

12-3888

To Be Argued By:
MARC H. SILVERMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-3888

UNITED STATES OF AMERICA,
Appellee,

-vs-

BRANDON EDWARDS, aka Bruce Edwards,
aka Bruce Read, aka Robert Rentell, aka Robert
Wright,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

DEIRDRE M. DALY
*Acting United States Attorney
District of Connecticut*

MARC H. SILVERMAN
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Ellen Bree Burns, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on September 25, 2012. Joint Appendix (“JA__”) 17. On September 27, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA17, JA298. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

**Statement of Issues
Presented for Review**

- I. A. Whether the defendant's unconditional guilty plea waived his challenge to the district court's denial of his motion to suppress evidence.
B. If not, whether the district court properly denied the suppression motion based on the voluntariness of the defendant's consent to search.
- II. Whether the district court properly sentenced the defendant as an Armed Career Criminal pursuant to 18 U.S.C. § 924(e) based on his three prior serious drug offenses.
- III. Whether the district abused its discretion in denying the defendant's request—on the day of sentencing—for substitute counsel.

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UNITED STATES OF AMERICA,

Appellee,

-vs-

BRANDON EDWARDS, aka Bruce Edwards,
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Wright,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This appeal arises following defendant Brandon Edwards's plea of guilty to unlawful possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and his sentencing as an armed career criminal pursuant to 18 U.S.C. § 924(e). The district court imposed the fifteen-year mandatory minimum term of imprisonment required by that statute.

On appeal, the defendant challenges first the district court's denial of his motion to suppress the ammunition recovered during a consent search of his residence. That ruling is not properly before this Court, however. The defendant's guilty plea was unconditional. Because the defendant's plea did not preserve his right to appeal the district court's suppression ruling, he waived any challenge to that ruling. Moreover, the district court—relying on the totality of the circumstances—properly determined that the defendant voluntarily consented to the search of his residence.

The defendant also challenges his sentencing as an armed career criminal in this appeal. This claim fails, too. Relying on the state court transcripts of the guilty pleas and the judgments of conviction for each of the defendant's three convictions under Connecticut General Statutes § 21a-277(a), the district court properly determined that each conviction qualified as a serious drug offense and therefore concluded that the defendant is an armed career criminal.

Finally, the defendant challenges the district court's denial of his motion for substitute counsel. The defendant abandoned this motion, however, and, in any event, the district court properly exercised its discretion to deny the motion.

The district court's judgment should be affirmed.

Statement of the Case

On November 18, 2010, a federal grand jury returned an indictment charging the defendant with unlawful possession of ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). JA3, JA21-22. On June 9, 2011, the government filed a Notice of Sentence Enhancement Pursuant to 18 U.S.C. § 924(e). JA5, JA51-52.

On June 23, 2011, the defendant filed a motion to suppress evidence, specifically the eighteen rounds of nine-millimeter ammunition that formed the basis of the pending charge. JA5-6. On July 18, 2011, following the parties' submission of pre-hearing briefing, the district court (Ellen Bree Burns, J.) held a hearing on the defendant's motion to suppress. JA7. On October 5, 2011, following the parties' submission of post-hearing briefing and a joint motion to supplement the record of the suppression hearing, the district court denied the defendant's suppression motion. JA9, JA183-98.

On December 1, 2011, the defendant pleaded guilty to Count One of the Indictment. JA10-11, JA199-248. On May 14, 2012, the government filed a Revised Notice of Sentence Enhancement Pursuant to 18 U.S.C. § 924(e). JA14, JA249-50.

On September 21, 2012, after granting several defense requests for continuances, the court sentenced the defendant to 180 months of im-

prisonment pursuant to 18 U.S.C. § 924(e). JA17, JA251-97. Judgment entered on September 25, 2012. JA17; Special Appendix (“SA”) 1-3. On September 27, 2012, the defendant timely filed a notice of appeal. JA17, JA298-99.

The defendant is serving the sentence imposed.

Statement of Facts and Proceedings Relevant to this Appeal

A. The arrest and consent search

On June 1, 2010, a Judge of the Superior Court of the State of Connecticut authorized an arrest warrant for the defendant. Government Appendix (“GA”) 20-25. On June 8, 2010, law enforcement officers executed that state arrest warrant as part of a broader law enforcement roundup on that date. JA96, JA125-26; GA28-29.

Prior to the execution of the state arrest warrant, law enforcement officers conducted an operational meeting in which they (1) learned that there was a state arrest warrant for the defendant for a weapons offense and that the defendant’s brother was in violation of his parole, (2) saw a photograph of the defendant, (3) received the defendant’s address and discussed the layout of that residence, (4) discussed the background of the defendant and his brother, and (5) reviewed an operational plan for executing the warrant. JA69-71, JA96-98, JA126-27.

Twelve to fifteen law enforcement officers then went to the defendant's home to execute the state arrest warrant. JA78, JA99.

After setting up a perimeter and clearing the apartment on the first-floor of the three-story home, law enforcement officers knocked on the door to the second-floor apartment and announced themselves as police. JA72. The defendant opened the door and law enforcement officers directed him to lie on his stomach. JA72. The defendant complied and law enforcement officers handcuffed him. JA72, JA73. Law enforcement officers secured the occupants of the second-floor apartment—the defendant's younger brother, his girlfriend, and his mother—on the couch in the living room and conducted a protective sweep of the apartment. JA73-75, JA101. This entire process took approximately five to seven minutes. JA76, JA100.

Law enforcement officers then escorted the defendant to the kitchen. JA76, JA102. A few minutes later, it became clear that the defendant wished to cooperate and Senior Inspector Charles Wood of the United States Marshals Service procured a *Miranda* waiver form and consent to search form. JA103-04.

Consistent with protocols he had followed at least 100 times, Inspector Wood then reviewed the *Miranda* waiver form with the defendant. JA104-05. As witnessed by Inspector Wood and Milford Police Officer Zenith McNemar, the de-

defendant initialed next to every right set forth on the *Miranda* waiver form and signed that document immediately below the following language:

I am willing to answer questions and make this statement knowing that I have and fully understand these rights. I do not want a lawyer at this time. I do make the following statements without fear, threats, or promises of favor knowing that this statement can be used for or against me in a court of law.

GA26. Following his completion of the *Miranda* waiver form, the defendant stated that he had ammunition in a jacket pocket in his bedroom closet. JA108.

Consistent with protocols he had followed on approximately 100 occasions, Inspector Wood then reviewed the consent to search form with the defendant. JA105, JA108. As witnessed by Inspector Wood and New Haven Police Lieutenant Casanova, the defendant provided written consent to search his residence. GA27. The consent to search form informed the defendant of his “constitutional rights not to have a search made without a search warrant” and “to refuse consent to search.” GA27. Moreover, the defendant signed after the following language: “This written permission is being given [by] me to the above named members of the above named agencies voluntarily and without duress, threats, or promises of any kind.” GA27.

After signing the consent to search form, the defendant teared up and told Inspector Wood that he knew the location of firearms outside of another New Haven address. JA110-11. Inspector Wood then contacted Task Force Officer (“TFO”) John Healy of the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”). JA111, JA128; GA29.

Approximately fifteen minutes later, TFO Healy and ATF Special Agent Kurt Wheeler arrived at the defendant’s house. JA112. During the interim, the defendant remained in the kitchen and his family members remained in the living room. JA112. Upon their arrival, Inspector Wood informed TFO Healy and Agent Wheeler of the information provided by the defendant and provided them with the completed *Miranda* waiver form and the consent to search form. JA113-14, JA131; GA29.

TFO Healy and Agent Wheeler then spoke to the defendant. JA131; GA29. The defendant directed Agent Wheeler to a jacket in his bedroom closet wherein Agent Wheeler recovered 18 rounds of nine millimeter ammunition in a pocket. JA132; GA29.

Shortly after the recovery of the ammunition, the defendant traveled with TFO Healy and Agent Wheeler to the address furnished by the defendant as the location of firearms. JA133; GA29. No firearms were recovered at that location. JA133. A New Haven Police Department

prisoner conveyance vehicle then transported the defendant to police headquarters for processing. JA134; GA29.

The defendant and the other occupants of the apartment were calm and compliant throughout the entire period of their interaction with law enforcement officers. JA73, JA78-80, JA102, JA109, JA113, JA115, JA129-30, JA131, JA133, JA135-36. Similarly, the law enforcement officers were respectful of the defendant and the other occupants of the apartment. For example, they contacted the defendant's girlfriend's employer on her behalf, JA149; provided water to the defendant's mother so that she could take her medication, JA160; and permitted the defendant's younger brother to prepare for and depart for school, JA80, JA103.

B. The indictment and the motion to suppress the ammunition

On November 18, 2010, a federal grand jury returned an indictment charging the defendant with unlawful possession of ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). JA21-22.

On June 23, 2011, the defendant filed a motion to suppress the ammunition, arguing that his consent was not voluntarily given. JA5-6; GA1-3. On July 18, 2011, following the parties' submission of pre-hearing briefing, the district court held a hearing on the defendant's motion

to suppress. JA7. On October 5, 2011, the district court denied the defendant's suppression motion. JA9, JA183-98.

In sum, the district court concluded that "based on the totality of the circumstances," the defendant's "consent to search was voluntary." JA198.

C. The change of plea

On December 1, 2011, the defendant pleaded guilty to Count One of the Indictment before United States Magistrate Judge Joan G. Margolis. JA10-11, JA199-248. On September 11, 2012, Judge Ellen Bree Burns adopted Magistrate Judge Margolis's Findings and Recommendations, thereby accepting the defendant's guilty plea. JA17.

The written plea agreement set forth the defendant's agreement "to plead guilty to Count One of the Indictment charging him with possession of ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2)." JA240. The plea agreement set forth the alternative penalties that would apply depending whether the defendant was an armed career criminal and further set forth three alternative Guidelines calculations based on whether the defendant was an armed career criminal and whether an obstruction of justice enhancement applied. JA241, JA243-44.

The plea agreement included an appeal waiver pursuant to which the defendant “agree[d] not to appeal or collaterally attack in any proceeding . . . the conviction or sentence imposed by the Court if that sentence does not exceed 120 months of imprisonment, a term of supervised release of three years, and \$250,000 fine” JA244.

The plea agreement concluded with a Stipulation of Offense Conduct pursuant to which the defendant agreed that “on or about June 8, 2010, the defendant knowingly and intentionally possessed ammunition, that is, 18 rounds of nine millimeter ammunition manufactured by Cascade Cartridge Incorporated,” which “had been transported in interstate or foreign commerce” prior to June 8, 2010. JA248.

As counsel for the government explained at the change of plea proceeding, the appeal waiver provision “would allow the Defendant to appeal the Court’s determination that he is an armed career criminal, if that is the Court’s ultimate determination, but the Defendant understands that he would not be allowed to appeal his conviction” JA216. Magistrate Judge Margolis subsequently asked the defendant if “this written Agreement that has just been outlined by the Assistant United States Attorney, fully and accurately reflect[s] your understanding of the agreement that you have entered with the Gov-

ernment?” JA218. The defendant answered “Yes.” JA218.

The defendant’s guilty plea was not a conditional plea in which he reserved the right to appeal the district court’s suppression ruling or any other issue. Instead, as Magistrate Judge Margolis informed him during the plea colloquy, if the defendant pleaded guilty and his plea was accepted by the district court, “[t]here will be no trial of any kind, and no right to an appeal of the conviction, although you still may be able to appeal the actual sentence which is imposed by the Court. The Court will simply enter a finding of guilty on the basis of your guilty plea.” JA209-10.

D. The sentencing

Following the defendant’s guilty plea, the defendant moved the court to appoint substitute counsel to replace the attorney who had been retained to represent him. JA11. The court granted that motion. JA12.

Moreover, the district court granted seven defense motions to continue sentencing requested on January 3, 2012; March 7, 2012; April 12, 2012; June 13, 2012; August 9, 2012; August 22, 2012; and September 11, 2012. JA11, JA13, JA14, JA15, JA16. On the ultimate date of sentencing, September 21, 2012, the district court further granted a recess to permit the defendant

additional time to confer with defense counsel. JA17, JA251-97.

After this recess, the district court determined that the defendant is an armed career criminal. JA276-77, JA290, JA291. The district court sentenced the defendant to the fifteen-year mandatory minimum term of imprisonment required by 18 U.S.C. § 924(e). JA17, JA291.

Summary of Argument

I. The defendant's unconditional guilty plea waived any challenge to the district court's denial of his suppression motion. But even assuming such a challenge was not waived, it fails on the merits because the district court considered the totality of the circumstances and properly determined that the defendant voluntarily consented to the search of his residence.

II. The defendant's three convictions for violations of Connecticut General Statutes § 21a-277(a) on November 24, 1997, May 21, 2003, and May 22, 2003, are "serious drug offense[s]" as defined in 18 U.S.C. § 924(e)(2)(A)(ii). Based on the state court judgments and transcripts of the relevant plea proceedings, the district court properly concluded each of these three convictions qualified as a predicate conviction for application of the Armed Career Criminal Act. Accordingly, the district court imposed the mandatory minimum sentence required by law.

III. The defendant abandoned his request for the appointment of substitute counsel—made on the date of sentencing—following a recess in the sentencing proceeding to permit the defendant and defense counsel additional time to confer. But even assuming this request was not abandoned, the district court did not abuse its discretion in proceeding with the sentencing where it already had appointed new counsel for sentencing, granted seven defense motions to continue the sentencing, granted an additional recess on the date of sentencing, and heard from the defendant regarding all of his concerns with defense counsel’s representation but was not alerted to any material defects in that representation.

Argument

I. The defendant’s unconditional guilty plea waived any challenge to the district court’s denial of the suppression motion, and that motion was meritless in any event.

On appeal, the defendant seeks to challenge the denial of his suppression motion. But the defendant’s unconditional guilty plea waived any such challenge. In any event, the district court properly denied the motion after concluding that the defendant had voluntarily consented to the search of his home.

A. The defendant waived any challenge to the denial of his suppression motion by entering an unconditional guilty plea.

1. Relevant facts

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

2. Governing law and standard of review

“The settled rule is that a defendant who knowingly and voluntarily enters a guilty plea waives all nonjurisdictional defects in the prior proceedings.” *Lebowitz v. United States*, 877 F.2d 207, 209 (2d Cir. 1989). Put another way, “[a] defendant who pleads guilty unconditionally while represented by counsel may not assert independent claims relating to events prior to the entry of the guilty plea.” *Parisi v. United States*, 529 F.3d 134, 138 (2d Cir. 2008) (internal quotations omitted); *see also Hayle v. United States*, 815 F.2d 879, 881 (2d Cir. 1987) (“It is well settled that a defendant’s plea of guilty admits all of the elements of a formal criminal charge, and, in the absence of a court-approved reservation of issues for appeal, waives all challenges to the prosecution except those going to the court’s jurisdiction.”) (internal citation omitted).

Rule 11(a)(2) of the Federal Rules of Criminal Procedure provides an exception to this rule:

With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

But this exception is narrow. “[T]o reserve an issue for appeal after a guilty plea, a defendant must obtain the approval of the court and the consent of the government, and he must reserve the right to appeal in writing.” *United States v. Coffin*, 76 F.3d 494, 497 (2d Cir. 1996). “Moreover, a defendant must reserve the right to appeal *at the time of the plea.*” *Id.* (emphasis in original).

3. Discussion

The defendant unconditionally pleaded guilty and thereby waived any challenge to the district court’s denial of his suppression motion. Neither the written plea agreement, JA240-48, nor the plea colloquy, JA199-239, reserved the defendant’s right to appeal the district court’s denial of his suppression motion.

To the contrary, the plea colloquy made clear that the defendant’s guilty plea would preclude his ability to appeal the suppression ruling or any other issue related to his conviction. Government counsel explained that the defendant’s

plea agreement “would allow the Defendant to appeal the Court’s determination that he is an armed career criminal, if that is the Court’s ultimate determination, but the Defendant understands that he would not be allowed to appeal his conviction.” JA216. Further, the court explained to the defendant that by pleading guilty, he would have “no right to an appeal of the conviction” and that “a finding of guilty” would be entered “on the basis of your guilty plea.” JA209-10.

Accordingly, the defendant’s unconditional guilty plea waived his challenge to the district court’s suppression ruling.

B. Based on the totality of the circumstances, the district court properly concluded that the defendant voluntarily consented to the search of his home.

1. Relevant facts

The district court found that as part of a large roundup on June 8, 2010, law enforcement officers went to the defendant’s house to execute a state arrest warrant for the defendant and apprehend his brother for a parole violation. JA184. When officers knocked on the door of the second-floor apartment, the defendant answered the door and complied with officers’ instructions to lay face-down on the floor. JA184. Officers then handcuffed the defendant, arrested him,

and entered the apartment to perform a protective sweep. JA184.

The defendant's girlfriend and mother were seated on a couch in the living room. JA185. Officers subsequently permitted the defendant's mother to retrieve her medication from her bedroom and brought her water so she could take the medicine. JA185. The defendant's younger brother was instructed to lay down on the floor until the officers determined that he was not the brother wanted for a parole violation. JA185. Officers subsequently permitted him to get ready for and depart for school. JA185.

At that point, the officers escorted the defendant into the kitchen. Although the facts—especially the length of time that elapsed—were disputed, the district court found as follows:

Within fifteen minutes of his arrest, officers took Edwards into the kitchen. A few minutes later, officers informed Charles Wood (“Wood”), a senior inspector with the USMS, who was not in the kitchen, that Edwards wished to cooperate. Wood left the residence to retrieve a waiver-of-*Miranda*-rights form and a consent-to-search form from a uniformed officer outside the residence. Wood returned with the forms approximately two minutes later

....

JA185-86. The district court then found that Wood reviewed the *Miranda* form with the defendant and after signing it, the defendant stated that he had ammunition located in the pocket of a jacket in his bedroom closet. JA186. Wood then reviewed the consent to search form with the defendant and after the defendant signed it, he cried briefly and informed the officers about the presence of firearms at another location in New Haven. JA186.

According to the district court, Wood then telephoned New Haven Police Officer and ATF Task Force Officer John Healy and “[a]pproximately fifteen minutes later,” Healy and ATF Special Agent Kurt Wheeler arrived at the defendant’s residence. JA187. “Edwards then accompanied Wheeler and Healy into his bedroom and pointed to the jacket where he indicated the ammunition could be found.” JA187. Eighteen rounds of ammunition were recovered in that jacket pocket, but no firearms were recovered at the other location. JA187.

The district court found that “[a]ccording to the timeline established by credible evidence, no more than thirty minutes passed between the officers’ initial entry and Edwards’s decision to consent to the search.” JA193.

In crediting this version of events, the district court expressly found that the defendant’s “statements to the contrary are not credible.” JA187. In support of this finding, the court

pointed to inconsistencies between the affidavit the defendant submitted in support of the suppression motion and his suppression hearing testimony regarding the length of time that elapsed between his arrest and his consent and regarding whether his younger brother was handcuffed. JA187-88, JA188 n.3. It further highlighted that the defendant's "uncorroborated testimony" was contradicted by the timeline established by the testimony of two officers, which, in turn, "was supported by recordings of police radio traffic." JA188.

The district court also discredited the defendant's testimony regarding "representations that he claims officers made to him before he consented to the search." JA188. In reaching this conclusion, the district court explained that the defendant's testimony was (1) "uncorroborated and self-serving," (2) "contradicted by all three of the officers who were present in the residence and who testified that they never told or heard any other officer tell Edwards that a warrant was on its way," and (3) undermined by the consent form he signed. JA189, JA195, JA196. On this topic, the district court further observed that "after the initial protective sweep, the atmosphere in the home was calm and professional." JA194.

Ultimately, the district court concluded that "the government has met its burden and demonstrated, by a preponderance of the evidence, that

Edwards's consent to the search of his residence was voluntarily given. The totality of the circumstances in this case indicates that Edwards[s] consent to search was the product of his own free will." JA191-92. In reaching this conclusion, the district court thoroughly considered the circumstances surrounding the defendant's provision of consent to search, JA192-98, and "based on the totality of the circumstances" found that the defendant's "consent to search was voluntary," JA198.

2. Governing law and standard of review

Law enforcement officers may search a residence without a warrant and without probable cause if the search is conducted with consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). When "the government relies on consent to justify a warrantless search, it bears the burden of proving by a preponderance of the evidence that the consent was voluntary." *United States v. Snype*, 441 F.3d 119, 131 (2d Cir. 2006). However, this consent need only be voluntary, not fully knowing and intelligent. *See Bustamonte*, 412 U.S. at 248-49; *United States v. Garcia*, 56 F.3d 418, 422 (2d Cir. 1995). Law enforcement officers are not legally bound to inform citizens of their right to refuse when seeking consent to conduct a warrantless search. *See United States v. Drayton*, 536 U.S. 194, 207 (2002).

Voluntariness is a question of fact to be determined based on the totality of the circumstances. *See Bustamonte*, 412 U.S. at 226. The Supreme Court has suggested that the following factors be considered: (1) the defendant's age; (2) the defendant's educational background; (3) the defendant's intelligence level; (4) whether the defendant was advised of his constitutional rights; (5) the length of detention; (6) the nature of the questioning; and (7) the use of physical punishment. *See id.* This Court has added the following factors for evaluating consent in a custodial situation: (1) whether guns were drawn or the consenting individual frisked; (2) whether the defendant was threatened; (3) whether the defendant was in a public area; and (4) whether the defendant knew he had the option to refuse consent to the search. *See United States v. Puglisi*, 790 F.2d 240, 243-44 (2d Cir. 1986) (*per curiam*).

The ultimate question "is whether the officer[s] had a reasonable basis for believing that there had been consent to the search." *Garcia*, 56 F.3d at 423 (internal quotation marks omitted). Reasonableness is measured by an objective standard: "[W]hat would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). Accordingly, the Fourth Amendment is satisfied if it was objectively reasonable for the officers to believe

that the individual voluntarily consented to the search that was undertaken. *Garcia*, 56 F.3d at 423.

When reviewing the denial of a suppression motion, this Court “review[s] findings of fact for clear error and legal questions *de novo*,” viewing “the evidence in the light most favorable to the government and draw[ing] all reasonable inferences in the government’s favor.” See *United States v. Ferguson*, 702 F.3d 89, 93 (2d Cir. 2012) (internal quotation marks omitted). This Court reviews a district court’s finding that a defendant’s consent to search was voluntary for clear error. *United States v. Moreno*, 701 F.3d 64, 72 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2797 (2013). “A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Ferguson*, 702 F.3d at 93 (internal quotation marks omitted).

3. Discussion

As the district court properly found, in view of the facts established at the suppression hearing and based on the totality of the circumstances, the defendant consented to the search freely and voluntarily and the law enforcement officers reasonably believed that the defendant’s consent to search was given freely and voluntarily.

Each of the seven factors enumerated in *Bustamonte* weighs in favor of voluntariness. Regarding the first three factors, the district court concluded that “Edwards’s age, intelligence and educational background weigh in favor of a finding of voluntariness.” JA192. The defendant was thirty years old at the time of his arrest, had received his General Equivalency Diploma, and could “read, write, and understand English.” JA192.

Fourth, on the date of his arrest, the defendant generally was familiar with his constitutional rights and law enforcement officers advised him of those rights. The defendant’s Presentence Report describes a lengthy criminal history and substantial interaction with law enforcement. PSR ¶¶ 28-49. There is no dispute that the defendant initialed next to each of the rights enumerated on the *Miranda* warning waiver and signed that document. GA26. Moreover, as the district court stated: “[I]t is not disputed that Edwards was informed of his right to refuse to consent to the search.” JA197; *see also* GA27.

Fifth, the length of the defendant’s detention favors a finding of voluntariness. In crediting the law enforcement account of this period, the district court explained it “was not so brief that he did not have time to consider what he was doing, nor was it so lengthy as to indicate that his consent was coerced after a long period of police pressure.” JA192. Moreover, the district court

found that a period of not more than thirty minutes was enough time to restore “an atmosphere of relative calm,” JA192, “not an unreasonable amount of time,” JA193, and not so long as to “raise concerns that Edwards’s consent was coerced,” JA193. See *Snype*, 441 F.3d at 131 (finding defendant’s host’s consent voluntary after forcible entry by heavily-armed SWAT team and possibility of placing host’s daughter in protective custody because “numerous steps were taken that did restore calm to [host’s] home before she consented to any search”); but see *United States v. Mapp*, 476 F.2d 67, 78 (2d Cir. 1973) (finding consent involuntary when given immediately after arrest “without taking even minimal steps to establish an atmosphere of relative calm”).

But the district court went further and considered the defendant’s timeline of the events and held that even under the facts as he recounted them, the length of the detention did not undermine a finding of voluntariness. JA193. The defendant testified that it took over an hour between the time law enforcement officers entered the residence and he signed the consent form. JA116-17. The district court discredited this timeline but determined that even “an hour to an hour and a half does not, under these circumstances, render Edwards’s consent involuntary.” JA193. As the district court concluded, even under the defendant’s discredited timeline,

“Edwards was ‘not subjected to the kind of intensive interrogation over many hours or days which would overwhelm’ him and render his consent involuntary.” JA193-94 (quoting *United States v. Arango-Correa*, 851 F.2d 54, 57 (2d Cir. 1988)).

Sixth, “the nature of Edwards’s interaction with the officers also supports a finding that his consent was voluntary.” JA194. None of the testifying law enforcement officers ever received any indication from the defendant that he did not wish to consent, that he was in any way coerced into providing consent, or that he wished to withdraw his consent. The defendant never testified that he indicated as much to any law enforcement officer. Although the defendant cried after signing the forms, he was calm and gave no indication of agitation or confusion throughout his review and signing of the forms. Accordingly, the nature of the questioning was consistent with the atmosphere in the second-floor apartment—calm, respectful, and professional. JA194. The defendant’s younger brother was permitted to prepare for and attend school, his mother was allowed to obtain her medication and provided with water to take that medicine, and the law enforcement officers contacted the defendant’s girlfriend’s employer on her behalf. JA194. The defendant himself “was calm, cooperative and, to a certain degree, apologetic during his interaction with the officers.” JA194. Not

only did he consent to the search, but he also “took the affirmative step of leading officers directly to the ammunition.” JA194.

Seventh, there is no evidence or even an allegation that law enforcement officers used physical punishment. The defendant’s girlfriend and mother both testified that they could see him in the kitchen throughout the period the defendant remained in the second-floor apartment. JA151, JA158.

As with the seven *Bustamonte* factors, the four *Puglisi* factors weigh in favor of voluntariness. First, law enforcement officers drew their weapons only for the initial arrest and protective sweep. JA196. *See United States v. Ansaldi*, 372 F.3d 118, 129 (2d Cir. 2004) (“The fact that police drew their guns to effectuate the arrest does not necessarily establish coercion”). This behavior comported with “standard procedure when executing warrants.” JA72, JA196. The district court found that “[o]fficers put their guns away shortly after the sweep,” “guns were not drawn when Edwards consented to the search,” and “nothing indicates that [the partial visibility of the guns] intimidated Edwards or had any bearing on his decision to consent to the search.” JA196. The law enforcement officers thus acted responsibly with respect to their weapons throughout the defendant’s arrest and consent to search.

Second, the district court found incredible the defendant's claims of coercive behavior, but held that even if an officer had told the defendant that a warrant "would be forthcoming if he did not consent, that fact would not require a finding of coercion." JA195. None of the other defense witnesses heard any officer make a threat or representation about a search warrant to the defendant. JA145-46, JA151, JA158, JA160-61, JA163. None of the law enforcement witnesses made or overheard such a threat or representation. JA80-81, JA114-15, JA135. Moreover, the defendant never indicated to any of the law enforcement witnesses that another officer had made such a threat or representation. JA107, JA109, JA115, JA135, JA136. Indeed, not only did the defendant review and sign the *Miranda* warning waiver and the consent to search form, which both explicitly acknowledged the absence of such threats, but he also led the officers to the ammunition after awaiting the arrival of Task Force Officer Healy and Agent Wheeler. JA194. The defendant not only failed to withdraw his consent to search after this period of delay, but actually took an affirmative step to further the purposes of the search. This action cuts against the defendant's self-serving testimony.

Third, the environment in which the defendant provided his consent to search weighs in favor of voluntariness. The district court considered that the defendant "was not in a public area

when he consented to the search,” JA196-97, but found that the defendant “was in the kitchen of his own home,” an environment “less coercive than the confines of a police station.” JA197. Law enforcement officers spoke with the defendant in an environment in which he was comfortable. JA196-97. Moreover, the defendant’s girlfriend and mother both testified that they could see him in the kitchen throughout the period the defendant remained in the second-floor apartment.

Fourth, the defendant knew he had the option to refuse consent to the search. He testified that he can understand, read, and write English and that reading a page of paper is no problem for him. JA175-76. The defendant’s testimony at the suppression hearing underscores his facility with English. The consent to search form plainly sets forth the “right to refuse to consent.” GA27. It is undisputed that the defendant signed that form and Inspector Wood testified that the defendant never indicated “that he did not understand the form.” JA109. Accordingly, the defendant knew he had the option to refuse consent to search.

In short, the district court considered that the defendant “was in custody at the time he gave consent.” JA195. But even applying a greater level of scrutiny due to his custodial status, “there is nothing to indicate that Edwards’s consent was not voluntary.” JA196.

In addition to the *Bustamonte* and *Puglisi* factors, the government highlights three additional considerations. First, after awaiting the arrival of Officer Healy and Agent Wheeler—a period of at least fifteen minutes during which the defendant could reflect on his decision to consent—the defendant gave no indication that he wished to withdraw his consent. Instead, the defendant took the additional affirmative step of leading the law enforcement officers to the ammunition. JA194.

Second, the largely undisputed sequence of events is entirely consistent with the defendant's continued presence in the apartment based on his willingness to cooperate. Agent Wheeler testified that it is standard practice to keep a defendant at the scene when that individual has indicated a willingness to cooperate. JA141-42. This theory is bolstered by the defendant's admission that he was aware of possible benefits, including a sentence reduction, to arrestees who provide information, JA174, and the recorded police radio calls which demonstrate a delay in the request for the prisoner conveyance van.

Third, in signing both the *Miranda* waiver form and the consent to search form, the defendant acknowledged that he was doing so freely and voluntarily. The *Miranda* waiver form stated that the defendant made statements “without fear, threats, or promises of favor.” GA26. The consent to search form stated that the defendant

gave consent “voluntarily and without duress, threats, or promises of any kind.” GA27. As the district court highlighted, all of the defendant’s claims of coercion were “contradicted by the consent-to-search form signed by Edwards which expressly states that his consent was granted absent any threats.” JA196.

Based on all of these factors and the totality of the circumstances, the district court properly found that the defendant freely and voluntarily consented to the search of his residence and the law enforcement officers had an objectively reasonable belief that the defendant’s consent was given freely and voluntarily.

The defendant’s reliance on *United States v. Isiofia*, 370 F.3d 226 (2d Cir. 2004), is misplaced. In *Isiofia*, the Second Circuit upheld the district court’s finding of involuntariness, but that case is readily distinguishable from the facts established at the suppression hearing here. First, in *Isiofia*, “numerous law enforcement agents” were present while the defendant was “handcuffed to a table for over thirty minutes” and some of those agents “extracted detailed personal and financial information from him.” *Id.* at 232. There is no evidence in the instant case that the defendant was ever handcuffed to an object. Indeed, the district court found that the defendant was not handcuffed while reviewing the forms and was handcuffed in front of his body after signing the forms. JA186. Moreover, the sup-

pression hearing testimony is unequivocal that fewer law enforcement officers were present during the defendant's detention in the kitchen. And there is no evidence that any of the agents ever extracted personal or financial information from the defendant.

Second, evidence indicated that the *Isiofia* defendant had trouble speaking and understanding English. *Id.* at 233. The defendant in the instant case admitted that he had no trouble understanding, reading, or writing English. JA176.

Third, the entry into the *Isiofia* defendant's residence was warrantless and there was no apparent need to conduct a protective sweep. 370 F.3d at 231-32, 234. In contrast, the law enforcement officers in this case had an arrest warrant for the defendant, were attempting to locate the defendant's brother for a parole violation, and believed that both individuals were involved in firearms dealing. These critical differences distinguish the circumstances that led to the suppression of evidence in *Isiofia*.

Similarly, the defendant's reliance on "the length of time in custody," Def.'s Br. at 17, and his assertion that "there is no police record whether federal or state, of the actual times of this incident," *id.* at 18, is misplaced. The district court found that "no more than thirty minutes passed between the officers' initial entry and Edwards's decision to consent to the search." JA193. That finding—based on credible

evidence in the record—was not clearly erroneous. Moreover, based on this finding, the district court properly determined that “[t]he length of Edwards’s interaction with police was not so brief that he did not have time to consider what he was doing, nor was it so lengthy as to indicate that his consent was coerced after a long period of police pressure.” JA192. But the district court went even further, considered the defendant’s discredited timeline, and determined that it would not render his consent involuntary. JA193-94.

In conclusion, the totality of the circumstances, as established at the suppression hearing and found by the district court, establish the voluntariness of the defendant’s consent to search. *See, e.g., Puglisi*, 790 F.2d at 243-44 (affirming the district court’s finding of voluntariness where the defendant “was advised of his *Miranda* rights and advised that he did not have to consent to a search, he was in handcuffs, had been arrested by agents with weapons drawn, and had been frisked”). The law enforcement officers involved in the defendant’s arrest and consent to search acted well within the bounds of the Fourth Amendment, when they learned of the defendant’s willingness to cooperate, reviewed with him the *Miranda* warning waiver and consent to search form, and followed his lead to retrieve the ammunition located in his bedroom closet.

II. The defendant is an armed career criminal and therefore subject to a mandatory minimum sentence of 180 months of imprisonment.

The district court sentenced the defendant as an Armed Career Criminal.¹ On appeal, the defendant's challenges to the three predicate convictions are misplaced. The November 24, 1997; May 21, 2003; and May 22, 2003 convictions are "serious drug offense[s]" as defined in 18 U.S.C. § 924(e)(2)(A)(ii). The district court therefore properly imposed the mandatory minimum sentence of 180 months of imprisonment required by 18 U.S.C. § 924(e)(1).

¹ The defendant purports to question the applicability of a two-level enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1. This question is misplaced. As set forth in the Guideline Stipulation of the written plea agreement, JA243-44, during the plea colloquy, JA214, in paragraphs 24-26 of the Presentence Report, and at the sentencing proceeding, JA276-77, JA282, JA289-90, the obstruction-of-justice enhancement would not apply if the district court sentenced the defendant as an armed career criminal. *See* U.S.S.G. § 4B1.4(b)(3)(B). Accordingly, in sentencing the defendant as an armed career criminal, the district court did not apply the enhancement. In other words, the defendant's purported confusion about whether that enhancement was applied, *see* Def.'s Br. at 20-21, is belied by the record.

A. Relevant facts

On June 9, 2011, the government filed a “Notice of Sentence Enhancement Pursuant to 18 U.S.C. § 924(e),” in which it identified three of the defendant’s convictions under Connecticut General Statutes § 21a-277(a) that qualified as predicates under the Armed Career Criminal Act, specifically convictions on November 24, 1997, May 21, 2003, and May 22, 2003. JA51-52. On May 14, 2012, the government filed a “Revised Notice of Sentence Enhancement Pursuant to 18 U.S.C. § 924(e),” in which it added the defendant’s conviction for a violation of Connecticut General Statutes § 21a-277(b) on October 20, 2008, as a fourth predicate conviction. JA249-50. The government subsequently withdrew its reliance on the October 20, 2008 conviction. GA100-01 n.2.

The government relied on the defendant’s three convictions for violations of Connecticut General Statutes § 21a-277(a) at the defendant’s sentencing to establish that the defendant is an armed career criminal. The state court transcripts of each of the defendant’s relevant changes of plea were presented to the district court and are excerpted below. *See* JA279.

On this record, the district court adopted the factual findings and the Guidelines range set forth in the Presentence Report. JA276, JA277, JA291. In sum, the district court concluded that

the defendant is an armed career criminal pursuant to 18 U.S.C. § 924(e). JA290.

1. November 24, 1997 conviction

At the defendant's November 24, 1997 change of plea proceeding, the defendant expressed his intention to enter a plea of guilty:

COURT CLERK: [U]nder substituted information you're being charged with possession of narcotics with intent to sell, under section 21a-277a, to this charge how [d]o you plead, guilty or not guilty?

DEFENDANT: Guilty.

JA24. After the appointment of a guardian ad litem, the proceeding continued:

COURT CLERK: To the charge possession of narcotics with intent to sell under section 21a-277a to this charge how [d]o you plead, guilty or not guilty?

DEFENDANT: Guilty.

JA26. The state prosecutor then offered the factual basis for this plea:

MR. DOSKOS: August 25th of this year, approximately six p.m., at 677 Winchester Avenue in the City of New Haven, Officers on patrol observed this defendant, who was previously known to them, on the sidewalk in front of that address, he was engaged in a hand to hand transaction

with another individual. They saw this defendant take the money and hand something back to the other individual. As the[y] approached the defendant ran, ran through some resident[s'] homes. They finally apprehended, he was found to be in possession of five packets containing— Uh—what tested as crack cocaine.

JA26. After ensuring the voluntary and knowing nature of the defendant's plea, JA27-28, the court returned to the factual basis:

THE COURT: . . .The prosecutor stated what the state claims happened here, is this accurate—essentially accurate what happened?

DEFENDANT: Yes.

* * *

THE COURT: All right. The Court finds that the plea of guilty has been made knowingly, intelligently, voluntarily with full understanding of the crime charged, it's possible penalties, adequate advice and effective assistance and counsel. The Court finds that there is a factual basis for it, accepted the plea. The plea is accepted and the finding of guilty is made.

JA29. Accordingly, the defendant expressly confirmed the factual basis for the plea in a colloquy with the judge. This confirmation preceded the

court's finding of a factual basis for the plea and the court's acceptance of the plea. Moreover, the certified copy of this conviction makes clear that the defendant pleaded guilty to a violation of Connecticut General Statutes § 21a-277(a). GA167-68.

2. May 21, 2003 conviction

At the defendant's May 21, 2003 change of plea proceeding, the defendant expressed his intention to enter a plea of guilty:

THE CLERK: Docket CR027361 to the charge of possession of narcotics with the intent to sell; what is your plea?

THE DEFENDANT: Guilty.

JA35. At that time, the defendant also pleaded guilty to other offenses and admitted five violations of probation. The state prosecutor set forth the factual basis for each of the pleas and admissions, including the following excerpt regarding the drug offense:

ATTY. DOYLE: Factual basis for the pleas . . . Docket ending in 361, larceny in the third degree and possession of narcotics with intent to sell. This is an arrest by warrant for an incident occurring May 16th 2002 in the city of New Haven. Officers of the New Haven Police Department conducting a narcotics investigation in the area of Exchange and Lloyd at this corner.

The investigation led them to a 1991— to two different automobiles in the city of New Haven. One automobile—officers watching this individual engage in what appeared to be narcotics activity. The individual was able to subsequently flee the scene. However, officers were able to observe him which is—an individual later identifies this defendant in the automobile.

The car turned out to be stolen and as well found in the automobile was a total of 87 bags of a substance and also a large chunk of a substance had tested positive for the presence of cocaine. The item was seized as well as the vehicle. The state alleges he possessed those items with the intent to sell and was in possession of a stolen car on that date.

JA36-37. After ensuring the voluntary and knowing nature of the defendant's plea, JA38-41, the court returned to the factual basis:

THE COURT: You heard the prosecutor recite the facts. Is that basically what happened?

THE DEFENDANT: Yes.

* * *

THE COURT: The Court will find that the pleas and admissions are knowingly and

voluntarily made with the assistance of competent counsel. There's a factual basis for the plea and admission. Plea and admissions are accepted. Findings of guilty, finding of violation of probation may enter.

JA41. Accordingly, the defendant expressly confirmed the factual basis for the plea in a colloquy with the judge. This confirmation preceded the court's finding of a factual basis for the plea and the court's acceptance of the plea. Moreover, the certified copy of this conviction makes clear that the defendant pleaded guilty to a violation of Connecticut General Statutes § 21a-277(a). GA169-70.

3. May 22, 2003 conviction

At the defendant's May 22, 2003 change of plea proceeding, the defendant expressed his intention to enter a plea of guilty:

THE CLERK: BRANDON EDWARDS, under docket number CR 02 211886, you're charged under substituted information to possession of narcotics with intent to sell under 21a-277a, how do you plea?

BRANDON EDWARDS: Guilty.

MR. LION [Assistant State's Attorney]: This is an incident dating back to conduct on 6/20/2002. The defendant sees the police, they approach, in plain view they see,

they smell the odor of marijuana. They conduct a search, they find scales, cell phones, grinder, cutting agent, sixteen bags, 36.3 grams cocaine. Those are the basic facts giving rise to the charge. Field Test positive.

JA45-46. After ensuring the voluntary and knowing nature of the defendant's plea, JA46-48, the court returned to the factual basis:

THE COURT: Did you do what the State's Attorney accused you of?

BRANDON EDWARDS: Yes.

JA48. The court then accepted the guilty plea:

THE COURT: The Court is going to find the plea has been knowingly and intelligently made with the assistance of competent counsel. There's a factual basis for the plea, the plea is accepted, finding of guilty.

JA49. Accordingly, the defendant expressly confirmed the factual basis for the plea in a colloquy with the judge. This confirmation preceded the court's finding of a factual basis for the plea and the court's acceptance of the plea. Moreover, the certified copy of this conviction makes clear that the defendant pleaded guilty to a violation of Connecticut General Statutes § 21a-277(a). GA171-72.

B. Governing law and standard of review

The Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), mandates a minimum sentence of fifteen years when a defendant “violates section 922(g) of [Title 18] and has three previous convictions . . . for a violent felony or a serious drug offense, or both . . .” 18 U.S.C. § 924(e)(1). The statute defines a “serious drug offense,” in pertinent part, as “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in . . . 21 U.S.C. § 802), for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e)(2)(A)(ii). In turn, 21 U.S.C. § 802(11) defines “distribute” as “to deliver (other than by administering or dispensing) a controlled substance or a listed chemical.”

In assessing whether a prior conviction qualifies as a “serious drug offense” under section 924(e), courts start with a “categorical approach,” looking “to the fact of conviction and the statutory definition of the prior offense.” *Taylor v. United States*, 495 U.S. 575, 602 (1990). Where a divisible state statute criminalizes conduct not prohibited in the relevant federal statute, the court applies the modified categorical approach. Under this approach, the sentencing court may look to additional sources, including “the indictment or information and jury instruc-

tions” to determine which provision of the statute was the basis for the defendant’s conviction. *Taylor*, 495 U.S. at 602. Where a prior conviction arose out of a guilty plea, the court may consider “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 [] some comparable judicial record of this information.” *Shepard v. United States*, 544 U.S. 13, 26 (2005).

In *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008), this Court considered whether to apply the categorical or the modified categorical approach to assessing whether a conviction under Connecticut General Statutes § 21a-277(b) qualified as a “controlled substance offense” under U.S.S.G. § 4B1.2(b). This Court concluded that “the Connecticut statute, by criminalizing a mere offer to sell, criminalizes more conduct than falls within the federal definition of a controlled substance offense.” *Savage*, 542 F.3d at 966. Accordingly, this Court applied the modified categorical approach.²

² Put another way, *Savage* treated Connecticut General Statutes § 21a-277(b) as a divisible statute. 542 F.3d at 965. In explaining the relevant portion of the statute, this Court enumerated the alternative elements of the offense: “. . . manufactures, distributes, sells, prescribes, dispenses, compounds, transports with intent to sell or dispense, possesses with intent

to sell or dispense, offers, gives, or administers to another person.” *Id.* at 961 (quoting Conn. Gen. Stat. § 21a-277(b)). Accordingly, Section 21a-277(b)—and, because it contains the same list of alternative elements, Connecticut General Statutes § 21a-277(a)—set forth “qualifying and non-qualifying offenses in distinct subsections or elements of a list,” warranting application of “the modified categorical approach.” *United States v. Beardley*, 691 F.3d 252, 264 (2d Cir. 2012).

The Supreme Court’s recent decision in *Descamps v. United States*, 133 S. Ct. 2276, 2282 (2013), held that “sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements.” However, the Supreme Court preserved the use of the modified categorical approach in the context of “a divisible statute, listing potential offense elements in the alternative.” *Id.* at 2283. Because this Court already has determined that section 21a-277(b) is a divisible statute, *Descamps* does not bear on the application of the modified categorical approach to section 21a-277(a).

Moreover, federal courts in the District of Connecticut treat Connecticut General Statutes § 21a-277(a) as a divisible statute subject to the modified categorical approach regarding the type of controlled substance. *See, e.g., United States v. Lopez*, 536 F. Supp. 2d 218, 221-25 (D. Conn. 2008); *United States v. Madera*, 521 F. Supp. 2d 149, 154-57 (D. Conn. 2007). Indeed, section 21a-277(a) refers to two alternatives: “a hallucinogenic substance other than marijuana, or a narcotic substance.” In turn, each of

Based on the reasoning of *Savage*, the modified categorical approach applies when assessing whether a conviction under Connecticut General Statutes § 21a-277(a) qualifies as a “serious drug offense” under 18 U.S.C. § 924(e)(2)(A)(ii). But the use of the word “involving” in Section 924(e)(2)(A)(ii) carries “expansive connotations” and “must be construed as extending the focus of § 924(e) beyond the precise offenses of distributing, manufacturing, or possessing, and as encompassing as well offenses that are related to or connected with such conduct.” *United States v. King*, 325 F.3d 110, 113 (2d Cir. 2003). Accordingly, “serious drug offense” as defined in the Armed Career Criminal Act is broader than “controlled substance offense[s]” as defined in the career offender enhancement. *See* U.S.S.G. § 4B1.4, cmt. 1 (“It is to be noted that the definitions of ‘violent felony’ and ‘serious drug offense’ in 18 U.S.C. § 924(e)(2) are not identical to the definitions of ‘crime of violence’ and ‘controlled substance offense’ used in § 4B1.1.”).

The government must prove the existence of the three predicate convictions under section 924(e) by a preponderance of the evidence. *See United States v. Rosa*, 507 F.3d 142, 151 (2d Cir.

those types of controlled substance is defined by alternatives enumerated in Connecticut General Statutes §§ 21a-240(23) and 21a-240(30). Accordingly, the modified categorical approach also is appropriate for the type-of-controlled substance inquiry.

2007). This Court applies clear error review to a district court's factual findings regarding the nature of a prior offense or a prior conviction, but reviews *de novo* questions of law, including "the district court's authority to make a factual finding about the nature of the conviction." *United States v. Beardsley*, 691 F.3d 252, 257 (2d Cir. 2012) (internal quotation marks and citations omitted).

C. Discussion

Armed with the plea transcripts and judgments for the defendant's November 24, 1997, May 21, 2003, and May 22, 2003 convictions, the district court properly determined that all three convictions constitute serious drug offenses pursuant to section 924(e). Each involved (1) an offense under state law (a violation of Connecticut General Statutes § 21a-277(a)), (2) involving possessing with intent to distribute a controlled substance (crack cocaine for the November 24, 1997 conviction, and cocaine for the May 21 and 22, 2003 convictions), (3) for which a maximum term of imprisonment of ten years or more is prescribed by law, *see* Conn. Gen. Stat. § 21a-277(a) (providing that "for a first offense, [a defendant] shall be imprisoned not more than fifteen years"). Each of the defendant's arguments to the contrary lack merit.

1. Each of the three predicate convictions carried a maximum term of imprisonment of ten years or more.

The defendant challenges the conclusion that each of the three predicate convictions carried a maximum term of imprisonment of ten years or more. *See* Def.'s Br. at 11-14. In doing so, the defendant contends that the relevant state court did not make a specific quantity finding with respect to the controlled substances and, for the May 22, 2003 conviction, the relevant state court did not specify the controlled substance—marijuana or cocaine—underlying the conviction. *See id.* These arguments are misplaced.

Based on the three transcripts of the defendant's guilty pleas and the three judgments of conviction, there can be no dispute that each of these three convictions was for a violation of Connecticut General Statutes § 21a-277(a). *See* JA24, JA26, JA35, JA45; GA167-72. Because marijuana explicitly is excluded from this offense, Conn. Gen. Stat. § 21a-277(a) (specifying "a hallucinogenic substance other than marijuana"), the May 22, 2003 conviction necessarily was based on the defendant's possession with intent to sell cocaine. Moreover, under the plain language of section 21a-277(a), a violation of this statute does not require any threshold quantity of cocaine or cocaine base.

Accordingly, the only remaining question is whether section 21a-277(a) prescribed a maxi-

maximum term of imprisonment of ten years or more at the time of the defendant's convictions in 1997 and 2003. "[A] federal sentencing court must determine whether 'an offense under State law' is a 'serious drug offense' by consulting the 'maximum term of imprisonment' applicable to a defendant's previous drug offense at the time of the defendant's state conviction for that offense." *McNeill v. United States*, 131 S. Ct. 2218, 2224 (2011) (quoting 18 U.S.C. § 924(e)(2)(A)(ii)).³ The 1997 and 2003 versions of the statute prescribed imprisonment of "not more than fifteen years" for a first offense, "not more than thirty years" for a second offense, and "not more than thirty years" for each subsequent offense. Conn. Gen. Stat. § 21a-277(a) (1997); Conn. Gen. Stat. § 21a-277(a) (2003). This statute has not been amended since 1987. At the time of the defendant's 1997 and 2003 convictions, therefore, section 21a-277(a) prescribed a maximum term of imprisonment of ten years or more.

2. The defendant confirmed the factual basis offered by the prosecutor at his May 22, 2003 change of plea.

In his supplemental *pro se* brief, the defendant contends that he never confirmed the factual

³ In *McNeill*, the Supreme Court abrogated this Court's decision in *United States v. Darden*, 539 F.3d 116 (2d Cir. 2008). The defendant's reliance on *Darden* therefore is misplaced.

basis offered by the prosecutor at his May 22, 2003 change of plea.

The defendant's argument rests on a hyper-technical reading of the term "accused." See Def.'s Supp. Br. at 11-12. After the prosecutor recited the factual basis and the court ensured the voluntary and knowing nature of the plea, the court inquired: "Did you do what the State's Attorney accused you of?" The defendant answered "Yes." JA48. When the court inquired "Did you do what the State's Attorney accused you of?," the court was not asking if the defendant generally possessed narcotics with intent to sell, but rather whether the defendant agreed with the prosecutor's recitation of the specific factual basis. The defendant made clear at the outset of the proceeding that he intended to plead guilty to the charge against him. JA45. The only substantive remarks of the Assistant State's Attorney during the entire colloquy consisted of the recitation of the factual basis. JA45-46. The defendant's affirmative response to the court's inquiry therefore confirmed the factual basis.

Shepard requires only that the records relied upon provide the same level of "certainty" as would otherwise be available from a "charging document," *Shepard*, 544 U.S. at 25, which itself "need not be perfect, and common sense and reason are more important than technicalities," *United States v. De La Pava*, 268 F.3d 157, 162

(2d Cir. 2001). Accordingly, a common-sense reading of the May 22, 2003 plea transcript establishes that the defendant confirmed the factual basis, the court expressly found a factual basis for the plea, and then the court accepted the defendant's guilty plea. JA49.

3. The factual bases confirmed by the defendant at the May 21 and 22, 2003 proceedings establish the defendant's possession with intent to distribute cocaine and therefore those convictions qualify as serious drug offenses under the modified categorical approach.

In his supplemental *pro se* brief, relying on *Savage*, the defendant contends that the factual bases recited at the May 21 and 22, 2003 changes of plea fall short of establishing that his convictions qualify as "serious drug offenses" under the modified categorical approach. *See* Def.'s Supp. Br. at 12-13. The defendant's reliance on *Savage* is misplaced.

The *Savage* decision is premised on two factors not present in the instant case. First, in *Savage*, the defendant had entered a guilty plea pursuant to the *Alford* doctrine and therefore never confirmed the factual basis for the plea. 542 F.3d at 962. Second, in view of the defendant's *Alford* plea and Connecticut's expansive definition of "sale," the possibility existed that

the defendant had engaged in conduct that does not “fall[] within the federal definition of a controlled substance offense”: “a mere offer to sell” without possession of the controlled substance that he had offered to sell. *Id.* at 966. This possibility does not arise in relation to the instant defendant’s May 21 and May 22, 2003 convictions and therefore both convictions serve as ACCA predicates.⁴

⁴ Although this Court need not reach either issue in deciding this appeal, the government highlights two problems with the *Savage* decision. First, in a subsequent opinion, the Supreme Court of Connecticut considered the definition of “offer” in the context of a drug offense. It equated “offer” to “the presentation of a controlled substance for acceptance or rejection.” *State v. Webster*, 308 Conn. 43, 53-54 (2013). If the *Webster* decision sufficiently narrowed the state’s definition of “offer” to exclude the possibility of a mere offer to sell without possession of the controlled substance, then the force of *Savage*’s reasoning would be cut dramatically. Second, in a subsequent opinion, this Court reasoned that “‘distribution,’ within the meaning of 21 U.S.C. § 841(a)(1) does not require a ‘sale’ to take place” and therefore, even if an individual “did no more than offer or attempt to sell cocaine, the state offense would be conduct punishable as a federal felony.” *Pascual v. Holder*, 707 F.3d 403, 405 (2d Cir. 2013) (per curiam) (citing *United States v. Wallace*, 532 F.3d 126, 129 (2d Cir. 2008)). The holding that a state conviction for offer-

The factual basis recited by the prosecutor at the defendant's May 21, 2003 change of plea included the following: that law enforcement officers were "conducting a narcotics investigation," that they observed the defendant "engage in what appeared to be narcotics activity," and, when the defendant later was apprehended, the officers recovered "a total of 87 bags of a substance and also a large chunk of a substance [that] tested positive for the presence of cocaine." JA36-37. The prosecutor then specified that the defendant "possessed those items with the intent to sell." JA37. When asked by the court, the defendant confirmed that was "basically what happened." JA41. Against this backdrop, there is no possibility that the defendant's offense was "a mere offer to sell drugs." *Savage*, 542 F.3d at 967. This offense conduct instead falls squarely within the definition of a serious drug offense.

Similarly, the factual basis recited by the prosecutor at the defendant's May 22, 2003 change of plea included the following results of a search: "scales, cell phones, grinder, cutting agent, sixteen bags, 36.3 grams cocaine." JA46. The defendant admitted the factual basis and thereby eliminated any possibility that this was a mere offer to sell. Instead, the defendant possessed a large quantity of cocaine and many of "the tools of the trade" of a drug distributor.

ing to sell cocaine would be conduct punishable as a federal felony severely undermines *Savage*.

United States v. Wallace, 532 F.3d 126, 131 (2d Cir. 2008) (determining that possession of drugs along with drug packaging materials supports intent to distribute) (citing cases). This offense conduct falls squarely within the definition of a serious drug offense.

In short, the factual bases confirmed by the defendant during the May 21 and 22 plea colloquies eliminated the possibility that either conviction was based on a mere offer to sell. Instead, the offense conduct in both cases plainly established the defendant's conviction for "a state of offense 'involving' possession with intent to distribute" and therefore both convictions qualify as serious drug offenses pursuant to 18 U.S.C. § 924(e)(2)(A)(ii). *King*, 325 F.3d at 114.

* * *

Based on the foregoing discussion, the defendant's three convictions for violations of Connecticut General Statutes § 21a-277(a) each satisfy the definition of a serious drug offense set forth in 18 U.S.C. § 924(e)(2)(A)(ii). Thus, the district court properly sentenced the defendant as an armed career criminal.

III. The district court acted well within its discretion in denying the defendant's request—on the day of sentencing—for substitute counsel.

In his supplemental *pro se* brief, the defendant contends that the district court abused its

discretion in denying his request for substitute counsel. The defendant abandoned this argument following the recess in his sentencing proceeding, and, in any event, the district court did not abuse its discretion in denying the defendant's motion.⁵

⁵ To the extent the defendant raises a claim of ineffective assistance of sentencing counsel, it fails as a matter of law. Any such claim boils down to an argument that defense counsel failed to present the strongest opposition to the defendant's designation as an armed career criminal (*i.e.*, the arguments the defendant himself presented at the time of sentencing, *see* JA262-64, and presents now in his supplemental *pro se* brief on appeal—all of which in fact were argued by defense counsel at sentencing, *see* JA256-61). To establish ineffective assistance of counsel, the defendant must show both that his counsel's performance was deficient and that he was prejudiced by this deficiency. *United States v. Hasan*, 586 F.3d 161, 170 (2d Cir. 2009). Even assuming *arguendo* that defense counsel's representation was deficient, for the reasons set forth *infra* in Section II, the defendant cannot prove prejudice. He is an armed career criminal and the district court sentenced him to the mandatory minimum term of imprisonment. Accordingly, this Court should adjudicate and reject any claim of ineffective assistance of counsel. *See Hasan*, 586 F.3d at 170 (expressing a preference “to address claims of ineffective assistance of counsel in collateral proceedings,” but permitting this Court to “decide the claim on the record before us”).

A. Relevant facts

On December 1, 2011, the defendant entered a plea of guilty in this matter. JA10-11. Shortly thereafter, on December 16, 2011, he filed a *pro se* motion seeking the appointment of substitute counsel. JA11; GA176. The government filed a brief response in which it highlighted that then-current defense counsel was retained, thereby requiring that the defendant demonstrate his financial eligibility for the appointment of counsel. JA11; GA177-78 (citing 18 U.S.C. § 3006A). The defendant filed a reply describing his financial eligibility and “accept[ing] counsel of the court’s choosing, so long as such counsel is competent in matters of federal law and practices, and not opposed to taking advice from the defendant regarding his defense.” JA12; GA179-80. The district court then issued an order requesting that the defendant file a financial affidavit and subsequently appointed new counsel. JA12.

Moreover, following the defendant’s guilty plea, the district court granted seven defense motions to continue sentencing. JA11, JA13, JA14, JA15, JA16; GA181-92, GA199-201. The August 22, 2012 defense motion to continue sentencing drew a response, in which the government deferred to the court with respect to that sixth motion to continue sentencing, but requested that, if granted, it be the final continuance of the sentencing proceeding. JA16; GA193-94. None of the motions to continue to that point

raised any issue regarding the attorney-client relationship. GA181-92. Moreover, the defendant never filed a motion for the appointment of substitute counsel as he had done following the breakdown in his relationship with his first attorney. GA176.

Accordingly, the defendant first raised concerns about sentencing counsel at the proceeding on September 11, 2012. GA200-02. As government counsel explained at that proceeding, it appeared that the defendant had concerns that he wanted to raise with his attorney. GA200. The court responded that “I certainly want the defendant to discuss whatever his concerns are with defense counsel.” GA201. When the defendant articulated that he had not “had a chance to speak to my lawyer since I did my [presentence interview],” the court responded, “Yes, well, I’m going to give you that chance now.” GA201. The court reiterated “I certainly want you to have an opportunity to discuss your concerns with your attorney before I sentence you, sir. So, we’re going to postpone the sentencing date to next Friday, the 21st.” GA202. The district court thus granted a seventh continuance of sentencing to permit the defendant a further opportunity to speak with defense counsel. JA16-17.

On September 21, 2012, the district court inquired whether defense counsel “had the opportunity to talk to your client, sufficient opportunity?” GA206. Defense counsel responded that he

“met with [the defendant] on Sunday. We went through what I believe are all the issues involved in this sentencing. I filed two sentencing memoranda as ha[s] the government. There’s a lengthy presentence investigation. Plus he was before your Honor some years ago.” GA206-07. Defense counsel continued:

My sense is there’s nothing more that can be added either legally or factually and we should go forward this morning, but when I met with Mr. Edwards this morning he indicated that he wanted new counsel, someone who would make—maybe I should let him speak for himself, but he wanted new counsel. He has some arguments that he wants to make and I say you should make them before the Judge and make them yourself.

GA207. The district court responded: “I’m prepared to hear anything he wants to say.” GA207. The defendant then repeated his complaint that he had not met with defense counsel to discuss his sentencing between the time of the presentence interview and the September 11, 2012 proceeding. GA208. The district court offered: “You want some time this morning to do that? . . . If you want an opportunity now to speak more with Mr. Einhorn, I’m prepared to wait for you to do that and I’ll come back on the bench. I want you to have an opportunity to pursue whatever it is you want to pursue.” GA208.

The defendant expressed his concern that “an hour or two ain’t long enough.” GA208-09. The defendant acknowledged that defense counsel traveled to the detention facility on Sunday, but remarked that was not “long enough.” GA209. The defendant explained:

I feel as though this is a serious sentencing issues. 15 years isn’t a walk in the park, understand what I’m saying. For him to come up here one time to speak to me about sentencing and what I want to argue about, what I want to say to the Judge, I don’t feel like that’s enough. Like there’s a lot of things that I’m asking him to do for me and he’s telling me he’s not going to do it because he’s not getting paid for that.

GA209. Defense counsel then clarified:

He would like to have me go to state court, as he said, and vacate some of his prior convictions. And I indicated to him that I can’t do that, that that’s not within the scope of my engagement in this case. And I never agreed to do that.

So I just want [] to make that clear, if that’s what he’s looking for, neither myself nor anyone is going to be able to do that. That’s something he’s going to have to hire state counsel for.

GA209-10. Defense counsel continued: "I thought I spent as much time as he needed with me last Sunday. I asked him, he seemed okay with it." GA210.

The district court again offered to let the defendant and defense counsel speak during a recess: "Well, I have nothing else on the docket today. I can let you two talk." GA210.

The following colloquy then ensued:

DEFENDANT: I don't feel comfortable with this man.

COURT: He's not your first lawyer is he?

DEFENDANT: No, he's not.

COURT: You're not happy with anybody.

DEFENDANT: The thing is if I'm sitting here explaining things to this man and I'm waiting for this man to come see me after the PSI because of the issues I got with the PSI, this man never shows up, I never get a chance to talk to him.

COURT: He tells me he was with you on Sunday.

DEFENDANT: He was with me Sunday for an hour and a half. Like I say, your Honor, no disrespect or nothing, but 15 years is a long time.

COURT: I know it's a long time, sir.

DEFENDANT: So to talk about 15 years in an hour and a half, that's not working for me. He had four months to come talk to me. Four months to talk to me about things I wanted to do regarding my defense. He didn't do that.

COURT: You were asking him to see if he could vacate your state convictions?

DEFENDANT: I'm asking him about more than just that. Even with the second memorandum he prepared, like, he's still not arguing the issue the way that I explained it to him.

GA210-11. At this point, government counsel offered two comments. First, the prosecutor noted that "this sentencing has been continued over and over and over again." GA211. During that time, the defendant "did go ahead and file a pro se memorandum challenging his designation or the Government's designation of him as an armed career criminal. This is not someone who's been shy about addressing the Court directly when he's had things to say." GA212. Second, the prosecutor noted that "the defendant's criminal history is what it is. There are transcripts and judgments here. You can't rewrite the past." GA212.

The district court then explained that it was "prepared to go forward" and "cannot put this over again." GA212. However, the district court

offered “if you want a little more time to talk to Mr. Einhorn this morning, I’ll be happy to give it to you, sir.” GA212-13. Before taking a recess, the district court again reiterated, “I want you to have an opportunity to discuss with Mr. Einhorn whatever it is you think you have in mind, sir.” GA213.

After the recess, but before re-commencing the sentencing proceeding, the following colloquy ensued:

COURT: Mr. Edwards, have you now had sufficient time to discuss your matters with Mr. Einhorn?

THE DEFENDANT: Yes, ma’am.

COURT: Are you ready to proceed?

MR. EINHORN: Yes, your honor.

JA252. The defendant did not object, did not repeat his request for an eighth continuance of sentencing, and did not reiterate his request for substitute counsel. He instead gave every indication that he now was prepared to proceed with his appointed attorney.

B. Governing law and standard of review

“The Sixth Amendment provides a criminal defendant the right to effective assistance of counsel.” *United States v. John Doe #1*, 272 F.3d 116, 122 (2d Cir. 2001) (citing U.S. Const.

Amend. VI). However, this right does not “guarantee a ‘meaningful relationship’ between the defendant and his counsel.” *Id.* (quoting *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983)). The “courts must impose restraints on the right to reassignment of counsel in order to avoid the defendant’s manipulation of the right so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.” *Id.*

However, “[i]t is settled that where a defendant voices a seemingly substantial complaint about counsel, the court should inquire into the reasons for dissatisfaction.” *McKee v. Harris*, 649 F.2d 927, 933 (2d Cir. 1981) (internal quotation marks omitted). “When the defendant’s complaints about counsel are fully made to the court, the court may rule without more.” *United States v. Hsu*, 669 F.3d 112, 123 (2d Cir. 2012) (internal quotation marks omitted). In other words, a hearing is not required if the defendant’s complaints are otherwise fully presented to the court. *See Hsu*, 669 F.3d at 123; *see also United States v. Simeonov*, 252 F.3d 238, 241 (2d Cir. 2001) (per curiam).

This Court reviews a denial of a motion to substitute counsel for abuse of discretion. *Simeonov*, 252 F.3d at 241. “In undertaking this review,” this Court evaluates the following factors:

- (1) whether the defendant’s motion for new counsel was timely;
- (2) whether the district court adequately inquired into the

matter; (3) whether the conflict between defendant and attorney “was so great that it resulted in a total lack of communication preventing an adequate defense;” and (4) “whether the defendant substantially and unjustifiably contributed to the breakdown in communication.”

Hsu, 669 F.3d at 122-23 (quoting *John Doe #1*, 272 F.3d at 122-23).

C. Discussion

As a preliminary matter, the defendant abandoned his request for substitute counsel and the district court therefore acted well within its discretion in declining to appoint substitute counsel. Following the recess in the September 21, 2012 sentencing proceeding, the defendant failed to press his request for substitute counsel. When the district court inquired whether the defendant had “now had sufficient time to discuss your matters” with defense counsel, the defendant answered in the affirmative. JA252. When the district court then inquired whether the defendant was ready to proceed, defense counsel answered in the affirmative and the defendant raised no objection. JA252. Indeed, throughout the sentencing proceeding, the defendant never again objected to the representation of counsel, reiterated his earlier request for substitute counsel, or repeated his request for an eighth continuance of sentencing. By failing to “press

the district court for a ruling” on his request for substitute counsel, the defendant “effectively abandoned his motion.” *United States v. Scotti*, 47 F.3d 1237, 1251 (2d Cir. 1995). Accordingly, the district court acted well within its discretion in declining to appoint substitute counsel.

But even assuming *arguendo* that the defendant did not abandon his request for substitute counsel, the district court acted well within its discretion in denying that request. First, the defendant’s request for substitute counsel was not timely. He pleaded guilty on December 1, 2011. JA10. On that date, the district court entered a scheduling order and set sentencing for February 16, 2012. JA11, JA236. In response to the defendant’s *pro se* motion, JA11, GA176, the district court appointed new counsel on February 6, 2012, JA12. Despite six continuances of sentencing between the change of plea and September 11, 2012, the defendant never voiced any concern regarding the representation of counsel. Then, on the date of the September 11, 2012 sentencing, the defendant requested additional time to confer with defense counsel; at that time, the defendant did not request the appointment of substitute counsel. GA201-02. It was not until the September 21, 2012 sentencing that the defendant first requested substitute counsel. GA210. Accordingly, the defendant’s request for substitute counsel was not timely. Indeed, it appeared to be a dilatory tactic given the sheer

number of continuances already granted. *See John Doe #1*, 272 F.3d at 122 (The “courts must impose restraints on the right to reassignment of counsel in order to avoid the defendant’s manipulation of the right so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.”).

Second, the district court fully inquired into the source of the defendant’s complaints about defense counsel. GA201-02, GA207-11. On September 11, 2012, when the defendant complained that he had not been afforded an adequate opportunity to prepare for his sentencing with defense counsel, the district court granted a seventh continuance of sentencing. On September 21, 2012, when the defendant reiterated this complaint, the district court took a recess to permit further discussion between the defendant and defense counsel. When the defendant complained that “there’s a lot of things that I’m asking him to do for me and he’s telling me he’s not going to do it because he’s not getting paid for that,” GA209, the district court received clarification from defense counsel: the defendant had requested that defense counsel seek to vacate some of his prior state court convictions, presumably the ACCA predicate convictions. GA209-10. Upon the district court’s inquiry, the defendant confirmed that he had asked defense counsel to vacate state convictions, but also asked defense counsel to do “more than just

that.” GA211. But the only other complaint raised by the defendant was that “[e]ven with the second memorandum [defense counsel] prepared, like, he’s still not arguing the issue the way I explained it to him.” GA211. The district court then permitted the defendant and defense counsel additional time to confer. Following that recess, the defendant raised no additional complaints as the district court proceeded to impose sentence. Moreover, the district court permitted defense counsel and the defendant to make lengthy sentencing arguments to ensure that all of the relevant issues were presented. JA252-74, JA285-89.

Third, any conflict between the defendant and defense counsel did not result in a total lack of communication. Indeed, the defendant’s primary complaint was that he had not had enough communication with defense counsel. In response, the district court granted a seventh continuance on September 11, 2012 to permit further communication. And there is no dispute that the defendant and defense counsel met at length the following weekend. *See* GA210, GA211. During the sentencing itself, the defendant assisted defense counsel in challenging the armed career criminal designation. JA258-59.

The fourth factor in the inquiry is not applicable in these circumstances because there was no breakdown in communication. The defendant and defense counsel continued to communicate

leading up to and even during the sentencing proceeding. Indeed, following the September 21, 2012 recess, the defendant conceded that he “had sufficient time to discuss [his] matters” with defense counsel. JA252. During the sentencing itself, defense counsel and the defendant conferred. JA258-59.

Accordingly, all four factors support the conclusion that the district court acted well within its discretion in denying the defendant’s request for substitute counsel. The defendant’s argument is grounded in the Sixth Amendment, “[b]ut the Sixth Amendment does not guarantee flawless defense strategy; it provides only for reasonably competent representation.” *Hsu*, 669 F.3d at 123 (internal quotation marks omitted). Nothing in the defendant’s complaints that (1) he had not had sufficient time to confer with defense counsel, (2) defense counsel had not taken steps to vacate his state court convictions, and (3) defense counsel was “not arguing the issue the way that I explained it to him,” GA211, “alerted the district court to material defects in counsel’s representation.” *Hsu*, 669 F.3d at 123. Moreover, the defendant’s abandonment of his request for substitute counsel following the recess, signaled to the district court that any complaints had been addressed in the ensuing discussions between the defendant and defense counsel. Accordingly, the district court acted well within its discretion in denying the defendant’s request for

substitute counsel and proceeding to sentence the defendant on September 21, 2012.

Conclusion

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

Dated: August 12, 2013

Respectfully submitted,

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

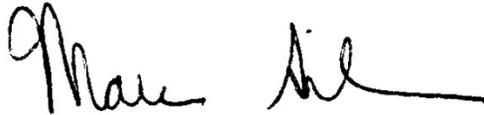
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MARC H. SILVERMAN
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

**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 13,954 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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MARC H. SILVERMAN
ASSISTANT U.S. ATTORNEY

Addendum

Conn. Gen. Stat. § 21a-277(a):

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

Conn. Gen. Stat. § 21a-277(b):

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

and, for each subsequent offense, may be fined not more than one hundred thousand dollars or be imprisoned not more than fifteen years, or be both fined and imprisoned.

18 U.S.C. § 924(e)(2)(A)(ii) defines a “serious drug offense” as:

[A]n offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined 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.

U.S.S.G. § 4B1.2(b) defines a “controlled substance offense” as:

[A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.”