08-5245-cr

To Be Argued By:
ANASTASIA ENOS KING

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-5245-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

KEITH JOHNSON,

Defendant-Appellant.

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

==========

BRIEF FOR THE UNITED STATES OF AMERICA

==========

NORA R. DANNEHY
United States Attorney
District of Connecticut

ANASTASIA E. KING
WILLIAM J. NARDINI *(of counsel)*
Assistant United States Attorneys

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

GUIDELINES

STATEMENT OF JURISDICTION

The district court (Burns, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on October 27, 2008. JA 9. The defendant's timely notice of appeal is deemed filed on October 27, 2008 pursuant to Fed. R. App. P. 4(b)(2). JA 9. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a) because the appeal challenges a criminal sentence.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court properly hold that Johnson's prior conviction for rioting in a correctional institution was a violent felony that subjected him to an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e)?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-5245-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

KEITH JOHNSON,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Defendant Johnson was convicted by a jury of one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The district court held that Johnson's criminal history subjected him to an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e). It sentenced him to 262 months in prison, which was within the applicable guidelines range.

Following appeal and resentencing pursuant to *United States v. Fagans,* 406 F.3d 138 (2d Cir. 2001), the district court again concluded Johnson's criminal history rendered him an armed career criminal, but imposed a below-Guidelines sentence of 240 months. In the previous appeal, this Court decided, based on *James v. United States*, 550 U.S. 192 (2007), that it was not plain error for the district court to consider Johnson's prior conviction for rioting in a correctional institution a "violent felony" for purposes of § 924(e). The defendant asks this Court to revisit that conclusion in this appeal, arguing for a different result in light of the Supreme Court's intervening decision in *Begay v. United States*, 128 S.Ct. 1581 (2008).

The defendant's claim lacks merit. The offense of rioting in a correctional institution qualifies as a violent felony under the residual provision of 18 U.S.C. § 924(e)(2)(B)(ii) pursuant to both *James*, because it is similar "in degree of risk posed" to the offenses enumerated in that section, and *Begay,* because it is also similar "in kind" to the enumerated offenses.

Statement of the Case

On July 30, 2003, a federal grand jury returned an indictment charging the defendant with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). JA3.[1] On August 14, 2003, the defendant was presented and arraigned, and the court appointed

[1] The Joint Appendix is cited as "JA__." The Government's proposed appendix is cited as "GA__."

counsel from the Office of the Federal Public Defender to represent him. (JA3). Through counsel, the defendant requested and received five continuances. Jury selection occurred on June 8, 2004, and trial was set for July 7, 2004. (JA3-5).

Before the start of trial on July 7, 2004, the United States District Court (Ellen Bree Burns, J.) decided to bifurcate the proceedings in light of the Supreme Court's decision two weeks earlier in *Blakely v. Washington*, 542 U.S. 296 (2004). In the first part of the proceedings, the jury would decide whether the defendant was guilty of the elements of the offense charged in the indictment. If necessary, the jury would then hear additional evidence and decide whether the Government had proven certain facts relevant to sentencing under the Sentencing Guidelines. (JA6)

Trial began on July 7, 2004, and continued until July 9, 2004, when the jury returned its verdict finding the defendant guilty as charged in the indictment. (JA7). On July 14, 2004, in open court, the defendant stipulated to certain facts relevant to his criminal history, although not to the prior convictions themselves. (JA7)

On September 28, 2004, the district court sentenced the defendant principally to 262 months of imprisonment to run concurrently with his state sentence for a prior robbery and assault. (JA7). Judgment entered on October 1, 2004, and the defendant filed a timely notice of appeal on October 8, 2004. (JA8).

In that first appeal, the defendant challenged his conviction and sentence. This Court affirmed the conviction, but remanded for re-sentencing in accordance with *Fagans*. (JA10-15) On October 8, 2008, the district court conducted a re-sentencing hearing and sentenced the defendant principally to 240 months imprisonment. (JA 9, 88) Judgment entered on October 27, 2008, and the defendant filed his notice of appeal on October 24, 2008. (JA 9). The defendant is currently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The Offense Conduct

Viewed in the light most favorable to the jury's guilty verdict, the evidence at trial showed the follwing: on October 15, 2002, at approximately 7:30 p.m., Keith Johnson used a gun to rob four people on Judson Street in Hartford, Connecticut. (GA127-28). Johnson walked down the street towards the group, pulling down a sheer mask as he approached. (GA127). He pointed the gun at the four people and demanded their money. Two of the victims, Ollie Vail and Christina Taylor, had no money. (GA8, 130, 137). The third victim, Tommy Watkins, gave up his wallet, which contained identification cards. (GA130, 467-68). The fourth victim, Marlo K. Bell-Lovett, Sr., gave up his money – $297. (GA 130, 197-98).

At one point Johnson stated, "I'm not playing with you," pointed the gun at Bell-Lovett's face, and cocked the hammer back. (GA129). Johnson also said, "there's

enough bullets in here for every one of y'all ass." (GA130). According to Bell-Lovett, the gun was silver, looked like a revolver, "similar to a .357," and was "pretty big." (GA129).

After taking the money and the wallet, Johnson told the group to back up into the driveway alongside 57 Judson Street. (GA130). There was screaming, and someone pleading, "Please don't shoot." (GA131). A little girl opened the front door of 57 Judson Street and Ollie Vail told her to go back in the house. (GA131, 470). Johnson started waving the gun around. He screamed and swore at Vail to "shut the f— up." (GA470-71). Then, Johnson backed up the driveway and fled to a car waiting at the far end of the block. (GA131).

Johnson rushed down Judson Street to his gray Mercury Sable, which was waiting near the intersection of Judson and Martin Streets. (GA368-70). He got into the front passenger seat. (GA356). Johnson's nephew, Joe Shannon, was driving the car. (GA356). In the rear passenger seat was Shannon's friend, Randy Crumpton. (GA356). When Johnson got back in the car he told Shannon to "pull off." (GA370). Earlier, Johnson had gotten out of the car in the area of Judson and Martin Streets. (GA366-67).

One of the victims, Christina Taylor, called 911 and reported the robbery. (GA12). She described the man with the gun as "a black dude . . . kind of thick and chubby." (GA14). She also described the robber as wearing "a black sweatshirt with a little white on the front,

a little marking on the front," and "blue jeans." (GA14). Taylor further reported that the robber went "down Martin Street way" towards the intersection of Judson and Martin Streets after the robbery. (GA15).

At approximately 7:38 p.m., a police cruiser started following a gray Mercury Sable in the area near where the robbery had occurred. (GA62, 65-66). The police officer saw the vehicle run through multiple stop signs and began following it. (GA63-64). The officer stopped the vehicle after learning via radio that a gray Taurus – which looks similar to a Mercury Sable – was linked to the recent events on Judson Street. (GA64-65).

Shannon pulled the car over. (GA371). Johnson told Shannon to "take off," but Shannon did not drive away. (GA372). After Shannon pulled over, he saw Johnson putting the gun under Johnson's seat – the front passenger seat. (GA374). Shannon also saw Johnson looking at identification from a wallet that did not belong to him. (GA374-376).

Lieutenant Andrew Nelson, the police officer who had pulled the gray Mercury Sable over, observed the occupants and noticed that the front passenger was moving around in his seat, looking very uncomfortable. (GA69-71). Another officer on the scene, Kevin Salkeld, also observed that the front passenger was fidgety, nervous and moving around. (GA232-33). As a result, the front passenger was the first to be removed from the vehicle, followed by the other two occupants. (GA76). Each was placed in a separate cruiser. (GA79). Subsequently,

Nelson found a silver Smith and Wesson .45 caliber revolver under the front passenger seat. (GA80-82). In the car, the police also found a wallet containing the identification of Tommy Watkins. (GA83). The front passenger was Johnson. (GA89).

Bell-Lovett was brought by the police to the scene of the traffic stop. (GA84, 145, 246-47.) First, he was shown Shannon, but did not identify him as the robber. (GA145). Then, he was shown Johnson and positively identified him as the man who had just robbed him and the others on Judson Street. (GA89). The police did not show the third occupant of the car, Randy Crumpton, to Bell-Lovett. (GA146).

A witness to the robbery, Tahirah Jones, was also brought to the traffic stop scene. (GA84, 309). The police showed her each of the three occupants of the car, however she was unable to positively identify the robber. (GA311). She had witnessed the robbery from across the street and saw the robber from behind. (GA310).

B. The trial

The trial began on July 7, 2004, and concluded on July 9, 2004. At trial, the jury heard from three of the robbery victims, Vail, Taylor, and Bell-Lovett. Each victim described the robber's clothing, and those descriptions matched the clothing worn by Johnson in his booking photo. (GA14-15, 135, 156-57, 471-472. In addition, each of the victims – all of whom knew Crumpton – testified that Crumpton's height and voice characteristics

were different from the robber's and they would have recognized Crumpton if he had robbed them while wearing a mask. (GA28-31, 153-54, 472-474).

Shannon testified at trial, pursuant to a compulsion order. (GA 349, 354). On direct examination, Shannon testified that on October 15, 2002, the night of the robbery, he had seen Johnson carrying the gun, a silver .45 caliber Smith and Wesson revolver. (GA361, 366).

On cross-examination, Shannon stated that he had previously seen his uncle (Johnson) with the gun. Shannon testified that he had seen the gun at Johnson's house. (GA407). Johnson had shown it to him in the living room, and put it away. (GA408-09). Johnson had shown the gun to Shannon approximately five times. (GA410). Shannon also saw Johnson with the gun on him, (GA411), in his pants, and in his hand (GA411-12). When asked, "So according to you, you never saw Johnson without this gun," Shannon testified, "I can't say that, but I seen it a lot." (GA410).

On July 9, 2004, the defendant was found guilty of being a felon in possession of a firearm. (JA7). On July 14, after a hearing in which the defendant was canvassed by the court, he stipulated that he was in Criminal History Category VI with at least thirteen criminal history points, that he was on parole at the time of the offense, and that he had been released from incarceration less than two years prior to the present offense. (JA7).

C. The initial sentencing on September 28, 2004

1. The pre-sentence report

The Pre-Sentence Report ("PSR") calculated the defendant's offense level pursuant to the armed career criminal provision of the Sentencing Guidelines, § 4B1.4. PSR ¶ 21. 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 crime of violence, as defined in § 4B1.2(a) . . . ; 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), resulting in a total offense level of 28. PSR ¶ 20. Because

the offense level of 34 specified in § 4B1.4(b)(3)(A) was greater, that offense level applied. PSR ¶ 21.

The PSR calculated the defendant's criminal history score at 18 points, placing him in Criminal History Category of VI. PSR ¶ 41. This calculation counted five of the defendant's prior felony convictions and accorded three points to each because the sentences exceeded one year and were within the time limits set forth in § 4A1.2(e).[2] PSR ¶¶ 34-39. Further, the criminal history score included two points under § 4A1.1(d) because the defendant committed the present offense while he was on parole, and one point under § 4A1.1(e) because the defendant committed the present offense less than two years after his release from prison. PSR ¶ 41. The PSR identified § 4B1.4(c) as an additional basis for calculating the defendant's criminal history category as category VI. PSR ¶ 41.

2. Initial sentencing hearing

The defendant did not object to the factual statements in the PSR, which included the facts concerning all of his convictions. Nor did he object to the applicability of the

---

[2] Of the thirteen prior convictions detailed in the PSR, five were for violent crimes including (1) rioting in a correctional institution; (2) robbery in the first degree and assault in the second degree; (3) attempt to commit robbery in the first degree; (4) robbery in the third degree, and (5) conspiracy to commit robbery in the first degree. PSR ¶¶ 33-39.

Armed Career Criminal Act or his status as an armed career criminal under § 4B1.4. However, the defendant objected to the offense level calculation of 34, argued that it should be level 33 pursuant to under § 4B1.4(b)(3), and preserved his objection under *Blakely v. Washington*, 542 U.S. 296 (2004). (JA93-94, 115).

At sentencing, the court found that the offense level was 34, the defendant's criminal history category was VI, and the resulting Sentencing Guidelines range was 262 to 327 months. (JA115). The court imposed a sentence at the bottom of the range (262 months) and ordered that it run concurrently with the state sentence being served by the defendant. (JA117). The court also indicated that if the Sentencing Guidelines were not in effect, the court would have imposed a 20-year sentence to run consecutively to the defendant's state sentence. (JA123-24).

D. The prior appeal

In the first appeal filed by the defendant, he sought reversal of his conviction, claiming (1) that the district court erred in failing to conduct a hearing on his alleged conflict with counsel from the Office of the Federal Public Defender; (2) that the jury should not have been allowed to convict him on a theory of constructive possession of a firearm; and (3) that the evidence was insufficient to convict him based on constructive possession of a firearm. (JA 11).

In addition, the defendant raised various challenges to the calculation of his Sentencing Guidelines range, including the claim that his prior conviction for rioting at a correctional institution is not a violent felony and, therefore, the district court should not have sentenced him as an armed career criminal. (JA 13-14).

This Court affirmed the conviction. (JA15). It noted that there was no need to reach the defendant's challenges regarding his sentence in light of the government's agreement that he was entitled to a remand for resentencing pursuant to the intervening decisions in *United States v. Booker*, 543 U.S. 220 (2005) and *United States v. Fagans* 406 F.3d 138 (2d Cir. 2005) (holding that a defendant who preserves a Sixth Amendment claim is entitled to resentencing in light of *Booker*). (JA 13). Nevertheless, this Court went on to state that "[t]he district court did not commit plain error by considering Johnson's conviction for rioting in a correctional facility as an ACCA predicate offense." (JA 14). This Court further stated that, "[w]hile not every conceivable instance of rioting in a correctional facility necessarily poses a serious risk of potential injury to others, in the ordinary case, the conduct encompassed by the crime does present such a risk." JA 15.

E. Resentencing

On October 8, 2008, the district court held a resentencing hearing. After considering the defendant's sentencing memorandum, the comments of the defendant and counsel for both parties, and the certified records

provided by counsel for the government, the Court again sentenced the defendant as an armed career criminal, although it imposed a non-Guidelines sentence principally of 240 months of incarceration. Defendant Johnson now appeals this sentence.

Summary of Argument

The district court correctly sentenced the defendant pursuant to the ACCA, 18 U.S.C. § 924(e), based in part on its conclusion that his prior conviction for rioting at a correctional institution is a violent felony.

Rioting at a correctional institution qualifies as a violent felony under the residual provision of § 924(e)(2)(B)(ii). Following the Supreme Court's decisions in *James v. United States*, 550 U.S. 192 (2007), and *Begay v. United States*, 128 S. Ct. 1581 (2008), the government must show that rioting at a correctional institution is "roughly similar, *in kind* as well as *in degree of risk posed*, to the examples [enumerated in § 924(e)(2)(B)(ii)]." *Begay*, 128 S. Ct. at 1585 (emphasis added).

To establish that an offense is similar "in kind" to the enumerated offenses, the government must show that the offense conduct requires criminal culpability similar to the enumerated offenses – that is, in a way that is both purposeful, and violent and aggressive. *United States v. Gray*, 535 F.3d 128, 131 (2d Cir. 2008). Despite the defendant's claim that the prison rioting statute can be violated in many peaceful ways, Connecticut courts have

applied Conn. Gen. Stat. § 53a-179b exclusively to affirmative efforts to conduct knowing and purposeful disturbances at correctional institutions. *See State v. Nixon*, 630 A.2d 74, 85 (Conn. App. 1993). Accordingly, if a defendant has been convicted of rioting at a correctional institution, it is because he has created risk in a similar way and with criminal culpability similar to that exhibited by an individual who commits burglary, an offense enumerated in the ACCA.

To establish that an offense is similar "in degree of risk posed," the government must demonstrate that "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *Gray*, 535 F.3d at 131 (quoting *James*, 550 U.S. at 208). As this Court held in the previous appeal, rioting at a correctional institution is an offense that, in the ordinary case, creates a high potential for violence through the risk of physical confrontation with a prison guard or another inmate. In this way it poses a risk of injury comparable to – if not greater than – burglary, an enumerated offense.

In the event that this Court finds that rioting at a correctional institution does not qualify as a "violent felony," the defendant may still be eligible for armed career criminal status in light of his other four prior robbery-related convictions. Since the parties have not had sufficient incentive to litigate whether each of the remaining convictions qualify as violent felonies, the matter should be remanded for further litigation before the district court.

Argument

I. The district court correctly determined that the defendant's prior conviction for rioting in a correctional institution is a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii)

A. Relevant facts

Defendant Johnson filed a sentencing memorandum on October 3, 2008. In his written submission, the defense challenged the total offense level, claiming that it should be level 24[3] or 33[4], rather than level 34, which was the

---

[3] The defense claimed that the total offense level should be 24 pursuant to U.S.S.G. § 2K2.1, which provides a base offense level of 24 for a felon in possession offense. JA 18. The defense further argued against a four-point enhancement for using the firearm in connection with another felony offense (robbery in the 1st degree). JA 18. According to the defense brief, the trial evidence suggested Johnson did not commit a robbery, but instead was convicted of constructive possession of the gun in the car. JA 18. In fact, the trial evidence established that Johnson actually possessed the gun when he used it to rob a group of four people and that he constructively possessed it when the car was stopped by the police. This Court's decision in the previous appeal, recognized that "[t]he government proved both actual and constructive possession," and did not find that the district court erred in calculating the

(continued...)

offense level calculated in the PSR and applied by the Court at the initial sentencing. (JA 18). The defendant also claimed that he should not be sentenced pursuant to the ACCA because his prior conviction for rioting in a correctional facility did not qualify as a violent felony pursuant to 18 U.S.C. § 924(e)(2)(B) and *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008).[5]

---

[3] (...continued)
defendant's offense level. *United States v. Johnson*, 265 Fed. Appx. 8, 2008 WL 449794 (2d Cir. 2008).

[4] The defendant claimed that in the event the ACCA provision does apply to Mr. Johnson, the offense level should be 33, rather than level 34 which is applied when a defendant has used the firearm in connection with a crime of violence. The defense claimed that in light of the general jury verdict, there was no way to tell whether Johnson had been convicted on a constructive or actual possession theory. Therefore, according to the defense, the district court should not have calculated the defendant's Guidelines range based on facts not found by the jury. This premise is simply wrong. This Court has repeatedly reaffirmed that a district court is entitled to make findings for sentencing purposes. *See*, *e.g.*, *United States v. Garcia*, 413 F.3d 201, 220 n.15 (2d Cir. 2005) ("Judicial authority to find facts relevant to sentencing by a preponderance of the evidence survives *Booker*."); *Crosby*, 397 F.3d at 112 ("[T]he traditional authority of a sentencing judge to find all facts relevant to sentencing will encounter no Sixth Amendment objection.").

[5] The defense argued pursuant to *Savage* that the riot statute was over-inclusive and, therefore, the government had (continued...)

The defendant acknowledged that he had unsuccessfully raised the same argument on appeal.[6] (JA 26). Nevertheless, the defense raised the argument again and noted that the plain error standard would not apply at a resentencing. The defense attempted to distinguish *James*, arguing as it had in the prior appeal that the rioting statute is sufficiently broad to include violations that do not involve an inherent risk of violence, including a peaceful hunger strike. (JA 24-29).

On October 8, 2009, the district court conducted the resentencing hearing. At the start of the hearing, the court indicated that it had read the defendant's sentencing brief. (JA 38). During the sentencing hearing, the defense raised the issue of the defendant's total offense level under the Guidelines. (JA 38) The district court referred to the decision of this Court and declined to revisit the issue. (JA 38). The defense then argued for a non-Guidelines sentence. (JA 38-47, 67-69)

Counsel for the government argued for a Guidelines sentence. (JA 58) In addition, counsel for the government provided the district court with certified records related to

---

[5] (...continued)
failed to meet its burden of proving under the modified categorical approach that the elements of the offense as committed by Johnson qualified as a violent felony under 18 U.S.C. § 924(e)(2)(B).

[6] In the initial appeal, the defendant argued this point but *Savage* had not yet been decided.

three additional prior convictions of the defendant. (JA 66-67, GA 496-506).

The district court acknowledged the defendant's Guidelines range as calculated at the initial sentencing. (JA 73). The district court also considered the factors set out in 18 U.S.C. § 3553(a), the statements of counsel, and the statement of the defendant. (JA 69-74) The district court then imposed a non-Guidelines sentence principally of 240 months of incarceration, finding that it "was sufficient but not greater than necessary[.]" (JA 73).

B. Governing law and standard of review

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*, 544 U.S. at 17 (quoting *Taylor*, 495 U.S. at 602).

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. 575, 602. Following a jury trial, the sentencing court can 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" and in a pleaded case, the sentencing court may look at admissions by the defendant, including "[the] transcript of plea colloquy[,] [the] written plea agreement presented to the court, or . . . a record of comparable findings of fact adopted by the defendant upon entering the plea." *Shepard*, 544 U.S. at 20. 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*, 550 U.S. at 202.

In order to establish that a conviction is a "violent felony" under the residual provision of § 924(e)(2)(B)(ii), the government must show that the offense conduct criminalized by the conviction is "roughly similar, *in kind* as well as *in degree of risk posed*, to the examples [enumerated in § 924(e)(2)(B)(ii)]." *Begay*, 128 S. Ct. at 1585 (emphasis added). To establish that an offense is similar "in degree of risk posed," the government must demonstrate that "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *Gray*, 535 F.3d at 131 (quoting *James*, 550 U.S. at 208).

To be similar "in kind," the prior offense must be similar to the enumerated offenses "[with] respect to the *way* the risk was produced." *Gray*, 535 F.3d at 131 (emphasis added). In other words, it must be shown that the offense involves criminally culpable risk creation on par with the enumerated offenses, each of which "typically involve[s] purposeful, 'violent,' and 'aggressive' conduct."*Begay*, 128 S. Ct. 1586. Applying this test in *Begay,* the Supreme Court held that "[offenses that] are, or are most nearly comparable to, crimes that impose strict liability" cannot be considered predicate felonies, even if dangerous. *Begay*, 128 S. Ct. 1586-87. In *Gray,* this Court held that reckless offenses, "[d]espite coming close to crossing the threshold into purposeful conduct" are not predicate offenses because such offenses "are not intentional, a distinction stressed by the Supreme Court in *Begay*." *Gray*, 535 F.3d at 131.

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) (citing *United States v. King*, 325 F.3d 110, 113 (2d Cir. 2003)). Although this Court previously rejected the defendant's claim that his rioting conviction was not a violent felony, he claimed at resentencing that this Court's subsequent decision in *Savage* was intervening authority that authorized revisiting the issue. On appeal, he raises the Supreme Court's decision in *Begay*, which was decided after his resentencing. The law of the case bars the defendant from relitigating the question already decided by this Court, and as to which the law has not changed –

namely, whether a Connecticut conviction for rioting in a correctional institution is similar in degree of risk to the crimes enumerated in § 924(e)(2)(B)(ii) in light of *James*. By contrast, the defendant is permitted to raise the new issue of whether, under the Supreme Court's subsequent decision in *Begay,* a rioting conviction is also similar in kind to the enumerated offenses. *See, e.g., Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 789 (2d Cir. 1983) (holding that law of the case doctrine permits court to reconsider issues that were resolved in an earlier appeal, in light of intervening Supreme Court decisions).

C. Discussion

Johnson acknowledges that two of his prior robbery convictions qualify as predicate violent felonies under 18 U.S.C. § 924(e). Defendant's Brief ("Def. Br.") at 7. However, the defendant claims that his prior conviction for rioting at a correctional institution is not a violent felony and, therefore, the district court erred in sentencing him as an armed career criminal. Johnson argues that "[a] conviction for rioting in a correctional institution is not categorically a 'violent felony' under the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) because the statute criminalizes some conduct that cannot be considered a 'violent felony.'" Def. Br. at 12. As explained below, the defendant's argument is meritless because a Connecticut conviction for rioting in a correctional institution is both similar in degree of risk and similar in kind to the offenses enumerated in § 924(e)(2)(B)(ii).

1. In light of *Begay*, a prior conviction qualifies as a violent felony under the residual provision of the ACCA if it is similar "in kind" and "in degree of risk posed" to the enumerated offenses.

The defendant's first appeal was argued and decided after the Supreme Court's decision in *James v. United States*, 550 U.S. 192 (2007), but before its decision in *Begay v. United States*, 128 S. Ct. 1581 (2008). The government argued in that appeal that the Court could determine whether a felony qualifies under the residual provision of § 924(e)(2)(B)(ii) by assessing "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *James*, 550 U.S. at 208. As the Supreme Court stated in *James*, the categorical approach does not require "that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony." *Id.* "As long as an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the requirements of § 924(e)(2)(B)(ii)'s residual provision." *Id.* Relying upon *James* in its evaluation of § 53a-179b, this Court concluded that "[w]hile not every conceivable instance of rioting in a correctional facility necessarily poses a serious risk of potential injury to others, in the ordinary case, the conduct encompassed by the crime does present such a risk." *Johnson*, 265 Fed. Appx. at 11.

Since this Court decided the former appeal, the Supreme Court has refined the test for determining whether a prior conviction ought to be considered a violent felony under the ACCA. *Begay*, 128 S. Ct. at 1584. In *Begay*, the Supreme Court determined that a conviction for driving under the influence ("DUI") "falls outside the scope of [§924(e)(2)(B)(ii)]." *Id.* Unlike the enumerated crimes, the Court explained, DUI statutes "do not insist on purposeful, violent, and aggressive conduct; rather, they are, or are most nearly comparable to, crimes that impose strict liability, criminalizing conduct in respect to which the offender need not have had any criminal intent at all." *Id*. at 1586-87.

Accordingly, the Supreme Court revised the *James* standard so that crimes like DUI would be excluded under the residual provision. The Court did not overrule *James*, but rather supplemented it with a second requirement. In *James*, the Supreme Court had considered only whether "attempted burglary was comparable to the amount of risk posed by the example crime of burglary." *Id*. at 1585. In *Begay*, the Supreme Court held that the residual provision covers offenses that are "roughly similar, *in kind* as well as *in degree of risk posed*, to the [enumerated offenses]." *Id.* (emphasis added). The Supreme Court considered it essential that courts determine that a crime is similar "in kind" because "the Armed Career Criminal Act focuses upon the special danger created when a particular type of offender – a violent criminal or drug trafficker – possesses a gun." *Id.* at 1587. The Supreme Court found that the necessary criminal intent was lacking in the case of an individual whose only convictions were for DUI. *Id.*

As explained more fully below, the defendant's conviction for rioting at a correctional institution qualifies as a "violent felony" because it is both similar "in kind" and "in degree of risk posed" to the enumerated offenses, such as burglary.

2. A Connecticut conviction for rioting at a correctional institution is similar "in kind" to the violent felonies enumerated in the residual clause of § 924(e)(2)(B)(ii)

In determining whether a Connecticut conviction for rioting at a correctional institution qualifies as a "violent felony," this Court must use the categorical approach, i.e., examine "how the law defines the offense" rather than "how an individual offender might have committed it on a particular occasion." *Begay*, 128 S. Ct. at 1584.

Under Connecticut law, rioting at a correctional institution is a class B felony punishable by a term of imprisonment not less than one year nor more than twenty years. *See* Conn. Gen. Stat. §§ 53a-179b, 53a-35a. Section 53a-179b provides:

> A person is guilty of rioting at a correctional institution when he incites, instigates, organizes, connives at, causes, aids, abets, assists or takes part in any disorder, disturbance, strike, riot, or other organized disobedience to the rules and regulations of such institution.

When examining a statute to determine whether it

criminalizes predicate conduct as well as non-predicate conduct, courts may scrutinize judicial interpretations of the statute to determine if the courts have "considerably narrowed its application." *James*, 550 U.S. at 202. Connecticut courts have "considerably narrowed" the application of § 53a-179b. This statute "is specifically directed at two groups: those who lead or plan disturbances at a correctional institution, and, those who follow in the proscribed activity, whether organized or spontaneous. Section 53a-179b, as construed by [Connecticut state] courts, does not reach a substantial amount of constitutionally protected conduct." *State v. Rivera*, 619 A.2d 1146, 1150 (Conn. App. 1993); *see also State v. Nixon*, 630 A.2d 74, 85 (Conn. App. 1993) (holding that to establish the element of a proscribed occurrence, the state must show that there was "a disorder, disturbance, strike, riot, or other organized disobedience to the rules and regulations of such institution."). Thus, the statute "presumably leav[es] to administrative disciplinary action mere isolated or privately committed acts of disobedience of the rules and regulations." *State v. Pascucci*, 316 A.2d 750, 752 (1972).[7]

---

[7] The *Pascucci* court addressed a predecessor statute entitled "Incitement to Riot." Courts have subsequently applied the *Pascucci* court's logic to § 53a-179b. *See Nixon*, 630 A.2d at 85 ("This statute [at issue in *Pascucci*, General Statutes (Rev. to 1968) § 53-167a,] was the predecessor to General Statutes § 53a-179c (inciting to riot at a correctional institution) and contains essentially the same language as the rioting statute at issue in the present case [§ 53a-179b]. . . . The statute at issue in *Pascucci* is essentially the same as [§ 53a-179b].").

Accordingly, Johnson's claim that this statute criminalizes "*any* disorder," including an isolated occurrence such as an inmate's "hunger strike" or "refusal to attend counseling" falls flat. Def. Br. at 12 (emphasis added). Thus narrowly understood, the typical offense proscribed by the Connecticut statute is purposeful, violent, and aggressive and therefore, under *Begay*, constitutes a violent felony.

a. Rioting in a correctional institution is a purposeful offense

The offense of rioting at a correctional institution is a "purposeful" offense as required under *Begay* because the offense involves affirmative and deliberate conduct, as distinguished from passive, reckless, or accidental conduct, and because the offense is of a type that creates the risk that the perpetrator or prison guards will have to intentionally use force. Accordingly, the offense conduct creates the serious potential risk of injury in the same way that the enumerated offenses create risk.

In *United States v. Daye*, 571 F.3d 225 (2d Cir. 2009), this Court held that "*Begay* does not require that *every* instance of a particular crime involve purposeful, violent, and aggressive conduct. Instead, all that is required is that a crime, in a fashion similar to burglary, arson, extortion, or crimes involving the use of explosives, *typically* involves purposeful, violent, and aggressive conduct." *Id.* at 235 (internal alteration and quotation marks omitted). "Indeed, the very crimes expressly named in § 924(e)(2)(B)(ii) are not always purposeful, violent, and

aggressive." *Id.* (citing *Begay*, 128 S.Ct. at 1590-91 (Scalia, J., concurring)). "'Burglary, for instance, can be described as purposeful but not, at least in most instances, as purposefully violent or necessarily aggressive.'" *Id.* (quoting *United States v. Williams*, 529 F.3d 1, 7 n.7 (1st Cir. 2008)). Accordingly, this Court indicated that "deliberate and affirmative conduct . . . [is] sufficient to satisfy *Begay*'s observation that violent felonies for purposes of § 924(e)(2)(B)(ii)'s residual clause typically involve 'purposeful' conduct." *Id.* at 234.

In *Daye*, this Court found that sexual assault of a minor – a crime involving "an intentional sexual act with a person who is . . . under the age of consent" – is a purposeful offense under the ACCA because the offense "involves deliberate and affirmative conduct." 571 F.3d at 234. By contrast, "reckless manslaughter and driving while intoxicated are not crimes of violence because they do not involve intentional and affirmative conduct" and may be "merely accidental or negligent." *Id.* at 233 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 2 (2004)). *See also Gray*, 535 F.3d at 131 (holding that a conviction for reckless endangerment does not qualify as a predicate under the ACCA because of the reckless or negligent manner in which the risk was created). Likewise, in *Chambers v. United States*, 129 S.Ct. 687 (2009), the Supreme Court held that "failure to report" to a correctional institution does not qualify as a predicate violent felony because it can be committed without any action or intention whatsoever, and, thus, stands as an offense in stark contrast with the "less passive, more aggressive behavior underlying an escape from custody." *Id.* at 691.

Plainly, the rioter in a correctional institution who "plan[s], lead[s], or take[s] part" in "a disorder, disturbance, strike, riot, or other organized disobedience" acts affirmatively and deliberately. Connecticut courts have held that to be guilty of rioting in a correctional institution, a defendant must intentionally "do the prohibited act." *Pascucci*, 316 A.2d at 753 (also noting that statute does not require additional showing of specific intent "to violate the criminal law"); *see also Nixon*, 630 A.2d at 86 (distinguishing between specific intent and general intent crimes, and relying on *Pascucci* to hold that rioting in correctional institution falls into latter category, where "the only issue is whether the defendant intended to do the proscribed act").[8] As has been detailed, infractions arising from passive, isolated, or private conduct fall outside of the scope of § 53a-179b. *Pascucci*, 316 A.2d at 752. Accordingly, riot is a "type of conduct [that] creates a risk, not generally present during the commission of [passive or reckless offenses], that the perpetrator will intentionally use force" in the furtherance of his scheme. *Daye*, 571 F.3d at 234. The drunk driver may ultimately cause very serious injuries, by virtue of his original recklessness, but the drunk driver has not created a situation where he risks intentional use of force. On the other hand, there can be no doubt that the rioter creates such a risk.

---

[8] In light of *Pascucci* and *Nixon*'s holding that Connecticut's rioting statute is a general intent crime, it is clear that Johnson is incorrect when he claims that § 53a-179b is a strict liability statute, lacking any requirement of criminal culpability. Def. Br. at 16.

In this regard, there is a strong parallel in kind between rioting at a correctional institution and the enumerated offense of burglary. In *James*, the Supreme Court explained that the main risk of burglary arises not from the simple physical act of wrongfully entering another's property, but from the possibility of a face-to-face confrontation between the burglar and an innocent person who might appear while the crime is in progress. *James*, 550 U.S. 203; *see Taylor*, 495 U.S. at 597. In the case of such confrontations, there arises the risk of intentional violence on the part of the burglar or the third party. Likewise, the rioter may or may not originally set out to create a physical altercation with prison guards or other inmates in his original designs, but he affirmatively and consciously assumes that risk of intentional violence when he sets about his original course of creating a disturbance in the prison. No matter the type of disruption, the rioter knows that correctional officials must address and disband disruptions. Indeed, the risk of detection and hence violent confrontation is far higher in a correctional institution setting, where inmates are closely supervised, than in the burglary setting, where the vast majority of burglars seek to avoid encounters with occupants. In such interactions, the risk of injury and of the intentional use of force becomes extremely high.

In sum, this Court has held in the wake of *Begay* that an offense qualifies under the residual provision as a "purposeful" offense in the same sense that the enumerated offenses are "purposeful," if the offense is both "affirmative and deliberate" and of a kind that "may often involve, but do[es] not necessarily require, the

intentional use of force." *Daye*, 571 F.3d at 233-34. It is apparent that the offense of rioting at a correctional institution, as interpreted by the Connecticut courts, qualifies as a purposeful offense under these criteria.

b. Rioting in a correctional institution is a violent and aggressive offense

Rioting in a correctional institution is also typically a violent and aggressive crime. Contrary to the defendant's claim, the government need not show that a violation of § 53a-179b is necessarily violent in every case or, in the alternative, that the portion of the offense committed by Johnson was necessarily violent. An offense qualifies as a violent felony so long as it *typically* involves purposeful, violent, and aggressive conduct. *Daye*, 571 F.3d at 234-35.

Empirical data confirms the commonsense observation that an inmate's prosecution for leading or participating in a prison disturbance will generally involve physical violence. Reference to available empirical data is appropriate here, as it was in *Chambers*. In that case, the Supreme Court relied in part on a Sentencing Commission report that examined the circumstances of all escape convictions for which sufficient detail was available, in determining the likelihood that violence would accompany a typical failure to report to custody. 129 S. Ct. at 692-93. Of the 160 cases for which data was available, "none at all involved violence" – a fact that "strongly supports the intuitive belief that failure to report does not involve a serious potential risk of physical injury." *Id.* at 692.

The chart below lists each reported case involving a conviction under Conn. Gen. Stat. § 53a-179b where the court recited the facts of the offense conduct. The facts – as reported by the Connecticut courts – reveal that the conduct which led to each rioting conviction involved the use of force and required prison guard response in 100% of the cases. [9] In 82% of the cases there was injury either to a guard, an inmate, or both. Also, 82% of the cases involved use of a dangerous weapon (if one includes *Hanks*, in which one inmate assaulted another with a ten-pound bucket). Notably, either injury or use of a dangerous weapon was present in every case. In other words, there were no cases which lacked both injury and use of a dangerous weapon.

---

[9] For convenience, the chart lists only one reported decision per case, and generally prefers appellate decisions where multiple court decisions were issued. *Nemhard v. Warden*, 2000 WL 992160, the decision regarding Nemhard's habeas petition, is included rather than *State v. Nemhard*, 667 A.2d 571 (Conn. App. 1995), because the former recites the facts regarding the offense conduct.

Case	Use of Force	Guard Response	Weapon used	Injury
State v. Barnett, 734 A.2d 991 (Conn. App. 1999)	x	x	x	x
State v. Faust, 678 A.2d 910 (Conn. 1996)	x	x	x	
State v. Hanks, 665 A.2d 102 (Conn. App. 1995)	x	x	x	x
State v. Harris, 631 A.2d 309 (Conn. 1993)	x	x	x	x
State v. Nelson, 689 A.2d 481 (Conn. App. 1997)	x	x	x	x
Nemhard v. Warden, 2000 WL 992160 (Conn. Super. 2000)	x	x	x	x
State v. Nixon, 630 A.2d 74 (Conn. App. 1993)	x	x		x
State v. Rivera, 619 A.2d 1146 (Conn. App. 1993)	x	x	x	
State v. Robinson, 631 A.2d 288 (Conn. 1993)	x	x	x	x
State v. Roque, 460 A.2d 26 (Conn. 1983)	x	x		x
State v. Santiago, 708 A.2d 969 (Conn. App. 1998)	x	x	x	x
Summary:	**100%**	**100%**	**82%**	**82%**

As this chart makes clear, injury is the rule, rather than the exception, in the typical offense of rioting in a correctional institution in violation of Conn. Gen. Stat. § 53a-179b. Indeed, this list shows that a typical offense involves not merely "a serious potential risk of injury" – as required by § 924(e)(2)(B)(ii) – but actually results in injury in the vast majority of cases. A violation of § 53a-179b is therefore similar to arson, extortion, or offenses that involve the use of explosives. And the risk of injury is far greater than in cases of burglary, where the risk of injury is considered more of a possibility than a likelihood. *See Daye*, 571 F.3d at 234 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985), for the proposition that statistical evidence shows that "burglaries only rarely involve physical violence"), and *Williams*, 529 F.3d at 7 n.7).

Notably, the State of Connecticut also considers defendants convicted of riot in a correctional institution to be violent offenders. Such inmates must serve 85% of their state sentences, rather than 50% as in the typical case, before becoming parole eligible. Conn. Gen. Stat. § 54-125a (a)-(c). The criteria used to determine who qualifies as a violent offender include (1) offenses listed in the statute, including home invasion, in violation of 53a-100aa, and burglary in the second degree,[10] in violation of 53a-102, (*see* Conn. Gen. Stat. § 54-125a(b)(1)(A)); (2) offenses where the underlying facts and circumstances of the offense involve the use, attempted use, or threatened use of physical force (*see* Conn. Gen. Stat. § 54-

[10] Buglary in the second degree is burglary of a dwelling when a person other than a participant in the crime is present.

125a(b)(1)(B)); and (3) offenses incorporated through the regulations promulgated as required by the statute (*see* Conn. Gen. Stat. § 54-125a(C) and Conn. ADC § 54-125a-4-6). The regulations provide, in part,

> (a) The [Parole] Board shall determine whether the statutory definition of the offense or any offenses for which an inmate was convicted of or is serving a sentence of imprisonment contains one or more elements which involve the use, attempted use or threatened use of physical force against another person. No such inmate shall become parole eligible until he or she has served not less than 85% of his or her definite sentence pursuant to the general statutes listed. The following Connecticut General Statutes are applicable to an inmate's 85% determination: 53a-55, 53a-55a, 53a-56, 53a-56a, 53a-56b, 53a-57, 53a-59, 53a-59a, 53a-60, 53a-60a, 53a-60b, 53a-60c, 53a-70, 53a-70a, 53a-70b, 53a-72b, 53a-92, 53a-92a, 53a-94, 53a-94a, 53a-95, 53a-101, 53a-102a, 53a-103a, 53a-111, 53a-112, 53a-134, 53a-135, 53a-136, 53a-167c, *53a-179b*, 53a-179c, 53a-181c.[11]

(Emphasis added).

Riot in a correctional institution is specifically identified in this list, which also includes, *inter alia*, the first and second degrees of robbery; arson; assault; assault

---

[11] The titles and class of felony for each of the listed offenses is set forth in Appendix A.

of elderly, blind, disabled, pregnant or mentally retarded person; sexual assault; kidnapping; and manslaughter. In addition, many of the listed offenses include a variation that involves "with a firearm," e.g., sexual assault in the third degree with a firearm, and burglary in the third degree with a firearm.

The inclusion of riot in a correctional institution in the list of offenses that render someone a "violent offender" who must serve 85% of his sentence is useful for several reasons. It shows that Connecticut employs similar, although not exactly the same, criteria as the ACCA for defining a violent offender. It also shows that most, if not all, of the other listed crimes that qualify an inmate as a violent offender are crimes that would also be considered "violent felonies" under 18 U.S.C. § 924(e). Not only does the state consider riot in a correctional institution to be a serious offense, as is it classified as a B Felony and carries a mandatory minimum sentence of one year of imprisonment, but also by including it in the above list of offenses, the state clearly considers it to fall within the same category of typical violence as burglaries, assaults, and robberies.

3. A Connecticut conviction for rioting at a correctional institution is similar "in degree of risk posed" to the violent felonies enumerated in the residual clause of § 924(e)(2)(B)(ii)

In *Gray*, this Court instructed that "[t]he proper inquiry to determine if [a prior felony] is similar to the listed

crimes in the degree of risk posed is 'whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.'" *Gray*, 535 F.3d at 131 (quoting *James*, 550 U.S. at 208). This does not mean that violence will *necessarily* follow from the defendant's action. The residual clause of § 924(e)(2)(B)(ii) "speaks in terms of a 'potential risk.' These are inherently probabilistic concepts. Indeed, the combination of the two terms suggests that Congress intended to encompass possibilities even more contingent or remote than a simple 'risk,' much less a certainty." *James*, 550 U.S. at 207. Thus, a felony offense is similar "in degree of risk posed" to the enumerated offenses if in the "ordinary case" of that committing that offense, one creates a "contingent" risk perhaps more remote than "simple risk." *Id.*

Indeed, this Court already concluded in Johnson's first appeal that rioting in a correctional institution creates a serious potential risk of injury to another. Although "not every conceivable instance of rioting in a correctional facility necessarily poses a serious risk of injury to others," it remains true that "in the ordinary case, the conduct encompassed by the crime does present such a risk." *Johnson*, 265 Fed. Appx. at 11. This assessment was made after the Supreme Court had issued its decision in *James*, which continues to provide the standard for measuring whether an offense is similar in the degree of risk posed by the crimes listed in § 924(e)(2)(B)(ii). While the defendant is correct that this former decision does not bar his current appeal, it is equally true that the logic applied by this Court in its former decision applies in full to this

identical issue on a second appeal. Because *Begay* did not call into question the *James* analysis with respect to the degree of risk posed by an offense, there is no basis for disturbing the law of the case on this point. *Cf. United States v. Carr*, 557 F.3d 93, 104-07 (2d Cir. 2009) (holding that Supreme Court's intervening decision in *Kimbrough v. United States*, 128 S. Ct. 558 (2007), did not alter legal standard on issue previously adjudicated, and therefore did not justify revising the law of the case).

Even if the Court were to revisit the issue, it should adhere to its holding that rioting at a correctional institution is an offense that in the ordinary case creates the potential of violence through the risk of physical confrontation with a prison guard or another inmate. Courts have found such risk pivotal in determining that an offense is a violent felony in other cases. For example, other Courts of Appeals have held in the wake of *Chambers* that escape from secure custody is a violent felony under 18 U.S.C. § 924(e)(2)(B)(ii), and in so holding focused not merely on the initial act of escape but also on the risk of physical confrontation inherent in recapture. *See United States v. Pratt*, 568 F.3d 11, 22 (1st Cir. 2009) (reasoning that escape from secure custody is a stealth crime that is likely to cause an eruption of violence if and when it is detected, and, therefore, the "powder keg" rationale still applies to such a crime); *United States v. Templeton*, 543 F.3d 382, 384 (7th Cir. 2008) (concluding, based on Department of Justice and academic data regarding the crime of escape from secure custody, that such escapes "generate a sufficient risk of injury to count as crimes of violence"). Furthermore, escape from secure

custody also passes the test articulated in *Begay* because the "less passive, more aggressive" conduct involved in an escape from custody, *Chambers*, 129 S.Ct. at 691, is "roughly similar, in kind as well as in degree of risk posed" to the crimes enumerated in the definition of violent felony. *Pratt*, 568 F.3d at 22 (citing *Begay*, 128 S.Ct. at 1585); *see also Templeton*, 543 F.3d at 384 (holding that escape from secure custody "involve[s] the sort of active and aggressive conduct that *Begay* requires")

For the same reasons that escape from secure custody is considered a violent felony under § 924(e)(2)(B)(ii), the offense of rioting at a correctional institution is properly considered a violent felony. Like the crime of escape, rioting in a correctional institution carries an inherent risk of confrontation not merely in the initial riot, disturbance, or organized disobedience, but also in the guards' predictable response. In each instance, the guards must address and disband the riot, disturbance or organized disobedience, and in doing so they face the inherent the risk of violent and injurious confrontation with the resistant inmate. Accordingly, the district court correctly treated Johnson's prior conviction for rioting in a correctional institution as a violent felony under the ACCA.

4. Johnson misstates the legal standard when he claims that the government must employ the modified categorical inquiry to prove that he "necessarily" plead guilty to a violent form of rioting at a correctional institution

Johnson argues that this Court must vacate his designation as an armed career criminal because the government has not shown that he "necessarily" committed a violent felony when he violated the Connecticut statute criminalizing riot at a correctional institution. Def. Br. at 13. He claims that "[t]he determinative issue is whether the judicial record of [Johnson's rioting conviction] conviction [*sic*] established with 'certainty' that the guilty plea 'necessarily admitted elements of the [predicate] offense.'" *Id.* (quoting *United States v. Savage*, 542 F.3d 959, 966 (2d Cir. 2008)) (quoting, in turn, *Shepard v. United States*, 544 U.S. 13, 25-26 (2005)) (bracketed material in original).

Quite simply, Johnson's argument is rooted in a misunderstanding of the law. *Savage* and *Shepard* are not controlling in this case. Those cases set forth what the government must establish in order for a prior state conviction under an *overbroad* but divisible statute to qualify as a predicate felony under the ACCA. As explained above, however, a typical Connecticut offense of rioting at a correctional institution involves a "serious potential risk of injury" within the meaning of the residual provision of the ACCA. Consequently, all convictions under the Connecticut rioting statute categorically qualify

as violent felonies pursuant to § 924(e)(2)(B)(ii), and no further examination of case-specific materials is necessary.

The Supreme Court's most recent decision concerning the residual provision of the ACCA, *Chambers*, 129 S.Ct. 687, does not alter this analytical framework. In *Chambers*, the Court was presented with the question of whether or not a conviction under an Illinois escape statute would qualify as a violent felony under the residual provision. The plain language of the state law criminalized two types of crimes: escape from detention and failure to report (or return) to detention. The Court concluded that it had to separate these crimes for the purposes of its analysis partly because failure to report escape is "less likely to involve a risk of physical harm" then an escape from custody, and partly because "the statute itself . . . lists escape and failure to report separately (in its title and its body) [and] places the behaviors in two different felony classes (Class Two and Class Three) of different degrees of seriousness." *Id.* at 691. Since the record reflected that the defendant was convicted of failure to report, the Court applied the *Begay* test only to that portion of the statute and concluded that a failure to report was similar neither in kind nor in degree of risk posed to the offenses listed in the residual clause. *Id.* at 692.

This additional layer of analysis from *Chambers* is not necessary in this case because § 53a-179b, as interpreted by the Connecticut courts, criminalizes only a narrow category of knowing and dangerous disturbances which all involve the same likely risk of physical harm, and which are all subject to the same penalty scheme. In contrast to

the Illinois escape statute, the Connecticut riot statute does not criminalize various crimes with distinct levels of culpability. As detailed in Part I above, the state courts have "considerably narrowed" the application of § 53a-179b to include only a limited range of cases in which the defendant "plan[s], lead[s] or take[s] part in the disturbance at the correctional institution." *Nixon*, 630 A.2d at 85. Moreover, Connecticut court have held that "the nine verbs" listed in the rioting statute "are not nine separate statutorily proscribed methods of violating this statute, but 'are verbs pertaining to the bringing about of any occurrence, spontaneous or organized, under the statute." *Nelson*, 689 A.2d at 484 (internal quotation marks and citations omitted). And though the Connecticut Supreme Court has held that only acts of "disobedience," and not "disorders, disturbances, strikes, and riots," must be "organized" to violate the statute, it has not suggested that different levels of culpability attach to the different forms in which such violations may occur. Indeed, the Connecticut prison riot statute is dissimilar to the Illinois escape statute considered in *Chambers* because it does not list any specific crimes "separately (in its title and its body)," nor does it place any "behaviors in . . . different felony classes . . . of different degrees of seriousness." *Chambers*, 129 S.Ct. at 691.

Similarly, Johnson's attempts to distinguish *James* fail. Johnson argues that burglary, the offense conduct considered in *James*, "inherently creates 'the possibility of face-to-face confrontation between the burglar and a third party – whether an occupant, a police officer, or a bystander – who comes to investigate." Def. Br. at 20

(quoting *James*, 550 U.S. at 203). Yet those same risks are present, in an even greater degree, in the prison setting. As every inmate is well aware, prisoners are subject to the control and supervision of prison officials in a controlled setting, and misbehavior is subject to punishment. Because the state statute does not sweep in "mere isolated or privately committed acts of disobedience of the rules and regulations," *Pascucci*, 316 A.2d at 752, violations of the Connecticut rioting statute are inherently more likely to produce confrontation and risk of injury than burglary, as noted above.

In short, § 53a-179b criminalizes a unified category of misconduct in prison that inherently creates a serious potential risk of injury. Accordingly, the government need not establish the factual details underlying the defendant's conviction. Indeed, this Court need not inquire into the factual record *at all*. Simply following the categorical approach as described by the Supreme Court in *James* and *Begay*, rioting at a correctional institution is a "violent felony" under the residual provision of § 924(e)(2)(B)(ii).

II. In the alternative, if this Court determines that rioting in a correctional institution is not a violent felony, it would be appropriate to remand to determine whether any of Johnson's four additional robbery convictions constitute violent felonies that would subject him to the enhanced penalties of the ACCA.

A. Relevant facts

In addition to the prior conviction for rioting at a correctional institution, the defendant has twelve prior convictions. Of those, four involve violations of Connecticut robbery laws, including:

> (a) Robbery in the First Degree, two counts, and Assault in Second Degree, one count, for which he was sentenced on November 9, 1990, to a total of 23 years in jail;
>
> (b) Attempt to Commit Robbery in the First Degree, for which the defendant was sentenced on April 23, 1991, to 9 years in jail to run concurrently to the sentence in (a) above;[12]
>
> (c) Robbery in the Third Degree, for which the

---

[12] According to certified conviction records, the offenses which resulted in the convictions set forth in (a) and (b) both occurred on October 12, 1989. Thus, further inquiry may be required to determine if these offenses occurred on "occasions different from one another," as that term is used in 18 U.S.C. § 924(e)(1). *See Daye*, 571 F.3d at 237.

defendant was sentenced on July 28, 1988, to 3 years in jail, suspended after 18 months; and

(d) Conspiracy to Commit Robbery in the First Degree, for which the defendant was sentenced on June 8, 1987, to 4 years in jail, suspended, after having served approximately 14 months in jail.

Certified records concerning convictions (a), (b) and (c) above were submitted to the district court and made part of the record at resentencing. JA 66-67. On remand, the government would seek to supplement the record with an additional certified record concerning the defendant's 1987 conviction described in (d) above.[13]

B. Governing law and standard of review

The law of the case doctrine generally "requires a trial court to follow an appellate court's previous ruling on an issue in the same case." *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002) (citations omitted). The mandate rule "compels compliance on remand with the

---

[13] At the time the records were provided to the defendant and the court at resentencing, counsel for the government indicated that it appeared that the State's records concerning the 1987 conviction had been destroyed. However, the government is in possession of a certified copy of the criminal docket sheet regarding this conviction which was made prior to the State's destruction of the other records. On remand, the government would move to supplement the record with this certified record and any other materials made relevant for the first time.

dictate of the superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (citations omitted).

"[W]here an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, it is considered waived and the law of the case doctrine bars the district court on remand and an appellate court in a subsequent appeal from reopening such issues unless the mandate can reasonably be understood as permitting it to do so." *Quintieri*, 306 F.3d at 1229 (citation and internal quotation marks omitted); see *Ben Zvi*, 242 F.3d at 95-96.

The law of the case doctrine admits of certain exceptions – for example, when a party did not previously have an incentive or opportunity to raise the issue; when the issue arises from events that occurred after the original appeal; or in light of other "cogent and compelling reasons such as an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *United States v. Frias*, 521 F.3d 229, 235 (2d Cir. 2008) (quoting *Quintieri*, 306 F.3d at 1230).

"Whether there is a waiver depends not . . . on counting the number of missed opportunities . . . to raise an issue, but on whether the party had sufficient incentive to raise the issue in the prior proceedings." *United States v. Ticchiarelli*, 171 F.3d 24, 32-33 (1st Cir. 1999) (citation omitted); *United States v. Whren,* 111 F.3d 956, 960 (D.C. Cir. 1997) (holding that a party "should not be held to

have waived an issue if he did not have a reason to raise it at his original sentencing"). Accordingly, if a sentencing determination had no practical effect on a defendant's sentence at the original sentencing but becomes relevant only after appellate review, a party is free to challenge that sentencing determination on remand, and ultimately on reappeal, despite the failure to challenge that determination initially. *See id.* (holding that district court may consider issues "made newly relevant by the court of appeals' decision – whether by the reasoning or by the result"); *Ticchiarelli,* 171 F.3d at 32 (same, citing *Whren*). To deprive litigants of this ability "would unnecessarily increase the burden on district courts and this court" because parties "would be forced to litigate every aspect of the sentencing report in the original hearing, even though irrelevant to the immediate sentencing determination in anticipation of the possibility that, upon remand, the issue might be relevant." *United States v. Jennings,* 83 F.3d 145, 151, *amended by* 96 F.3d 799 (6th Cir. 1996).

A corollary to the mandate rule addresses whether a resentencing after appellate remand should be "*de novo*" or "limited" in nature. A "resentencing usually should be *de novo* when . . . the Court of Appeals' decision 'effectively undoes the entire knot of calculation' underlying the original sentencing." *United States v. Barresi*, 361 F.3d 666, 672 (2d Cir. 2004) (quoting *Quintieri,* 306 F.3d at 1228).

C. Discussion

In the event that this Court were to determine that a Connecticut conviction for rioting in a correctional institution is not a "violent felony," Johnson's prior robbery-related convictions may provide an alternative basis for the district court's conclusion that Johnson qualifies as an armed career criminal. How many of Johnson's prior robbery-related convictions qualify as "violent felonies" is an issue that has not previously been litigated by the parties. Under the law of the case doctrine and its exceptions, the district court may appropriately consider this issue on a remand for resentencing because the parties did not have any reason to litigate this issue previously. *See Frias*, 521 F.3d at 235 (quoting *Quintieri*, 306 F.3d 1229 (exceptions to the law of the case doctrine include when a party did not previously have an incentive or opportunity to raise the issue)).

At the initial sentencing, the defendant did not object to his status as an armed career criminal, nor did he object to any of the prior convictions set forth in the PSR. Thus, the government did not have any reason at that time to litigate whether more than three of the defendant's prior convictions – including certain of his robbery-related convictions – qualified as "violent felonies" pursuant to 18 U.S.C. § 924(e)(2)(B)(ii). In the first appeal, the defendant challenged only one of the violent felonies, i.e., the conviction for rioting in a correctional institution. The government argued that the rioting conviction was a violent felony, but noted in its brief that the defendant might still be eligible for armed career criminal status

based on his other prior convictions. Yet the government had no need to brief this issue because the defendant had not raised it and because the government had agreed that resentencing pursuant to *Booker* and *Fagans* was appropriate.

At resentencing, the only predicate offense that the defendant claimed was not a violent felony was the conviction for rioting in a correctional institution.[14] The district court relied on this Court's decision in the first appeal which (1) found that the district court had not committed plain error by considering the prior conviction as a "violent felony" and (2) further stated that, "[w]hile not every conceivable instance of rioting at a correctional facility necessarily poses a serious risk of potential injury to others, in the ordinary case, the conduct encompassed by the crime does present such a risk." JA 15. The district court indicated early in the resentencing hearing that it intended to apply the same total offense level calculated at the first sentencing, thus also indicating that it was relying on the defendant's conviction for rioting at a correctional institution as a qualifying "violent felony." Because the government had to prove only that three of Johnson's prior convictions constituted violent felonies, it would have been superfluous at that point to litigate whether Johnson's

---

[14] Defense counsel conceded that Johnson's robbery convictions in 1988 (Robbery in the Third Degree) and 1990 (Robbery in the First Degree, two counts, and Assault in the Second Degree (one count)) qualify as predicate violent felonies. Def. Br. at 9.

remaining robbery-related convictions qualified as additional "violent felonies."

Johnson argues that if his conviction for riot in a correctional institution is not considered a "violent felony," then he would not qualify as an armed career criminal and that his Guidelines range would be 140-170 months of imprisonment. Def. Br. at 10. (Although Johnson's brief speaks only about his Guidelines range, more significant is his statutory sentencing range; if he is not an armed career criminal, his sentence would be capped at 120 months, the statutory maximum for a violation of 18 U.S.C. § 922(g)(1), as provided in 18 U.S.C. § 924(a)(2).) As discussed above, however, the defendant's prior robbery-related convictions may still render him eligible for armed career criminal status. A determination by this Court that riot in a correctional institution is not a "violent felony" has the potential to undo the entire knot of calculation underlying Johnson's sentence. *See Barresi*, 361 F.3d at 672 (quoting *Quintieri*, 306 F.3d at 1228). In the event the Court reached such a conclusion, it would be appropriate to remand and permit the parties to litigate the newly relevant issue of whether Johnson's remaining prior convictions provide an alternative basis for his sentence under the ACCA.

CONCLUSION

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

Dated: August 28, 2009

Respectfully submitted,

NORA R. DANNEHY
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

Anastasia Enos King

ANASTASIA ENOS KING
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

CURTIS ISAKE
Law Student Intern

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 12,148 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

Anastasia Enos King

ANASTASIA ENOS KING
ASSISTANT U.S. ATTORNEY

APPENDIX

CONNECTICUT GENERAL STATUTES
LISTED IN CT ADC § 54-125a-5

53a-55	Manslaughter in the first degree	Class B Felony
53a-55a	Manslaughter in the first degree with a firearm	Class B Felony
53a-56	Manslaughter in the second degree	Class C Felony
53a-56a	Manslaughter in the second degree with a firearm	Class C Felony
53a-56b	Manslaughter in the second degree with a motor vehicle	Class C Felony
53a-57	Misconduct with Motor Vehicle	Class D Felony
53a-59	Assault in the first degree	Class B Felony
53a-59a	Assault of elderly, blind, disabled, pregnant or mentally retarded person in the first degree	Class B Felony
53a-60	Assault in the second degree	Class D Felony
53a-60a	Assault in the second degree with a firearm	Class D Felony

53a-60b	Assault of elderly, blind, disabled, pregnant or mentally retarded person in the second degree	Class D Felony
53a-60c	Assault of elderly, blind, disabled, pregnant or mentally retarded person in the second degree in 2nd Degree with a firearm	Class D Felony
53a-70	Sexual assault in the first degree	Class B or A Felony
53a-70a	Aggravated sexual assault in the first degree	Class B or A Felony
53a-70b	Sexual assault in spousal or cohabiting relationship	Class B Felony
53a-72b	Sexual assault in the third degree with a firearm	Class C or B Felony
53a-92	Kidnapping in the first degree	Class A Felony
53a-92a	Kidnapping in the first degree with a firearm	Class A Felony
53a-94	Kidnapping in the second degree	Class B Felony
53a-94a	Kidnapping in the second degree with a firearm	Class B Felony
53a-95	Unlawful Restraint in in the first degree	Class D Felony

Appendix 2

53a-101	Burglary in the first degree	Class B Felony
53a-102a	Burglary in the second degree with a firearm	Class C Felony
53a-103a	Burglary in the third degree with a firearm	Class D Felony
53a-111	Arson in the first degree	Class A Felony
53a-112	Arson in the second degree	Class B Felony
53a-134	Robbery in the first degree	Class B Felony
53a-135	Robbery in the second degree	Class C Felony
53a-136	Robbery in the third degree	Class D Felony
53a-167c	Assault of public safety or emergency medical personnel	Class C Felony
53a-179b	Riot at a correctional institution	Class B Felony
53a-179c	Inciting to riot at a correctional Institution	Class C Felony
53a-181c	Stalking in the first degree	Class D Felony

Appendix 3

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(2)(2)(B)

(E)(2)(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding pne 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.

* * *

Conn. Gen. Stat. § 53a-179b. Rioting at a correctional institution

(a) A person is guilty of rioting at a correctional institution when he incites, instigates, organizes, connives at, causes, aids, abets, assists or takes part in any disorder, disturbance, strike, riot, or other organized disobedience to the rules and regulations of such institution.

(b) Rioting at a correctional institution is a class B felony.

Conn. Gen. Stat.§ 54-125a. Parole of inmate serving sentence of more than two years. Eligibility. Hearing to determine suitability for parole release of certain inmates

(a) A person convicted of one or more crimes who is incarcerated on or after October 1, 1990, who received a definite sentence or aggregate sentence of more than two years, and who has been confined under such sentence or sentences for not less than one-half of the aggregate sentence or one-half of the most recent sentence imposed by the court, whichever is greater, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which the person is confined, if (1) it appears from all available information, including any reports from the Commissioner of Correction that the panel may require, that there is reasonable probability that such inmate will live and remain at liberty without violating the law, and (2) such release is not incompatible with the welfare of society. At the discretion of the panel, and under the terms and conditions as may be prescribed by the panel including requiring the parolee to submit personal reports, the parolee shall be allowed to return to the parolee's home or to reside in a residential community center, or to go elsewhere. The parolee shall, while on parole, remain under the jurisdiction of the board until the expiration of the maximum term or terms for which the parolee was sentenced. Any parolee released on the condition that the parolee reside in a residential community center may be required to contribute to the cost incidental to such

residence. Each order of parole shall fix the limits of the parolee's residence, which may be changed in the discretion of the board and the Commissioner of Correction. Within three weeks after the commitment of each person sentenced to more than one year, the state's attorney for the judicial district shall send to the Board of Pardons and Paroles the record, if any, of such person.

(b) (1) No person convicted of any of the following offenses, which was committed on or after July 1, 1981, shall be eligible for parole under subsection (a) of this section: Capital felony, as provided in section 53a-54b, felony murder, as provided in section 53a-54c, arson murder, as provided in section 53a-54d, murder, as provided in section 53a-54a, or aggravated sexual assault in the first degree, as provided in section 53a-70a. (2) A person convicted of (A) a violation of section 53a-100aa or 53a-102, or (B) an offense, other than an offense specified in subdivision (1) of this subsection, where the underlying facts and circumstances of the offense involve the use, attempted use or threatened use of physical force against another person shall be ineligible for parole under subsection (a) of this section until such person has served not less than eighty-five per cent of the definite sentence imposed.

(c) The Board of Pardons and Paroles shall, not later than July 1, 1996, adopt regulations in accordance with chapter 54 [FN1] to ensure that a person convicted of an offense described in subdivision (2) of subsection (b) of

this section is not released on parole until such person has served eighty-five per cent of the definite sentence imposed by the court. Such regulations shall include guidelines and procedures for classifying a person as a violent offender that are not limited to a consideration of the elements of the offense or offenses for which such person was convicted.

(d) The Board of Pardons and Paroles shall hold a hearing to determine the suitability for parole release of any person whose eligibility for parole release is not subject to the provisions of subsection (b) of this section upon completion by such person of seventy-five per cent of such person's definite or aggregate sentence. An employee of the board or, if deemed necessary by the chairperson, a panel of the board shall reassess the suitability for parole release of such person based on the following standards: (1) Whether there is reasonable probability that such person will live and remain at liberty without violating the law, and (2) whether the benefits to such person and society that would result from such person's release to community supervision substantially outweigh the benefits to such person and society that would result from such person's continued incarceration. After hearing, if the board determines that continued confinement is necessary, it shall articulate for the record the specific reasons why such person and the public would not benefit from such person serving a period of parole supervision while transitioning from incarceration to the community. The decision of the board under this subsection shall not be subject to appeal.

(e) The Board of Pardons and Paroles shall hold a hearing to determine the suitability for parole release of any person whose eligibility for parole release is subject to the provisions of subdivision (2) of subsection (b) of this section upon completion by such person of eighty-five per cent of such person's definite or aggregate sentence. An employee of the board or, if deemed necessary by the chairperson, a panel of the board shall assess the suitability for parole release of such person based on the following standards: (1) Whether there is reasonable probability that such person will live and remain at liberty without violating the law, and (2) whether the benefits to such person and society that would result from such person's release to community supervision substantially outweigh the benefits to such person and society that would result from such person's continued incarceration. After hearing, if the board determines that continued confinement is necessary, it shall articulate for the record the specific reasons why such person and the public would not benefit from such person serving a period of parole supervision while transitioning from incarceration to the community. The decision of the board under this subsection shall not be subject to appeal.

(f) Any person released on parole under this section shall remain in the custody of the Commissioner of Correction and be subject to supervision by personnel of the Department of Correction during such person's period of parole.

* * *

CT ADC § 54-125a-4 Criteria

(a) The board shall determine whether the statutory definition of the offense or any offenses for which an inmate is serving a sentence of imprisonment contains one or more elements which involve the use, attempted use or the threatened use of physical force against another person. Such inmates shall be ineligible for parole until they shall have served not less than 85% of their definite sentences pursuant to section 54-125a of the general statutes, as amended by public act 95-255.

(b) In all other cases, the board shall determine whether the underlying act or acts constituting the offense or any offense for which the inmate is serving a sentence of imprisonment, or any other relevant information, demonstrate that the inmate is a violent offender. Not less than thirty days prior to making such determination, the board shall notify the division of criminal justice, and shall consider all information and comment provided by that agency. If the board determines that an inmate meets such criteria, the inmate shall be ineligible for parole until he or she has served not less than 85% of his or her definite sentence or sentences pursuant to section 54-125a of the general statutes, as amended by public act 95-255.

(c) In classifying inmates under subsections (a) and (b) of this section, the board may consider any information which it deems to be relevant.

* * *

CT ADC § 54-125a-5 Guidelines

(a) The Board shall determine whether the statutory definition of the offense or any offenses for which an inmate was convicted of or is serving a sentence of imprisonment contains one or more elements which involve the use, attempted use or threatened use of physical force against another person. No such inmate shall become parole eligible until he or she has served not less than 85% of his or her definite sentence pursuant to the general statutes listed. The following Connecticut General Statutes are applicable to an inmate's 85% determination: 53a-55, 53a-55a, 53a-56, 53a-56a, 53a-56b, 53a-57, 53a-59, 53a-59a, 53a-60, 53a-60a, 53a-60b, 53a-60c, 53a-70, 53a-70a, 53a-70b, 53a-72b, 53a-92, 53a-92a, 53a-94, 53a-94a, 53a-95, 53a-101, 53a-102a, 53a-103a, 53a-111, 53a-112, 53a-134, 53a-135, 53a-136, 53a-167c, 53a-179b, 53a-179c, 53a-181c.

(b) In all other cases, the Board shall consider the underlying act or acts constituting the offense or any offense for which the inmate is serving a sentence of imprisonment or any other relevant information that demonstrates a tendency toward the use, attempted use or threatened use of physical force against another person. Information may include, but not be limited to, presentence reports. State Police criminal records check, sentencing dockets, Criminal Justice Information System information, police reports, out of state criminal records, parole and probation reports, victim(s) statement, witness statements, inmates prior incarceration history. After reviewing this information, the panel will determine

whether the inmate has a past history and/or a series or a pattern of convictions for an offense or offenses described in subsection (a) of these guidelines.

* * *

CT ADC § 54-125a-6 Effect

Decisions of the Board under sections 54-125a-1 to 54-125a-6, inclusive, of the Regulations of Connecticut State Agencies shall be limited solely to the determination of inmates' earliest parole eligibility dates pursuant to section 54-125a of the general statutes, as amended by public act 95-255, and shall not be relevant in proceedings to determine whether an inmate should be granted parole on that or subsequent dates, nor to any other parole matter.

* * *

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for --

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by

the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular

sentence, and, if the sentence --

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Johnson

Docket Number: 08-5245-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 8/28/2009) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: August 28, 2009

CERTIFICATE OF SERVICE

08-5245-cr USA v. Johnson

I hereby certify that two copies of this Brief for The United States of America were sent by Regular First Class Mail to:

Jeffrey Kestenband, Esq.
Tindall, Stratton & Kestenband
170 Grandview Avenue, 2nd Floor
Waterbury, CT 06708

Attorneys for Defendant-Appellant

I also certify that the original and nine copies were also shipped via Hand delivery to:

Clerk of Court
United States Court of Appeals, Second Circuit
United States Courthouse
500 Pearl Street, 3rd floor
New York, New York 10007
(212) 857-8576

on this 28th day of August 2009.

Notary Public:

_____

Sworn to me this

August 28, 2009

RAMIRO A. HONEYWELL
Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
Commission Expires November 15, 2012

_____

SAMANTHA COLLINS
Record Press, Inc.
229 West 36th Street, 8th Floor
New York, New York 10018
(212) 619-4949