

12-3131

To Be Argued By:
ROBERT M. SPECTOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-3131

UNITED STATES OF AMERICA,
Appellee,

-vs-

CARL HARVEY,
Defendant,

KEVIN MILLS,
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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Statement of Jurisdiction

The district court (Vanessa L. Bryant, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on August 2, 2012. Appendix (“A”)20-A21. On August 2, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A39. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

**Statement of the Issues
Presented for Review**

- I. In a felon-in-possession case, did the district court plainly err in failing, *sua sponte*, to enter a judgment of acquittal in the absence of expert testimony disproving the speculative defense theory that the loaded shotgun found between the defendant's legs after a high-speed vehicle pursuit and crash was merely propelled there coincidentally by the force of the crash?

- II. Did the district court plainly err in imposing the Armed Career Criminal Act's mandatory minimum term of 180 months' incarceration where defense counsel expressly conceded that the defendant had the requisite three qualifying convictions for violent felonies and/or serious drug offenses, and court transcripts established that the defendant had actually sustained two felony convictions for sale of narcotics, two felony convictions for assault on a public safety official and one felony conviction for escape from custody?

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Appellee,

-vs-

KEVIN MILLS,
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In the early-morning hours of March 27, 2011, the defendant, Kevin Mills, was the front-seat passenger in a speeding vehicle. The police tried to pull over the vehicle, but the driver engaged them in a high-speed chase that ended when he crashed into a guardrail at the approach to the Stevenson Dam in Monroe, Connecticut. When officers providing medical aid reached Mills, who was unconscious from the

impact, they discovered a 12-gauge Mossberg shotgun positioned upright between his knees. After a three-day trial, a jury found Mills guilty of being a previously convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

At sentencing, the district court considered, among other things, Mills's state court criminal record, which included two felony convictions for the sale of narcotics, two felony convictions for assaulting police officers, and a felony conviction for a custodial courthouse escape. Based on his record and his count of conviction, Mills faced a mandatory term of 180 months' incarceration, under 18 U.S.C. § 924(e), and a guideline range of 235-293 months' incarceration, under U.S.S.G. § 4B1.4. Defense counsel expressly conceded orally and in writing that Mills was an Armed Career Criminal, that he faced a mandatory 180-month sentence and that the guideline incarceration range was 235-293 months. He asked for a substantial downward departure to 180 months' incarceration, and the government joined in that request. The district court agreed with the parties and the Pre-Sentence Report that Mills was an Armed Career Criminal and imposed the 180-month mandatory term.

On appeal, Mills raises two arguments that were not preserved below. First, having never filed a motion for judgment of acquittal, he now

argues that there was insufficient evidence to prove that he knowingly possessed the charged firearm because the government failed to employ a scientific expert to testify about the possibility that the seized firearm had moved around inside the vehicle as a result of the crash. Second, contrary to his concession before the district court, Mills now objects to the imposition of the 180-month term of incarceration and argues that he was not an Armed Career Criminal.

For the reasons discussed below, these claims are without merit, and the judgment of conviction should be affirmed.

Statement of the Case

On July 26, 2011, a federal grand jury returned an indictment charging Mills with one count of the Unlawful Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). A17-A19. On January 12, 2012, after a three-day trial, a jury convicted Mills of the charge. Mills never filed a motion for judgment of acquittal either before or after the verdict.

On August 2, 2012, the district court (Vanessa L. Bryant, J.) found that Mills was an Armed Career Criminal under 18 U.S.C. § 924(e) and sentenced him to the mandatory minimum incarceration term of 180 months, along with 60-months of supervised release. A20-A23. On August 2, 2012, immediately following sentencing,

Mills filed a timely notice of appeal. A39. Mills is currently in federal custody serving his sentence.

Statement of Facts

I. The offense conduct¹

In the early-morning hours of March 27, 2011, Officer Ryan Macuirzynski, of the Monroe Police Department, was running “stationary radar” on the eastbound side of Route 34 in Monroe, Connecticut. Government’s Appendix (“GA”)20, GA22. He was approximately one mile east of the Stevenson Dam, linking Monroe to the town of Oxford. GA20-GA21. The posted speed limit at his position was 40 miles per hour. GA26.

At approximately four a.m., Macuirzynski observed a Ford Taurus wagon travelling toward him at sixty-one miles per hour. GA27-GA28. From his elevated vantage, and with his patrol car’s high-beams on, he had a clear view of the passenger-side of the Taurus. GA26-GA27. As it passed, he clearly observed four black males in

¹ At trial, the government’s evidence included the trial testimony of Officers Ryan Macuirzynski and David Geismar, and Sergeant Peter Howard, all of the Monroe Police Department. The government also admitted a video recording from Geismar’s dash-mounted camera, an audio recording of the police officers’ dispatch communications, photographs of the crash scene, and the firearm itself.

that car, GA27, each of whom actually turned and made eye-contact with him as the speeding Taurus attempted to slow while passing Macuirzynski's patrol car. GA51, GA55. Accordingly, Macuirzynski saw that Mills, later identified as the front-seat passenger, was initially awake and alert. GA55-GA56.

Using his lights and sirens, Macuirzynski signaled the Taurus to pull over. GA29. When the Taurus came to a stop, Macuirzynski pulled behind it and shined his car-mounted spotlight into the Taurus. GA29. When he did so, he could again see all four individuals moving inside the car GA30. Their movements raised his suspicions. GA30. Thus, without getting out of his patrol car, Macuirzynski called David Geismar, a fellow patrol officer who was working with Macuirzynski that night. GA29. Geismar, who was parked across the street from Macuirzynski's initial position, confirmed that he was on his way. GA29-30. While Macuirzynski waited, he again "observed . . . the driver and all three passengers moving around inside the vehicle." GA31.

Responding to Macuirzynski's call, Geismar pulled his vehicle behind and just to the right of Macuirzynski's patrol car, and then Geismar also activated his car's spotlight and directed it into the Taurus. GA74. Like Macuirzynski, Geismar too observed "a lot of movement in the vehicle," and confirmed that all four of the vehicle's occu-

pants were shifting around inside the car. GA74.

Before either of the officers could get out of their vehicles, the Taurus sped off, travelling eastbound in the direction of the Stevenson Dam. GA74-GA75. As shown in video-footage from Geismar's dash-mounted camera, the Taurus reached speeds in excess of 70 miles per hour and led the two officers on a high-speed chase for approximately one mile. GA75, GA89-GA91. At the approach to the Stevenson Dam, the Taurus did not slow and crashed into a guardrail when it failed to negotiate a sharp left turn. GA75-GA76.

As captured on video, Macuirzynski and Geismar's patrol cars come to a stop at a safe distance from the crashed Taurus. GA91. The two officers then called for medical assistance and approached to secure the scene. GA40, GA77. Other officers arrived within minutes to assist. GA80.

After Geismar removed the driver from the Taurus, he turned his attention to Mills, the front passenger, who was unconscious, GA79, and slumped forward against the dash, GA82, GA125, where the airbag had deployed, GA44. Geismar explained, "Once I removed the driver from the vehicle, I observed the occupant in the passenger, front seat, I observed . . . the shotgun in between his legs." GA81. After seeing the shotgun, Geismar alerted his fellow officers that

there was a “shotgun in between the passenger’s legs,” and attempted to remove it but could not. GA81-GA82. He testified,

Q: And how did you attempt to remove it?

A: Physically, with my hands.

Q: And why were you unable to?

A: The way the shotgun was positioned, the butt of the shotgun was on the right side of the occupant, and the muzzle was down towards the ground, and this – from the impact, the seat of the vehicle – the seat inside the vehicle was pushed all the way towards to dashboard, so there was really no way to maneuver the shotgun. . . . The grip of the shotgun was approximately in between his right hip and thigh area, with the muzzle of the shotgun facing the floorboard, in between the party’s two legs and the dashboard of the vehicle.

GA82, GA85.

Sergeant Peter Howard arrived on the scene and went to the front passenger area, where he began to render medical assistance to Mills. GA126-GA27. From Geismar, Howard learned that there was a gun between Mills’s legs, which Geismar then illuminated with his flashlight. GA126. From his position, Howard was able to

remove the gun, which he described as approximately two feet long. GA127. Howard also confirmed that the shotgun was between Mills's legs, with the barrel pointed downward toward the floor. GA46, GA85, GA127.²

Although Mills called no witnesses and presented no evidence, throughout cross-examination and during closing argument, defense counsel posited that the force of the crash propelled the shotgun to its ultimate position between Mills's knees. GA52, GA54-GA55. Indeed, in cross-examining both Macuirzynski and Geismar, defense counsel focused upon the violence of the crash, noting the extent of the occupants' injuries, and the fact that at least one of the backseat passengers may have been ejected from the car by the force of the collision. GA63-GA64.

In highlighting the violence of the crash, the defense focused particularly on Mills's injuries, asking officer Macuirzynski whether Mills could

² Joseph Bartozzi, a senior executive with firearms manufacturer O.F. Mossberg, examined the firearm and confirmed that it was a Mossberg firearm, but that it had been highly modified. GA14-GA17. Bartozzi also confirmed the shotgun had travelled in interstate commerce, having been assembled in Eagle Pass, Texas and shipped to a retailer in Arkansas before being recovered in Connecticut. GA25-GA29. Mills stipulated that, prior to March 27, 2011, he had sustained at least one felony conviction. GA15.

have struck the windshield at the time of the crash:

Q: He could have hit the windshield, right?

A: Possibly.

Q: He could have flown forward and back, right, and banged up his face

A: Yes, sir.

Q: And so that's a bad accident, right?

A: Yes, sir.

GA64-GA65.

With Mills's injuries as evidence, defense counsel asked Macuirzynski to concede the general principle that occupants and cargo can be thrown about in crash:

Q: And in a bad accident things fly around, right?

A: They do.

Q: They do.

GA65. Having established that the crash was violent enough to propel occupants and cargo, defense counsel asked both Macuirzynski and Geismar to concede that the equipment in their own patrol cars was bolted down specifically to prevent those objects from becoming lethal missiles in the event of a crash, and both officers agreed. GA65-GA66, GA118. He then asked

about a litany of disparate objects that could be propelled in a crash, as follows:

Q: And that's why we put babies in car seats, correct?

A: Yes, sir.

Q: Because when people hit things, things fly?

A: Yes, sir.

GA65.

Q: [I]f there was something laying on the back seat of your car, that could come flying forward, too?

A: Yes.

...

Q: Human beings fly around inside of cars, correct?

A: Yes.

Q: Human being, you would agree, are pretty big objects, right?

A: Uh-huh.

...

Q: And if there was an umbrella in the back of the car and he got into an accident, that umbrella could fly anywhere, right? Crowbars,

A: Yeah.

Q: [A]nything laying around in that car will go flying around in that car if you hit something at 60 miles an hour, correct?

A: Yes.

GA119-GA120.

In summation, defense counsel appealed, as he had throughout cross-examination, to jurors' every-day common experience concerning car crashes. GA184. In so doing, he implied the practical possibility that, like any loose object, the shotgun could have been launched from elsewhere in the car:

[The government] *asks you to use your common sense. I think that's all we got. That's all we got in this life, is to use our common sense*, and I think when I said to the officer the first time, and I'm – maybe it occurred to you, maybe it didn't, I don't know, but when something – if you're driving down the road and a car stops in front of you and you hit the brake, everything moves forward. Even at a very, very low speed.

I mean, how many times do we have our books on the seat next to us, or our pocketbooks, or whatever, and you hit the brake and everything foes flying, and you got the coffee cup, you're soaking wet. I mean, *that's common experience*.

GA184 (emphasis added). Underscoring the “common sense” notion that objects “fly around” during crashes, defense counsel mocked the idea that science or expert opinion could refute such a straight-forward principle, stating: “. . . I didn’t hear anybody come in here that was a physicist that could tell us that things – objects don’t fly around in cars.” GA187. Simply put, the defense implored the jury to draw from its common experience in concluding that the shotgun had not been between Mills’s legs before the crash. GA189.

The jury returned a verdict of guilty on the felon-in-possession charge, and Mills never filed a motion for a judgment of acquittal, either before or after the verdict. GA280.

II. Sentencing

On February 22, 2012, Mills filed a handwritten *pro se* letter claiming that his attorney had erroneously determined that he was an Armed Career Criminal (“ACC”) and, therefore, subject to a mandatory minimum incarceration term of 180 months. GA366. He claimed that, because some of his prior offenses were not separated by an intervening arrest, they should not be counted separately under the Sentencing Guidelines. GA366-GA367. He maintained that his guideline incarceration range should be 33-41 months. GA369.

The Pre-Sentence Report (“PSR”), which was first disclosed on February 23, 2012, next disclosed on March 16, 2012 and ultimately finalized on August 2, 2012, concluded that Mills had at least three prior convictions for violent felonies and/or serious drug offenses and, therefore, was an ACC, under 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4. PSR ¶¶ 26, 58. As a result, it concluded that he faced a statutory mandatory minimum incarceration term of 180 months, and a guideline incarceration range of 235-293 months. PSR ¶¶ 58-59. In setting forth the factual basis for the prior state court convictions, the PSR expressly referenced court documents, including the June 1, 2005 plea transcript which outlines Mills’s guilty pleas to five separate ACC predicate offenses: two separate drug sales, two separate assaults on police officers, and one escape from custody. PSR ¶¶ 31-33; GA344-GA346.³

³ Because Mills conceded his ACC status at sentencing, the government did not seek to admit as exhibits the certified copies of convictions and the state court transcripts cited in the PSR. To address his appellate challenge, the government has moved to supplement the record with those documents and has included them in the Government’s Appendix.

For all five of these predicate convictions, Mills pleaded guilty without reliance on the *Alford*⁴ doctrine and expressly admitted to the factual basis articulated during the guilty plea proceeding. The first 2005 state conviction for sale of narcotics involved his February 10, 2005 possession of twenty-one bags of crack cocaine and his participation in various hand-to-hand drug transactions. PSR ¶ 31; GA344. The second 2005 state conviction for sale of narcotics involved his March 2, 2005 possession of seven packets of crack cocaine and \$102 in drug currency. PSR ¶32; GA345. His first 2005 state assault conviction stemmed from the March 2, 2005 arrest, during which he broke free from his handcuffs and fled from the police, elbowing one uniformed officer in the face. PSR ¶ 32; GA345. The second 2005 state assault conviction likewise stemmed from that same March 2 arrest; after removing one of his handcuffs and elbowing one of the pursuing officers in the face, Mills was able to push away from the officers and escape, during which he struck a female officer in the face with a closed fist six times. PSR ¶32; GA345. And the state felony conviction for custodial escape stemmed from an incident which occurred on March 3, 2005, when Mills concealed his shackles with a jacket and attempted to flee from the courthouse during a court appearance. PSR ¶33; GA345-GA346.

⁴ *North Carolina v. Alford*, 400 U.S. 25 (1970).

On July 24, 2012, Mills, through defense counsel, filed his memorandum in aid of sentencing expressly and unequivocally conceding his status as an ACC and the applicability of its 180-month minimum prison term. GA386. In particular, he stated, “As *correctly* set forth in the presentence report, Mr. Mills was convicted after trial as being an Armed Career Criminal which *compels* a mandatory minimum period of incarceration of 180 months of imprisonment.” GA386 (emphasis added).⁵

At sentencing on August 2, 2012,⁶ the government addressed whether Mills was an ACC

⁵ The only objection to any ACC calculation was set forth in footnote 3 of the memorandum, advancing the view that Mills’s two assault convictions should be deemed a single offense. In that footnote, however, there is an implicit acknowledgment that the objection would be entirely academic because Mills had two qualifying convictions for sale of narcotics, one qualifying conviction for escape from custody and at least one qualifying conviction for assault on a public safety officer, so that the ACC penalties would be triggered even if the district court agreed that the two assault convictions counted as only one ACC-qualifying offense. GA391.

⁶ At the start of the sentencing hearing, the government was excused while the district court inquired into a potential breakdown in the attorney-client relationship between Mills and defense counsel. GA287. That portion of the sentencing hearing remains sealed. The government does not know the

and reviewed his five qualifying convictions. Although defense counsel first stated that “Mr. Mills has objected to the ACCA determination,” GA288, he never clarified the nature of that objection, made any argument against application of the § 924(e) penalties, or suggested that the paragraphs in the PSR detailing his ACC qualifiers were inaccurate. Indeed, as he did in his sentencing memorandum, defense counsel specifically acknowledged that Mills qualified as an ACC, stating, “He meets the [ACC] definition. As I said to Your Honor before, I wish he didn’t but he does and here we are, and he has to face the consequences of what the law is.” GA309. And later, defense counsel repeated, “He has the predicates, and here we are facing a very substantial sentence.” GA311.

At the start of the sentencing hearing, the district court adopted the factual findings contained in the PSR. GA292. The government then addressed the court, reiterated its argument as to why the defendant was an ACC, and maintained that a sentence of 180 months,

substance of those discussions and does not have a copy of that transcript. Mills cites portions of the sealed transcript in his brief to suggest that he preserved the ACC objection during the *ex parte* hearing, but did not include that transcript in his Appendix. At the conclusion of the sealed, *ex parte* hearing, Mills and defense counsel withdrew their motions for replacement counsel. GA287.

which was significantly below the 235-293 month guideline range, was sufficient. GA293-GA306. The government responded to the only ACC objection, which Mills had raised in his February 2012 *pro se* letter. It argued that the existence of an intervening arrest was entirely irrelevant to the ACC determination, which depended instead on the simple question of whether each crime arose from a separate criminal incident. GA294-GA295. Relying on *Brown v. United States*, 636 F.3d 674 (2d Cir. 2011), the government explained that “offenses actually occurring on the same day may be deemed arising out of separate incidents, simply faced on the fact that they . . . involve separate victims, or a separate offense conduct, or that . . . some amount of time had passed between the first and the second incident, or the first, and the second, and the third incident.” GA296. The government then reviewed the timeline for Mills’s prior crimes, pointing out that his sale of crack cocaine, his assault on two different police officers and his subsequent escape from the courthouse each occurred at different times and, therefore, each counted separately under 18 U.S.C. § 924(e). GA296-GA298.

In arguing in support of a 180-month sentence, the government emphasized the seriousness of the offense conduct, pointing out that Mills had possessed a loaded, pistol-grip shotgun, that the vehicle in which Mills had been

riding had engaged the police in a high speed chase that resulted in a serious accident, and that another loaded “machine pistol” and narcotics had been found in the backseat of the vehicle. GA299-GA302. The government also reviewed Mills’s criminal history, which included three separate convictions for sale of narcotics, each of which was committed almost immediately after the other, two separate convictions for assaulting police officers, one conviction for escaping from custody, and multiple instances of committing crimes while on some form of court supervision. GA302-GA304. The government also emphasized the fact that Mills had bragged about attacking the female officer during the March 2005 arrest and had threatened to kill a correctional officer while incarcerated. GA304.

Defense counsel also argued for a sentence of 180 months. GA309. He conceded that Mills was an ACC, GA309, and maintained that his criminal history category overstated the seriousness of his criminal past. GA307-GA308. He pointed out that a fifteen-year sentence was about three times longer than any state sentence he had previously served and certainly sufficient to deter him specifically from ever committing another crime. GA310. He also maintained that fifteen years was sufficient given that his co-defendant, who, despite having a very similar record, was not an ACC. GA311.

In imposing sentence, the court began by referencing the factors set forth under 18 U.S.C. § 3553(a) and explaining the serious nature of any crime involving firearms and narcotics, a “deadly combination that have ruined individual lives, families, communities, and threaten to destroy entire cities.” GA318-GA319. The court also noted that “a stiff sentence of imprisonment is necessary to fulfill the purposes of fostering respect for the law, punishing the Defendant and, most importantly, protecting the public from the Defendant, because what’s clear here is that Mr. Mills cares about those who care about him, but cares nothing . . . about anyone else.” GA319.

The court found it “incomprehensible, inconceivable that Mr. Mills is innocent, having sat through that trial, having heard the officers testify to the movement in the vehicle immediately after they made the traffic stop. Just common sense tells you that Mr. Mills was not placed comatose in a car with people that he had no idea were dealing drugs and carrying weapons.” GA320. It noted, “It’s hard to conceive that someone who really cares about their significant other and their children would be in a car containing the contents of the car in which Mr. Mills was found.” GA321.

Commenting on the previous light sentences imposed on Mills, the court stated, “Eventually, leniency is proven to be the wrong course, to be unappreciated, inadequate and unsuccessful,

and at that point, after the courts have considered the Defendant, and have been repeatedly rebuffed, the Court has to consider the public, the public at large and, to some extent, the defendant.” GA322-GA323.

Although the court found “that the Defendant has the combination of violent and drug offenses to qualify as an armed career criminal,” it found that the resulting guideline range was excessive. GA324. The court found that “the Guidelines don’t take into consideration, the youthful indiscretion, the immaturity that Mr. Mills was laboring under when he engaged in the criminal conduct that qualifies him as an armed career criminal, and when you think about a career offender you do think, and I agree, I think Congress thought of an adult in their 30s, 40s, maybe even 50s, a person who had served substantial periods of incarceration, possibly on three separate occasions and still hadn’t gotten it, someone who really needed to be put away, and put away for a long time in order to protect the public, but I think we all know that young people lack the maturity and the understanding that more older people have, and therefore, it is this Court’s belief that the Guidelines don’t take into consideration, Mr. Mills.” GA324-GA325. As a result, the court imposed a non-guideline sentence of 180 months’ incarceration. GA326.

Summary of Argument

I. Mills was found in the front-passenger seat of wrecked car following a high-speed chase and crash. In rendering medical aid at the scene, officers discovered a loaded shotgun between his knees. At trial, the government proved sufficiently that, just prior to the crash, Mills was awake and alert inside the car. Based on the shotgun's positioning relative to Mills's body, a rational trier of fact could have concluded that he exercised controlled over the firearm and knowingly possessed it just prior to the accident.

As a threshold matter, Mills's insufficiency claim was not preserved at trial. Accordingly, he must show that, despite his failure to object to the sufficiency of the evidence at trial, the district court plainly erred in failing, *sua sponte*, to enter a judgment of acquittal. He cannot satisfy that burden and has failed to demonstrate error, plain or otherwise. The government's evidence established that Mills exercised dominion and control over the shotgun, and the jury was certainly entitled to discredit Mills's speculative theory that the shotgun could have been somewhere else in the vehicle prior to the accident. The government was under no obligation to call an expert witness to disprove or address Mills's defense theory and certainly was entitled to rely on the evidence of what the officers found when they approached the crashed vehicle to assert that Mills had knowingly possessed the shotgun.

II. As amply demonstrated by the reliable factual record, Mills sustained no fewer than five separate ACC-qualifying convictions. As such, a fifteen-year mandatory sentence was properly imposed. Indeed, at sentencing, Mills conceded that he was an ACC and specifically sought the imposition of its 180-month minimum sentence as a substantial downward departure from the applicable guideline range. On appeal, Mills advances the unpreserved arguments that (1) the imposition of an ACC sentence was improper because the district court failed to refer to reliable sources for information concerning his criminal history; (2) he was not convicted of the requisite three qualifying ACC offenses; and (3) the § 924(e) penalties were unconstitutionally applied in this case. These claims have no merit. The PSR's conclusion that Mills was an ACC was properly based on *Shepard*-approved state court transcripts showing that he had sustained five separate ACC qualifying felony convictions, two of which were for sale of narcotics, two of which were for assault of public safety personnel, and one of which was for escape from custody.

Argument

I. The district court did not plainly err in failing to conclude that the jury's guilty verdict was not supported by sufficient evidence

The evidence in this case, which included testimony that the charged shotgun was seized from between the defendant's legs, was sufficient to support the jury's guilty verdict as to the felon-in-possession charge.

A. Relevant facts

The facts relevant to this issue are set forth above in the Statement of Facts.

B. Governing law and standard of review

An appellant who challenges the sufficiency of the evidence bears a heavy burden. *See United States v. Walker*, 142 F.3d 103, 112 (2d Cir. 1998); *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997). In reviewing such a challenge, this Court must view the evidence, whether direct or circumstantial, in the light most favorable to the government and credit every inference that could have been drawn in its favor. *See United States v. Salameh*, 152 F.3d 88, 151 (2d Cir. 1998). Further, this Court assesses the evidence not in isolation but in conjunction, see *United States v. Podlog*, 35 F.3d 699, 705 (2d Cir.1994), and the conviction must be affirmed, so long as, from the inferences rea-

sonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt, *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

To raise a challenge to the sufficiency of the evidence on appeal, a defendant must offer a timely motion for judgment of acquittal before the district court. *See United States v. Allen*, 127 F.3d 260, 264 (2d Cir. 1997). Failure to preserve the issue by motion for judgment of acquittal at the close of the evidence or by filing a timely post-verdict motion requires that the appellant demonstrate, not only that the evidence was legally insufficient, but that it was plain error for the court to fail to dismiss on its own motion. *See id.*; Fed. R. Crim. P. 52(b); *United States v. Muniz*, 60 F.3d 65, 70 (2d Cir. 1995).

Under plain error review, “an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an ‘error’; (2) the error is ‘clear or obvious, rather than subject to reasonable dispute’; (3) the error ‘affected the appellant’s substantial rights, which in the ordinary case means’ it ‘affected the outcome of the district court proceedings’; and (4) ‘the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)); *see also Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Cotton*,

535 U.S. 625, 631-32 (2002); *United States v. Wagner-Dano*, 679 F.3d 83, 94 (2d Cir. 2012). “[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it” *Wagner-Dano*, 679 F.3d at 94 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)).

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

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

C. Discussion

At trial the government presented evidence sufficient to establish beyond reasonable doubt that Mills knowingly possessed the shotgun on March 27, 2011. The government's theory of the case was simple: Mills was awake and armed with the shotgun at or before the time the Taurus was pulled over for speeding, thus he was in actual and knowing possession of that weapon immediately prior to the crash.

In finding that Mills was awake prior to the crash and that he was armed, the jury considered the testimony of officers Macuizyinski and Geismar, both of whom testified that Mills was awake and alert during the traffic stop immediately preceding the crash. That these two officers were in a position to observe Mills' condition prior to the accident was supported by credible testimony concerning, among other things, the elevated vantage point of Macuirzynski's patrol car; the fact that the Taurus attempted to brake when passing the speed-trap, causing the occupants of the car, including Mills, to turn and make eye-contact with Macuirzynski as they passed; the ample lighting conditions at the location of the stop, which included both Macuirzynski and Geismar's car-mounted spotlights; and testimony that the officers were nervous and therefore more vigilant because they were outnumbered and could see that all four occupants

in the Taurus were making furtive movements inside the car.

That Mills was armed at the time of the initial stop was an inference reasonably supported by testimony and audio/video records of the encounter, which demonstrated that mere moments elapsed from the time of the traffic stop to the crash. Evidence of such quick timing reasonably undercut any suggestion that someone in the car, other than Mills, placed the shotgun in his lap during the momentary chase. And, of course, the fact that the police recovered the shotgun from between Mills's legs further supports the argument that he knowingly possessed it. In particular, three different police officers consistently testified that the loaded shotgun was found in a relatively upright position between Mills's knees, with the grip of the gun at the ready in his lap and the barrel pointed safely toward the floor. This evidence permitted the reasonable inference that Mills had kept the loaded shotgun there because it was safe, convenient, well-concealed, and where he could quickly bring it into action if necessary. The evidence thus logically supported a finding of knowing possession.

Lastly, the trial evidence undercut the defense suggestion that the gun landed in Mills's lap coincidentally, as numerous photographs of the crash scene provided visual evidence of the Taurus's close confines and the extent to which

the front-passenger footwell, where the shotgun was found, was hemmed in by, among other things, the deployment of the front airbag, the collapse of the dashboard, and the forward movement of the front-seat with its passenger. Each of these factors, together with the size and weight of the shotgun in evidence, reasonably precluded the notion that it had been propelled there accidentally. Because the jury's verdict was founded on legally sufficient evidence of possession, Mills's appeal is without merit.

Under plain error review, it is incumbent upon Mills to demonstrate that the district court was "derelict" in failing to issue, *sua sponte*, a directed verdict or judgment of acquittal based on the insufficiency of the government's trial evidence. *See Plitman*, 194 F.3d at 63. Mills's appeal makes no effort to satisfy that burden. Indeed, it fails even to note that the insufficiency argument was unpreserved at trial and thus ignores the applicable plain-error standard altogether. Regardless, the sufficiency challenge lacks merit under either the stringent plain-error standard or the legal standard generally applied to preserved claims.

On cross-examination defense counsel attempted to undercut the evidence that Mills was awake before the accident, suggesting that the Taurus may have been travelling too fast for Macuirzynski to have seen its occupants, GA55; that the area of the stop may have been too dark

to allow him to see the front passenger, GA55; and that Mills was not moving because the incident report referred only to movement by the backseat passengers, GA56-GA58. But each of those suggestions was dispelled in turn.

Macuirzynski testified that his radar post was well-lit, that it was on elevated ground, that his high-beam lights were illuminated, and that the driver actually slowed when he saw Macuirzynski's patrol car. GA55-GA56, GA69. As for the lighting conditions at the vehicle stop, Macuizynski testified that the interior of the Taurus was well-lit by his patrol car's exterior-mounted spotlight, headlights and police lights, GA29 – lighting conditions that were only improved when Geismar arrived, GA31-GA32. As to the reports, Macuizynski clarified that his report focused on the rear-seat passengers only because their movements were more extreme and first drew his attention to the potential for danger. GA68-GA69. Finally, Macuirzynski's testimony that Mills was, in fact, awake during the motor vehicle stop was corroborated by Geismar, who also testified to having seen Mills moving during the stop. GA74. This evidence, viewed in the light most favorable to the government, was more than sufficient to permit a rational jury to find that Mills was awake immediately prior to the crash.

Because it defies logic that Mills, if awake, would not have noticed a two-foot long, pump ac-

tion shotgun propped upright between his knees, the only remaining question is whether the trial evidence was sufficient for the jury to infer that the shotgun was there before the crash. The jury was thus asked to evaluate two alternative theories: that the shotgun was found between Mills's knees because he placed it there deliberately, and thus knowingly possessed it, or that it was coincidentally propelled there as a result of the crash, *i.e.*, it came to be there only coincidentally. In this regard, the circumstantial evidence, viewed in the light most favorable to the government, was more than sufficient to permit the jury to find that the placement of the shotgun was deliberate and to reject the defense's theory that the shotgun landed in Mills's lap as a result of the car accident.

On the critical question of possession, testimony from Macuirzynski, GA45-GA47, Geismar, GA85, and Howard, GA127, about where and how the shotgun was found, demonstrated more than Mills's mere proximity to the weapon. The fact that each testified to seeing the gun between Mills's knees, with the grip upright near his lap and the barrel pointed toward the floor, was consistent with the government's claim that a front passenger armed with a shotgun would logically choose to place it there. In this regard the positioning of the shotgun presented the most convenient spot to rest it safely, conceal it from outside onlookers, and leave it readily accessible.

GA47. Viewing that evidence in the light most favorable to the government, the jury reasonably found beyond a reasonable doubt that Mills knowingly possessed the shotgun, and Mills cannot demonstrate the existence of error, much less plain error, as required under the first and second prongs of the plain-error standard.

Moreover, because the improbable defense theory now advanced on appeal was fully considered and rejected at trial, Mills cannot demonstrate that the verdict affected his substantial rights or undermined the integrity of the judicial proceedings. Notwithstanding references to esoteric physics formulas and “Impulse-Momentum Change Theorem,” Def.’s Br. at 39, Mills’s appeal essentially rehashes trial counsel’s unpersuasive theory of the case, *i.e.*, because “things fly around” in crashes, the government could not disprove the highly improbable and speculative possibility that the gun travelled through the car, threading its way past every occupant and obstacle, to land between Mills’s knees. That defense was squarely considered and rejected by the jury, and Mills cannot now show that the government’s alleged failure to refute conclusively such a speculative defense theory somehow deprived him of his substantial rights or undermined the integrity of the judicial proceedings.

Notwithstanding the new gloss of physics citations, the underlying assumption that the shotgun was a loose object in the car remains en-

tirely against the weight of the trial evidence, all of which reasonably indicated that, during the crash, the shotgun was cordoned by and pinned under Mills's body, the passenger seat, the airbag and the dashboard.⁷ GA44, GA82, GA125. Mills's defense theory remains entirely speculative. He advances the simple proposition that "a shotgun held by one of the backseat occupants could have ended up *anywhere* after the accident" Def.'s Br. at 43. He then argues that the government's evidence was insufficient because it failed to disprove the possibility of that the shotgun was somewhere else in the vehicle before the accident. That argument is unavailing, however, because "the government's burden of proof does not mean that it must disprove all of the defendant's alternative theories, no matter how speculative or implausible." *United States v. Dowdell*, 595 F.3d 50, 72, n3 (1st Cir. 2010); see also *United States v. Catillo*, 924 F.2d 1227, 1230 (2d Cir. 1991); *United States v. Rivera*, 844

⁷ To be sure, had the shotgun been loose and elsewhere in the car, defense counsel's summation argument that it may have struck and killed one of the occupants, gone through the windshield or otherwise been launched from the car might have come to pass. But none of those things happened. There was no suggestion that the shotgun struck anyone; it did not travel through the windshield; it was not launched out into the road. All of the evidence shows that the shotgun was trapped in the front passenger area.

F.2d 916, 925 (2d Cir. 1988). Because the sufficiency of the government's evidence did not require the refutation of speculative and improbable defense theories, Mills cannot establish that the verdict in this case affected his substantial rights or undermined the integrity of the judicial proceedings.

II. The district court did not commit plain error in sentencing Mills as an armed career criminal because he had sustained five qualifying felony convictions

The reliable record of Mills's criminal history reflects prior convictions for serious drug crimes and violent felonies sufficient to support the district courts appropriate imposition of a mandatory minimum term of incarceration as required under the Armed Career Criminal Act.

A. Relevant facts

The facts relevant to this issue are set forth above in the Statement of Facts.

B. Governing law and standard of review

Where a challenge to a district court's ACC determination is unpreserved, the district court's findings will be reviewed only for plain error. *United States v. Danielson*, 199 F.3d 666, 671 (2d Cir. 1999).

Under 18 U.S.C. § 924(e), "a person who violates 18 U.S.C. § 922(g) and has three previous convictions . . . for a violent felony or a serious drug offense . . . shall be . . . imprisoned not less than fifteen years." *Id.*

The term "violent felony" is defined as:

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 destruc-

tive 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[.]

18 U.S.C. § 924(e)(2)(B).

Crimes not specifically enumerated in 18 U.S.C. § 924(e)(2)(B)(ii) but that nonetheless “involve[] conduct that presents a serious potential risk of physical injury to another” fall within the final clause of subsection (ii), known as the “residual clause.” *United States v. Johnson*, 616 F.3d 85, 89 (2d Cir. 2010). This clause reaches crimes “typically committed by those whom one normally labels armed career criminals, that is, crimes that show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.” *Sykes v. United States*, 131 S. Ct. 2267, 2275 (2011) (quoting *Begay v. United States*, 553 U.S. 137, 146 (2008)) (internal quotation marks omitted). An offense of intent that poses roughly the same degree of risk as the enumerated offenses themselves qualifies as a predicate under the re-

sidual clause. *See id.* at 2276 (“The felony at issue here is not a strict liability, negligence, or recklessness crime and because it is . . . similar in risk to the [enumerated offenses], it is a crime that ‘otherwise involves conduct that presents a serious potential risk of physical injury to another.’”) (quoting 18 U.S.C. § 924(e)(2)(B)(ii)).

In determining whether an offense qualifies as a “violent felony” under § 924(e), this Court employs a “categorical approach.” *United States v. Brown*, 629 F.3d 290, 294 (2d Cir. 2011). Under this approach, the Court looks only to the fact of conviction and the statutory definition of the prior offense, and does not generally consider the particular facts disclosed by the record of conviction. That is, the Court considers whether the elements of the offense are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of the particular offender. *James v. United States*, 550 U.S. 192, 202 (2007) (internal citations and quotation marks omitted). Notably, the categorical approach does not “requir[e] 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.* at 208. The relevant inquiry is “whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.” *Id.* (emphasis added).

Statutory language defining a criminal offense on occasion may encompass both violent and non-violent felonies. “In such circumstances, we may undertake a limited inquiry into which part of the statute the defendant was convicted of violating, at least where the statute of conviction is divisible in that it ‘describe[s] the violent felonies . . . in distinct subsections or elements of a disjunctive list.’ ” *Brown*, 629 F.3d at 294–95 (quoting *United States v. Daye*, 571 F.3d 225, 229 n. 4 (2d Cir. 2009)) (internal citations and quotation marks omitted); *see also Johnson v. United States*, 130 S. Ct. 1265, 1273 (2010). We are constrained in this “modified categorical approach” by the Supreme Court’s requirement that we consult only “particular documents that can identify the underlying facts of a prior conviction with certainty.” *United States v. Rosa*, 507 F.3d 142, 161 (2d Cir. 2007) (emphasis added).

This Court has also extended the application of this modified categorical approach to the determination of whether the Connecticut sale of narcotics statute qualifies as a career offender or an ACC predicate. *See United States v. Savage*, 542 F.3d 959, 960 (2d Cir. 2008) (holding that a conviction under Conn. Gen. Stat. § 21a-277(b) was not categorically a conviction for a “controlled substance offense” as that term is defined in U.S.S.G. § 4B1.2(b)). A controlled substance offense, under § 4B1.2, is defined similarly to a

serious drug offense under § 924(e) and means “an offense under . . . state law . . . that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute or dispense.” U.S.S.G. § 4B1.2(b). This definition “include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.” *Id.* comment. (n.1). A “sale” under Connecticut law, however, includes “a mere offer to sell drugs,” and “a mere offer to sell, absent possession, does not fit within the Guidelines’ definition of a controlled substance offense.” *Savage*, 542 F.3d at 965 (internal quotation marks and citation omitted). Accordingly, a prior conviction that resulted from a guilty plea to “sale” of a controlled substance under § 21a-277(b), or its analogous subsections, does not qualify as a conviction for a controlled substance offense or a serious drug offense unless the sentencing court determines that the defendant necessarily pled guilty to exchanging drugs for money. *See id.* at 967.

In applying the modified categorical approach to a determination as to whether a conviction counts as a § 924(e) predicate, a sentencing court is limited to “the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant [in the prior case] in which the factual basis for

the plea was confirmed by the defendant, or some other comparable judicial record of [that] information.” *Shepard v. United States*, 544 U.S. 13, 26 (2005) (relying on *Taylor v. United States*, 495 U.S. 575, 602 (1990)); see *Savage*, 542 F.3d at 966.

C. Discussion

1. The district court’s ACC determination was based upon a review of *Shepard*-approved sources.

At sentencing the application of the Armed Career Criminal Act was not in dispute. To the contrary, defense counsel readily conceded that Mills had sustained the requisite number of qualifying convictions and implored the district court to impose the applicable 180-month mandatory minimum term of incarceration, rather than the applicable 235 to 293-month range established under the Sentencing Guidelines. Despite having conceded his ACC status at sentencing, Mills now argues that the district court’s determination was defective because it was not based upon *Shepard*-approved sources. That contention is plainly false.

At sentencing the district court properly adopted, as its own, the factual findings set forth in the PSR. Any *Shepard* concerns were satisfied, as the PSR clearly and expressly delineated those facts drawn from non-*Shepard* documents, from those taken directly from *Shepard*-

approved court transcripts. See *United States v. Bennet*, 472 F.3d 825, 833-34 (11th Cir. 2006) (approving district court's reliance upon PSR, where probation identified *Shepard*-approved sources and where defendant failed to object to those facts); *United States v. Thompson*, 421 F.3d 278, 285 (4th Cir. 2005) (same). As discussed in the PSR, the *Shepard*-approved transcript of Mills's 2005 state guilty pleas reflects no fewer than five ACC predicates, including his sale of crack cocaine on February 10, 2005; his sale of crack cocaine on March 2, 2005; his assault of two different officers on March 2, 2005; and his escape from custody on March 3, 2005.

Moreover, the fact that defense counsel below conceded that Mills was an ACC and did not challenge the PSR's findings of fact on this issue certainly undercuts his unpreserved claim on appeal that the district court committed procedural error. As stated above, the court committed no error at all, let alone an error that was plain. But even if the court should have articulated in more detail why each of Mills's five prior convictions counted as ACC predicates, it is difficult to understand how its failure to do so somehow affected his substantial rights or undermined the integrity of the judicial proceedings. The PSR was quite specific. It reviewed the facts underlying each of these convictions and identified the source for this information as the June 1, 2005 guilty plea transcript. There

can be do dispute that this transcript is a *Shepard* approved source and, therefore, no serious claim that the district court committed some procedural error in adopting the factual findings contained in the PSR.

2. The district court properly determined that Mills had at least three prior felony convictions for serious drug offenses and violent felonies

On appeal, Mills concedes that his February and March 2005 crack convictions would qualify as ACC predicates if the facts of those convictions were drawn from *Shepard* documents. Def.'s Br. at 55 (“[W]e acknowledge that they may well qualify as predicates if their facts were established by the appropriate records.”) As discussed above, the record explicitly confirms that the facts underlying these two narcotics convictions were drawn directly from a guilty plea transcript, which is a *Shepard*-approved source. The facts set forth in the June 1, 2005 guilty plea transcript establish that, for each of the qualifying Connecticut sale of narcotics offenses, Mills was involved in exchanging drugs for money and did indeed possess crack cocaine with the intent to sell it. Mills does not claim otherwise and conceded both before the district court and this Court that the sale convictions do not suffer from any *Savage* defect.

Mills, however, does contend that his two separate convictions for assault on public safety

personnel are not violent felonies. He is incorrect. Although the criminal statute at issue, Conn. Gen. Stat. § 53a-167c, does encompass both violent and non-violent conduct, this Court determined in *Canada v. Gonzales*, 448 F.3d 560, 568 (2d Cir. 2006), that the statute was divisible and further held, in *Brown*, 629 F.3d at 296, that an assault directed against a law enforcement officer in the course of her duties is a crime of violence. *See id.* (finding assault on corrections officer to be an ACC predicate on same rationale applied to police officers in *Canada*); *see also Daye*, 571 F.3d at 229 n.4 (noting that, where the language of a particular statute encompasses both conduct that categorically constitutes a violent felony and conduct that does not,” court may applied modified categorical approach).

The rationale, ultimately articulated in *Brown*, 629 F.3d at 296, that a knowing attack on an on-duty law enforcement officer constitutes a violent felony, originated in *United States v. Santos*, 363 F.3d 19, 23 (1st Cir. 2004), where the First Circuit considered it “self-evident that assault and battery upon a police officer usually involves force against another At a minimum, assault and battery upon a police officer requires purposeful and unwelcomed contact with a person the defendant knows to be a law enforcement officer actually engaged in the performance of official duties.”

Santos, 363 F.3d at 23 (citations and quotations omitted).⁸ The *Santos* court further noted that while “neither violence, nor the use of force, is an essential element of the crime[,] . . . the use of force, *and a serious risk of physical harm* are all likely to accompany and assault and battery upon a police officer.” *Id.* at 23 (quoting *United States v. Fernandez*, 121 F.3d 777, 780 (1st Cir. 1998)) (emphasis added).

While both *Canada* and *Santos* dealt with the definition of “violent felony” under an analogous immigration law, not § 924(e), *Brown* ultimately extended that rationale to § 924(e). *Brown*, 629 F.3d at 296 n.4. There, this Court held that an assault on an officer, however effected, necessarily presents “a serious potential risk of injury to another,” sufficient to satisfy § 924(e)’s “violent felony” definition. *Brown*, 629 F.3d at 296.

Having determined both that § 53a-167c is divisible, *Brown*, 629 F.3d at 294-95, and that a conviction for assaulting law enforcement personnel, including police officers, is categorically a crime of violence, *see Canada*, 448 F.3d at 568, the district court was certainly entitled to conduct a limited inquiry to determine whether the assault in fact involved a police officer and whether the assault was violent. *Cf. Canada*,

⁸ The identity between the Massachusetts provision and Conn. Gen. Stat § 53a-167c was recognized in *Blake v. Gonzales*, 481 F.3d 152, 161 (2d Cir. 2007).

448 F.3d at 568 (“a court may look to the record of conviction for the limited purpose of determining which public safety employee was the subject of any assault . . .”). As cited in the PSR, the June 1, 2005 transcript of Mills’s plea described two separate, violent assaults on two different New Haven police officers, one of whom was elbowed several times in the face and the other of whom was punched repeated in the face, and both of whom sustained injuries. These facts, drawn from a *Shepard*-approved source, were sufficient to support the district court’s determination that the two assault convictions counted as violent felonies.

In addition, contrary to Mills’s argument on appeal, the two assault convictions were separate criminal incidents “committed on occasions different from one another,” within the meaning of § 924(e)(1). And, of course, they were separate and distinct from the drug crime for which New Haven police were pursuing him.

This Court has held that multiple convictions arise from conduct committed on different occasion if they do not stem from the same criminal episode. *See Brown*, 629 F.3d at 293 (quoting *Daye*, 571 F.3d at 237). The relevant considerations include whether the victims of the crimes were different, whether they were committed at different locations, and whether they were separated by the passage of time. *Id.*

With respect to multiple attacks on pursuing police officers, the Fourth Circuit in *United States v. Williams*, 187 F.3d 429 (4th Cir. 1999), found that attacks on different officers constituted separate criminal events for ACC purposes. There, the defendant fired at an officer after fleeing from a motor vehicle stop, after which the officer gave up the chase and called for backup. Within ten minutes, a pair of pursuing officers was also fired upon. The court held that the two shootings gave rise to separate ACC predicates, regardless of the fact that the shootings were committed to achieve the same criminal objective, i.e., to escape apprehension and prosecution. *Id.* at 431. Although the incidents were separated briefly by time and distance, the court viewed the incidents as distinct criminal episodes principally because they involved separate victims. *Id.* (“The fact that there were multiple victims decisively tips the scales in favor of concluding that each assault was a separate and distinct criminal episode.) That logic should apply with equal force here.

In this case, *Shepard* documents indicate that, immediately after his arrest on the March 2005 crack charge, Mills slipped out of his handcuffs, broke free from the officers and ran away to escape. When one of the pursuing officers caught him, Mills elbowed him in the face several times. When a second pursuing officer tried to subdue him, Mills struck her in the head with a

closed fist about six times. Both of these assaults occurred in the course of Mills's attempted escape after he was arrested on the crack charge. Here, as in *Williams*, Mills's attacks were launched at two separate times, against two different police officers. That the interval between those events may have been brief does not undercut the view that they were separate occurrences. *Williams*, 187 F.3d at 431-432. ("The fact that the events occurred within a short period of time does not dictate a result that the offenses occurred on one occasion.") Accordingly, the facts drawn from reliable sources supported the view that each of Mills's assaults constituted independent predicates.

Even clearer is the distinction between Mills's drug sale and his assaults, which represent crimes of entirely different nature. See *United States v. Leeson*, 453 F.3d 631, 643 (4th Cir. 2006); *United States v. Davidson*, 527 F.3d 703, 709 (8th Cir. 2008).

And, finally, Mills sustained a fifth predicate offense when he attempted to escape from the courthouse on March 3, 2005 and was convicted of a felony escape from custody. According to the PSR, which cites the June 1, 2005 state plea transcript, Mills escaped during a March 3, 2005 criminal court appearance. At the time he escaped, he was "shackled" and therefore in the physical custody of law enforcement officers. He

was charged and convicted under Conn. Gen. Stat. § 53a-171, A36, which provides:

Escape from Custody: Class C felony or class A misdemeanor.

- (a) A person is guilty of escape from custody if such person (1) escapes from custody, or (2) has been convicted as delinquent, has been committed to the Department of Children and Families, and (A) fails to return from a leave authorized under section 17a-8a, or (B) escapes from a state or private facility or institution in which such person has been assigned or placed by the Commissioner of Children and Families.
- (b) If a person has been arrested for, charged with or convicted of a felony, escape from such custody is a class C felony, otherwise, escape from custody is a class A misdemeanor.

Because Mills had previously sustained a felony drug conviction in 2004, and because the charges pending at the time of his escape included two felony drug sales and two felony assaults on police, Mills's escape conviction was a Class C felony, and he was sentenced to five years' imprisonment for his escape. A36; GA335-GA336. That term of imprisonment, which clearly exceeded the one-year threshold for felonies, dis-

pels the notion that Mills was sentenced to a misdemeanor, as his appeal brief erroneously suggests. Def.'s Br. at 57-58.

The reliable factual details of Mills's felony offense conduct confirm that he violated subsection (a)(1) of the statute, proscribing custodial escapes. *See Canada*, 448 F.3d at 566-67 (permitting factual inquiry to determine the specific offense of conviction under a divisible statute). The only question on appeal is whether a violation of subsection (a)(1) constitutes a violent felony.

Section 53a-171, like § 53a-167c, reaches certain offense conduct that has previously been held non-violent, particularly failures to return to custody, as proscribed under subsection (a)(2)(A), or non-violent, walk-away escapes, as proscribed under subsection (a)(2)(B). *See United States v. Chambers*, 555 U.S. 122, 130 (2009) and *United States v. Mills*, 570 F.3d 508, 512 (2d Cir. 2009). Nonetheless, the divisible nature of those non-violent offenses is sufficient to permit inquiry under the modified categorical approach. *See Daye*, 571 F.3d at 229 n.4; *see also Chambers*, 555 U.S. at 126.

Challenging the divisibility of the statute, Mills argues that subsection (a)(1) cannot itself be limited to violent conduct, because the non-violent offenses proscribed in subsections (a)(2)(A) and (a)(2)(B) are limited only to delinquents. He therefore contends that subsection

(a)(1) must necessarily reach such non-violent conduct when perpetrated by adult offenders, and thus cannot be deemed a violent felony under § 924(e). That argument ignores the fact that non-violent walk-away escapes and failures to return by adult offenders fall under a separate statute altogether, Conn. Gen. Stat. § 53a-168, which provides that:

(a) A person is guilty of escape in the first degree (1) if he escapes from a correctional institution or (2) if he escapes from any public or private, nonprofit halfway house, group home or mental health facility or community residence to which he was transferred pursuant to subsection (e) of section 18-100 or section 18-100c and he is in the custody of the Commissioner of Correction or is required to be returned to the custody of said commissioner upon his release from such facility or (3) if he escapes from a work detail or school on the premises of the correctional institution or (4) if he fails to return from a furlough authorized under section 18-101a or (5) if he fails to return from work release or education release as authorized under sections 18-90a and 18-100 or (6) if he escapes from a hospital for mental illness in which he has been confined under the provisions of section 17a-582, 17a-584, 17a-593, 17a-594 or 17a-596 or

(7) if, while under the jurisdiction of the Psychiatric Security Review Board, but not confined to a hospital for mental illness, he leaves the state without authorization of the board.

Accordingly, § 53a-171(a)(1) addresses affirmative custodial escapes that do not involve non-violent walk-aways or failures to report to custody under §§ 53a-169(a)(2)-(7) or § 53a-171(a)(2). In sum, subsection (a)(1), which encompasses only custodial escapes, does not extend to the types of escapes held to be non-violent in *Chambers* and *Mills*.

Because the statute is properly divisible, the only remaining question is whether the district court properly determined that a violation of subsection (a)(1) constituted a violent felony. A review of similar determinations by this and other Circuits answers that question in the affirmative. For example, this Court's recent decision in *United States v. Baker*, 665 F.3d 51, 56 (2d Cir. 2012), analyzed an affirmative escape from a local lock-up. In applying the test set forth in *Begay*, 553 U.S. at 143, this Court held that affirmative escapes from the custody of a law enforcement officers "present a risk of violent confrontation at least as great as that of burglary," reasoning that while a homeowner may not be at home, or decline to confront a burglar, law enforcement officers have a duty to "confront and challenge inmates escaping from

confinement, increasing the likelihood of a violent encounter.” That rationale accords with *Sykes*, in which the Supreme Court held that vehicular flight was an ACC predicate because an “attempt to elude capture is a direct challenge to an officer’s authority. It is a provocative and dangerous act that dares, and in a typical case requires, the officer to give chase.” *Sykes*, 131 S. Ct. at 2273.

Although this Court has not had an opportunity to determine specifically whether a custodial courthouse-escape presents the same potential risk of physical injury posed by enumerated crimes like burglary, other circuits have. In *United States v. Koufos*, 666 F.3d 1243 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2787 (2012), for example, the Court found that, in escaping from a courthouse during his arraignment, the defendant committed a “willful act . . . in a purposeful manner . . . more provocative than a burglary.” 666 F.3d at 1252. That rationale should apply equally here, where Mills was in secure custody – that is, he was shackled – at the time of his courthouse appearance. His escape from that custody necessarily required law enforcement pursuit, thus inviting the potential for injury described in *Sykes*. For that reason, Mills’s custodial escape from the courthouse

amounts to a crime of violence under § 924(e)'s residual clause.⁹

3. Imposition of ACCA's mandatory-minimum sentence was not unconstitutional in this case.

Finally, Mills claims that the application of the mandatory minimum 180-month penalty under 18 U.S.C. § 924(e) to him was unconstitutional because the severity of the sentence is disproportionate to his relative youth and criminal career. Though the Eighth Amendment recognizes a narrow proportionality principle, *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 (1991) (Kennedy, J. concurring), this Court and other Circuits that have previously addressed whether a mandatory minimum sentence under § 924(e) is grossly disproportionate have uniformly held that the statute's penalties do not violate the Eighth Amendment. *See United States v. Bullock*, 550 F.3d 247, 252 (2d Cir. 2008) (holding that fifteen-year sentence was not "grossly disproportionate" for felon-in-possession of ammunition offense where defendant had three prior robbery convictions); *United States v.*

⁹ The Court need not reach the issue of whether custodial escape under § 53a-171 counts as a violent felony provided it agrees with the government's argument that it was not plain error for the district court to conclude that Mills was an ACC based on his two narcotics convictions and at least one of his assault convictions.

Gamble, 388 F.3d 74, 75-77 (2d Cir. 2004) (upholding 216-month sentence for defendant who possessed small quantity of crack cocaine and six rounds of ammunition because “the Supreme Court has long recognized the propriety under the Eighth Amendment of subjecting recidivists to enhanced penalties.”); *United States v. Mitchell*, 932 F.2d 1027, 1028-29 (2d Cir. 1991) (upholding ACC sentence for defendant who had three prior burglary convictions); *see also United States v. Moore*, 643 F.3d 451, 456 (6th Cir. 2011); *United States v. Reynolds*, 215 F.3d 1210, 1214 (11th Cir. 2000); *United States v. Cardoza*, 129 F.3d 6, 18 (1st Cir. 1997); *United States v. Presley*, 52 F.3d 64, 68 (4th Cir.1995); *United States v. Hayes*, 919 F.2d 1262, 1266 (7th Cir. 1990); *United States v. Baker*, 850 F.2d 1365, 1372 (9th Cir. 1988). Mills has failed to cite to any decision that has found a mandatory-minimum sentence under the ACCA violates the Eighth Amendment’s proportionality principle, and the facts of this case do not suggest a constitutional infirmity. As set forth above, Mills has an extensive criminal history which includes three separate convictions for sale of narcotics, two separate convictions for assault of a police officer, one conviction for escape from custody, five different ACC qualifiers and multiple instances of committing crimes while on court supervision. The fact that he was subjected to enhanced penalties as a recidivist was certainly reasonable and not at all grossly disproportion-

ate in light of his offense conduct and criminal record.

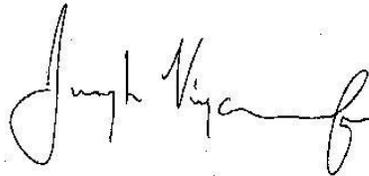
Conclusion

For the reasons set forth above, this appeal lacks merit, and this Court should affirm Mills's judgment of conviction.

Dated: June 4, 2013

Respectfully submitted,

DEIRDRE M. DALY
ACTING U.S. ATTORNEY
DISTRICT OF CONNECTICUT

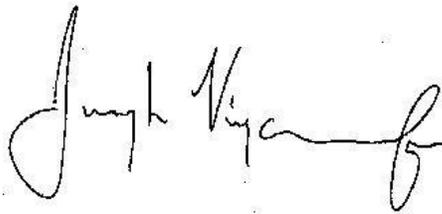
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**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,374 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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JOSEPH VIZCARRONDO
SPECIAL ASSISTANT
U.S. ATTORNEY

ADDENDUM

18 U.S.C. § 924. Penalties

* * *

(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).

(2) As used in this subsection--

(A) the term “serious drug offense” means--

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

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section

102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(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; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * *