

**09-4991-cr**

*To Be Argued By:*  
BRIAN P. LEAMING

=====  
**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 09-4991-cr**

UNITED STATES OF AMERICA,

*Appellee,*

-vs-

MOZZELLE BROWN,

*Defendant-Appellant.*

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

=====  
**BRIEF FOR THE UNITED STATES OF AMERICA**  
=====

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## TABLE OF CONTENTS

Table of Authorities.....	iii
Statement of Jurisdiction.....	viii
Statement of Issues Presented for Review.....	ix
Preliminary Statement.....	1
Statement of the Case.....	2
Statement of Facts and Proceedings	
Relevant to this Appeal.....	4
A. The offense conduct.....	4
B. The sentencing proceedings.....	5
1. The presentence report.....	5
2. The sentencing hearing.....	6
Summary of Argument.....	8
Argument.....	10
I. The district court correctly held that the defendant’s two prior serious drug offenses were committed on “occasions different from one another” under 18 U.S.C. § 924(e)(1).....	10
A. Relevant facts.....	10

B. Governing law and standard of review.....	14
C. Discussion.....	16
II. The district court correctly held that the defendant’s conviction for “assault on a peace officer” under Conn. Gen. Stat. § 53a-167c(a)(1) was categorically a “violent felony” under the ACCA, 18 U.S.C. § 924(e).....	23
A. Relevant facts.....	23
B. Governing law and standard of review.....	25
C. Discussion.....	29
1. A conviction for assault on a corrections officer is similar “in kind” to the violent felonies enumerated in the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii). ....	32
2. A conviction for assault on a corrections officer is similar “in degree of risk posed” to the violent felonies enumerated in the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii).....	39
Conclusion.....	42
Certification per Fed. R. App. P. 32(a)(7)(C)	
Addendum	

## 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.

<i>Begay v. United States</i> , 553 U.S. 137 (2008).....	<i>passim</i>
<i>Canada v. Gonzales</i> , 448 F.3d 560 (2d Cir. 2006).....	30, 35, 36, 37, 40
<i>James v. United States</i> , 550 U.S. 192 (2007).....	27, 39
<i>Lewis v. Casey</i> , 518 U.S. 343 (1996).....	39
<i>Shepard v. United States</i> , 544 U.S. 13 (2005).....	26, 27
<i>State v. Flynn</i> , 539 A.2d 1005 (Conn. App. Ct. 1988).....	34
<i>State v. Raymond</i> , 621 A.2d 755 (Conn. App. Ct. 1993).....	34, 35, 39
<i>Taylor v. United States</i> , 495 U.S. 575 (1990).....	26

<i>United States v. Alexander</i> , 543 F.3d 819 (6th Cir. 2008), <i>cert. denied</i> , 129 S. Ct. 2175 (2009). . . . .	37
<i>United States v. Bennett</i> , 469 F.3d 46 (1st Cir. 2006). . . . .	28
<i>United States v. Boonphakdee</i> , 40 F.3d 538 (2d Cir. 1994).. . . . .	18
<i>United States v. Brady</i> , 988 F.2d 664 (6th Cir. 1993).. . . . .	20
<i>United States v. Cardenas</i> 217 F.3d 491 (7th Cir. 2000). . . . .	21
<i>United States v. Canty</i> , 570 F.3d 1251 (11th Cir. 2009).. . . . .	15
<i>United States v. Daye</i> , 571 F.3d 225 (2d Cir. 2009).. . . . .	<i>passim</i>
<i>United States v. Gray</i> , 535 F.3d 128 (2d Cir. 2008).. . . . .	<i>passim</i>
<i>United States v. Hill</i> , 440 F.3d 292 (6th Cir. 2006).. . . . .	15
<i>United States v. Houman</i> , 234 F.3d 825 (2d Cir. 2000) (per curiam). . . . .	28

<i>United States v. Hudspeth</i> , 42 F.3d 1015 (7th Cir. 1994) (en banc) . . . . .	20
<i>United States v. Johnson</i> , 616 F.3d 85 (2d Cir. 2010) . . . . .	<i>passim</i>
<i>United States v. Kelley</i> , 981 F.2d 1464 (5th Cir. 1993) . . . . .	19, 21, 22
<i>United States v. King</i> , 325 F.3d 110 (2d Cir. 2003) . . . . .	28
<i>United States v. Letterlough</i> , 63 F.3d 332 (4th Cir. 1995) . . . . .	16
<i>United States v. Long</i> , 320 F.3d 795 (8th Cir. 2003) . . . . .	21
<i>United States v. Lynch</i> , 518 F.3d 164 (2d Cir. 2008), <i>cert. denied</i> , 129 S. Ct. 1316 (2009) . . . . .	28
<i>United States v. Mitchell</i> , 932 F.2d 1027 (2d Cir. 1991) (per curiam) . . . . .	15
<i>United States v. Pope</i> , 132 F.3d 684 (11th Cir. 1998) . . . . .	16
<i>United States v. Rideout</i> , 3 F.3d 32 (2d Cir. 1993) . . . . .	15, 20

<i>United States v. Rivers</i> , 595 F.3d 558 (4th Cir. 2010).....	28
<i>United States v. Savage</i> , 542 F.3d 959 (2d. Cir. 2008).....	27
<i>United States v. Speakman</i> , 330 F.3d 1080 (8th Cir. 2003).....	19, 21
<i>United States v. Tisdale</i> , 921 F.2d 1095 (10th Cir. 1990).....	16, 20
<i>United States v. Washington</i> , 898 F.2d 439 (5th Cir. 1990).....	20
<i>United States v. West</i> , 550 F.3d 952 (10th Cir. 2008).....	38
<i>United States v. Williams</i> , 529 F.3d 1 (1st Cir. 2008), <i>cert. denied</i> , 129 S. Ct. 1580 (2009). . . . .	33

**STATUTES**

18 U.S.C. § 922. . . . .	1, 2, 3, 14, 25
18 U.S.C. § 924. . . . .	<i>passim</i>
18 U.S.C. § 3231. . . . .	viii
18 U.S.C. § 3553. . . . .	8

18 U.S.C. § 3742. . . . . viii  
Conn. Gen. Stat. § 21a-277. . . . . 10, 12  
Conn. Gen. Stat. § 53a-167c. . . . . *passim*

**RULES**

Fed. R. App. P. 4. . . . . viii

**GUIDELINES**

U.S.S.G. § 4A1.2. . . . . 7, 18  
U.S.S.G. § 4B1.4. . . . . 6, 14, 18

## Statement of Jurisdiction

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on November 24, 2009. Appendix (“A”)<sup>1</sup> 98, GA 83. On November 23, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A 101, GA 84. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a) because the appeal challenges a criminal sentence.

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<sup>1</sup> Defendant’s Appendix is cited herein as “A \_\_” and Government’s Appendix is cited herein as “GA \_\_.”

**Statement of Issues  
Presented for Review**

- I. The defendant was arrested in May 2000 on state narcotics charges and pleaded guilty in October of the same year. Less than one month later, while awaiting sentencing on the first offense, he was arrested on new charges, and ultimately pleaded guilty to another drug charge. Did the district correctly hold that Brown's prior serious drug offenses were committed on "occasions different from one another" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)?
  
- II. Did the district court correctly hold that Brown's prior conviction for "assault on a peace officer" was a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e)?

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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**BRIEF FOR THE UNITED STATES OF AMERICA**

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### **Preliminary Statement**

Defendant Mozzelle Brown was convicted on a plea of guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The district court held that Brown's criminal history subjected him to an enhanced sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), and sentenced him to 180 months in prison, which was the minimum sentence mandated by the statute, but below the applicable guidelines range of 188 to 235 months of imprisonment.

On appeal, Brown argues that the district court erred in sentencing him under the ACCA. Specifically, he argues (1) that his two prior sale of narcotics convictions do not qualify as separate convictions because they were not “committed on occasions different from one another” as required by the statute, and (2) that his conviction for assault on a corrections officer was not a “violent felony” as that term is defined in the statute.

The defendant’s arguments are not persuasive. *First*, although the defendant was sentenced on the same date for the two narcotics offenses, they were committed on “occasions different from one another” in that the crimes occurred approximately eight months apart, at different locations, and were separated by an intervening arrest. *Second*, under *Begay v. United States*, 553 U.S. 137 (2008), the defendant’s conviction for “assault on a peace officer” under Connecticut law is categorically a “violent felony” under the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii).

### **Statement of the Case**

On July 24, 2008, Brown was arrested on a sealed criminal complaint. GA 75. On July 29, 2008, a federal grand jury returned a two count indictment charging the defendant with possession of a firearm by a convicted felon, in violation of Title 18, United States Code, Section 922(g)(1), and possession with intent to distribute, and distribution, of 5 grams or more of cocaine base, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(B). GA 76, A 3-5.

On July 28, 2009, Brown entered a guilty plea to Count One of the Indictment, charging him with possession of a firearm by a convicted felon, in violation of Title 18, United States Code, Section 922(g). GA 81, A 84. Brown's guilty plea was entered in accordance with a plea letter with the government of the same date. GA 81, A 6-13. The plea letter did not include an agreement to a sentencing guidelines range. Rather, the plea letter acknowledged the parties' disagreement as to whether sentencing enhancements under the Armed Career Criminal Act (18 U.S.C. § 924(e)) applied to the offense of conviction. A 9.

On November 20, 2009, the district court (Janet C. Hall, J.) sentenced Brown principally to 180 months in prison. GA 83, A 98. Judgment entered November 24, 2009. GA 83. On November 23, 2009, Brown filed a timely notice of appeal. GA 84, A 101.

Brown is currently serving his federal sentence.

**Statement of Facts and Proceedings  
Relevant to this Appeal**

**A. The offense conduct**

On April 18, 2008, a Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) confidential informant (“CI”) arranged to purchase a quantity of crack cocaine and a handgun from an individual hereinafter identified as H.H. A 84. The CI initiated a recorded phone call to H.H. during which H.H. explained that he was unavailable to meet with the CI and that “Mozzelle” (subsequently identified as the defendant) would meet the CI instead. A 84-85, GA 5.

On that same date, during a recorded conversation between the CI and Brown, the CI asked Brown about “the burner.” A 85, GA 5. Brown replied, “No. Off of who? Man, I can get you one, but it ain’t gonna be cheap.” A 85, GA 5. Brown told the CI, “I’ll come bring it to you ... I’m old school nigga. I love my money, man. I did 14 years in prison. I don’t give a fuck about ... I don’t have a license and I’m still driving around.” A 85, GA 6.

When Brown and the CI met later that day, Brown delivered to the CI a Smith and Wesson, Model 38 Special, .38 caliber revolver. A 85, GA 7. Brown also attempted to sell the CI one ounce of cocaine base, but the CI informed Brown that he did not have enough money to purchase that amount. A85, GA 7. Brown then sold the CI a half-ounce of cocaine base. A 85, GA 7. Laboratory results later confirmed the substance to be cocaine base

and its weight to be approximately 14.2 grams. A 85, GA 7. The firearm was determined to have been manufactured in the Commonwealth of Massachusetts, and, therefore, was shipped or traveled in interstate commerce. A 85.

## **B. The sentencing proceedings**

### **1. The presentence report**

In anticipation of sentencing, the United States Probation Office (“Probation Office”) prepared the Presentence Report (“PSR”). The PSR concluded that Brown had one conviction for a “violent felony” and two convictions for a “serious drug offense” within the meaning of Section 924(e) and was therefore subject to the 15-year mandatory minimum sentence prescribed by the ACCA. A 86, 95. Specifically, the PSR recited the following qualifying convictions:<sup>2</sup>

- On August 11, 1993, Brown was sentenced to seven years’ imprisonment for “Assault on a Peace Officer” in Norwich (Connecticut) Superior Court (A 88);
- On June 12, 2001, Brown was sentenced to three years’ imprisonment for “Sale of Narcotics” in New London (Connecticut) Superior Court (A 88); and

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<sup>2</sup> The PSR listed seven other prior criminal convictions for Brown, none of which warranted any additional criminal history points. A 87-90.

- On June 12, 2001, Brown was sentenced to three years' imprisonment for "Sale of Hallucinogens/Narcotics" and "Criminal Possession of a Pistol" in New London Superior Court (A 89).

The Probation Office concluded that Brown had a total of 9 criminal history points, which established a Criminal History Category of IV. A 90. Brown's status as an Armed Career Criminal, however, placed him in Criminal History Category VI under U.S.S.G. § 4B1.4(c)(2). *Id.* That, and an offense level of 31, yielded a sentencing guidelines imprisonment range of 188 to 235 months. A 95.

## **2. The sentencing hearing**

On November 20, 2009, Brown appeared in district court for sentencing. GA 82, A 33. The district court determined that Brown was subject to the enhanced penalties under 18 U.S.C. § 924(e). A 98. This decision was based on a finding that Brown had the requisite three predicate felonies to establish that he was indeed an Armed Career Criminal. A 52.

With respect to the defendant's two drug-related offenses, the district court specifically found that they should count as separate offenses under the ACCA. A 38. The district court made the following factual findings:

First [Brown] committed an offense obviously on May 3, 2000 and he was arrested for that offense and charged. He entered a guilty plea on October 31

to the crime of possession with intent to sell narcotics under Connecticut statute 21a-277a. It was set for sentencing on December 12 which, of course, didn't occur because nine days later on November 11 [sic], Mr. Brown was again stopped as a result of that stop, and a subsequent search warrant I believe was executed as well as items found, he was charged with possession with intent to sell again under the same statute. He pled guilty to that second offense and was sentenced on that second offense and the first offense all on June 12, 2001.

A 37.

The district court stated that Brown “possessed with intent to distribute on May 3 and . . . possessed with an intent to distribute on November 9.” A 38. And as the court further noted, Brown pled guilty on the May 3 charge before he was arrested on the November offense. A 38. After this discussion, defense counsel conceded that his “position [was] weak.” A 38. On these facts, the district court concurred with the PSR that the criminal history category under § 4A1.2(a)(2) was VI. A 39, 52-53. The defendant conceded that the two June 12, 2001 convictions otherwise qualified as “serious drug offenses.” A 40-41.

Turning to the defendant's conviction for “assault on a peace officer,” under subsection (a)(1) of Conn. Gen. Stat. § 53a-167c, the district court found that the elements of that conviction “categorically qualify under ACCA for

a crime of violence given the nature of the setting within a penal institution, that it was an intentional act towards a correctional officer. It was towards that officer in connection with the commission of his official duties and it in fact caused injury.” A 50-51. The district court further noted that the statute required “actual injury” in an “environment that is inherently a risky environment for correctional officers as well as inmates at penal institutions[.]” A 51.

The district court credited Brown with three points for acceptance of responsibility resulting from his guilty plea and timely notification to the government of his intent to plead guilty. A 53. The district court calculated that Brown had a total offense level of 31 and a criminal history category of VI, which resulted in a guidelines imprisonment range of 188 to 235 months. *Id.* Applying the factors set forth in 18 U.S.C. § 3553(a), however, the district court found that the mandatory minimum term of 180 months’ imprisonment was sufficient to achieve the purposes of sentencing, without being longer than necessary, and sentenced the defendant accordingly. A 67-78.

### **Summary of Argument**

The district court properly sentenced the defendant pursuant to the ACCA, 18 U.S.C. § 924(e). *First*, the district court properly determined that the defendant’s two serious drug offenses in May and November, 2000, were committed on “occasions different from one another,” particularly since the defendant was arrested and pled

guilty to the first drug offense before his arrest on the second drug offense. The district court's findings were amply supported by the record. In fact, the defendant at sentencing conceded his argument to the contrary was "weak." Having determined that the defendant's June 12, 2001 convictions were committed on "occasions different from one another," and with the defendant's concession that they were qualifying "serious drug offenses," the district court properly counted the convictions as qualifying convictions under the ACCA.

*Second*, the district court properly concluded that the defendant's conviction for "assault on a peace officer," under Conn. Gen. Stat. § 53a-167c(a)(1) was categorically a "violent felony" under the ACCA. A conviction under this subsection of the statute qualifies as a violent felony under the so-called "residual" clause of the statute because it involved "conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). A conviction for assault on a peace officer, including a corrections officer, is a crime "roughly similar, in kind as well as in degree of risk posed," to the offenses enumerated in the statute.

## Argument

### **I. The district court correctly held that the defendant's two prior serious drug offenses were committed on "occasions different from one another" under 18 U.S.C. § 924(e)(1).**

#### **A. Relevant facts**

On June 12, 2001, Brown was sentenced on two separate cases, from two separate arrests, for sale and possession with intent to sell cocaine. GA 32, 34. The first offense, bearing docket number CR00-0079114-T, stemmed from an arrest on May 3, 2000, and resulted in a guilty plea on October 31, 2000, in New London Superior Court. GA 33. At the October 31, 2000, hearing, the defendant entered a guilty plea to the crime of "possession of cocaine with intent to sell" in violation of Conn. Gen. Stat. § 21a-277(a). GA 41, 44. During the plea colloquy, the state prosecutor proffered the following factual basis:

[PROSECUTOR]: On May 3rd of this year the defendant was arrested by the Norwich Police Department for motor vehicle violation. He was taken into custody for that arrest.

At the police station a drug dog was brought in because the defendant was known to conceal narcotics in his pants. The dog did alert to that area. He was found to be in possession of twenty-nine rocks of a substance which tested positive for the presence of cocaine. It appeared to be crack

cocaine. And that was concealed in his buttocks and crotch areas.

GA 41. There was further discussion about the agreed upon sentence (seven years' imprisonment suspended after eighteen months to serve and three years probation). *Id.* The state court then inquired of the defendant:

THE COURT: All right. Now, you heard what [the Prosecutor] just told me about this incident May 3<sup>rd</sup> of this year. You were stopped. You were brought to the station and you're found to be concealing twenty-nine bags of crack cocaine. Is that what you're pleading guilty to here today?

THE DEFENDANT: Yes.

GA 42. After canvassing the defendant on his various statutory and constitutional rights, the state court accepted the defendant's guilty plea to "possession of cocaine with intent to sell" and set a sentencing date of December 12, 2000. GA 44-45.

On November 9, 2000, while awaiting sentencing on the May 3 offense, the defendant was arrested. GA 52-53. On this date, Norwich (CT) police officers had obtained a search warrant for the defendant's residence and were conducting surveillance of Brown and his residence. GA 54. While surveillance was ongoing, Brown "fled in a motor vehicle, [and] was stopped after a pursuit." *Id.* The search warrant was executed at the defendant's residence

which resulted in the seizure of cocaine and a revolver and ammunition. *Id.*

On March 22, 2001, Brown appeared in New London Superior Court, to enter a guilty plea regarding his November 9, 2000 arrest. GA 52. At the outset, the state court noted that the defendant “got re-arrested” and “has already pled to possession of cocaine with intent to sell, a 21a-277a . . . in October of last year, so that plea stands.” GA 52-53. The defendant was thereafter put to plea and the following exchange was recorded:

THE CLERK: In docket number CR00-80699 the Information that was just hand amended charges you with the crime of possession of cocaine with intent to sell which violates Section 21a-277(a) of the Connecticut General Statutes. Do you plead guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: That same Information charges you with the crime of criminal possession of a pistol or revolver which violates Section 53a-217c of the Connecticut General Statutes; do you plead guilty to or [not] (sic) guilty?

THE DEFENDANT: Guilty.

GA 53-54. The state prosecutor thereafter proffered the factual basis for the offense:

[THE PROSECUTOR]: On the new file, 11/9 in the City of Norwich, the Norwich Police Department had a search warrant for the defendant's residence at 251 Laurel Hill Avenue, Apartment number 1. They were conducting surveillance on the apartment on the date in question. The defendant fled in a motor vehicle, was stopped after a pursuit.

The warrant was served on the residence. Ten grams of a substance tested positive as cocaine, and appeared to be crack cocaine was found. In addition, in the residence a 357 revolver, ammunition, marijuana, and a pager.

The defendant also had a video surveillance system set up on his apartment for viewing the exterior of the building. *And this incident occurred while he was pending sentencing on a prior possession with intent, your Honor.*

As part of the factual basis for the criminal possession, the defendant does have a conviction from 1993 of assault on an officer for which he received jail time; and that's a C felony, your Honor.

GA 54-55 (emphasis added). The state court then inquired of the defendant:

THE COURT: And then in November, while you were awaiting sentence, this situation happened in Norwich where the search and seizure warrant was

executed at your residence, drugs were found, a gun was found; is that what you are pleading guilty to here today?

THE DEFENDANT: Yes.

GA 55.

After canvassing the defendant on his various statutory and constitutional rights, the court accepted the defendant's guilty pleas and set sentencing for the May and November cases for June 12, 2001. GA 55-61.

On June 12, 2001, the defendant was sentenced in New London Superior Court on both cases to 10 years' imprisonment, execution suspended after 3 years to serve, and 3 years' probation, to run concurrently. GA 33, 35.

#### **B. Governing law and standard of review**

The Armed Career Criminal Act prescribes 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).

To qualify for the enhanced penalties under 18 U.S.C. § 924(e), an offender must have three previous convictions “committed on occasions different from one another[.]” 18 U.S.C. § 924(e)(1). The statute “unambiguously requires that a defendant’s three convictions stem from three, separate criminal episodes and does not suggest, much less require, that the criminal acts and prior convictions take place in any particular sequence. . . [and] does not require that a defendant’s three criminal acts be punctuated by intervening convictions.” *United States v. Mitchell*, 932 F.2d 1027, 1028 (2d Cir. 1991) (per curiam). “[T]wo convictions arise from conduct committed on different occasions if they do not ‘stem from the same criminal episode.’” *United States v. Daye*, 571 F.3d 225, 237 (2d Cir. 2009) (quoting *United States v. Rideout*, 3 F.3d 32, 34 (2d Cir. 1993)). “Considerations relevant to this determination include whether the victims of the two crimes were different, whether the crimes were committed at different locations, and whether the crimes were separated by the passage of time.” *Id*; see also *United States v. Hill*, 440 F.3d 292, 297-98 (6th Cir. 2006) (in determining whether convictions arose from separate criminal episodes the court looks to whether the offenses occurred at different locations, whether the offenses occurred sequentially or distinct in time, and whether it would have been possible for the defendant to cease his criminal conduct after the first offense).

Whether crimes were committed on “occasions different from one another,” within the meaning of the ACCA is a question of law subject to *de novo* review. *United States v. Canty* 570 F.3d 1251, 1254-55 (11th Cir.

2009) (citing *United States v. Pope*, 132 F.3d 684, 689 (11th Cir. 1998)); see also *United States v. Tisdale*, 921 F.2d 1095, 1098 (10th Cir. 1990) (application of distinct offenses requirement to particular factual situation is legal determination subject to de novo review); *United States v. Letterlough*, 63 F.3d 332, 334 (4th Cir. 1995) (determination of whether convictions were “committed on occasions different from one another” is a question of statutory interpretation subject to *de novo* review).

### **C. Discussion**

The district court properly found that Brown’s June 12, 2001 convictions arose from offenses “committed on occasions different from one another[.]” 18 U.S.C. § 924(e)(1). The records of the defendant’s prior convictions reveal that those convictions involved separate and distinct criminal episodes. They occurred at different locations and were separated in time by approximately six months. Indeed, the second criminal episode occurred while the defendant was awaiting sentencing on the first offense. In fact, the only fact shared by the two offenses is the date of judgment.

As described in the state prosecutor’s factual proffer, to which the defendant agreed, the first offense occurred on May 3, 2000, when he was found in possession of twenty-nine rocks of cocaine base secreted on his person. GA 40. The cocaine base was recovered from his buttocks and crotch areas after a narcotics canine alerted to these areas on the defendants’ person. GA 41. The narcotics seizure occurred in the Norwich Police Department after

the defendant was arrested on motor vehicle charges. *Id.* Following his arrest, the defendant was released on a \$35,000 bond. GA 31.

The defendant pleaded guilty to this first offense on October 31, 2000, and while awaiting his sentencing date of December 12, 2000, he was arrested on November 9, 2000 and charged with various narcotics and firearm offenses. GA 52-55. In the latter arrest, the defendant's residence was the target of a search warrant. GA 54. The search resulted in the seizure of ten grams of cocaine base and a .357 revolver with ammunition. GA 54. As the state court explained at the change of plea hearing for the November arrest:

THE COURT: And then in November, while you were awaiting sentence, this situation happened in Norwich where the search and seizure warrant was executed at your residence, drugs were found, a gun was found; is that what you are pleading guilty to here today?

THE DEFENDANT: Yes.

GA 55. In short, the plea colloquy confirmed again that the criminal episodes were separate and distinct.

The defendant argues that the two offenses are somehow related because they share the date of conviction, and that the government can not prove

otherwise.<sup>3</sup> The fact of being sentenced on the same date,

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<sup>3</sup> The defendant also argues that his prior narcotics convictions should have counted as one sentence under U.S.S.G. § 4A1.2(a). Def. Br. at 8-11. Brown’s interpretation of § 4A1.2(a) is not only erroneous, but also, more significantly, irrelevant. *First*, the defendant’s argument directly contradicts the plain language of the rule. Section 4A1.2(a)(2) provides in pertinent part: “Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense.)” U.S.S.G. § 4A1.2(a)(2); *see also United States v. Boonphakdee*, 40 F.3d 538, 543-44 (2d Cir. 1994). “[W]hether an intervening arrest was present constitutes a *threshold* question that, if answered in the affirmative, precludes any further inquiry to determine whether the prior sentences were imposed in related cases.” *Boonphakdee*, at 544. If the offenses were “separated by an intervening arrest” then by definition they are not considered related. *Id.* Thus, regardless of whether certain offenses were consolidated for sentencing, if the offenses were separated by an intervening arrest, as they were here, then they are not related and should be counted separately. *Second*, Section 4A1.2, is inapplicable when the dispositive issue under the ACCA is whether the qualifying convictions were for offenses “committed on occasions different from one another.” 18 U.S.C. 924(e). Section 4A1.2 is triggered only if the defendant is *not* eligible for ACCA’s enhanced penalties, and then only for purposes of determining criminal history. *See* U.S.S.G. § 4B1.4(c)(2) (criminal history category is Category VI if defendant used or possessed the firearm in connection with a controlled substance offense). The district court found that the firearm was

(continued...)

however, is irrelevant to the inquiry of whether the two offenses were separate criminal episodes. *See United States v. Speakman*, 330 F.3d 1080, 1082 (8th Cir. 2003) (noting that fact that defendant was convicted of seven felonies at one trial and sentenced to concurrent sentences on those felonies was irrelevant to inquiry; “it is the criminal episodes underlying the convictions, not the dates of conviction, that must be distinct to trigger the provisions of the ACCA”); *United States v. Kelley*, 981 F.2d 1464, 1474 (5th Cir. 1993) (“[M]ultiple convictions arising from multiple criminal transactions should be treated as separate convictions, regardless of the number of judicial proceedings involved in the conviction.”) (internal quotations omitted).

And as described above, the defendant’s convictions arose from distinct criminal episodes. First, the offenses occurred at different locations. The defendant’s first arrest came about following a motor vehicle stop and the recovery of cocaine base from his person. GA 41. The second arrest occurred after the police obtained a search warrant for his residence on Laurel Hill Avenue. GA 54. Second, the offenses occurred at different times. The defendant committed and was arrested for the first offense on May 3, 2000. He was thereafter released on bond. GA 31. Six months later, on November 9, 2000 (just days after he pleaded guilty to the first offense), he was arrested again following the seizure of cocaine and a gun from his residence. GA 54. The different locations, the significant

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<sup>3</sup> (...continued)  
possessed in connection to the defendant’s distribution of crack cocaine. A 39, 52-53.

passage of time between the two offenses, and the interceding arrest easily confirms that the offenses were committed on occasions different from one another and validates the district court's ruling.

Numerous appellate courts have ruled similarly even when confronted with crimes committed very close in time and location. *See, e.g., Rideout*, 3 F.3d at 35 (burglaries located 12 to 13 miles and at least 20 to 30 minutes apart were offenses committed on occasions different from one another); *United States v. Hudspeth*, 42 F.3d 1015, 1021 (7th Cir. 1994) (en banc) (three burglaries in same shopping center committed in a span of 35 minutes were separate and distinct); *United States v. Brady*, 988 F.2d 664, 668-70 (6th Cir. 1993) (robberies of different victims at different locations separated by thirty to forty-five minutes were distinct criminal episodes); *Tisdale*, 921 F.2d at 1098-99 (three burglaries committed successively during one night at different stores in same mall are separate and distinct episodes); *United States v. Washington*, 898 F.2d 439, 440-42 (5th Cir. 1990) (separate and distinct episodes where defendant robbed same clerk at all-night convenience store twice within a few hours).

Moreover, in the context of narcotics possession and distribution convictions, several appellate courts have concluded that separate drug transactions are distinct criminal episodes under the ACCA. In *United States v. Van*, the Eight Circuit concluded: “[w]e have repeatedly held that convictions for separate drug transactions on separate days are multiple ACCA predicate offenses, even

if the transactions were sales to the same victim or informant.” 543 F.3d 963, 966 (8th Cir. 2008); *cf. Speakman*, 330 F.3d at 1082-83 (narcotics sales to the same undercover officer at four different locations on seven different dates were separate predicate offenses); *United States v. Long*, 320 F.3d 795, 801-802 (8th Cir. 2003) (three drug deliveries on three separate days were separate offenses). Similarly, in *Kelley*, the Fifth Circuit had “no difficulty” in holding that two separate deliveries of drugs on separate days at separate locations were separate and distinct criminal episodes under the ACCA. 981 F.2d at 1474. In *United Cardenas*, the Seventh Circuit concluded that two separate narcotics sales to the same people, and separated in time by forty-five minutes and in distance by half a block, were separate and distinct criminal episodes. 217 F.3d 491, 492 (7th Cir. 2000).

Here, the defendant’s arrests were separated by six months and his criminal activity occurred at different locations (residence versus his vehicle). Thus, regardless of what factors the Court employs, the defendant’s prior narcotics convictions are unequivocally separate criminal episodes under the ACCA.

Brown nevertheless contends that these convictions should be counted as one because they were not separated by an intervening arrest. Def. Br. at 8. Brown avers that the second arrest occurred “while the Defendant was still in custody.” Def. Br. at 7. Brown cites to the PSR that he “remained in custody until his sentencing on June 12, 2001.” *Id.* Yet, there is nothing in the PSR that supports his assertion.

In fact, all the evidence is the contrary and the defendant is unable to point to any document which supports his claim. The State's factual proffer for the defendant's second conviction reveals that the defendant was arrested in a motor vehicle *while attempting to leave his residence* on November 9. GA 54. It is inconceivable that Brown "remained in custody" from May 3, as he claims, while simultaneously fleeing from the police on November 9, 2000. Moreover, the record of conviction for his first offense reveals that he was released on a \$35,000 bond, and that he only received credit for jail time beginning after his second arrest in November. *See* GA 33. Finally, as the cited case law makes clear, even if there was no intervening arrest, the defendant's prior convictions were separate and distinct criminal episodes. *See Kelley*, 981 F.2d at 1474 ("[M]ultiple convictions arising from multiple criminal transactions should be treated as separate convictions, regardless of the number of judicial proceedings involved in the conviction.") (quotations omitted).

In sum, the district court properly found that the defendant's prior narcotics offenses were committed on "occasions different from one another" under the ACCA.

**II. The district court correctly held that the defendant’s conviction for “assault on a peace officer” under Conn. Gen. Stat. §53a-167c(a)(1) was categorically a “violent felony” under the ACCA, 18 U.S.C. § 924(e).**

**A. Relevant facts**

On August 11, 1993, the defendant entered guilty pleas on two counts of “assault on a peace officer,” in violation of Conn. Gen. Stat. § “53a-167c(1)” GA 31.<sup>4</sup> In particular the following exchange was recorded:

THE CLERK: Mozelle Brown this substituted information charges that on 12/18/92 you’re charged with the crime of assault on a peace officer in violation of 53a-167c(1). How do you plead to this charge, guilty or not guilty?

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<sup>4</sup> The hand written information referenced the statute number as “53a-167c(1),” omitting a reference to subsection (a). GA 31. The statute is titled “53a-167c” with two subsections designated as paragraphs (a) and (b). The statute, as was codified at the time the defendant committed the offense on December 18, 1992, further divided paragraph (a) into four subsections numbered (1) through (4). Paragraph (b) did not have subsections, but rather specified that a violation of this statute was a Class C felony and mandated a consecutive sentence if the offense was committed against a corrections employee. The reference on the information to “53a-167c(1)” thus was an apparent scrivener’s error as subsection (1) could only have been intended to reflect a violation of “53a-167c(a)(1).”

THE DEFENDANT: Guilty.

THE CLERK: How do you plead to a charge – a second charge of assault on a peace officer, a violation of 53a-167c(1), guilty or not guilty?

THE DEFENDANT: Guilty.

GA 65.

Thereafter the prosecutor proffered the following facts to support the guilty plea:

[THE PROSECUTOR]: Your Honor, this occurred in the town of Montville, the Radgowski Correctional Center, on December 18<sup>th</sup>, 1992. At that time around 6:30 p.m. a fight that this defendant had been involved in broke out at the correctional facility.

Correctional officers responded to the incident, and while they were responding this individual assaulted by kicking and punching two correctional officers.

The correctional officers at the time were in uniform during the performance of their duties and were trying to break up the fight.

As I said the assault took place on two separate correctional officers at that time.

GA 65-66. After canvassing the defendant on his various constitutional and statutory rights, the court then inquired:

THE COURT: Okay. All right. You admit that you did assault the guards here?

THE DEFENDANT: Yes.

GA 70. The defendant was sentenced to seven years on each count to run concurrently with each other. GA 71.

### **B. Governing law and standard of review**

The ACCA authorizes an enhanced penalty for an individual who violates § 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). The ACCA defines a “violent felony” as follows:

any crime punishable by imprisonment for a term exceeding one year . . . that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

18 U.S.C. § 924(e)(2)(B).

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

The general categorical inquiry affords a limited exception. In evaluating a conviction under a broad statute that appears to criminalize both predicate conduct under § 924(e) and non-predicate conduct, courts may take some steps to determine whether the original court was “actually required” to find the requisite elements of the predicate offense in returning a conviction. *Taylor*, 495 U.S. at 602. This modified categorical approach authorizes the district court, following a jury trial, to look to the “indictment or information and jury instructions” to determine if “the jury necessarily had to find” the defendant guilty of the predicate conduct. *Id.* Similarly, following a case tried without a jury, the sentencing court may scrutinize the “bench-trial judge’s formal rulings of law and findings of fact.” *Shepard*, 544 U.S. at 20. In cases which are resolved short of trial, the sentencing court may rely on documents such as “the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was

confirmed by the defendant, or to some comparable judicial record of this information.” *Id.* at 26. In addition, following any type of conviction, the sentencing court can look to case law interpreting the statute to determine if courts have “considerably narrowed [the statute’s] application” to criminalize predicate conduct exclusively. *James v. United States*, 550 U.S. 192, 202 (2007). “The determinative issue is whether the judicial record of the state conviction established with ‘certainty’ that the guilty plea ‘necessarily admitted elements of the [predicate] offense.’” *United States v. Savage*, 542 F.3d 959, 966 (2d Cir. 2008) (quoting *Shepard*, 544 U.S. at 25-26).

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 v. United States*, 553 U.S. 137, 143 (2008) (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.” *United States v. Gray*, 535 F.3d 128, 131 (2d Cir. 2008) (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*, 553 U.S. at 144-45. 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*, 553 U.S. at 145. 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 predicate offense 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)), *cert. denied*, 129 S. Ct. 1316 (2009). A district court’s factual findings as to the nature of a qualifying offense is reviewed under a “clear error standard.” *United States v. Houman*, 234 F.3d 825, 827 (2d Cir. 2000) (per curiam). As the First Circuit summarized, “[w]e review the determination that a defendant is subject to an ACCA sentencing enhancement *de novo*, but we review the district court’s factual findings underlying the determination for clear error.” *United States v. Bennett*, 469 F.3d 46, 49 (1st Cir. 2006) (internal citations omitted); *see also United States v. Rivers*, 595 F.3d 558, 560-61 (4th Cir. 2010) (lower court’s factual findings regarding ACCA qualification reviewed for clear error).

### C. Discussion

The district court correctly determined that Brown's conviction for "assault on a peace officer" was a violent felony under the residual clause of the ACCA.<sup>5</sup> The

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<sup>5</sup> While the offense of conviction was described as "assault on a peace officer," the factual basis, as confirmed by the defendant during the plea colloquy, established that the assault was against a corrections officer. The statute, as codified at the time of defendant's arrest, listed peace officers, firemen and department of corrections employees as the classes protected by the statute. Connecticut Public Act 90-250 amended Conn. Gen. Stat. § 53a-167c(a) to include "employee of the department of corrections" as a member of the protected class, effective June 8, 1990. The list of protected classes have been significantly expanded since the defendant's conviction, and now include, *inter alia*, employees of an emergency medical service organization, an emergency room nurse or physician, a member or employee of the Board of Pardon and Paroles, probation officers, and certain employees of the Judicial Branch, Department of Children and Families, and Department of Motor Vehicles. The statute has also been amended to include a new subsection (5) under paragraph (a) which criminalizes the act of hurling or throwing "any bodily fluid including, but not limited to, urine, feces, blood or saliva[.]" Conn. Gen. Stat. § 53a-167c (2009). For the reasons more particularly described herein, an assault on a corrections officer under subsection (a)(1) of the statute is categorically a "violent felony" under the residual clause. Because the statute has so significantly expanded in the scope of persons protected, and presently incorporates a range of conduct not charged to the defendant, it is not necessary to address whether a violation 53a-167c(a) as a whole is categorically a "violent felony." As  
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defendant challenges the district court's finding that his assault conviction is "roughly similar" to the enumerated offenses of burglary, arson, extortion or the use of explosives, in that the enumerated offenses are property crimes and the defendant's felony assault conviction is not. Def. Br. at 19.<sup>6</sup> The defendant alternatively argues that a violation of Conn. Gen. Stat. § 53a-167c is not "roughly similar" in the "degree of risk" to the enumerated offenses in that the statute only requires "physical injury," not

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<sup>5</sup> (...continued)

the statute has been construed by this Court as divisible, *see Canada v. Gonzales*, 448 F.3d 560, 568 (2d Cir. 2006), the government submits that the only issue to be decided here is whether an assault on a corrections officer under subsection (a)(1) is a "violent felony." *See also United States v. Johnson*, 616 F.3d 85, 92 (2d Cir. 2010) ("[W]hen a statute encompasses both violent and non-violent felonies . . . we make a limited inquiry into which part of the statute the defendant was convicted of violating.") (quotations omitted).

<sup>6</sup> The defendant also argued that a conviction under Conn. Gen. Stat. § 53a-167c(a) does not have as "an element the use, attempted use, or threatened use of physical force against the person of another" under 18 U.S.C. § 924(e)(2)(B)(i). The government did not argue at sentencing, nor does it here, that a violation of this statute qualified as a violent felony under subsection (i) of § 924(e)(2)(B). A 45. Nor did the district court make a finding that the statute of conviction qualified as a violent felony under subsection (i). Rather, the district court found that the defendant's conviction for assaulting a corrections officer was a violent felony under the residual clause because it "does present a risk of a serious potential risk of injury to another . . . [and] requires purposeful action." A 47-50.

“serious physical injury,” and does not require specific intent to injure. Def. Br. at 22-23. The defendant further argues that the seriousness of the defendant’s particular conduct is lessened because it happened inside a correctional facility during a riot and was not “egregious violent behavior.” *Id.* at 23-24.

The defendant’s arguments are unavailing. *First*, a conviction for assaulting a corrections officer under subsection (a)(1), involves purposeful, violent, and aggressive conduct in that it requires specific intent to prevent a corrections officer from performing his duties and the actual infliction of physical injury. *Second*, the residual clause does not mandate that the prior conviction be an offense against property, an argument already rejected by this Court in *Daye, supra*, and more recently in *Johnson*, 616 F.3d 85 (holding that a conviction under Connecticut’s “rioting in a correctional institution” is categorically a violent felony). *Third*, the defendant misapplies the legal standard in determining whether the offense is similar in degree of risk as the enumerated offenses. The appropriate standard is whether an assault on a corrections officer “presents a serious potential risk of physical injury to another,” a standard easily met here because the statute requires *actual* injury.

As explained more fully below, the defendant’s conviction for assault on a corrections officer qualifies as a “violent felony” because it is both similar “in kind” and “in degree of risk posed” to the enumerated offenses.

**1. A conviction for assault on a corrections officer is similar “in kind” to the violent felonies enumerated in the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii).**

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].” 553 U.S. at 143 (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 146. *Begay* held that “[t]he listed crimes all typically involve purposeful, ‘violent,’ and ‘aggressive’ conduct.” *Id.* at 144-45. Such conduct increases the likelihood that “an offender, later possessing a gun, will use that gun deliberately to harm a victim.” *Id.* at 145. “Crimes committed in such a purposeful, violent, and aggressive manner are ‘potentially more dangerous when firearms are involved.’ And such crimes are ‘characteristic of the armed career criminal, the eponym of the statute.’” *Id.* (internal citations omitted). The *Begay* Court contrasted the DUI conviction at issue from crimes involving purposeful or deliberate conduct by noting that the DUI conviction did not require a finding of criminal intent, but may be committed through negligence, accident or recklessness. *Id.* at 145.

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 234 (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*, 553 U.S. at 151 (Scalia, J., concurring)). “Burglary, for instance, can be described as purposeful but not, at least in most instances, as purposefully violent or necessarily aggressive.” *United States v. Williams*, 529 F.3d 1, 7 n.7 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 1580 (2009). 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.” *Daye*, 571 F.3d at 234.

In December 1992, when the defendant was arrested and charged with assault on a peace officer, Conn. Gen. Stat. § 53a-167c(a) provided in relevant part:

(a) A person is guilty of assault of a peace officer, a fireman, or an employee of the department of correction when, with intent to prevent a reasonably identifiable peace officer, fireman, as defined in section 53a-3, or employee of the department of correction from performing his duty, and while such peace officer, fireman or employee is acting in the performance of his duties, (1) he causes physical

injury to such peace officer, fireman or employee, or (2) he throws or hurls, or causes to be thrown or hurled, any rock, bottle, can or other article, object or missile of any kind capable of causing physical harm, damage or injury, at such peace officer, fireman or employee, or (3) he uses or causes to be used any mace, tear gas or any like or similar deleterious agent against such peace officer, fireman or employee, or (4) he throws, hurls, or causes to be thrown or hurled, any paint, dye or other like or similar staining, discoloring or coloring agent or any type of offensive or noxious liquid, agent or substance at such peace officer, fireman or employee.

Conn. Gen. Stat. § 53a-167c(a) (1990).

Connecticut courts have identified the essential elements of this offense as requiring proof of “(1) intent to prevent a reasonably identifiable peace officer [including a corrections officer] from performing his duties; (2) the infliction of physical injury to the officer; and (3) the victim must be a peace [or corrections] officer.” *State v. Raymond*, 621 A.2d 755, 758 n.4 (Conn. App. Ct. 1993); *State v. Flynn*, 539 A.2d 1005, 1012 (Conn. App. Ct. 1988) (conviction pursuant to Conn. Gen. Stat. § 53a-167c(a)(1) “requires proof of (1) intent to prevent (2) a reasonably identifiable officer (3) from performing his duty (4) by causing physical injury”).

The offense of assaulting a corrections officer is similar in kind to the ACCA’s enumerated offenses. It is

a purposeful, violent and aggressive offense because the offense requires not only specific intent to prevent an officer from performing his or her duties but also the actual infliction of physical injury. A violation of §53a-167c(a)(1) not only “typically” involves purposeful conduct, but also, because it requires specific intent to prevent an officer from performing his responsibilities, a conviction for this offense necessarily involves purposeful conduct. Unlike the strict liability DUI conviction at issue in *Begay*, and unlike the Reckless Endangerment conviction at issue in *Gray* – on which the defendant relies – a violation of Conn. Gen. Stat. § 53a-167c(a)(1) requires a specific intent – the deliberate intent to prevent a peace officer from performing her duties. *See* Conn. Gen. Stat. § 53a-167c(a)(1); *Raymond*, 621 A.2d at 758 n.4; *Canada*, 448 F.3d at 565 (“Under Connecticut law, assault under C.G.S. § 53a-167c(a)(1) is a specific intent crime.”).

Assaulting a corrections officer is also typically a violent and aggressive crime. Contrary to the defendant’s claim, the government need not show that a violation of § 53a-167c(a) is necessarily violent in every case or, in the alternative, that the portion of the offense committed by Brown 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. The inquiry is whether the conduct is intentional and involves aggressive, violent conduct. As this Court has stated:

*Begay* places a strong emphasis on intentional-purposeful-conduct as a prerequisite for a crime to

be considered similar in kind to the listed crimes. The Court was concerned that, without this requirement, the statute would apply to a large number of crimes which pose a great degree of risk to others but are far removed from the deliberate kind of behavior associated with violent criminal use of firearms.

*Gray*, 535 F.3d at 131-32 (internal quotations omitted).

The conduct involved in an offense under Conn. Gen. Stat. § 53a-167c(a)(1) is typically intentional, violent and aggressive. In *Canada*, this Court noted that to be convicted of assaulting a “peace officer” the offender “must injure an officer while *intentionally* preventing the officer from performing his or her official duties.” 448 F.3d at 568. Those duties for a law enforcement officer include apprehending and arresting suspected criminals, conducting search and seizures, and intervening in personal disputes. *Id.* Like peace officers, corrections officers perform “duties that routinely involve physical intervention.” *See id.* at 568-69 (citing cases). A corrections officer also conducts searches and seizures and intervenes in personal disputes, and performs these duties in a uniquely dangerous location, a prison facility. *See Johnson*, 616 F.3d at 94 (“[P]risons are like powder kegs, where even the slightest disturbance can have explosive consequences”). At Brown’s sentencing, the district court noted that, “[a]n assault on a corrections officer within the prison system goes to the heart of a sentencing process.” A 49. The district court also observed that “[s]uch an assault can lead to further harm of the other correctional

personnel and foster a very dangerous situation that can lead to the loss of life and severe property damage.” A 49-50.

Thus, the offense – inflicting a physical injury in an effort to prevent a corrections officer from performing his or her public duties – is exactly the kind of risky, deliberate, violent and aggressive conduct contemplated by *Begay*. A prior offense of this sort is also precisely the kind of criminal history that indicates an increased likelihood of future dangerous criminal conduct, and is therefore properly counted as a violent felony. *See Begay*, 553 U.S. at 146. The purposeful interference with corrections officers while causing injury is not only a violent act standing alone, but also is likely to result in an escalating situation with serious potential for violent confrontation. *Cf. Canada*, 448 F.3d at 571 (“[I]t is manifestly clear that intentionally preventing a police officer from carrying out his or her duties, particularly where injury results, always presents a substantial risk that the defendant may intentionally use force in committing the crime.”); *see also United States v. Alexander*, 543 F.3d 819, 823-24 (6th Cir. 2008) (conviction for assaulting, battering, wounding, resisting, obstructing, opposing or endangering one known to be performing his duties and causing bodily injury “unambiguously defines a crime of violence because the offense involves causing an actual physical injury”), *cert. denied*, 129 S. Ct. 2175 (2009).

The defendant’s argument that the residual clause incorporates only property crimes has been soundly rejected by this Court. In *Daye*, the Court noted that *Begay*

did not rely on “the distinction between property crimes and crimes against the person.” 571 F.3d at 236. Instead, “the Court focused upon whether the crime at issue typically involves purposeful, aggressive, and violent conduct.” *Id.* “Although clause (i) of § 924(e)(2)(B) requires a crime to ‘have as an element the use, attempted use, or threatened use of physical force against the person of another,’ it encompasses not only pure crimes against the person, but also offenses such as robbery that, while typically considered to be property crimes, require at least the threatened use of force against another.” *Id.* (quoting statute). *Daye* noted further that the enumerated crimes listed in clause (ii) are not necessarily limited to property crimes, as offenses involving the use of explosives “do not necessarily require use against property rather than use against a person.” *Id.* (quoting *United States v. West*, 550 F.3d 952, 967 (10th Cir. 2008)). *Daye* concluded “that the ACCA’s residual clause is not limited only to property crimes, but rather encompasses both property crimes and crimes against the person that fulfill the requirements articulated in *Begay*.” *Id.*

Here, as set forth above, an examination of the elements of the defendant’s offense – assault on a corrections officer – easily fulfills the *Begay* requirements.

**2. A conviction for assault on a corrections officer is similar “in degree of risk posed” to the violent felonies enumerated in the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii).**

Assaulting a corrections officer is similar to the enumerated offenses “in the degree of risk posed only if ‘the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious *potential risk* of injury to another.’” *Johnson*, 616 F.3d at 93 (quoting *James*, 550 U.S. at 208) (emphasis in original); *see also Gray*, 535 F.3d at 131. “[T]he ACCA’s enumerated offenses all ‘create significant risks of bodily injury or *confrontation that might result in bodily injury*.’” *Johnson*, 616 F.3d at 94 (quoting *James*, 550 U.S. at 199).

This standard is readily satisfied by a violation of Conn. Gen. Stat. § 53a-167c(a)(1). Indeed, such an offense must necessarily involve more than a serious *risk* of injury because it requires *actual* infliction of an injury as an element of the offense. *See* Conn. Gen. Stat. § 53a-167c(a)(1); *Raymond*, 621 A.2d at 758 n.4.

The risk of injury is heightened further in circumstances involving a corrections officer. “‘Prisons are inherently dangerous institutions,’ *Lewis v. Casey*, 518 U.S. 343, 391 (1996), where prison guards are greatly outnumbered by inmates – many of whom have a history of violence or of aggressive tendencies.” *Johnson*, 616 F.3d at 94. The defendant’s argument that his offense is less “egregious” because it occurred during a riot in a

correctional institution is therefore misguided. Indeed, assaulting a corrections officer during a riot *increases* the threat of violence and danger. *See id.* (noting that in a prison “the slightest disturbance can have explosive consequences”). Here, the defendant intentionally prevented two corrections officers from performing their duties by “kicking and punching” them. GA 66. As duly noted in *Johnson*, “[t]he risk of physical injury arises not only from this confrontation, but also from the fact that prisons are like powder kegs[.]” 616 F.3d at 94.

The defendant cites *Gray* in support of his argument that since a violation of § 53a-167c requires only “physical injury” rather than “serious physical injury” the degree of risk is not similar in degree. Def. Br. at 22. His reliance on *Gray* is misplaced, however. In *Gray*, this Court concluded that New York’s reckless endangerment statute did not satisfy the “similar in kind” component of the *Begay* test. This Court in *Gray* disqualified reckless endangerment because it did not require purposeful, violent and aggressive conduct, and therefore did not decide if this statute was similar in the degree of risk posed. 535 F.3d at 132 (“Despite coming close to crossing the threshold into purposeful conduct, the criminal acts defined by the reckless endangerment statute are not intentional[.]”). Unlike New York’s reckless endangerment statute, assault on a corrections officer under § 53a-167c(a) is a specific intent crime. *See Canada*, 448 F.3d at 565 (“Under Connecticut law, assault under C.G.S. § 53a-167c(a)(1) is a specific intent crime.”) Moreover, § 924(e)(2)(B)(ii) does not explicitly or implicitly require a risk of “serious” physical injury.

Just as this Court had “no trouble concluding that rioting at a correctional institution ‘presents a serious potential risk of physical injury to another’” there should be little difficulty in reaching the same conclusion in regards to assaulting a corrections officer. *See Johnson*, 616 F.3d at 94. An assault on a corrections officer with the specific intent to prevent the performance of their duties coupled with the infliction of actual injury amply satisfies *Begay*’s “degree of risk” prong.

Because the defendant’s conviction for assault on a corrections officer is both similar “in kind as well as in degree of risk posed” to the examples listed in the residual clause, *Begay*, 553 U.S. at 143, that conviction qualifies as a violent felony under the ACCA.

**Conclusion**

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

Dated: October 21, 2010

Respectfully submitted,

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UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

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**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 9,715 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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## **ADDENDUM**

**18 U.S.C. § 922(g)(1)**

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

(1) who has been 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 from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not 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 one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

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

- (a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.
- (b) The offense level for an armed career criminal is the greatest of:
  - (1) the offense level applicable from Chapters Two and Three; or
  - (2) the offense level from § 4B1.1 (Career Offender) if applicable; or
  - (3)(A) **34**, if the defendant used or possessed the firearm or ammunition in connection with . . . a crime of violence, as defined in § 4B1.2(a)...; or
  - (3)(B) **33**, otherwise.
- (c) The criminal history category of an armed career criminal is the greatest of:
  - (1) the criminal history category from Chapter Four, Part A (Criminal History), or § 4B1.1 (Career Offender) if applicable; or
  - (2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in

§ 4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. §5845(a); or

(3) Category IV.

\* \* \*

**Conn. Gen. Stat. § 53a-167c(a) (1990) Assault of public safety, emergency medical or public transit personnel: Class C. felony.**

(a) A person is guilty of assault of a peace officer, a fireman, or an employee of the department of correction when, with intent to prevent a reasonably identifiable peace officer, fireman, as defined in section 53a-3, or employee of the department of correction from performing his duty, and while such peace officer, fireman or employee is acting in the performance of his duties, (1) he causes physical injury to such peace officer, fireman or employee, or (2) he throws or hurls, or causes to be thrown or hurled, any rock, bottle, can or other article, object or missile of any kind capable of causing physical harm, damage or injury, at such peace officer, fireman or employee, or (3) he uses or causes to be used any mace, tear gas or any like or similar deleterious agent against such peace officer, fireman or employee, or (4) he throws, hurls, or causes to be thrown or hurled, any paint, dye or other like or similar staining, discoloring or coloring agent or any type of offensive or noxious liquid, agent or substance at such peace officer, fireman or employee.

(b) Assault on a peace officer, a fireman, or an employee of the department of correction is a class C felony. If any person who is confined in an institution or facility of the department of correction is sentenced to a term of imprisonment for assault of an employee of the department of correction under this section, such term shall run consecutively to the term for which the person was serving at the time of the assault.