No.

IN THE
Supreme Court of the United States

LINWOOD CHARLES MATHIAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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July 12, 2007

QUESTION PRESENTED

Whether a conviction under Va. Code Ann. § 18.2-479(B) for escape "other than by force or violence" is a "violent felony" for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e), when the defendant's escape involved the failure to return from a work release program?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit held that Petitioner's conviction for a "walkaway escape" during a work release was a "violent felony" that requires a mandatory fifteen-year sentence.

The Fourth Circuit's decision is in conflict with a decision of the Ninth Circuit, which has held that a walkaway escape is not categorically a "crime of violence" because it does not necessarily involve "conduct that presents a serious potential risk of physical injury to another." The Fourth Circuit's decision is in accord with decisions of several other courts of appeals, but is in tension with the views of a growing chorus of federal appellate judges, expressed in majority opinions of the Seventh and D.C. Circuits and concurring opinions of the Tenth and Eleventh Circuits. Certiorari should be granted to resolve the split among the circuits on this important issue of federal law.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App., *infra*, 1a-11a, is reported at 482 F.3d 743. The order of the district court, *id.* at 12a-21a, was unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2007. *Id.* at 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act, codified in part at Section 922(g) of Title 18, states, in relevant part:

(g) It shall be unlawful for any person—

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

* * *

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

18 U.S.C. § 922(g)(1)

Section 924(e) of Title 18 states, in relevant part:

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

(2) As used in this subsection—

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by

imprisonment for such term if committed by an adult, that—

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

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

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

18 U.S.C. § 924(e)

Section 4B1.2 of the United States Sentencing Guidelines states, in pertinent part:

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that —

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

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

Section 479 of Title 18.2 of the Virginia Code, entitled "Escape without force or violence or setting fire to jail," provides, as relevant here:

B. Any person, lawfully confined in jail or lawfully in the custody of any court, officer

> of the court, or of any law enforcement officer on a charge or conviction of a felony, who escapes, other than by force or violence or by setting fire to the jail, is guilty of a Class 6 felony.

Va. Code Ann. § 18.2-479(B).

STATEMENT OF THE CASE

This case presents an important and recurring question on which the federal courts of appeals are divided. The Armed Career Criminal Act ("ACCA") provides a mandatory minimum sentence of fifteen years for any person who is convicted of being a felon in possession of a firearm if that person has three prior convictions for a "violent felony." Similarly, the United States Sentencing Guidelines provide increased sentences for specific crimes if the defendant has prior felony convictions for a "crime of violence," and designate a defendant convicted of a "crime of violence" with at least two such prior convictions as a "career offender." The statutory definitions of "violent felony" and "crime of violence" are identical in relevant part, and the courts of appeals treat them interchangeably. The circuits have split over whether escape is a crime that categorically "involves conduct that presents a serious potential risk of physical injury to another," and thus is a "violent felony" under the Armed Career Criminal Act and a "crime of violence" under the Sentencing Guidelines.

1. Meaning Of "Violent Felony" Under The Armed Career Criminal Act. Section 922(g)(1) of Title 18 prohibits, among other things, possession of a firearm by a felon. Under section 924(a)(2) of Title 18, a defendant convicted of being a felon in possession of a firearm is subject to a maximum sentence of ten years. If that same defendant, however, has three prior convictions for a "violent felony," he is subject to a mandatory minimum sentence of fifteen years under section 924(e).

A "violent felony" is defined as an offense punishable by imprisonment for more than a 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).

To determine whether a crime is a violent felony, courts use the "categorical approach" adopted by this Court in *Taylor* v. *United States*, 495 U.S. 575 (1990). Under this approach, a court generally will "look only to the fact of conviction and the statutory definition of the prior offense," as opposed to the particular facts underlying the crime. *Id.* at 600, 602 (footnote omitted). If it is not clear from the statute whether the conviction is a crime of violence, a court may look to the charging documents and jury instructions. *Id.* at 602; *see also Shepard* v. *United States*, 544 U.S. 13, 16 (2005) (court may consider written plea agreement, transcript of plea colloquy, and explicit factual findings by the trial judge to which the defendant assented).

Where, as here, the offense does not have "as an element the use, attempted use, or threatened use of physical force against the person of another," is not "burglary, arson, or extortion," and does not "involve [the] use of explosives," the sole question is whether the offense "otherwise involves conduct that presents a serious potential risk of physical injury to another." Recently, in *James* v. *United States*, 127 S. Ct. 1586, 1597 (2007), this Court addressed the proper analysis for determining whether a conviction is a violent felony under this "residual provision." Employing the categorical approach of *Taylor* and *Shepard*, the Court 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." *Id.* (emphasis added).

2. Definition Of "Crime Of Violence" Under The Sentencing Guidelines. Section 4B1.2 of the Sentencing Guidelines defines a "crime of violence" in relevant part as an offense that is punishable by imprisonment for more than a year and:

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, 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. § 4B1.2(a). This definition is materially identical to the definition of "violent felony" contained in the Armed Career Criminal Act. Both definitions contain the same residual provision for an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2).

The courts of appeals uniformly construe "violent felony" under the Armed Career Criminal Act and "crime of violence" under the Sentencing Guidelines to have the same meaning. *See, e.g., United States* v. *Nolan*, 397 F.3d 665, 666 (8th Cir. 2005); *United States* v. *Jackson*, 301 F.3d 59, 62 (2nd Cir. 2002); *United States* v. *Houston*, 187 F.3d 593, 594-95 (6th Cir. 1999); *see also United States* v. *Taylor*, No. 06-13139, 2007 U.S. App. Lexis 13822, at *6 n.4 (11th Cir. June 13, 2007) (Hill, J., concurring) ("[C]ourts uniformly treat 'crimes of violence' under the

Guidelines and 'violent felonies' under the ACCA the same").[1]

Section 4B1.2's definition of "crime of violence" is employed in numerous sections of the Sentencing Guidelines, including Section 4B1.1, which provides that a defendant is a "career offender" subject to a higher sentencing range if (1) the defendant was at least eighteen years old at the time of the instant offense of conviction, (2) the offense is a felony that is "either a crime of violence or a controlled substance offense," and (3) the defendant has at least two prior felony convictions for "either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a).[2] A defendant sentenced as a career offender is subject to the offense level contained in Section 4B1.1 if this results in an offense level "greater than the offense level otherwise applicable." *Id.* § 4B1.1(b).

In determining whether an offense qualifies as a "crime of violence" under the Sentencing Guidelines, courts apply the categorical approach adopted by *United States* v. *Taylor* and its progeny. *See, e.g., United States* v. *Piccolo*, 441 F.3d 1084, 1086 (9th Cir. 2006).

3. This Case. Petitioner Linwood Charles Mathias pleaded guilty to being a felon in possession of a firearm and to aiding and abetting the same conduct, in violation of 18 U.S.C. §§ 922(g)(1), 924 and 2, based on his

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[1] A defendant convicted of being a felon-in-possession of a firearm whose is subject to the fifteen-year minimum sentence enhancement under the Armed Career Criminal Act may be subject to the offense level prescribed in the career offender sentencing guideline. *See* U.S.S.G. § 4B1.4(b)(2).

[2] Other Guidelines provide for increased sentences for prior convictions of a "crime of violence." *E.g.*, U.S.S.G. §§ 2K1.3(a), 2K2.1(a).

role in the armed robbery of a payday lender. Pet. App., *infra*, 3a-4a.

At the time of the robbery, Mathias had two prior felony convictions for burglary and a Virginia felony conviction for escape by walking away from a work release program. *Id.* at 4a. The Presentence Report characterized each of these prior convictions as "violent felonies," resulting in the minimum fifteen-year sentence enhancement under the ACCA. *Id.* Before the district court, Mathias conceded that his two burglary convictions qualified as violent felonies, but he argued that his escape conviction did not. *Id.* at 4a, 27a. He noted that the statute under which he was convicted, Va. Code Ann. § 18.2-479(B), is entitled "Escape without force or violence or setting fire to jail." *Id.* at 2a, 4a, 27a.

4. The District Court's Order. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. It rejected Mathias's argument, finding that his escape conviction was a violent felony under the ACCA regardless of its classification under state law. *Id.* at 4a. Although the court sentenced Mathias to the minimum fifteen-year sentence, it decided against imposing the longer sentence prescribed by the advisory guideline range. *Id.* at 24a-25a. It stated that "Defendant's history of treatment for psychological ailments militates against a sentence within the advisory guideline range. Accordingly, the Court will enter a non-guideline sentence." *Id.* at 24a.

5. The Fourth Circuit's Decision. The Fourth Circuit affirmed. *Id.* at 2a-3a. The Court began its analysis by stating that it would follow the "categorical approach" and consider only the statutory definition of the escape offense. *Id.* at 6a. The court noted that the Virginia law under which Mathias was convicted does not

include as an element "'the use, attempted use, or threatened use of physical force.'"[3] *Id.* (quoting 18 U.S.C. § 924(e)(2)(B)(i)). Accordingly, it explained the offense would qualify as a violent felony only if it "'otherwise involves conduct that presents a serious risk of physical injury to another.'" *Id.* (quoting 18 U.S.C. § 924(e)(2)(B)(ii)).

The Court found that Mathias's escape conviction met this standard, writing that "any escape, even an escape by stealth, inherently presents the serious potential risk of physical injury to another." *Id.* at 7a (internal quotation marks omitted). The Court did not address Mathias's argument that the Virginia Code includes a companion statute for "escape by force or violence," Va. Code Ann. § 18.2-477, which, unlike § 18.2-479(B), requires a consecutive sentence.[4] *Id.* at 28a. Instead, the court rested its decision on two basic grounds. *First*, it found that the act of escape itself involves a serious potential risk of violence, since "there is always a chance that an escape attempt will be interrupted — by a prison guard, work supervisor, or citizen bystander." *Id.* at 9a. *Second*, it stated that "[e]ven if the escape itself could somehow sidestep any

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[3] Virginia Code § 18.2-479(B) states: "Any person, lawfully confined in jail or lawfully in the custody of any court, officer of the court, or of any law enforcement officer on a charge or conviction of a felony, who escapes, other than by force or violence or by setting fire to the jail, is guilty of a Class 6 felony."

[4] Virginia Code § 18.2-477 provides: "If any person confined in jail or in custody after conviction of a criminal offense shall escape by force or violence, other than by setting fire thereto, he shall be guilty of a Class 6 felony. The term of confinement under this section shall commence from the expiration of the former sentence."

potential risk of injury, the circumstances of recapture necessarily encompass just such a risk." *Id.*

The Court noted that its holding conflicts with the Ninth Circuit's decision in *United States* v. *Piccolo*, 441 F.3d 1084 (9th Cir. 2006), but is in accord with the decisions of the other courts of appeals that have addressed whether an escape conviction is a violent felony under the Armed Career Criminal Act or a crime of violence under the Sentencing Guidelines. *Id.* at 7a-8a, 8a n.2.

REASONS FOR GRANTING THE WRIT

The court of appeals has decided an important question in a way that conflicts with decisions of other courts of appeals. Further review by this Court is warranted to resolve the conflict in the lower courts and restore the uniformity of federal law.

I. The Fourth Circuit's Opinion Conflicts With The Ninth Circuit.

A. The Ninth Circuit Holds That Escape Is Not Categorically A "Crime Of Violence."

In *United States* v. *Piccolo*, the Ninth Circuit held that a conviction under the federal escape statute, 18 U.S.C. § 751(a), does not categorically involve "conduct that presents a serious potential risk of physical injury to another," and therefore is not a "crime of violence" for purposes of the career offender enhancement guideline, U.S.S.G. § 4B1.1. *See* 441 F.3d 1084, 1085 (9th Cir. 2006). Like this case, *Piccolo* involved a "walkaway escape." *Id.* The defendant in *Piccolo* failed to return to a non-secure halfway house after attending a drug treatment meeting, although he voluntarily turned himself in on a later date. *Id.*

The Ninth Circuit explained that it would apply the categorical approach of *Taylor*, which required it to

look only to the statutory definition of the offense. *Id.* at 1086. The court observed that the federal escape statute "does not differentiate between violent and non-violent escapes; the statutory definition of the crime runs the gamut from maximum-security facilities to non-secure halfway houses." *Id.* at 1088. Because the elements of the statute did not include the use, attempted use, or threatened use of physical force, the offense, like the Virginia escape statute in this case, would only qualify as a "crime of violence" if it involved "conduct that presents a serious potential risk of physical injury to another." *Id.* at 1086 (quoting U.S.S.G. § 4B1.2(a)(2)).

The Court held that a walkaway escape is "of an entirely different order of magnitude than escapes from jails and prisons."[5] *Id.* at 1088. Residents who leave a halfway house "without returning do not pose an automatic risk of danger and therefore do not categorically raise a serious potential risk of physical harm." *Id.* The court recognized that other courts of appeals had found that escape, even a non-violent walkaway escape, constituted a "crime of violence" and a "violent felony" under the ACCA. *Id.* at 1089-90. It noted that the majority of these decisions had adopted the language of the Tenth Circuit in *United States* v. *Gosling*, likening escape to a "'powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the

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[5] The district court believed itself bound to treat all escapes as crimes of violence under the categorical approach. Nevertheless, it found that "the facts of Mr. Piccolo's case are about as far removed from a crime of violence of any — as any crime of violence I've personally had in front of me . . . . It's — this is a halfway house, he did walk away, there was no threat to anyone. . . ." *Piccolo*, 441 F.3d at 1085 (internal quotation marks omitted).

serious potential to do so.'" *Id.* at 1089 (quoting *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994)).

The Court found "the powder-keg rationale adopted by other circuits proves too much." *Id.* "While an escapee who flees a secured facility or the custody of an armed guard presents a serious risk of injury to himself and others, the same cannot be said for an escapee who leaves a halfway house with permission and fails to return." *Id.* Therefore, because the federal escape statute criminalized walkway escapes that "could clearly take place on the basis of conduct that did not present a serious potential risk of physical injury to another," the conviction was not a crime of violence. *Id.* at 1088 (internal quotation marks omitted).

B. A Growing Chorus Of Judges Agree That Escape Is Not Categorically A "Violent Felony" Or A "Crime Of Violence."

An increasing number of judges have urged that a distinction be made between escapes from jail and other situations of physical custody — which do pose a serious potential risk of physical injury — and walkaway and failure to return escapes, which do not. The skepticism of the majority view that *all* escape crimes are categorically violent felonies and crimes of violence can be traced to Judge McKay's concurrence in *United States* v. *Adkins*, 196 F.3d 1112, 1119 (10th Cir. 1999). There, the majority, following prior circuit precedent, held that a non-violent escape from a juvenile facility was a violent felony under the ACCA. *Id.* at 1118. In his concurrence, Judge McKay's took exception to the proposition that felony escape "always constitutes 'conduct that presents a serious potential risk of physical injury to another.'" *Id.* at 1119 (quoting *United States* v. *Moudy*, 132 F.3d 618, 620 (10th Cir. 1998)).

Judge McKay noted that state law regularly defined felony escape to include a "failure to return to work release or other inmate release program." *Id.* He stated that he would make a distinction between escape from actual custody and the mere failure to return from authorized release. *Id.* "There is a quantum difference between the assumptions about the intrinsic danger of unauthorized departure from actual custody, as in this case, and of failure to return from authorized departure from actual custody." *Id*; *see also United States v. Springfield*, 196 F.3d 1180, 1186 (10th Cir. 1999) (McKay, J., concurring) (disputing that "escape is necessarily always a violent crime").

The D.C. Circuit has criticized the view that every escape crime presents a potential risk of physical injury. *United States* v. *Thomas*, 333 F.3d 280, 282 (D.C. Cir. 2003). In *Thomas*, the court reviewed a district court's holding that escape crimes are categorically crimes of violence.[6] *Id.* at 281. The Court did not need to reach that question, finding instead that the defendant's offense of escaping from an officer qualified as a crime of violence. *Id.* at 283.

The Court took issue with decisions of other courts of appeals that found that walkaway escapes inherently present a serious risk of physical injury based on the reasoning that even "'the most peaceful escape cannot eliminate the potential for violent conflict when the

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[6] Because of the trial court's holding, the defendant was subject to an enhanced sentence under U.S.S.G. § 2K2.1(a)(4)(A), which applies when the defendant's current conviction occurs "subsequent to sustaining one felony conviction of . . . a crime of violence . . . ." Section 2K2.1(a)(4)(a) relies upon the same definition of "crime of violence" used in the career offender sentencing guideline, U.S.S.G. § 4B1.2(a). *See Thomas*, 333 F.3d at 281.

authorities attempt to recapture the escapee.'" *Id.* at 282 (quoting *United States* v. *Nation*, 243 F.3d 467, 472 (8th Cir. 2001)). "Arguably, the approach taken by the other circuits proves too much." *Id.* "While it may be true that the recapture of an escapee inherently contains a risk of violent encounter between the escapee and the arresting officers, the same is true as to the capture of *any* lawbreaker." *Id.* (emphasis added).

The Seventh Circuit recently expressed a similarly critical view. Judge Posner, writing for a unanimous panel in *United States* v. *Chambers*, stated that the required application of circuit precedent to the facts of the case was an "embarrassment to the law." 473 F.3d 724, 726 (7th Cir. 2007). At issue in the case was whether the defendant's Illinois state conviction for failing to report to a penal institution was a "violent felony" under the ACCA. *Id.* at 725. Judge Posner indicated that he did not believe that failing to report to prison, as distinct from escaping from a jail, prison or other form of custody, "was a crime that typically or often involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 725 (internal quotation marks omitted). Nevertheless, he stated that the panel was bound by prior circuit precedent, which had held that any violation of the Illinois statute qualifies as a "violent felony." *Id.* at 726.[7]

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[7] On May 8, 2007, a petition for certiorari was filed in *Chambers*. *Chambers* v. *United States* (No. 06-11206). The Illinois escape statute at issue in *Chambers* punishes both violent and non-violent escapes, *see Chambers*, 473 F.3d at 725, while the Virginia statute at issue in this case is expressly limited to non-violent escapes, Pet. App., *infra*, 6a. The Court may wish to grant review in this case instead of *Chambers*. Alternatively, the Court may wish to grant review in both cases and consolidate them for oral argument. *Cf. Lopez v. Gonzales* and *Toledo-Flores v. United States*, 547 U.S. 1054 (2006) (granting petitions for writs of certiorari in cases presenting parallel issues).

As Judge Posner observed, under the court's interpretation of the Illinois statute, "[y]ou could show up an hour late (without an excuse) and be guilty of a felony that could result in your receiving a fifteen-year mandatory minimum sentence under the Armed Career Criminal Act." *Id.* at 725.

Judge Posner wrote that, with the exception of the D.C. Circuit's reservation of the question in *Thomas*, and the holding of the Ninth Circuit in *Piccolo*, the remaining courts of appeals were in accord with the Seventh Circuit's prior precedent. *Id.* at 726. He observed that all of these cases involved either a failure to return to a halfway house, or a walkaway escape, "which does not involve breaking out of a building or wrestling free of guards." *Id.* Following the reasoning of Judge McKay in *Adkins*, Judge Posner suggested that a distinction be made between "custodial" escapes from prison or physical custody, and "noncustodial" walkaway or failure to return escapes. *Id.* "There would be no impropriety in dividing escapes, for purposes of 'crime of violence' classification, into jail or prison breaks on the one hand and walkaways, failure to report, and failures to return, on the other. The sentencing judge would not have to dig beneath the charging document or the other, limited evidence on which a judge is permitted by *Shepard* v. *United States*, to decide which bin a conviction for escape belonged in."[8] *Id.* (citation omitted). Judge Posner also noted that recent

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[8] Virginia's escape statutes make a clear distinction between escape with force or violence and escape without force or violence. *See supra* notes 3 and 4 and accompanying text. Petitioner was charged and convicted of escape "other than by force or violence" for his walkaway from a work release program. Pet. App., *infra*, 4a; Va. Code Ann. § 18.2-479(B). The Fourth Circuit in this case failed to address this distinction. *Supra* page 9.

research showed that almost ninety percent of all escapes are walkaways.[9]

Most recently, two members of an Eleventh Circuit panel added their voices to the "growing[] choruses of doubt that a district court is permitted to enhance a sentence under the ACCA based in part upon a 'failure to return' prior escape conviction." *United States* v. *Taylor*, No. 06-13139, 2007 U.S. App. LEXIS 13822, at *6 (11th Cir. June 13, 2007). A per curiam opinion in the case adhered to the court's prior precedent on the issue, but Judge Hill concurred *dubitante*, joined by Judge Wilson. Judge Hill wrote, "I wish to express my agreement with those who reject the rule that escape is categorically a violent felony." 2007 U.S. App. Lexis 13822, at *13 (discussing *Adkins*, *Thomas*, *Chambers* and *Piccolo*). Judge Hill acknowledged that the panel was bound by circuit precedent to treat the failure to return to a halfway house as a violent felony under the ACCA, but suggested that courts adopt a generic federal definition of escape, as this Court adopted a generic definition of burglary in *Taylor*. *Id.* at *13 n.8 (citing *Taylor*, 495 U.S. at 590). Following Judge Posner's suggestion, Judge Hill recommended that this definition distinguish between custodial escapes that would qualify as violent felonies, and non-custodial, failure to return escapes that would not. *Id.*

C. The Fourth And Other Circuits Hold That Escape Is Categorically A "Violent Felony" or "Crime Of Violence."

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[9] *Chambers*, 473 F.3d at 727 (citing Richard F. Culp, *Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data*, 85 Prison J. 270, 278 (2005)).

The Fourth Circuit held in this case that *any* escape, even a walkway escape, "inherently presents the serious potential risk of physical injury to another." Pet. App., *infra*, 7a (internal quotation marks omitted). This decision is consistent with the decisions of most courts of appeals that have addressed whether escape is categorically a "violent felony" under the ACCA,[10] or a "crime of violence" under the Sentencing Guidelines.[11]

The Fourth Circuit's opinion, however, is in clear conflict with the Ninth Circuit's holding in *Piccolo* that a "walkaway escape could clearly take place on the basis of conduct that did not present a serious potential risk of physical injury to another." *Piccolo*, 441 F.3d at 1088

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[10] *See, e.g., United States* v. *Jackson*, 301 F.3d 59, 63 (2d Cir. 2002) (walkaway escape violent felony under ACCA); *United States* v. *Houston*, 187 F.3d 593, 594-95 (6th Cir. 1999) (escape violent felony under ACCA); *United States* v. *Franklin*, 302 F.3d 722, 724-25 (7th Cir. 2002) (same); *United States* v. *Abernathy*, 277 F.3d 1048, 1051 (8th Cir. 2002) (walkaway escape); *United States* v. *Springfield*, 196 F.3d 1180, 1185 (10th Cir. 1999) (same).

[11] *See United States* v. *Winn*, 364 F.3d 7, 12 (1st Cir. 2004) (failure to return to halfway house crime of violence); *United States* v. *Luster*, 305 F.3d 199, 202 (3rd Cir. 2002) (walkaway escape crime of violence); *United States* v. *Dickerson*, 77 F.3d 774, 777 (4th Cir. 1996) (escape, by its nature, qualifies as crime of violence); *United States* v. *Ruiz*, 180 F.3d 675, 676-77 (5th Cir. 1999) (walkaway escape); *United States* v. *Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999) (escape qualifies as crime of violence); *United States* v. *Bryant*, 310 F.3d 550, 554 (7th Cir. 2002) (failure to return to halfway house); *United States* v. *Nation*, 243 F.3d 467, 472 (8th Cir. 2001) (escape qualifies as crime of violence); *United States* v. *Turner*, 285 F.3d 909, 915-16 (10th Cir. 2002) (failure to return to halfway house); *United States* v. *Gay*, 251 F.3d 950, 954-55 (11th Cir. 2001) (walkaway escape).

(internal quotation marks omitted).[12] The Fourth Circuit's opinion is also in tension with the views expressed by the majority opinions in *Thomas* (D.C. Circuit) and *Chambers* (Seventh Circuit), the concurring opinion of the majority panel in *Taylor* (Eleventh Circuit), and Judge McKay's concurring opinions in *Adkins* and *Springfield* (Tenth Circuit).

If Mathias's case had arisen in the Ninth Circuit he would not have been subjected to a mandatory minimum fifteen-year sentence.

II. A Walk-Away "Escape" Is Not Categorically A Crime That "Presents A Serious Potential Risk Of Physical Injury To Another."

The reasons given by the courts of appeals for holding all escape crimes categorically involve "conduct that presents a serious potential risk of physical injury to another" are unpersuasive. Like the court of appeals' decision here, the other courts have generally relied on two arguments.

First, the courts adhere to (and often quote) the Tenth Circuit's statement that "every escape scenario is a powder keg, which may or may not explode into violence." *Gosling*, 39 F.3d at 1142.[13] As Judge Posner noted in *Chambers*, "This is conjecture floating well free of any facts — even the facts of *Gosling*." 473 F.3d at 727. While the Tenth Circuit's colorful metaphor may well describe a jailbreak scenario, it has little relevance to

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[12] As noted *supra* at pp. 6-7, the courts of appeals treat the definition of "violent felony" and "crime of violence" interchangeably.

[13] *See, e.g., Jackson*, 301 F.3d at 62; *Franklin*, 302 F.3d at 724; *Winn*, 364 F.3d at 11; *Luster*, 305 F.3d at 202; *Harris*, 165 F.3d at 1068.

crimes that involve walking away from a halfway house or failing to return or report.

Second, like the Fourth Circuit here, other courts have argued that recapturing an escapee "necessarily" poses a serious potential risk of physical injury.[14] Pet. App., *infra*, 9a. Again, this statement is belied by the reality of many walkaway "escapes." For instance, the defendant in *Piccolo* returned *voluntarily* after failing to return to a non-secure halfway house following a drug treatment meeting. 441 F.3d at 1085. As the D.C. Circuit stated in *Thomas*, some risk of physical injury exists in *any* capture of a lawbreaker, and thus under the Fourth Circuit's reasoning practically every crime would be classified as a violent felony under the Armed Career Criminal Act. *See* 333 F.3d at 282 ("While it may be true that the recapture of an escapee inherently contains a risk of violent encounter between the escapee and the arresting officers, the same is true as to the capture of *any* lawbreaker.") (emphasis added).

Following the analysis recently employed by this Court in *James*, "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." 127 S. Ct. at 1597 (emphasis added). As made clear by *Piccolo*, a walkaway "escape" from a work release program does not ordinarily present a "serious potential risk" of physical injury. 441 F.3d at 1088; *see also Adkins*, 195 F.3d at 1119 (McKay, J., concurring); *Springfield*, 196 F.3d at 1186 (McKay, J., concurring); *Thomas*, 333 F.3d at 282; *Chambers*, 473 F.3d at 726; *Taylor*, 2007 U.S. App. Lexis 13822, at *13 n.8.

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[14] *See, e.g., Jackson*, 301 F.3d at 63; *Franklin*, 302 F.3d at 724; *Winn*, 364 F.3d at 12; *Nation*, 243 F.3d at 472.

III. The Question Presented Is Important And Recurring, And Will Not Benefit From Further Review In The Courts Of Appeals.

Almost every federal court of appeals has addressed whether escape crimes categorically involve "conduct that presents a serious potential risk of physical injury to another," and are therefore "violent felonies" or "crimes of violence." The substantial number of appellate cases that have addressed the question presented attests that it is a recurring issue. The question is also important. Nearly ninety percent of all escapes involve walkaways rather than potentially violent jailbreaks. *Chambers*, 473 F.3d at 727. Review in this case would provide important guidance to the lower courts. *See James*, 127 S. Ct. at 1601 (Scalia, J., dissenting).

The question presented is not likely to benefit from further consideration in the courts of review. Although most circuits have held that escapes are categorically "crimes of violence" or "violent felonies," a growing chorus of judges takes the opposite view. Further consideration by the lower courts will likely exacerbate, rather than ameliorate, the conflict among the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 12, 2007