# 04-3769-cr(L)

*To be Argued By*:
ERIC J. GLOVER

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 04-3769-cr(L);**
**04-3773-cr(XAP)**

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UNITED STATES OF AMERICA,
*Appellee-Cross-Appellant,*

-vs-

JOSE RIVERA,
*Defendant-Appellant-Cross- Appellee.*

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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 (Stefan R. Underhill, J.) had subject matter jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The district court imposed sentence on May 28, 2004, and entered judgment on June 1, 2004. A-15. The defendant filed his notice of appeal on June 8, 2004. A-17. The government filed a timely notice of cross-appeal on June 15, 2004. A-18. The government's appeal has been personally approved by the Acting Solicitor General of the United States, and this Court has appellate jurisdiction under 18 U.S.C. § 3742(b).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the jury was properly instructed that the interstate commerce element could be satisfied by evidence that the firearm crossed state lines, and whether the government's evidence was sufficient to show as much.

2. Whether the district court erred in concluding that the defendant's prior conviction for first degree escape did not constitute a violent felony under the Armed Career Criminal Act.

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 04-3769-cr(L);**
**04-3773-cr(XAP)**

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UNITED STATES OF AMERICA,
*Appellee-Cross-Appellant,*

-vs-

JOSE RIVERA,
*Defendant-Appellant-Cross- Appellee.*

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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The defendant appeals his conviction after a jury trial for being a felon in possession of a firearm. He appeals on the ground that the government's evidence on the interstate commerce element was insufficient, and on the ground that the district court's jury instructions on the interstate commerce element were erroneous. The defendant's argument is flawed on both grounds. The district court correctly instructed the jury that the

government need only have demonstrated that the firearm had crossed a state line prior to the defendant's possession, and properly rejected the defendant's proposed jury instruction stating otherwise. Moreover, the government's evidence showed that the defendant possessed the firearm in Connecticut, and that it had been manufactured in Massachusetts. This Court has repeatedly held that such evidence is sufficient to satisfy the interstate commerce element. The defendant's conviction should be affirmed.

The government cross-appeals the defendant's sentence. At sentencing, the Presentence Report ("PSR") and the government took the position that the defendant was subject to the Armed Career Criminal Act (the "ACCA"), and that as such he was subject to a sentence of 262-327 months under the Sentencing Guidelines, and a mandatory minimum sentence of 180 months under 18 U.S.C. § 924(e). The district court, however, concluded that the defendant's conviction for first degree escape did not constitute a violent felony under the ACCA -- that is, a crime that "presented a serious potential risk of physical injury to others" -- and thus sentenced the defendant to the non-ACCA statutory maximum of 120 months of imprisonment.

The district court erred in concluding that, because the defendant's first degree escape conviction involved a failure to return from furlough, it did not constitute a "violent felony" under the ACCA. In *United States v. Jackson*, 301 F.3d 59, 61-62 (2d Cir. 2002), *cert. denied*, 539 U.S. 952 (2003), this Court held that "escape, regardless of the particular circumstances, amounts to a violent felony under § 924(e)." As this Court noted,

"[e]very circuit court that has considered the issue has held that an escape, *from whatever location by whatever means*, constitutes 'conduct that presents a serious potential risk of physical injury to another.'" *Id.* at 62 (emphasis added). The conduct underlying the defendant's escape conviction clearly presented such a potential risk, and the district court erred in concluding otherwise. Accordingly, this Court should vacate the defendant's sentence and remand for re-sentencing under the ACCA.

## STATEMENT OF THE CASE

On August 26, 2003, a federal grand jury in Connecticut returned a one-count 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). A-9-10.[1]

Trial by jury began on March 8, 2004, and on March 10, 2004, the jury found the defendant guilty.

The defendant was sentenced on May 28, 2004, and the district court entered judgment on June 1, 2004. A-15. The district court sentenced the defendant to 120 months of imprisonment, to be followed by three years of supervised release. The district court did not fine the defendant, but ordered him to pay a $100 special assessment. *Id.*

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[1] Citations to the Joint Appendix filed by the defendant are cited as "A-__." Citations to the Government's Supplemental Appendix are cited as "GSA-__." Citations to the trial transcript are cited as "Tr. __."

On June 8, 2004, the defendant filed a timely notice of appeal. A-17. On June 15, 2004, the government filed a timely notice of cross-appeal. A-18.

## STATEMENT OF FACTS

### A. The Trial Evidence

The evidence at trial showed that on the evening of March 4, 2003, members of the Gang Task Force of the Waterbury Police Department responded to a call that a gang fight was about to break out between the Los Solidos and the Latin Kings, two street gangs. Tr. 39-40; 104-05; 157-59. When the police arrived at the scene, they observed several males arguing and engaged in boisterous behavior on the front porch of 233 River Street in Waterbury. Tr. 41 110; 161-62. Three officers testified that, as they were exiting their vehicles and making their way to the building, they saw the defendant, Jose Rivera, and another individual, Raul Santiago, inside the entrance to the multi-unit apartment building, at the foot of the inside stairwell. Tr. 42, 111; 162-63, 168. The building was known to the police as the Los Solidos house. Tr. 125. Each of the three officers testified that he saw Rivera holding a shotgun and Santiago holding a machete. Tr. at 42; 111; 162-63.

The officers testified that, when Rivera and Santiago saw the police, they fled up the internal flight of stairs and into an apartment at the top of the stairs. Tr. 42-43; 112-14; 163-64. The three officers chased the pair into the apartment, whereupon one of the officers pursued Santiago

into the kitchen, arrested him and seized the machete, while the other two officers pursued Rivera into a bedroom in the apartment. Tr. 48-49; 114-15; 164-65. The two officers saw the defendant trying to crawl under a bed. They dragged the defendant out from underneath the bed and seized the shotgun which he had been holding onto until the officers removed him from underneath the bed. Tr. 49-51; 165-67.

The police arrested the defendant and Santiago, Tr. 51-52; 115; 167. They also arrested the defendant's girlfriend, Luciana Rodriguez, and his sister, Elizabeth Rivera, for interfering with the police officers as they were trying to arrest the defendant and Santiago. Tr. 52; 118; 167-69.

The government presented expert testimony that the shotgun had been manufactured in Massachusetts, and that the manufacturer had never made guns in Connecticut. Tr. 215. The shotgun itself contains engraved writing: "Savage Arms Corporation, West[field], Massachusetts." Tr. 213.

The defendant called three witnesses to testify. The first witness was the defendant's girlfriend, Luciana Rodriguez. Tr. 270, 306. She testified that the police did not chase Rivera and Santiago up the stairwell of the building and into her apartment, as the police officers had testified. Tr. 293. Rather, she testified that Rivera and Santiago were in her apartment that evening prior to the time the police arrived; that Santiago left the apartment briefly to go downstairs; and that he returned to the apartment a short time later because the police had arrived.

Rodriguez testified that Santiago locked the door. The police then came to her door on the second floor a short time later, asking to speak to Santiago. Tr. 293-96; 325-30.

Rodriguez testified that after Santiago stepped into the hallway, the police officers asked about a jacket that belonged to the defendant and whether anyone else was in the apartment. Tr. 295-96; 331. According to Rodriguez, she lied and did not tell them that Rivera was in the apartment and that the jacket was his. Tr. 296-97; 331-32. According to Rodriguez, Rivera was in the apartment hiding in a closet because he had outstanding warrants for his arrest. Tr. 296. Rodriguez testified that the police then looked through the apartment without her consent and found Rivera hiding in a closet. Tr. 296-97.

Rodriguez testified on cross-examination that, after Rivera was found in her closet, she saw the police officers come out of her bedroom with the sawed-off shotgun. Tr. 298-99, 332, 337. She also testified that she saw the officers enter her bedroom and that they did not have the sawed-off shotgun when they entered her bedroom. Tr. 332. Rodriguez then testified that she found out from Rivera how the sawed-off shotgun had made its way into her apartment. Tr. 332-33. She testified that after Rivera's arrest, he told her that he was holding the shotgun for another individual, Edgardo Guzman. Tr. 334-36. Rodriguez admitted that she had testified previously (specifically, at the suppression hearing) that she had no idea how the shotgun that the police seized had gotten into her apartment. Tr. 333-34. However, she testified repeatedly -- on cross-examination and redirect -- that she

now knew that, based on Rivera's statements to her after his arrest, Rivera was keeping the shotgun in the apartment for Guzman. Tr. 335-36; 352-57.

The defendant also called Virgin Alvarado to testify. Tr. 361. Alvarado, a 20-year friend of Luciana Rodriguez who lived next door to her, testified that she sold a bed frame to Luciana Rodriguez and that the frame was too close to the ground for a person to fit under. Tr. 362, 365, 369. (Luciana Rodriguez had likewise testified that no one could fit under her bed because it was too close to the floor. Tr. 292.) But Alvarado tesified on cross-examination that Luciana Rodriguez had altered the bed frame since she sold it to her by removing the wheels from the bed, which made the bed closer to the floor. Tr. 372-73.

Finally, the defendant called Juan Rodriguez, the boyfriend of the defendant's sister, Elizabeth Rivera. Tr. 380, 383. Juan Rodriguez testified that he had been a member of the Los Solidos gang, Tr. 405-06, and that he was with the shotgun's owner, Edgardo Guzman, also a gang member, when Guzman purchased the sawed-off shotgun from an unknown individual in Waterbury, Connecticut, just days before the police arrested Rivera on March 4, 2003. Tr. 390-92. Juan Rodriguez testified that the sawed-off shotgun was referred to as "baby." Tr. 388-90. He testified that on the day of Rivera's arrest, Guzman had asked Rodriguez to hold the shotgun for him but that he refused to do so, and that he did not see the shotgun again until the police brought it down from the second floor after they arrested Rivera. Tr. 393-94.

Contrary to Luciana Rodriguez's testimony, Juan Rodriguez testified that Jose Rivera was "on the bottom step" of the stairway in the building when the police arrived. Tr. 396. He also testified, contrary to Luciana Rodriguez's testimony, that Raul Santiago was also "standing in the doorway" when the police arrived. Tr. 399. He testified that after the police arrived, Rivera started to walk upstairs and Santiago "ran upstairs." Tr. 399. Juan Rodriguez testified, however, that Rivera was not carrying the sawed-off shotgun and that Santiago was not carrying a machete. *Id.*

On cross-examination, Juan Rodriguez testified that the defendant had also been a member in the gang, and that the building at issue was a hangout for the Los Solidos gang. Tr. 416. Juan Rodriguez further admitted that the defendant's brother, Juan Rivera, had been the president of the gang, Tr. 432, and that membership in the Los Solidos gang required a loyalty oath, requiring a pledge of loyalty to your "family" -- *i.e.*, the gang. Tr. 423-25.

### B. The Presentence Report

In the PSR, the Probation Officer found that Rivera qualified for armed career criminal status under U.S.S.G. § 4B1.4 and 18 U.S.C. § 924(e) for three predicate violent felonies or serious drug offenses: (1) possession of narcotics with intent to sell; (2) second degree assault; and (3) first degree escape. The defendant possessed a sawed-off shotgun which, with a criminal history category VI, yielded a guideline range of 262 to 327 months under § 4B1.4(b)(3)(A). *See* PSR at ¶¶ 18, 29, 73-74.

The defendant filed a sentencing memorandum challenging only the third offense as a predicate, arguing that it should not be deemed a violent felony because it does not "involve[] conduct that presents a serious potential risk of physical injury to another" under 18 U.S.C. § 924(e)(2)(B)(ii).

The government filed a memorandum arguing that the this Court had already concluded in *United States v. Jackson*, 301 F.3d 59, 61-62 (2d Cir. 2002), *cert. denied*, 539 U.S. 952 (2003), that "escape, regardless of the particular circumstances, amounts to a violent felony under § 924(e)." In *Jackson*, the Florida statute at issue covered "the escapee who peaceably walks away from a work site as well as the inmate who violently busts out of confinement." *Id.* at 61. The Court noted that "[e]very circuit court that has considered the issue has held that an escape, *from whatever location by whatever means*, constitutes 'conduct that presents a serious potential risk of physical injury to another.'" *Id.* at 62 (emphasis added). The *Jackson* court noted that an escape "invites pursuit; and the pursuit, confrontation, and recapture of the escapee entail serious risks of physical injury to law enforcement officers and the public." *Id.* at 63.

### C. The Sentencing Hearing

The district court rejected the government's position and agreed with the defendant that his prior conviction for escape did not constitute a violent felony under the ACCA. The district court acknowledged that after an escapee who failed to return from furlough is found, his or her "arrest may in fact lead to a dangerous

situation." GSA-22. But the district court stated that "[t]hat is true in absolutely every case." *Id.* The district court thus ruled that the "offense that we're dealing with here do[es] not involve any action by the defendant that could be considered to give rise to [a] risk to law enforcement." GSA-23.

Because the district court did not find Rivera's conviction for escape to be a violent felony under the ACCA, the district court sentenced Rivera to a guidelines sentence (and the non-ACCA statutory maximum) of 120 months under § 2K2.1(a)(1) (level 26, CHC VI, range of 120-150 months). If the district court had found Rivera's escape conviction to be an ACCA predicate, Rivera would have faced a mandatory minimum sentence of 180 months, and a likely guidelines sentence of 262-327 months (level 34, CHC VI) under § 4B1.4(b)(3)(A).

## SUMMARY OF ARGUMENT

The district court properly denied the defendant's motion for judgment of acquittal and properly instructed the jury on what the government had to prove to satisfy the interstate commerce element. The defendant's arguments on both issues are the same -- he challenges this Court's well-established case law holding that the government may satisfy the interstate commerce element by presenting evidence showing that the firearm in question crossed a state line prior to the felon's possession. The defendant does not challenge the sufficiency of the government's evidence or the jury instructions under existing case law; rather, he argues that this Court should require the government to show more than that the firearm crossed a

state line. He argues that the government should have to show the "manner" in which the firearm entered "the stream of commerce," and that here the government did not "prove when or how [the firearm] had been transported into Connecticut." Def.'s Br. at 15, 10.

The defendant's arguments on these points need not detain this Court long. In *United States v. Carter*, 981 F.2d 645, 648 (2d Cir. 1992), this Court, relying on *Scarborough v. United States*, 431 U.S. 563 (1977), held that the interstate commerce element of § 922(g)(1) is met if "the firearm allegedly possessed or received by the defendant had at some point previously traveled across a state line." This Court stated that the phrase "'in or affecting commerce'" is a "jurisdictional term of art that indicates a Congressional intent to assert its full Commerce Clause power." *Carter*, 981 F.2d at 647. This Court has made clear in subsequent cases that this full Commerce Clause power encompasses "a firearm whose only connection to commerce was the previous crossing of a state line." *United States v. Palozie*, 166 F.3d 502, 505 (2d Cir. 1999) (per curiam). This Court should re-affirm its well-established precedent on this point and affirm the defendant's conviction.

The district court erred in concluding that the defendant's conviction for escape under Connecticut law did not constitute a violent felony under the ACCA. In *United States v. Jackson*, 301 F.3d 59, 61 (2d Cir. 2002), *cert. denied*, 539 U.S. 952 (2003), this Court held that "escape, regardless of the particular circumstances, amounts to a violent felony under § 924(e)." As this Court noted, "[e]very circuit court that has considered the issue

has held that an escape, from whatever location by whatever means, constitutes 'conduct that presents a serious potential risk of physical injury to another.'" *Id.* at 62. The means of escape here -- failure to return from furlough -- cannot be distinguished from walking away from a work site, which the statute in *Jackson* prohibited, or failing to return to a halfway house, which at least four Courts of Appeals have found qualifies under the ACCA. *Jackson* made clear that the danger posed to law enforcement by an escapee stems in large part from the dangers inherent in the pursuit of the escapee, regardless of the manner by which the escapee initiates his escape: escape "invites pursuit; and the pursuit, confrontation, and recapture of the escapee entail serious risks of physical injury to law enforcement officers and the public." *Id.* at 63. The defendant's sentence should be vacated, and the case should be remanded for re-sentencing of the defendant under the ACCA.

## ARGUMENT

### I. THE JURY WAS PROPERLY INSTRUCTED THAT THE INTERSTATE COMMERCE ELEMENT COULD BE SATISFIED BY EVIDENCE THAT THE FIREARM CROSSED STATE LINES, AND THE GOVERNMENT'S EVIDENCE WAS SUFFICIENT TO SHOW AS MUCH.

#### A. Relevant Facts

The government presented testimonial and tangible evidence on the interstate commerce element at trial. The

government called Special Agent John Fretts of the Bureau of Alcohol, Tobacco and Firearms, who testified that he has received specialized training concerning foreign and domestic firearms manufacturers. Tr. 206-11. The government offered Special Agent Fretts as an expert witness, to which the defendant had no objection. Tr. 212.

Special Agent Fretts testified that the firearm at issue was a Stevens 12 gauge shotgun which had been manufactured by the Savage Arms Corporation in Westfield, Massachusetts. Tr. 212, 215. The shotgun itself contains engraved writing indicating that it was manufactured by the Savage Arms Corporation, Westfield, Massachusetts. Tr. 213. Special Agent Fretts also testified that he conducted research in gun publications. Tr. 214-15. In addition to testifying that the firearm was manufactured in Massachusetts, Special Agents Fretts testified that the manufacturer had never manufactured guns in Connecticut. Tr. 215.[2]

The defendant requested that the district court give the jury an instruction on the interstate commerce element as follows:

> The third element that the government must prove beyond a reasonable doubt is that the firearm the defendant is charged with possessing was in or

[2] Special Agents Fretts also testified that, based on tests he performed on the shotgun, the shotgun was designed to expel a projectile by the action of an explosive, and that the shotgun is operable. Tr. 216-18.

> affecting interstate in that it had been transported in interstate commerce.
>
> This means that the government must prove that at some point prior to the defendant's possession, the firearm had been transported in interstate commerce. It is not necessary that the government prove that the defendant himself carried it in interstate commerce or that the defendant knew that the firearm had previously been transported in interstate commerce.
>
> There has been testimony that the firearm in question was manufactured in a state other than where the defendant is charged with possessing it. You may consider this, if you find it to have been proven, in determining if the firearm was transported in interstate commerce; however, the fact of manufacture outside of Connecticut, if proven, would not by itself establish that the firearm was transported in interstate commerce.

A-12; Tr. 235-37. At the charge conference, the district court indicated that it would not give the defendant's requested instruction. Tr. 237. The district court had previously stated that this Court had "held more than once that travel across state lines is sufficient." Tr. 224.

Instead, the district court instructed the jury as follows on the interstate commerce element:

> The third element that the government must prove beyond a reasonable doubt is that the specific

> firearm Jose Rivera is charged with possessing had been transported in interstate or foreign commerce prior to March 4, 2003.
>
> This means that the government must prove that at some time prior to the defendant's possession the firearm at issue had been transported in interstate or foreign commerce. The government can satisfy this element by proving that at any time prior to March 4, 2003, the firearm crossed a state line or the United States border. It is not necessary that the government prove that the defendant himself carried it across a state line or that the defendant knew that the firearm had previously been transported in interstate commerce.

Tr. 481-82.

## B. Governing Law and Standard of Review

One of the elements of the offense of being a felon in possession of a firearm is that the possession of the firearm be "in or affecting commerce." 18 U.S.C. § 922(g); *see also United States v. Smith*, 160 F.3d 117, 122 n.2 (2d Cir. 1998) ("The three simple elements of the charged offense are (1) knowing possession of the firearm, (2) a previous felony conviction, and (3) the possession being in or affecting commerce.").

In *United States v. Carter*, 981 F.2d 645, 647 (2d Cir. 1992), this Court held that the interstate commerce element of § 922(g)(1) is met if the firearm in question has "traveled previously in interstate commerce." This Court

held that the district court in that case properly instructed the jury that, to prove that element of the offense, "'[i]t is sufficient . . . that the firearm allegedly possessed or received by the defendant had at some point previously traveled across a state line.'" *Id.* (quoting instructions) (alteration and omission in original); *see also id.* at 648 (noting that "the requirement that the firearms have been 'in or affecting commerce' is satisfied 'merely upon a showing that the possessed firearm has previously . . . travelled in interstate commerce.'") (quoting *Scarborough v. United States*, 431 U.S. 563, 567 n.5 (1977)).

This Court has on numerous occasions re-affirmed its holding that to satisfy its burden with respect to the interstate commerce element, the government need only prove that the firearm possessed by the defendant previously traveled across a state line, which can be established by presenting evidence that the firearm was manufactured out of state. *See, e.g.*, *United States v. Palozie*, 166 F.3d 502, 503 (2d Cir. 1999) (per curiam) (affirming conviction in face of interstate commerce challenge where jury was charged that the government could carry its burden by proving that the firearm "had at some time previously traveled across a state line"); *United States v. Sanders*, 35 F.3d 61, 62 (2d Cir. 1994) (per curiam) (stating in case involving interstate commerce challenge to possession of ammunition under § 922(g) that "[o]ur decision in [*Carter*] disposes of this appeal"); *United States v. Jones*, 16 F.3d 487, 491 (2d Cir. 1994) ("Testimony that a weapon was manufactured out of state is generally sufficient to meet the interstate commerce element.").

Other Courts of Appeals have held likewise. *See, e.g.*, *United States v. Corey*, 207 F.3d 84, 88-91 (1st Cir. 2000) (testimony that firearm not manufactured in state of possession sufficient to prove that firearm previously traveled across state line); *United States v. Washington*, 17 F.3d 230, 233 (8th Cir. 1994) (same); *United States v. Buggs*, 904 F.2d 1070, 1076 (7th Cir. 1990) (same, and stating that "evidence that a weapon was manufactured outside of the state in which it was possessed is sufficient proof that the weapon was 'in or affecting commerce'"); *United States v. Sherbondy*, 865 F.2d 996, 999-1001 (9th Cir. 1988) (holding that "past connection with commerce is enough," and that "past connection" was "established by the fact that the gun was manufactured in Connecticut and possessed by [the defendant] in California"); *United States v. Thomas*, 810 F.2d 478, 480 (5th Cir. 1987) (holding that, where the defendant's possession was in Texas, "[t]he government's proof that the shotgun was manufactured in Massachusetts satisfie[d] the nexus requirement"). *See also United States v. Lowe*, 860 F.2d 1370, 1374 (7th Cir. 1988) ("It is firmly established that under § 922(g), proof of a gun's manufacture outside of the state in which it was allegedly possessed is sufficient to support the factual finding that the firearm was 'in or affecting commerce.'").[3]

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[3] In cases where the government must prove that a firearm has previously traveled in interstate commerce, the government may offer expert testimony concerning the place of manufacture of firearms. *See, e.g.*, *United States v. Floyd*, 281 F.3d 1346, 1349-50 (11th Cir. 2002) (per curiam); *United States v. Glover*, 265 F.3d 337, 344-45 (continued...)

The issue of whether the district court properly instructed the jury is an issue of law that is reviewed *de novo* by this Court. *See United States v. George*, 386 F.3d 383, 397 (2d Cir. 2004) ("We review *de novo* the propriety of jury instructions."); *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003) ("We review a claim of error in jury instructions *de novo*, reversing only where, viewing the charge as a whole, there was prejudicial error.").

Where, as here, the defendant challenges the conviction on the ground that the evidence was insufficient, this Court must determine whether viewing the facts in the light most favorable to the government, with all inferences drawn in its favor, "*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); *see also United States v. Thomas*, 377 F.3d 232, 237 (2d Cir. 2004).

### C. Discussion

The district court properly instructed the jury that the third element of § 922(g) could be established "by proving that at any time prior to [the date of the offense], the firearm crossed a state line or the United States border." Tr. 482. Moreover, the government's evidence on this point was clearly sufficient to allow the jury to find that the firearm at issue here had crossed a state line.

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[3] (...continued)
(6th Cir. 2001) (collecting cases from four circuits); *United States v. Corey*, 207 F.3d 84, 88-92 (1st Cir. 2000) (rejecting *Daubert* challenge).

The district court's jury instructions on the interstate commerce element tracked the law on this issue as set forth by this Court in *Carter*, *Palozie, Sanders*, *Jones*, and other cases. Yet the defendant argues that this Court should overturn those cases because the government should have to offer some evidence to show *how* the firearm went from its place of manufacture to its place of possession (here, Massachusetts to Connecticut). He argues that not requiring such evidence is inconsistent with the term "interstate commerce." Def.'s Br. at 16. The defendant has offered no persuasive reason to revisit the well-established law on this issue in this and other Circuits, and his invitation to do so should be declined.

The defendant argues that the portion of the Supreme Court's opinion in *Scarborough* that this Court relied upon in *Carter* -- that "the requirement that the firearm have been 'in or affecting commerce' is satisfied 'merely upon a showing that the possessed firearm has previously . . . traveled in interstate commerce," 981 F.2d at 648 (quoting 431 U.S. at 567 n.5) -- "was not a statement of law, rather it was a statement of the question upon which review had been granted." Def.'s Br. at 12. But the defendant simply ignores the fact that, in addition to restating the question upon which certiorari was granted in footnote 5, the Court stated quite clearly at the outset of its opinion that "[t]he issue in this case is whether proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the statutorily required nexus between the possession of a firearm by a convicted felon and commerce." *Scarborough*, 431 U.S. at 564. The Supreme Court answered that question in the affirmative. The Supreme Court answered that question in the affirmative.

*See also Palozie*, 166 F.3d at 503 ("In *Scarborough*, the Supreme Court -- construing a statutory predecessor of § 922(g)(1) -- concluded that the prosecution could carry its burden of showing the requisite interstate commerce element by proving beyond a reasonable doubt that the firearm previously had traveled in interstate commerce.") (citation omitted).

Equally important, while the defendant asserts that *Scarborough* addressed "travel in interstate commerce" and did not consider whether that could be established by travel across a state line (*see* Def.'s Br. at 12), the Supreme Court appears to have assumed in that case that evidence of manufacture in a state or nation other than the state in which the firearm was possessed was sufficient to show that the firearm had traveled in interstate commerce. The Supreme Court indicated that "the Government offered evidence to show that all of the seized weapons had traveled in interstate commerce," *Scarborough*, 431 U.S. at 565, and specifically noted that the Government's evidence on one of the firearms leading to conviction consisted of the fact that the firearm "was manufactured in France in the 19th century and was *somehow later* brought into Virginia." *Id.* at 565 n.2 (emphasis added) (citation omitted); *see also United States v. Thomas*, 810 F.2d 478, 480 (5th Cir. 1987) (noting same). The Court was thus under no impression that the government had to show *how* or *when* the firearm at issue got to Virginia, only that the defendant possessed it in Virginia and that it had been manufactured in France.

The defendant has not cited one case in which a court has departed from this well-established interpretation of

the interstate commerce nexus under the statute. No court has revisited this issue because doing so would place an artificially high burden on the government in proving the interstate commerce element. As this Court stated in *Carter*, the phrase "'in or affecting commerce'" is a "jurisdictional term of art that indicates a Congressional intent to assert its full Commerce Clause power." *Carter*, 981 F.2d at 647. That full Commerce Clause power encompasses firearms that "have travelled previously in interstate commerce," *id.*, which includes "a firearm whose only connection to commerce was the previous crossing of a state line." *Palozie*, 166 F.3d at 505.

The defendant appears also to argue that evidence of how the firearm actually traveled in interstate commerce should be required in this case because of certain language used in the indictment here. *See* Def.'s Br. at 11-12, 15. The indictment in this case alleged that the defendant "did knowingly possess a firearm in and affecting interstate commerce . . . which had been transported in interstate or foreign commerce." A-9. The indictment clearly alleged the essential elements of the offense, and the defendant does not argue otherwise. Rather, he seems to imply, without legal support, that the addition of the word "transported" should require the government to prove more than that the firearm traveled across state lines.

But the allegation that the firearm was "transported" in interstate commerce simply tracks certain language in the statute, and in any event is clearly "surplusage" given the fact that the indictment clearly alleges that the defendant's possession was "in and affecting commerce." *Cf.* 18 U.S.C. § 922(g) (stating that it "shall be unlawful for any

[felon] . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition"). The addition of the "transported" allegation, therefore, has no bearing on the elements of the offense that the government had to prove in this case, as it is axiomatic that the government "'need not prove allegations of an indictment that are 'surplusage' to the essential elements of the offense charged.'" *United States v. Autorino*, 381 F.3d 48, 54 (2d Cir. 2004) (quoting *United States v. Richards*, 302 F.3d 58, 67 n.6 (2d Cir. 2002) (despite fact that indictment alleged specific drug quantity, government not required to prove drug quantity where sentence imposed was less than statutory maximum applicable to lower drug quantity)); *see also United States v. Rosenthal*, 9 F.3d 1016, 1022-23 (2d Cir. 1993) (despite fact that indictment alleged that defendant gave a "thing of value" gratuity constituting "false and fraudulent tax losses," government required at trial only to prove giving of "thing of value" and not that the "thing of value" was also "false and fraudulent"); *United States v. Helmsley*, 941 F.2d 71, 92 (2d Cir. 1991) (despite fact that indictment alleged omission of "substantial" items of income on tax return, government not required to prove that the items were "substantial"); *United States v. Rodriguez*, 545 F.2d 829, 831 (2d Cir. 1976) (despite fact that indictment alleged defendant's source of unreported income to be from sale of heroin, government not required to prove source of income at trial in tax case).

The defendant's proposed revision of the law on the interstate commerce nexus on this issue would make it exceedingly difficult in many cases for the government to prove that a firearm traveled in interstate commerce. In

this case, for instance, the sawed-off shotgun at issue did not have a serial number, which made it impossible to conduct a so-called "trace" of the firearm's history. The government, therefore, presented no evidence at trial as to what happened to the firearm between the time it was manufactured in Massachusetts and the time that the defendant possessed the firearm in Connecticut. Tr. 219-20. Under the defendant's proposed interpretation of the interstate commerce nexus, the government would be required to produce evidence of more than just the fact that a firearm was manufactured outside the state in which it was possessed. The government would be hard pressed, at best, to obtain such evidence in cases in which the firearm at issue did not have a serial number. As a result, such a requirement would encourage and reward what the law otherwise prohibits -- obliterating serial numbers on firearms so that firearm traces could not be successfully conducted. Suffice it to say that the defendant's proposed wholesale revision of this area of the law should be rejected.

Under this Court's well-established caselaw, therefore, the jury was properly instructed, and the government clearly presented sufficient evidence that the firearm the defendant was charged with possessing had previously traveled in interstate commerce. The testimony of Special Agent Fretts, as well as the firearm itself, provided precisely what this Court has stated is sufficient to prove the interstate commerce element for a conviction under 18 U.S.C. § 922(g) -- that the firearm was manufactured in a state other than the state in which the defendant possessed it, and that a jury can therefore find that the firearm previously traveled across state lines. *See, e.g.*, *Sanders*,

35 F.3d at 61 (concluding that the interstate commerce element was satisfied where the "government concede[d] that the ammunition's only nexus to interstate commerce [was] that it had been manufactured in another state and reached New York via interstate commerce at some unspecified time prior to [defendant's] possession of it").

In his sufficiency challenge, the defendant does not contest the fact that the government proved what this Court has clearly held to be sufficient evidence of interstate commerce nexus in previous cases. The defendant does not contest that the government proved that the firearm at issue was manufactured in Massachusetts, that the defendant possessed the firearm in Connecticut, and that the jury could thereby reasonably find that the firearm crossed state lines prior to the defendant's possession. *See* Def.'s Br. at 9 (stating that the only basis for finding the interstate commerce element to have been satisfied here "were the facts as to [the firearm's] place of manufacture and its place of seizure, and the District Court erred in finding this sufficient"); *id.* at 10 ("the government's evidence establishes only that the firearm was manufactured in Massachusetts in 1960 and at some unknown later time and by some unknown means went to Connecticut"); *see also id.* at 11 ("the government established that the firearm was manufactured in Massachusetts").

Instead of asking this Court to find that the government failed to present sufficient evidence on the interstate commerce element based on this Court's established precedent, the defendant asks that this Court assess the government's evidence based on a heightened standard

under which the government must show more than that the firearm previously traveled across state lines. "[T]he statute and the indictment should be read to require more than mere manufacture outside Connecticut and some later arrival in Connecticut by unknown means; rather, they should be read to require proof that the firearm in fact affected interstate commerce in some manner at some time and that it was in fact transported in interstate commerce." Def.'s Br. at 11. The defendant acknowledges that he is asking this Court to overrule numerous prior cases which have clearly held that the evidence the government produced at trial in this case was sufficient for a jury to find the interstate commerce element satisfied. *See* Def.'s Br. at 11. Therefore, if this Court holds that the district court properly instructed the jury on the law -- and under this Court's precedents, it clearly did -- the defendant's sufficiency challenge fails.

## II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE DEFENDANT'S ESCAPE CONVICTION DID NOT CONSTITUTE A VIOLENT FELONY FOR PURPOSES OF THE ARMED CAREER CRIMINAL ACT.

### A. Relevant Facts

The PSR found that Rivera qualified for armed career criminal status under 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4 for three predicate violent felonies or serious drug offenses: (1) possession of narcotics with intent to distribute; (2) second degree assault; and (3) first degree escape. The defendant possessed a sawed-off shotgun

which, along with his armed career criminal status, yielded an offense level of 34 under § 4B1.4(b)(3)(A). With a criminal history category VI, his guideline range was 262 to 327 months.[4]

The defendant filed a sentencing memorandum challenging only the third offense as a predicate, arguing that it should not be deemed a violent felony because it does not "involve[] conduct that presents a serious potential risk of physical injury to another" under 18 U.S.C. § 924(e)(2)(B)(ii). The government filed a memorandum arguing that this Court had already concluded in *United States v. Jackson*, 301 F.3d 59, 61-62 (2d Cir. 2002), *cert. denied*, 539 U.S. 952 (2003), that "escape, regardless of the particular circumstances, amounts to a violent felony under § 924(e)."

The district court rejected the government's position and agreed with the defendant that his prior conviction for escape did not constitute a violent felony under the ACCA. The district court and the parties agreed that the escape conviction at issue had been for a violation of Connecticut General Statutes § 53a-169(a)(4), which defines escape in the first degree to include a "fail[ure] to return from a

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[4] The defendant had a criminal history category of VI based on his possession of a sawed-off shotgun under U.S.S.G. § 4B1.4(c)(2), as well as on his 17 criminal history points under § 4B1.4(c)(1). *See* PSR at ¶¶ 21-293; GSA-34 ("you got up into criminal history category six without any help from the armed career criminal provisions of the guidelines, so you've got a very serious criminal history").

furlough authorized under section 18-101a."[1] The district court attempted to distinguish *Jackson*, which made clear that pursuit of an escapee presents a danger, by noting that the pursuit involved in an escape from active custody involves "a duty to immediately pursue," while "[g]oing out and rearresting someone who simply hasn't returned is not pursuit in the same sense." GSA-13. The district court stated that the defendant "had to be sought out and found, absolutely that's the case. He can't be arrested if he isn't found, but seeking him out and finding him doesn't mean that he's being pursued in the sense of Jackson." GSA-17-18. Rather, the district court likened the arrest of a prisoner who escapes from furlough to the arrest of anyone who has committed a crime. GSA-18, 20-21.

The district court acknowledged that after an escapee who failed to return from furlough is found, his or her "arrest may in fact lead to a dangerous situation." GSA-22. But the district court stated that "[t]hat is true is absolutely every case." *Id.* The district court also noted that it did not matter whether Rivera was "at his house watching television" or "was actively fleeing the

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[1] Conn. Gen. Stat. § 18-101a provides in relevant part that the "Commissioner of Correction at [his] discretion may extend the limits of the place of confinement of an inmate . . . by authorizing [him] under prescribed conditions to visit a specifically designated place or places." The statute states that "[a]ny inmate who fails to return from furlough as provided in the furlough agreement shall be guilty of the crime of escape in the first degree."

jurisdiction." GSA-23. The district court thus ruled that the "offense that we're dealing with here do[es] not involve any action by the defendant that could be considered to give rise to [a] risk to law enforcement." *Id.*[6]

### B. Governing Law & Standard of Review

In determining whether a prior conviction constitutes a violent felony under § 924(e), courts are to take a "'categorical approach,' generally looking only to the fact of conviction and the statutory definition of the prior offense rather than to the underlying facts of a particular offense." *United States v. Jackson*, 301 F.3d 59, 61 (2d Cir. 2002) (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)), *cert. denied*, 539 U.S. 952 (2003); *see Taylor*, 495 U.S. at 600 (stating that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions").

In *Jackson*, this Court addressed the question of "whether escape, regardless of the particular

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[6] Based on this finding, the district court declined to apply § 4B1.4. The district court instead applied § 2K2.1(a)(1), which provided an offense level of 26. Because the defendant had a criminal history category of VI, the resulting guidelines range was 120-150 months. Absent a finding that the defendant was ACCA eligible, the applicable statutory maximum penalty was 120 months, which is what the court imposed.

circumstances, amounts to a violent felony under § 924(e); that is, whether every escape constitutes 'conduct that presents a serious potential risk of physical injury to another.'" 301 F.3d at 61-62. The escape statute at issue in *Jackson* covered "the escapee who peaceably walks away from a work site as well as the inmate who violently busts out of confinement." *Id.* at 61. This Court noted that "[e]very circuit court that has considered the issue has held that an escape, from whatever location by whatever means, constitutes 'conduct that presents a serious potential risk of physical injury to another.'" *Id.* at 62. After canvassing these decisions, this Court "adopt[ed] the reasoning and holding of these cases." *Id.* at 63 (referring particularly to *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994), and *United States v. Hairston*, 71 F.3d 115, 117-18 (4th Cir. 1995)).

In adopting the reasoning and holding of those cases, this Court focused not merely on the initial act of escape itself but on the risk of physical confrontation inherent in recapture, stating:

> An inmate who escapes by peacefully walking away from a work site will (if he can) be inconspicuous and discreet, and will (if he can) avoid confrontation and force. But escape invites pursuit; and the pursuit, confrontation, and recapture of the escapee entail serious risks of physical injury to law enforcement officers and the public. This makes escape a violent felony under § 924(e).

*Id.* at 63.

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 United States v. Danielson*, 199 F.3d 666, 672 n.2 (2d Cir. 1999).

### C. Discussion

The district court erred in not finding the defendant's conviction for escape to constitute a violent felony under the ACCA. The district court concluded that the escape statute under which Rivera was convicted -- failure to return from furlough -- does not involve conduct that categorically that "presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

However, as this Court stated in *Jackson*, "[e]very circuit court that has considered the issue has held that an escape, *from whatever location by whatever means*, constitutes 'conduct that presents a serious potential risk of physical injury to another.'" 301 F.3d at 62 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)) (emphasis added).[7] The escape

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[7] Other Courts of Appeals have held likewise. *See, e.g.*, *United States v. Luster*, 305 F.3d 199, 202 (3d Cir. 2002) (holding that conviction under statute that "extends to a 'walk away' from custody" is a crime of violence under the Guidelines), *cert. denied*, 538 U.S. 970 (2003); *United States v. Hairston*, 71 F.3d 115, 117 (4th Cir. 1995) (holding that statute that extends to escape by stealth from minimum security facility constitutes a violent felony); *United States v. Ruiz*, 180 F.3d 675, 677 (5th Cir. 1999) (holding that "a knowing escape from lawful federal (continued...)

statute in *Jackson* covered "the escapee who peaceably walks away from a work site as well as the inmate who violently busts out of confinement," *id.* at 61, and there is no principled distinction between pursuing and apprehending an escapee who walks away from a work site and an escapee who does not return from furlough. There is no material difference between the two types of conduct because *Jackson* made clear that the danger posed to law enforcement by an escapee stems in large part from the dangers inherent in the pursuit of the escapee, regardless of the manner by which the escapee initiates his escape: escape "invites pursuit; and the pursuit, confrontation, and recapture of the escapee entail serious risks of physical injury to law enforcement officers and the public." *Id.* at 63. *See also id.* at 62-63 ("'[E]ven in a case where a defendant escapes from a jail by stealth and injures no one in the process, there is still a serious potential risk that injury will result when officers find the defendant and attempt to place him in custody.'") (quoting *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994)).

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[7] (...continued)
custody . . . constitutes a crime of violence" even though the defendant merely walks away from a prison camp); *United States v. Abernathy*, 277 F.3d 1048, 1051 (8th Cir. 2002) (walkaway escape from place of incarceration is both violent felony and crime of violence); *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994) (escape by stealth); *United States v. Gay*, 251 F.3d 950, 954-55 (11th Cir. 2001) (per curiam) (concluding that even a walkaway escape from an unsecured facility constitutes a crime of violence).

The district court rejected the notion that the pursuit of a prisoner who fails to return from furlough entails the same "potential risk of physical injury" as does the pursuit of an escapee who escapes from custody by stealth. But the distinction is one without a difference. Even the district court conceded that an escapee from furlough, just like any escapee, would have "to be sought out and found," GSA-18, and that the furlough escapee's subsequent apprehension "may in fact lead to a dangerous situation," GSA-22. The district court also recognized that an escapee from furlough could just as easily "actively flee[] the jurisdiction" as any other escapee. GSA-23. But because the district court believed that Rivera's escape crime was complete at the time he did not return from furlough, *see* GSA-19, his crime could not have created a potential risk of danger to law enforcement.

The district court failed to understand the nature of the crime of escape as a continuing offense. *See United States v. Bailey*, 444 U.S. 394, 408 (1980) (holding that "[e]scape from federal custody as defined in § 751(a) is a continuing offense, and . . . an escapee can be held liable for failure to return to custody as well as for his initial departure"). *Accord State v. Lubus*, 581 A.2d 1045, 1048 (Conn. 1990) (defining "escape" in related Conn. Gen. Stat. § 53a-169(a)(2) as "contemplat[ing] an unauthorized departure from, *or failure to return to*, a 'community residence'") (emphasis added). Thus, so long as the escapee remains out of custody, the crime of escape continues to present a danger to others. The same is no less true with respect to remaining on the lam after escaping by not returning from furlough. The furlough escapee could, just like any other escapee, take active steps to hide from the authorities, and

could take active steps to flee the jurisdiction, all of which would be part of the continuing offense of escape, and none of which would necessarily differ depending on the nature of the escapee's initial departure. That is the reason the underlying conduct of an escape while on furlough presents the same "'powder keg'" scenario that *Jackson* concluded every escape presents -- it "'may or may not explode into violence and result in physical injury to someone at any given time, but [it] always has the serious *potential* to do so.'" *Jackson*, 301 F.3d at 62 (quoting *Gosling*, 39 F.3d at 1140).

That is the reason that at least four Courts of Appeals have held that even the failure to return to a halfway house involves conduct that presents the risk of serious potential risk of physical injury to another. *See United States v. Thomas*, 361 F.3d 653, 657-58 (D.C. Cir.), *petition for cert. filed*, -- U.S.L.W. -- (U.S. Oct. 12, 2004) (No. 04-6811); *United States v. Bryant*, 310 F.3d 550, 553-54 (7th Cir. 2002); *United States v. Turner*, 285 F.3d 909, 915 (10th Cir. ), *cert. denied*, 537 U.S. 895 (2002); *United States v. Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999).[8] Individuals who simply refuse to return to a halfway house, or to prison after furlough, are people who by definition wish so adamantly to avoid returning to prison that they are willing to risk substantial penalties to be

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[8] Several of these cases (*e.g.*, *Thomas*, *Bryant* and *Harris*) concern U.S.S.G. § 4B1.2 (career offender), which defines a "crime of violence" in language substantially identical to the definition of "violent felony" under the ACCA. In construing § 924(e), this Court looks to cases construing § 4B1.2. *See Jackson,* 301 F.3d at 62.

away from it. The apprehension of such people (compared to people who are first being arrested for an offense) necessarily poses a heightened risk of physical injury to those who pursue them.

Indeed, in *Thomas*, 361 F.3d at 657, the D.C. Circuit held that escape under the federal escape statute, 18 U.S.C. § 751, and the D.C. Code is a crime of violence under the Guidelines. In so doing, the court noted that the federal escape statute encompasses "walking away from a halfway house -- or simply failing to return on time." *Id.* at 658. In finding such conduct to present a potential risk of danger to law enforcement and the public, the court relied upon the fact that "escape is a 'continuing offense,' which does not end until the defendant is returned to custody." *Id.* at 660. The "risk of injury" must therefore be "evaluated not only at the time of the defendant's escape from imprisonment, but at the time of his reapprehension as well." *Id.* (citing *Jackson*, 301 F.3d at 63).[9] It is thus clear that the conduct underlying a conviction under the Connecticut escape statute at issue here involves essentially the same type of conduct encompassed by the federal escape statute, and that a violation of the Connecticut statute presents the same serious potential risk of physical injury as conduct proscribed by the federal statute. *See also Bryant*, 310 F.3d at 552 (holding that

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[9] In this regard, the D.C. Circuit rejected dicta in an earlier decision, *United States v. (Toumani) Thomas*, 333 F.3d 280, 282 (D.C. Cir. 2003), which had suggested agreement with the notion that any lawbreaker, like any escapee, poses the same risk of violent encounter with the police. *See Thomas*, 361 F.3d at 657.

conviction under federal escape statute for failure to return to halfway house categorically constitutes a crime of violence under the Guidelines).

Whether one can "hypothesize circumstances in which escape can be committed without either force or risk of injury cannot be dispositive" because "such an analytical approach would eviscerate the notion of a 'categorical' definition." *Thomas*, 361 F.3d at 658; *see also United States v. Franklin*, 302 F.3d 722, 724 (7th Cir.) (stating that the issue is not "whether one can postulate a nonconfrontational hypothetical scenario") (internal quotations omitted), *cert. denied*, 537 U.S. 1095 (2002). Rather, "the benchmark should be the possibility of violent confrontation." *Franklin*, 302 F.3d at 725. The pursuit and apprehension of a prisoner who escapes while on furlough clearly presents the possibility of violent confrontation. The district court itself essentially conceded as much. *See* GSA-22 (noting that the apprehension of an escapee from furlough "may in fact lead to a dangerous situation"). Accordingly, the conviction should have been considered a violent felony under the "otherwise" clause of § 924(e)(2)(B)(ii), and the defendant should have been sentenced as an armed career criminal.

## CONCLUSION

For the foregoing reasons, the Court should affirm the defendant's conviction, vacate the district court's sentence and remand for imposition of a sentence under the Armed Career Criminal Act.

Dated: December 8, 2004

Respectfully submitted,

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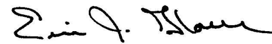

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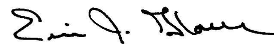
## CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,172 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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# Addendum

**18 U.S.C. § 922(g)(1)**. Title 18, United States Code, Section 922(g) provides in relevant part:

> It shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition. . . .

**18 U.S.C. § 924(a)(2).** Title 18, United States Code, Section 924(a)(2) provides in relevant part:

> Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

**18 U.S.C. § 924(e)(1)**. Title 18, United States Code, Section 924(e)(1) provides in relevant part:

> In the case of person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .

**18 U.S.C. § 924(e)(2)(B)(ii)**. Title 18, United States Code, Section 924(e)(2)(B)(ii) provides in relevant part:

> As used in this subsection . . . the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . .

> that . . . is burglarly, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

**Conn. Gen. Stat. § 53a-169(a)(4).** Connecticut General Statutes § 53a-169(a)(4) provides in relevant:

> A person is guilty of escape in the first degree . . . if he fails to return from a furlough authorized under section 18-101a[.]

**Conn. Gen. Stat. § 18-101a.** Connecticut General Statutes § 18-101a provides in relevant part:

> The Commissioner of Correction at the commissioner's discretion may extend the limits of the place of confinement of an inmate . . . by authorizing the inmate under prescribed conditions to visit a specifically designated place or places . . . . Any inmate who fails to return from furlough as provided in the furlough agreement shall be guilty of the crime of escape in the first degree.

**U.S.S.G. § 4B1.4 (2002)**. Section 4B1.4 of the Sentencing Guidelines provides as follows:

> (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 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

(B) 33, otherwise.*

If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) The criminal history category for 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.