

October 2004

## Escaping a Rigid Analysis: The Shift to a Fact-Based Approach for Crime of Violence Inquiries Involving Escape Offenses

Timothy W. Castor

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### Repository Citation

Timothy W. Castor, *Escaping a Rigid Analysis: The Shift to a Fact-Based Approach for Crime of Violence Inquiries Involving Escape Offenses*, 46 Wm. & Mary L. Rev. 345 (2004), <https://scholarship.law.wm.edu/wmlr/vol46/iss1/6>

# NOTES

## ESCAPING A RIGID ANALYSIS: THE SHIFT TO A FACT-BASED APPROACH FOR CRIME OF VIOLENCE INQUIRIES INVOLVING ESCAPE OFFENSES

### INTRODUCTION

The introduction of the U.S. Sentencing Guidelines to the federal criminal justice system in 1987 arose in large part due to the call for more uniformity in sentencing.<sup>1</sup> The Guidelines have sought to meet the overarching goal of limiting disparity in sentencing and to impose harsher sentences on repeat offenders.<sup>2</sup> The pursuit of these two objectives has greatly influenced the manner in which federal courts assess criminal convictions. For instance, several federal appellate courts, in determining whether past or present convictions constitute crimes of violence under the career offender provision of the Guidelines, have employed a categorical analysis.<sup>3</sup> Rather than examining the conduct underlying the conviction in question to assess whether the defendant deserves an enhanced sentence, these courts consider only the "statutory definition" of the offense.<sup>4</sup> This approach has resulted in the imposition of lengthy sentences for recidivist offenders regardless of whether their criminal conduct actually posed a serious threat to the well-being of others. This result is especially troubling when escape offenses are at issue,

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1. See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1685 (1992).

2. See William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. DAVIS L. REV. 571, 577-78 (1992).

3. See, e.g., *United States v. Arnold*, 58 F.3d 1117, 1121 (6th Cir. 1995).

4. *Id.*

for the vast majority of escapes are “walk-aways,” which do not inherently pose a serious risk of harm to others.<sup>5</sup>

In the recent decision of *United States v. Thomas*,<sup>6</sup> the D.C. Circuit questioned the categorical method of analysis several other circuit courts have employed when inquiring as to whether an escape offense constitutes a crime of violence under the career offender provision of the Guidelines.<sup>7</sup> Specifically, the D.C. Circuit, in declining to follow the approach adhered to by its fellow federal appellate courts, suggested that the application of the categorical method of analysis would result in incorrect outcomes.<sup>8</sup> The set of facts in the instant case, however, did not necessitate that the D.C. Circuit propose an alternative method of analysis, as the court asserted that the application of any approach in this instance would have rendered the same result.<sup>9</sup> Even so, the D.C. Circuit’s hesitance to follow the trend set by several other jurisdictions sets the stage for the introduction of a different method of analysis when considering crime of violence inquiries involving escape offenses.

This Note will assess the utility of the categorical approach, as well as the similar intermediate approach, and draw comparisons with a proposed fact-based approach in order to demonstrate that the fact-based approach proves most effective when conducting crime of violence inquiries involving escape offenses. Part I will provide a brief overview of the career offender provision of the U.S. Sentencing Guidelines. More specifically, it will examine the meaning of the phrase “crime of violence” in the career offender provision, as defined by the Guidelines, fleshed out by the commentary to the Guidelines, and interpreted by the federal judiciary. Part II will consider the elements of an escape offense and the current treatment of escape offenses in crime of violence inquiries. A basic understanding of an escape offense is essential to determine whether courts need to alter the manner in which they carry out these crime of violence analyses. Part III will argue for the rejection of the categorical and intermediate approaches, and for adherence

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5. See *infra* Part III.A and note 64 and accompanying text.

6. 333 F.3d 280 (D.C. Cir. 2003).

7. *Id.* at 282.

8. See *id.*

9. See *id.* at 282-83.

to a fact-based analysis when assessing whether an escape offense constitutes a crime of violence. This argument rests heavily on the fact that, because not all escape offenses inherently pose a serious risk of harm to others, the use of a fact-based approach renders the most appropriate sentence determinations.

## I. THE MEANING OF "CRIME OF VIOLENCE"

### A. Overview of the U.S. Sentencing Guidelines

In response to ever-growing concern over the marked disparities in criminal sentencing,<sup>10</sup> Congress passed legislation in 1984 that created the U.S. Sentencing Commission and supplied the Commission with the power to formulate a uniform set of sentencing guidelines that the federal court system would adopt.<sup>11</sup> The byproduct of this legislation, the U.S. Sentencing Guidelines, took effect on November 1, 1987.<sup>12</sup>

The centerpiece of the U.S. Sentencing Guidelines is a sentencing grid that consists of forty-three offense levels situated on the vertical axis and six criminal history categories located on the horizontal axis.<sup>13</sup> A sentence range appears at each point on the grid where a particular offense level intersects with a particular criminal history category.<sup>14</sup> Absent "unusual circumstances,"<sup>15</sup> the court must sentence the defendant to a term that falls within this range.<sup>16</sup> In

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10. See Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1942-46 (1988).

11. John Patrick Crossett, Comment, *The United States Sentencing Commission and the Problem of Non-Residential Burglary Under the Career Offender Provision of the Federal Sentencing Guidelines*, 6 GEO. MASON L. REV. 675, 675-76 (1998); see Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (2000), 28 U.S.C. §§ 991-998 (2000)).

12. Ogletree, *supra* note 10, at 1950.

13. U.S. SENTENCING GUIDELINES MANUAL § 5A (2003); Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 6 (1991).

14. Selya & Kipp, *supra* note 13, at 6.

15. 18 U.S.C. § 3553(b) (2000) (requiring the court to impose a sentence within the range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described").

16. Selya & Kipp, *supra* note 13, at 6.

order to determine the relevant sentencing range in a particular instance, a court must follow the Guidelines' application instructions.<sup>17</sup> These instructions first direct the court to determine the base offense level applicable to the crime in question.<sup>18</sup> The court then proceeds to adjust this offense level upward or downward depending upon the existence or absence of a variety of factors, including whether the defendant has a criminal history.<sup>19</sup>

### *B. The Career Offender Provision*

In accordance with congressional directive,<sup>20</sup> the Guidelines include a provision echoing the notion that particular repeat criminal offenders should receive sentences that either meet or approach the maximum penalty authorized under the relevant statute.<sup>21</sup> Specifically, the career offender provision applies to recidivist offenders over eighteen years of age who both: (1) currently face a conviction in federal court for a "crime of violence" or "controlled substance offense," and (2) previously received felony convictions in either state or federal court for two or more crimes of violence or controlled substance offenses.<sup>22</sup>

If the career offender provision applies in a particular case, the sentencing court places the defendant in criminal history category VI, the highest such category.<sup>23</sup> Next, the court determines the offense level by looking to the defendant's "offense statutory maximum."<sup>24</sup> The court then refers to the sentencing grid to ascertain the applicable sentencing range.<sup>25</sup>

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17. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1.

18. See *id.*

19. See *id.*

20. See 28 U.S.C. § 994(h) (2000).

21. See U.S. SENTENCING GUIDELINES MANUAL § 4B1.1; Crossett, *supra* note 11, at 681.

22. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1.

23. Jeffrey H. Knox, *Legislating Through the Use of Commentary: The Sentencing Commission's Interpretation of § 994(h) of the Sentencing Reform Act*, 88 J. CRIM. L. & CRIMINOLOGY 906, 910 (1998).

24. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1; Knox, *supra* note 23, at 910. It should be noted that when the career offender provision is not invoked, the crime in question determines the offense level. *Id.* at 910; see U.S. SENTENCING GUIDELINES MANUAL § 1B1.1.

25. Knox, *supra* note 23, at 910.

### *C. Textual Definition of "Crime of Violence"*

According to the text of the Guidelines, the term "crime of violence" refers to any offense under federal or state law carrying a potential prison sentence of at least one year that either "has an element ... of physical force" against another person or "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."<sup>26</sup>

The commentary accompanying section 4B1.2 of the Guidelines provides further insight into the meaning of a crime of violence. First, the commentary enumerates ten offenses that categorically constitute a crime of violence.<sup>27</sup> Second, the commentary explains that any offense not included in the aforementioned list is a crime of violence if "that offense has as an element ... of physical force" against another person or if "the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted ... by its nature, presented a serious potential risk of physical injury to another."<sup>28</sup> Although not part of the Guidelines themselves, this commentary certainly carries significant weight, as the Supreme Court held that commentary to the U.S. Sentencing Guidelines that interprets or explains a provision is "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."<sup>29</sup>

### *D. Courts' Interpretation of "Crime of Violence"*

Despite the guidance seemingly provided by the Guidelines and the accompanying application notes, courts have struggled in applying the crime of violence standard to offenses not enumerated in the Guidelines. As a result, several different approaches have developed across jurisdictions. One method of analysis employed to determine whether an offense constitutes a crime of violence is

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26. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a).

27. These enumerated offenses are murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. *Id.* § 4B1.2, cmt. n.1.

28. *Id.*

29. *Stinson v. United States*, 508 U.S. 36, 38 (1993).

categorical. Under this approach, which stems from the Supreme Court's ruling in *Taylor v. United States*,<sup>30</sup> the court considers only the statutory definition of the offense in question.<sup>31</sup> For example, upon examining the Tennessee statute concerning the offense of assault with intent to commit sexual battery, the Sixth Circuit concluded that, because the statute deals with circumstances that may or may not pose a serious risk of harm, the court could not categorically deem the instant offense a crime of violence.<sup>32</sup>

When the statute in question does not clearly indicate that the instant offense amounts to a crime of violence, a court may conduct a more thorough inquiry.<sup>33</sup> This alternative method of analysis, sometimes referred to as the "intermediate" approach,<sup>34</sup> not only examines the statutory elements, but also considers the information laid out in the indictment<sup>35</sup> and, in some instances, other "easily produced and evaluated court documents."<sup>36</sup> This approach most closely mirrors the commentary to the Guidelines, as the conduct "expressly charged"<sup>37</sup> seemingly refers to information presented in the indictment.<sup>38</sup>

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30. 495 U.S. 575, 602 (1990) (holding that, when determining whether a prior conviction constitutes a violent felony under the Armed Career Criminal Act, the sentencing court generally must adhere to a categorical approach that considers only the statutory definition of the prior offense in question).

31. See, e.g., *United States v. Arnold*, 58 F.3d 1117, 1124 (6th Cir. 1995).

32. *Id.*

33. See *id.*; see also *Taylor*, 495 U.S. at 602 (noting that, in a small subset of cases, a sentencing court may consider documents such as the indictment and jury instructions to ascertain the precise offense with which the defendant was charged as well as what the jury had to find in order to convict).

34. See Jennifer Riley, Note, *Statutory Rape as a Crime of Violence for Purposes of Sentence Enhancement Under the United States Sentencing Guidelines: Proposing a Limited Fact-Based Analysis*, 34 IND. L. REV. 1507, 1512 (2001); cf. *United States v. Sherbondy*, 865 F.2d 996, 1008 n.16 (9th Cir. 1988): "We recognize that there may be an intermediate approach ... in which a sentencing judge would neither limit his analysis to the category of offense committed nor conduct a full hearing into the individual acts of the defendant, but rather would look only to the court records of prior convictions."

35. See, e.g., *United States v. Ruiz*, 180 F.3d 675, 676 (5th Cir. 1999).

36. See *United States v. Spell*, 44 F.3d 936, 939 (11th Cir. 1995) (stating that applicable documents include "the judgment of conviction, charging papers, plea agreement, presentence report adopted by the court, and the findings of a sentencing judge").

37. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2, cmt. n.1 (2003).

38. See *United States v. Fitzhugh*, 954 F.2d 253, 254 (5th Cir. 1992) (asserting that the Guidelines' commentary limits the court in crime of violence inquiries, as it can look to only conduct "set forth in the count of which the defendant was convicted").

A final method of analysis is fact-based, in that the court takes into account the underlying facts surrounding the conviction for the offense in question.<sup>39</sup> The 1991 amendments to the commentary to section 4B1.2, however, added language implying that a court's use of a fact-based analysis was improper.<sup>40</sup> Specifically, the amendments indicate that the conduct the court is to evaluate consists of that which was "expressly charged."<sup>41</sup> Moreover, the amendments instruct that "the conduct of which the defendant was convicted is the focus of inquiry."<sup>42</sup>

Due to these amendments, as well as the alleged "impracticability and unfairness" of a factual inquiry into a defendant's prior conviction,<sup>43</sup> courts have declined to adopt the fact-based approach.<sup>44</sup> Yet, some courts have followed the lead of scholars,<sup>45</sup> alluding to the appropriateness of a fact-based approach in particular instances.<sup>46</sup>

## II. ESCAPE OFFENSES AND THEIR TREATMENT IN CRIME OF VIOLENCE INQUIRIES

### A. *The Elements of Escape*

To determine whether a fact-based approach is the best method of analysis for crime of violence inquiries involving escape offenses,

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39. See, e.g., *United States v. Chapple*, 942 F.2d 439, 441-42 (7th Cir. 1991).

40. See *Fitzhugh*, 954 F.2d at 255.

41. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2, historical notes.

42. *Id.*

43. *United States v. Arnold*, 58 F.3d 1117, 1121 (6th Cir. 1995).

44. See, e.g., *United States v. Bryant*, 310 F.3d 550, 554 (7th Cir. 2002); cf. *Taylor v. United States*, 495 U.S. 575, 600-02 (1990) (rejecting a fact-based analysis with regard to inquiries as to whether an offense constitutes a "violent felony" under the Armed Career Criminal Act).

45. Writings from the academic community have called for the utilization of a fact-based approach when particular offenses are at issue. For instance, some individuals have argued for the application of a fact-based analysis in cases involving statutory rape offenses. See generally Lewis Bossing, Note, *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, 73 N.Y.U. L. REV. 1205 (1998); Susan Fleischmann, Comment, *Toward a Fact-Based Analysis of Statutory Rape Under the United States Sentencing Guidelines*, 1998 U. CHI. LEGAL F. 425; Riley, *supra* note 34.

46. See *United States v. Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999) ("We presume, moreover, that there might be cases in which some other type of limited factual inquiry would be appropriate.").



it is necessary to consider the elements of an escape offense. Under federal law,<sup>47</sup> an individual commits the crime of escape when he escapes or attempts to escape from the custody of an institution that has confined him by authorization of the Attorney General, where such custody arose via any process set forth under the laws of the United States.<sup>48</sup> An individual need not have possessed the intent to escape for a court to convict him of this offense.<sup>49</sup> Rather, the prosecution must merely demonstrate that the defendant knew that his conduct would "result in his leaving physical confinement without permission."<sup>50</sup> In fact, even if the defendant was initially forced to escape against his will, he still commits the crime of escape if, upon his involuntary escape, he willingly elects to remain at large.<sup>51</sup>

Although a consideration of the crime of escape may evoke the image of an inmate attempting to break out of a maximum-security prison, the escape offense actually encompasses a much wider scope of conduct. The flexibility with which the courts have construed the term "custody" exemplifies the breadth of this offense.<sup>52</sup> Along with one's confinement in a federal prison,<sup>53</sup> courts have ruled that the government's "custody" over an individual extends to instances in which he leaves a prerelease facility without permission<sup>54</sup> or fails to report to the authorities upon the revocation of his probation.<sup>55</sup>

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47. This Note looks to the elements of the federal escape offense simply for convenience. The elements of an escape under state law generally resemble those outlined in the federal statute, so the present analysis is relevant when considering both federal and state escape offenses. The only significant difference for the purpose of this analysis is that, unlike the federal law, many state codes divide escape into several degrees based on the severity of the offense. See, e.g., 18 PA. CONS. STAT. ANN. § 5121 (West 1983).

48. 18 U.S.C. § 751 (2000).

49. See *United States v. Bailey*, 444 U.S. 394, 408 (1980).

50. *Id.*

51. *United States v. Chapman*, 455 F.2d 746, 749-50 (5th Cir. 1972).

52. See Grant H. Morris, *Escaping the Asylum: When Freedom is a Crime*, 40 SAN DIEGO L. REV. 481, 489 (2003).

53. See *United States v. Camacho*, 277 F. Supp. 814, 816 (D. Ariz. 1967).

54. See *United States v. Taylor*, 485 F.2d 1077, 1078 (D.C. Cir. 1973).

55. See *United States v. Keller*, 912 F.2d 1058, 1060 (9th Cir. 1990).

*B. Escape as a Crime of Violence*

Upon inquiring whether an escape offense constitutes a crime of violence, courts have considered the applicability of each of the three methods of analysis discussed in Part I. Several jurisdictions have elected to follow a categorical approach. For instance, in *United States v. Dickerson*,<sup>56</sup> the Fourth Circuit examined the escape offense in the abstract,<sup>57</sup> inevitably concluding that an escape, even one in which an individual stealthily fled from a federal maximum-security prison, presented a "potential risk of physical injury" that satisfied the career offender provision of the Guidelines.<sup>58</sup> The court reasoned that such a risk existed because "the escapee, intent on his goal of escaping, faces the decision of whether to dispel the interference or yield to it."<sup>59</sup>

Despite its adherence to a categorical approach, the Fourth Circuit implied that the default method of analysis in making crime of violence inquiries was the intermediate approach.<sup>60</sup> The court justified its application of the categorical approach on the fact that it could not assess the circumstances surrounding the instant escape offense by examining the indictment, as this document contained little informative content.<sup>61</sup> This reasoning also prevailed in *United States v. Luster*,<sup>62</sup> as the Third Circuit maintained that, because the instant charging document closely tracked the language of the escape statute, the focus shifted to a consideration of whether escape, by its nature, posed a "serious potential risk of physical injury to another."<sup>63</sup> Having determined its method of analysis, the court held that a "walk-away" escape<sup>64</sup> inherently presented the aforementioned risk and, therefore, constituted a crime of violence.<sup>65</sup>

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56. 77 F.3d 774 (4th Cir. 1996).

57. *See id.* at 777.

58. *Id.*

59. *Id.*

60. *See id.* at 776.

61. *See id.*

62. 305 F.3d 199 (3d Cir. 2002).

63. *Id.* at 202 (quoting *Dickerson*, 77 F.3d at 776).

64. This form of escape occurs when an individual removes himself from custody (presumably in a clandestine manner) simply by walking away without resorting to force. *See id.*

65. *See id.*

In *United States v. Nation*,<sup>66</sup> the Eighth Circuit also seemingly invoked a categorical analysis when it deemed escape a crime of violence.<sup>67</sup> Yet, the court appeared to base its conclusion, in part, on a consideration of the expressly charged conduct.<sup>68</sup> What the court identified as a "categorical" approach, therefore, actually more closely resembles an intermediate approach. This apparent mislabeling of the approach adopted by the court is informative in that it highlights the marked similarity between the categorical and intermediate analyses. An assessment of the decision making of the Tenth Circuit further supports this contention.

In *United States v. Gosling*,<sup>69</sup> the Tenth Circuit "expressly declined" to employ a categorical analysis.<sup>70</sup> Instead, the court looked to the indictment, eventually concluding that the expressly charged conduct "by its nature involves conduct that presents a serious potential risk of physical injury to another."<sup>71</sup> In support of this assertion, however, the court explained that "every escape scenario is 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 serious *potential* to do so."<sup>72</sup> This reasoning suggests that all escape offenses constitute a crime of violence. Although not adopting a categorical approach by name,<sup>73</sup> the Tenth Circuit essentially employed a method of analysis categorical in the results it produces.<sup>74</sup>

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66. 243 F.3d 467 (8th Cir. 2001).

67. *See id.* at 472.

68. *See id.* (examining the particulars of the instant information).

69. 39 F.3d 1140 (10th Cir. 1994).

70. *Id.* at 1142 n.3.

71. *Id.* at 1142-43.

72. *Id.* at 1142.

73. Despite *Gosling*'s explicit refusal to adopt a categorical approach, the Tenth Circuit, in a subsequent decision, referred to the view of *Gosling* as "categorical." *See United States v. Mitchell*, 113 F.3d 1528, 1533 (10th Cir. 1997).

74. The Fifth Circuit reached the same outcome in *United States v. Ruiz*, for despite examining the instant indictment, the court ultimately invoked the "powder keg" reasoning of *Gosling*. *See* 180 F.3d 675, 676-77 (5th Cir. 1999). The First, Seventh, and Eleventh Circuits have also reached categorical findings with regard to the issue of whether escape constitutes a crime of violence under the career offender provision of the Guidelines. *See United States v. Winn*, 364 F.3d 7, 12 (1st Cir. 2004); *United States v. Bryant*, 310 F.3d 550, 551 (7th Cir. 2002); *United States v. Gay*, 251 F.3d 950, 954-55 (11th Cir. 2001).

Regardless of whether the aforementioned jurisdictions have adhered to a categorical approach, these circuit courts have uniformly discredited a fact-based method of analysis. For instance, the Eighth Circuit has maintained that, because the Guidelines instruct the sentencing court to look to the expressly charged conduct when making a crime of violence determination, the court cannot consider the underlying facts surrounding the conviction.<sup>75</sup> Similarly, the Fifth Circuit has asserted that the commentary to section 4B1.2 of the Guidelines makes "clear that only conduct 'set forth in the count of which the defendant was convicted' may be considered in determining whether [an] offense is a crime of violence."<sup>76</sup> As a result, the Fifth Circuit has stated that it cannot examine the underlying facts of the defendant's conviction if those facts are not contained in the indictment.<sup>77</sup>

Although most jurisdictions have rebuked the fact-based approach, a few courts have alluded to the possible utility of such an approach. In *United States v. Harris*,<sup>78</sup> the Sixth Circuit adopted the reasoning of *Gosling*, ultimately holding that the instant escape offense constituted a crime of violence.<sup>79</sup> Yet, while the court considered only the indictment relating to the conviction in question, the court stated that "there might be cases in which some other type of limited factual inquiry would be appropriate."<sup>80</sup>

In *United States v. Thomas*,<sup>81</sup> the D.C. Circuit implied that a fact-based approach might be appropriate by way of its criticism of the categorical method adopted by the aforementioned circuit courts.<sup>82</sup> In the instant case, the court considered whether the defendant's prior conviction for escaping from an officer constituted a crime of violence under the career offender provision of the Guidelines.<sup>83</sup> Considering that such an offense constituted a crime of violence

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75. See *United States v. Nation*, 243 F.3d 467, 472 (8th Cir. 2001).

76. *United States v. Fitzhugh*, 954 F.2d 253, 254 (5th Cir. 1992) (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.2, cmt. n.1) (2003).

77. See *Ruiz*, 180 F.3d at 676.

78. 165 F.3d 1062 (6th Cir. 1999).

79. *Id.* at 1068.

80. *Id.*

81. 333 F.3d 280 (D.C. Cir. 2003).

82. *Id.* at 282.

83. See *id.*

regardless of which approach the court employed,<sup>84</sup> the D.C. Circuit maintained that it did not have to embrace a particular method of analysis.<sup>85</sup> Yet, the court did not hesitate to put forth its thoughts regarding the utility of the categorical approach.

Specifically, the court suggested that the categorical approach was flawed, in that the reasoning underlying this method of analysis "prove[d] too much."<sup>86</sup> Jurisdictions that employ a categorical analysis have asserted that an escape offense inherently "involves conduct that presents a serious potential risk of physical injury to another."<sup>87</sup> Although the process of detaining an escapee may inherently give rise to a potential risk of harm to others, the D.C. Circuit explained that such a risk is present as to the capture of *anyone* who breaks the law.<sup>88</sup> The conclusion that follows is that "all crimes become crimes of violence."<sup>89</sup> Due to the fact that the reasoning for a categorical method of analysis as applied to the offense of escape produces such an incongruous result, the D.C. Circuit declined to adopt this approach.<sup>90</sup>

Even though the circumstances in the instant case did not compel the D.C. Circuit to adopt a particular methodology, the court's view of the categorical approach implies that there may be a place for a fact-based analysis when escape offenses are at issue. In fact, had the instant conviction been a conviction for "escape from an institution," the court suggested it might have had to decide which of the two approaches to adopt.<sup>91</sup> Given the court's uneasiness in embracing a categorical approach, it certainly seems possible that, if forced to choose amongst the available methods of analysis, the D.C. Circuit would have elected to follow a fact-based approach. This statement is supported by the D.C. Circuit's assertion that "[a] prisoner not returning to a halfway house or sneaking away from an

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84. *See id.* at 283 (stating that a prisoner's escape from the custody of an officer inherently creates a risk of harm to others).

85. *Id.* at 282.

86. *Id.*

87. *United States v. Dickerson*, 77 F.3d 774, 777 (4th Cir. 1996).

88. *Thomas*, 333 F.3d at 282.

89. *Id.*

90. *See id.*

91. *Id.* at 283.

unguarded position in the night may not inherently create a risk of harm to others.<sup>92</sup>

### III. THE ARGUMENT FOR USE OF A FACT-BASED APPROACH WITH REGARD TO CRIME OF VIOLENCE INQUIRIES INVOLVING ESCAPE OFFENSES

#### *A. All Escapes Do Not Inherently Pose a Risk of Harm*

In holding that an escape offense categorically constitutes a crime of violence under the U.S. Sentencing Guidelines, several circuit courts have likened an escape to a "powder keg."<sup>93</sup> These jurisdictions have contended that, although violence may not arise during a particular escape, there always exists the potential for such violence to arise.<sup>94</sup> The potential for violence to come about at any time stems from the fact that an escapee "is likely to possess a variety of supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees."<sup>95</sup> Even though this reasoning is certainly plausible with regard to *some* escape offenses, it fails to describe *all* escape offenses correctly.

In order to understand why an escape, in general, does not inherently pose a risk of harm to others, the focus must first turn to the purpose of an escape. All criminal acts ideally purport to achieve some primary purpose. For instance, the primary purpose of robbing an individual is, at least in the abstract, to obtain personal property.<sup>96</sup> The primary purpose of committing arson is to damage or destroy a structure.<sup>97</sup> Unless an individual fulfills the primary purpose, he will not complete the crime.<sup>98</sup>

The primary purpose of escaping from custody is significantly different from the purpose of other crimes. Whereas a criminal who

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92. *Id.*

93. *See, e.g.,* United States v. Gosling, 39 F.3d 1140, 1142 (10th Cir. 1994).

94. *See id.*

95. *Id.*

96. *See* 18 U.S.C. § 2112 (2000).

97. *See* 18 U.S.C. § 81 (2000).

98. For instance, if an individual fails in his efforts to take another's personal property, the former will have committed only attempted robbery. *See* 18 U.S.C. § 2112.

commits a non-escape offense may hope to avoid detection by the authorities, the *primary* purpose of escaping from custody is to avoid such detection.<sup>99</sup> In other words, the goal of the escape is to circumvent confrontation. On the contrary, the fundamental goal of a non-escape offense is not to evade confrontation but to fulfill a purpose that relates to the substantive elements of the offense. Given that the escapee, unlike other criminals, at least theoretically places the most emphasis on eluding detection by the police, it becomes difficult to conclude that the potential for serious harm inherently exists during the commission of all escapes.

Of course, although escapees may ideally seek to escape by stealthily avoiding detection by the authorities, there are instances in which confrontations between the escapee and the authorities arise. For instance, confrontation and subsequent violence may develop when an individual imprisoned in a maximum-security facility seeks to escape. In fact, for this individual to escape successfully, he may need to resort to force to evade prison personnel trained to prevent such an escape, which may result in the prison staff or other inmates suffering harm.<sup>100</sup>

On the contrary, there are escape scenarios in which the previously mentioned dangers are not typically present. One such scenario involves the convicted individual who escapes from a prerelease program. Prerelease programs typically take the form of assignment to a halfway house, a community-based residential facility designed for inmates whose sentences expire shortly after entering the facility.<sup>101</sup> The purpose of transferring a convicted individual from a prison to a halfway house is to allow him to obtain the skills and opportunities that will enable him to reintegrate himself into the community once he has served his sentence.<sup>102</sup> For instance, under a work release program, residents of the community

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99. See *United States v. Jackson*, 301 F.3d 59, 63 (2d Cir. 2002) ("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.").

100. For example, in trying to escape from a maximum-security prison in Florida, an inmate fatally wounded a corrections officer by hitting the officer with a sledgehammer. Michael A. Scarcella, *Inmate Named in Killing of Officer*, SARASOTA HERALD-TRIB., Feb. 8, 2004, at B1, 2004 WL 58976827.

101. EDWARD J. LATESSA & HARRY E. ALLEN, CORRECTIONS IN THE COMMUNITY 345 (1997).

102. *Id.* at 350.

facility are periodically released from physical supervision so that they can undertake regular employment.<sup>103</sup> The overseers of the halfway house may allow a resident to leave the premises for other purposes, provided he remains within the surrounding area.<sup>104</sup> The resident generally must sign in and out when going to and from the halfway house, and may leave the facility only during designated hours.<sup>105</sup>

Although the resident continues to remain "in custody" within the meaning of federal law during this release period, the only restraint burdening him is the restriction that he must return to the facility at the culmination of the release period.<sup>106</sup> If a resident of the halfway house does not return to the facility, he can be held to have committed the crime of escape.<sup>107</sup> Even if the individual merely fails to return before the expiration of his "curfew," the government can bring forth an escape charge successfully.<sup>108</sup> Considering the ease with which these walk-away escapes can be carried out, it is not surprising that the vast majority of escapes are walk-aways.<sup>109</sup>

Given that the only barrier preventing an individual from escaping from a prerelease program is the rule that he cannot do so,<sup>110</sup> it is difficult to conclude that this type of escape inherently poses the potential for harm.<sup>111</sup> Yet, the Eighth Circuit has argued that "[e]ven the most peaceful escape cannot eliminate the potential for violent conflict when the authorities attempt to recapture the

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103. See, e.g., *United States v. Rudinsky*, 439 F.2d 1074, 1075 (6th Cir. 1971) (explaining, in brief terms, the nature of the defendant's release program).

104. See *id.* (noting that the halfway house's rules restricted the defendant by requiring him to remain within the county limits).

105. See *McCullough v. United States*, 369 F.2d 548, 549 (8th Cir. 1966).

106. See *Rudinsky*, 439 F.2d at 1076-77.

107. See, e.g., *Rindgo v. United States*, 411 A.2d 373, 378 (D.C. 1980).

108. See, e.g., *United States v. Jones*, 569 F.2d 499, 501 (9th Cir. 1978).

109. *Riots, Disturbances, Violence, Assaults, and Escapes*, 27 CORRECTIONS COMPENDIUM 6 (2002) (noting the results of a survey of forty United States and three Canadian correctional systems, which indicated that of the 5629 reported successful or unsuccessful escape attempts in 2001, eighty-nine percent constituted walk-away escapes).

110. See Brief of Defendant-Appellant at 17, *United States v. Ruiz*, 180 F.3d 675 (5th Cir. 1999) (No. 98-41073).

111. See Brief of Appellant Gay at 17, *United States v. Gay*, 251 F.3d 950 (11th Cir. 2001) (No. 00-14729-DD) ("An escapee from a community based corrections facility must not be considered violent or he could not be there ....").



escapee.”<sup>112</sup> The Eighth Circuit, however, did not support this assertion with empirical research indicating that individuals other than the escapee frequently suffer injuries when the escapee commits a walk-away escape.<sup>113</sup> Nor did the court reconcile its conclusion with the fact that community-based facilities predominantly house non-violent offenders.<sup>114</sup> The court also failed to account for the fact that many walk-away escapes merely involve a resident’s tardy return to the halfway house.<sup>115</sup> Given that walk-away offenses appear to lack the inherent dangers that exist with regard to an escape from a maximum-security penitentiary,<sup>116</sup> the Eighth Circuit’s failure to put forth empirical evidence challenging this presumption renders the court’s argument unpersuasive.<sup>117</sup>

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112. *United States v. Nation*, 243 F.3d 467, 472 (8th Cir. 2001); *see also United States v. Bryant*, 310 F.3d 550, 554 (7th Cir. 2002) (holding that all escape offenses, including an escape stemming from one’s “failure to report back to a halfway house,” are crimes of violence).

113. *See* THOMAS W. HUTCHISON ET AL., *FEDERAL SENTENCING LAW AND PRACTICE* 1285 (2003).

114. In 1998, only twelve percent of offenders held in halfway facilities in Washington, D.C. were awaiting trial for violent felonies (as defined by the Federal Bureau of Investigation Index) or convicted of violent felonies. Ctr. on Juvenile and Criminal Justice, *Half Truths: The Complicated Story of D.C.’s Halfway House “Escapees”* (1999), available at <http://www.cjcj.org/pubs/halftruth/halftruth.html> (last visited Apr. 10, 2004). Considering that the vast majority of halfway house residents committed non-violent offenses, it is not surprising that rewards offered for information that leads to the capture of these individuals pale in comparison to rewards offered for inmates who escape from secure prison facilities. Compare U.S. Dep’t of Justice, *Task Force Announces Rewards for Information on 50 Most Wanted Halfway House Escapees* (Apr. 1, 1999), available at <http://www.usdoj.gov/opa/pr/1999/April/115ag.htm> (last visited Apr. 10, 2004) (announcing that the Justice Department is offering \$200 rewards for “information leading to the arrest of each of the 50 most wanted District of Columbia halfway house escapees”), with *Anti-Abortion Escapee Added to FBI Top 10 List*, L.A. TIMES, Sept. 22, 2001, 2001 WL 2519965 (noting that the FBI is offering \$50,000 for information that leads to the arrest of an escaped prison inmate who previously had threatened to kill abortion providers).

115. *See* Ctr. on Juvenile and Criminal Justice, *supra* note 114 (stating that escapes from Washington, D.C. halfway houses often consisted of trivial tardiness).

116. *See United States v. Hillstrom*, 988 F.2d 448, 453 (3d Cir. 1993) (“The non-violent walk-away ... does not present the potential dangers found in ‘going over the wall.’” (quoting Paul D. Borman, Chief Federal Defender for the Eastern District of Michigan)).

117. *Cf. William R. Maynard, Judge-Made Sentence Enhancements: A Question of Fact, of Law, or of the Constitution?*, 25 CHAMPION 14, 16 (2001) (maintaining that, in categorically ruling that escape is a violent felony under the Armed Career Criminal Act, the court in *United States v. Moudy*, 132 F.3d 618 (10th Cir. 1998), “relied on certain inherent qualities the court (not jurors or Congress) attributed to escape”). Although the Eighth Circuit’s unsubstantiated holding is troubling enough, it is even more disconcerting that some courts

The Eighth Circuit's argument becomes even less persuasive when one considers how state legislatures treat escape offenses. Several states' criminal codes divide escape into degrees, each of which is dependent upon the existence or lack of particular factors.<sup>118</sup> One such factor is whether the defendant escaped from a correctional facility or from a less secure form of custody.<sup>119</sup> Because these statutes require courts to consider the type of escape when grading the offense, they suggest that some escapes are inherently less dangerous than other escapes. The U.S. Sentencing Guidelines *themselves* echo this sentiment, albeit outside the context of the career offender provision. According to the Guidelines, an individual convicted of escape may receive a downward departure in his sentence under certain circumstances.<sup>120</sup> Specifically, if the individual escapes "from the non-secure custody of a community corrections center, community treatment center, 'halfway house,' or similar facility," he may receive a downward departure in his sentence.<sup>121</sup> Again, this language implies that individuals who escape from less secure facilities should be punished less severely than those who escape from more heavily secured facilities. Both state criminal codes and the Guidelines themselves take into account the varying severity of escape offenses. It seems contradictory, therefore, to treat all escape offenses alike under the career offender provision by holding that every offense poses a serious potential risk of harm to others.

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have simply regurgitated the language of other jurisdictions. For instance, in *United States v. Ruiz*, the Fifth Circuit based its holding on the fact that the court found "persuasive the reasoning of our Tenth Circuit colleagues," as well as the fact that the Fourth and Sixth Circuits had put forth similar rulings. 180 F.3d 675, 676-77 (5th Cir. 1999).

118. 4 WHARTON'S CRIMINAL LAW § 644 (Charles E. Torcia ed., 15th ed. 1996).

119. *Id.*; see, e.g., ALA. CODE § 13A-10-31, 32, 33 (1975).

120. See U.S. SENTENCING GUIDELINES MANUAL § 2P1.1(b) (2003).

121. *Id.* § 2P1.1(b)(3). This reduction would not apply, however, if the individual, "while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more." *Id.*

*B: Categorical and Intermediate Approaches Produce Improper Outcomes*

Were one to champion the argument that all escapes do not inherently present a threat of serious harm, it would be impossible to simultaneously support the use of a categorical approach in the context of crime of violence inquiries involving escape offenses. For if one were to begin with the premise that all escape offenses *are not* inherently dangerous, it would be illogical to employ a method of analysis that would lead to the conclusion that all escape offenses *are* inherently dangerous. Of course, those who favor use of the categorical approach view all escape offenses as posing a serious risk of harm.<sup>122</sup> Yet, the reasoning underlying this contention renders the use of the categorical method of analysis inappropriate with respect to escape offenses.

As discussed in Part II, courts' application of the categorical analysis to escape offenses results in questionable outcomes. These jurisdictions begin with the premise that the recapturing of an escapee always has the potential to give rise to a violent encounter between the escapee and the authorities.<sup>123</sup> Espousal of this premise leads these courts to hold that an escape offense is categorically a crime of violence under the U.S. Sentencing Guidelines.<sup>124</sup> Although the inferential path connecting the premise with the conclusion appears sound, a problem arises when one considers that a court could conceivably trace this path with regard to any crime.<sup>125</sup> In other words, because violence could erupt when the authorities attempt to detain any person at large, it follows that all offenses are crimes of violence.<sup>126</sup>

This incongruous result clearly suggests the inappropriateness of the categorical analysis, at least when the reasoning is limited to that which has been presented by the courts. More importantly, however, it suggests that there must exist more than the possibility of conflict upon the criminal's detainment for the underlying offense

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122. See, e.g., *United States v. Dickerson*, 77 F.3d 774, 777 (4th Cir. 1996).

123. See *United States v. Thomas*, 333 F.3d 280, 282 (D.C. Cir. 2003).

124. See, e.g., *Dickerson*, 77 F.3d at 777.

125. See *Thomas*, 333 F.3d at 282.

126. See *id.*

to constitute a crime of violence. For instance, with regard to the crime of non-residential burglary, there is arguably the additional risk that a private citizen could "happen upon the crime."<sup>127</sup> As a result, therefore, some courts have deemed this offense a crime of violence.<sup>128</sup>

One could contend that a similar risk exists with regard to every escape offense, for a private citizen could interfere, intentionally or unintentionally, with the escapee's flight from the authorities.<sup>129</sup> Upon further consideration of this potential risk, however, it becomes evident that such harm could occur in only select circumstances. It is certainly foreseeable that a penitentiary escapee, donned in a prison uniform and closely pursued by prison authorities, could face an altercation with private citizens during the course of his escape. As it is obvious to the common observer that the escapee in this instance is, in fact, an escapee, it is plausible that citizens would take affirmative steps to aid in the apprehension of the escapee.<sup>130</sup> If this aid involves attempts to detain the escapee directly, there is little question that violence could result.

Consider, however, a situation in which a convicted individual escapes from a prerelease program. Instead of returning to the residential facility, were the plain-clothed escapee simply to travel to an inappropriate destination (e.g., outside the county limits), it seems unlikely that a violent confrontation would necessarily result between the escapee and private citizens.<sup>131</sup> Aside from scenarios in which the media heavily documents the escapee's flight,<sup>132</sup> there

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127. *United States v. Jackson*, 22 F.3d 583, 584 (5th Cir. 1994).

128. *See* Crossett, *supra* note 11, at 684.

129. *Dickerson*, 77 F.3d at 777.

130. *See* Keren Holland, *Police — Prison Escapee May Be Trying to Steal Vehicle*, KALGOORLIE MINER, Dec. 17, 2003, 2003 WL 60716346 (detailing that a citizen in Australia notified police after the individual thwarted a burglary attempt by a prison escapee).

131. *See* Janell Cole, *Inmate Fleeing, Not Dangerous*, BISMARCK TRIB., July 1, 1995, at 6A (noting that local authorities in North Dakota stated that an inmate who escaped by leaving his prerelease program was not considered dangerous).

132. One would suspect that the escape of an inmate from a maximum-security penitentiary would receive far greater media exposure than the failure of a resident to return to a community-based facility, especially given that the latter individual would likely have been released from the facility in short order anyway. *Compare* Ray Gibson & Jerry Shnay, *Security Hit in Breakout from Joliet*, CHI. TRIB., Feb. 13, 1990, at C1, 1990 WL 2929988 (detailing that over one hundred correctional officers and police conducted a "statewide manhunt" for five inmates who escaped from a maximum-security prison), *with* 10-Year

would be no reason for the average citizen to suspect that the plain-clothed escapee is, in fact, an escapee.<sup>133</sup> Given that private citizens are not likely to "happen upon" an escapee in every particular instance, the argument used to support a finding that non-residential burglary categorically constitutes a crime of violence cannot be utilized with regard to escape. The inability to invoke this argument means that the generic risk of detaining a criminal remains the only potential justification for categorically deeming escape a crime of violence. Due to the aforementioned problem tied to this argument, there seems to be no contention that both correctly points to a potential risk of harm to others and leads to intelligible outcomes.

The foregoing analysis in this section demonstrates the flawed nature of the categorical approach when applied to crime of violence inquiries involving escape offenses. One can apply this same analysis when examining the utility of the intermediate approach. As stated previously, the intermediate approach, at least in the context of escape, is essentially equivalent to the categorical method of analysis.<sup>134</sup> The indictment for an escape charge may provide little information beyond the statutory provision a court considers under the categorical approach.<sup>135</sup> For instance, in *United States v. Ruiz*, the indictment charged that the defendant "knowingly escape[d] from custody of [a federal prison camp] ... in which he was lawfully confined."<sup>136</sup> Likely because the indictment adds little to the inquiry, courts that invoke the intermediate analysis ultimately have reached a categorical holding.<sup>137</sup> As a result, the foremen-

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*Fugitive Caught in N.Y. Subway*, CHI. TRIB., Apr. 28, 1992, at C14, 1992 WL 4476992 (noting in very brief terms that an individual who escaped from a halfway house more than ten years earlier was apprehended when he attempted to ride the subway without placing a token in the turnstile).

133. *Cf. United States v. Jackson*, 22 F.3d 583, 585 (5th Cir. 1994) (stating that the defendant's attempt to take parts from an air conditioning unit in the backyard of a house that had been vacant for seven years did not pose a serious risk of injury to others).

134. *See supra* Part II.B.

135. *See supra* Part II.B.

136. 180 F.3d 675, 676 (5th Cir. 1999) (quoting instant indictment); *cf.* 18 U.S.C. § 751(a) (2000) (stating that one commits the offense of escape when he "escapes or attempts to escape from the custody of the Attorney General ... or from any institution or facility in which he is confined by direction of the Attorney General").

137. *See, e.g., United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994).

tioned defect of the categorical approach also exists with regard to the intermediate approach.

### *C. The Fact-Based Approach and Its Reply to the Critics*

This Part has explained that not all escape offenses pose a serious risk of harm. Furthermore, this Part has highlighted the flaws in the rationale used to support the invocation of the categorical and intermediate approaches in the context of crime of violence inquiries involving an escape offense. Given this analysis, it becomes evident that the use of a fact-based approach most effectively results in proper outcomes when conducting crime of violence inquiries involving an escape offense. Under the proposed fact-based approach, a court would examine the underlying record in order to determine whether the instant escape constituted a crime of violence.<sup>138</sup> If the record failed to provide sufficient insight, the court would hold an evidentiary hearing.<sup>139</sup> By inevitably bringing to light the circumstances underlying escape convictions, the court could effectively distinguish escapes that pose a risk of harm from those that do not pose such a risk.<sup>140</sup>

Despite the utility of the fact-based approach, several criticisms have been directed at this method of analysis. One criticism concerns the unfairness that could result when examining the trial record. Specifically, because some facts in the record might have only been alleged or not subject to a judicial fact-finding process, the crime of violence determination may be inaccurate.<sup>141</sup>

Although some facts included in the record might not have been proven conclusively, this does not necessarily mean that the crime of violence determination will be inaccurate. When assessing whether a particular escape poses a substantial risk of harm, the key facts a court must consider are the type of custody from which the defendant escaped and the means by which he escaped. Given that it seems rather unlikely that the parties would sharply

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138. See *United States v. Goodman*, 914 F.2d 696, 699 (5th Cir. 1990).

139. See *Riley*, *supra* note 34, at 1512.

140. See *Fleischmann*, *supra* note 45, at 432 (maintaining that the fact-based approach "allows the sentencing judge to more accurately determine whether a particular defendant truly poses a danger to society.").

141. See *Taylor v. United States*, 495 U.S. 575, 601 (1990); *Riley*, *supra* note 34, at 1516.

disagree as to the nature of these particulars at trial,<sup>142</sup> a court would have access to reasonably accurate information when making its ruling on the crime of violence issue. If the sentencing court did in fact face a clouded evidentiary picture, because either the defendant pleaded guilty to the escape offense<sup>143</sup> or the parties vehemently disagreed on the material issues in the underlying trial, the sentencing court would be empowered to conduct an evidentiary hearing to better assess the matter at hand.

A second criticism involves flaws of the evidentiary hearing that a court may hold to assist in its crime of violence inquiry. Because this hearing might take place long after the crime has occurred or might fail to include all the witnesses who originally testified, it is possible that the hearing would not accurately reflect how the crime actually transpired.<sup>144</sup> Moreover, this long lapse between the commission of the crime and the hearing would burden the defendant, in that it would require him to rebut old charges.<sup>145</sup>

The fear that stale or absent evidence might compromise the accuracy of the hearing is less weighty when dealing with an escape offense than with other crimes. Given that an escape offense is a victimless crime,<sup>146</sup> the concern that the victim would be unable to testify at the hearing, due to his absence or loss of memory, is

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142. See *United States v. Gay*, 251 F.3d 950, 953 (11th Cir. 2001) (noting "both parties agreed that the underlying facts involved a situation where [the defendant] walked away from a diversion facility in a non-violent manner"). Intuitively, it seems that the more hotly debated issues would consist of the following: (1) whether the defendant's conduct actually constituted an escape (e.g., whether the defendant possessed the requisite intent); and (2) whether the defendant had a legitimate basis for escaping from custody, such that he should not be held criminally liable. See *United States v. Bailey*, 444 U.S. 394 (1980).

143. The Court in *Taylor* also raised concern over instances in which the defendant pleaded guilty to a lesser included offense that substantively differed from the charged offense. See *Taylor*, 495 U.S. at 601-02. The Court asserted that "it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty" to the charged offense. *Id.* at 602. Unlike the crime of burglary, however, which was at issue in *Taylor*, an escape offense is not readily accompanied by a substantively different lesser included offense. See, e.g., *Williams v. State*, 591 So.2d 582, 583 (Ala. Crim. App. 1991) (holding that resisting arrest is not a lesser included offense of escape). The Court's concern, therefore, seems inapplicable in this context.

144. *United States v. Sherbondy*, 865 F.2d 996, 1008 (9th Cir. 1988); Riley, *supra* note 34, at 1517.

145. Riley, *supra* note 34, at 1517.

146. Although an escapee, in the course of his escape, might inflict an injury upon another, this injury is distinct from the elements of the escape itself. See 18 U.S.C. § 751 (2000).

inapplicable in this context. Furthermore, because many escapees, particularly those who walk away from a prerelease facility, do not facilitate their escape by using a tangible object,<sup>147</sup> there is not much need to worry that important physical evidence would have been lost or destroyed prior to the hearing.

Although these mitigating factors do not address the memory loss of the defendant or the absence or imperfect recall of other witnesses, it is difficult to conclude that these concerns will be so pervasive that they will taint all evidentiary hearings, for not all hearings will assess ancient convictions or suffer from the absence of key witnesses. Granted, in some cases, stale evidence may prevent the sentencing court from gaining sufficient insight into the conviction in question. Under these circumstances, however, the sentencing court would simply maintain the status quo by not invoking the career offender provision, for acting otherwise in the face of ambiguity would unfairly burden the defendant.<sup>148</sup>

As for the alleged burden placed on the defendant because of the potential long lapse between the crime and the hearing, this concern is unconvincing when an escape offense is at issue. Given that courts' application of the categorical approach has deemed all escapes crimes of violence,<sup>149</sup> it is difficult to see why holding a hearing would prove detrimental to the defendant. Rather, the hearing would provide the defendant with the *only* opportunity to prevent the court from invoking the career offender provision against him. Moreover, as stated previously, if the lapse between the conviction and the hearing prevented the defendant from putting forth enough evidence to provide the sentencing court with an accurate portrayal of the escape conviction, the court could err on the side of leniency and refuse to invoke the career offender provision upon sentencing the defendant.

There is also the argument that a fact-based approach would place a heavy burden on the courts and waste finite judicial

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147. See, e.g., Brief for the United States at 3, *United States v. Cuna*, 2003 WL 22416326 (5th Cir. 2003) (No. 02-11152) (detailing that the government charged the defendant for escape when she failed to report to the halfway house in a timely fashion).

148. Cf. *United States v. Lazo-Ortiz*, 136 F.3d 1282, 1286 (11th Cir. 1998) (stating that the rule of lenity requires a court to construe ambiguous sentencing provisions in favor of the defendant).

149. See *supra* Part II.B.



resources.<sup>150</sup> Obviously, the fact-based method of analysis would prove more time-consuming than the categorical approach. Yet, given that escape offenses, when compared to other felonies, are rare,<sup>151</sup> any additional strain on judicial efficiency would be minimal. Moreover, because adherence to the fact-based approach would render the most appropriate and just sentences, the judicial resources employed to accomplish these results are not wasted but instead put to good use.

Finally, there is the argument that, because the fact-based approach runs counter to the language of the Guidelines' application notes, courts are prohibited from utilizing this method of analysis.<sup>152</sup> The application notes state that courts should rely on "the conduct set forth (i.e., expressly charged)" when determining whether the conviction in question constitutes a crime of violence.<sup>153</sup> This language, coupled with the Supreme Court's ruling that the commentary to the Guidelines is presumptively authoritative,<sup>154</sup> seems to suggest that courts cannot consider the facts underlying a conviction when making a crime of violence inquiry. The commentary to the Guidelines is not authoritative, however, when it is inconsistent with the corresponding Guideline provision.<sup>155</sup> A showing that the commentary to the Guidelines' definition of a crime of violence is inconsistent with that definition, therefore, would provide courts with the freedom to adopt a fact-based approach.

According to the Guidelines, an escape can constitute a crime of violence only if the offense "involves conduct that presents a serious potential risk of physical injury to another."<sup>156</sup> Yet, in invoking the commentary, which implies that a fact-based approach is inappropriate, courts have deemed inherently non-violent escape offenses as crimes of violence. Due to the courts' adherence to the commen-

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150. See Riley, *supra* note 34, at 1517.

151. In cases terminated in U.S. district courts during 2000, escape convictions constituted less than one percent of all felony convictions. See U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 414 (Ann L. Pastore & Kathleen Maguire eds., 2001).

152. See *United States v. Nation*, 243 F.3d 467, 472 (8th Cir. 2001); *United States v. Fitzhugh*, 954 F.2d 253, 255 (5th Cir. 1992).

153. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2, cmt. n.1 (2003).

154. See *Stinson v. United States*, 508 U.S. 36, 38 (1993).

155. See *id.*

156. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a).

tary, therefore, a marked disparity exists between the courts' rulings and the results that the Guidelines' definition of a crime of violence intends to produce.

More generally, there is also a significant inconsistency between the commentary in question and the mission of the U.S. Sentencing Guidelines as a whole. Although the Guidelines were created primarily to remedy marked disparity in sentencing,<sup>157</sup> the U.S. Sentencing Commission stressed that "[t]he increase in uniformity was not ... to be achieved through sacrificing proportionality."<sup>158</sup> By construing the commentary to the Guidelines' definition of a crime of violence as binding on courts, however, these efforts to maintain proportionality are thwarted. Despite the fact that some escape offenses pose much less of a risk of harm than other escape offenses, adhering to the commentary results in treating all of these crimes equally when conducting a crime of violence inquiry. As a result, an individual who committed an escape that lacked the requisite risk of harm bears the burden of serving a sentence that is disproportionate to the degree of his culpability.<sup>159</sup> This reality is especially troublesome when one considers that, because the vast majority of escapes constitute mere walk-aways,<sup>160</sup> courts that adhere to the Guidelines' commentary will hand down disproportionate sentences in a great number of cases.

Given that the invocation of the commentary produces outcomes that conflict with the crime of violence provision of the Guidelines, as well as the purpose of the Guidelines as a whole, courts should not view the commentary as authoritative with regard to crime of violence determinations involving escape offenses. Instead, courts should circumvent the commentary and utilize the fact-based approach, thereby ensuring that the Guidelines' goal of maintaining proportionality is met.

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157. See Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883-84 (1990).

158. See U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 13 (1987).

159. See, e.g., *United States v. Gay*, 251 F.3d 950, 951 (11th Cir. 2001) (noting that the probation department urged that the defendant be deemed a career offender with an elevated offense level of 32, instead of the base offense level of 18).

160. See *supra* note 109.

## CONCLUSION

When one considers the problematic disparities in criminal sentencing that existed prior to the adoption of the U.S. Sentencing Guidelines in 1987,<sup>161</sup> one cannot doubt the importance of maintaining a degree of uniformity in sentencing. The federal judiciary's repeated application of a categorical analysis to crime of violence inquiries involving escape offenses has certainly furthered this goal.<sup>162</sup> By alluding to the categorical approach's deficiencies and refusing to adhere to this approach,<sup>163</sup> however, the D.C. Circuit fueled the debate as to whether this method of analysis was truly the most appropriate approach when dealing with crime of violence inquiries involving escape offenses. After comparing the various methods of analysis, it becomes clear that use of the fact-based approach is best when escape offenses are at issue.

Given that a large subset of escapes, particularly walk-away escapes from a halfway house or similar facility, lack the inherent dangers and risk to others that may accompany an escape from a maximum-security penitentiary,<sup>164</sup> categorically deeming all escape offenses as crimes of violence under the career offender provision produces unsound results. These outcomes become even more inappropriate when one considers that, outside the context of the career offender provision, the Guidelines themselves recognize that escapes differ in their level of culpability.<sup>165</sup> As escape offenses encompass conduct with varying degrees of culpability, a categorical analysis, or an intermediate approach that resembles a categorical approach, is not properly tailored to undertake crime of violence inquiries involving escape offenses.<sup>166</sup> A fact-based approach, however, in which the sentencing court accesses the underlying

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161. Former United States District Judge Marvin E. Frankel criticized the manner in which federal courts determined sentences prior to the implementation of the Guidelines: "[We] must not choose any longer to tolerate a regime of unreasoned, unconsidered caprice for exercising the most awful power of organized society, the power to take liberty and ... life by process of what purports to be law." Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 2 (1972).

162. See *supra* Part II.B.

163. See *supra* text accompanying notes 81-90.

164. See *supra* Part III.A.

165. See *supra* text accompanying notes 120-21.

166. See *supra* Part III.B.

record and may conduct an evidentiary hearing, possesses the flexibility to assess whether a particular escape offense truly constitutes a crime of violence. Although the tools with which the court implements this approach may at times be imperfect, these limitations are less glaring than would be the case if other offenses were at issue.<sup>167</sup> Even in those instances in which deficiencies in the record or hearing prevent the court from determining the nature of the crime in question, the sentencing court is not handcuffed, for it can deal with this ambiguity by properly maintaining the status quo through its refusal to invoke the career offender provision.<sup>168</sup>

The Guidelines' application notes, which reject the fact-based analysis, might appear to bar the use of this approach.<sup>169</sup> One reaches a different conclusion, however, when considering the fact that, when dealing with crime of violence determinations pertaining to escape offenses, only by employing the fact-based approach are the Guidelines' goals met. That is, by assessing each escape offense in order to determine which crimes indeed call for an elevated punishment, the fact-based analysis accurately labels inherently non-violent escapes as such, and it effectively balances the desire for uniformity with that of proportionality.<sup>170</sup>

When confronting the question of whether escape offenses should be deemed crimes of violence under the career offender provision of the U.S. Sentencing Guidelines, the broad range of conduct that escape offenses may involve necessitates a flexible approach. As such, it is essential that the federal judiciary discard the categorical analysis and adopt the fact-based approach. Only then can it pursue a degree of uniformity in sentencing without fear that meeting this goal will come at the expense of offenders receiving excessive sentences.

*Timothy W. Castor*

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167. See *supra* Part III.C.

168. See *supra* note 148 and accompanying text.

169. See *supra* text accompanying notes 152-54.

170. See *supra* Part III.C.