11-2722

To Be Argued By:
SARAH P. KARWAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-2722

UNITED STATES OF AMERICA,
Appellee,

-vs-

DOMINGO GONZALEZ, JR.,
Defendant.

FRANCISCO DEIDA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Table of Authorities

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Statement of Jurisdiction

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231.

On March 4, 2010, following a three-day trial, a jury returned a verdict finding the defendant guilty of two counts of bank robbery. Joint Appendix 5 ("A__").

On June 21, 2011, the district court sentenced the defendant to life imprisonment. A9. Judgment entered on July 6, 2011. A9. On that same date, the defendant filed a timely notice of appeal. A9, A92. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

I. Did the district court plainly err in admitting into evidence a job application found in the defendant's backback when he was arrested when that application was a statement of the defendant, and not, therefore, hearsay?

II. Did the district court commit plain error in failing *sua sponte* to declare the "three strikes" provision, 18 U.S.C. § 3559(c), unconstitutional based on an argument that:

A. the statute violates the separation of powers by giving some control over sentencing to the executive branch?

B. the defendant's prior convictions had to be found by a jury rather than by the district court?

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Preliminary Statement

Following a three-day trial, a jury found the defendant, Francisco Deida, guilty of two counts of bank robbery in connection with the January 28, 2009 robbery of the Webster Bank in Milford, Connecticut, and the April 6, 2009 robbery of the TD Bank in Woodbridge, Connecticut.

The evidence at trial, which included, among other things, the testimony of a cooperating witness, DNA evidence recovered from a getaway car, and telephone call records, established that on January 28, 2009, the defendant and his co-defendant, Domingo Gonzalez, entered the Webster Bank on Merwin Avenue in Milford, threatened the bank employees with a firearm, and stole approximately $84,000 from the bank's teller drawers and day vault. The evidence also demonstrated that on April 6, 2009, the defendant and Gonzalez robbed the TD Bank on Amity Road in Woodbridge at gunpoint and stole about $23,000 from the bank.

At sentencing, after the government submitted evidence that the defendant had prior convictions for robbery, assault, and manslaughter, the district court sentenced the defendant to life imprisonment as required by the "three strikes" provision, 18 U.S.C. § 3559(c).

On appeal, the defendant challenges the admission into evidence of a job application found on his person at the time of his arrest, arguing that the document was inadmissible hearsay. In addition, the defendant challenges the three strikes provision, arguing that that the law violates the separation of powers and furthermore that a jury, not a judge, must decide if the defendant's prior convictions qualify as predicate offenses under that law.

As set forth below, the defendant's arguments—all raised for the first time on appeal—

all fail. The job application was admissible as a party admission, and the defendant can identify no prejudice from its admission in any event. The defendant's challenges to the three strikes provision also fail: the law does not violate the separation of powers and this Court's precedents make clear that a judge may determine if the defendant's prior convictions qualify as predicate offenses to trigger the law's penalties.

Statement of the Case

On June 2, 2009, a federal grand jury returned an indictment charging the defendant, Francisco Deida, together with Domingo Gonzalez, with two-counts of bank robbery, in violation of 18 U.S.C. § 2113(a). A3, A11-12.

On February 4, 2010, the government filed an information pursuant to 18 U.S.C. § 3559(c), the "three strikes" provision, and 21 U.S.C. § 851, notifying the defendant of its intention to seek a sentence of mandatory life imprisonment in the event of the defendant's conviction on the offenses charged in the indictment by reason of the defendant's three prior felony convictions set forth in the information. A4, A13-14.

Beginning on February 25, 2010, a jury trial was held in Bridgeport, Connecticut, before the Hon. Stefan R. Underhill, United States District Judge. A4. On March 4, 2010, the jury returned a verdict finding the defendant guilty of both counts of the indictment. A5.

On March 3, 2010, the defendant moved for a judgment of acquittal, or, alternatively, for a new trial pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure. A5-6. On July 15, 2010, the district court denied the motions. A6.

On June 21, 2011, following an evidentiary hearing, the district court sentenced the defendant to a term of life imprisonment. A9. On July 6, 2011, the defendant filed a timely notice of appeal. A9, A92. The defendant is currently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The offense conduct

The defendant's conviction stems from the armed bank robberies of the Webster Bank in Milford, Connecticut on January 28, 2009, and of the TD Bank in Woodbridge, Connecticut, on April 6, 2009. The evidence at trial demonstrated that the defendant committed both takeover-style robberies with co-defendant Domingo Gonzalez; co-defendant Henry Crespo served as the getaway driver on both occasions. Crespo testified as a cooperating witness at trial and identified the defendant as a participant in both of the robberies. *See* Government Appendix 282-353 ("GA___").

Crespo met Domingo Gonzalez in a halfway house and then would occasionally run into him in Bridgeport. GA288, GA290-92. Crespo dis-

cussed with Gonzalez the subject of doing a bank robbery together and agreed to act as a getaway driver for Gonzalez. GA292-93. According to Crespo, the plan was to rob the Webster Bank in Milford with Gonzalez and his partner, "Cisco," who Crespo identified as the defendant, Francisco Deida. GA296-99.

On January 28, 2009, the defendant and Gonzalez entered the Webster Bank on Merwin Avenue in Milford. GA21-22, GA32, GA306-GA307. Both men were wearing heavy winter clothing, had their faces covered with masks and scarves, and were carrying umbrellas, which they kept open, partially blocking the bank's video surveillance. GA33; Ex. 5F. Gonzalez approached the bank manager, grabbed her by the arm, and demanded access to the safe. GA34-35. The manager explained that Gonzalez had a gun, which he pressed up against her. GA34. Gonzalez then demanded that the manager and the assistant branch manager accompany him behind the teller line and provide him with the combination for the bank's safe. GA34-35. At the same time, the defendant approached a bank teller at her teller station, pulled out a gun, and demanded money. GA59-60; Ex. 5G.

Gonzalez directed all of the bank employees to a corner behind the teller line, while the teller emptied the bank's day vault into a bag held by the defendant, who still displayed the gun. GA39, GA41, GA71-72. The defendant and Gonzalez then fled the bank in a car driven by Cres-

po with approximately $84,000. GA43, GA312-315; Ex. 5E.

On April 6, 2009, the defendant and Gonzalez robbed the TD Bank on Amity Road in Woodbridge, again with the assistance of Crespo. GA154-55, GA164-65, GA321-22. On that morning, Domingo Gonzalez called Crespo and asked him if he "would . . . drive again." GA323. A short time later, Gonzalez and the defendant arrived at Crespo's house in New Haven in Gonzalez's gold Cadillac. GA323-24. The defendant was in a "disguise" of a fake mustache and nose. GA324. The three then drove to the TD Bank in Woodbridge where Gonzalez parked the car; Gonzalez and the defendant then got out of the car and headed towards the bank. GA324-39.

Like in the Webster Bank robbery, both Gonzalez and the defendant wore heavy clothing, masks and disguises on their faces, and carried umbrellas. GA165-67; Ex. 10A. Gonzalez entered the bank and vaulted over the teller line towards a bank teller. GA165-67. After demanding her teller drawer cash, he approached another bank teller and demanded her cash. GA189-90. At the same time, the defendant, who was wearing a fake nose and moustache, approached the branch manager, flashed a gun in his waistband, and demanded access to the vault. GA167-68, GA324; Ex. 10C. The defendant then directed the bank employees to a safe deposit room behind the teller line, while Gonzalez forced a bank employee to go into the vault with him. GA171-72, GA193, GA208-10. The defendant

and Gonzalez left the bank with approximately $23,000. GA173. They returned to Gonzalez's Cadillac, where Crespo was waiting in the driver's seat, and urged him to drive. GA330.

During the course of the TD Bank robbery, a United States postal carrier delivering mail entered the bank and observed the robbery in progress. GA223-26. The postal carrier then left the bank and immediately called 911 from his postal vehicle. GA227; Ex. 12. A high speed police chase then ensued, with Crespo driving the getaway car from Woodbridge into the Rock Creek neighborhood of New Haven. GA249-65. There, Crespo slowed the car down and the defendant and Gonzalez jumped out and fled on foot. GA259-60, GA333-34.

Crespo abandoned the car a few blocks later; as he left the car, a Woodbridge Police officer believed he saw Crespo holding a gun and fired five rounds at him. GA266-68. Crespo, who was not hit, was apprehended a few hours later in the neighborhood. GA336-38. Police officers located a cell phone in the vicinity of the home where Crespo abandoned the getaway car. GA401; Ex. 23. The telephone's display identified the user as Gonzalez. GA403.

Evidence recovered by law enforcement officers after the robberies connected the defendant, Gonzalez and Crespo to the two crimes. For example, officers obtained the telephone records for Gonzalez's cell phone, which was recovered after the April 6th TD Bank robbery. GA404-

405. Those records revealed that Gonzalez's telephone had contacted telephone number 203-223-8157 around the times of both the Milford and Woodbridge robberies. GA407.[1] When the defendant was arrested, agents found a job application on him, GA457-59, Ex. 26; the application had phone number 203-223-8157 listed as the defendant's telephone number. GA459; Ex. 26. In addition, the application listed 637 Arctic Street, Bridgeport, Connecticut as the defendant's address; agents had previously observed the defendant at that location. GA459-60.

Officers also obtained a search warrant for the getaway car driven by Crespo after the TD Bank robbery and which was registered to Gonzalez. GA384, GA399, GA450-451. Among the items discovered inside the car were a fake latex nose and a fake mustache. GA387; Exs. 20, 21. DNA recovered from the two exhibits matched the defendant's DNA. GA493-94.

B. Sentencing

On June 21, 2011, the district court held a sentencing hearing. A59-88. During the hearing, the government offered evidence of the defendant's prior convictions for robbery in the first

[1] Telephone records also confirmed that the defendant's cell phone was sending signals to a cell phone tower in the area of Rock Creek Road in New Haven shortly after the defendant and Gonzalez bailed out of the car as it was being chased by police. *See* Ex. 28.

degree, in violation of Conn. Gen. Stat. § 53a-134(a)(2), assault in the first degree, in violation of Conn. Gen. Stat. § 53a-59, and manslaughter in the first degree, in violation of Conn. Gen. Stat. § 53a-55(a)(1). A70-74; Exs. 1B, 2, and 3. The government argued that the evidence demonstrated that the defendant had been previously convicted of three "serious violent felonies" such that a term of life imprisonment was mandated under 18 U.S.C. § 3559(c). A74-75.

The district court agreed that the evidence demonstrated that the defendant had been convicted of three predicate offenses under the three strikes provision. A75-76. Accordingly, the district court imposed a term of life imprisonment on each of the two counts. A86.

Summary of Argument

I. The district court did not plainly err in admitting a job application found on the defendant's person at the time of his arrest. This issue is reviewed for plain error because although the defendant argued below that the application was inadmissible, he never argued, as he does now, that the application was inadmissible hearsay. In any event, the exhibit was not inadmissible hearsay, but rather the defendant's own admission and was therefore properly admitted under Fed. R. Evid. R. 801.

II. The "three strikes" provision, 18 U.S.C. § 3559(c), is constitutionally sound.

A. The three strikes provision does not violate the separation of powers. The determination of a defendant's criminal sentence is not exclusively assigned to one branch of the government. As this Court has previously concluded, the seeking of enhanced penalties based upon a defendant's criminal record does not impermissibly transfer power over sentencing from the judicial branch to the executive branch.

B. Pursuant to the Supreme Court's decision in *Apprendi v. New* Jersey, 530 U.S. 466 (2000), the fact of the defendant's prior convictions, for purposes of sentencing enhancement under the three strikes provision, was properly determined by the sentencing court, and did not have to be submitted to the jury for its consideration.

Argument

I. The district court did not commit plain error when it admitted into evidence the job application found on the defendant at the time of his arrest.

The defendant claims that the district court erred in admitting the job application that was found on him on the day of his arrest. Specifically, the defendant argues, for the first time on appeal, that the document was hearsay, and that the government did not establish that the document fell within any exceptions to the hearsay rule.

A. Relevant facts

On the start of the third day of trial, outside of the presence of the jury, counsel for the government proffered a list of exhibits the government intended to offer into evidence that day. That list included Exhibit 26, the job application at issue. GA416. Counsel for the defendant agreed to the admissibility of all of the exhibits on the government's list, with the exception of Exhibit 26, stating, "That one I'm not going to agree [to] ahead of time." GA416. The government suggested to the district court that it hear argument about the admissibility of the exhibit at that time, before the jury was brought out, to which defense counsel responded, "I'm not arguing—I'm not objecting to its admissibility. I just don't want to agree to it, I want [the government] to lay a foundation." GA417.

To lay a foundation, FBI Special Agent Lisa MacNamara testified that when she arrested the defendant on May 28, 2009, she searched a small backpack that the defendant was carrying for purposes of officer safety. GA457. Inside the backpack, Special Agent MacNamara found Exhibit 26, which was a job application bearing the defendant's name, social security number, telephone number, signature and other personal information. GA457-58; A88.1-88.2. The government then moved to admit Exhibit 26. GA458. Defense counsel objected "as to foundation and relevance." GA458. The district court overruled the objection, GA458-59, explaining later (outside the presence of the jury) that "the founda-

tion was sufficiently laid simply by the connection to Mr. Deida from the fact that the application for employment was found on, in effect on his person . . . [and] [t]he relevance was both the street address listed on the application and the cell phone listed on the application, which both of which tie Mr. Deida back to Mr. Gonzalez[.]" GA501. At no time did defense counsel raise an argument that the document was inadmissible hearsay.

B. Governing law and standard of review

1. Preserving evidentiary objections

In order to preserve an evidentiary issue for appeal, a defendant must make a timely objection at trial and state the specific ground for the objection. Fed. R. Evid. 103(a)(1). "To be timely, an objection . . . must be made as soon as the ground of it is known, or reasonably should have been known to the objector." *United States v. Yu-Leung*, 51 F.3d 1116, 1120 (2d Cir. 1995) (internal quotations omitted).

The requirement that a defendant specify the grounds of the evidentiary objection serves the dual purposes of giving "the trial judge sufficient information so she can rule correctly[]" while allowing the objector's adversary "to take steps to obviate the objection." Wright, 21 *Federal Practice and Procedure, Evidence* § 5036 (2d ed. 2011).

In the absence of a timely objection, this Court reviews the admission of evidence only for plain error. *See United States v. Jackson*, 345 F.3d 59, 65 (2d Cir. 2003). Applying this standard, "an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009)); *see also Johnson v. United States*, 520 U.S. 461, 467 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir.), *cert. denied*, 130 S. Ct. 2394 (2010).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.*

This Court has made clear that "plain error" review "is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings." *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, "[t]he error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

2. Hearsay

Federal Rule of Evidence 802 generally bars the admission of out-of-court assertions, including oral and written statements, when offered to prove the truth of the matter asserted. Rule 801, provides, however, that statements made by an opposing party and offered against that party are not hearsay. Fed. R. Evid. 801(d)(2)(A); *see United States v. Dukagjini*, 326 F.3d 45, 62-63 (2d Cir. 2003) (concluding that a defendant's own statement is admissible under Rule 801); *United States v. Russo*, 302 F.3d 37, 43 (2d Cir. 2002) ("Statements made by the defendant may be introduced by the government in a criminal trial to prove the truth of the facts stated in them because they are admissions of an adverse party.").

C. Discussion

1. The defendant did not preserve a hearsay objection.

The record is clear that the defendant did not make a hearsay objection to the admission of Exhibit 26. Instead, the defendant objected to the exhibit on the basis of "foundation and relevance" when the exhibit was offered, GA458, and these are the grounds which the district court addressed when it explained its ruling on the objection, GA501. At no time did the defendant state or imply that he objected to the exhibit as impermissible hearsay.

In this Court, the defendant states that he "objected to [the exhibit's] admission as there was no foundation through [Special Agent MacNamara] that this document was anything other than Hearsay . . . ." Def. Br. 11. However, the transcript reveals that the defendant did not object to the exhibit as hearsay, but only objected claiming lack of relevance and lack of foundation. To the extent that the defendant suggests that objections on the basis of foundation and relevance are one and the same as a hearsay objection, the defendant is wrong. The three objections involve different evidentiary concepts and are governed by separate rules of evidence. *See* Fed. R. Evid. R. 401-403 (rules governing relevancy); 801-807 (rules governing hearsay); 901 (rule governing authentication).

Accordingly, the defendant's objection for relevance and lack of foundation did not preserve

the hearsay objection he raises on appeal. *See also United States v. Ruffin*, 575 F.2d 346, 355 (2d Cir. 1978) (holding that a trial objection on the ground of relevance did not preserve a hearsay objection raised for the first time on appeal); *United States v. Inserra*, 34 F.3d 83, 90, n.1 (2d Cir. 1994) (concluding that a defendant failed to preserve a hearsay objection for appeal where defendant's objection at trial was only based upon authenticity).

2. The district court did not plainly err in admitting the exhibit because it was the defendant's own statement offered against him.

On review of defendant's hearsay objection for plain error, the defendant's argument fails.

First, there was no error in admitting the document, much less a "clear or obvious" error. *See Marcus*, 130 S. Ct. at 2164. As the district court concluded, the government sufficiently laid a foundation for the document because it was a job application for the defendant "found on, in effect on his person." GA501. The exhibit was clearly relevant to the matters at issue because it contained the street address for the defendant as well as his cell phone number, which was the same number being contacted by his co-defendant shortly before the time of both bank robberies. *See* GA501.

Moreover, the exhibit was not inadmissible hearsay, as the defendant now argues. The exhi-

bit was a written statement made by the defendant and offered against the defendant; as such, the exhibit was not hearsay under Fed. R. Evid. 801(d)(2)(A). For example, in *Inserra*, 34 F.3d at 90-91, this Court held that there was no plain error in admitting the defendant's monthly reports to the probation office because the reports were not hearsay under Rule 801(d)(2)(A)). *See also United States v. Johnson*, 28 F.3d 1487, 1498-1499 (8th Cir. 1994) (concluding that a money transfer application filled out by the defendant was not hearsay but the "admission of a party-opponent."). Here, just like the statements in the probation reports, the defendant's statements on his job application were not hearsay under Rule 801(d)(2)(A).

However, even assuming that the district court improperly admitted Exhibit 26, this error was not plain error because it did not affect the outcome of the proceedings below. *See Olano*, 507 U.S. at 734. To be sure, the job application "circumstantially" linked the defendant to the cell phone that was in contact with Gonzalez's cell phone on the day of the TD Bank robbery. Def. Br. 14. However, the job application represented a small fraction of the overwhelming evidence, including direct evidence, which tied the defendant to both of the bank robberies. The defendant has not explained how the circumstantial evidence of the job application affected the jury's verdict such that, without the exhibit, the verdict would have been different. *See United States v. Logan*, 419 F.3d 172, 179

(2d Cir. 2005) (concluding that there was no plain error where defendant did not show that, without the corroborative evidence, "the result at trial would have been any different.").

It is clear, moreover, that the defendant cannot make such a showing. The jury's verdict would have been the same without the exhibit in question because of the overwhelming evidence of the defendant's guilt. For example, Henry Crespo, the getaway driver for both robberies, testified at trial and identified the defendant as a participant in both the Webster Bank and the TD Bank robberies. *See* GA282-353.[2]

While Crespo's testimony concerning the two robberies, as credited by the jury, forms a sufficient evidentiary basis on its own to support the verdict, *see United States v. Best*, 219 F.3d 192, 200 (2d Cir. 2000), the testimony was corroborated by other evidence presented by the government. For example, Crespo's testimony that the defendant carried "a little gray bag" and a gun into the Webster Bank, *see* GA305-307, was corroborated by one of the bank tellers, who explained that the robber who confronted her was carrying a gray bag and threatened her with a gun. *See* GA58-62. Crespo's testimony was also corroborated by the video surveillance images from the bank, which show the shorter of the

[2] In its denial of the defendant's Rule 29 motion, the district court remarked that if the jury believed Mr. Crespo, "certainly the government's case is very strong." GA500.

two robbers carrying a gray bag and a revolver. *See* Ex. 5G. Crespo's account of the TD Bank robbery was also substantially corroborated by independent evidence—for example, Crespo testified that the defendant wore a fake nose and moustache as a disguise during the robbery, *see* GA324, and a fake nose and moustache with the defendant's DNA were found by police in the getaway car after the April 6th robbery. *See* Exs. 20, 21; GA493-94.

Thus, there can be no doubt that, even absent the job application form, the jury would have reached the same verdict. The defendant, therefore, has not shown that the admission of the exhibit "affected the outcome of the trial proceedings[,]" *Olano*, 507 U.S. at 734, and his argument fails. It was not error, much less plain error, to admit the defendant's job application.

II. The "three strikes" provision, 18 U.S.C. § 3559(c), is constitutionally sound.

The defendant claims—for the first time on appeal—that the "three strikes" provision, which required the district court to sentence him to life imprisonment on both counts of conviction, is unconstitutional. Specifically, the defendant argues that the three strikes law gives too much sentencing authority to the executive branch in violation of the separation of powers and that a jury (as opposed to the judge) had to find the fact of his prior convictions.

A. Relevant facts

Before the defendant's trial began, the government filed an information pursuant to 18 U.S.C. § 3559(c), the "three strikes" provision, and 21 U.S.C. § 851, notifying the defendant of its intention to seek a sentence of mandatory life imprisonment in the event of the defendant's conviction on the offenses charged in the indictment by reason of the defendant's three prior felony convictions set forth in the information. A4, A13-14.

On June 21, 2011, following the jury's verdict of guilty on both counts of the indictment, the district court held a sentencing hearing. A59-88. During the hearing, the government offered the testimony of a records specialist from the Connecticut Department of Corrections, who authenticated the Department of Corrections' original file for the defendant. A64; Exs. 1A-1B. Those records included the judgment mittimus for the defendant's prior convictions for robbery in the first degree, in violation of Conn. Gen. Stat. § 53a-134(a)(2), assault in the first degree, in violation of Conn. Gen. Stat. § 53a-59, and manslaughter in the first degree, in violation of Conn. Gen. Stat. § 53a-55(a)(1). A70-74; Exs. 1B, 2, and 3. The government argued that the evidence demonstrated that the defendant had been previously convicted of three "serious violent felonies" such that a term of life imprisonment was mandated under 18 U.S.C. § 3559(c). A74-75.

The district court stated that the record demonstrated that "each of the three crimes set forth in the information have been proven to have been committed by the defendant here, Francisco Deida . . . and I find that the crimes for which Mr. Deida has been convicted in this court are serious violent felonies . . . ." A75-76. Accordingly, the court concluded "that the information properly sets forth the predicate offenses required by the statute and that Mr. Deida is subject to a mandatory sentence under that statute as a result." A76. The district court imposed a term of life imprisonment on each of the two counts. A86.

B. Governing law and standard of review

1. The "three strikes" provision

On September 13, 1994, Congress enacted the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796, *et seq.* (1994). Title VII of that Act, Section 7001, also known as the "three strikes" provision, mandates life imprisonment for persons convicted of certain felonies who have at least two qualifying criminal convictions. 108 Stat. 1982-1085, codified at 18 U.S.C. § 3559(c). Specifically, Section 3559(c)(1) provides:

> [A] person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if–

> (A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of–
>
> > (i) 2 or more serious violent felonies[.]

18 U.S.C. § 3559(c)(1)(A)(i). Congress intended Section 3559(c) "to take the Nation's most dangerous recidivist criminals off the street and imprison them for life." H. Rep. 103-463, 1994 WL 107574 at *5 (Mar. 25, 1994).

2. Separation of powers

The Supreme Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). That is, the Court has recognized that "our Constitution mandates that 'each of the three general departments of government [must remain] entirely free from the control of coercive influence, direct or indirect, of either of the others.'" *Id*. (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)); *see also Loving v. United States*, 517 U.S. 748, 757 (1996) ("[O]ne branch of the Government may not intrude upon the central prerogatives of another.").

The separation of powers principle, however, does not mandate "that the three Branches must be entirely separate and distinct." *Mistretta*, 488 U.S. at 380. Instead, as the Court has explained, "our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'" *Id.* at 381 (quoting *Buckley v. Valeo*, 424 U.S. 1, 121 (1976)).

Thus, while the Court has invalidated laws "that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch," the Court has upheld provisions "that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment." *Id.* at 382. "In order to 'determin[e] what [one branch] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination.'" *United States v. Jennings*, 652 F.3d 290, 300-301 (2d Cir. 2011) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928)).

In the realm of federal criminal sentencing, the Supreme Court has recognized this need for overlap and interdependence, explaining: "feder-

al sentencing . . . never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government." *Mistretta*, 488 U.S. at 365. In that connection, the Court has explained that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." *Chapman v. United States*, 500 U.S. 453, 467 (1991).

3. Judicial versus jury fact finding

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The *Apprendi* decision preserved the rule announced in *Almendarez-Torres v. United States*, 523 U.S. 224, 239-247 (1998), in which the Court held that where a statute creates an enhanced penalty based upon a defendant's prior convictions, the fact of those convictions is a sentencing factor to be determined by the trial court, rather than found by a jury.

4. Standard of review

Because the defendant did not challenge the constitutionality of the three strikes provision in the proceedings below, this Court reviews the district court's failure to declare the statute unconstitutional for plain error. *See United States v. Rybicki*, 354 F.3d 124, 128-29 (2d Cir. 2003)

(en banc). That is, "an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Marcus*, 130 S. Ct. at 2164 (quoting *Puckett*, 129 S. Ct. at 1429).

C. Discussion

1. The government's decision to seek enhanced penalties under a valid statute does not violate the separation of powers.

The defendant first argues that the filing of the § 3559(c) information "violates the constitutional principle of separations [sic] of powers by ceding to the prosecution, an agent of the executive, the authority to determine the defendant's punishment namely life imprisonment . . . ." Def. Br. 18. The defendant's argument fails.

While this Court has not addressed whether the three strikes provision violates the principle of separation of powers, the circuit courts that have considered this question have unanimously concluded that the law does not violate separa-

tion of powers principles.[3] Thus, in *United States v. Gurule*, 461 F.3d 1238 (10th Cir. 2006), the Tenth Circuit explained that "we have generally recognized that mandatory sentences do not violate the separation of powers principle[,]" noting that "the Supreme Court has held that Congress has the power not only to define criminal offenses but to determine punishments, and in the exercise of that power Congress may choose to give the judicial branch no sentencing discretion whatsoever." *Id.* at 1246 (citing *Chapman*, 500 U.S. at 467); *see also United States v. Kaluna*, 192 F.3d 1188, 1199 (9th Cir. 1999) (rejecting the defendant's argument that the three strikes provision violates separation of powers); *United States v. Rasco*, 123 F.3d 222, 226 (5th Cir. 1997) ("The power to fix sentences rests ultimately with the legislative, not the judicial, branch of the government and thus the mandatory nature of the punishment set forth in § 3559 does not violate the doctrine of separation of powers.").

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[3] Although this Court has not addressed this precise challenge to the three strikes law, this Court has previously rejected various other constitutional challenges to § 3559(c). Specifically, in *United States v. Snype*, 441 F.3d 119 (2d Cir. 2006), this Court held that § 3559(c) did not violate a defendant's due process rights, nor did the imposition of a life sentence violate the Eighth Amendment. 441 F.3d at 149-52. Similarly, in *United States v. Matthews*, 545 F.3d 223 (2d Cir. 2008) (per curiam), this Court upheld § 3559(c) against a due process challenge.

In *United States v. Washington*, 109 F.3d 335 (7th Cir. 1997), the Seventh Circuit rejected the very argument that the defendant raises here—that § 3559(c) offends separation of powers by vesting the prosecutor with too much authority over the ultimate sentence—explaining:

> As for the contention that § 3559(c) offends principles of separation of powers by giving the prosecutor too much power over the sentence—or the due process clause of the fifth amendment by giving the judge too little—neither prosecutorial discretion nor mandatory sentences pose constitutional difficulties. If one person shoots and kills another, a prosecutor may charge anything between careless handling of a weapon and capital murder. The prosecutor's power to pursue an enhancement under § 3559(c)(1) is no more problematic than the power to choose between offenses with different maximum sentences.

109 F.3d at 338. *See also United States v. Batchelder*, 442 U.S. 114, 125-126 (1979) (holding that a prosecutor's discretion as to which statutory violation to charge did not delegate to the Executive Branch the Legislature's responsibility to set criminal penalties because that power "is no broader than the authority they routinely exercise in enforcing the criminal laws.").

The defendant attempts to discredit the *Gurule* line of cases on the basis that the analysis in those cases ignores the Supreme Court's deci-

sion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Specifically, the defendant suggests that *Apprendi* "castes [sic] a new light on the separation of powers concern of reallocation of powers from the executive branch back to the judicial branch[.]" Def. Br. 20. The defendant's argument is unpersuasive because the Court's decision in *Apprendi* was based upon due process and Sixth Amendment concerns—*i.e.*, a criminal defendant's right to have a jury, rather than a judge, "determin[e] that he is guilty of every element of the crime with which he is charged . . . ." *Apprendi*, 530 U.S. at 477. The *Apprendi* decision did not address—either explicitly or implicitly—the question of the allocation of powers between the three branches.

The conclusion reached by *Gurule* and the other circuit courts that § 3559(c) does not violate the separation of powers doctrine is consistent with this Court's decisions in analogous cases. For example, in *United States v. Sanchez*, 517 F.3d 651 (2d Cir. 2008), this Court rejected the argument, in the context of a § 851 information, that the seeking of enhanced penalties impermissibly transferred power over sentencing from the judicial branch to the executive branch. Citing *Mistretta*, this Court noted that the scope and extent of determining a defendant's punishment has never been exclusively assigned to one branch of government. 517 F.3d at 670. Moreover, the Court noted that the Attorney General and the United States Attorneys "retain 'broad discretion' to enforce the criminal laws."

Id. (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)). Thus, the Court concluded, "[a]lthough this discretion [to file an § 851 information] gives prosecutors some degree of control over a defendant's ultimate sentence, it does not violate the principle of separation of powers." *Id.* at 671. *See also United States v. LaBonte*, 520 U.S. 751, 762 (1997) ("Insofar as prosecutors . . . may be able to determine whether a particular defendant will be subject to the enhanced statutory maximum, any such discretion would be similar to the discretion a prosecutor exercises when he decides what, if any, charges to bring against a criminal suspect. Such discretion is an integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors.").

Similarly, in *United States v. Huerta*, 878 F.2d 89 (2d Cir. 1989), this Court concluded that 18 U.S.C. § 3553(e), which permits a judge to impose a sentence below the otherwise-applicable mandatory minimum term only upon a substantial assistance motion of the government, did not violate the separation of powers doctrine. 878 F.2d at 91-93. This Court rejected the defendant's argument that § 3553(e) usurped "an inherently judicial function" by precluding a court's consideration of a defendant's cooperation unless the prosecutor files a substantial assistance motion. In so doing, the Court noted that sentencing has long been shared among the three Branches of government and that "'the scope of judicial discretion with respect to a sen-

tence is subject to congressional control.'" *Id.* at 93 (quoting *Mistretta*, 488 U.S. at 364). The Court also rejected a related due process argument that discretion in sentencing "cannot be validly circumscribed" and instead held that "Congress may constitutionally prescribe mandatory sentences or otherwise constrain the exercise of judicial discretion so long as such constraints have a rational basis." *Id.* at 94 (internal citations omitted).

Here, the defendant cannot explain how the discretion afforded to the prosecution in seeking a mandatory life sentence under § 3559(c) is any different from the discretion normally afforded to prosecutors in determining what crimes to charge, or what enhanced penalties to seek. As both the Supreme Court and this Court have explained, federal sentencing has never been assigned to one of the branches exclusively. *Mistretta*, 488 U.S. at 365; *Sanchez*, 517 F.3d at 671. The fact that Congress has enacted a mandatory penalty, which a prosecutor elects to enforce, and a sentencing court imposes, reflects the "interdependence" of the three branches, not an "encroachment or aggrandizement" by one branch to the detriment of another. *Mistretta*, 488 U.S. at 381-382. The defendant's separation of power challenge therefore fails.

2. The fact of the defendant's prior convictions was properly determined by the district court.

The defendant's argument that the fact of his prior convictions had to be found by a jury, rather than by the district court is directly foreclosed by this Court's decision in *United States v. Snype*, 441 F.3d 119 (2006). In *Snype*, this Court rejected the precise argument raised by the defendant here, noting that the Supreme Court's decision in *Almendarez-Torres*—that a prior conviction is a sentencing factor to be determined by the court—was still controlling in this context. 441 F.3d at 148. And as the *Snype* Court noted, its holding was consistent with the decisions of four other circuits at the time. *Id.* (collecting cases).

The defendant relies upon Justice Thomas's concurring opinion in *Shepard v. United States*, 544 U.S. 13 (2005) in which Justice Thomas referred to the *Almendarez-Torres* rule as "flawed." 544 U.S. at 28 (Thomas, J. concurring in part and concurring in judgment). This Court's decision in *Snype*, however, was decided after *Shepard*, and in fact, acknowledged Justice Thomas's criticism of the *Almandarez-Torres* rule. Nonetheless, this Court held that "*Almendarz-Torres* continues to bind this court and its application of *Apprendi*." *Snype*, 441 F.3d at 148. The Court has recently reiterated its position, *see United States v. Espinal*, 634 F.3d 655, 664 n.5 (2d Cir. 2011).

The defendant offers no authority subsequent to *Snype* or *Espinal* to support his argument that *Almendarez-Torres* is no longer good law. Accordingly, this Court's decisions in *Snype* and *Espinal* control here. This Court is "not at liberty to depart from binding Supreme Court precedent unless and until [the] Court reinterpret[s]" that precedent[,]" *OneSimpleLoan v. Secretary of Education*, 496 F.3d 197, 208 (2d Cir. 2007) (citations omitted), and this Court is "'bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court,'" *United States v. Frias*, 521 F.3d 229, 232 n.3 (2d Cir. 2008) (quoting *United States v. Brutus*, 505 F.3d 80, 87 n.5 (2d Cir. 2007)).

Thus, the district court did not err in determining the fact of the defendant's prior convictions, and the defendant's challenge fails.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: February 6, 2012

Respectfully submitted,

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,202 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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ADDENDUM

§ 3559. Sentencing classification of offenses

(c) Imprisonment of certain violent felons.--

(1) Mandatory life imprisonment.--Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if--

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of--

(i) 2 or more serious violent felonies; or

(ii) one or more serious violent felonies and one or more serious drug offenses; and

(B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.

* * *

Federal Rules of Evidence Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).