[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-14354
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEBRUARY 2, 2004
THOMAS K. KAHN
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D. C. Docket No. 01-00108-CR-J-20-TEM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NATHANIEL BROWN,
a.k.a. Pumkin,
AVISE MERRILL HUNTER,
a.k.a. Red, et al,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(February 2, 2004)

Before CARNES, HULL and WILSON, Circuit Judges.

PER CURIAM:

Nathaniel Brown and Avise Hunter appeal their convictions for (1) conspiracy to distribute cocaine and crack cocaine, in violation of 21 U.S.C. § 846, and (2) two counts of distribution of crack cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). Seeing no error, we affirm their convictions.

Charles Coleman also appeals his convictions and life sentence for (1) conspiracy to distribute cocaine and crack cocaine, in violation of 21 U.S.C. § 846, and (2) two counts of distribution of crack cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B). We affirm his convictions. However, we vacate Coleman's sentence and remand for further proceedings consistent with this opinion.

Background

On April 26, 2001, Brown, Hunter, and Coleman were charged with distributing crack cocaine and a conspiracy to distribute crack cocaine. On September 7, 2001, the government filed a notice pursuant to 21 U.S.C. § 851 of its intent to seek a mandatory life sentence for Coleman under § 841(b)(1)(A), based on the government's allegation that Coleman had two prior felony drug convictions. The case proceeded to trial with respect to the charges against Brown, Hunter, and Coleman.

On November 27, 2001, the district judge used the "jury box" method of voir dire. The "jury box" method is a procedure in which the first twelve veniremembers

are directed to the jury box and questioned. The parties exercise cause and peremptory challenges regarding the first twelve veniremembers. The challenged veniremembers are then replaced with other veniremembers, and the parties are allowed to question and exercise challenges regarding the new members. No one objected to the "jury box" method of voir dire.

After the first twelve jurors were seated and questioned, the parties advised the district court that they had no challenges for cause, and then began exercising their peremptory challenges. The defendants jointly had ten challenges available, while the government had six. The district court *sua sponte* struck eight veniremembers for cause.

During the voir dire, the defendants exercised a peremptory strike to excuse veniremember Ferguson, an African-American. Subsequently, veniremember Koon, also an African-American, stated that she previously had served on a jury in a civil trial and that the jury had returned a verdict of "not guilty" in that case. The government used a peremptory strike against Koon, at which point the defendants objected that the government had stricken "two, possibly three, black jurors" and requested a race-neutral explanation for the striking of Koon. The government responded that it struck Koon because of her prior participation in a trial in which she had voted "not guilty." The government also added that it had not, to that point,

stricken any black jurors, but rather the defendants had stricken Ferguson. The defendants responded, "Oh, we struck Ferguson? . . . . I apologize."

After the twelve regular jurors were selected, four potential alternate jurors were seated for questioning. The district court dismissed one of those veniremembers (who had stated that he "would be . . . partial") and another was brought in his place. The government stated that it had no objections to the four veniremembers and would "pass" on a peremptory strike. Noting that two of the veniremembers needed to be relieved, the district court required the parties to submit peremptory strikes. The government therefore exercised its strike against veniremember Reed, an African-American who said he had been around drug use. The defendants objected to the striking of another black veniremember and requested a race-neutral explanation. The government replied that it had not wanted to exercise any peremptory strikes, but that it struck Reed because he had been around drug use and was the first alternate called. Based on that response, the district court decided to let the strike stand.

The jury trial proceeded for seven days. At trial, Walter Lee Hall, a codefendant who had pled guilty to the instant conspiracy, testified for the government. He admitted that he was cooperating with the government and testifying at trial in an effort to obtain favorable treatment at sentencing. Hall

testified that he began purchasing crack from Coleman and selling drugs to Brown in 1998. Hall said that Brown initially bought drugs from him "probably like every day, twice a day." Hall also testified that he saw Brown on several occasions selling crack in Green Cove Springs, Florida, and obtaining drugs directly from Coleman and codefendant Roderick Harris. In addition, Hall said that he sold drugs to Hunter "two or three times," and that Hall knew Hunter sold the drugs he received from him. On cross-examination, Hall was impeached with several statements from a prior hearing that were inconsistent with his trial testimony.

Vaughn Kenny, a patrol sergeant with the Clay County Sheriff's Office (CCSO), also testified for the government. Operating undercover, Kenny observed Steve Arnold, a known crack user who was working with the CCSO, make two separate crack purchases from Brown in December 1998. Although both transactions had been videotaped, the relevant videotape had been destroyed by law enforcement after a period of time.

Steve Arnold testified that he had been working with the CCSO since 1998, making street-level crack purchases for pay. Arnold testified that once on September 28, 2000, and three times on March 7, 2001, Arnold purchased small amounts of crack from Brown. On cross-examination, Arnold admitted that he was paid to testify and had a history of crack addiction.

Aguanda Battle, a street-level crack dealer from Green Cove who was testifying in exchange for prosecutorial immunity, testified that she observed Brown purchase drugs from Coleman "once or twice" and sell drugs in Green Cove.

Roderick Harris, a.k.a. Lou Stiles, was another codefendant who pled guilty and was testifying in exchange for a potentially reduced sentenced. He testified that he sold Brown approximately $200 worth of crack every day for a period of time. Brown then resold the crack, according to Harris, in Green Cove. In addition, Harris testified that he worked with Hunter as well. Harris said that Hunter often sold drugs out of Harris' car and that Hunter traveled with Harris to Palatka, Florida "[a]t least ten times" in order to purchase drugs. Harris claimed that he "fronted" Hunter drugs, which Hunter then sold on the street. According to Harris, he and his customers (including Hunter) had an agreement to distribute drugs for profit, and Harris was dependant upon his customers to achieve that objective.

Finally, Charlotte Smith, a crack dealer who pled guilty to the instant offense and was testifying in cooperation with the government, testified that she had seen Brown sell drugs on a few occasions.

Following the government's case in chief, the defendants moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. Specifically, Brown challenged the conspiracy charge, arguing that (1) the evidence

shown by the testimony did not establish the existence of a conspiracy, (2) there was no evidence that Brown was a member of any conspiracy that may have existed, and (3) buyer-seller drug transactions are not conspiratorial, standing alone. The court denied Brown's motion.

Brown subsequently proposed the following instruction regarding the conspiracy charge: "Mere proof of the existence of a buyer-seller relationship is not enough to convict one as a co-conspirator on drug conspiracy charges." The government opposed the proposed instruction. Upon the government's suggestion, the court proposed instead the following instruction: "A conspiracy does not exist when, in an isolated transaction, someone merely sells and another merely buys alleged drugs for personal consumption. Personal consumption by the buyer himself." The court asked if there was "anything further" on the instruction, and the defendants responded, "No, Your Honor."

The jury found Brown, Hunter, and Coleman guilty on both the conspiracy and the distribution charges. The defendants filed motions for a new trial, which were denied. On August 1, 2002, the district court held a sentencing hearing for Brown and Hunter. Both received terms of life imprisonment.

Prior to his scheduled sentencing, Coleman filed a written objection to the use of one of his two prior state felony convictions to support a statutory sentence

enhancement pursuant to § 851. Coleman objected that his conviction for possession of cocaine in 1997 in Dade County, Florida, was constitutionally infirm because Coleman's plea to that charge was not knowingly and intelligently made as a result of ineffective assistance of counsel. Coleman's claim of ineffective assistance of counsel was based on the fact that Coleman's lawyer in 1997 did not tell Coleman that he had a statute of limitations defense to his 1997 charge that, if pursued, would have been successful. Coleman alleges that had he been advised of the statute of limitations defense, he would have asserted it instead of entering a guilty plea to the charge. The district court held an evidentiary hearing on the issue, and overruled Coleman's objection. The court sentenced Coleman to life imprisonment.

Brown, Hunter, and Coleman appeal their convictions, and Coleman also appeals his life sentence. Specifically, Brown alleges (1) that there was insufficient evidence to convict him of the conspiracy charge, and (2) that the district court erred by giving a more limited "buyer-seller" jury instruction than Brown requested. Hunter alleges (1) that there was insufficient evidence to convict him of the conspiracy charges, (2) that the district court erred by giving a more limited "buyer-seller" jury instruction than was requested, and (3) that the district court erred by denying Hunter's challenges, pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986),

to the government's exercising of peremptory strikes against two black veniremembers. Finally, Coleman alleges on appeal (1) that the district court erred by using the "jury box" method of voir dire and *sua sponte* excusing several jurors for cause, and (2) that the district court erred by determining that Coleman's 1997 convictions was not constitutionally infirm, and thus, properly could be used to sentence him to a mandatory term of life imprisonment.

I.

We first consider Brown's claim that there was insufficient evidence presented at trial to convict him of the conspiracy charge. We review de novo sufficiency of evidence claims. *United States v. Toler*, 144 F.3d 1423, 1428 (11th Cir. 1998). For the evidence to be sufficient, there must have been enough evidence presented at trial to allow a reasonable jury to conclude that the defendant's guilt was established beyond a reasonable doubt. *Id.* We review the evidence in the light most favorable to the jury's verdict. *United States v. Trujillo*, 146 F.3d 838, 845 (11th Cir. 1998). The evidence need not exclude every reasonable hypothesis of innocence and jurors are free to choose among reasonable constructions of the evidence. *United States v. Weaver*, 905 F.2d 1466, 1479 (11th Cir. 1990).

Furthermore, we may not reconsider the credibility choices made by the jury, so long as the challenged testimony is not incredible as a matter of law. *United*

States v. Chastain, 198 F.3d 1338, 1351 (11th Cir. 1999). "For testimony of a government witness to be incredible as a matter of law, it must be unbelievable on its face" and must relate to "facts that [the witness] physically could not have possibly observed or events that could not have occurred under the laws of nature." *United States v. Calderon*, 127 F.3d 1314, 1325 (11th Cir. 1997) (alteration in original) (internal quotations and citations omitted), *modified on other grounds*, 144 F.3d 123 (11th Cir. 1998).

Brown makes only one argument to support his sufficiency of the evidence claim. Brown argues that the only evidence presented at trial of his guilt to the conspiracy charge was testimony by parties that were either on drugs, were under government prosecution, were paid by law enforcement, or were successfully impeached on cross-examination. Thus, according to Brown, the witnesses were not credible and did not provide sufficient evidence for the jury to find Brown guilty of the conspiracy charge.

Brown's argument is without merit. The jury is entitled to believe the witnesses' testimony, even if some of those witnesses had made prior inconsistent statements and had criminal backgrounds. *See Calderon*, 127 F.3d at 1325 (stating that "the fact that [the witness] has consistently lied in the past, engaged in various criminal activities, [and] thought that his testimony would benefit him . . . does not

make his testimony incredible.") (alterations in original) (internal quotations and citations omitted). The jury made credibility determinations as to the veracity of the witnesses, and we do not reweigh such evidence on appeal. *See Chastain*, 198 F.3d at 1351. Thus, Brown's sufficiency of the evidence claim fails.

II.

Hunter, likewise, alleges that sufficient evidence was not presented at trial for the jury to find him guilty of the conspiracy charge. Specifically, Hunter argues that the trial testimony established, at most, that he was an individual buyer and seller of drugs, and that a buyer-seller relationship is not a conspiratorial agreement. He also asserts that the fact that he knew some of the codefendants did not necessarily make him part of the conspiracy.

In order to obtain a conviction for conspiracy, the government must prove "(1) that an agreement existed between [the defendant] and one or more other persons, (2) to engage in unlawful activity . . . ." *United States v. Gil*, 204 F.3d 1347, 1349 (11th Cir. 2000). Such an agreement constitutes a conspiracy only if the parties have the same criminal objective. *United States v. Dekle*, 165 F.3d 826, 829 (11th Cir. 1999). In the context of a conspiracy to distribute drugs, a simple buyer-seller relationship does not constitute a conspiratorial agreement because the parties do not share a common objective, namely, the objective of distributing drugs. *Id.* at

829-30; *see also United States v. Burroughs*, 830 F.2d 1574, 1581 (11th Cir. 1987), *cert. denied*, 485 U.S. 969 (1988) (stating that, "[w]here the buyer's purpose is merely to buy, and the seller's purpose is merely to sell, and no prior or contemporaneous understanding exists between the two beyond the sales agreement, no conspiracy has been shown."). The purpose of the buyer-seller rule "is to separate consumers, who do not plan to redistribute drugs for profit, from street-level, mid-level, and other distributors, who do intend to redistribute drugs for profit, thereby furthering the objective of the conspiracy." *United States v. Ivy*, 83 F.3d 1266, 1285-86 (10th Cir. 1996).

Contrary to Hunter's contention, the evidence demonstrated that he, at least implicitly, agreed with several individuals to distribute crack cocaine for profit. Harris and Hall both testified that they sold crack to Hunter and that they knew that Hunter then sold the crack on the street. Harris also testified that he and his customers, including Hunter, had a joint objective of distributing the drugs for profit. We find that there was sufficient evidence to support the jury's verdict, and thus Hunter's sufficiency of the evidence claim fails.

III.

We next consider Hunter's assertion that the district court erred by denying Hunter's challenges, pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), to the

government's exercising of peremptory strikes against black veniremembers Koon and Reed. We review de novo the equal protection principles of *Batson*, but review only for clear error the district court's determination regarding why a veniremember was excused. *United States v. Allen-Brown*, 243 F.3d 1293, 1296-97 (11th Cir. 2001) (quotations and citations omitted), *cert. denied*, 534 U.S. 1010 (2001).

A party may not exercise a peremptory challenge against a juror if the challenge is based on race. *Batson*, 476 U.S. at 96-98. We apply a three-step procedure to determine whether a party has violated the principle annunciated in *Batson*: (1) the party objecting to the challenge must make a *prima facie* showing that the challenge was exercised based on the potential juror's race; (2) upon such a showing, the party exercising the challenge must provide a "race-neutral explanation for striking the jurors in question;" and (3) the district court "must determine whether the objector has carried [his] burden of proving purposeful discrimination." *Allen-Brown*, 243 F.3d at 1297. Unless the objecting party makes a *prima facie* showing, the district court may not require the other party to articulate a race-neutral justification for its peremptory challenges, and we may not reverse the district court's decision to uphold the contested peremptory challenge. *United States v. Stewart*, 65 F.3d 918, 925 (11th Cir. 1995).

"[A] showing that a party used its authorized peremptory strikes against jurors of one race does not, standing alone, establish a *prima facie* case of discrimination." *Central Ala. Fair Hous. Ctr. Inc. v. Lowder Realty Co.*, 236 F.3d 629, 637 (11th Cir. 2000). Rather, "[t]he number of persons of a particular race struck takes on meaning *only* when coupled with other information such as the racial composition of the venire, the race of others struck, or the *voir dire* answers of those who were struck compared to the answers of those who were not struck." *Id.* at 636-37.

Hunter failed to make a *prima facie* case that Koon was stricken because of her race. Regarding the government's strike of Koon, Hunter said that Koon was black and that the government had stricken "two, possibly three, black jurors." After the government noted that Hunter was the one who had stricken the only other black veniremember up to that point, Hunter responded, "Oh, we struck Ferguson? . . . I apologize." Thus, the only evidence proffered by Hunter to support his *Batson* claim regarding the striking of Koon is the fact that Koon is black. That is insufficient. Hunter did not supplement his claim with other information from which the district court could have concluded that the government sought to strike Koon based on her race, such as "the racial composition of the venire, the race of others struck, or the *voir dire* answers of those who were struck compared to the answers

of those who were not struck." *Lowder Realty*, 236 F.3d at 637. Thus, Hunter's claim that the government improperly had stricken Koon because he is black is insufficient to make the required *prima facie* showing.

Hunter also failed to make a *prima facie* showing that the potential alternate juror Reed was stricken because of his race. The only evidence that Hunter provided the district court was that Reed was the second black veniremember stricken by the government. That reason, alone, is insufficient. As a matter of law, merely showing that two veniremembers were stricken who have the same race is not enough to establish a *prima facie* case. *Lowder Realty*, 236 F.3d at 636 (finding that the mere fact that a party struck two white males is insufficient to establish a *prima facie* case).

We conclude, therefore, that the district court did not error in allowing the government to strike Koon and Reed.

IV.

Brown and Hunter also allege that the district court erred by giving a more limited "buyer-seller" jury instruction than the one they requested. The government's instruction that Brown and Hunter challenge on appeal is the following: "A conspiracy does not exist when, in an isolated transaction, someone merely sells and another merely buys alleged drugs for personal consumption.

Personal consumption by the buyer himself." Brown and Hunter argue that the instruction was erroneous because of its limitation to purchases "for personal consumption." Their argument lacks merit.

Brown and Hunter did not object to the district court's instruction on appeal, thus we review their claim for plain error. *United States v. Freixas*, 332 F.3d 1314, 1316 (11th Cir. 2003). Plain error occurs only when there is (1) error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Hall*, 312 F.3d 1250, 1259 (11th Cir. 2002) (internal quotations omitted), *cert. denied*, 123 S.Ct. 1646 (2003).

Contrary to Brown's and Hunter's assertion, the jury instruction that the district court gave the jury regarding the buyer-seller defense is a correct statement of law. The buyer-seller defense is limited to situations in which drugs are bought and sold only for personal consumption. *See Ivy*, 83 F.3d at 1285-86; *United States v. Brown*, 895 F.2d 1331, 1334-35 (11th Cir. 1990) (overturning an individual's conviction for conspiracy to distribute cocaine where the defendant purchased cocaine for personal use). Thus, the challenged jury instruction is not a plain error that affected Brown's and Hunter's substantial rights.

V.

Coleman challenges the district court's method of empaneling the jury. Specifically, Coleman alleges the district court erred by (1) using the "jury box" method of voir dire, and (2) *sua sponte* excusing several jurors for cause, thus depriving him of a jury that consists of a fair cross section of the community. Coleman failed to object to these alleged errors at trial, thus we review his claims only for plain error. *Freixas*, 332 F.3d at 1316.

The Sixth Amendment guarantees the right to an impartial jury, and the jury selection process and peremptory challenges are critical to ensure that right. *See United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988). We have held that a district court has broad discretion to determine the method of jury selection, as long as "the method of *voir dire* adopted by the trial court is capable of giving reasonable assurance that prejudice [of potential jurors] would be discovered if present." *United States v. Brunty*, 701 F.2d 1375, 1378 (11th Cir. 1983); *see also United States v. Holman*, 680 F.2d 1340, 1344 (11th Cir. 1982). In addition, "peremptory challenges are not of a federal constitutional dimension," and without more, the loss or limitation on their use "does not constitute a violation of the constitutional right to an impartial jury." *Martinez-Salazar*, 528 U.S. at 311, 313. If the jury is actually impartial, then the

party has no constitutional claim regardless of whether a party was limited in the use of his or her peremptory challenges. *See id.* at 313; *Ross*, 487 U.S. at 88.

Contrary to Coleman's assertions, he fails to show plain error. A review of the record makes it clear that the jury selection process was "capable of giving reasonable assurance that prejudice would be discovered if present." *Brunty*, 701 F.2d at 1378. Coleman was allowed to evaluate the impartiality of each potential juror, and strike a potential juror if he so desired. Furthermore, Coleman makes no claim that any member of the jury seated by the district court was partial. Thus, his claim must fail as there was no plain error in the jury selection process that denied Coleman his Sixth Amendment right to an impartial jury.

In addition, Coleman claims that the court's *sua sponte* dismissal of jurors for cause denied him his constitutional right to have a fair cross section of the community on his jury. This claim is without merit. The Sixth Amendment entitles defendants in criminal cases "to a grand and petit jury *selected* at random *from* a fair cross section of the community." *United States v. Terry*, 60 F.3d 1541, 1544 (11th Cir. 1995) (emphasis added) (citation omitted). However, a defendant does not have a constitutional right to have the *actual make-up* of the petit jury be a fair cross section of the community. *See United States v. Rodriquez-Cardenas*, 866 F.2d 390, 392-93 (11th Cir. 1989). Thus, Coleman's claim fails.

VI.

Finally, Coleman argues that the district court improperly overruled his objection to the use of his 1997 Florida felony conviction as a predicate to enhance his sentence to life imprisonment pursuant to 21 U.S.C. § 851. Specifically, he alleges that his 1997 felony conviction was obtained in violation of his Sixth Amendment right to effective assistance of counsel. Coleman asserts that the statute of limitations had run on the offense by 1997, and his attorney failed to inform him of his statute of limitations defense. Coleman claims that he would not have pled guilty to the felony charge had he known that a complete defense existed.

A defendant may collaterally attack a conviction for purposes of § 851(e) if the challenge involves a claim of ineffective assistance of counsel. *United States v. Jackson*, 57 F.3d 1012, 1019 (11th Cir. 1995). We review de novo whether a defendant received ineffective assistance of counsel. *Brownlee v. Haley*, 306 F.3d 1043, 1058 (11th Cir. 2002).

We apply a two part test to determine if a guilty plea, based on alleged ineffective assistance of counsel, was knowing and voluntary. *See Hill v. Lockhart*, 474 U.S. 52, 57 (1985). The defendant must show that (1) his counsel's representation fell below an objective standard of reasonableness, and (2) "there is a

reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." *Id.* at 59.

First, Coleman argues that his counsel in 1997 provided him with representation that fell below an objective standard of reasonableness because his attorney did not advise Coleman of his statute of limitations defense that would have barred his conviction.[1] When Coleman was arrested in 1997, his attorney told him that he could plead guilty and receive a sentence of time-served (four days), and thus go home immediately. Coleman's attorney did not advise Coleman that he had a statute of limitations defense that would have been a complete defense to the felony charge. In other words, Coleman's attorney did not advise Coleman that Coleman had the option to avoid conviction of a felony without a trial because the charge was time barred.

The government argues, and the district court determined, that it was reasonable for Coleman's attorney to not assert the statute of limitations defense

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[1] The district court said that "it appears" Coleman's statute of limitations defense "may have been successful," but the court did not deem it necessary to make that determination. The district court's analysis assumed that the statute of limitations defense would have succeeded. Likewise, we will analyze the effective assistance of counsel claim with the assumption that the statute of limitations defense would have succeeded. However, we will not make a factual finding that the statute of limitations defense would have succeeded because the district court made no determination on that issue for us to review.

because Coleman's primary goal was an immediate release from jail. Asserting the statute of limitations defense, according to the government, would have meant that Coleman would have had to stay in jail longer than he did to await a ruling on the motion challenging the charge on statute of limitations grounds. That argument misses the mark. Coleman is not alleging that his attorney's representation was unreasonable because his attorney did not *assert* the defense, but rather that Coleman's attorney was unreasonable because he did not *advise* Coleman that he had a complete defense. By not advising Coleman of his option of asserting a complete defense, and thus avoid a felony conviction without a trial, Coleman claims that he could not make a knowing and voluntary plea of guilty.

It is difficult to conceive how a lawyer failing to advise his client, before he enters a plea of guilty, that he has a complete defense to a felony conviction is "reasonable" representation. Indeed, the government offers no argument that Coleman's attorney's failure to *advise* him of his complete defense is reasonable. We have said that "[i]n order for a guilty plea to be entered knowingly and intelligently, the defendant . . . must be reasonably informed of . . . the legal options and alternatives that are available." *LoConte v. Dugger*, 847 F.2d 745, 751 (11th Cir. 1998) (citations omitted). Coleman's attorney's failure to advise Coleman that he had a complete defense to the felony charge is indefensible and unreasonable,

and thus we find that the first prong of Coleman's ineffective assistance claim is satisfied. *See, e.g., United States v. Hansel*, 70 F.3d 6, 8 (2d Cir. 1995) (finding that counsel's failure to object to the time-barred counts cannot be considered a reasonable strategy).

Next, we must consider whether the unreasonable representation that Coleman received in 1993 prejudiced him. Generally, in determining whether prejudice is shown, we inquire whether there is "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. The standard is slightly different in Coleman's circumstances. The question we must ask is not whether, if properly advised of his statute of limitations defense, Coleman would have "insisted on going to trial," but rather whether he would have insisted on asserting his statute of limitations defense that would have been argued and decided before trial. In other words, if Coleman was properly advised, his options would have been to (a) plead guilty to the felony conviction and be sentenced to time-served, or (b) assert his statute of limitations defense *before* deciding whether to go to trial or accept the plea agreement. Thus, we must consider whether, but for Coleman's attorney's failure to advise Coleman of his statute of limitations defense, Coleman would have asserted that defense.

In determining whether a defendant was prejudiced by ineffective representation, the Supreme Court has said that we first must consider whether the attorney, if he discovered his error, would have advised his client differently regarding the plea. For instance, "where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." *Id.* at 59. In the instant case, we must inquire whether, if Coleman's attorney in 1997 discovered that Coleman had a statute of limitations defense, would he have advised Coleman to pursue his complete statute of limitations defense before deciding to plead guilty. This inquiry will "depend largely on whether the affirmative defense likely would have succeeded . . . ." *Id.*

The district court made no finding whether the statute of limitations defense would have succeeded in 1997, thus we will remand that issue for the district court to determine in the first instance. If Coleman's statute of limitations defense would have been successful, then it is reasonably probable that, if Coleman's attorney would have discovered that defense, he would have advised Coleman to assert it before pleading guilty to a felony. If that was the advise Coleman received from his

attorney, it is reasonably probable that Coleman would not have pled guilty, and rather would have let his attorney assert his complete statute of limitations defense. This is a reasonable conclusion because, unlike the petitioner in *Hill*, Coleman specifically alleged that if he would have known about the statute of limitations defense, he would not have pled guilty. *See id.* at 60.

The government alleges that we cannot conclude that Coleman would not have pled guilty because Coleman's primary intention in 1997 was to "go home." Because immediate release from custody was his main concern, the government argues, even if Coleman would have known about his statute of limitations defense, he would have pled guilty in order to facilitate his immediate release instead of waiting for the motion to be filed and then decided upon by the judge. This is a conjecture, though, that is based on the assumption that asserting the statute of limitations defense would have meant that Coleman would spend a significant amount of additional time in custody. That assumption is not supported by the record. Presumably, if Coleman's attorney would have discovered the statute of limitations defense and advised Coleman of it, Coleman would have allowed his attorney to point out the issue to the prosecutor. The prosecutor may have dropped the felony charge immediately when the statute of limitations issue was pointed out

to him, rather than fight a presumably losing battle before the judge.[2] That course of action would have resulted in Coleman's immediate release as well. There is nothing in the record precluding that possibility. Therefore, it is reasonable to conclude that Coleman's primary objective of immediate release from custody could not have *only* been achieved by pleading guilty to the felony, but also could have been achieved by asserting his statute of limitations defense. The only difference between those two strategies is that asserting a statute of limitations defense, presumably, would have prevented Coleman from being convicted of a felony and accepting the social stigma associated with a felony conviction. Thus, Coleman was prejudiced by his attorney failing to advise him of the statute of limitations defense, which could have led to his immediate release without a felony conviction.

If Coleman, on remand, can show that the statute of limitations defense would have been successful in 1997, then he will have shown that his attorney's representation was objectively unreasonable and that Coleman was prejudiced by that unreasonable representation. It is reasonably probable, that if the defense would have been successful, Coleman's attorney would have advised Coleman to

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[2] This is reasonable to assume given that the prosecutor was willing to give Coleman a punishment of time-served for the felony charge, thus allowing Coleman to go home immediately.

not plead guilty, and it is reasonably probable that Coleman would have followed that advice.

Conclusion

We find no error in the convictions of Brown, Hunter, and Coleman, and thus affirm their convictions. With respect to Coleman's sentence, we vacate and remand for further proceedings consistent with this opinion.

AFFIRMED in part, VACATED and REMANDED in part.