UNITED STATES V. WATKINS: ELEVENTH CIRCUIT OVERRULES PRIOR PRECEDENT, HOLDING THE PROPER BURDEN OF PROOF FOR THE ULTIMATE DISCOVERY EXCEPTION IS PREPONDERANCE OF THE EVIDENCE

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In *United States v. Watkins*, the United States Court of Appeals for the Eleventh Circuit imposed a higher burden of proof for when the government seeks to introduce evidence through the "ultimate discovery" exception to the exclusionary rule of evidence.[1] The exclusionary rule prohibits evidence from being admitted into court proceedings if it was obtained in violation of the Fourth Amendment; however, the ultimate discovery exception allows the government to introduce otherwise excluded evidence by showing it would ultimately have been discovered absent the unlawful conduct.[2] Previously, the Eleventh Circuit used the "reasonable probability" standard to determine whether evidence would ultimately have been discovered.[3] However, in *Watkins*, the court overruled this precedent, explaining that the United States Supreme Court required the use of the preponderance of the evidence standard.[4] The court also concluded that this was the proper burden of proof in its own view.[5]

The Fourth Amendment establishes that, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause."[6] Under the exclusionary rule, evidence obtained in violation of this provision is barred from admission into court proceedings.[7] However, there is an exception when the government can prove that the "evidence would ultimately have been discovered through lawful means had there been no constitutional violation."[8]

Previously in the Eleventh Circuit, the government could meet the requisite burden of proof for the ultimate discovery exception by showing with "reasonable probability" that the evidence would have been discovered

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[1] United States v. Watkins, 10 F.4th 1179 (11th Cir. 2021).

[2] *See id.* at 1180–81.

[3] *Id.* at 1180.

[4] *See id.* at 1181.

[5] *See id.*

[6] U.S. CONST. amend. XIV.

[7] *See Watkins*, 10 F.4th at 1180.

[8] *Id.*

absent the constitutional violation.[9] Even after the United States Supreme Court addressed the issue in *Nix v. Williams*,[10] the Eleventh Circuit "re-pledged allegiance to the . . . reasonable probability standard."[11] In *Nix*, the Supreme Court held that the preponderance of the evidence standard was a permissible standard for ultimate discovery cases.[12] However, prior to its decision in *Watkins*, the Eleventh Circuit did not initially construe the holding in *Nix* to *require* the use of this evidentiary burden; thus, it continued to apply the reasonable probability standard to ultimate discovery cases.[13]

Pursuant to this precedent, the district court was required to use the reasonable probability standard when deciding the issue in this case.[14] On appeal, however, the Eleventh Circuit overruled its prior precedent and held that, based on the Supreme Court's statement in *Bourjaily v. United States*,[15] the *Nix* decision mandated the use of the preponderance of the evidence standard.[16] Citing *Nix*, the Supreme Court wrote in a parenthetical that the "inevitable discovery of illegally seized evidence *must* be shown to have been more likely than not."[17] Although arguably dicta, the Eleventh Circuit refused to issue a holding contrary to what the Supreme Court stated.[18] Therefore, the court "realign[ed] [its] circuit law about *Nix's* holding to square with what the Supreme Court in *Bourjaily* said *Nix* held."[19]

The Eleventh Circuit further provided its own reasoning for concluding that the preponderance of the evidence standard was the proper evidentiary burden.[20] The "primary problem" with the reasonable probability standard "is that no one knows exactly what reasonably probability means in this context."[21] The term "reasonable probability" suggests that there is an "unreasonable probability;" yet, the court questioned "how . . . a probability

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[9] *Id.* (citing United States v. Brookins, 614 F.2d 1037, 1042 n.2, 1044–48 (5th Cir. 1980); United States v. Wilson, 671 F.2d 1291, 1293–94 (11th Cir. 1982); United States v. Roper, 681 F.2d 1354, 1358 (11th Cir. 1982); Jefferson v. Fountain, 382 F.3d 1286, 1296 (11th Cir. 2004); United States v. Johnson, 777 F.3d 1270, 1274 (11th Cir. 2015)).
[10] *Nix v. Williams*, 467 U.S. 431, 442–43 (1984).
[11] *Watkins*, 10 F.4th at 1181.
[12] *Nix*, 467 U.S. at 444.
[13] *See Watkins*, 10 F.4th at 1181.
[14] *See id.*
[15] Bourjaily v. United States, 483 U.S. 171 (1987).
[16] *See Watkins*, 10 F.4th at 1182.
[17] *Id.* at 1182 (citing *Bourjaily*, 483 U.S. at 176).
[18] *See Watkins*, 10 F.4th at 1182 ("Some may argue that the Court's statement in *Bourjaily* about *Nix* is dicta, but we need not decide whether it is. As we have stated before, 'there is dicta and there is dicta, and then there is Supreme Court dicta.'") (citation omitted).
[19] *Id.*
[20] *See id.* at 1182–83.
[21] *Id.* at 1182 (noting that the term has never been defined in Eleventh Circuit case law in this context).

[can be] unreasonable?"[22] The two terms are not compatible in their plain ordinary meanings.[23] Although the Supreme Court uses this standard in other contexts, the phrase is a "term of art" for specific issues and its meaning departs from the textual definition of the individual words.[24]

For example, the Eleventh Circuit discussed the reasonable probability standard defined in *Strickland v. Washington*.[25] In *Strickland*, the Supreme Court held that the reasonable probability standard should be used to determine ineffective assistance of counsel cases.[26] The Supreme Court noted that the purpose of the Sixth Amendment is to guarantee that defendants will have competent counsel, which enables justifiable reliance on a fair outcome in their case.[27] Accordingly, a successful defendant in an ineffective assistance of counsel case must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[28] Through this definition, the Supreme Court promoted justifiable reliance on the judicial system by intentionally adopting a lesser burden of proof.[29]

However, Eleventh Circuit reasoned that the standard set out in *Strickland* could not be the proper burden of proof for cases involving questions of the ultimate discovery exception to the exclusionary rule.[30] As the court explained, the exclusionary rule "exclude[s] from the trier of fact some relevant and probative evidence, which could decrease the reliability of the outcome of a criminal proceeding," which is the opposite effect of ensuring that outcomes in judicial proceedings are reliable.[31] Producing evidence that is both relevant and probative will increase the reliability of the outcome.[32] When the outcome is more reliable, confidence in outcomes produced by the judicial system increases.[33] Because "applying an exception to the exclusionary rule would [always] increase our confidence in the accuracy of the outcome of a trial," the burden of proof under the reasonable

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[22] *Id.*
[23] *See id.*
[24] *Watkins*, 10 F.4th at 1182 (citing Borden v. United States, 141 S. Ct. 1817, 1828 (2021)) ("[T]erms of art *depart* from ordinary meaning.").
[25] *See id.* at 1182–83 (citing Strickland v. Washington, 466 U.S. 668, 691–96 (1984)).
[26] *Id.* at 1183 (citing *Strickland*, 466 U.S. at 691–96)
[27] *Id.* (citing *Strickland*, 466 U.S. at 693–94).
[28] *Id.* (quoting *Strickland*, 466 U.S. at 694). The Supreme Court went on to explain that "[a] reasonable probability [of a different result] is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694).
[29] *See Watkins*, 10 F.4th at 1183.
[30] *See id.*
[31] *Id.* (citing Lange v. California, 141 S. Ct. 2011, 2027 (2021)).
[32] *See id.* at 1184.
[33] *See id.*

probability standard would always be met.[34] If the government always meets its burden, the court reasoned that evidence obtained in violation of the Fourth Amendment would never be barred from admission under the exclusionary rule.[35] Accordingly, the court determined that the *Strickland* reasonable probability standard cannot be the proper burden of proof for the ultimate discovery exception to the exclusionary rule.[36]

The Eleventh Circuit went on to explain that even if the Supreme Court did not mandate the use of the preponderance of the evidence standard in *Nix*, the court now holds that it would still change its law to require this standard for ultimate discovery cases.[37] First, the court noted that the preponderance of the evidence has received a "green light" from the Supreme Court, but "[n]o Supreme Court decision green lights use of the reasonable probability standard for ultimate discovery purposes."[38] Moreover, the court reasoned the preponderance of the evidence standard is a popular burden of proof clearly defined as "more likely true than not true."[39] In explaining its reasoning, the court stated:

> The preponderance standard is well-defined; the reasonable probability standard is undefined in our case law for use in this context. The preponderance standard is unambiguous and clear; the reasonable probability standard is ambiguous and vague in this context. The preponderance standard is straightforward and simple to apply; the reasonable probability standard is not in this context. Use of the preponderance standard in this context has the Supreme Court's good judging seal of approval; use of the reasonable probability standard does not.[40]

Accordingly, the Eleventh Circuit held that the clear definition and widespread use of the preponderance of the evidence standard renders it the proper burden of proof for ultimate discovery cases.[41]

After forty-one years of using the reasonable probability standard, the Eleventh Circuit in *Watkins* adopted a higher burden of proof for the ultimate

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[34] *Id.*

[35] *See Watkins*, 10 F.4th at 1184 ("[U]sing the *Strickland* 'reasonable probability' definition or standard, which focuses entirely on confidence in the reliability of the trial's outcome, would always lead to application of the ultimate discovery exception to the exclusionary rule. A standard or test that always produces the same result is not a standard or test.")

[36] *See id.*

[37] *See id.*

[38] *Id.*

[39] *Id.* at 1185 (quoting United States v. Deleveaux, 205 F.3d 1292, 1296 n.3 (11th Cir. 2000)) (internal quotation marks omitted).

[40] *Id.*

[41] *Watkins*, 10 F.4th at 1185.

discovery exception.[42] Thus, the government now must prove that it is "more likely true than not true" that the evidence would have ultimately been discovered without violating the Fourth Amendment rather than merely showing it was "reasonably probable."[43] By requiring the government to meet the preponderance of the evidence standard, *Watkins* sets a significant precedent—that is, the Eleventh Circuit is ensuring the adequate protection of an individual's right to be secure from unlawful searches and seizures.

[42] *See id.* at 1180.
[43] *Id.*