04-5635-cr *To Be Argued By*:

ANASTASIA ENOS KING

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FOR THE SECOND CIRCUIT

United States Court of Appeals

Docket No. 04-5635-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

KEITH A. JOHNSON,
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Burns, J.) had subject matter jurisdiction under 18 U.S.C. § 3231, and entered judgment on October 1, 2004. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on October 8, 2004, and 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

1. Did the defendant's dissatisfaction with his attorney amount to a conflict of interest requiring reversal of his conviction where he has not shown that any alleged conflict had an impact on his attorney's performance?

2. Did the district court commit plain error when it instructed the jury regarding constructive possession at the defendant's request?

3. Was there sufficient evidence for the jury to conclude that the defendant constructively possessed the firearm?

4. Did the district court properly calculate the defendant's Sentencing Guidelines range?

5. Did the district court err by accepting the defendant's stipulation to facts relevant to the calculation of his criminal history score under the Sentencing Guidelines?

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Preliminary Statement

A federal jury convicted the defendant of one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). In this Court, the defendant seeks reversal of his conviction claiming (1) that the district court erred in failing to conduct a hearing on his alleged conflict with his appointed lawyer; (2) that the jury should not have been allowed to convict him on a theory of

"constructive possession" of the gun; and (3) that the evidence was insufficient to convict him of constructive possession of the gun. In addition, the defendant raises various challenges to the calculation of his Sentencing Guidelines range.

As explained more fully below, the defendant's claims on appeal are meritless. The district court adequately inquired into potential conflicts between the defendant and his counsel. Furthermore, the district court – at the request of the defendant – properly instructed the jury to consider whether the defendant constructively possessed the gun, and the evidence was more than sufficient to establish this point. Finally, although most of the defendant's various sentencing arguments are meritless, the Government agrees that he is entitled to a remand for resentencing under *United States v. Booker*, 543 U.S. 220 (2005) and *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005).

Statement of the Case

On July 30, 2003, a federal grand jury returned an indictment charging the defendant with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). JA3.[1] On August 14, 2003, the defendant was presented and arraigned, and the court appointed counsel to represent him, specifically attorney Roger Sigal, of the Office of the Federal Public Defender. (JA3, 14). Through counsel, the defendant requested and received five continuances, with jury selection ultimately

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

set for June 8, 2004, and trial to begin July 7, 2004. (JA3-4).

On June 8, 2004, before jury selection, the Honorable Ellen Bree Burns, Senior United States District Judge, held a hearing in which the defendant conveyed his dissatisfaction with attorney Sigal and the continuance motions he had filed. (JA9-39). At the conclusion of this hearing, the defendant elected to waive his right to a speedy trial and proceed with jury selection and trial, as scheduled. (JA39).

Before the start of trial on July 7, 2004, the court decided to bifurcate the proceedings in light of the Supreme Court's decision two weeks earlier in *Blakely v. Washington*, 542 U.S. 296 (2004). In the first part of the proceedings, the jury would decide whether the defendant was guilty of the elements of the offense charged in the indictment. If necessary, the jury would then hear additional evidence and decide whether the Government had proven certain facts relevant to sentencing under the Sentencing Guidelines. (GA20).

Trial began on July 7, 2004, and continued until July 9, 2004, when the jury returned its verdict finding the defendant guilty as charged in the indictment. (JA6). On July 14, 2004, in open court, the defendant stipulated to facts relevant to his criminal history. (GA697-707).

On September 28, 2004, the district court imposed sentence principally of 262 months of imprisonment to run concurrent with the defendant's state sentence for a prior robbery and assault. (JA7). Judgment entered on October

1, 2004, and the defendant filed a timely notice of appeal on October 8, 2004. (JA7). The defendant is currently serving his custodial sentence.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. The Offense Conduct

On October 15, 2002, at approximately 7:30 p.m., a masked man with a gun robbed a group of four people on Judson Street in Hartford, Connecticut. (GA163-64). The man walked down the street towards the group, pulling down a sheer mask as he approached. (GA164). He pointed the gun at the four people and demanded their money. Two of the victims, Ollie Vail and Christina Taylor, had no money. (GA44, 167, 174). The third victim, Tommy Watkins, gave up his wallet, which contained identification cards. (GA167, 225-26, 504-505). The fourth victim, Marlo K. Bell-Lovett, Sr., gave up his money – $297. (GA165).

At one point the robber stated, "I'm not playing with you," pointed the gun at Bell-Lovett's face, and cocked the hammer back. (GA165). The robber also said, "there's enough bullets in here for every one of y'all ass." (GA167). According to Bell-Lovett, the gun was silver, looked like a revolver, "similar to a .357," and was "pretty big." (GA166).

After taking the money and the wallet, the robber told the group to back up into the driveway alongside 57 Judson Street. (GA167, 193). There was screaming, and

someone pleading, "Please don't shoot." (GA168). A little girl opened the front door of 57 Judson Street and Ollie Vail told her to go back in the house. (GA168, 507). The robber started waving the gun around. The robber screamed and swore at Vail to "shut the f— up." (GA507-8). Then, the robber backed up the driveway and fled to a car waiting at the far end of the block. (GA168).

Keith Johnson rushed down Judson Street to his gray Mercury Sable which was waiting near the intersection of Judson and Martin Streets. (GA404-6). He got into the front passenger seat. (GA393). Johnson's nephew, Joe Shannon, was driving the car. (GA393). In the rear passenger seat was Shannon's friend, Randy Crumpton. (GA393). When Johnson got back in the car he told Shannon to "pull off." (GA406). Earlier, Johnson had gotten out of the car in the area of Judson and Martin Streets. (GA404).

One of the victims, Christina Taylor, called 911 and reported the robbery. (GA48). She described the man with the gun as "a black dude . . . kind of thick and chubby." (GA50). She also described the robber as wearing "a black sweatshirt with a little white on the front, a little marking on the front," and "blue jeans." (GA50). Taylor further reported that the robber went "down Martin Street way" towards the intersection of Judson and Martin Streets after the robbery. (GA50-51).

At approximately 7:38 p.m., a police cruiser started following a gray Mercury Sable in the area near where the robbery had occurred. (GA98, 101-2). The police officer saw the vehicle run through multiple stop signs and began

following it. (GA99). The officer stopped the vehicle after learning via radio that a gray Taurus – which looks similar to a Mercury Sable – was linked to the recent events on Judson Street. (GA100-101).

Shannon pulled the car over. (GA408). Johnson told Shannon to "take off," but Shannon did not drive away. (GA409). After Shannon pulled over, he saw Johnson putting the gun under Johnson's seat – the front passenger seat. (GA411). Shannon also saw Johnson looking at identification from a wallet that did not belong to him. (GA411-13).

Lieutenant Andrew Nelson, the police officer who had pulled the gray Mercury Sable over, observed the occupants and noticed that the front passenger was moving around in his seat, looking very uncomfortable. (GA105). Another officer on the scene, Kevin Salkeld, also observed that the front passenger was fidgety, nervous and moving around. (GA269-70). As a result, the front passenger was the first to be removed from the vehicle, followed by the other two occupants. (GA113). Each was placed in a separate cruiser. (GA115). Subsequently, Nelson found a silver Smith and Wesson .45 caliber revolver under the front passenger seat. (GA116-118). In the car, the police also found a wallet containing the identification of Tommy Watkins. (GA119). The front passenger was Johnson. (GA126, 130).

Bell-Lovett was brought by the police to the scene of the traffic stop. (GA120, 180, 280). First, he was shown Shannon, but did not identify him as the robber. (GA182). Then, he was shown Johnson and positively identified him

as the man who had just robbed him and the others on Judson Street. (GA125). The police did not show the third occupant of the car, Randy Crumpton, to Bell-Lovett. (GA183).

A witness to the robbery, Tahirah Jones, was also brought to the traffic stop scene. (GA120, 345-46). The police showed her each of the three occupants of the car, however she was unable to positively identify the robber. (GA348). She had witnessed the robbery from across the street and saw the robber from behind. (GA347-48).

B. The Trial

The trial began on July 7, 2004 and concluded on July 9, 2004. At trial, the jury heard from three of the robbery victims, Vail, Taylor, and Bell-Lovett. Each victim described the robber's clothing, and those descriptions matched the clothing worn by Johnson in his booking photo. (GA50-51, 172, 193-94, 508-509). In addition, each of the victims – all of whom knew Crumpton – testified that Crumpton's height and voice characteristics were different from the robber's and they would have recognized Crumpton if he had robbed them while wearing a mask. (GA64-67, 190-91, 509-11).

The gun exhibited at trial was identified as the weapon used during the robbery. (GA 194, 502). The exhibited gun was the .45 caliber revolver with a silver barrel and black grips recovered by Lt. Nelson from under the front passenger area of the gray Mercury Sable. (GA118).

Agent Kurt Wheeler testified that the gun was an operable firearm and had traveled in interstate commerce as it had been manufactured in Massachusetts and first sold retail in Connecticut. (GA468-69). Agent Wheeler also testified, based on registration, title and license plate records, that Johnson was the registered owner of the gray Mercury Sable from which the gun was recovered. (GA470-75).

A witness, Tahirah Jones, testified that she had witnessed the robbery from across the street, while hiding behind some bushes. (GA322). After the robbery, Jones watched as the robber fled down Judson Street. (GA329). Jones testified that she saw the robber get into a gray Taurus. (GA334, 341, 343). Jones thought the robber entered the car on the passenger side, rear seat. (GA343). However, Jones also testified that she knows Randy Crumpton, has spoken to him hundreds of times, and can recognize his voice without seeing his face. (GA350). She stated that the robber's voice did not sound like Crumpton's and the robber was taller than Crumpton. (GA350-51). Further, Jones testified that she could not identify the robber (when the police later showed the car's three occupants to her) because the robber was never facing her and had been wearing a mask. (GA350-51).

Shannon testified at trial, pursuant to a compulsion order. (GA301, 386, 391). On direct examination, Shannon testified that on October 15, 2002, the night of the robbery, he had seen Johnson carrying the gun, a silver .45 caliber Smith and Wesson revolver. (GA398, 403).

He testified that on that night, he was driving a car with Johnson and Crumpton as passengers. He testified that Crumpton was in the rear passenger seat and did not leave the vehicle. (GA393, 404, 406). He pulled the car over in the area of Judson Street, and Johnson got out of the car. (GA404). Minutes later, Johnson returned and told Shannon to "pull off." (GA404).

Shannon also testified that when the police pulled the car over, Johnson told him to "'Take off' as in don't stop for the police." (GA 409). Shannon saw Johnson put the gun under Johnson's seat – the front passenger seat. (GA411). Further, Crumpton said, "don't put it near me," according to Shannon. (GA414). At this point, Shannon also saw Johnson with someone else's wallet. (GA412-13).

On cross examination, Shannon stated that he had previously seen his uncle (Johnson) with the gun. Shannon testified that he had seen the gun at Johnson's house. (GA444). Johnson had shown it to him in the living room, and put it away. (GA445-46). Johnson had shown the gun to Shannon approximately five times. (GA446). Shannon also saw Johnson with the gun on him, (GA447), in his pants, and in his hand (GA449). When asked, "So according to you, you never saw Johnson without this gun," Shannon testified, "I can't say that, but I seen it a lot." (GA447).

On July 9, 2004, the defendant was found guilty of being a felon in possession of a firearm. (GA661). On July 14, after a hearing in which the defendant was canvassed by the court, he stipulated that he was in

Criminal History Category VI with at least thirteen criminal history points, that he was on parole at the time of the offense, and that he had been released from incarceration less than two years prior to the instant offense. (GA693, 695-707).

SUMMARY OF ARGUMENT

1. Upon learning that the defendant wished to address the court, the district court properly conducted a hearing and heard the defendant's complaints about his lawyer and the delays in his case. Based on the facts adduced at that hearing, there was no conflict of interest between Johnson and his lawyer. Moreover, because the defendant has not shown that any alleged conflict adversely impacted his lawyer's performance, his conviction should stand.

2. The defendant asked the court to present an instruction on "constructive possession" to the jury, and so has waived his arguments in this Court based on the jury's consideration of that theory. In any event, his arguments based on the constructive possession theory are meritless. The jury was given a general unanimity instruction thus protecting his right to a unanimous verdict. Further, there was no due process violation where ample evidence of both constructive possession and actual possession was adduced at trial. In addition, the defendant's claim that the "general verdict rule" was violated is erroneous because both theories of possession were properly before the court. Finally, the defendant's argument that the indictment was impermissibly broadened by the constructive possession instruction is meritless because the government proved

precisely what was alleged in the indictment – that the defendant possessed the firearm.

3. The Government presented more than sufficient evidence that Johnson constructively possessed the firearm. For example, the Government presented evidence that Johnson was seen carrying the gun the night of the robbery, the gun was recovered from beneath Johnson's seat in Johnson's car, Johnson was seen placing the gun there, and Johnson urged flight from the police when the car was being pulled over. In addition, the Government presented evidence that Johnson had possessed the gun on previous occasions. On this record, the defendant's conviction must stand.

4. The defendant's sentencing arguments are predominantly without merit. The defendant's claim that the district court improperly found facts (i.e., that he used a firearm in connection with another felony or in connection with a crime of violence) reflects a misunderstanding of the law. District courts retain their traditional authority to find facts relevant to sentencing by a preponderance of the evidence. Similarly, this Court should reject the defendant's argument that he was improperly sentenced as an armed career criminal. His conviction for riot at a correctional institution was a qualifying predicate offense because it involved the "serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). Finally, the Government agrees that the defendant is entitled to resentencing under *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005) because he preserved his challenge under *Blakely v. Washington*, 542 U.S. 296 (2004).

5. Finally, the defendant's stipulation as to his criminal history facts should not be disturbed. The facts he stipulated to did not have to be included in the indictment or presented to a jury, and the district court conducted a thorough canvas to ensure that the defendant knowingly and voluntarily entered into the stipulation.

ARGUMENT

I. THERE WAS NO CONFLICT OF INTEREST AND THE DEFENDANT HAS NOT SHOWN ANY IMPACT ON HIS LAWYER'S REPRESENTATION IN ANY EVENT

A. Relevant Facts

After learning that the defendant wished to address the court, on June 8, 2004, before jury selection began, the district court immediately held a hearing. (JA11). During this hearing, the defendant made a lengthy statement to the court, while reading from his legal pad of handwritten notes. (JA11-34).

The defendant began by discussing the case pending against him in state court on charges arising out of the events of October 15, 2002. He complained that he had been forced to continue that case repeatedly because "they wanted to allow the federal jurisdiction to go first. It didn't really make a difference to me. I just wanted to have my day in court." (JA12). He also complained that after eighteen months representing him, the state defender assigned to his case left her employment without telling him and that he learned of her departure from the two

lawyers assigned to replace her. (JA12-13). He commented, "So, now I am faced with . . . an attorney who has just left me. I've been given two new attorneys. Now, this is three attorneys I've dealt with already." (JA13). Finally with respect to his state case, he reported that during his last state court appearance, the court assured him that the case would be brought to trial if the federal case did not go forward on June 8, 2004. (JA13).

Turning to his federal case, the defendant discussed attorney Roger Sigal, the Assistant Federal Public Defender assigned to represent him. (JA14). The defendant complained that Sigal had not visited him in prison until September 30, 2003. He complained that he and his family had to call attorney Sigal several times. Johnson acknowledged, however, that Sigal "got back to them" and came to see him in jail, although the appointment was rescheduled two or three times. During that meeting, Sigal and Johnson "discussed the case and went into what was going to take place." (JA14).

Johnson then complained about a continuance of his federal trial from November 15, 2003 to January 15, 2004. According to Johnson, Sigal advised him by letter that he was requesting a continuance and included a Speedy Trial waiver form for him to sign. Johnson told the court that he had not signed that form because it said that he had consulted with his attorney regarding the waiver and he had not done so. (JA15).

Johnson explained that after the continuance, he and his mother called Sigal repeatedly. In response, Sigal had promised he would see Johnson by the week of February

2, 2004. (JA16). However, Sigal did not actually visit Johnson until February 14, 2004. (JA19).

Johnson indicated that there was also an exchange of letters during this time. (JA17). Johnson reported that Sigal's letter indicated that he had received Johnson's letter which, according to Johnson referred to "our lack of communication and why he had not been communicating with me." Sigal's letter also included a request for a continuance through March 31, 2004 and included another waiver of Speedy Trial form. (JA17). Again, Johnson said that he did not sign the form because he had not discussed it with Sigal. (JA19).

Johnson indicated that he had a state court date around this time and was told by his state defender that he was supposed to be going to federal court on March 8. Johnson said, "[t]his date, also, was cancelled for reasons that I'm truly not all clear with." (JA19).

Johnson, Sigal, and an investigator met on February 14, 2004, and discussed his case. In addition, Johnson expressed his "dissatisfaction with the communication and the representation that Mr. Sigal had been providing me and how unfair it was." (JA20). Johnson went on to say that "the only thing that I've ever wanted was – what is the due process – was to have my day [in court]." (JA20-21). According to Johnson, Sigal said, "you know, I can't come out here and hold your hand." (JA21). Johnson responded that he did not want Sigal to hold his hand, but rather wanted "fair and proper representation." (JA21-22). "[A]t least," Johnson stated to Sigal, "give me your best effort in representing me." (JA22).

According to Johnson, Sigal said the next court date would be jury selection on April 14, 2004. (JA22-23). Johnson reported that he called Sigal several times as that day approached. On April 6, Johnson heard from Sigal that jury selection would not occur on April 14. (JA23). Johnson expressed his frustration to Sigal regarding the logistics and the lack of notice to his family members. (JA24).

Thereafter, Johnson and Sigal had another meeting. Johnson acknowledged, "I thought the meeting was pretty productive. I really did." Johnson further stated that Sigal "has skills above the level that is required." (JA25).

The defendant also told the court of a meeting on May 20, 2004 with Sigal and an investigator during which they went over the case. Sigal informed Johnson that "everything is on, and June 8, we're ready." (JA26). According to Johnson, Sigal told him that another attorney would be working on the case with him. Johnson also noted that Sigal communicated the schedule to Johnson's family. (JA26). Although Sigal promised to come back the next week, Johnson explained that he encountered difficulty contacting Sigal between May 20 and June 7. (JA27-28).

On June 7, attorney Peter Avenia came to see him and told him that Sigal was leaving the Office of the Federal Public Defender and that he (Avenia) would be his new attorney. (JA28-29). Johnson understood that Avenia had been assigned the case one week earlier. (JA29). Johnson expressed dissatisfaction with the fact that both the state defender and the federal defender who were originally

assigned to his cases, left their respective offices, and as a result were no longer representing him. (JA29). Expressing concern that this late change in his counsel would lead to another delay, Johnson stated "I am not accepting another continuance again," (JA30), and asked "[w]hen is my case ever going to be a priority?" (JA32).

After hearing the defendant's complaints, the court explained to Johnson that "to stop your frustrations, today we are going to select a jury," and that trial would proceed on July 7th, at which time the court was "confident" Avenia would be prepared to go forward. (JA34-35). The defendant thanked the court and stated that "I've never had an opportunity to allow anyone to hear my side and to put on the record what is going on." (JA35).

The court next turned to the defendant's Speedy Trial waivers and engaged the defendant in a colloquy:

Court: All right. Now, you have never waived your right to a Speedy Trial?

Johnson: Never.

Court: Mr. Sigal has given you the forms, but you haven't executed them?

Johnson: Never.

Court: Are you prepared to do that now?

Johnson: Excuse me?

Court: Are you prepared to waive your right to go forward on July 7?

Johnson: Yes.

Court: So that the period of time between when you were indicted and the due date, you're prepared to waive your right that you would have had to a Speedy Trial?

Let me tell you. If you don't do that, what's going to happen, probably, is – the statute of limitations is not passed on your trial – on your crime – alleged crime. If you would not waive your right and insist on having the case dismissed because the Speedy Trial has been violated, you'll be indicted again. And, we'll have to go through this all over again.

So, I'm asking you now, are you prepared to waive any rights you might have claiming that you were not brought to a Speedy Trial?

Johnson: I'm trying to understand. If I waive the right to a Speedy Trial, that's not going to affect what's going on today, and my trial is going to start on the 7th?

Court: Yes. If you waive the right to a Speedy Trial, you are going to have jury selection today, and you are going to be tried on July 7. I promise you that.

> If you don't – if you say, no, I'm not going to waive my right. You should have brought me to trial earlier. I want this case dismissed. What will happen to you – I am confident – is the Government will reindict you, because they can. The statute of limitations is not passed.
>
> So we'd be going through this dilemma all over again. Do you understand?

Johnson: Yes, ma'am.

Court: You do understand?

Johnson: Yes, I do.

Court: Are you prepared, then, to waive that right and go forward today?

Johnson: Yes, I am prepared to go forward today.

Court: Okay. So, we'll do that.

Johnson: Thank you.

(JA36-39). Following this canvas and waiver, the hearing was concluded. Sigal was present during this hearing but did not speak.

On June 8, 2004, the court conducted jury selection at which the defendant was represented by both Sigal and Avenia. (GA134). At trial, which stated on July 7, 2004,

the defendant was represented by attorneys Avenia and Gary Weinberger. (GA5, 134).

B. Governing Law and Standard of Review

"'A defendant's Sixth Amendment right to effective assistance of counsel includes the right to representation by conflict-free counsel.'" *United States v. Schwarz*, 283 F.3d 76, 90 (2d Cir. 2002) (quoting *United States v. Blau*, 159 F.3d 68, 74 (2d Cir. 1998)). "A claim that counsel is conflicted is in essence a claim of ineffective assistance of counsel." *United States v. Stantini*, 85 F.3d 9, 15 (2d Cir. 1996) (citing *Glasser v. United States*, 315 U.S. 60, 70 (1942)).

Ordinarily, "[t]o support a claim for ineffective assistance of counsel, petitioner must demonstrate" first "that his trial counsel's performance 'fell below an objective standard of reasonableness . . . .'" *Johnson v. United States*, 313 F.3d 815, 817-18 (2d Cir. 2002) (per curiam) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984)). Second, the defendant must demonstrate "that he was prejudiced by counsel's deficient acts or omissions." *Id.* at 818 (quoting *Strickland*, 466 U.S. at 687-90). In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

"However, when the claim of ineffective assistance of counsel is based on an asserted conflict of interest, a less exacting standard applies, and prejudice may be presumed." *United States v. Moree*, 220 F.3d 65, 69 (2d

Cir. 2000). "A defendant is entitled to a presumption of prejudice on showing (1) 'an actual conflict of interest,' that (2) 'adversely affected his lawyer's performance.'" *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)).

To meet his burden under *Cuyler*, a defendant must first establish that an actual conflict of interest existed, that is he must show "the attorney's and defendant's interests 'diverge[d] with respect to a material factual or legal issue or to a course of action.'" *Winkler v. Keane*, 7 F.3d 304, 307 (2d Cir. 1993) (quoting *Cuyler*, 446 U.S. at 356 n.3). Second, the defendant must establish an actual lapse in representation that resulted from the conflict. *Id.* at 309. An actual lapse in representation is demonstrated by the existence of some "plausible alternative defense strategy" not taken up by defense counsel." *Id.* (citations omitted). Third, the defendant must establish causation, that is, he must establish that the alternative defense strategy "was inherently in conflict with or not undertaken *due* to the attorney's other loyalties or interests." *Moree*, 220 F.3d at 69 (quoting *Winkler*, 7 F.3d at 307).

Because defendants benefit from the presumption of prejudice available under *Cuyler*, "courts have noted the incentive for defendants to characterize ordinary ineffective assistance of counsel claims as conflict of interest claims." *Id.* at 69-70 (citing cases). In addition, this Court has recognized that defendants with appointed counsel often complain to the court about their attorneys in an effort to have substitute counsel appointed. *Id.* at 71; *United States v. White*, 174 F.3d 290, 296 (2d Cir. 1999) (observing that it would be an understatement to say that disputes frequently arise where a disgruntled defendant

criticizes his attorney's performance in open court). Accordingly, the Court "declined to adopt a broad rule that would give a defendant the unilateral power to establish a 'conflict of interest' simply by 'expressing dissatisfaction with his attorney's performance.'" *Moree*, 220 F.3d at 71 (identifying the types of common complaints made by a defendant that do **not** give rise to a conflict of interest including: disagreement with his attorney over whether "to file certain motions, to pursue certain evidentiary leads, to object to the introduction of certain evidence at trial, ... to call certain witnesses at trial and at sentencing..." or where a defendant allege[s] that the attorney is not paying sufficient attention to his case, has not come to see him in prison, has not undertaken sufficient investigation, is not making necessary motions, is not calling witnesses, or is trying to induce the defendant to plead guilty.") (quoting *White*, 174 F.3d at 296).

When a district court is apprised about the "even the possibility of a conflict of interest," the court has an "inquiry" obligation: to "investigate the facts and details of the attorney's interest to determine whether the attorney in fact suffers from an actual conflict, a potential conflict, or no genuine conflict." *United States v. Levy*, 25 F.3d 146, 153 (2d Cir. 1994).

In the past, a district court's failure to inquire into a potential conflict of interest required automatic reversal, *see, e.g.*, *United States v. Rogers*, 209 F.3d 139, 143-44 (2d Cir. 2000), but the Supreme Court rejected that rule in *Mickens v. Taylor*, 535 U.S. 162 (2002). *See United States v. Blount*, 291 F.3d 201, 211-12 (2d Cir. 2002) (discussing *Mickens*). As this Court explained in *Blount*, in *Mickens*,

"the Supreme Court held that the trial court's failure to inquire into a potential conflict of interest on the part of the defendant's attorney, about which the court knew or reasonably should have known, does not automatically require reversal of the conviction . . . ." *Blount*, 291 F.3d at 211. Because the focus of a Sixth Amendment inquiry is into the competence of counsel, and not into the actions of the trial judge, *see Mickens*, 535 U.S. at 179 (Kennedy, J., concurring), the trial judge's failure to inquire about a conflict of interest "does not reduce the defendant's burden of proof." *Mickens*, 535 U.S. at 173-74. To overturn a conviction, a defendant still must establish that "the conflict of interest adversely affected his counsel's performance." *Id.* at 174. *See, e.g.*, *Blount*, 291 F.3d at 212 (rejecting conflict of interest claim even though trial court did not conduct full inquiry after learning of claim because the defendant had not shown that the alleged conflict had any impact on his attorney's performance).

This Court reviews a claim of ineffective assistance of counsel *de novo*. *United States v. Schwarz,* 283 F.3d 76, 90-91 (2d Cir. 2002).

C. Discussion

The defendant argues that the trial court's failure to hold a formal inquiry on Sigal's alleged conflict of interest requires automatic reversal of his conviction. This argument is based on a misreading of both the record and the law. The trial judge *did* conduct an inquiry into Johnson's complaints about his attorney, and resolved those complaints to Johnson's satisfaction. Moreover, there was no conflict of interest, and even if there were a

conflict, the defendant has not shown that this alleged conflict adversely affected his lawyer's performance.

Upon learning of the defendant's desire to address the court, the trial judge immediately held a hearing so the defendant could express his concerns. (JA11-39). The defendant presented his complaints to the court by speaking at length in an organized fashion, referring often to notes on a legal pad as he provided examples and dates, and describing chronologically the facts giving rise to his complaints. In this prepared and thorough presentation, he complained about Sigal's failure to communicate effectively with him and his family, and with Sigal's perceived inattention to his case. (JA14-29). In addition, he complained about the delay in bringing his case to trial. (JA20-21, 30-32). The district court – already aware that the defendant would be represented by a new lawyer at trial – addressed Johnson's concerns about delay by assuring him that his trial would go forward as planned in one month. (JA34-35). In response, the defendant thanked the court, but asked for no other relief. On this record, it can hardly be said that the district court failed in its duty to inquire into potential conflicts between the defendant and his attorney.

Furthermore, the defendant's prepared statement revealed that there was no conflict of interest. Johnson complained mostly about Sigal's failure to communicate with him and his family about dates and scheduling issues and about Sigal's inattention to his case. (JA14-29). In addition, he complained about Sigal's filing of motions for continuance. These complaints did not indicate a complete breakdown in the attorney-client relationship,

however, because in the same statement, Johnson also indicated that he had met with Sigal on multiple occasions to discuss his case, and that when he met with Sigal, they had productive meetings. (JA14, 20-22, 25, 26). These complaints do not rise to the level of a conflict of interest; they are instead, merely typical complaints raised by defendants about their appointed attorneys. *See White*, 174 F.3d at 296; *Moree*, 220 F.3d at 65. Accordingly, there was no conflict of interest between Johnson and Sigal.

Finally, even if Johnson had established a conflict, he would still not be entitled to reversal because he has not shown that the conflict adversely affected his counsel's performance. *Mickens*, 535 U.S. at 174; *Blount*, 291 F.3d at 211-12. Indeed, by arguing for automatic reversal, Johnson does not even attempt to show any impact on his lawyer's performance. He discusses hypothetical problems that might arise if a lawyer and client come to an irreconcilable conflict, *see, e.g.,* Defendant's Br. at 14, but does not identify any plausible alternative strategy that his lawyer could have adopted but was not adopted because of the conflict. *See Winkler*, 7 F.3d at 309. Furthermore, because Johnson was represented at trial by different attorneys, any failure in communication between Sigal and Johnson, or any failure in preparation by Sigal, could not have impacted his case.

In sum, the district court here conducted a proper inquiry into Johnson's concerns about his lawyer, and that inquiry revealed that there were no conflicts of interest. Furthermore, Johnson has not shown that any alleged conflict affected his lawyer's performance.

II. THE DISTRICT COURT PROPERLY PERMITTED THE JURY TO CONVICT THE DEFENDANT OF CONSTRUCTIVELY POSSESSING A FIREARM

Johnson argues that his conviction should be reversed because the district court should not have permitted the jury to convict him of constructive possession. He argues that the district court's error violated the Sixth Amendment's unanimous verdict rule, violated Due Process, violated the "general verdict" rule, and improperly broadened the indictment in violation of the Fifth Amendment.

A. Relevant Facts

The defendant was charged with one count of being a felon in possession of a firearm. The indictment stated as follows:

> On or about October 15, 2002, in the District of Connecticut and elsewhere, KEITH JOHNSON, having been convicted in the Superior Court of the State of Connecticut of robbery in the third degree in violation of CGS § 53a-136, attempt to commit robbery in the first degree in violation of CGS §§ 53a-134(a)(4) and 53a-49(a)(2), and rioting at a correctional institution in violation of CGS § 53a-179(b), which are crimes punishable by a term of imprisonment exceeding one year, did unlawfully and knowingly possess a firearm, to wit a Smith and Wesson, Model 625, .45 ACP caliber revolver,

> serial number BEU3255, that firearm having been previously shipped and transported in interstate commerce. In violation of Title 18, United States Code, Section 922(g)(1).

(GA712-13). The indictment submitted to the jury, however, was redacted to omit the nature of the prior convictions. (GA641-42).

On July 2, 2004, the defendant filed his proposed jury instructions. (GA 667-92). The defendant's proposed jury instruction regarding Possession of a Firearm was adopted and delivered by the court. (GA667, 686-88, 644-47). This instruction contained the following language regarding constructive possession:

> Because the legal concept of possession may differ from the everyday usage of the term, I will explain it in some detail.
>
> Actual possession is what most of us think of as possession; that is, having physical custody of an object. But to find that Mr. Johnson possessed a firearm, you do not need to determine that he owned it, or that he was physically holding it or carrying it on his person. The Government can prove possession by showing that Mr. Johnson had constructive possession. To find constructive possession, you must determine beyond a reasonable doubt that the Defendant had both the power and the intent to exercise control over a firearm that was not in his physical custody. An example of constructive possession from everyday

> experience would be a person's possession of items he keeps in a safe deposit box at his bank. Although the person does not have physical custody [of] *sic* those items, he exercises substantial control over them.
>
> Possession of a firearm can not be found solely on the ground that a defendant was near or close to a firearm. Nor can it be found simply because a defendant was present at the scene where a firearm was seized, or solely because a defendant associated with a person who controlled a firearm or the property where it was found. However, these factors, if found to be true, may be considered by you, in connection with all other evidence in making your decision whether the Defendant possessed a firearm as charged in the indictment. If you determine the defendant has both the power and intent to control the firearm, then you may find that the Government has proven possession.

(GA645-46).

B. Standard of Review

As explained below, Johnson has waived any argument based on the jury's consideration of a "constructive possession" theory. Nevertheless, if this Court were to review his arguments, they would be reviewed for plain error because he raises them for the first time on appeal. Fed. R. Crim. P. 52(b). *See* Defendant's Br. at 26

(acknowledging that arguments to be reviewed for plain error).

A trilogy of decisions by the Supreme Court interpreting Fed. R. Crim. P. 52(b) has established a four-part plain error standard. *See United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732 (1993). Under plain error review, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that was "plain" (which is "synonymous with 'clear' or equivalently 'obvious'"), and (3) that affected the defendant's substantial rights. *Olano*, 507 U.S. at 734. "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (internal citations and quotations omitted).

C. Discussion

1. By Submitting a Proposed Jury Instruction on Constructive Possession, the Defendant Waived Any Argument Based on the Jury's Consideration of Constructive Possession

The defendant claims that the jury's consideration of a "constructive possession" theory resulted in plain error for a number of reasons, but these arguments are foreclosed to appellate review. When a defendant invites a jury charge

or affirmatively waives his position on that charge, appellate review of that instruction is foreclosed. *United States v. Giovanelli*, 464 F.3d 346, 351 (2d Cir. 2006) (citing *United States v. Crowley*, 318 F.3d 401, 411 (2d Cir. 2003)). Here, the defendant submitted a proposed instruction on constructive possession to the district court, and the court adopted that proposed instruction. (GA667, 686-88, 644-47). Because the court instructed the jury on constructive possession *as the defendant requested*, the defendant cannot now claim that the district court erred to do so. He has waived his claims based on the jury's consideration of a constructive possession theory.

In any event, as described more completely below, all of the defendant's claims of error based on this instruction are meritless.

2. Johnson's Conviction Did Not Violate the Sixth Amendment

The defendant argues that his conviction should be reversed because the jury may not have been unanimous in its theory of how he possessed the gun. This claim should be rejected.

Although a jury verdict must be unanimous, this Court has consistently held that a general instruction to the jury on unanimity protects the defendant's right on this point. *See United States v. Harris*, 8 F3.d 943, 945 (2d Cir. 1993) ("[A] general charge regarding unanimity is ordinarily sufficient to protect the defendant's right to a unanimous verdict."); *United States v. Schiff*, 801 F.2d 108, 114-15 (2d Cir. 1986) ("A general instruction on unanimity is sufficient to ensure that . . . a unanimous verdict is reached"). Indeed this Court has held that "[e]ven in circumstances where it might have been advisable as a matter of sound policy to give 'specific' unanimity instructions," the "failure to give such instructions does not constitute plain error." *United States v. Shaoul*, 41 F.3d 811, 818 (2d Cir. 1994) (citing *United States v. Peterson*, 768 F.2d 64, 68 (2d Cir. 1985)). Here, the district court provided a general instruction on unanimity to the jury, instructing the jury that its "verdict, whether guilty or not guilty, must be unanimous." (GA193). With this charge, the district court satisfactorily ensured that the jury returned a unanimous verdict.

In any event, the defendant cites no authority for the proposition that the Sixth Amendment required an instruction that the jury must unanimously agree whether

Johnson's possession of the firearm was actual or constructive. The defendant relies primarily on *United States v. Adkinson*, 135 F.3d 1363 (11th Cir. 1998), but that case does not help him. In *Adkinson*, the Eleventh Circuit held that it was plain error for the district court not to instruct the jury that it must unanimously agree which overt act – out of 227 overt acts in the indictment – constituted the criminal scheme in the case, but the Eleventh Circuit subsequently distinguished *Adkinson*'s holding as limited to cases concerning "claims by the defendant[] that the language of the charging count in the *indictment* was insufficient." *United States v. Verbitskaya*, 406 F.3d 1324, 1334 n.2 (11th Cir. 2005). Here, as in *Verbitskaya*, the defendant has not argued that the language of the charging count in the indictment was insufficient. *See also United States v. Stewart*, 433 F.3d 273, 319 (2d Cir. 2006) ("The district court did not err by failing to instruct the jurors that they must agree unanimously as to which theory of the offense . . . supported the verdict."). Accordingly, the district court did not err and the conviction should be affirmed.

3. The Defendant's Conviction Did Not Violate Due Process

The defendant claims that his Fifth Amendment right to due process was violated because the jury was permitted to convict him on an "alternate and mutually exclusive theory" – constructive possession – that was not presented

at trial.[2] Defendant's Br. at 35. The defendant's argument fails on the facts and the law.

On the facts, the defendant misstates the record when he claims that the Government did not present evidence or argument on constructive possession until closing argument. While it is certainly true that the Government did not *argue* constructive possession until closing argument, in light of the District of Connecticut practice eschewing opening arguments (a practice followed here), closing argument was the Government's first and only chance to argue to the jury *at all*. Moreover, the Government presented substantial evidence of constructive possession throughout the trial. *See* Part III, *infra*. In light of this evidence, it is simply inaccurate to say that the Government failed to present evidence of constructive possession to the jury.

The defendant's argument on the law also fails. He relies primarily on *United States v. San Juan*, 545 F.2d 314 (2d Cir. 1976) for the proposition that his due process rights were violated by the Government's argument of "constructive possession" to the jury.[3] In that case,

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[2] The theory of constructive possession was not "mutually exclusive" to the theory of actual possession. Johnson could have actually possessed the gun while committing the robbery, and subsequently constructively possessed the gun when he was sitting in the front passenger seat of his car during the traffic stop, having concealed the gun under his seat when the police pulled his car over.

[3] Johnson also relies on *United States v. James*, 819 F.2d
(continued...)

however, the Government had repeatedly stated its theory of the case and expressly rejected an alternate theory presented for the first time in the court's instructions to the jury. *Id.* Indeed this Court has declined to extend *San Juan* by focusing on these precise facts. *See United States v. Russo*, 564 F.2d 2, 4 n.2 (2d Cir. 1977) (rejecting defendant's reliance on *San Juan* because in that case "the government repeatedly made clear its theory of the case and specifically rejected the alternative theory suggested for the first time in the court's charge to the jury."). Here, by contrast, the Government presented evidence on constructive possession to the jury, and argued that theory in its closing argument. Moreover, unlike the facts of *San Juan*, the Government never expressly rejected reliance on a theory of constructive possession. *See United States v. James*, 998 F.2d 74, 79 (2d Cir. 1993) (distinguishing *San Juan* because unlike that case, Government never made representations that led the defendant to forgo any defenses).

4. The Defendant's Conviction Did Not Violate the General Verdict Rule

The defendant claims that because the constructive possession theory was improperly submitted to the jury,

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[3] (...continued)
674 (6th Cir. 1987), as having "significant persuasive weight" due to its similarity to the facts of his case. In that case, however, the Government had conceded that "neither party presented evidence of constructive possession." *Id.* at 675. The Government has made no such concession here, since the facts do provide evidence of constructive possession.

the jury's general verdict – a verdict that did not specify the precise theory of possession – cannot stand. The defendant's argument is misplaced.

As a preliminary matter, the premise of the defendant's argument – that the constructive possession theory was improperly submitted to the jury – is wrong. The submission of a constructive possession theory to the jury did not violate due process, *see* Part II.C.3, and the Government presented more than sufficient evidence of constructive possession, *see* Part III. On these facts, there was no error in submitting the constructive possession issue to the jury.

On the law, the defendant relies on two civil cases to support his argument, but fails to note criminal cases upholding general verdicts in precisely this context. For example, in *Griffin v. United States*, 502 U.S. 46 (1992), the Supreme Court held that a general guilty verdict on a multi-object conspiracy charge did not have to be set aside even though the evidence was insufficient to support a conviction on one of the alleged objects of the conspiracy. Similarly, in *United States v. Pimentel*, 346 F.3d 285 (2d Cir. 2003), this Court considered whether the evidence was sufficient to establish that the defendants had engaged in specific racketeering activities. The Court noted that because the jury had returned a general verdict (i.e., had not specified which racketeering acts it had found), it "must affirm the convictions in the event that we find sufficient evidence to establish that the [defendants] engaged committed at least one of the charged racketeering activities." *Id.* at 297.

5. The Indictment was not Improperly Broadened by the Constructive Possession Evidence and Arguments

The defendant argues that his conviction should be reversed because instructing the jury on constructive possession constituted an improper broadening of the indictment in violation of the Fifth Amendment. As with his other arguments on constructive possession, this argument too must fail.

An indictment is constructively amended when the proof at trial broadens the basis of conviction beyond that charged in the indictment. *United States v. Danielson*, 199 F.3d 666, 669 (2d Cir. 1999) (holding indictment for felon in possession case was not impermissibly broadened where indictment alleged seven rounds of .45 caliber ammunition moved in interstate commerce, but at trial evidence showed that shells, rather than entire rounds, traveled in interstate commerce). In other words, "'[c]onstructive amendment occurs when the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.'" *Id.* at 670 (quoting *United States v. Wallace*, 59 F.3d 333, 337 (2d Cir. 1995)).

Within these parameters, however, this Court has "consistently permitted significant flexibility in proof, provided the defendant was given notice of the core of criminality to be proven at trial." *Id.* at 669; *United States v. Patino,* 962 F.2d 263, 265-66 (2d Cir. 1992). "The

critical determination is whether the allegations and the proof 'substantially correspond.'" *Danielson*, 199 F.3d at 670 (quoting *Patino*, 962 F.2d at 266).

The defendant relies heavily on *United States v. Dhinsa*, 243 F.3d 635 (2d Cir. 2001), but in that case, this Court explicitly emphasized that its holding was "limited by the highly unusual circumstances of the case" and "confine[d] . . . to the specific facts and procedural posture of the case. *Id.* at 668-69. There, the Court held that the indictment was impermissibly amended when the Government amended the indictment, after presentation of its case-in-chief, to change the statute under which the defendant was charged and where the defendant had conceded one of the elements required by the new statute. Those facts are simply not at issue here.

Here, the indictment was not constructively amended or broadened in any way. The proof at trial established what was alleged in the indictment – that Johnson possessed the firearm. Here, unlike in *Dhinsa*, the Government did not change the statute under which it was charging the defendant; it did not need to, since constructive possession is a valid way of proving a violation of 18 U.S.C. § 922(g)(1). Furthermore, the defendant has not pointed to any way in which his *strategy* would have changed, nor can he, since the evidence the Government presented was sufficient to show both actual and constructive possession from the outset. The trial judge was not precluded from giving an instruction she deemed appropriate, and the indictment was not impermissibly broadened thereby.

III. THE EVIDENCE WAS MORE THAN SUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTION ON A THEORY OF CONSTRUCTIVE POSSESSION

A. Relevant Facts

The Government presented extensive evidence regarding constructive possession. For example, Joseph Shannon testified on direct examination that he was driving Johnson's car on the night of October 15, 2002. (GA393). Shannon said that on that night, Johnson was carrying a Smith & Wesson .45 caliber revolver as he got into the car. (GA398, 403). Shannon further testified that Johnson told him to "take off," and not stop for the police as they were getting pulled over. (GA409). According to Shannon, after he pulled the car over, Johnson put the gun under the front passenger seat, i.e., the seat where Johnson was sitting. (GA411). On cross examination, Shannon stated that he had seen the gun previously at Johnson's house, and that Johnson had put the gun away in the house. (GA444-45). Further, Shannon stated that Johnson had shown him the gun "a few times." (GA445). When defense counsel argued that Shannon had not actually seen the gun at Johnson's house, Shannon stated, "I seen it at his house . . . I seen it a lot." (GA447).

Lt. Nelson, the officer who initially stopped Johnson's car, also testified to Johnson's actions that night. Nelson stated on direct examination that he thought the situation "was kind of strange" because the driver and rear passenger never looked in his direction, but Johnson was

"moving around in a manner almost like getting in a better position to know where I was." (GA106). Nelson testified that he pulled Johnson out of the car first "because of the manner in which he was reacting. . . . He was the only one moving around." (GA113). Nelson said that after the three men were out of the car, he looked in the vehicle and saw a revolver "sitting between the seat and the floorboard" on the "front, right-hand front passenger seat underneath the seat," where Johnson had been sitting. (GA115-16, 131). Nelson stated that Crumpton, who was sitting in the left-hand side behind the driver, could not have reached the gun from where it was positioned. (GA130). When asked who could have reached the gun from the location where he found it, Nelson identified the "[r]ight front passenger, Mr. Johnson." (GA131).

Finally, Agent Kurt Wheeler testified that it was Johnson's car in which the gun was found. (GA475).

B. Governing Law and Standard of Review

A defendant who challenges the sufficiency of the evidence supporting his conviction carries a heavy burden. *United States v. Walker*, 142 F.3d 103, 112 (2d Cir. 1998). This Court must "defer to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998).

A reviewing court must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. A conviction should not

be reversed if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). This Court must view the evidence in the light most favorable to the Government, and every inference that could have been drawn in the Government's favor must be credited. *United States v. Salameh*, 152 F.3d 88, 151 (2d Cir. 1998) (per curiam).

"To convict a defendant of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1), the government must prove that (1) the defendant possessed a firearm, (2) the defendant had a prior felony conviction, and (3) the firearm was possessed in or affecting interstate commerce." *United States v. Moore*, 208 F.3d 411, 412 (2d Cir. 2000) (per curiam). "Possession" within the meaning of § 922(g)(1) may be actual or constructive. *United States v. Gaines*, 295 F.3d 293, 299-300 (2d Cir. 2002); *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998). Constructive possession "exists when a person has the power and intention to exercise dominion and control over an object." *Payton*, 159 F.3d at 56. "In making this determination, courts examine, *inter alia*, whether the defendant exercised dominion and control over the premises in which the firearms are located." *Dhinsa*, 243 F.3d at 676. Furthermore, "[i]t is of no moment that other individuals also may have exercised control over the weapons." *Id.* at 677.

C. Discussion

The defendant claims that the evidence was insufficient to show that he constructively possessed the gun. This

argument is meritless. Viewed in the light most favorable to the Government, the evidence was more than sufficient to show that Johnson constructively possessed the weapon. In other words, the evidence overwhelmingly supports a finding that Johnson had the "power and intention to exercise dominion and control" over the gun. *Payton*, 159 F.3d at 56.

The testimony of Joseph Shannon, Lieutenant Nelson, and Agent Kurt Wheeler provided ample support for a finding of constructive possession. Shannon, the driver of the car, testified that Johnson not only entered the car that night carrying the gun, but also put the gun under the passenger seat where he was sitting. (GA398, 403, 411). Furthermore, Shannon had seen Johnson in possession of the same gun in the past. (GA444-45, 447). Lieutenant Nelson's testimony corroborated Shannon's. He stated that Johnson had looked "very uncomfortable" and was moving around "a lot" after Nelson stopped the car, and that he later found a revolver sitting between the seat and the floorboard under Johnson's seat. (GA1068, 115-16). According to Nelson, the right front passenger – Johnson – was the one who could have accessed the gun, based on its position in the car. (GA131). Finally, Agent Wheeler testified that the car the gun was found in belonged to Johnson. (GA475).

Thus, the evidence established that Johnson entered the car with the gun, instructed Shannon to flee when the traffic stop was initiated, attempted to hide the gun when police arrived, and positioned the gun under his own seat. Through this evidence, the Government established that Johnson had the power and intention to exercise dominion

and control over the weapon. Contrary to the defendant's assertions, this evidence also provided strong evidence that Johnson had actual knowledge of the gun's presence under his seat, since Johnson himself hid it there.

This Court's holdings in prior possession cases support a finding of constructive possession based on the facts here. *See, e.g.*, *United States v. Vasquez*, 82 F.3d 574, 578 (2d Cir. 1996) (rejecting argument that evidence was insufficient on possession because "no one actually saw him with the gun and his fingerprints were not found on it" given the manner in which Vasquez had been running, the retrieval of a dry shotgun from the wet ground near where he had been standing, and the recovery of a shell from an area where Vasquez had appeared to drop something); *United States v. Rivera*, 844 F.2d 916, 926 (2d Cir. 1988) (finding sufficient evidence to support constructive possession conviction when the gun was found in the defendant's apartment, there were other weapons found in the apartment, and because the apartment was the center of a large-scale drug operation, the defendant had a motive to possess a weapon). As in *Vasquez* and *Rivera*, the Government here presented evidence of the unusual manner in which Johnson had been moving, the recovery of a gun from his seat, and incriminating surrounding circumstances, i.e., it was Johnson's gun and Johnson's car. Going further than *Vasquez* or *Rivera*, the Government here was also able to present credible testimony of a witness who initially saw Johnson with the gun, and later saw Johnson himself hiding it under his seat. Based on Shannon's and Nelson's testimony, the evidence was clearly sufficient to establish constructive possession.

Other courts have also found evidence similar to that presented here to be sufficient to prove possession. In *United States v. Jameson*, the Tenth Circuit cited an officer's testimony that, as he approached, Jameson looked as though he "was trying to retrieve something from or conceal something underneath the seat in front of him" and that the police eventually retrieved the gun from the spot where Jameson's foot had been, as sufficient to establish possession. 478 F.3d 1204, 1210 (10th Cir. 2007). The Tenth Circuit found this to be more than mere presence; rather, the defendant possessed the gun because this was "a case where Mr. Jameson's proximity to the pistol was coupled with Mr. Jameson's furtive movements, . . . his inferred physical contact with the pistol . . . and the pistol's being in plain view and easily retrievable to a passenger in Mr. Jameson's seat." *Id*. (citations omitted). *See also United States v. Bradley*, 473 F.3d 866, 868 (8th Cir. 2007) (citing evidence that the firearm was seized from immediately below Bradley's seat, Bradley's movements in reaching down to the area where the firearm was found, and Bradley's attempt to flee as sufficient for a finding of possession). *Jameson* and *Bradley* present striking parallels to this case, and support a finding that the evidence was sufficient to convict Johnson of possession of a firearm.

The cases relied upon by the defendant are distinguishable. Although the court in *United States v. Blue*, 957 F.2d 106 (4th Cir. 1992) found insufficient evidence of possession, the Government only presented testimony that an officer saw the defendant dip his shoulder as the officer approached and that the gun was found under the defendant's seat. The Fourth Circuit

specifically cited the Government's failure to produce evidence demonstrating that Blue owned the gun, testimony that Blue had been seen with the gun, or evidence that Blue owned the car as reasons for finding insufficiency. *Id.* at 108. Here, by contrast, the Government produced evidence that Johnson owned the car and the gun, and evidence that he had been seen with the gun in the past. (GA393, 398-99, 402-403, 444-45, 447). In *United States v. Behanna*, 814 F.2d 1318 (9th Cir. 1987), the Government relied almost exclusively on the defendant's presence in the vehicle and proximity to the weapon, and the Ninth Circuit found this insufficient to establish possession. *Id.* at 1319-1320. By contrast, here, the Government presented evidence of far more than presence and proximity. It introduced testimony from another passenger that the defendant himself had carried and hidden the gun. (GA398, 411).

IV. ALTHOUGH THE COURT CORRECTLY CALCULATED THE DEFENDANT'S GUIDELINES RANGE, THE CASE SHOULD BE REMANDED FOR RESENTENCING UNDER *UNITED STATES V. FAGANS*

A. Relevant Facts

1. The Pre-Sentence Report

The Pre-Sentence Report ("PSR") calculated the defendant's offense level pursuant to the armed career criminal provision of the Sentencing Guidelines, § 4B1.4. PSR ¶ 21. This provision states as follows:

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

U.S.S.G. § 4B1.4(b). Accordingly, the PSR calculated the defendant's offense level under Chapter Two as well as

under § 4B1.4(b)(3)(A). The Chapter Two calculation identified a base offense level of 24, pursuant to § 2K2.1(a)(2), and added 4 levels under § 2K2.1(b)(5), resulting in a total offense level of 28. PSR ¶ 20. Because the offense level of 34 specified in § 4B1.4(b)(3)(A) was greater, that offense level applied. PSR ¶ 21.

The PSR calculated the defendant's criminal history score at 18 points, resulting in a criminal history category of VI. PSR ¶ 41. This calculation counted five of the defendant's felony convictions and accorded three points to each because the sentences exceeded one year and were within the time limits set forth in § 4A1.2(e).[4] PSR ¶¶ 34-39. Further, the criminal history score included two points under § 4A1.1(d) because the defendant committed the instant offense while he was on parole, and one point under § 4A1.1(e) because the defendant committed the instant offense less than two years after his release from imprisonment. PSR ¶ 41.

The PSR also identified § 4B1.4(c) as an additional basis for calculating the defendant's criminal history category as category VI. PSR ¶ 41. That section provides that the criminal history category of an armed career criminal is the greatest of:

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

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

(2) Category VI, if the defendant used or possessed the firearm . . . in connection with . . . a crime of violence, as defined in § 4B1.2(a), . . . ; or

(3) Category IV.

U.S.S.G. § 4B1.4(c).

2. Sentencing

The defendant did not object to the factual statements in the PSR, which included the facts concerning all of his convictions. Nor did he object to the applicability of the armed career criminal statute or his status as an armed career criminal under § 4B1.4. However, the defendant objected to the offense level calculation of 34, argued that it should be level 33 pursuant to under § 4B1.4(b)(3), and preserved his objection under *Blakely v. Washington*, 542 U.S. 296 (2004). (JA93-94, 115).

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

impose a 20-year sentence to run consecutively to the defendant's state sentence. (JA123-24).

B. Governing Law and Standard of Review

1. The Sentencing Guidelines

The Sentencing Guidelines are no longer mandatory. Rather a district court must consider the Sentencing Guidelines as well as the other sentencing factors set forth in 18 U.S.C. § 3553(a) in fashioning an appropriate sentence. *See United States v. Booker*, 543 U.S. 220, 258 (2005); *United States v. Crosby*, 397 F.3d 103, 110-14 (2d Cir. 2005).

In light of *Booker*, district courts should now engage in a three-step sentencing procedure. First, the district court must determine the applicable Guidelines range. Second, the district court should consider whether a departure from that Guidelines range is appropriate. *Crosby*, 397 F.3d at 111-12. Third, the court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id.* at 112-13. The fact that the Sentencing Guidelines are no longer mandatory does not reduce them to "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Id.* at 113.

This Court has repeatedly emphasized the as district courts apply this sentencing process, they retain "the traditional authority of a sentencing judge to find all facts relevant to sentencing." *Id.* at 112. In other words, "the sentencing judge will be entitled to find all of the facts that

the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Id.* *See also United States v. Vaughn*, 430 F.3d 518, 525(2d Cir. 2005) ("We reiterate that, after *Booker*, district courts' authority to determine sentencing factors by a preponderance of the evidence endures . . . ."), *cert. denied*, 126 S. Ct. 1665 (2006).

This Court reviews factual determinations underlying Guidelines determinations for clear error. *United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005). Issues of law are reviewed *de novo*, and mixed questions of law and fact are reviewed under either a *de novo* or clear error standard of review, depending on whether the issue is predominantly legal or factual. *Id.* (citing *United States v. Vasquez*, 389 F.3d 65, 75 (2d Cir. 2004) and *United States v. Rubenstein*, 403 F.3d 93, 99 (2d Cir.), *cert. denied*, 126 S. Ct. 388 (2005)).

2. The Armed Career Criminal Act

The Armed Career Criminal Act ("ACCA") applies a 15-year mandatory minimum in the case of a person who violates 18 U.S.C. § 922(g) and "has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). *See also* U.S.S.G. § 4B1.4 (providing for enhanced penalties for armed career criminals).

The ACCA defines a "violent felony" as:

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

18 U.S.C. § 924(e)(2)(B).

Ordinarily, the issue of whether a prior conviction constitutes a "violent felony" under § 924(e) is an issue of law, which this Court reviews *de novo*. *See Danielson*, 199 F.3d at 672 n.2. However, where a defendant does not object to the armed career criminal determination at the time of sentencing, this Court reviews the district court's decision for plain error. *Id.* at 671. Under this standard, the Court vacates a judgment only if it finds that the district court made an error "that is clear and obvious, affected substantial rights, and seriously affects the fairness, integrity or public reputation of the judicial proceedings." *Id.* (internal quotations omitted).

C. Discussion

1. The defendant argues that the district court improperly increased his base offense level by four levels under § 2K2.1(b)(5) (use or possession of a firearm in connection with another felony offense) because the jury never determined that he committed a robbery. Defendant's Br. at 46-47. This argument is meritless.

Even if the district court erred in applying this enhancement – which it did not – this error had no impact on the defendant's sentence. The PSR calculated the defendant's offense level under Chapter Two using this enhancement, but because the resulting offense level (28) was lower than level 34, the Chapter Two calculation was not used to set the defendant's offense level. *See* U.S.S.G. § 4B1.4(b) (offense level is the "greatest of" the offense level calculated under Chapters Two and Three, or level 34 if the defendant used a firearm in connection with a crime of violence, or 33 otherwise). In other words, any error in application of the enhancement under § 2K2.1(b)(5) did not affect the defendant's substantial rights.

In any event, the premise of the defendant's argument – that the district court improperly calculated the defendant's Guidelines range based on facts not found by a jury – is simply wrong. This Court has repeatedly reaffirmed that a district court is entitled to make findings for sentencing purposes. *See*, *e.g.*, *United States v. Garcia*, 413 F.3d 201, 220 n.15 (2d Cir. 2005) ("Judicial authority to find facts relevant to sentencing by a preponderance of the evidence survives *Booker*."); *Crosby*,

397 F.3d at 112 ("[T]he traditional authority of a sentencing judge to find all facts relevant to sentencing will encounter no Sixth Amendment objection.").

2. The defendant claims next that his prior conviction for rioting at a correctional institution is not a violent felony and, therefore, the district court should not have sentenced him as an armed career criminal.

In determining whether a prior conviction constitutes a violent felony under § 924(e), courts apply a categorical approach, looking "only to the fact of conviction and the statutory definition of the prior offense," and not "generally . . . the particular facts disclosed by the record of conviction." *James v. United States*, 127 S. Ct. 1586, 1593-94 (2007) (internal quotations omitted). *See also Shepard v. United States*, 544 U.S. 13, 17 (2005).

Applying the categorical approach, the defendant's conviction for rioting at a correctional institution is a violent felony. Under Connecticut law, rioting at a correctional facility is prohibited by Conn. Gen. Stat. § 53a-179b. That section provides:

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

CGS § 53a-179b.

"In order for a defendant to be found guilty of rioting at a correctional institution, he must plan, lead or take part in the disturbance at the correctional institution." *State v. Nixon*, 630 A.2d 74, 85 (Conn. 1993) (citing *State v. Rivera*, 619 A.2d 1146, 1150 (Conn. 1993)). To establish the element of a proscribed occurrence, the state must show there was "a disorder, disturbance, strike, riot, or other organized disobedience to the rules and regulations of such institution." *Nixon*, 630 A.2d at 85. While the first four types of proscribed occurrence may be either organized or spontaneous, the disobedience to the rules, must be organized, thus leaving the mere isolated or privately committed acts of disobedience of the rules and regulations to administrative disciplinary action. *Id.*

Even if, as Johnson contends, this offense does not include an element involving the use, attempted use, or threatened use of physical force, this conclusion does not end the inquiry. The offense of rioting at a correctional institution is a violent felony because it falls within the "residual" provision as a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

To determine if an offense falls within the residual provision of § 924(e)(2)(B), the Supreme Court has stated "the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *James*, 127 S. Ct. at 1597. The categorical approach does not require "that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent

felony." *Id.* "As long as an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the requirements of §924(e)(2)(B)(ii)'s residual provision." *Id.*

Rioting at a correctional institution is an offense which inherently carries the serious potential risk of injury, through the risk of physical confrontation, that courts have found pivotal in determining that an offense is a violent felony. For example, this Court held that escape is a violent felony under 18 U.S.C. §924(e)(2)(B)(ii), and in so holding focused not merely on the initial act of escape but also on the risk of physical confrontation inherent in recapture. *United States v. Jackson*, 301 F.3d 59, 61-62 (2d Cir. 2002); *see also United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994) (holding that escape qualifies as crime of violence under U.S.S.G. § 4B1.2(1)).

Like the crime of escape, rioting in a correctional institution carries an inherent risk of confrontation not merely in the initial riot, disturbance, or organized disobedience, but also in the guards' response. In each instance, the guards must address and disband the riot, disturbance or organized disobedience and in doing so they face the inherent the risk of confrontation. Moreover, this risk of confrontation is greater than the risk inherent in escape because the rioting offense necessarily occurs in a confined setting where guards must contend with multiple inmates. This inherent risk of confrontation creates a serious potential risk of physical injury. For the same reasons this court determined escape is a violent felony under §924(e)(2)(B)(ii), the offense of rioting at a correctional institution is properly considered a violent

felony. Accordingly, the district court did nor plainly err by including this prior conviction as one of three predicate felonies required under the ACCA.[5]

3. The defendant argues that the district court was not permitted to find he used a gun in connection with a crime of violence to set his offense level at 34 under § 4B1.4(b). This argument fails because, as described above, post-*Booker*, district courts are entitled to make findings for sentencing purposes. *See*, *e.g.*, *Garcia*, 413 F.3d at 220 n.15; *Crosby*, 397 F.3d at 112.

4. Finally, the defendant argues that he is entitled to resentencing under the non-mandatory, post-*Booker* Guidelines regime. Because the defendant preserved his objection on this issue, *see* JA93-94, 115, the Government agrees that he is entitled to resentencing under *Fagans*.

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[5] If this Court determines that the defendant's conviction for rioting at a correctional institution was not a violent felony, he may still be eligible for armed career criminal status based on two other convictions that potentially qualify as predicate felonies, specifically, his convictions for attempt to commit first degree robbery and conspiracy to commit first degree robbery. PSR ¶¶ 33, 37. On remand pursuant to *Fagans*, the Government would argue that the defendant was properly sentenced as an armed career criminal based on those convictions.

V. THE DISTRICT COURT PROPERLY ACCEPTED THE DEFENDANT'S STIPULATION REGARDING CRIMINAL HISTORY FACTS

A. Relevant Facts

On July 14, 2004, the court held a hearing to address a proposed stipulation between the defendant and the Government concerning the defendant's criminal history and related facts. At the hearing, the court addressed the defendant directly concerning the proposed stipulation, advised the defendant of the contents and limits of the stipulation, answered the defendant's questions about the stipulation, and ensured that the defendant was entering into the stipulation knowingly and intelligently. (GA695-711).

During the hearing, the court specifically said to the defendant, "Do you have any questions?" (GA700). The defendant asked further questions and the court answered the defendant's questions. (GA700-701). The court again asked, "Anything else you want to ask me? Because I would like you to sign this only if you have all your questions answered." (GA701). After further clarification from the court, (GA701-704), the court provided the defendant with a third opportunity to ask questions, "Anything further you want to ask me?" (GA704). After an additional exchange, attorney Weinberger indicated that the defendant was prepared to sign the stipulation. (GA706). The court asked the defendant if he understood it and defendant Johnson indicated that he did. (GA706). After being canvassed, the defendant chose to enter into the stipulation and signed it in open court in the presence

of his attorneys, Gary Weinberger and Peter Avenia. (GA693-94).

The facts stipulated by the defendant related to his criminal history calculation. In particular, he stipulated that he was in Criminal History Category VI with at least thirteen criminal history points, that he was on parole as of the date of the offense, October 15, 2002, and that the offense was committed less than two years after he had been released from imprisonment. (GA693-94).

B. Governing Law and Standard of Review

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court interpreted the Sixth Amendment right to a trial by jury (as incorporated by the Fourteenth Amendment's Due Process Clause) to hold that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. In other words, as the Court recently reaffirmed, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 543 U.S. at 244.

Nevertheless, district courts may continue to sentence defendants based on facts "not alleged in the indictment, as long as those facts do not increase the penalty beyond the prescribed statutory maximum sentence or trigger a mandatory minimum sentence that simultaneously raises

a corresponding maximum, without violating the Fifth or the Sixth Amendment." *United States v. Sheikh*, 433 F.3d 905, 906 (2d Cir. 2006). In addition, *Apprendi* carves out an express "recidivism" exception: facts pertaining to a defendant's prior convictions may be used to enhance the defendant's sentence even though those facts were not admitted by the defendant or proved to a jury. 530 U.S. at 489. This exception derives from the Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). This Court has repeatedly held (consistent with the Supreme Court's own statements) that *Almendarez-Torres* survives *Apprendi*. *See United States v. Santiago*, 268 F.3d 151, 155 (2d Cir. 2001) (rejecting claim that predicate facts supporting sentencing enhancement under 18 U.S.C. § 924(e) must be considered elements of the offense and must be charged in the indictment and found by a jury beyond a reasonable doubt).

C. Discussion

The defendant claims that there was no legal basis to enhance his sentence based on unindicted facts and thus he should not have been asked to stipulate to those facts, but the defendant's argument is misplaced. With respect to the defendant's stipulation relating to his criminal history points, those facts fall within the recidivism exception carved out by the Supreme Court in *Almendarez-Torres*, and thus they did not need to be included in the indictment. Similarly, the other facts in the defendant's stipulation (i.e., that he was on parole and that he committed the offense within two years of being released from prison) did not have to be included in the indictment

because they did not increase the statutory maximum penalty he faced. *Sheikh*, 433 F.3d at 906. In sum, there is no basis for the defendant's argument that the facts he stipulated to had to be included in the indictment.

Moreover, the defendant's claim that he was required to stipulate to certain sentencing enhancements is contrary to the evidence in the record. A defendant's right to enter in to a stipulation is clear; he can even enter into a stipulation as to elemental facts, which would otherwise be submitted to a jury, thus waiving his right to jury trial on that element. *United States v. Mason*, 85 F.3d 471, 472 (10th Cir. 1996). Before accepting the stipulation, however, a court must determine whether the defendant agreed to the stipulation. *See, e.g., United States v. Herndon*, 982 F.2d 1411, 1418 (10th Cir. 1992) (leaving undisturbed stipulation where district court took great care to ensure the defendant, through his trial counsel, understood the nature of the stipulation). Here, the district court went beyond the process approved in *Herndon* by taking steps to ensure that the defendant voluntarily chose to enter into the stipulation of facts concerning his criminal history and did so knowingly and intelligently. At a hearing held specifically for this purpose, the court canvassed the defendant directly, as recommended in *Herndon*. Through the canvas, the court ensured that the defendant understood the nature and limits of the proposed stipulation. Only after the defendant's questions were all answered by the court did the defendant elect to sign the stipulation. Accordingly, the court did not err when it accepted the stipulation.

CONCLUSION

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

Dated: May 14, 2007

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,978 words, exclusive of the Table of Contents, Table of Authorities, this certification and the Addendum of Statutes and Rules.

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ADDENDUM

18 U.S.C. § 922(g)(1)

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

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

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

18 U.S.C. § 924(e)(1)

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

* * *

18 U.S.C. § 924(2)(2)(B)

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

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

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

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

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

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

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

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

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

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

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

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

(3) Category IV.

* * *

CGS § 53a-179b. Rioting at a correctional institution

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

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