09-4999-cr

To Be Argued By:
BRIAN P. LEAMING

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-4999-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

CARLOS ESCALERA, also known as Pucho,

Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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DAVID B. FEIN
United States Attorney
District of Connecticut

BRIAN P. LEAMING
Assistant United States Attorney
NORA R. DANNEHY
Assistant United States Attorney (of counsel)

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Statement of Jurisdiction

The district court (Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on November 16, 2009. JA 3. The defendant's timely notice of appeal was filed on November 17, 2009. JA 1.[1] This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a) because the appeal challenges a criminal sentence.

[1] The Joint Appendix is cited as "JA__."

Statement of Issues Presented for Review

I. Did the district court err in its reliance on Escalera's admission to facts proffered during a so-called *Alford* guilty plea hearing in determining whether the defendant's prior conviction for burglary was a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii)?

II. Did the district court clearly err in finding that Escalera's admissions during the February 8, 1996 and May 19, 2004 guilty plea colloquies were sufficiently specific to determine that Escalera's convictions for sale of narcotics were "serious drug offenses" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii)?

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Preliminary Statement

Defendant Escalera was convicted on a plea of guilty to one count of being a felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1). The district court held that Escalera's criminal history subjected him to an enhanced sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), and sentenced him to 180 months in prison, which was the minimum sentence

mandated by the statute but below the applicable guidelines range of 188 to 235 months of imprisonment.

The defendant's plea of guilty was entered in accordance with an agreement with the government. JA 234-41. The plea agreement acknowledged the parties disagreement as to whether the defendant's prior felony convictions would trigger enhanced penalties under the ACCA. JA 237. At sentencing, and in his appeal, the defendant challenged the qualification of each of the three prior felony convictions upon which the government relied. As to each prior conviction, the defendant claims, the government failed to prove that the admitted facts were sufficient to qualify as either a "violent felony" or a "serious drug offense." The defendant's argument is not persuasive. First, the district court correctly relied on the defendant's admission during a so-called *Alford* guilty plea colloquy as being a *Shepard*-approved judicial record. Having accepted the defendant's admissions during the guilty plea colloquy, the district court appropriately found that the defendant admitted to the elements of a 'generic' burglary and therefore a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii). Second, the district court correctly found that the defendant's admissions during his February 8, 1996 and June 23, 2004 guilty plea colloquies were sufficiently specific to qualify as "serious drug offenses" under 18 U.S.C. § 924(e)(2)(A)(ii). In both guilty plea hearings, the district court found that the defendant admitted to the facts proffered by the prosecutor which established the defendant's possession with intent to or delivery of a controlled substance, as defined in 21 U.S.C. § 802.

Statement of the Case

On November 27, 2007, a federal grand jury returned an indictment charging the defendant with one count of being a felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1) and one count of possession with intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). JA 242. On March 3, 2009, the defendant entered a guilty plea to Count One of the Indictment which charged him with being a felon in possession of ammunition. JA 234. The defendant's plea of guilty was in accordance with an agreement with the government. JA 234-241. Count Two was dismissed by agreement upon the district court's acceptance of the defendant's guilty plea to Count One. *Id.*

Statement of Facts and Proceedings Relevant to this Appeal

A. The offense conduct

On or about June 1, 2007, task force officers assigned to the Hartford Violent Crime Impact Team ("VCIT") received information that members of the street gang *Los Solidos* were acquiring hand grenades to use against police vehicles at the Hartford Police Affleck Street sub-station. Pre-sentence Report ("PSR") ¶ 6. The ensuing investigation developed information that "Pucho" and another *Los Solidos* member had ordered the bombing of a police cruiser at the Hartford Police south sub-station. *Id.* ¶ 8. This plan, however, was aborted. *Id.* According to a Hartford Police confidential informant, sometime

thereafter, Escalera, a.k.a. "Pucho," moved from his Westland Street residence because of police pressure on the *Los Solidos*. *Id.* ¶ 9.

On or about September 17, 2007, a State of Connecticut Probation Officer advised VCIT agents that Escalera had moved to Mahl Avenue, Hartford. *Id.* ¶ *10.* Further investigation revealed that Escalera was residing at 51 Mahl Avenue and was in possession of a black and grey Glock firearm. *Id.* Based on the foregoing, a State of Connecticut search and seizure warrant was obtained for 51 Mahl Avenue. *Id.* ¶ 11.

On September 21, 2007, VCIT agents and other members of the Hartford Police Department executed the search warrant at 51 Mahl Avenue. *Id.* The defendant, his girlfriend, and a one-year old child, were located asleep in the bedroom. *Id.* A search of the premises resulted in the following items being seized: 1) in the bedroom closet, a black bag containing plastic sleeves, zip-lock bags with "Batman" logo, three digital scales, one with white residue, a grinder with residue, a strainer, face masks, ink stamper with "Great White Shark," bags stamped with "Great White Shark," bag with chunks of a white powder substance (total weight 44 grams), which was negative for a controlled substance and believed to be cutting agent, and a cardboard box with two knotted plastic bags with a beige, powder-like substance, which was determined to be heroin with a net weight of 49.5 grams, and a magazine containing nine .40 caliber rounds of ammunition; 2) in the same bedroom closet, a shoe box containing $7803 in U.S.

currency; 3) in the defendant's pants pocket, $1739 in U.S. currency; and 4) a shirt with a *Los Solidos* emblem. *Id.*

The defendant was transported to the Hartford Police Station where he was advised of his *Miranda* rights. *Id.* ¶ 12. The defendant agreed to waive his rights and signed a written waiver. *Id.* The defendant admitted in writing that everything found inside the black bag belonged to him, including the magazine and ammunition. *Id.* The defendant also admitted that he acquired the heroin a few days earlier and that he had been selling heroin for about three months. *Id.* The defendant claimed to have found the loaded magazine, but denied ownership or possession of a firearm. *Id.*

Interstate nexus was established on each round of ammunition. Inside the magazine were three (3) rounds of Federal, caliber .40 S&W (manufactured in Minnesota), four (4) rounds of Winchester, Caliber .40 S&W (manufactured in Illinois), and two (2) rounds of Speer, caliber .40 S&W (manufactured in Idaho). *Id.* ¶ 13.

B. Sentencing

1. The pre-sentence report

The PSR calculated the defendant's offense level pursuant to the armed career criminal provision of the Sentencing Guidelines, § 4B1.4. PSR ¶¶ 26-27. This provision states as follows:

> The offense level for an armed career criminal is the greatest of:
>
> (1) the offense level applicable from Chapters Two and Three; or
>
> (2) the offense level from § 4B1.1 (Career Offender) if applicable; or
>
> (3)(A) **34**, if the defendant used or possessed the firearm or ammunition in connection with . . . a controlled substance offense, as defined in § 4B1.2(b) . . . ; or
>
> (3)(B) **33**, otherwise.

U.S.S.G. § 4B1.4(b). Accordingly, the PSR calculated the defendant's offense level under Chapter Two as well as under § 4B1.4(b)(3)(A). The Chapter Two calculation identified a base offense level of 24, pursuant to § 2K2.1(a)(2), and added 4 levels under § 2K2.1(b)(5) as the ammunition was possessed in connection with, and had the potential to facilitate the felony offense of narcotics

trafficking, resulting in a total offense level of 28. PSR ¶ 24. Because the offense level of 34 specified in § 4B1.4(b)(3)(A) was greater, that offense level applied. PSR ¶ 27. Three levels were subtracted for the defendant's acceptance of responsibility pursuant to § 3E1.1(a) and (b) for a total offense level of 31. PSR ¶ 28.

The PSR calculated the defendant's criminal history score at 12 points, placing him in criminal history Category V. PSR ¶ 38. The criminal history score included two points under § 4A1.1(d) because the defendant committed the present offense while he was on probation. *Id.* Pursuant to § 4B1.4(c)(2), however, the PSR calculated the defendant's criminal history as category VI because he possessed the ammunition in connection with a controlled substance as defined by § 4B1.2(b). *Id.*

2. Sentencing hearing

At the sentencing hearing, the government presented evidence to support the factual allegations contained in paragraphs 6 through 10 of the pre-sentence report, which were disputed by the defendant. JA 84. While the disputed facts in paragraphs 6 through 10 did not impact the calculation of the guideline range, the district court concluded that the resolution of these facts was appropriate under U.S.S.G. § 1B1.4 which authorizes the sentencing court to "consider, without limitation, any information concerning the background, character and conduct of the defendant, unless prohibited by law." JA

87. To substantiate the disputed factual allegations, the government offered the testimony of a Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF") Task Force Officer ("TFO") Richard Medina. Having determined that the disputed facts were important to its sentencing determination under U.S.S.G. § 6A1.3, the district court permitted the sworn testimony of TFO Medina. JA 94. At the conclusion of testimony, the district court credited the testimony of TFO Medina and adopted the disputed factual allegations. JA 147-50. In the instant appeal, the defendant does not challenge the district court's adoption and consideration of Paragraphs 6 through 10, or the manner in which the district court conducted the hearing.

The other significant component of the sentencing hearing pertained to the district court's findings regarding the qualification of the defendant's prior felony convictions. It was those findings which are the subject of the present appeal.

At the sentencing hearing, and in its memorandum in aid of sentencing, the government argued that three of the defendant's prior felony convictions qualified as either a "violent felony" or "serious drug offense." More particularly, the defendant had been previously convicted on: (1) November 23, 2005, for "Burglary 3rd Deg.," in violation of Conn. Gen. Stat. § 53a-103; (2) May 2, 1996, for "Sale of Hallucinogen/Narcotic," in violation of Conn. Gen. Stat. § 21a-277(a); and (3) June 23, 2004, for "Sale of Hallucinogen/Narcotic," in violation of Conn. Gen. Stat. § 21a-277(a). The defendant contested at sentencing that

these convictions were qualifying predicate offenses under the ACCA.

1. November 23, 2005 Conviction for "Burglary 3rd Degree."

On November 23, 2005, Escalera appeared in Manchester Superior Court to enter a guilty plea to burglary in the third degree, in violation of § 53a-103. JA 50, 226. Escalera's prior plea of not guilty was withdrawn. JA 227. Upon advisement of the charge, Escalera was asked "what is your plea, guilty or not guilty?" JA 227. Escalera responded: "Guilty." *Id.* Escalera's attorney then stated: "It's an *Alford* plea, your Honor." *Id.* The court responded, "so noted." *Id.* After the defendant admitted to violating his probation in two unrelated cases, it came time for the prosecutor to proffer the State's version of the facts:

> PROSECUTOR: [Prosecutor first recites procedural history of underlying conviction and defendant's status as a person under a sentence of probation.] And after he'd been released from custody and commenced his probation, he committed the instant offense, the burglary third was on June 17th, 2005, in East Hartford. The complainant was a Frankie Rome who said she was in her bedroom at her residence sleeping and she heard knocking at the back door; then she heard something break and her ex-boyfriend, the defendant, then appeared in her bedroom, your Honor. He had smashed out the door, your Honor, entering wrongfully and forcefully and he assaulted her, your

> Honor. He entered the dwelling with intent to commit that crime against her.
>
> [Discussion about agreed upon sentence and how the court came to agree to the sentence.]
>
> DEFENDANT'S ATTORNEY: The facts here are disputed, as indicated by an *Alford* Plea, your Honor.
>
> [More discussion among the parties and court including a request by the "family" for a nolle.]
>
> COURT: Mr. Escalera, as far as the VOPS and the burglary in the third degree, those facts accurate?
>
> DEFENDANT: Yes.
>
> . . . .
>
> COURT: The court will accept the plea of Mr. Escalera as being voluntarily made. He understands the crimes charged, the consequences of his pleas, indicated he's had effective assistance of counsel; *admitted the factual basis*. The plea shall be accepted and may be recorded.

JA 228-231 (emphasis added).

The defendant challenged the eligibility of this conviction because by definition an *Alford* plea does not require an admission of the underlying facts. At the very least, the defendant argued, the admissions are "murky."

The district court disagreed. The district court noted that a burglary of a residence "qualif[ies as a violent felony] under federal law [18 U.S.C. § 924(e)]" and "the defendant stating that the description by the prosecutor of the facts [burglary of a residence] is accurate and . . . if it weren't an *Alford* plea, clearly that would make this qualify." JA 184. The district court concluded that "[o]nce the defendant admitted it is a residence, it's ACCA . . . [s]o clearly page 4 [of the plea colloquy transcript] is sufficient." *Id.* The district court explained, "so the fact that his lawyer said it was an *Alford* plea and the court accepted that early on, doesn't necessarily mean that the defendant couldn't as he did here voluntarily acknowledge the facts in the case." JA 188. The district court thereafter concluded "the fact that the *Alford* plea in effect entered by the lawyer precedes the admission by the defendant of the facts without objection by the lawyer which is followed by the Court's finding of the sufficient basis in fact to support a guilty plea then a guilty finding is entered, is sufficient to satisfy *Shepard*." JA 191.

2. May 2, 1996 Conviction for "Sale of Hallucinogen/Narcotics."

On February 8, 1996, the defendant appeared in Hartford Superior Court to enter a guilty plea to the charge of "sale of hallucinogen/narcotics," in violation of Conn. Gen. Stat. § 21a-277(a). In addition to the defendant's guilty plea to "sale of hallucinogen/narcotics," the defendant entered a guilty plea to "sale of a controlled

substance," in violation of Conn. Gen. Stat. § 21a-277(b),[2] and admitted to a violation of probation. JA 54-61. As to the sale of hallucinogen/narcotics charge, the prosecutor recited the following facts:

> PROSECUTOR: June 3rd of 1995, . . . That particular day [defendant] was observed in the vicinity of 18 Day Street approaching a vehicle. An exchange took place whereby [defendant] took U.S. currency for a package of white powdery substance, a yellow package, tested positive for heroin. He was stopped at that point and found to be in possession of eight packages of heroin.

JA 55.

The prosecutor thereafter proffered facts supporting the sale of controlled substance offense, and the defendant's earlier conviction (a May 26, 1995 conviction for possession of narcotics with intent to sell) for the purpose of establishing a basis for the violation of probation. JA 55-56. The prosecutor explained that the basis for the violation of probation "are pleas he entered today." JA 56. The court then began its canvas of the defendant, which included a review of the elements of the offenses, the

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[2] At sentencing, the government conceded that a this conviction did not satisfy the requirements of a "serious drug offense" as the statutory maximum under Conn. Gen. Stat. § 21a-277(b) is only seven (7) years incarceration for a first offense. By definition, a "serious drug offense" must include a maximum sentence of ten years or more. 18 U.S.C. § 924(e)(2)(A)(i).

various constitutional rights afforded an accused and the defendant's waiver of those rights with the entry of a guilty plea. JA 57-59. The court asked the defendant whether he agreed to the proffered facts. Specifically, the following exchange was recorded:

> COURT: Were the description of the crimes that you committed on the violation of probation, were they accurate?
>
> DEFENDANT: Yes.
>
> . . . . . .
>
> COURT: The plea is voluntarily made with the effective assistance of counsel, factual basis for the pleas. The plea is accepted, finding of guilty. Pre-sentence investigation is ordered. I'll find the defendant in violation of probation. . . .

JA 60-61. The defendant was subsequently sentenced on May 2, 1996 to 30 months of imprisonment concurrent with the sale of a controlled substance conviction. JA 35.

Escalera argued that his confirmation of the prosecutor's proffer was ambiguous as to whether he admitted only to the fact that he violated his probation, or to the facts underlying the drug offense. Appellant Br. at 15-16. The district court was not persuaded by the defendant's claim of ambiguity. In responding to defendant's claim, the district court concluded:

> it seems clear to me that the court in inquiring of the defendant as to the two crimes, the two drug sale crimes, the heroin and marijuana as described earlier was accurate and that those were the two crimes which caused, in effect, the violation of probation. In other words, while he's on probation he violates probation by committing two crimes. It is not that the violation was he failed to report or didn't change his address or things like that. He violated probation because he was charged with these two crimes. And he is acknowledging that in the description of the two crimes is what he did. The description includes the reference to the drug on one of the charges to be heroin which is a qualifying drug even under *Savage*.

JA 161-62. The district court interpreted the court's question ("Were the description of the crimes that you committed on the violation of probation, were they accurate?") as meaning "that while you are on probation, you committed two crimes." JA 165. While the district court theorized that the question could have been better phrased, it concluded that there was no other "reasonable reading" of the defendant's admission. In the view of the district court, "there is no question that with regard to this charge, the defendant in my view admitted it was heroin." JA 164. The district court accordingly found that the 1996 sale of hallucinogen/narcotics conviction was a "serious drug offense." JA 172.

3. June 23, 2004 Conviction for "Sale of Hallucinogen/Narcotics"

On May 19, 2004, the defendant appeared in Hartford Superior Court to enter a guilty plea to the charge of "sale of hallucinogen/narcotics," in violation of Conn. Gen. Stat. § 21a-277(a). At the change of plea hearing, the following colloquy was recorded:

> PROSECUTOR: Mr. Carlos Escalera, you are charged in CR575676, count four, possession of narcotics with intent to sell, violation of general statute 21a-277(a), how do you plead to that, guilty or not guilty?
>
> DEFENDANT: Guilty.
>
> PROSECUTOR: This occurred on November 22, 2003, on Brook Street in Hartford. A Hartford police officer observed the defendant loitering. The defendant was approached by an officer. He ran towards a motor vehicle. The defendant was arrested for trespass. The vehicle was searched after a key to the vehicle was found in the defendant's pocket. Found in the vehicle were numerous bags of white powder, approximately 95 were located in this matter and were seized. The white powder was field tested positive for heroin. The defendant gave a written statement claiming ownership of the vehicle. Apparently, at a judicial pre-trial, the State had indicated that there may be a search issue here. The State had indicated previously that it would recommend three years to serve. The Court indicated the sentence as three years, execution suspended after

> one year to serve, three years probation with whatever special conditions the Court deems reasonable[.]

JA 65.

The court thereafter initiated its canvas, to include advising the defendant of the various constitutional rights he had and would be waiving with his guilty plea. JA 66. The court then inquired of the defendant his understanding of the charge and his agreement to the facts as proffered by the prosecutor. *Id*. In particular, the following exchanged was recorded:

> COURT: Understand the elements of the offense and the penalties that can be imposed? Anybody who knowingly and intentionally possesses with intent to sell a quantity of narcotic substance can go to jail for 15 years and/or a $50,000 bond (sic).
>
> DEFENDANT: Yes, sir.
>
> COURT: Now, you heard the facts as recited by the Attorney for the State, is that what happened here?
>
> DEFENDANT: Yes.
>
> . . . . .
>
> COURT: The Court will make the following findings. The plea is voluntarily and understandably made with the assistance of counsel, there is, indeed, a factual

basis for the plea, the plea is accepted, a finding of guilty. . . .

JA 66-67. The court thereafter imposed the agreed upon sentence of three years of imprisonment, suspended after one year to serve, and three years probation. JA 68. At the request of defendant's counsel, a stay was ordered until June 23, 2004 to allow the defendant to meet his employment obligations. *Id.*

At the federal sentencing hearing, the defendant argued that the plea transcript was ambiguous on whether the defendant admitted that the controlled substance involved was "heroin." Appellant Br. at 12. If the record did not conclusively establish the substance as heroin, or some other federally controlled substance, the defendant argued, then the government could not sustain its burden that this conviction qualified as a "serious drug offense." According to the defendant, he admitted only that the substance field-tested positive for heroin, and not that it was in fact heroin. JA 173, 176.

The district court rejected the defendant's argument noting that Escalera "admits that what is described as the factual basis for his plea is true and that factual basis is it field tested positive for heroin." JA 176. The defendant conceded that "it is probably true that odds are this was heroin" but that nevertheless "that doesn't mean that we have met the standard here." *Id.* The district court thereafter concluded that the "record reflects the adoption by the defendant of facts that are placed on the record which facts support a finding that that (sic) portion of 22

(sic) - 277a, which would qualify under ACCA, i.e. possession with intent to sell heroin was, in fact, what the defendant admitted or acknowledged on the record before the judge as a basis for the judge's finding of guilt." JA 181. At the conclusion of the hearing, the district court stated, "the court's finding is there's three qualifying offenses. Therefore, the defendant qualified under the Armed Career Criminal Act." JA 191.

Having found that the defendant was eligible for the enhanced penalties, the district court applied U.S.S.G. § 4B1.4(b)(3) in calculating the recommended sentencing range. In applying § 4B1.4(b)(3) the district court further found that the defendant's possession of the ammunition "triggers" the "one point enhancement" under the ACCA Guideline, resulting in a base offense level of 34. JA 199-200. Subtracting three levels for the defendant's acceptance of responsibility resulted in an adjusted offense level of 31. The district court's finding that the defendant's possession of the ammunition in connection with the controlled substance offense under §4B1.4(c)(2) additionally resulted in a criminal history category VI. JA 201. A total offense level of 31, with a criminal history category VI, resulted in a sentencing range of 188 to 235 months of imprisonment. JA 201.

After hearing comments from counsel and remarks by the defendant, the district court outlined the sentencing factors under 18 U.S.C. §3553(a), noting that the factors of the nature and circumstances of the offense, the defendant's history and characteristics and the need for a just sentence as the most significant factors in this case.

JA 212. The district court thereafter imposed a sentence of 180 months of imprisonment, followed by 5 years of supervised release and a $100 special assessment. JA 217. The district court noted that a sentence of 180 months, the minimum mandated by 18 U.S.C. §924(e), was a "minor variance" from the recommended range. The district court justified this variance in part because of the comparatively short sentences the defendant had previously served and the defendant's personal history. JA 217.

The defendant challenges on appeal the district court's findings that these three prior felony convictions were qualifying predicates under the ACCA. But, there is no dispute regarding the records upon which the district court relied in its findings of fact. Rather, the defendant's challenge is directed to the sufficiency of those facts and the propriety of: 1) the district court's reliance on factual admissions made in a so-called *Alford* guilty plea colloquy on his burglary conviction; and 2) the district court's findings on the sufficiency of the defendant's admissions on his two prior sale of narcotics convictions.

Summary of Argument

The district court correctly sentenced the defendant pursuant to the ACCA, 18 U.S.C. § 924(e). First, the district court properly considered the defendant's admission during a so-called *Alford* guilty plea colloquy where the defendant the admitted to the essential elements of a generic burglary. Second, the district court did not clearly err in finding that the defendant's admissions during his prior narcotics related convictions were

sufficiently specific upon which to conclude both constituted "serious drug offenses" under the ACCA.

Argument

I. The district court did not err in its reliance on Escalera's admission to facts proffered during a so-called *Alford* guilty plea hearing in determining whether the defendant's prior conviction for burglary is a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii).

A. Governing law and standard of review

1. Governing law

The Armed Career Criminal Act ("ACCA") provides a 15-year mandatory minimum sentence and a maximum of life imprisonment for a person who violates 18 U.S.C. § 922(g) and "has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). These penalties are significantly higher than for a standard violation of 18 U.S.C. § 922(g), which entails no mandatory minimum sentence, and a maximum term of ten years in prison. *See also* U.S.S.G. § 4B1.4 (providing for enhanced Guidelines ranges for armed career criminals).

The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year . . . that –
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

18 U.S.C. § 924(e)(2)(B). When considering whether a prior conviction constitutes either a "violent felony" or a "serious drug offense" under § 924(e), courts employ a categorical approach. Pursuant to this approach, the "ACCA generally prohibits the later court from delving into particular facts disclosed by the record of conviction, thus leaving the court normally to 'look only to the fact of conviction and the statutory definition of the prior offense.'" *Shepard v. United States*, 544 U.S. 13, 17 (2005) (quoting *United States v. Taylor*, 495 U.S. 575, 602 (1990)).

The general categorical inquiry affords a limited exception. In evaluating a conviction under a broad statute that appears to criminalize both predicate conduct under § 924(e) and non-predicate conduct, courts may take some steps to determine whether the original court was "actually required" to find the requisite elements of the predicate offense in returning a conviction. *Taylor*, 495 U.S. at 602. This modified categorical approach authorizes the district

court, following a jury trial, to look to the "indictment or information and jury instructions" to determine if "the jury necessarily had to find" the defendant guilty of the predicate conduct. *Id.* Similarly, following a case tried without a jury, the sentencing court may scrutinize the "bench-trial judge's formal rulings of law and findings of fact." *Shepard*, 544 U.S. at 20. In cases which are resolved short of trial, the sentencing court may rely on documents such as "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Id.* at 26. In addition, following any type of conviction, the sentencing court can look to case law interpreting the statute to determine if courts have "considerably narrowed [the statute's] application" to criminalize predicate conduct exclusively. *James v. United States*, 550 U.S. 192, 202 (2007). "The determinative issue is whether the judicial record of the state conviction established with 'certainty' that the guilty plea 'necessarily admitted elements of the [predicate] offense.'" *United States v. Savage*, 542 F.3d 959, 966 (2d. Cir. 2008) (quoting *Shepard*, 544 U.S. at 25-26).

"Burglary" is specifically enumerated as a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii). Thus, at first glance, the defendant's conviction for burglary in the third degree would qualify without further inquiry. In *United States v. Taylor*, the Supreme Court held that the "generic" form of burglary is categorically a crime of violence. 495 U.S. at 598-99. The "generic" form of burglary is the

"unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* Under Connecticut law, burglary in the third degree provides: "A person is guilty of burglary in the third degree when he enters or remains unlawfully in a building with intent to commit a crime therein." Conn. Gen. Stat. § 53a-103 (1971). A literal reading of Connecticut's statute would suggest that a conviction under this statute constitutes "generic" burglary as defined in *Taylor*. A closer examination of the Connecticut burglary statute, however, reveals that a "building" is not always a structure. Connecticut General Statutes §53a-100(a), in pertinent part, defines "building" as follows: (1) "Building" in addition to its ordinary meaning, includes any watercraft, aircraft, trailer, sleeping car, railroad car or other structure or vehicle or any building with a valid certificate of occupancy[.]" Conn. Gen. Stat. § 53a-100(a)(1) (2008). As the statute criminalizes the entry into conveyances, and other non-structures, it cannot be considered to be categorically a "generic" burglary under § 924(e). Therefore, to determine if the defendant's burglary conviction under §53a-103 qualifies as a violent felony, the "modified categorical" approach must be employed.

2. Standard of review

Ordinarily, the issue of whether a prior conviction constitutes a "violent felony" under § 924(e) is an issue of law, which this Court reviews *de novo*. *United States v. Lynch*, 518 F.3d 164, 168 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 1316 (2009). This Court also reviews *de novo* "the

scope of a district court's authority to make factual findings." *Savage*, 542 F.3d at 964. A district court's factual findings as to the nature of a qualifying offense is reviewed under a "clear error standard." *United States v. Houman*, 234 F.3d 825, 827 (2d Cir. 2000) (per curiam). "[T]he determination that a defendant is subject to an ACCA sentencing enhancement *de novo*, but we review the district court's factual findings underlying the determination for clear error." *United States v. Bennett*, 469 F.3d 46, 49 (1st Cir. 2006) (internal citations omitted); *see also United States v. Rivers*, 595 F.3d 558, 560-61 (4th Cir. 2010) (lower court's factual findings regarding ACCA qualification is reviewed for clear error). To reject a finding of fact as "clearly erroneous," this Court must, "upon review of the entire record," be "left with the definite and firm conviction that a mistake has been committed." *United States v. Garcia*, 413 F.3d 201, 222 (2d Cir. 2005).

B. Discussion

1. Escalera's admission to the elements of a generic burglary offense during his guilty plea colloquy negated the *sine qua non* of an *Alford* plea and rendered it a straight guilty plea.

The defendant principally argues that because he tendered his guilty plea to the burglary charge under the *Alford* doctrine, whatever subsequent admission he made to the court is "murky and cannot form the basis for a definitive conclusion that the defendant entered into a

'building' as that term is defined in the federal statute." Appellant's Br. at 9. Because the "distinguishing" feature of an *Alford* plea is a denial of the factual basis for the plea, the defendant argues, the district court erred in considering the defendant's admissions. *Id.* at 8. The essence of his argument, however, is its undoing. In the absence of the "distinguishing" denial of the factual basis, the defendant's guilty plea cannot be construed as an *Alford* guilty plea.

Under *North Carolina v. Alford*, "an individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." 400 U.S. 25, 37 (1970). "The distinguishing feature of an *Alford* plea is that the defendant does not confirm the factual basis for the plea." *Savage*, 542 F.3d at 962 (citing *State v. Faraday*, 842 A.2d 567, 588 (Conn. 2004) ("A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless."). Frequently analogized to a plea of nolo contendere, an *Alford* plea often asserts innocence whereas a nolo contendere plea refuses to admit guilt. *See id.*; *see also State v. Faraday*, 842 A.2d at 588 ("A guilty plea under the *Alford* doctrine is the functional equivalent [to an unconditional] plea of nolo contendere." (alteration in original) (citation omitted))." "An *Alford* plea is simply a guilty plea, with evidence in the record of guilt, typically accompanied by the defendant's protestation of innocence

and his or her unequivocal desire to enter the plea.")" *Abimbola v. Ashcroft*, 378 F.3d 173, 181 (2d Cir. 2004) (quoting *United States v. Mackins*, 218 F.3d 263, 268 (3rd Cir. 2000).

At the burglary guilty plea hearing, the defendant, through his attorney, requested the court at the outset of the plea proceeding to accept his guilty plea under the *Alford* doctrine. JA 227. After the state proffered the factual basis for the guilty plea, the defendant's attorney noted that there are facts in dispute as the reason for the *Alford* plea. JA 229. Notwithstanding the defendant's (or his attorney's) intent in tendering his plea under the *Alford* doctrine, the defendant's subsequent admission to the proffered facts, and the court's finding that the defendant admitted those facts, stripped the *sine qua non* from the so-called *Alford* plea. Without a protestation of innocence or denial of some or all of the elements of the charged offense, the plea by definition could not have been accepted under the *Alford* doctrine. "In its strictest sense, then, an *Alford* plea refers to a defendant who pleaded guilty but maintained that he is innocent." *United States v. Tunning*, 69 F.3d 107, 110 (6th Cir. 1995). An *Alford* plea is "nothing more than a guilty plea entered by a defendant who either: 1) maintains that he is innocent; or 2) without maintaining his innocence, is unwilling or unable to admit that he committed acts constituting the crime." *Id.* (citing *Alford*) (quotations omitted). Escalera, however, did neither; that is, he neither proclaimed his innocence nor refused to admit his guilt as to some or all the elements of the charge. When the judge inquired of the defendant if the facts proffered regarding the burglary

were accurate, the defendant unequivocally affirmed. Further, in accepting the defendant's guilty plea, the judge specifically found the defendant "admitted the factual basis." JA 231. Other than "not[ing]" the defendant's reference to his intention to plea guilty under *Alford*, there is no other mention by the court that the guilty plea was accepted under the *Alford* doctrine.

In fact, the plea colloquy is devoid of the "typical" trappings of an *Alford* plea. There was no acknowledgment by the court that the defendant was not admitting the underlying facts. There was no explanation by the court as to the meaning of an *Alford* plea. There was no inquiry by the court of the defendant's understanding and agreement that, despite his professed innocence, he nevertheless acquiesced to a finding of guilty. There was also no identification on the docket sheet that it was an *Alford* plea. JA 50, 188. In fact, there was very little about his plea colloquy which would suggest an *Alford* plea other than the two instances where defendant's request that the guilty plea be accepted under the *Alford* doctrine. In *Savage*, by contrast, the court specifically asked the defendant if he wanted to have the guilty plea accepted under the *Alford* doctrine. *Savage*, 542 F.3d at 962. Thereafter, the court particularly explained to Savage the meaning of *Alford*: "I take that to mean that you don't agree with all or some of the facts that [the prosecutor] just reported to the Court but after discussing the case with your lawyer, you feel that if you went to trial, even though you don't agree with the facts, you feel there's a significant chance that you could get convicted of that charge." *Id.* Savage responded, "yeah,"

and the court did not ask Savage to allocute to the factual basis. *Id.* The *Savage* scenario is in complete contrast to Escalera's plea colloquy.

Thus, if an *Alford* plea is nothing more than a guilty plea entered by a defendant who either maintains his innocence or is unwilling admit to the crime, than an *Alford* plea can be nothing less. The protestation of innocence or the denial of the elements is the *sine qua non* of the *Alford* plea. Without either, the only reasonable interpretation is that it was a straight guilty plea. The district court therefore appropriately accepted the "transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant." *Shepard*, 544 U.S. at 26.

Having accepted the defendant's affirmation as an admission to the proffered facts, the district court correctly determined that the admitted facts "substantially correspond[ed] to generic burglary." JA 184, 186. In particular, the admitted facts included the defendant "smash[ing] out the door . . . [and] entering wrongfully and forcefully" thereby satisfying the "unlawful and unprivileged entry" element. JA 228. The defendant further admitted that the entry was into his girlfriend's "bedroom at her residence" thereby satisfying the "entry into, or remaining in, a building or other structure" element. JA 228. Lastly, the defendant admitted that after entry into the residence he "assaulted" his girlfriend thereby satisfying the element that the entry was "with intent to commit a crime." JA 228.

2. Even if the defendant's guilty plea was tendered as and accepted by the court as an *Alford* guilty plea, the district court properly considered the defendant's admission as a *Shepard*-approved judicial record.

Alternatively, even if the conviction could be construed as an *Alford* guilty plea, the district court did not err in accepting the transcript as a *Shepard*-approved judicial record of the defendant's admission. Nothing in *Shepard* or *Taylor* precludes a sentencing court from considering admissions made during an *Alford* plea colloquy. The dispositive issue is whether the "judicial record" established with "certainty" that the conviction was for a 'generic' burglary. *Shepard*, 544 U.S. at 25. The defendant's own admission to the essential elements of a generic burglary was unconditional and unequivocal. JA 229. The "certainty" of his admission was in no way diminished when the defendant's attorney uttered the word "*Alford*" before the court inquired of the defendant if he agreed with the prosecutor's proffer. Even if it was the defendant's initial intention to deny one or all of the essential elements of the offense, there is no legal impediment to Escalera's later decision to admit those facts. After all, when the defendant requested an *Alford* plea, he did so before the prosecutor proffered the factual basis. Upon query by the state court, the defendant could have readily denied some or all of the facts, or proclaimed his innocence. Escalera did neither. Instead, he freely admitted the facts. However the plea is characterized, the defendant admitted during a colloquy between he and the

judge to facts which define with certainty that he was convicted of generic burglary. This case stands in direct contrast to the *Alford* plea in *Savage* during which the court explicitly acknowledged that it was accepting the plea under the *Alford* doctrine, and the defendant was never asked if he agreed with any of the facts proffered by the prosecutor. *Savage*, 542 F.3d at 962.

The defendant argues that because he intended to have the court accept the guilty plea under the *Alford* doctrine, the "issue remains murky" as to whether the burglary involved the entry into a building. There is nothing "murky" about the facts to which the defendant admitted. The court asked the defendant if the facts about the burglary [as proffered by the prosecutor] were accurate, and Escalera unequivocally responded "yes."

It is well established that a guilty plea under the *Alford* doctrine is a conviction under Connecticut law. *See Burrell v. United States*, 384 F.3d 22, 28 (2d Cir. 2004). While the defendant is correct in his assessment that a defendant entering an *Alford* plea does not necessarily admit any or all of the underlying facts, such a plea is in all other respects a conviction of the substantive offense. Because an *Alford* plea is, after all, a guilty plea, *see Abimbola*, 378 F.3d at 181, a district court may look to the plea colloquy for guidance, *Shepard*, 544 U.S. at 26, when applying the modified categorical approach. *Shepard* specifically authorized the use of the "transcript of colloquy between judge and defendant in which the factual basis for the plea *was confirmed by the defendant*." *Shepard*, 544 U.S. at 26. (emphasis added). Even if Escalera intended at the outset

of the proceeding to deny some or all of the facts, there is no basis upon which to conclude that the defendant denied (or intended to deny) the specific facts proffered. As the district court observed, "[h]e may enter the *Alford* plea before the facts are laid on the record." JA 186. In accepting the burglary conviction as an eligible predicate, the district court held "the fact that the *Alford* plea in effect entered by the lawyer precedes the admission by the defendant of the facts without any objection by the lawyer . . . followed by the Court's finding of the sufficient basis in fact to support a guilty plea . . . is sufficient to satisfy *Shepard*." JA 191. In fact, the State court went further when it found specifically that Escalera admitted the factual basis. JA 231. The district court's findings in this regard were well supported by the record and can only be disturbed for "clear error." *Houman*, 234 F.3d at 827. The district court thoroughly reviewed the judicial records and transcript of the burglary conviction and concluded that the defendant confirmed the factual basis for the plea. There is nothing about the district court's analysis which reflects a "definite and firm conviction that a mistake" was made," *Garcia*, 413 F.3d at 222, and the district court's finding should be affirmed.

II. The district court did not clearly err in finding Escalera's admissions during the February 8, 1996 and May 19, 2004 guilty plea colloquies were sufficiently specific to determine that Escalera' convictions for sale of narcotics were "serious drug offenses" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii).

A. Governing law and standard of review

1. Governing law

When considering whether a prior conviction constitutes a "serious drug offense" under § 924(e), courts employ a categorical approach, as more particularly discussed in Section IA, herein. A "serious drug offense" is "an offense under State law, involving . . . possessing with intent to manufacture or distribute, a controlled substance (as defined in . . . 21 U.S.C. 802), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). If in evaluating a conviction under a statute that appears to criminalize both predicate conduct under § 924(e) and non-predicate conduct, the courts employ a modified categorical approach. *Shepard*, 544 U.S. at 17. Under the modified categorical approach, the appellate court must ask whether the government has shown that "the plea necessarily rested on a fact identifying the conviction as a predicate offense." *Savage*, 542 F.3d at 964 (citing *Shepard*, 544 U.S. at 24).

In *Savage*, this Court held that a prior conviction under Conn. Gen. Stat. § 21a-277(b) cannot categorically qualify as a "controlled substance offense" within the meaning of U.S.S.G. § 4B1.2 because the Connecticut Statute criminalizes certain conduct that falls outside the Guidelines' definition. *Savage*, 542 F.3d at 964-65. Under Connecticut law, "the statutory definition of 'sale' as applied to illegal drug transactions is much broader than [the] common definition" of a sale as an "exchange of an object for value." *Id.* at 965 (quoting *State v. Myers*, 921 A.2d 640, 648-49 (Conn. App. Ct. 2007)). Specifically, the Connecticut statute criminalizes "a mere offer to sell a controlled substance." *Savage*, 542 F.3d at 965. The *Savage* Court further concluded that a "mere offer to sell, absent possession, does not fit within the Guidelines definition of a controlled substance offense." *Id.* (quoting *United States v. Price*, 516 F.3d 285, 288-89 (5th Cir. 2008)). Consequently, if a prior conviction under Conn. Gen. Stat. § 21a-277(b) is being relied upon as a predicate "controlled substance offense" under U.S.S.G. § 4B1.2, the government must show that the plea "necessarily" rested on the fact identifying the conviction as a predicate offense. *Savage*, 542 F.3d at 966 (quoting *Shepard*, 544 U.S. at 21).

Both prior narcotics convictions which are the subject of this appeal were imposed under Connecticut General Statute § 21a-277(a), the near identical counterpart to § 21a-277(b) which was at issue in *Savage*. Section 277(a) provides in pertinent part:

> Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any controlled substance which is a hallucinogenic substance other than marijuana, or a narcotic substance, except as authorized in this chapter, for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars or be both fined and imprisoned . . . .

Conn. Gen. Stat. § 21a-277(a) (2009). Other than the type of proscribed controlled substance, the statute is identical to § 21a-277(b). Thus, because the statute at issue here criminalizes conduct that does not fall exclusively within the federal definition of a predicate offense, *Savage* controls, and the modified categorical approach must be applied.

2. Standard of review

The determinative issue as to both prior convictions turns on the sufficiency of the judicial records upon which the district court relied in finding both convictions qualified as "serious drug offenses." A district court's factual findings as to the nature of a qualifying offense is reviewed under a "clear error standard notwithstanding the fact that the findings were based entirely upon documents." *United States v. Houman*, 234 F.3d 825, 827 (2d Cir. 2000) (per curiam). "[T]he determination that a defendant is subject to an ACCA sentencing enhancement

de novo, but we review the district court's factual findings underlying the determination for clear error." *United States v. Bennett*, 469 F.3d 46, 49 (1st Cir. 2006) (internal citations omitted); *see also United States v. Rivers*, 595 F.3d 558, 560-61 (4th Cir. 2010) (lower court's factual findings regarding ACCA qualification is reviewed for clear error). To reject a finding of fact as "clearly erroneous," this Court must, "upon review of the entire record," be "left with the definite and firm conviction that a mistake has been committed." *United States v. Garcia*, 413 F.3d 201, 222 (2d Cir. 2005).

B. Discussion

1. Escalera's admissions during the February 8, 1996 guilty plea colloquy were sufficiently specific to determine that the defendant possessed with intent to distribute and did distribute a federally controlled substance.[3]

The defendant argues that the transcript of February 8, 1996 guilty plea is "incomprehensible" and therefore insufficient to establish what he admitted. Appellant Br.

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[3] The defendant in his brief also claims that an alleged scriveners error in the docket number somehow undermines the government's ability to rely on this conviction. Appellant Br. at 13. The defendant's argument is neither factually correct, nor legally persuasive. Indeed, the plea colloquy identified the correct docket number. JA 54-55. ("Carlos Esaclera, in docket CR1447357, how do you plead?"). The only difference in the docket number is that the clerk included the number "14" which is a reference to the location of the Superior Court. The conviction occurred in Superior Court, Geographical Area No. 14, in Hartford. Moreover, based on the charging documents and plea colloquy transcript, there is no question that the defendant pled guilty to and was convicted of "sale of hallucinogen/narcotics" under Conn. Gen. Stat. § 21a-277(a). JA 35, 53. The charging documents for both convictions - sale of narcotics under § 21a-277(a) and sale of a controlled substance under § 21a-277(b) - reflect the same disposition date and judge and each references the other docket number in documenting that the sentences were concurrent with each other. JA 35, 39.

at 13-14. The only reasonable interpretation, the defendant avers, is that he admitted only to the fact he violated probation, and not to the facts of the offense of conviction. *Id.* at 15-16. The defendant's assessment of the record is by no means the "only reasonable" interpretation. On the contrary, such an interpretation is illogical when the entire plea colloquy is considered, as the district court did, in rejecting the defendant's argument.

The plea transcript of February 8, 1996 established with certainty that the defendant was convicted of a "serious drug offense." First, the transcript confirmed that the defendant entered a straight guilty plea to "sale of narcotics." JA 55.[4] Second, the plea transcript further established that the "[a]n exchange took place whereby [defendant] took U.S. currency for a package of white powdery substance, a yellow package, [which] tested positive for heroin." *Id.* Third, the defendant "was stopped . . . and found to be in possession of eight packages of heroin." *Id.* Fourth, the defendant was asked: "Were the description of the crimes that you committed on the violation of probation, were they accurate?" and he responded, "yes." JA 60-61.

There is no dispute that the proffered facts established the actual possession of heroin and the sale or exchange of heroin for money. There is similarly no dispute that if the

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[4] In addition to the defendant's guilty plea to "sale of narcotics," the defendant also entered a straight guilty plea to "sale of a controlled substance," in violation of §21a-277(b), as well as an admission to a violation of probation. *Id.*

defendant was convicted on these facts, this offense would constitute a "serious drug offense." The defendant argues, however, that he never admitted to the proffered facts. Escalera avers that the state court only inquired about the defendant's probation violation, and not about his commission of the underlying offenses. Such an interpretation is nonsensical.

Escalera's argument centers on an admittedly poorly worded question posed by the state judge ("Were the description of the crimes that you committed on the violation of probation, were they accurate?"). JA 61. Regardless of whether the judge's question was poorly phrased, there was nothing erroneous in the district court's conclusion that Escalera "is acknowledging that in the description of the two crimes is what he did." JA 162. The district court found that the defendant admitted to the necessary facts to support a serious drug offense. In assessing the district court's decision, a review of the plea colloquy in its entirety is essential. The purpose of the plea colloquy must also be considered.

In accepting a guilty plea, the court must be satisfied that there is a factual basis for the plea. *See* Connecticut Practice Book § 39-21 (2009) ("The judicial authority shall not accept a plea of guilty unless it is satisfied that there is a factual basis for the plea."); *see also State v. Pena*, 548 A.2d 445, 447 (Conn. App. Ct. 1988) ("trial court should not accept a plea of guilty until it has satisfied itself that a factual basis exists for that plea"). In this instance, the court had not only to make a finding of a violation of probation but also a finding that there was a factual basis

for the guilty pleas to the underlying offenses, one of which was the exchange of heroin for money. The plea transcript confirms this dual purpose when the defendant agreed to the "crimes" he "committed,"and not merely to the fact of his violation of probation. The court's statement "on the violation of probation" simply referenced the defendant's probationary status at the time he committed the crimes. Otherwise, the court's question would have been superfluous. There would be no point in the court asking the defendant to admit (again) to the probation violation because the clerk had already put the defendant to plea on the violation of probation charge. (Clerk: "And docket CR14470860, how do you plead to the charge of 53a-32, violation of probation, do you admit or deny? Defendant: I'm guilty. Court: That's an admission."). JA 55.

The sentencing court was specific in its inquiry that the defendant confirm "the description of the crimes you committed . . .[as] accurate." JA 61. Nowhere else on the record was a description of the crimes detailed except by the prosecutor. Thus, the defendant could only have understand the question to pertain to the offenses described by the prosecutor. Further, the question could not be reasonably construed to be limited to non-specific criminal offenses which resulted in the violation of probation. If that is what the court intended, then there would be no purpose in articulating the phrase "description of." While the guilty pleas would have been sufficient for the violation of probation, a guilty plea without a factual basis would conflict with Practice Book § 39-21.

As the state court's question specifically referenced the defendant's agreement to the *description of the crimes*, there was no clear error by the district court in concluding that Escalera admitted to the sale of heroin charge proffered by the prosecutor. To hold otherwise would mean not simply that a district court can look only to a narrow category of judicial records in determining whether a defendant was convicted of a serious drug offense but also that these records must be worded in a technically precise manner. Neither *Taylor* nor *Shepard* envisioned such a scenario and the district court's factual finding that the defendant admitted to possession with the intent to distribute heroin should be affirmed.

2. Escalera's admissions during the June 23, 2004 guilty plea colloquy were sufficiently specific to establish that he possessed with intent to distribute heroin.

For essentially the same reason why the defendant's argument against the qualification of the May 2, 1996 conviction fails, so does his argument here. The defendant's challenge to his June 23, 2004 conviction for "Sale of Hallucinogen/Narcotic," is similarly rooted in a claimed ambiguity in the plea colloquy. Appellant Br. at 13. According to the defendant, he never admitted that the controlled substance he possessed was heroin; rather he only admitted that the substance tested positive for heroin. As a result, the defendant argues that the government cannot rely on this conviction. This argument elevates form over substance and distorts the meaning of the "certainty" requirement of *Shepard*.

The district court did not clearly err in determining that the defendant admitted he possessed with intent to sell heroin. As set forth in the May 19, 2004 colloquy, the prosecutor proffered, in pertinent part, that the 95 bags of white powder were found in a vehicle, that the white powder "field tested positive as heroin," and that the defendant gave a written statement and claimed ownership of the vehicle. JA 65. The court determined that the plea was voluntary and outlined for the defendant the following:

> COURT: Understand the elements of the offense and the penalties that can be imposed. Anybody

> who knowingly and intentionally possesses with an intent to sell a quantity of narcotic substance can go to jail for 15 years and/or a $50,000 bond (sic).
>
> DEFENDANT: Yes sir.
>
> COURT: Now, you have heard the facts as recited by the Attorney for the State, is that what happened here?
>
> DEFENDANT: Yes.

JA 66-67. Thereafter the state court accepted the guilty plea and found that there was a factual basis. JA 67. There was no exception or explanation by the defendant to any of the proffered facts. The defendant did not question or contest that the substance in his possession was in fact heroin. Rather, he admitted unconditionally to the facts proffered.

Shepard and *Taylor* should not be construed to require the prosecutor to frame the evidence in absolute or hypertechnical terms. Contrary to the defendant's overly formalistic and semantical argument, the mere fact that the State proffered its evidence of the narcotic substance as a field test does not undo the certainty that the drug involved was heroin, and that the defendant agreed that it was heroin. For example, what if the prosecutor proffered that the substance was analyzed in a certified toxicology laboratory with a positive result for heroin. If the defendant agreed to those facts, there would still not be an admission that the substance was in fact heroin, only that

it tested positive for heroin. But surely such an admission made during a plea colloquy satisfied the certainty requirement of *Shepard*. To hold otherwise would exalt form over substance.

In challenging the district court's finding that the plea colloquy established the requisite federal predicate conduct, the defendant's relies on *United States v. Madera*, 521 F. Supp.2d 149 (D. Conn. 2007), and *United States v. Lopez*, 536 F. Supp.2d 218 (D. Conn. 2008). This reliance is misplaced. As of 1986, Connecticut listed on its Controlled Substance Schedules two obscure chemicals, thenylfentanyl and benzylfentanyl, which it categorized as "narcotic substances." Conn. Regs. § 21a-243-7. The substances had been temporarily listed by federal authorities on the federal controlled substances schedules, while research was conducted concerning the abuse potential of these substances, 50 Fed. Reg. 43698 (Oct. 29, 1985), and Connecticut followed suit, scheduling the substances in 1986 in an effort to conform with federal law. 29 Conn. H.R. Proc., Pt. 5, 1986 Sess., p. 1626 (April 19, 1986). Upon completion of the federal studies of the substances, their temporary federal scheduling was allowed to expire later in 1986. *See, e.g.*, 51 Fed. Reg. 43025 (Nov. 28, 1986). The substances remained on Connecticut's regulatory drug schedules. While not explicitly stated in his brief, the defendant's argument suggests that if Escalera did not admit that the controlled substance in his possession was heroin, the government cannot prove that the substance was a federally-controlled substance. Because thenylfentanyl and benzylfentanyl have remained listed in Connecticut's controlled substance

schedules as illicit narcotic substances, Conn. Regs. § 21a-243-7, there remains an abstract theoretical possibility that, under Conn. Gen. Stat. § 21a-277(a), an individual could have been convicted in May of 2004 – the time of Escalera's Connecticut drug conviction at issue here – for conduct relating to a substance that did not constitute a controlled substance under federal law. Both *Madera* and *Lopez* addressed this issue but under distinctly different facts from the instant case.

In *Madera*, the district court concluded that the government could not sustain its burden in proving that two of Madera's prior narcotics convictions qualified as "serious drug offenses" because Madera did not admit or confirm the substances were heroin. In both cases, Madera's guilty pleas were accepted under the *Alford* doctrine, and the district court acknowledged that the defendant did not admit those facts. *Madera*, 521 F. Supp.2d at 154. In *Lopez*, the government was confronted with similar proof problems. Lopez's criminal history revealed four potentially qualifying narcotics offenses. The district court found that the government could not prove the eligibility for three of Lopez's prior convictions for the following reasons. In Lopez's 1990 conviction, there were no records, and no transcript, specifying the nature of the substance. In Lopez's 1999 and 2004 convictions, the prosecutor failed to specify the controlled substance other than as "narcotics."

The type and quality of evidence available in Escalera's June 23, 2004 conviction is distinctly different. The plea transcript unequivocally identified the substance as heroin,

and the defendant confirmed that the substance tested positive for heroin. The district court similarly interpreted the defendant's admission as confirming the substance as heroin. There was no other logical way to interpret the defendant's agreement to the facts. The district court followed the modified categorical approach, looked to the plea colloquy and determined, based on a common sense and logical reading of the entire transcript, that it established with certainty that the defendant plead guilty to a serious drug offense, possession with intent to distribute heroin. This determination satisfied *Shepard's* requirement of a "factual basis for the plea confirmed by the defendant, or to some comparable judicial record of this information," *Shepard*, 544 U.S. at 26, and should be affirmed.

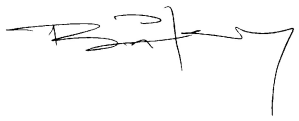
CONCLUSION

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

Dated: August 26, 2010

Respectfully submitted,

UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

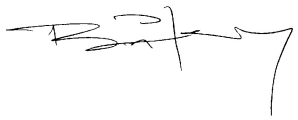


BRIAN P. LEAMING
ASSISTANT U.S. ATTORNEY

NORA R. DANNEHY
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 10,388 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



BRIAN P. LEAMING
ASSISTANT U.S. ATTORNEY

ADDENDUM

18 U.S.C. § 922(g)(1)

(g) It shall be unlawful for any person --

(1) who has bee convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;...

to ship or transport in interstate or foreign commerce, or possess in or affecting interstate or foreign commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped in interstate or foreign commerce.

18 U.S.C. § 924(e)(1)

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different form one another, such person shall be fined under this title and imprisoned no less than fifteen years, and, notwithstanding any other provision of law, the court shall no suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

* * *

18 U.S.C. § 924(e)(2)(A)

(e)(2)(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

18 U.S.C. § 924(e)(2)(B)

(e)(2)(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

U.S.S.G. § 4B1.4 Armed Career Criminal

(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C.§ 924(e) is an armed career criminal.

(b) The offense level for an armed career criminal is the greatest of:

(1) the offense level applicable from Chapters Two and Three; or

(2) the offense level from § 4B1.1 (Career Offender) if applicable; or

(3)(A) **34**, if the defendant used or possessed the firearm or ammunition in connection with . . . a crime of violence, as defined in § 4B1.2(a)...; or

(3)(B) **33**, otherwise.

(c) The criminal history category of an armed career criminal is the greatest of:

(1) the criminal history category from Chapter Four, Part A (Criminal History), or § 4B1.1 (Career Offender) if applicable; or

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in § 4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. §5845(a); or

(3) Category IV.

* * *