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United States Court of Appeals
For the First Circuit

No. 19-1613

UNITED STATES OF AMERICA,

Appellee,

v.

JEROME CAPELTON,
a/k/a ANTHONY COLEMAN,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Michael A. Ponsor, U.S. District Judge]

Before

Howard, Chief Judge,
Torruella and Barron, Circuit Judges.

Samia Hossain, Federal Public Defender Office, on brief for appellant.

Donald C. Lockhart, Assistant United States Attorney, and Andrew E. Lelling, United States Attorney, on brief for appellee.

July 16, 2020

TORRUELLA, Circuit Judge. Defendant-Appellant Jerome Capelton ("Capelton") challenges the district court's determination on resentencing pursuant to the 2018 First Step Act that he is a career offender under section 4B1.1 of the U.S. Sentencing Guidelines (the "Guidelines"). In classifying Capelton as a career offender, the court relied on two Massachusetts drug convictions from 1992 and 1996, which Capelton claims do not qualify as predicate "controlled substance offense[s]" under the career-offender guideline. He argues that the convictions implicitly include aiding and abetting liability under Massachusetts law -- then called "joint venture"[1] -- which is broader in scope than generic aiding and abetting liability and, consequently, there cannot be a categorical match between the convictions and the definition of "controlled substance offense." According to Capelton, at the time of his Massachusetts convictions, a defendant could be convicted under the relevant Massachusetts drug statute on a theory of joint venture by proving knowledge of the crime alone, rather than by proving shared intent with the principal to promote or facilitate the crime, as would be required to be convicted as an aider and abettor of a generic

[1] Massachusetts's "joint venture" theory of liability "finds its roots in the concept of accessorial or accomplice liability." Commonwealth v. Zanetti, 910 N.E.2d 869, 879 (Mass. 2009).

"controlled substance offense." Because Capelton failed to establish that the scope of joint venture liability under Massachusetts law is any broader than under the generic standard, we find no error in the district court's determination of his career-offender status and affirm the sentence.

I. Background

On September 26, 2001, a jury convicted Capelton of one count of conspiracy to possess with intent to distribute at least fifty grams of cocaine base, in violation of 21 U.S.C. § 846, and three counts of distribution and possession with intent to distribute at least fifty grams of cocaine base, in violation of 21 U.S.C. § 841(a)(1). The presentence investigation report ("PSR") issued after Capelton's conviction indicated that the Guidelines' career-offender provisions, U.S.S.G. § 4B1.1, were applicable because Capelton was over the age of eighteen, the instant offenses involved a controlled substance violation, and Capelton had several Massachusetts state felony convictions, at least two of which were for either a crime of violence or a crime involving an applicable controlled substance violation.[2] With the

[2] Section 4B1.1(a) of the Guidelines provides that a defendant qualifies as a career offender if

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a

career-offender guideline governing, Capelton's total offense level was thirty-seven[3] and his criminal history category was VI, which yielded a guideline sentencing range ("GSR") of 360 months' to life imprisonment.

The district court adopted the PSR's recommendations, and after denying Capelton's request for a downward departure,[4] it imposed sentences of 360 months of imprisonment followed by a five-year term of supervised release on each count, to be served concurrently. On direct appeal, Capelton raised several trial errors and challenged the district court's sentencing determination denying his request for a downward departure from the Guidelines. See United States v. Capelton, 350 F.3d 231 (1st Cir. 2003). We affirmed his conviction and sentence. See id. at 235. Subsequently, Capelton attempted to collaterally attack his conviction and sentence on several occasions without success.[5] See

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> controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

[3] The PSR did not apply any other adjustments.

[4] Capelton grounded his request for a downward variance on sections 4A1.3 (Departures Based on Inadequacy of Criminal History Category) and 5H1.6 (Family Ties and Responsibilities) of the Guidelines.

[5] Some of Capelton's petitions included a challenge to his career-offender designation, albeit on grounds different than the one presented in his argument now before us. See Capelton v. United States, No. 15-cv-312-JL, 2016 WL 3102200, at *1 (D.N.H.

Capelton v. United States, No. 15-cv-312-JL, 2016 WL 3102200, at *1 (D.N.H. Jan. 5, 2016).

In August 2010, the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, was signed into law. As it pertains to this appeal, the statute amended the Controlled Substances Act, 21 U.S.C. § 841(b)(1), by raising the quantity of crack cocaine necessary to trigger both the ten-year statutory-minimum sentence and statutory-maximum penalty of life imprisonment from fifty to 280 grams. See 21 U.S.C. § 841(b); Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372. These amendments applied only to defendants who were sentenced on or after the Fair Sentencing Act's effective date of August 3, 2010. See Dorsey v. United States, 567 U.S. 260, 264 (2012). However, in December 2018, the First Step Act was enacted into law, allowing certain defendants, like Capelton, who were convicted for crack cocaine offenses under 21 U.S.C. § 841 prior to the enactment of the Fair Sentencing Act, to seek a retroactive sentencing reduction. See First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222.

In light of the First Step Act, on March 6, 2019, the United States Probation Office ("Probation") issued a memorandum

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Jan. 5, 2016).

supplementing the PSR it had initially prepared for Capelton's sentencing back in 2002. The memorandum explained that Capelton still qualified as a career offender based on two prior Massachusetts drug convictions: a 1992 conviction for possession of a class B substance with intent to distribute, in violation of Mass. Gen. Laws ch. 94C, § 32A(a), and a 1996 conviction for distribution of a class B substance, in violation of Mass. Gen. Laws ch. 94C, § 32A(b). However, because the statutory maximum term of imprisonment was reduced to forty years from life, Capelton's corresponding offense level was now thirty-four (down from thirty-seven). According to the memorandum, with the career-offender enhancement, Capelton's GSR was 262 to 327 months of imprisonment, and without it, his GSR was 168 to 210 months of imprisonment. Under either scenario, Capelton faced a supervised release term of a minimum of four years.

Capelton sought relief under the First Step Act on March 20, 2019. He requested to be resentenced under section 404(b) of that Act and without the application of the career-offender enhancement. Specifically, Capelton objected to his continued designation as a career offender, arguing that the two Massachusetts drug offenses identified in Probation's memorandum did not qualify as predicate "controlled substance offense[s]" under U.S.S.G. § 4B1.1 because, at the time of the

offenses, generic aiding and abetting liability required proof of an element -- shared intent -- that joint venture liability under Massachusetts state law did not, which rendered the Massachusetts offenses categorically overbroad. Because Capelton had already served nearly nineteen years in prison, he requested a sentence of time served. On the other hand, the Government recommended that Capelton receive a sentence at the high end of the updated career-offender GSR.

The district court held a resentencing hearing on June 5, 2019. First, it acknowledged that Capelton's eligibility for a reduced sentence following the passage of the First Step Act was undisputed. It then turned to Capelton's career-offender status. Capelton expanded on the argument presented in his motion for relief, which he now also presses on appeal: that, under Massachusetts law prior to the 2009 opinion of the Supreme Judicial Court ("SJC") in Commonwealth v. Zanetti, 910 N.E.2d 869 (Mass. 2009), a person could be found guilty of aiding and abetting a drug crime without necessarily having an intent to participate in the crime if the person was present with knowledge that the crime was being committed and willing to assist in the commission of the crime. According to Capelton, because the generic controlled substances offenses contemplated by the career-offender guideline required that a person have the intent to commit the crime, his

Massachusetts state offenses were broader in scope and therefore a categorical mismatch with the guideline.

The district court questioned Capelton's argument because it had difficulty understanding "how someone can participate in possession of a drug with intent to distribute without having any intent to participate in a crime involving an intent to distribute." Ultimately, it rejected his theory as "imaginative but unsound," concluding that there was no "realistic probability that any jury would find an individual guilty of either of [the two Massachusetts drug crimes for which Capelton was convicted, even as an aider and abettor,] without finding beyond a reasonable doubt that there [wa]s an intent to commit that crime." Upholding Capelton's designation as a career offender, the court adopted a GSR of 262 to 327 months of imprisonment. It then granted a ten-month downward variance from the low end of the GSR based on Capelton's "very difficult upbringing" and the family support shown towards him. Accordingly, the court imposed a revised sentence of 252 months of imprisonment and four years of supervised release. Capelton then filed this appeal.[6]

[6] Since filing the notice of appeal, Capelton was released from prison in December 2019 and began his term of supervised release. However, his supervised release was revoked two months later on February 12, 2020, because he violated three conditions of his term of supervision. Consequently, the court sentenced him to three months of imprisonment to be followed by forty-five months of supervised release. On April 10, 2020, due to the COVID-19

II. Discussion

On appeal, Capelton disputes that his 1992 and 1996 Massachusetts convictions qualify as predicate "controlled substance offense[s]" under U.S.S.G. § 4B1.2(b) for career offender purposes. Specifically, Capelton avers that we should apply the "categorical approach" in analyzing whether his Massachusetts offenses fall within the career-offender guideline because, at the time of those offenses, aiding and abetting liability was indivisible from the Massachusetts substantive offenses -- i.e., Massachusetts law did not require a specific finding by the jury that it was convicting a defendant as a principal or as a joint venturer. He further contends that in 1992 and 1996, Massachusetts joint venture liability was broader than generic aiding and abetting liability and therefore the Massachusetts offenses were not categorically "controlled substance offense[s]." According to Capelton, when he was convicted in 1992 and 1996, Massachusetts could convict a defendant on a joint venture theory simply by proving a mens rea of knowledge that another participant intended to commit a crime, rather than

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pandemic and the short time remaining before Capelton's release, the court modified his sentence to time-served, ordered his release to home confinement, and amended the supervised release portion of the judgment to substitute a five-month period of home confinement in place of residential re-entry, but the other conditions of supervised release remained untouched.

a mens rea of specific intent to promote or facilitate the crime, as generic aiding and abetting requires. Consequently, Capelton reasons that Massachusetts joint venture liability criminalized more conduct than generic aiding and abetting liability and, thus, his prior convictions were overbroad and cannot serve as predicates for career offender purposes.

In response, the Government disputes that Massachusetts joint venture liability is broader in scope than generic aiding and abetting liability, arguing that Capelton misinterprets Massachusetts case law, which does require proof of shared intent in order to convict on a joint venture theory and thus does not allow a conviction based on mere knowledge. The Government also contends that we must uphold Capelton's conviction because, first, he waived his challenge during the 2019 resentencing by endorsing the sentence, and second, any error was harmless because Capelton has already completed his term of imprisonment, and his term of supervised release is mandated by statute.[7]

We need not resolve whether Capelton waived his sentencing challenge because as we will explain, we reject his

[7] The Government also suggests (in a footnote) that the district court was not authorized under the First Step Act to revisit Capelton's career-offender determination at resentencing, but we do not resolve this "antecedent statutory authority question here," nor does the Government ask us to, for we find other grounds to affirm Capelton's sentence.

claim on the merits. See United States v. Llanos-Falero, 847 F.3d 29, 33 n.2 (1st Cir. 2017) (opting to bypass an appellate-waiver argument to address the merits instead because the issues raised by the appellant all failed); Yeboah-Sefah v. Ficco, 556 F.3d 53, 68 n.6 (1st Cir. 2009) (withholding resolution of a waiver dispute because the petitioner's claim could be "easily reject[ed]" on the merits). We hold that Capelton's Massachusetts convictions qualify as "controlled substance offense[s]" and therefore constitute valid predicate offenses under the relevant provision of the career-offender guideline.

A.

We review whether a prior conviction qualifies as a predicate offense under section 4B1.1 de novo. United States v. Mohamed, 920 F.3d 94, 99 (1st Cir. 2019) (quoting United States v. Davis, 873 F.3d 343, 345 (1st Cir. 2017); United States v. Almenas, 553 F.3d 27, 31 (1st Cir. 2009). To qualify as a career offender, a defendant must have, among other requirements, "at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). Capelton concedes that he has two prior felony convictions but disputes that they satisfy the Guidelines' definition of "controlled

substance offense." For purposes of the career-offender guideline, a "controlled substance offense" is defined as

> an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Id. § 4B1.2(b). The Guidelines' application note 1 to § 4B1.2 specifies that the offense of aiding and abetting is included in the definition of "controlled substance offense." Id. § 4B1.2 cmt. n.1; see also United States v. Benítez-Beltrán, 892 F.3d 462, 467 n.4 (1st Cir. 2018); cf. United States v. Lewis, No. 18-1916, 2020 WL 3249058, at *8 (1st Cir. June 16, 2020) (Torruella, J., and Thompson, J., concurring) (expressing "discomfort with the practical effect of the deference to Application Note 1" regarding inchoate offenses).

We apply the "categorical approach" set forth by the Supreme Court in Taylor v. United States, 495 U.S. 575 (1990), to determine whether a prior offense qualifies as a "controlled substance offense" under section 4B1.1. United States v. García-Cartagena, 953 F.3d 14, 18 (1st Cir. 2020); see also Benítez-Beltrán, 892 F.3d at 466 ("We use a 'categorical approach' to determine whether the offense for which a defendant was previously convicted matches an expressly enumerated offense under

§ 4B1.2(a)." (citing United States v. Castro-Vázquez, 802 F.3d 28, 35 (1st Cir. 2015))). Under this approach, we look only to the elements of the offense, not to "'how a given defendant actually perpetrated the crime,' to decide if the offense, as defined in the statute, matches § 4B1.2's criteria" for a "controlled substance offense." García-Cartagena, 953 F.3d at 18 (quoting Mathis v. United States, 136 S. Ct. 2243, 2248, 2251-52 (2016)); see also Benítez-Beltrán, 892 F.3d at 466 ("[A] prior conviction qualifies as one for a ['controlled substance offense'] so long as the elements of the prior offense encompass no more conduct than do the elements of the 'generic' version of an offense that the guideline expressly enumerates." (citing Castro-Vázquez, 802 F.3d at 35)).

B.

Based on an application of the categorical approach, Capelton argues that the Massachusetts joint venture liability standard in 1992 and 1996 (the years of his purported predicate felony convictions) encompassed more conduct than the generic definition of aiding and abetting, resulting in a categorical mismatch. Capelton's argument relies on the following analytical steps: (1) that aiding and abetting liability is implicit in every Massachusetts criminal charge; (2) that the categorical approach requires that we consider, in looking to the minimum conduct

criminalized by a statute, the scope of aiding and abetting liability; and (3) that the principal and accomplice theories of guilt are indivisible from the substantive offense. We neither accept nor reject any of those premises because, as the Government proposes in its brief, we assume without deciding that they are true; after all, the Government does not address them, and the parties' dispute hinges on a comparison of the mens rea required to prove joint venture liability in Massachusetts and generic aiding and abetting liability at the time of Capelton's purported predicate offenses in 1992 and 1996.

The parties generally agree that generic aiding and abetting liability requires a shared intent with the principal and that knowledge alone is insufficient to meet the mens rea requirement.[8] Therefore, for purposes of this appeal, we assume

[8] Capelton adopts the generic aiding and abetting liability standard from the Ninth Circuit decision in United States v. Franklin, 904 F.3d 793, 799 (9th Cir. 2018), abrogated on other grounds by Shular v. United States, 140 S. Ct. 779 (2020). On the other hand, the Government relies primarily on Rosemond v. United States, 572 U.S. 65, 70-71 (2014), which sets forth the federal aiding and abetting liability standard (not necessarily the generic one). But both approaches require shared intent. Compare Franklin, 904 F.3d at 799 ("[G]eneral principles of accomplice liability establish that '[a] person is an "accomplice" of another in committing a crime if, with the intent to promote or facilitate the commission of the crime,' he commits certain acts; 'a person's . . . knowledge that a crime is being committed or is about to be committed, without more, does not make him an accomplice.'" (second and third alterations in original) (quoting 1 Wharton's Criminal Law § 38 (15th ed.))), with Rosemond, 572 U.S. at 71 ("[A] person is liable under [the federal aiding and

that the generic aiding and abetting liability standard proposed by the parties is correct. See United States v. Boleyn, 929 F.3d 932, 940 (8th Cir. 2019) (adopting this approach), cert. denied, 140 S. Ct. 1138 (2020). The narrower issue before us, then, is to determine the mens rea that was required to prove joint venture liability in Massachusetts in 1992 and 1996. Capelton argues that only "mere knowledge" was required, while the Government contends that Massachusetts law required more than that because shared intent had to be shown.

We side with the Government. We have been warned that in applying the categorical approach, the "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) (quoting Gonzáles v. Dueñas-Álvarez, 549 U.S. 183, 193 (2007)). As we explain next, Capelton has not persuaded us that, at the time of his Massachusetts convictions in 1992 and 1996, Massachusetts applied its aiding and abetting liability

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abetting statute, 18 U.S.C. § 2,] if (and only if) he (1) takes an affirmative act in furtherance of th[e] offense, (2) with the intent of facilitating the offense's commission.").

standard to encompass more conduct than the generic form of that standard. Put another way, Capelton has not shown that a jury in Massachusetts could convict a defendant on a joint venture theory of guilt without finding that the defendant had a shared intent with the principal to commit the crime. Accordingly, we reject Capelton's contention that his prior convictions are overbroad.

C.

In 1979, the SJC articulated the theory of joint venture liability in Commonwealth v. Soares, stating that to convict a defendant on such theory, the prosecution had to show that the defendant shared the intent required for the underlying crime with the principal. See 387 N.E.2d 499, 506 (Mass. 1979) ("The theory underlying joint enterprise is that one who aids, commands, counsels, or encourages commission of a crime while sharing with the principal the mental state required for the crime is guilty as a principal."). Four years later, in Commonwealth v. Bianco, the SJC articulated the Soares joint venture liability standard as a three-part test, recognizing joint venture liability when a defendant was "(1) present at the scene of the crime, (2) with knowledge that another intends to commit the crime or with intent to commit a crime, and (3) by agreement is willing and available to help the other if necessary." 446 N.E.2d 1041, 1047

(Mass. 1983) (citing Commonwealth v. Casale, 408 N.E.2d 841 (Mass. 1980), and Soares, 387 N.E.2d at 499).

The Bianco three-part test was the standard in place at the time of Capelton's Massachusetts convictions. Capelton argues that the SJC's use of the conjunctive word "or" in the second prong of the Bianco test suggests that knowledge and intent were separate elements of joint venture liability and, thus, a defendant could be convicted under that theory "upon proof of mere knowledge that another intended to commit the crime, without proof of specific intent to commit the crime."

The Government persuasively argues that Capelton erroneously isolates the second prong of the test when, in context, the three prongs read together "plainly require intent." In support, the Government explains that "[o]ne who is actually present at the scene of an impending crime, and who has knowledge that the principal intends to commit the crime, and who even has a prior 'agreement' with the principal that he is 'willing and available to help' . . . shares the intent of the principal." In response, Capelton argues that only the second prong of the test concerns the mens rea requirement, and that if the Government's reasoning were correct, the "with intent to commit a crime" clause of the second prong would be superfluous.

It is hard to imagine a situation relevant to the drug crimes at issue here (possession with intent to distribute and distribution of a controlled substance) in which the combination of the second prong -- "knowledge that another intends to commit the crime" -- with the third prong -- the "agreement [to be] willing and available to help the other [commit the crime] if necessary" -- does not amount to having a shared intent with the principal "to promote or facilitate the commission of the crime," as the parties agree generic aiding and abetting requires. And while Capelton proposes that Bianco "did not include the shared mental state language" from Soares, the SJC in Bianco rejected the argument that the defendants in that case could be convicted on a joint enterprise theory "because there was insufficient evidence that they shared the mental state required of joint venturers," and cited Soares to support this conclusion. See Bianco, 446 N.E.2d at 1045 (emphasis added).

Capelton makes much of the post-Bianco case Zanetti, 910 N.E.2d 869, arguing that it changed the joint venture standard articulated in Bianco by implementing a heightened mens rea requirement of shared intent. According to Capelton, Soares's shared mental state requirement that the SJC had eliminated in Bianco in 1983 was not reintroduced until 2009 in Zanetti. However, a close reading of Zanetti instead supports the

Government's contention that, in 1992 and 1996, the Massachusetts joint venture theory of liability required a showing of shared intent.

In Zanetti, the SJC implemented procedural reforms to the jury instructions in an attempt to clarify the law on joint venture. 910 N.E.2d at 871, 883. It recognized that Bianco's definition of joint venture liability "ha[d] proven to be a source of confusion to jurors and judges." Id. at 880-81. The confusion arose from an outdated and "false distinction between a principal and an accomplice" (or joint venturer) created by the language in the model jury instructions. Id. at 881. The SJC explained that at the time, the model jury instructions "encourage[d] judges to instruct on the required elements of the charged offense, and then separately instruct on joint venture liability, identifying the three familiar elements [of the Bianco test]." Id. at 882. Seeking to eliminate "the confusion and complexity" created by the separate narration of the elements in the instructions, the SJC reformulated the standard for joint venture liability by requiring that the jury be instructed simply that "the defendant is guilty if the Commonwealth has proved beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, alone or with others, with the intent required for that offense." Id. at 883 (emphasis added).

Contrary to Capelton's contention, there is no indication in Zanetti that the SJC thought that Bianco had eliminated the shared intent requirement from Soares, which it then had to reintroduce in Zanetti as a requirement to prove joint venture liability. Rather, it appears to us that the SJC was concerned that, with the instructions for principal liability being separated from the instructions for joint venture liability, the jury would not understand that, "to find the defendant guilty as a joint venturer, [it] must find that the Commonwealth ha[d] proved both the elements of the offense and the defendant's knowing participation in the offense." Id. at 882. The SJC also expressed concern that, in cases where a lesser crime escalates into a more serious crime, the severed jury instructions could confuse the jury about whether a defendant needed to share the intent of the principal in the initial crime and/or in the subsequent one. Id. at 882 n.20.

Furthermore, the SJC expressly stated that the reformulated joint venture standard was "hardly novel" and that "it best reflect[ed] the spirit behind the common law as . . . reflected in the aiding and abetting statute, which declares the aider and abettor to be as culpable as the chief perpetrator of the offense." Id. at 883 (citation omitted); see Mass. Gen. Laws ch. 274, § 2. The SJC recognized that, "[a]t its core, joint

venture criminal liability has two essential elements: that the defendant knowingly participated in the commission of the crime charged, and that the defendant had or shared the required criminal intent." Zanetti, 910 N.E.2d at 883. Thus, the SJC expressed that it was merely "[s]treamlining the [jury] instruction" for accomplice liability, id., "hop[ing] to provide clearer guidance to jurors and diminish the risk of juror confusion in cases where two or more persons may have committed criminal acts," id. at 884. The shift in language, the SJC clarified, "d[id] not enlarge or diminish the scope of existing joint venture liability." Id.

In our view, the series of cases decided between Bianco and Zanetti to which both Capelton and the Government cite also tend to support the Government's position that the Commonwealth had to prove shared intent in the wake of Bianco. See, e.g., Commonwealth v. Clemente, 893 N.E.2d 19, 51 (Mass. 2008) (concluding that a joint venturer "must share the mental state of the principal," and jury instructions that quoted the Bianco test verbatim, "considered as a whole, explained that concept to the jury"); Commonwealth v. Cannon, 869 N.E.2d 594, 600 (Mass. 2007) (upholding jury instruction requiring proof of shared intent to be convicted of the crime as a joint venturer); Commonwealth v. Hernández, 790 N.E.2d 1083, 1087-88 (Mass. 2003) ("Under the joint venture theory, for a trafficking conviction, the defendant need

not have possessed the drugs, actually or constructively. He need only have shared the intent of the principal to distribute." (citations omitted)); Commonwealth v. Blake, 696 N.E.2d 929, 934 (Mass. 1998) (affirming conviction under a joint venture theory of liability where sufficient evidence supported an inference that the defendant "and the other shooters shared the intent to aid each other and to engage in a shooting spree"); Commonwealth v. Brooks, 664 N.E.2d 801, 804-05 (Mass. 1996) (reciting the Bianco three-factor test, while requiring that defendant share the shooters' intent to be convicted as a joint venturer); Commonwealth v. Semedo, 665 N.E.2d 638, 641 (Mass. 1996) (noting that, to sustain a conviction for joint venture, in addition to "knowledge that another intended to commit a crime," the Commonwealth had to show "that the defendant shared with the principal the mental state required for the crime"); Commonwealth v. Cunningham, 543 N.E.2d 12, 20 (Mass. 1989) ("To sustain a conviction based on a joint venture, the Commonwealth need only show that each defendant shared the mental state required for the crime of which he was convicted, and that he satisfied the other elements of the test for joint venture.").

This leads us to conclude that Massachusetts required a showing of shared intent to convict a defendant on a theory of joint venture pre- and post-Zanetti, and importantly to this

appeal, during the time period Capelton was convicted of his drug offenses in Massachusetts. Thus, Capelton has not shown, as required by Moncrieffe, that there is "a realistic probability" that Massachusetts would have applied its drug statute at issue here to conduct that fell outside the generic definition of aiding and abetting, namely, where the joint venturer lacked the requisite intent to distribute. See Moncrieffe, 569 U.S. at 191 (quoting Dueñas-Álvarez, 549 U.S. at 193). Accordingly, we reject Capelton's contention that his two prior state convictions are overbroad and do not qualify as "controlled substance offense[s]," and we hold that the district court correctly sentenced Capelton under the career-offender guideline. Our conclusion makes it unnecessary to reach the parties' harmless error arguments.

III. Conclusion

For the foregoing reasons, Capelton's sentence is affirmed.

Affirmed.

UNITED STATES DISTRICT COURT

for the

District of Massachusetts

United States of America	)	
v.	)	Case No. 3:00cr30027:001-MAP
JEROME CAPELTON	)	USM No. 90556-038

Order for Sentence Reduction Pursuant to Section 404 of the First Step Act of 2018

Upon motion of ☑ the defendant ☐ the Director of the Bureau of Prisons ☐ the Court for a reduction in the term of imprisonment imposed based on the statutory penalties for which were modified by sections 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time defendant's offense was committed. Having considered such motion, and taking into account the Fair Sentencing Act of 2010, to the extent that they are applicable,

IT IS ORDERED that the motion is:

☐ DENIED. ☑ GRANTED and the defendant's previously imposed sentence of imprisonment *(as reflected in the last judgment issued)* of 360 Months **is reduced to** 252 months .

I. COURT DETERMINATION OF SENTENCING PURSUANT TO FIRST STEP ACT OF 2018:

Previous Sentence Imposed: 360 Months
Amended Sentence: 252 months
Previous Supervised Release Term Imposed: 5 Years
Amended Supervised Release Term: 4 years

II. SENTENCE RELATIVE TO AMENDED TERMS:

☑ The reduced sentence is within the terms of the Fair Sentencing Act of 2010.
☑ Conditions of release set forth in judgment are to remain in effect.
☐ Conditions of release set forth in judgment are to remain in effect, with the following modifications:

Except as provided above, all provisions of the judgment dated 02/20/2002 shall remain in effect.

IT IS SO ORDERED.

Order Date:
June 5, 2019

Michael A. Ponsor
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
WESTERN SECTION

United States of America)
) 00cr30027-MAP
vs)
) June 5, 2019
Jerome Capelton)
_____)

Re-sentencing Hearing Held Before

The Honorable Michael A. Ponsor

United States District Judge.

APPEARANCES:

On behalf of the government: Todd E. Newhouse, Assistant United States Attorney, 300 State Street, Suite 230, Springfield, MA 01105.

On behalf of the defendant: J. Martin Richey, Federal Public Defender Office, 51 Sleeper Street, 5th Floor, Boston, MA 02210.

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(Hearing commenced at 11:06.)

(The defendant participated in this hearing by phone.)

THE CLERK: Your Honor, the matter before the court is 00cr30027, the United States of America versus Jerome Capelton.

THE COURT: Good morning. Please be seated.

For the record we are here in the courtroom with Attorney Richey from the Public Defender's Office and Attorney Newhouse, the assistant United States attorney who originally prosecuted this case so many years ago, and on the phone we have Mr. Capelton. He's not going to be here with us physically but will be on the phone.

Mr. Capelton, I'm going to -- first of all, before I get any further, I understand from your attorney that your actual name is Anthony Coleman and I'm happy to refer to you as Mr. Coleman rather than Mr. Capelton if you'd prefer.

I just want the record to be clear that Mr. Coleman and Mr. Capelton are the same person. I don't want there to be any confusion, but at the same time I think a person has the right to be called by the name that they want to be called by.

So my first question, Mr. Coleman, can you hear me?

THE DEFENDANT: I can hear you. It's a little low, but I can hear you.

THE COURT: All right. We're going to bump up the volume a little bit here and see if we can make it easier for you to hear me and everybody else in the courtroom.

Is that a little better?

THE DEFENDANT: Yes, it's a little better. It's a little better. I can hear you. It's not a problem like that. I can hear you.

THE COURT: Okay. Excellent. So I'm going to probably be talking a little louder than I normally do so I'll apologize to counsel. I don't want to deafen them.

THE DEFENDANT: It's probably not necessary.

THE COURT: Okay. So we are here this morning to consider re-sentencing under the First Step Act. There are quite a few motions pending in this case that you have filed, Mr. Capelton, and I want to make sure that the record is clear on what I'm going to do with them.

I'll say ahead of time my intention is to deal first with the various motions that you filed *pro se* and then focus on Docket No. 488, which is the motion for relief under the First Step Act that's been filed on your behalf by Mr. Richey.

The arguments that you make in some of your *pro se* motions are picked up to some extent or in part by Mr. Richey's filings and so they will be discussed to some

extent by him. I'll give you an opportunity to be heard as well as we approach the issues here.

THE DEFENDANT: Thank you.

THE COURT: I want to do some background to the case just to tee this up and make sure everybody knows what I've looked at and what's in my brain as we approach the sentencing.

Mr. Coleman was born in 1973. He's going to be 46 this September. Back at the time we were trying this case he was in his late 20s. We had a trial over at the other courthouse in which Mr. Coleman and Mr. White went to trial on Count 1, which was conspiracy to possess with intent to distribute crack and various other counts, including Counts 7, 8, and 10 which were substantive counts of possession with intent to distribute crack cocaine against Mr. Coleman.

Mr. Coleman after the trial was found guilty on all four of those counts, one conspiracy count and three substantive counts.

At that time -- well, I can't help but recollecting that in the middle of the trial we had the two planes go into the Twin Towers in New York and we had to suspend the trial for a few days while our marshals participated in the follow-up investigation of that event, and eventually I ended up excusing one of the jurors who was so upset by

the event and felt he couldn't continue.

At any rate, when we came back after the trial for sentencing a few months later Mr. Coleman was found to be a career offender, and I know that's an issue which is contested here. But at least at the time Mr. Coleman was found to be a career offender based upon three drug offenses, a trafficking offense, a possession with intent to distribute, and a distribution offense which were identified in the presentence report as well as a fourth offense, I think assault and battery or assault with something or other which is no longer under *Johnson* no longer a proper predicate offense and that seems to be uncontested.

MR. RICHEY: Correct. That was larceny from the person.

THE COURT: Thank you, larceny from the person. So we can flip that one aside. It's been eliminated by subsequent case law as a career offender predicate. But at the time of the sentencing, Mr. Coleman was found to be a career offender and the sentencing guideline range at that time was 360 months to life.

This was back in, from my point of view, the dark ages around 2002 pre-*Booker* and the First Circuit was regularly slapping down judges who imposed sentences outside the guideline range.

My own feeling was that they were only titularly advisory at that time. There were some highly-restricted, closely-guarded so-called departures which were recognized to the sentencing guideline range, but regularly district court judges were reversed at that time for employing departures to go below the applicable guideline range in ways that the First Circuit didn't like.

So I was pretty much obliged I felt in consistent with the law at that time to impose the low end of the guideline range which was 360 months.

Now I don't want to make it sound like I'm ignoring the fact that Mr. Coleman had a lot of problems growing up and had engaged in a fairly long course of pretty serious antisocial conduct.

He never knew his father. His father was actually murdered when he was a little boy. His mother had a lot of problems with drug addiction. He was out of his house when he was 13 living with his grandmother sometimes up to age 14 basically on the street, no dad, and started smoking pot pretty regularly pretty heavily from the time that he was about 14 years old and was doing a lot of drug dealing.

He did two significant sentences in the state court, multiple-year sentences, and pretty much every time he got out of prison Mr. Coleman went back to dealing drugs at

least part time. He didn't do just that. I know Mr. Coleman had a business and did some promotional work and was an energetic fellow in a number of ways but that certainly included selling drugs.

So when it came time for Mr. Coleman to be sentenced, he was going be looking at a serious sentence and I couldn't think of any way to justify going below the low end of the guideline range at that time.

I'll be honest, if it had been post-Booker and the guidelines really were advisory, I almost certainly would have departed below the low end of the sentencing guideline range based upon Mr. Coleman's diminished capacity relating to the very, very difficult time he had growing up and how young he was when he found himself on the streets. I'm almost certain that I would have gone down below the 360 months, but I really didn't think that there was enough there on the record to justify the departure.

In any event, we're here now following the passage of the First Step Act which is an effort to moderate what for many, many years was decried and criticized as the ridiculous one-hundred-to-one crack-to-powder ratio and as a result it's uncontested that Mr. Coleman's sentencing guideline range has dropped from 360 to life to 262 to 327 months. So the bottom end of the guideline range is

almost a hundred months lower than it was when I was sentencing Mr. Coleman way back when.

With that in mind, as a practical matter, we're talking about a fairly short period of time that's at issue here today because I'm going to be honest I'm going to hear from Mr. Newhouse and he may ask me to impose a sentence at the top end of the guideline range as it exists now or in the middle, but I'm going to be very drawn towards a sentence at the bottom of the current guideline range. We will see how that comes out after argument.

I've been told this morning that if I impose a sentence at the bottom of the guideline range, Mr. Coleman will be eligible for release, assuming he gets all the good time he's entitled to, in August of 2020. In other words, in about 14 months that's when he would get released unless I decide to impose a sentence above the bottom of the guideline range.

Mr. Coleman has had some serious problems while he's been in prison. He lost at least at one point -- I don't know whether they've been restored or not, but he lost over 500 days of good time as a result of misbehavior while he's in prison. I don't see that very often. That's a big chunk of time for somebody to lose as a result of problems while incarcerated. So I'll, of

course, hear from you, Mr. Richey, but Mr. Coleman's institutional history certainly does not help him in this situation.

One thing that I should underline so that I can reassure you, Mr. Richey, is that I did receive the letters that you submitted, both the letters from the gentlemen who are aware of Mr. Coleman's interest in creating programs for people at risk. The response that he got from the government official about his plans, but most importantly just this morning, and I have read them, we have a letter from Mr. Coleman's mother, his stepfather, his brother Melvin, and his sister Melvina.

I've read them and they're extraordinarily powerful letters. Very, very well written, and so I am reassured to hear that Mr. Coleman will have a stable home and a loving family ready to take him in when he is released, which is probably going to be much sooner than it looked like before the passage of the First Step Act.

So those are some of the things I have in mind. I know, Mr. Richey, you also pointed out that all four -- sorry, all three of Mr. Coleman's co-defendants, Mr. White, Mr. Rodriguez, and Mr. Brown received lesser sentences than he received.

I don't think any of the three of them was a career offender and as a result all three of them have been out

already for several years, and that's a point that you wanted me to consider in determining where to place the sentence now.

MR. RICHEY: Your Honor, may I clarify?

THE COURT: Sure.

MR. RICHEY: Pardon the interruption.

THE COURT: No.

MR. RICHEY: Mr. Rodriguez was a career offender. The court departed downward in his case. I just wanted to clarify that.

THE COURT: Thank you. I appreciate that. I wonder what the basis was for the departure I did, but I have that in mind. Thank you. In any event, I did not depart in Mr. Coleman's case.

So there we are I think. Before we get into argument from counsel, I have a packet of motions from Mr. Coleman that he's submitted *pro se*.

Mr. Coleman, I want to go over the motions and indicate to you based upon my reading of the motions what my tentative intent is in terms of my rulings on them. I have not made any final decisions but where I'm leaning and give you an opportunity to be heard.

THE DEFENDANT: Thank you.

THE COURT: The first one that I have on my stack is Docket No. 467, which was filed back in March of

2018, about 17 months ago, and it was called a Motion to Exercise Broad Equitable Power.

I'm inclined to deny that. I think that I don't have that sort of broad equitable power, but I do have power under the First Step Act to reconsider your sentence and I think as a practical matter that's your remedy.

I'm going to go through the motions one by one and tell you what I'm intending to do and on that one, No. 467, the motion asking the court to exercise broad equitable power I'm intending to deny that.

The second motion that I have is Docket No. 469, which is a *pro se* motion for leave to file late appeal and that was basically based upon the fact, according to the motion, that Mr. Capelton did not receive timely notice of the judgment and therefore was entitled to have additional time to file an appeal.

The First Circuit had just shortly before the filing of that motion disposed of Mr. Capelton's or Mr. Coleman's appeal and indicated that it was untimely and that he did not -- they did not think that a motion to file a late appeal would be allowed. I'm going to deny that motion.

I think that, first of all, it's certainly unfortunate that Mr. Coleman did not receive the judgment in time, but I do not think that there is any significant or adequate basis to prosecute the appeal and based upon

that I'm going to deny the motion to file a late appeal.

The third motion is Docket No. 470 seeking revision of the presentence report. I'm going to deny that motion. I have read the presentence report and for reasons I will get into I think that it is not in need of any revision. However, I am going to approach the issue of whether Mr. Coleman is a career offender and make a decision about that, but I don't believe even if I was to find he was not a career offender it would require any revision of the presentence report. It would just require a ruling from me, and so I'm going to deny the motion for revision of the presentence report without prejudice to hearing argument on the question of whether Mr. Coleman is properly categorized a career offender.

The fourth motion is a motion for reconsideration based upon a change in controlling law which is Docket No. 472 and I'm going to deny that motion. I believe his strongest argument is subsumed in the motion for relief under the First Step Act.

I still believe that the Caraballo precedent is binding on the question of whether prior possible remedies were available to Mr. Coleman since he was -- based on the sentence based on a career offender and we will get to that in a minute. But in any event, 472 I am inclined to deny.

Now 499 is a motion for a waiver of the defendant's presence physically at this hearing and to the extent that that motion is intended to memorialize Mr. Coleman's agreement to participate in this hearing by telephone rather than in person, that motion is allowed.

Finally, we have Docket No. 497, which is a motion to submit a guideline analysis and reply memo. To the extent that that motion is seeking leave of the court to submit this alternate guideline analysis, I'm going to allow it to be submitted and I will consider the arguments. They're already subsumed to a great extent in what Mr. Richey has submitted, but purely as a question of whether Mr. Coleman can submit a memo with regard to guidelines, I'm going to allow that.

Finally, I have one other document. It's not a motion, but I want you to know, Mr. Coleman, that I've read it. That was submitted on May 20th. It's Docket No. 502. It's a reply memo with regard to the sentencing hearing and it reviews a certain number of points which I'll be getting to in the sentencing proceeding.

So those are all the *pro se* motions that I have pending from you, Mr. Coleman, which I've unearthed from the docket. Before I make my final rulings I'm happy to hear what you have to say.

I should say that when Mr. Richey and Mr. Newhouse

were here tomorrow (sic) -- we talked briefly in preparation for today's hearing, and with regard to some of the arguments that you've offered, Mr. Richey indicated to me he thought that you would do a better job of presenting your arguments than he would.

He still intends, as I understand it, to argue that you are not a career offender and should not have been designated a career offender so I'll be hearing from Mr. Richey and Mr. Newhouse on that point a little later on.

So sorry for the long-winded introduction. I don't usually talk this long. I let other people talk, but I want to make sure, Mr. Coleman, that you have an opportunity to be heard on any of the motions that I have just reviewed before we move on to the issue of what your new sentence should be because whatever happens you're going to be getting a new sentence. The government agrees with that. What that sentence should be may be a point of disagreement, but you're going to be getting a new sentence one way or another here this morning.

Anything you would like to argue, Mr. Coleman, certainly I'll be happy to hear it.

THE DEFENDANT: Well, yeah. Thank you for the court's time. This isn't my allocution? This is strictly over the unresolved dispute, correct?

THE COURT: Correct. I will be giving you a

second opportunity after I heard from Mr. Richey and Mr. Newhouse to present your allocution. That's a separate issue.

THE DEFENDANT: Okay. Thank you. I just wanted to know if my little bit of research is on point. Okay.

The only thing I'm asking --

(Silence.)

THE COURT: We're having a long silence here, Mr. Coleman. I don't know whether you're thinking or whether we've got a problem in our audio system.

Can you hear me?

(Silence.)

THE COURT: I love it when this happens. It sounds like we've got a problem. I'm pretty sure that Mr. Coleman could hear the review that I just went through because he didn't indicate that he had any problem, but something happened.

For the record, something happened about a sentence and a half into Mr. Coleman's attempt to respond to me and we're getting dead silence on the other end of the line, and as I speak --

THE DEFENDANT: I can hear you. Can you hear me?

THE COURT: All right. Now I can hear you.

THE DEFENDANT: Can you hear me now?

THE COURT: I can hear you just fine now.

THE DEFENDANT: Okay. Okay. We have that this is over the resolved dispute and not the allocution.

THE COURT: Right.

THE DEFENDANT: A quick question for the court, you started with a guideline range between 262 and 327?

THE COURT: Correct.

THE DEFENDANT: I would ask, is that a statutory offense maximum calculation versus the indictment question that was started at a level 24? And if so, would a Rosemond error occur between the old jury instructions to define elements and today's jury instructions defined the elements of me being charged in joinder with 841 and aiding and abetting? And if so, how is it lawful now to separate that joinder to satisfy 4(b)(1)'s instant offense requirement? That is my first question on the instant offense requirement not being able to satisfy 4(b)(1).

My second question would be the way the Commonwealth charges with my controlled substance offenses is that they would be overbroad after *Matthis* and so I would ask that that be defined by the court that a *Matthis* error exists for the instant offense requirement and there's a *Matthis* error exists for two or more controlled substances offenses be defined.

THE COURT: Right. When you say a *Matthis*

error, what you're referring to is a Supreme Court case called M-a-t-t-h-i-s which is a Supreme Court case.

THE DEFENDANT: A categorical inquiry.

THE COURT: Right. It's just that my stenographer here was giving me a look which I think at least part of that was she didn't get. Maybe it was *Matthis* and maybe it was other parts. We'll do the best we can.

THE DEFENDANT: Inside of a categorical inquiry with all the ingredients.

THE COURT: The way it works here, just so you understand, is you don't get to ask me questions. You get to tell me what you think, and what I think you're telling me is that you think under the authorities that you just cited, that there was an error made by the court in coming up with the 262- to 327-month guideline range.

THE DEFENDANT: Exactly.

THE COURT: I hear you on that and I'm going to be making a further decision on that after I hear from Mr. Richey who also takes the position that the 262- to 327-month guideline range is not the correct range.

THE DEFENDANT: We agree on one, but one way I disagree that there's another way also by being charged in joinder and not to rehash 19 years ago and the jury confusion, but just saying once I'm charged in joinder,

just assuming that those elements affect my categorical inquiry now in 2019 to satisfy the 4(b)(1)'s instant offense requirement.

THE COURT: Okay.

THE DEFENDANT: 4(b)(1)(A)(2) to be exact.

THE COURT: All right. We'll get to that in a minute when I'm talking to Mr. Richey. Thank you.

THE DEFENDANT: Thank you.

THE COURT: Is there anything else you want to bring to my attention?

THE DEFENDANT: No. I don't have nothing else but allocution.

THE COURT: Okay. Fine.

THE DEFENDANT: Thank you.

THE COURT: So let me just see if I can clear out some of the underbrush on the docket, and then we'll hear from Mr. Newhouse and then we'll hear from Mr. Richey. I'm going to give you an opportunity before your allocution to make any additional comments, Mr. Coleman, that you'd like to make on the legal issues that have come up in this case.

THE DEFENDANT: No problem.

THE COURT: Just so that we're clear, Docket No. 467, which seeks to exercise a broad equitable power by the court, is denied.

THE DEFENDANT: Right.

THE COURT: Docket No. 469, motion for leave to file late notice of appeal, is denied.

THE DEFENDANT: I have that.

THE COURT: Docket No. 470, a motion for revision of the presentence report, is denied.

Docket No. 472, a motion for reconsideration for a change in controlling law, is denied without prejudice to argument later in this hearing relating to the appropriateness of the career offender designation. Otherwise, 472 is denied.

Docket No. 499 having to do with the waiver is allowed. I'm permitting you and I'm comfortable having you participate in this hearing by telephone rather than in person, so 499 is allowed.

Docket No. 497, the last motion by you seeking leave to submit a guideline analysis, is allowed. I'm letting you submit that guideline analysis. I've read it and I have it in mind as I approach what I'm doing here this morning.

So that I think will clear out the docket and now I want to focus on Docket No. 488, which is the motion filed by Mr. Richey on your behalf for relief under the First Step Act.

As I've already said at least once, maybe twice,

there isn't any question that you're entitled to some relief under the First Step Act, and I'm going to be making a decision as to just exactly what the extent of that relief should be.

Before I get to that I think I would like to tackle this issue of whether Mr. Coleman was properly categorized as a career offender at the time of his sentencing. Mr. Richey takes the position that he wasn't and if that is the case, then Mr. Coleman is entitled to immediate release because the sentencing guideline range without the career offender designation would be I believe 168 to 210 months, at least that's what Mr. Richey says, which is less than what you have already served.

So here's what I understand the argument to be, and I think -- I asked Ms. Healy to give you a call yesterday afternoon, Mr. Newhouse, because there haven't been any written submissions on this issue on career offender and I asked her to warn you that I was going to be asking you to lay out the government's position on career offender. I don't have it in writing. I only have Mr. Richey's memo on this.

So here if I can summarize it, Mr. Richey, and maybe I'll have you lead off. It's kind of your motion on this and that way you can refine my analysis if I'm off base.

As I understand it, your argument is that under

Massachusetts law prior to the *Zanetti* opinion, Z-a-n-e-t-t-i, an individual could be convicted of a state drug crime without having an intent to participate in a drug crime if he was found to be a joint venturer or someone who was assisting in aiding and abetting.

Under Massachusetts law, according to the defense, prior to the SJC's *Zanetti* opinion an individual could be guilty of aiding and abetting if they were present with knowledge that the crime was being committed and, although not specifically required to have an intent, they were there willing to assist in the commission of the crime.

According to the defense, this aiding and abetting aspect of Massachusetts law created a crime that was broader than the generic drug offenses contemplated by the statute and advisory notes relating to career offender status.

The defense argues that under the federal law an individual can only be guilty of one of these drug offenses unless he actually intended to have the crime committed.

So if you're standing around and you know that the drug crime is going on and you are willing to help but you don't particularly have an intent that the drug crime be committed, you could be found guilty under state law for aiding and abetting but the conviction under that theory

would not hold up as a predicate for the career offender because the career offender authorities require intent.

That issue came up recently in another case in this court called *Maldonado*. However, the *Maldonado* career offender issue had to do with the force clause and not the drug offense aspect and I think it's a little easier to make in the force context than here.

What I'm struggling with is two things, Mr. Richey, and maybe you can help me with this. We, trial judges, have worn out the bottoms of our feet dancing on a head of a pin since *Johnson* came down with these highly-contorted distinctions and extremely labyrinthine analyses to try to figure out whether something is a predicate under the career offender statute, and as a result there have been some surprising decisions, decisions that on their face didn't seem to intuitively make much sense. Nevertheless, trial judges have struggled to apply them. This is one such case.

My understanding is that in order for there to be a problem between the state court conviction and the use of that conviction as a predicate in the career offender context, you have to look at the least serious conduct that would qualify for conviction under state law, the least serious conduct for which there is a realistic probability of conviction under state law and then

determine whether it is an offense that is congruent with the generic offense referred to in the authorities governing the application of the career offender statute.

I'm having a hard time understanding how someone can participate in possession of a drug with intent to distribute without having any intent to participate in a crime involving an intent to distribute, and whether there is really a realistic probability that anybody could ever be convicted under that theory.

I understand that if you trace the logic closely enough you can find a little rather labyrinthine trail through the artery, but I think I'm responsible for looking at it at least to some extent from a practical point of view and trying to figure out whether these two crimes that remain, probably three, but certainly two which are at paragraphs 61 and 68 in the original PSR, which involved a possession with intent to distribute cocaine and an actual distribution of cocaine. There's also a trafficking offense which was mentioned in the PSR. It hasn't been reprised in the most recent submission but it still seems to me to be a predicate.

I'm really having a hard time seeing as a practical matter how there could be a realistic probability that someone over in the state court can be convicted of any of those three crimes, even if they were an aider and

abettor, without possessing the intent that the drug crime actually take place. So that for me, that's where the rubber hits the road here and I'm happy to hear anything that you have to say.

THE DEFENDANT: Me?

THE COURT: No. Mr. Richey is going to talk now, Mr. Coleman.

THE DEFENDANT: Yeah. I can answer that question. It just took me a second to get myself together. I can answer that question.

THE COURT: Okay. Let's start with Mr. Richey.

THE DEFENDANT: Me answer or --

THE COURT: Sorry, you're coming through a little bit garbled. If you can speak a little more slowly, I didn't hear what you said.

THE DEFENDANT: No, it was a long pause. I didn't know if it was my turn or his turn. I didn't know, so.

THE COURT: Fair enough. No. Mr. Richey was -- I can see from here that the wheels were visibly turning as he was preparing to present his argument.

THE DEFENDANT: Okay.

THE COURT: So here he goes.

MR. RICHEY: I don't know if Your Honor is equating the willingness perhaps with the intent that a

crime be committed and I can understand the court's point on that, and I simply rest on the elements of aiding and abetting as the SJC previously articulated them and for some reason they made a distinction between -- as to *mens rea*, they made a distinction between knowledge that another intends to commit the crime or with the intent to commit the crime and I just have to rest on that.

It appears that a jury could convict a defendant with mere knowledge that the crime is going to be committed and a willingness to help if necessary, which is not the same thing as with the intent that the drugs be distributed, and I will rest on that. I believe this was implicit in the court's recitation of the argument.

THE COURT: It is. It is, and I'm happy to hear you state the argument because it means that I have a grasp of your argument.

MR. RICHEY: Yes, Your Honor.

THE COURT: I understand that that is what the argument is; that the absence of an explicit reference to intent for an aider and abettor prior to the *Zanetti* decision is what distinguishes the state law conviction from a generic conviction that would support a career offender designation.

I'm getting back to my realistic probability formulation but I understand that. I am trying to put

myself in that scene. I'm trying to put myself in the head of a juror who would go into the jury room and say, well, we don't know whether he intended to commit the crime while he was standing there aiding and abetting but we did find that he was willing to have the crime committed and therefore we're going to convict him and then the angel from the federal court would note down in his notebook, well, I guess that can't be used a career predicate because the jury didn't have to find intent.

I'm being a little bit gnostic and I don't mean to be. I certainly don't mean to be because arguments that are only slightly less contorted than that one have obtained the approval of the Supreme Court and sometimes the First Circuit.

So I think it's important for this argument to be made and I think it certainly is not ridiculous on its face but I'm struggling to swallow it. I hear you. I understand your argument, and it's very well laid out in your brief. I don't need anything more from you, although I want to give Mr. Coleman an opportunity if he wants to add something on this.

THE DEFENDANT: Yes, I do.

THE COURT: Okay. Let me hear you. Please try to talk slowly. There's a bit of a --

THE DEFENDANT: Okay. Sorry about that.

THE COURT: It's all right. There's a very slight distortion in our speakers here and it's really being a real hardship for our stenographer to try to get everything down here, so nice and slow.

THE DEFENDANT: I'll try my best.

Where we need to be at, okay, in the categorical inquiry --

THE COURT: In the category of what?

THE DEFENDANT: Inside the categorical inquiry when we're looking at how state law defines their crime even though --

THE COURT: Hang on. Hang on. I'm going to break in on you here because we are all having a hard time catching you. So in the category of what constitutes a crime on the state --

THE DEFENDANT: No.

THE COURT: Wait. Please don't interrupt me because if I'm talking and then you start talking, chaos ensues.

THE DEFENDANT: Okay. Okay.

THE COURT: So what I'm understanding is you're talking about the category of a crime under state law that can constitute a predicate for a career offender offense. I'm going to stop now because Mr. Richey is standing and I think he wants to say something. Okay.

MR. RICHEY: I believe he's saying in the categorical inquiry.

THE COURT: Okay.

MR. RICHEY I'll just say this, this may be something he's going to try to say or say, it's an elemental inquiry --

THE COURT: Right.

MR. RICHEY: -- and whether someone is convicted on a theory of principal liability or aiding and abetting liability in Massachusetts, those are different means and they're not separate elements and they're indivisible so that anyone convicted is -- well, essentially that is the overbreadth argument.

THE COURT: Correct.

MR. RICHEY: So he may be leading into an explanation of the categorical inquiry and this line.

THE COURT: That I understand. I know that I look at the statute and the elements of the statute and not at the conduct and I do a sort of hypothetical analysis of the elements in determining whether there is a match.

I also understand that in Massachusetts pre-*Zanetti* at least, and maybe even now, a jury is instructed that they can find someone guilty beyond a reasonable doubt as an aider and abettor or as a principal and jurors don't

have to make distinctions between that.

So in performing our analysis we have to assume that anybody who is found guilty of this drug offense could have been found guilty as an aider and abettor and not as a principal and therefore we have to look underneath that aider and abettor label to determine whether it carries the required level of intent to satisfy the federal authorities governing career offender status. I hope I got that reasonably correct.

One thing that goes through my mind and I'll be happy to hear anybody comment on it is if your argument is correct, if your argument is correct, the government will no longer be able to use any drug offense predating *Zanetti* as a prerequisite for the career offender status because there isn't a match.

So the possible consequences of a ruling along these lines could be pretty substantial. No drug offense -- because any drug offense could be anchored on aiding and abetting, and pre-*Zanetti* aiding and abetting can be found without an explicit finding of intent and if that's what's required for an offense to constitute a predicate, then none of those drug convictions under Massachusetts state law prior to *Zanetti* can possibly act as a predicate for career offender status.

I assume I've got that right, haven't I, Mr. Richey?

MR. RICHEY: I think you do, Your Honor, and I think it extends beyond drug predicates to any crimes of violence as well.

THE COURT: Correct. Although I really think the argument is a little easier to make in a force environment than it is in a drug environment.

MR. RICHEY: Understood, Your Honor.

THE COURT: So, Mr. Coleman, I'm sorry we've kind of been assuming we understood your arguments and we've been trying to summarize them for you.

THE DEFENDANT: We're all on the same page here.

THE COURT: Okay.

THE DEFENDANT: Right. If I can just add, we're all on the same page with how a categorical inquiry goes. But if you look at what this circuit has already decided in *Fish* when they decided *Duenas-Alveres*, the Circuit guides us in this. They said we're not to consider hypothetical scenarios at *Fish* 758 F.3d and which we go by the state court and the Supreme -- the SJC has already outlined joint venture elements.

This only expands the possession element to the Commonwealth's jury. So it's not on us today to give the U.S. attorney's office a gifted horse or however you want to say it, an extra advantage. If they extend the guilt

on the possession element past what federal jurisprudence dictates, then it speaks for itself. It's overboard.

THE COURT: I hear you. Thank you.

I think I'd like to hear from Mr. Newhouse now. What's the government's response? I have incidentally read the transcript of your colleague's argument in the *Maldonado* case citing some First Circuit law. I wasn't there and so I wasn't able to absorb it quite as well as I would have if I had been there, but I want you to know that I did look at Mr. Desroches's argument in *Maldonado* disagreeing with Ms. Conrad in the force context involving *Maldonado* so I have that in mind.

MR. NEWHOUSE: Thank you, judge. That case is a pretty I think clear distinction in that Mr. Maldonado was convicted -- there was a trial in that case and an appeal, at least one appeal to I think the State Court of Appeals, and it was very clear that the government's -- that the Commonwealth's theory in this case all along was that Mr. Maldonado -- I think it's an armed assault with intent to murder case, a shooting -- it was clearly the Commonwealth's theory was a joint venturer. That he was I think the driver of the car or something like that.

So the government, as you saw in that transcript, strenuously objected to Ms. Conrad's argument and the court went with Ms. Conrad's argument but I believe

there's been a notice of appeal filed.

THE COURT: This has been, yes.

MR. NEWHOUSE: I apologize, judge, for not briefing this. I was focusing on first whether in response to Mr. Richey's initial briefing was Mr. Coleman or Mr. Capelton eligible and then what should the sentence be. His brief was filed on the 17th of May and I did not respond to it.

Judge, simply stated I agree with your analysis. You have to get to intent to distribute. The jury has to find that the defendant or the defendant has to plead guilty to that intent and whether it's an intent to distribute, distribution, and the trafficking statute in the state is intent to distribute a specific amount, it's varying amounts kind of like our minimum mandatory amounts, so I suggest that that rules the day.

As you just said at the end if not, then before 2009 and probably subsequent to 2009 there are no state predicates for drug distribution, at least drug distribution offenses if not force clause offenses.

Quite frankly, Judge, I know it's out there and you have to make a decision on it, but in the end the sentence the defendant is looking for or the court has at least talked about a sentence slightly above time served to give him time to step down could easily be granted by the court

without making basically a sea change decision, which I guess it's a little more than a sea change if there's no more drug distribution predicates involved.

THE COURT: All right. So I'm going to make it clear on the record so that the defendant will have an opportunity to pursue an appeal that I am not buying the argument that the offenses set forth at paragraphs 61 and 68, meaning the possession with intent to distribute and distribution of cocaine offenses, were insufficient to provide a basis for the career offender status.

I think it's a plausible argument. I just don't think in the end it is persuasive. It's in the category of what I would call imaginative but unsound in the end. I don't think that the First Circuit is going to go for it. I don't need to rely on -- I think there's a case that was discussed at length at the hearing and I should have written his name down. It starts with an L, Lesser or something.

MR. RICHEY: *Lessend*.

THE COURT: L-e-s-s-e-n-d?

MR. RICHEY: L-a-s-s-e-n-d.

THE COURT: I read the *Lassend* case. It's not exactly on point but it certainly creates a flavor of where the First Circuit would go on this. I think that the argument certainly was easier to make in the *Maldonado*

case, and I don't consider my decision here to be inconsistent with Judge Mastroianni's decision in *Maldonado*.

As Mr. Newhouse points out, *Maldonado* explicitly involved a joint venture theory. Here we have to hypothecate a joint venture theory and we're also in a situation where intent is a central element of the crime itself, and I can't, I really can't picture in my mind any realistic probability that any jury would find an individual guilty of either of those two crimes at 61 and 68 of the PSR without finding beyond a reasonable doubt that there is an intent to commit that crime.

I know Mr. Coleman disagrees with me on this and he's written a pretty good memo on it and I know you disagree, Mr. Richey. Your memo saves your rights completely, but I find that Mr. Coleman was appropriately designated as a career offender at the time of his original sentencing and the result of that is that today under the First Step Act the applicable sentencing guideline range is 262 to 327 months.

If I impose a sentence at the low end of that guideline range, I believe I said this before but my understanding from probation, is that Mr. Coleman will be out in about 14 months.

If I depart below the low end of the guideline range

or vary my sentence below the guideline range, Mr. Coleman could get out even earlier as a practical matter.

So let's talk about what the sentence should be here today. I'm going to begin with Mr. Newhouse and then I'm going to hear from Mr. Richey and then, Mr. Coleman, you'll have an opportunity to present your allocution and I will make my final decision.

THE DEFENDANT: No problem.

THE COURT: All right.

MR. NEWHOUSE: Thank you, Judge.

Judge, in my memorandum I believe I said or I know I said a sentence -- I requested a sentence in the middle of the guideline range of 262 to 327.

I don't think it would be unfair for a sentence several months below the low end which gets him out in 14 months. I think it's essential -- it's the government's position it's essential that Mr. Coleman, who has been in prison for quite a bit of time, have some time to do the step down through the BOP and enter a residential reentry.

I will note, Judge, that Mr. Capelton -- I was required to write a memorandum towards the end of the Obama Administration with regard to the clemency situation going on then. I'm pretty sure in this case I did.

THE COURT: It didn't reach me, Maybe it did. Did I end up writing a letter in support of clemency for

Mr. Coleman?

I'm sorry. I wrote several letters. I'm pleased to say that some of them were successful. I know obviously I wasn't successful in the case of Mr. Coleman.

Do you happen to know, Mr. Richey, whether this was one of the letters that I wrote?

MR. RICHEY: I know nothing of this, Your Honor.

THE COURT: Okay. I had a number of such letters cross my desk coming to me from counsel in Washington who was handling the applications for clemency and at least two of the defendants that I had sentenced, maybe three, did receive clemency. I hope that they took into consideration the letters of support that I sent.

I think I would have had no trouble writing a letter on behalf of Mr. Coleman supporting clemency because, as I said earlier, I think that the 30-year sentence was excessive at the time I imposed it but I didn't think I had any choice.

Sorry, Mr. Newhouse.

MR. NEWHOUSE: My memory is I was required to forward some paperwork to Boston on that and then that was then forwarded by the U.S. attorney to I think the clemency board at the time, and my memory is that -- or my understanding is we're here still with the 360-month sentence that despite the fact that many, many people were

granted clemency in that time period, Mr. Coleman/Capelton's record was such that it was denied.

THE COURT: I'm not sure that's a correct interpretation. I think what happened -- it may have been. It certainly may have been that they looked at the package and decided that clemency was not appropriate.

I know there were a lot of packages pending and they ran out of time. The clock ran out and a lot of people just didn't get to the President's desk who might very well have been entitled to clemency. I don't know whether that's what happened to Mr. Capelton or whether they made an objective analysis and decided no, he would not be one that qualified.

MR. NEWHOUSE: In any event, the defendant has had and has a very serious prior criminal history.

THE COURT: Yeah.

MR. NEWHOUSE: The case that we tried through the 9-11 situation in this case went on I think for about two weeks, a little over two weeks. If you subtract the days we lost for the 9-11 situation, I think it was about ten or twelve trial days. It was a pretty extensive in my experience here in Springfield a very large crack distribution network. We were dealing with individual counts all over that 50 grams and significantly over that 50-gram amount. There were individuals, co-defendants

involved in a lot of crack distribution which hurt this community significantly.

And as you pointed out, the defendant has not had a stellar institutional adjustment record, although I think the last one was back several years or back to '18. That wasn't a really serious one, but there was some pretty serious ones earlier on. His conduct has I think at least somewhat been ameliorated in more recent transgressions, but for all those reasons, Judge, as I said, the middle of the guideline range I don't think it would be unfair for a 262-month sentence which would give him, as you said, about 14 months more.

He would begin being stepped down almost immediately if he's got the good time the probation calculated. They can get him into a residential reentry after the step-down programs so he can be successful reintegrating into society. Thank you.

THE COURT: Okay. Mr. Richey.

MR. RICHEY: Thank you, Your Honor. First I would introduce Melvin Coleman.

THE COURT: Good. Thank you, Mr. Coleman. I was assuming that you were the defendant's brother.

You should know, Mr. Coleman, that Melvin Coleman is here and has been in the front row listening to everything that's happened here since we began.

Thank you for being here, Mr. Coleman.

MR. RICHEY: The other family members are working and Melvina is a teacher had a field trip scheduled today so their absence doesn't indicate that they aren't very concerned about the decision the court makes as I think their letters make clear.

THE COURT: The letters are excellent, four of the best letters I've ever received from his mother, stepfather, brother, and sister. Excellent.

MR. RICHEY: So, Your Honor, we're left I think -- Your Honor has mentioned in other First Step Act proceedings your desire that individuals are stepped down appropriately and I'm simply going to leave that to the court.

I think that Mr. Coleman has been in more than he would be in today's view of things and so the question is how best to reintegrate him. He has a solid family to come to.

I don't think you have to impose -- I don't think -- the bottom of the guidelines having him out in August of 2020, I'm not sure the court has to go out that far but I will leave that determination to the court.

THE COURT: Okay. From my conversations with probation a 252-month sentence, which is only ten months below the low end of the guideline range, would have Mr.

Coleman out in early December and that's one of the sentences I'm thinking of as I look this over.

MR. RICHEY: That would have him out before Christmas.

THE COURT: Yeah.

MR. RICHEY: And it would give time for him to go to a residential reentry center and that is a perfectly appropriate number in my view.

THE COURT: Okay.

Mr. Coleman, you have a right to be heard before I make my final decision.

THE DEFENDANT: I'm the last one.

THE COURT: You're the last one to talk. You're the last soldier in the fort here.

THE DEFENDANT: Okay. I'm the last soldier in the fort. Okay. This is where we're at and it's tough to speak without a lot of animosity or ill-will or saying something that might aggravate you. You know what I mean because that's what everybody's saying. Don't aggravate Ponsor; don't aggravate Ponsor, but --

THE COURT: That's good advice. I don't aggravate easily but it's always possible.

THE DEFENDANT: No. No. I remember when I first got sentenced, you might remember, you deal with so many people, but you said "say it like you mean it and

mean it like you say it, and just give it to me straight," and that's all I know how to do. So I'm not trying to speak like a gangster or rant and so I'm going to just speak straight and tell you where I'm at and then you just do what you have to do.

But everybody wants to talk to you about problems. The U.S. attorney, oh, the problems, record, record, record, and then on other side of the defense table, oh, a horrendous upbringing, but what I have noticed is that nobody's spoken about where I'm from. You know what I mean?

A-hundred-to-one ratio, I came in here and they said I'm the super-predator and a hundred-to-one but nobody's talked about the ramifications of a hundred-to-one that was to be punished; that was to get the severest penalties possible, and the BOP applied the security and designation and because of the designation sends us to the worst prisons because of that. So I left the courtroom at a hundred-to-one to get to the Bureau of Prisons to get three times that.

So as the policy statement says, anything over 31 grams is equal to 10,000 grams of heroin creating a custody level disparity. And now I'm in front of you and I got to show disciplinary or programs and that's a program disparity because the only programs in the

penitentiary is GED or basketball or a shoe program. So how do I win even arguing inside of that paradigm, so to speak? I can't win.

And then as for the law today, again you hear Newhouse bring up Obama and all that, but, you know, the clock might have expired. But what I haven't heard anybody mention is I was sentenced under the mandatory guidelines, and the flip side of that is if I don't qualify or I don't pass this hearing, then we re-implement a mandatory guideline system because we don't get the post-conviction factors until we have the advisory factors and 3553(b)(1) was clear that was no out. Even the probation department's calculation of 262-327, that's with a mandatory calculation. It's not an advisory calculation.

The prosecutor didn't go get any Shepard documents. They didn't prove their burden but I understand that's an appeals court issue, but I don't want to talk about none of that. I want to talk about where I'm from, and the bottom line is I have solutions to where I'm from.

I don't want to talk about the problems that where I'm from developed or even the problems that could hypothetically come out of it. I know for a fact that how I was raised was forced to raise that way.

I have children. I have grandchildren that are still

being raised that way. So when you look at it that I have solutions, it's not costing the city a dime. They're in front of you. I did a net worth. I wrote to the White House. I did all that with no help and I'm still not asking for no help. I'm saying let my solutions out of prison. Don't let me out of prison. Let my solutions out of prison, and they're not afraid of Ponsor. You might have the (unintelligible) They understand me because I'm from there. Everybody understands me.

My little brother that's in front of you is a product of me sacrifice so people understand me and I have three solutions. Cost efficient, not cost nobody a dime for the city, for the community itself, and so it's the employment rate that we can affect with this. If there's a STEM education disparity that I can affect and I've contacted the places for the hardware, for the software, and we're talking about the land that's just sitting there through my research, even though I can't see, that the city is not using, whether they confiscated through taxes or deliquent properties, then let me rehab it. Let me train. Let me hire the task force. Let me take people below the tax scale in my community. It's not costing nobody a dime. How can I fail? They will listen. I can't affect everybody but I can affect enough.

I took up a lot of this court's time. I don't want

to over-talk my position, but basically that's where I'm at. I don't want to talk about the problems. I don't even want to hear the problems. I just want to hear about solutions and that's what I'm putting on your desk, whether that's now or whatever, whatever. There it is, and that's really all I got to say.

THE COURT: Thank you, Mr. Coleman.

THE DEFENDANT: No problem.

THE COURT: I want to make clear what my sentence is going to be, and I'm pleased that the result of the sentence is that you will be out before very long.

I'm going to impose a sentence of 262 months. Sorry, strike that, 252 months which as I understand from our probation officer will have you out of prison and back in the community and I assume at your mother's home that's where the plan is by the early part of December. I don't know the specific day. The Bureau of Prisons will have to calculate that but it will be right around then and so you're going to be home before Christmas after a long, long time in prison.

There's also going to be four years of supervised release which you will be picking up once you begin your time in the community.

I base this sentence on two things. I should step

back a little bit. I base the variance on two considerations which I think justify this very, very modest variance. One is your very difficult upbringing.

I don't know whether any human being could ever truly know another human being. I certainly don't pretend to know everything about your life, but the little bit that I know tells me that you had a really rough time way back when you were 13, 14 years old and that went on for quite awhile. So that's one reason why I think you get this ten-month break. It's a very modest break as I say, but you're entitled to it.

The second reason that I am going to be giving you this ten months off is your family support. I want to compliment your brother who's here, your sister, your stepfather, and your mom for the absolutely incredible letters that they wrote. You may not have actually seen them yet because I just got them this morning around 9:30 when I opened up my computer, but I think when you read them you will see how much you are loved and how much your family is standing behind you. That gives me confidence that when you get out, you will resume life in a happier mode and so those are my two reasons.

So the sentence that I'm going to impose pursuant to the First Step Act is 252 months with four years of supervised release. Your previously imposed conditions of

supervised release will remain the same, and the rationale for the very small downward departure is based upon the difficulties in your upbringing and the very impressive family support that you are receiving.

I think you've been through a lot but in one sense you're a lucky man. Your family has really stood by you for a long time and they really came through for you here at this sentencing.

So if there's nothing further, you have a right to appeal. If you are unhappy with this sentence, you have a right to appeal. If you cannot afford an attorney to represent you on an appeal and qualify, an attorney will be appointed to represent you who will be paid out public funds.

I've already indicated what my rulings are on all the pending *pro se* motions and I think that ties everything up.

I can't help noting that this is my last case for 35 years and six months as a judge. It's kind of moving to me that we would be back here after so many years and we tried the case when the planes went into the Towers, and from now on I'm going to be doing just civil mediation. Right now this is the last case on my docket and I am a judge with no cases as of this moment. I will be proceeding to do my work as part of the court's mediation

program assisting civil cases from this point on.

I never felt comfortable about the severity of the sentence that I imposed on you, Mr. Coleman, and it pleases me at the end of my career with this sort of work to be providing you at least some relief.

THE DEFENDANT: Thank you.

MR. NEWHOUSE: How did you end up with me in the courtroom as the last prosecutor, Judge?

THE COURT: I beg your pardon?

MR. NEWHOUSE: How did you end up with me in the courtroom as the last prosecutor? That shouldn't have happened somehow.

THE COURT: That's an honor.

Okay. If there's nothing further, the court will be in recess.

MR. RICHEY: Thank you, Your Honor.

THE CLERK: All rise.

(Hearing concluded at 12:17.)

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CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/ Alice Moran June 26, 2019

Alice Moran, RMR, RPR

Federal Official Court Reporter