH T. LABRUM, III, NELSON S.T. THAYER, JR., LEAD ATTORNEY, U.S. ATTORNEY'S OFFICE, PHILADELPHIA, PA.

Judges: KEARNEY, J.

Opinion by: KEARNEY

Opinion

MEMORANDUM

KEARNEY, J.

Convicted and sentenced for his role in a heroin drug trafficking organization, and having exhausted his direct appeal rights, ***Francisco Gonzalez Jose*** now asks us to vacate, set aside, or correct his sentence under *28 U.S.C. § 2255*. He does not argue a lack of evidence. Mr. Gonzalez Jose argues ineffective assistance of trial counsel for failing to object to the instruction we gave the jury after replacing an ill juror with an alternate juror. Mr. **[*4]** Gonzalez Jose appealed from the judgment of sentence raising, among several issues, this same error in the jury charge. Our court of appeals rejected Mr. Gonzalez Jose's challenges. He now claims ineffective assistance of trial counsel for failing to object to the jury charge limiting review on appeal to the plain error standard. He argues if his trial counsel objected to the jury instruction, the court of appeals would not have applied a plain error standard and the outcome of his appeal would have been different. Mr. Gonzalez Jose argues he is entitled to a new trial.

Analyzed under the familiar standards defined by the Supreme Court in *Strickland v. Washington*, we deny Mr. Gonzalez Jose's motion.

I. Background[1]

A grand jury returned a Superseding Indictment against the Mexico-based Laredo Drug Trafficking Organization ("DTO") led by fugitives Antonio Laredo and Ismael Laredo and thirty-five individuals including Mr. Gonzalez Jose. The Superseding Indictment charged the DTO conspired from 2008 to November 2014 to import and distribute over 1,000 kilograms of heroin in Philadelphia and launder millions of dollars in heroin proceeds.[2] Mr. Gonzalez Jose, based in Philadelphia, worked **[*5]** both the supply and payment side of the conspiracy. The grand jury charged him as one of the Philadelphia-based heroin distributors, responsible for distributing and selling multi-kilogram quantities of heroin and with collecting and concealing hundreds of thousands of dollars intended to be secretly returned to the Laredo DTO in Mexico.

The eight days of evidence adduced at trial overwhelmingly confirmed Mr. Gonzalez Jose played a key middle management role for the Laredo DTO in Philadelphia. He regularly distributed multi-kilogram quantities of heroin in the Philadelphia area. Mr. Gonzalez Jose made multiple payments aggregating hundreds of thousands of dollars to the Laredo DTO representing the proceeds of heroin sales in Philadelphia. The United States showed how he concealed these payments.

The United States adduced evidence Mr. Gonzalez Jose conspired to distribute at least ninety kilograms of heroin and laundered approximately six million dollars in heroin sales. Several co-conspirators identified Mr. Gonzalez Jose's role in the money laundering conspiracy. Co-conspirator Joseph Torres, admitted member of the Laredo DTO and son-in-law of Antonio Laredo, testified to maintaining **[*6]** written ledgers.[3] Mr. Torres identified ledgers showing payments made by Mr. Gonzalez Jose in an exchange of heroin and money.[4] Mr. Torres testified to direct payment transactions with Mr. Gonzalez Jose as the direction of Antonio Laredo;[5] Mr. Torres picked up money from Mr. Gonzalez Jose as payment for heroin;[6] Mr. Torres knew Mr. Gonzalez Jose made one bank deposit for Antonio Laredo;[7] Mr. Torres always received money from Mr. Gonzalez Jose in bulk;[8] and, Mr. Torres described at least $100,000 collected from Mr. Gonzalez Jose and recorded in Mr. Torres' ledger.[9]

Both Mr. Torres and co-conspirator Bertin Torres Sanchez testified to a ledger they maintained tracking deliveries of money and drugs. Mr. Torres testified he knew Mr. Gonzalez Jose as "Franci" and identified his ledger recording transactions for Mr. Gonzalez Jose for a six-week period in May — July, 2013.[10] Mr. Tones testified to being present at a cash delivery with Mr. Sanchez and Mr. Gonzalez

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[1] Our previous opinions addressing post-trial motions detailed the evidence. *See* Memorandum denying Mr. Gonzalez Jose's Motion for acquittal or for a new trial (ECF Doc. No. 923). We only include background relevant to Mr. Gonzalez Jose's motion based on ineffective assistance of counsel.

[2] ECF Doc. No. 23. The Superseding Indictment charged Mr. Gonzalez Jose with conspiracy to distribute one kilogram or more of heroin in violation of ***21 U.S.C. § 841(a)(1), (b)(1)(A)*** and *21 U.S.C. §§ 963, 960(b)(1)(A)* (Counts 1 and 2); two counts of aiding and abetting and causing the distribution of one kilogram or more of heroin in violation of ***21 U.S.C. §§ 841(a)(1), (b)(1)(A)*** and ***18 U.S.C. § 2*** (Counts 13 and 36); and money laundering in violation of *18 U.S.C. § 1956(a)(1)(B)(i)* (Count 44).

[3] April 19, 2016 Notes of Testimony ("N.T.") at 40-46 (ECF Doc. No. 847).

[4] *Id.* at 45-46, 55, 65-68.

[5] *Id.* at 68-69.

[6] *Id.* 119-120; 137-138.

[7] *Id.* at 120.

[8] *Id.* at 121.

[9] April 18, 2016 N.T. at 272 (ECF Doc. No. 846).

[10] April 19, 2016 N.T. at 44-45 (ECF Doc. No. 847).

Jose.[11]

Co-conspirator Mr. Sanchez testified he kept track of heroin he received and distributed in a small notebook until Mr. Torres put the information into a computer spreadsheet.[12] Mr. Sanchez testified his ledger records money and heroin Mr. [*7] Gonzalez Jose gave to Mr. Sanchez; Mr. Sanchez met Mr. Gonzalez Jose nine or ten times for the purpose of transferring money and heroin.[13] Mr. Sanchez described the transactions in the ledger including, for example, a May 28, 2013 transaction where Mr. Gonzalez Jose paid Mr. Sanchez $50,000 for heroin previously given to Mr. Gonzalez Jose.[14] Mr. Sanchez described the record of telephone calls between him and Mr. Gonzalez Jose, and confirmed he gave Mr. Gonzalez Jose five kilograms of heroin on July 4, 2013 and Mr. Gonzalez Jose gave him money on July 14, 2013 as reflected in Mr. Torres's and Mr. Sanchez's ledger.[15]

Co-conspirator Edwin Vidal testified he laundered money through Western Union accounts as directed by Antonio Laredo from 2012 to 2014.[16] Mr. Vidal received money directly from Mr. Gonzalez Jose in amounts ranging from $50,000 to $180,000 beginning in 2012.[17] Antonio Laredo directed Mr. Vidal to deliver heroin to Mr. Gonzalez Jose. Mr. Vidal testified he gave heroin hidden inside car batteries to Mr. Gonzalez Jose and then received cash from Mr. Gonzalez Jose in exchange for heroin.[18] Mr. Vidal testified he gave heroin to Mr. Gonzalez Jose hidden inside an air compressor and received [*8] money from Mr. Gonzalez Jose.[19]

Co-conspirator Frank Christian Peralta testified he picked up money from Mr. Gonzalez Jose packed in a sneaker box and turned over the money to another member of the Laredo DTO.[20] Co-conspirator Leandro Rodriguez Urena authenticated an exhibit as his handwriting on a paper noting cash collected, including from Mr. Gonzalez Jose, for heroin.[21] Mr. Urena testified he and Mr. Vidal together picked up $150,000 from Mr. Gonzalez Jose at the direction of Antonio Laredo, and the money Mr. Urena collected came from the drugs given to Mr. Gonzalez Jose.[22] Mr. Urena received $100,000 and $75,000 from Mr. Gonzalez Jose on another occasions.[23] Mr. Urena testified he delivered multiple kilograms of heroin to Mr. Gonzalez Jose four or times at the direction of Antonio Laredo,[24] and picked up money from Mr. Gonzalez Jose six or seven times.[25]

Additional conspirators testified to Mr. Gonzalez Jose's participation in the Laredo DTO. For example, co-conspirator Gregorio Lantigua Reyes testified he maintained ledgers.[26] Mr. Reyes testified to his knowledge of Mr. Gonzalez Jose "making bundles of heroin."[27] Co-conspirator Euddy Izquierdo testified to exchanges with Mr. Gonzalez Jose of drugs [*9] and money at the direction of Antonio Laredo and to Mr. Gonzalez Jose distributing heroin for the Laredo DTO through vehicles equipped with trap compartments

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[11] *Id.* at 44-46.

[12] April 20, 2016 N.T. at 137-143 (ECF Doc. No. 848).

[13] *Id.* at 141-142. Sanchez identified "Franci" as Mr. Gonzalez Jose. *Id.* at 143.

[14] *Id.* at 147-150.

[15] *Id.* at 166-167.

[16] *Id.* at 234-236, 238.

[17] *Id.* at 236-244.

[18] *Id.* at 245-255.

[19] *Id.* at 259-264.

[20] April 21, 2016 N.T. at 19-25 (ECF Doc. No. 851).

[21] *Id.* at 74-75.

[22] *Id.* at 74-76.

[23] *Id.* at 81-84.

[24] *Id.* at 86-87.

[25] *Id.* at 99-101.

[26] April 21, 2016 N.T. at 30 (ECF Doc. No. 849).

[27] *Id.* at 40-41.

to conceal drugs.[28] Co-conspirator Frank Felix-Herrera testified to a transaction with Mr. Gonzalez Jose of heroin and money in connection with the Laredo DTO and testified generally to distributing heroin for the Laredo DTO.[29]

Mr. Gonzalez Jose is not challenging this overwhelming evidence today. Mr. Gonzalez Jose's *§ 2255* motion challenges our instruction to the jury when one juror became ill. After approximately ninety minutes of deliberation, a juror notified us of illness preventing him from continuing.[30] Outside the presence of the jury, we spoke with counsel on the record regarding the ill juror.[31] After questioning the ill juror regarding his condition, we excused the juror without objection from counsel.[32] After replacing the ill juror with an alternate, we instructed the jury:

> Ladies and gentlemen, I -- I appreciate your extraordinary efforts. As you may know, we have replaced one -- Juror Number 10 with an alternate and I appreciate the alternate's service.
>
> Under the law the selection of a foreperson remains. I don't need to know that. **[*10]** The selection of a foreperson remains, but with a new alternate that person has to be brought up to speed on any decisions, determinations and you have to, sort of -- so I don't want to know this.
>
> But by way of example if you had a sheet of paper and you went through Questions 1 and 2 or 1(A) or whatever you did, you'd have to ask that person their view just like -- just like they were in the room. So you have to start over at one and say -- I don't know the person's name -- I don't know the person's name, let's say it's Bill or Sue -- Sue, you know, what do you think about -- what do you think about one? What do you think about two? You know that kind of thing you have [to] review. And then if your minds change because of what Bill or Sue says then you have to revisit the issue. And if you've taken a vote -- this is the most important -- if you've taken a vote on any issue already that has resulted in a number -- that resulted in something on the piece of paper then you have to revote that number. Okay.[33]

Mr. Gonzalez Jose did not object to this instruction (the "Jury Instruction").

The reconstituted jury then deliberated for approximately two hours and fifteen minutes and found Mr. Gonzalez **[*11]** Jose guilty of conspiracy to distribute one kilogram or more of heroin; conspiracy to import one kilogram or more of heroin; two counts of possession with the intent to distribute one kilogram or more of heroin; aiding and abetting; and conspiracy to commit money laundering.[34]

Mr. Gonzalez Jose timely moved for a new trial and acquittal raising, among other issues, an objection to the Jury Instruction.[35] We denied Mr. Gonzalez Jose's post-trial motions.[36] We sentenced Mr. Gonzalez Jose on September 8, 2016 to 220 months imprisonment, five years of supervised release, a $10,000 fine and $500 special assessment.

Retaining new counsel, Mr. Gonzalez Jose filed a timely appeal from the final judgment of sentence. On appeal, Mr. Gonzalez Jose argued we erred in our instructions after replacing the ill juror with an alternate by failing to instruct the jury to "begin its deliberations anew" as required by *Federal Rule of Criminal Procedure 24*. The United States Court of Appeals for the Third Circuit rejected this argument

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[28] April 21, 2016 N.T. at 140-146 (ECF Doc. No. 851).

[29] *Id.* at 105-109; 110-114.

[30] April 22, 2016 N.T at 49-50 (ECF Doc. No. 732).

[31] *Id.* at 49-53.

[32] *Id.* at 53-59, 65-66.

[33] *Id.* at 67-68.

[34] *See* Judgment at ECF Doc. No. 929.

[35] ECF Doc. No. 619.

[36] ECF Doc. Nos. 921, 923.

and affirmed the judgment and sentence in its September 26, 2017 opinion.[37] Mr. Gonzalez Jose then moved under *28 U.S.C. § 2255*.

II. Analysis

Mr. Gonzalez Jose argues he is entitled to relief under *§ 2255* based on ineffectiveness of his **[*12]** trial counsel. Mr. Gonzalez Jose argues our Jury Instruction failed to explicitly instruct jurors, after installing the alternate juror, to "begin its deliberations anew." Mr. Gonzalez Jose asserts if his trial counsel had objected, our court of appeals would not have limited its review to plain error, and the outcome of the appeal would have been different. He argues he is entitled to a new trial.

Under the two-part standard of *Strickland v. Washington*,[38] Mr. Gonzalez Jose bears the burden of showing (1) "counsel's performance was deficient"; and (2) "the deficient performance prejudiced the defense."[39] Mr. Gonzalez Jose must demonstrate deficient performance and prejudice to have a valid claim for relief.[40]

To establish deficient performance of his trial counsel, Mr. Gonzalez Jose must show "counsel's representation fell below an objective standard of reasonableness."[41] There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[42] To establish prejudice, Mr. Gonzalez Jose must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[43]

A. Appellate [*13] court's standards for reviewing jury instructions.

Where, as here, trial counsel does not object to jury instructions, our court of appeals reviews the instruction for plain error. As explained in its opinion affirming the jury verdict, the court of appeals will grant relief under a plain error standard only if it concludes "(1) there was an error, (2) the error was 'clear or obvious,' and (3) the error 'affected the appellant's substantial rights.'"[44]

Where trial counsel objects to a jury instruction, our court of appeals "exercises[s] plenary review in determining 'whether the jury instructions stated the proper legal standard.'"[45] The wording of instructions is reviewed for abuse of discretion.[46] The court of appeals must reverse a jury instruction if it "was capable of confusing and thereby misleading the jury."[47] When reviewing a jury instruction, our court of appeals "considers[s] the totality of the instructions and not a particular sentence or paragraph in isolation."[48]

B. Even if the Court of Appeals applied plenary review to the Jury Instruction, Mr. Gonzalez Jose cannot show prejudice under *Strickland*.

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[37] *United States v. Sotelo, 707 F.App'x 77 (3d Cir. 2017)*.

[38] *466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*.

[39] *Id. at 687*; *United States v. Washington, 869 F.3d 193, 204 (3d Cir. 2017)*.

[40] *Washington, 869 F.3d at 204* (quoting *United States v. Travillion, 759 F.3d 281, 289-90 (3d Cir. 2014)*).

[41] *United States v. Vaskas, 696 F. App'x 564, 566 (3d Cir. 2017)* (quoting *Strickland, 466 U.S. at 688*).

[42] *Strickland, 466 U.S. at 689*.

[43] *Vaskas, 696 F.App'x at 566* (quoting *Strickland, 466 U.S. at 694*).

[44] *Sotelo, 707 F.App'x at 84* (quoting *United States v. Stinson, 734 F.3d 180, 184 (3d Cir. 2013)*).

[45] *United States v. Shaw, 891 F.3d 441, 2018 WL 2423174, at *6 (3d Cir. 2018)* (quoting *United States v. Khorozian, 333 F.3d 498, 507-08 (3d Cir. 2003)*).

[46] *Id.* (quoting *Gov't of Virgin Islands v. Mills, 821 F.3d 448, 465, 64 V.I. 699 (3d Cir. 2016)*).

[47] *Id.* (quoting *United States v. Zehrbach, 47 F.3d 1252, 1264 (3d Cir. 1995)* (en banc)).

[48] *Id.* (quoting *Khorozian, 333 F.3d at 508*).

Mr. Gonzalez Jose contends ineffective assistance of his trial counsel for **[*14]** failing to object to our Jury Instruction. Mr. Gonzalez Jose contends, as he did in his post-trial motions and on appeal, we erred by failing to explicitly instruct the jury using the words "to begin its deliberations anew" found in *Rule 24*. *Federal Rule of Criminal Procedure 24(c)(3)* provides "[t]he court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew."

Mr. Gonzalez Jose argues but for his trial counsel's error, the result of his ***appeal*** would have been different because the Court of Appeals would not have limited its review of the Jury Instruction to plain error. He argues he is entitled to a new trial. He assumes, without any authority, argument, or reasoning, the Court of Appeals would have found the Jury Instruction failed to state the proper legal standard and would have vacated his conviction and ordered a new trial. He does not provide us with any argument of a reasonable probability, ***but for***, his counsel's error the results of the appeal **[*15]** would have been different.

Mr. Gonzalez Jose's argument is based solely on an assertion we did not use the exact words "begin its deliberations anew." Although we did not use those exact words, the law in this Circuit does not require us to do so and our court of appeals in *Claudio v. Snyder* rejected the same argument. In *Claudio*, the court of appeals reviewed a trial court's instruction to the jury, after replacing an ill juror with an alternative, to "'take whatever time is necessary" to inform the alternate juror of deliberations.[49] The court found the instruction the "functional equivalent" to the jury to "begin its deliberations anew."[50]

In denying Mr. Gonzalez Jose's appeal challenging the Jury Instruction, the Court of Appeals, relied on *Claudio*, citing its holding "'a violation of the established criminal procedure is not sufficient in itself to create a constitutional violation' and that the specific wording of *Rule 24* does not hold 'talismanic' value. So long as the district court's instruction to the jury upon the substitution of an alternate is the 'functional equivalent' of an instruction to begin deliberations anew, there is no violation of the defendant's constitutional rights."[51] The Court of Appeals further found Mr. Gonzalez Jose did not "proffer anything to show that any error would have affected the outcome of the

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[49] *Claudio v. Snyder, 68 F.3d 1573, 1577 (3d Cir. 1995), as amended* (Dec 1. 1995). The jury instruction challenged in *Claudio* read in part:

> You find yourself [sic] somewhat of a disadvantage. Fortunately, however, with your diligence and the cooperation of your fellow jurors, you will be able to familiarize yourself with the deliberations concluded thus far, so that you are not at any disadvantage with regard to understanding all of the evidence and the views of your fellow jurors. It is essential and critical that you take whatever time is necessary to familiarize yourself with the evidence and the thinking and views of the jurors.
>
> You must guard against the natural feelings **[*16]** to rush or hasten in order to keep up with the majority or the other 11. I instruct you to be conscious, and forthright in telling the others if you feel any disadvantage with regard to the level of your understanding.
>
> When and only when you feel yourself adequately and reasonably equipped to understand what has transpired thus far in the deliberations, should you signal to your fellow jurors your desire to move forward.

Id. at n. 3 (citng *Claudio v. State*, 585 A.2d 1278, 1284 n.9 (Del. 1991)).

[50] *Id. at 1577*. The United States Court of Appeals for the Fourth

proceedings."[52]

We read the court's opinion in Sotelo **[*17]** to have addressed any prejudice argument by Mr. Gonzalez Jose. Even if the Court of Appeals applied plenary review, we see no difference in the outcome of the appeal. Even if the Court of Appeals addressed whether our instructions to the jurors, taken as a whole, are the functional equivalent of "begin deliberations anew," it would have so found. As we explained in our memorandum opinion denying Mr. Gonzalez Jose's post-trial motions, we instructed the reconstituted jury to consider every issue, and to ask the new juror his/her view "just like they were in the room" during the earlier deliberations. We instructed the jury "to start over" — synonymous with "begin anew" - and, as an example, if the jury went through questions, ask the new juror "'what do you think about one?' 'what do you think about two?' You know that kind of thing you have review. And if your minds change because of what [new juror] says, then you have to revisit the issue." We instructed the jury "[a]nd if you've taken a vote - this is the most important - if you've taken a vote on any issue already that has resulted in a number - that resulted in something on the piece of paper then you have to revote that number." **[*18]**

It is Mr. Gonzalez Jose's burden, under Strickland's prejudice prong to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[53] Mr. Gonzalez Jose fails to provide us with argument as to how an objection to the Jury Instruction would have altered the outcome of the appeal or the trial. The reconstituted jury deliberated for over two hours and considered the overwhelming evidence of Mr. Gonzalez Jose's role in the heroin trafficking and money laundering conspiracies. As set forth above, and in our memorandum denying Mr. Gonzalez Jose's post-trial motions, the evidence adduced at trial showed Mr. Gonzalez Jose's role in the Laredo DTO, including the testimony of co-conspirators and ledgers showing payments made by Mr. Gonzalez Jose in an exchange of heroin and money. There is no reasonable probability but for his trial counsel's failure to object to the Jury Instruction, giving the functional equivalent of an instruction under Rule 24(c)(3), his appeal would have been different.

III. Conclusion

Having failed to meet the prejudice prong under *Strickland*, we deny Mr. Gonzalez Jose's *§ 2255* motion in the accompanying Order. We decline **[*19]** to issue a certificate of appealability as Mr. Gonzalez Jose has neither shown a denial of a federal constitutional right nor has he established reasonable jurists would debate the correctness of our ruling.

ORDER

AND NOW, this 25th day of June 2018, upon

Circuit similarly holds. For example, in *United States v. Runyon*, the Fourth Circuit rejected a challenge to the jury instruction given after the district court replaced a juror with an alternate. 707 F.3d 475 (4th Cir. 2013). In that case, the district instructed the jury "I would tell you that what you need to do is, now it is the 12 of you, and if you would review for [the second alternate juror] — you were out only a little over an hour yesterday, and [Jury Foreperson], as foreperson, if you would just see that you review with her what was discussed and key her in, and then proceed with your deliberations." Id. at 518. The Fourth Circuit rejected the challenge to the jury charge, finding the defendant could not show error affecting his "substantial rights." Id. at 519. The court of appeals applied the plain error standard because defendant's trial counsel did not object to the instruction. The court found "'while a careful picking apart of the instructions' wording [may often] reveal minor ambiguity, when read in [their] entirety,' it may become apparent that the 'instructions were clear and did not permit' an improper verdict." *Id.* (quoting ***United States v. Moran, 493 F.3d 1002, 1010 (9th Cir. 2007)*** (per curiam)). And although the district court "did not repeat the words of [Rule 24(c)(3)] verbatim, the court in substance instructed the jury to rewind its proceedings for the benefit of the alternate before proceeding further. This, in essence, is what the Rule requires." *Id.*

[51] Sotelo, 707 F.App'x at 84 (citing Claudio, 68 F.3d at 1577).

[52] Id. at 85.

[53] Vaskas, 696 F.App'x at 566 (quoting Strickland, 466 U.S. at 694).

considering ***Francisco Gonzalez Jose***'s Petition for relief under *28 U.S.C. § 2255* (ECF Doc. No. 1106), the United States' Response (ECF Doc. No. 1120), and for reasons in the accompanying memorandum, it is **ORDERED**:

1. Mr. Gonzalez Jose's Petition for relief (ECF Doc. No. 1106) is **DENIED**;

2. We decline to issue a certificate of appealability as Mr. Gonzalez Jose has neither shown denial of a federal constitutional right nor has he established reasonable jurists would debate the correctness of this Court's ruling[1]; and,

3. The Clerk of Court shall close this case.

/s/ Kearney

KEARNEY, J.

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[1] *See Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).*