07-0308-cr

To Be Argued By:
KAREN L. PECK

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-0308-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

GARY MILLS, also known as G Knocker,
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Dorsey, J.) had subject matter jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The district court imposed sentence on January 22, 2007, and entered judgment on that same date. JA-15-16. The defendant filed his notice of appeal on or about January 25, 2007. JA-17. This Court has appellate jurisdiction under 18 U.S.C. § 3742(b).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by applying controlling Second Circuit precedent to conclude that the defendant's prior conviction for Escape in the First Degree constituted a violent felony under the Armed Career Criminal Act.

2. Whether the district court erred in electing not to depart downward or otherwise impose a lesser sentence from the defendant's applicable Sentencing Guideline range.

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The defendant Gary Mills appeals the 188-month sentence imposed pursuant to his guilty plea to Possession of a Firearm by a Convicted Felon under 18 U.S.C. § 922(g). Mills argues, contrary to controlling precedent in this Circuit, that he should not have been sentenced as an armed career criminal pursuant to 18 U.S.C. § 924(e) because one of his qualifying felonies, that is, his conviction for Escape in the First Degree, in violation of Conn. Gen. Stat. § 53a-169(a)(2), should not have been deemed a "violent felony." Mills also claims that the district court failed to address his grounds for a downward

departure when imposing sentence. Neither of Mills' claims has any merit. Precedent in this Circuit, and indeed in nearly every other circuit, supports the district court's finding that an escape conviction is indeed a conviction for a "violent felony" under the Armed Career Criminal Act ("ACCA") given the "serious potential risk of physical injury to another" inherent in such a criminal violation. Further, the record demonstrates that, contrary to Mills' claim, the district court did consider and reject the grounds for a downward departure or lesser sentence proposed by Mills. In so doing, the district court acted well within its discretion and entirely reasonably.

STATEMENT OF THE CASE

On February 18, 2003, a federal grand jury in Connecticut returned a one-count indictment charging Mills with Possession of a Firearm by a Convicted Felon in violation of 18 U.S.C. § 922(g). JA-2, 13-14.[1]

After the jury was selected and on the day evidence was to commence, Mills entered a plea of guilty to the indictment on October 19, 2006. JA-10.

Mills was sentenced and judgment was entered on January 22, 2007. JA-11. The district court sentenced the defendant to 188 months of imprisonment, to be followed by five years of supervised release. The district court did

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[1] Citations to the Joint Appendix filed by Mills are cited as "JA-__." Citations to the Government's Appendix are cited as "GA-__." Citations to the Presentence Report ("PSR") which was filed under seal are cited as "PSR ¶ __."

not fine Mills but ordered him to pay a $100 special assessment. *Id.*

On January 25, 2007, Mills filed a timely notice of appeal. JA-11.[2]

STATEMENT OF FACTS

A. The Offense of Conviction[3]

On the night of June 13, 2002, in the Hill section of New Haven, New Haven Police Officer Robert Fumiatti was shot and critically wounded as he got out of a police van to investigate suspicious activity. Officer Fumiatti's assailant fled and was apprehended several hours later hiding in bushes a few blocks from the scene of the

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[2] This case has been before this Court once before on interlocutory appeal. The Government appealed a suppression order entered by the district court (Squatrito, J.). JA-7. This Court affirmed the suppression order in a published opinion, *United States v. Mills*, 412 F.3d 325 (2d Cir. 2005), and subsequently denied the Government's petition for rehearing and rehearing *en banc* on December 12, 2005. The mandate issued on May 8, 2006. JA-8. While the interlocutory appeal was pending, the case was re-assigned to a different district judge. JA-6.

[3] Mills did not object to the factual recitations of the offense of conviction set forth in the PSR. *See* GA-93-94. Further, Mills, as part of his plea agreement, entered into a stipulation of offense conduct that includes certain of the facts set forth herein. *See* Attachment to PSR.

shooting. The assailant was Arnold Bell. A gun was found at the scene, a Colt Cobra .38 caliber revolver, serial number F99443. The cylinder of the gun contained one spent shell casing and three live rounds. PSR ¶ 12. Police ran a trace on the gun and determined that it was registered to Michael Rice. Rice was the registered owner of three handguns, including the Colt used to shoot the officer.[4] *Id.*

Two days after the shooting, police arrested Rice for the illegal transfer of a firearm. Rice immediately cooperated with police and gave a sworn statement. He told police that, in late 2001 through early 2002, he had a serious crack cocaine habit. He would frequent the Hill section of New Haven to buy crack, and his primary supplier was someone he knew as "G Knocker," later identified by police as Gary Mills. PSR ¶ 13. At times when Rice did not have sufficient cash to buy crack, Mills would accept certain items that he would hold until Rice could bring him the money. Rice would then pay Mills double the amount he owed him for the crack and retrieve the items he had given him. Rice noted that he had given Mills his tool box (Rice was employed as an elevator repairman) to hold in exchange for crack on one occasion. *Id.*

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[4] Arnold Bell was eventually charged in federal court with Possession of a Firearm by a Convicted Felon, based on his possession of the Colt Cobra at the time of the shooting, and he was convicted after a jury trial. He was also charged in state court with the shooting of Officer Fumiatti, and he was convicted of those charges after a trial. PSR ¶ 12.

When asked about the guns that were registered to him, Rice related that he carried the guns, including the Colt Cobra, in a lockbox in his car. He said that, on one occasion in late 2001 when he tried to buy crack from Mills, he lacked sufficient cash. Mills noticed the lockbox in Rice's car, and upon hearing that the box contained guns, Mills suggested that Rice leave the guns with him until he had the cash to pay for the crack. Rice agreed, believing he would be able to retrieve the guns as he had other items he had given to Mills. PSR ¶ 14. When Rice later returned with the money to retrieve the guns, Mills refused to return the guns and threatened Rice that he should leave. Rice never purchased crack from Mills after that time but frequented other dealers instead. Rice did not report the guns as stolen or missing. *Id.*

New Haven police prepared an arrest warrant for Mills on state gun charges. At that time, Mills was in state custody on charges unrelated to the gun or the shooting of Officer Fumiatti. Two detectives arranged to visit Mills in prison. Mills consented to the interview, and while he denied providing Arnold Bell with a gun, he made other incriminatory remarks. PSR ¶ 17. He admitted, for example, that he knew Rice, he picked Rice's photograph out of a photo array, and he admitted that he had seen Rice in the Hill neighborhood. He said that Rice came into the city from the suburbs to buy drugs. While he denied selling drugs to Rice or getting any guns from him, Mills admitted that he had accepted items from Rice as collateral of sorts in exchange for money that Mills loaned to Rice. *Id.*

Rameek Gordon, a cousin of Arnold Bell, lived in the Hill section and was involved in the drug trade. He was arrested on drug charges by federal authorities in November of 2002, and he eventually cooperated with the government. Gordon provided information about how the Colt Cobra came to be in possession of Arnold Bell and provided the link between Mills and Bell. PSR ¶ 19. Bell, who had been incarcerated until mid-February 2002, told Gordon that he planned to begin anew as a drug dealer and wanted to re-claim his old territory in the Hill section, which included the area where Officer Fumiatti ultimately was shot. Bell asked Gordon about getting a gun for him. Gordon knew Mills, had seen him with a gun, had been told by Mills that he got the gun from a customer, and believed that Mills might be willing to sell it. Gordon asked Mills whether he would be willing to sell the gun, and Mills indicated that he wanted $250 for it. PSR ¶ 20. Gordon arranged a meeting between himself, Bell, and Mills in late February of 2002. Gordon gave Mills 7 grams of crack (worth approximately $250) for the gun, and Bell took possession of the Colt. Bell retained possession until he dropped the gun at the scene of the shooting of Officer Fumiatti on June 13, 2002. PSR ¶ 21.

Mills, who had a lengthy criminal record, was indicted by a federal grand jury on February 18, 2003, for possessing the Colt Cobra as a convicted felon. PSR ¶ 1; JA-9-10. He entered a plea of guilty on the day his trial was to commence after executing a plea agreement which included a stipulation of offense conduct. PSR ¶¶ 3-10; JA-10.

B. The Sentencing

In the PSR, the Probation Officer found that Mills qualified for armed career criminal status under U.S.S.G. § 4B1.4(a) and 18 U.S.C. § 924(e) for three predicate violent felonies or controlled substances offenses, including two prior convictions for Sale of Narcotics, Conn. Gen. Stat. § 21a-277(a), and one prior conviction for Escape in the First Degree, Conn. Gen. Stat. § 53a-169(a)(2). Given Mills' extensive criminal record, he had accumulated 36 criminal history points, while only 13 are needed to reach criminal history category VI. PSR ¶¶ 39-59. With a criminal history category VI, and an adjusted offense level of 31, Mills' applicable Guideline range was 188 to 235 months of imprisonment. *See* PSR at ¶ 81. As an armed career criminal, Mills was exposed to a 15-year mandatory minimum term of imprisonment by statute, which was less than the bottom of the applicable Guideline range. *See* PSR ¶ 80, 18 U.S.C. § 924(e).

The probation officer noted that he was unaware of any circumstances that would warrant a departure from the applicable range. PSR ¶ 90.

In his objections to the PSR and again in his sentencing memorandum, Mills took issue with his status as an armed career criminal, claiming that his first degree escape conviction should not be considered a violent felony despite controlling precedent to the contrary. Mills argued that the district court should look behind his conviction and find that it was not a violent crime because it involved his failure to remain in community confinement at a private residence even though he had been transferred

there by the Connecticut Department of Corrections ("DOC") and was still an inmate and under the jurisdiction of DOC. GA-46-50. Mills urged the district court to adopt the reasoning of the Ninth Circuit Court of Appeals in *United States v. Piccolo*, 441 F.3d 1084 (9th Cir. 2006), holding that absconding from a halfway house was not a crime of violence under the career offender provisions of the Sentencing Guidelines. GA-49. In so urging, Mills asked the district court to ignore controlling precedent in this Circuit and decisions in every circuit other than the Ninth Circuit.

Mills also raised a number of bases for a downward departure, including his purported extraordinary rehabilitation, the alleged effect on him of the suicide of his sister and godfather a number of years before, and his claim that he had been subject to more restrictive terms of incarceration in the state system while serving a state sentence due to the federal detainer that had been lodged. He also argued that his escape conviction was not a "typical crime of violence" and that this circumstance justified a departure. GA-51. Mills provided little to no support for the grounds he cited. For example, he submitted nothing from the Department of Corrections to support his claim that he had been denied access to various programs due to the federal detainer that had been lodged. GA-52, 98-102.

The government submitted a letter to the Probation Officer in which it responded to Mills' claim that he did not qualify as an armed career criminal. GA-42-44. The government cited *United States v. Jackson*, 301 F.3d 59, 61 (2d Cir. 2002), and a number of other cases which have

held that an escape conviction is a violent felony under the ACCA.

At the sentencing hearing, Mills pressed his claim that his escape conviction should not be considered a violent felony under the ACCA, asserting that he had been effectively on parole. He called Melissa Carcia, a Connecticut DOC employee who supervised him at the time of his escape conviction. Carcia testified that Mills was on "transitional supervision" when he committed the crime of escape. GA-72. Carcia noted that inmates who are allowed to participate in the transitional supervision program remain Connecticut inmates who are serving their sentence, they are wards of the state, and they are transferred by DOC to serve their sentence in the community. GA-75-76. Moreover, such inmates are given ample notice of this fact. GA-75-76, 79-80. When Mills failed to report to his correctional counselor as required, she investigated his whereabouts. She discovered that he was not living at the residence where he had been transferred and that the person who lived there had not seen him and did not know where he was. Mills also failed to report to the correctional facility where he was required to report; in fact, he never reported after his initial visit with his supervisory officer. GA-81-82. Given Mills' failure to remain in the location to which he had been transferred and to abide by the conditions of his community confinement, the DOC officer prepared an arrest warrant, charging Mills with Escape in the First Degree, in violation of Conn. Gen. Stat. § 53a-169(a)(2), and referred his case to the fugitive unit. GA-81-83. Mills pled guilty to the escape charge. PSR ¶ 51.

The district court rejected Mills' argument that he should not be sentenced as an armed career criminal, noting that the law requires a sentencing court to look to the crime categorically when determining if it is a violent felony under the ACCA. GA-69. Such an approach ensures consistency and uniformity in application. *Id.* Citing *Jackson*, the district court found that an escape was a violent felony and that Mills was therefore an armed career criminal.

Mills then argued for a downward departure, reiterating certain of the bases set forth in his sentencing memorandum, primarily that he had rehabilitated himself while in prison. GA-97-99. Government counsel opposed any departure, urging the court to take into consideration Mills' extensive prior history, which led to 36 criminal history points, and the fact that Mills sold the gun at issue to a dangerous criminal, and to impose a sentence at the top of the range. GA-111-119.

At the conclusion of counsel's arguments and after hearing directly from Mills repeatedly, the district court explained on the record the reasoning behind the sentence he ultimately imposed. The judge discussed Mills' lengthy criminal history and his sustained unwillingness to abide by the law and the foreseeability to Mills that his sale of the gun to a known drug dealer might lead to further criminal activity. GA-122-126. The judge noted that he had also considered "each and every one of the factors that Congress mandated be considered in imposing sentence" and then stated explicitly what those factors are. GA-126. Thereafter, the court stated the following:

> You have been given a very definitive benefit of the doubt by virtue of the range that the guidelines provide. There is a very good reason why your sentence should not be at the top of the guideline range, the 235 months. The credit that you are entitled to includes an accommodation for the fact that you have manifested a redirection of your life . . . but on the other hand, the seriousness of the offense more than just simply a transfer, or the simple possession with no significant use of a weapon, is something I cannot ignore. I think that you have made some effort at rehabilitation, and for that, I think that giving you credit at the lower end of the sentencing guideline range is appropriate . . . I am not inclined to think that in reaching for what is a reasonable sentence, that going below the guideline range is warranted.

GA-126-127. The district court declined to depart below the range and sentenced Mills to 188 months of incarceration. *Id.* at 75-76. After imposing sentence, the court inquired of counsel for both sides whether they had any question about what the court had done. Both government counsel and counsel for Mills acknowledged that they had no questions. *Id.* at 78.

SUMMARY OF ARGUMENT

The district court correctly concluded that Mills' conviction for Escape in the First Degree under Connecticut law was a violent felony under the ACCA. In *United States v. Jackson*, 301 F.3d 59, 61 (2d Cir. 2002), this Court held that "escape, regardless of the particular circumstances, amounts to a violent felony under § 924(e)." As this Court noted, "an escape, from whatever location by whatever means, constitutes 'conduct that presents a serious potential risk of physical injury to another.'" *Id.* at 62. Mills urged the district court and urges this Court to consider the circumstances underlying his escape conviction and find that it is not a "violent felony" under the ACCA. This approach, however, is contrary to the categorical approach required by the Supreme Court in *Taylor v. United States*, 495 U.S. 575, 602 (1990), and this Court in *Jackson*. *Jackson* made clear that the danger posed to law enforcement by an escapee stems in large part from the dangers inherent in the pursuit of the escapee, regardless of the manner by which the escapee initiates his escape: escape "invites pursuit; and the pursuit, confrontation, and recapture of the escapee entail serious risks of physical injury to law enforcement officers and the public." 301 F.3d at 63. Mills was correctly sentenced as an armed career criminal.

Mills' second claim, that the district court failed to follow the requirements of *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), by purportedly not stating that it considered the grounds for departure and refused to depart from the applicable Sentencing Guidelines range, has no merit and should be rejected. The record amply

demonstrates that the district court fulfilled its obligation to calculate the relevant Guidelines range, consider that range and the relevant factors set forth in 18 U.S.C. § 3553(a), and impose a sentence that is sufficient but no greater than necessary to achieve the purposes of sentencing. The district court was explicit about the considerations that led it to impose a sentence at the bottom of the applicable range and to not depart below that range, and provided an explanation about why the court believed that sentence to be appropriate. There is no basis to find that the district judge exceeded the bounds of allowable discretion or violated the law in imposing the sentence it did.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR BY APPLYING CONTROLLING SECOND CIRCUIT PRECEDENT TO CONCLUDE THAT THE DEFENDANT'S ESCAPE CONVICTION CONSTITUTED A VIOLENT FELONY FOR PURPOSES OF THE ARMED CAREER CRIMINAL ACT.

A. Relevant Facts

The PSR found that Mills qualified for armed career criminal status under 18 U.S.C. § 924 (e) and U.S.S.G. § 4B1.4. His numerous prior convictions included two for Sale of Narcotics, in violation of Conn. Gen. Stat. § 21a-277(a), and one for Escape in the First Degree, in violation of Conn. Gen. Stat. § 53a-169(a)(2). With an adjusted

offense level of 31 and a criminal history category VI,[5] Mills' Guideline range was 188 to 235 months of imprisonment. PSR ¶¶ 39-59, 81.

Mills objected to the PSR and filed a sentencing memorandum challenging only the third offense as a predicate, arguing that it should not be deemed a violent felony because the circumstances of Mills' escape were not violent. He explained that he had been transferred to a private residence to serve out his sentence under Connecticut's transitional supervision program and that his escape involved his failure to remain at this residence and report to his correctional counselor as required. GA-46-49.[6] The government responded by letter, citing this Court's opinion in *United States v. Jackson*, 301 F.3d 59, 61-62 (2d Cir. 2002), among other cases, holding that "escape, regardless of the particular circumstances, amounts to a violent felony under § 924(e)."

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[5] Mills' criminal convictions led to a score of 36 points, nearly three times the number needed to qualify for criminal history category VI. PSR ¶¶ 39-59.

[6] By statute, the Connecticut Commissioner of Corrections is authorized to "transfer any person from one correctional institution to another or . . . to any approved community or private residence. Any inmate so transferred shall remain under the jurisdiction of said commissioner." Conn. Gen. Stat. § 18-100(e). Connecticut's escape statute includes escape from any residence to which an inmate was transferred by the Commissioner of Corrections pursuant to 18-100(e). *See* Conn. Gen. Stat. § 53a-169(a)(2).

The district court agreed with the government's position and found that under *Jackson* and the Supreme Court's decision in *Taylor v. United States*, 495 U.S. 575, 602 (1990), courts take a categorical and not a case-by-case approach when determining whether a crime is a "violent felony" under the ACCA. Because escape has repeatedly been found by courts to present a serious potential risk of physical injury to another, *see* 18 U.S.C. § 924(e)(2)(B)(ii), the district court concluded that Mills' conviction for Escape in the First Degree was a violent felony under the ACCA and that Mills qualified as an armed career criminal. GA-69.

B. Governing Law and Standard of Review

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides enhanced penalties for certain repeat offenders who are convicted of illegal possession of a gun in violation of 18 U.S.C. § 922(g). Specifically, the Act provides for a mandatory minimum sentence of 15 years' imprisonment for anyone who has been convicted previously of three predicate offenses, including violent felonies or serious drug offenses. Section 924(e) reads as follows:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court . . . for a violent felony or 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).

18 U.S.C. § 924(e)(1).

The term "violent felony" is defined in the ACCA as:

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

18 U.S.C. § 924(e)(2)(B).

The Sentencing Guidelines implement the ACCA in U.S.S.G. § 4B1.4. The Commentary to that provision notes that the term "violent felony" as used in the ACCA is defined by statute. Section 4B1.4 provides for specific offense levels and criminal history computations for defendants who qualify as armed career criminals.

In determining whether a prior conviction constitutes a violent felony under § 924(e), courts are to take a "'categorical approach,' generally looking only to the fact of conviction and the statutory definition of the prior offense rather than to the underlying facts of a particular offense." *United States v. Jackson*, 301 F.3d 59, 61 (quoting *Taylor v. United States*, 495 U.S. at 602); *see Taylor*, 495 U.S. at 600 (stating that "Congress intended

the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions").

The Connecticut Escape provision, Conn. Gen. Stat. § 53a-169, provides that a person is guilty of Escape in the First Degree if he escapes from a correctional institution or from "any public or private, non-profit halfway house, group home or mental health facility, or community residence to which he was transferred pursuant to subsection (e) of section 18-100 . . . and he is in the custody of the Commissioner of Correction . . . ."[7]

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

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[7] Mills was transferred to a community residence pursuant to Conn. Gen. Stat. § 18-100(e).

1142 (10th Cir. 1994), and *United States v. Hairston*, 71 F.3d 115, 117-18 (4th Cir. 1995)).[8]

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

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

Id. at 63.

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[8] Since this Court's decision in *Jackson*, the Ninth Circuit has held in *United States v. Piccolo*, 441 F.3d 1084, 1089 (9th Cir. 2006), that an escape may not necessarily be deemed a crime of violence under the career offender provision of the Sentencing Guidelines. In this regard, the Ninth Circuit stands alone. All other circuits have held to the contrary. *See United States v. Thomas*, 361 F.3d 653, 336 & n. 4 (D.C. Cir. 2004) (concluding that escape under any circumstance is a crime of violence under U.S.S.G. § 4B1.2(a)(2) and citing cases from nine other circuits that held the same), *judgment vacated on other grounds*, 543 U.S. 1111 (2005); *see also United States v. Winn*, 364 F.3d 7, 11-12 (1st Cir. 2004) (same holding in an opinion after *Thomas* and joining all other circuits in this regard).

Whether a prior conviction constitutes a "violent felony" under § 924(e) is an issue of statutory interpretation, which this Court reviews *de novo*. *See United States v. Danielson*, 199 F.3d 666, 672 n.2 (2d Cir. 1999).

C. Discussion

The district court properly concluded that Mills' conviction for Escape in the First Degree was a violent felony under the ACCA. This Court's decision in *Jackson* is controlling and fully supports the district court's decision to sentence Mills as an armed career criminal pursuant to 18 U.S.C. § 924(e)(2)(B)(ii). As this Court stated in *Jackson*, "an escape, *from whatever location by whatever means*, constitutes 'conduct that presents a serious potential risk of physical injury to another.'" 301 F.3d at 62 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)) (emphasis added). The escape statute in *Jackson* covered violent as well as non-violent escapes. *Id.* at 61.

Courts from other circuits have found that walkaway escapes from custody and the failure to return to custody, including from halfway houses and non-secure locations, are violent felonies under the ACCA or crimes of violence under the career offender provision of the Sentencing Guidelines.[9] *See*, *e.g.*, *United States v. Thomas*, 361 F.3d

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[9] The career offender provision of the Sentencing Guidelines defines the term "crime of violence" in language substantially identical to the definition of "violent felony" in the ACCA. *See* U.S.S.G. § 4B1.2(a) and 18 U.S.C. § 924(e) (continued...)

653, 658 (D.C. Cir. 2004) (non-violent walkaway escapes are crimes of violence under § 4B1.2 of the Sentencing Guidelines); *United States v. Winn*, 364 F.3d 7, 11-12 (1st Cir. 2004) (walkaway escape from halfway house is violent felony under career criminal provision); *United States v. Luster*, 305 F.3d 199, 202 (3d Cir. 2002) (holding that conviction under statute that "extends to a 'walk away' from custody" is a crime of violence under the Guidelines); *United States v. Gay*, 251 F.3d 950, 954-55 (11th Cir. 2001) (per curiam) (concluding that a walkaway escape from an unsecured facility constitutes a crime of violence); *United States v. Maddox*, 388 F.3d 1356, 1369 (10th Cir. 2004) (failure to return from work release is a violent felony under the ACCA); *United States v. Bryant*, 310 F.3d 550 (7th Cir. 2002) (failure to report to halfway house is crime of violence under career offender provision).

What this Court's decision in *Jackson* and the decisions of the other courts acknowledge is that the danger posed to law enforcement by an escapee stems in large part from the dangers inherent in the pursuit of the escapee, regardless of the manner by which the escapee initiates his escape: escape "invites pursuit; and the pursuit, confrontation, and recapture of the escapee entail serious risks of physical injury to law enforcement officers and the public." 301 F.3d at 63. As the Fourth Circuit recently noted in *United States v. Mathias*, "Congress, in

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[9] (...continued)
(2). In construing § 924(e), this Court looks to cases interpreting the career offender provision. *See Jackson*, 301 F.3d at 62.

enacting the ACCA, spoke in terms of risk, not result . . . 'it is not necessary that the defendant's specific conduct actually resulted in physical injury to another.' To the contrary, we examine only whether the nature of the offense presents 'a serious potential *risk* of physical injury to another.'" 482 F.3d 743, 748 (4th Cir. 2007) (emphasis in original, internal citations omitted).

In assessing escape as a crime of violence under the career offender provision of the Sentencing Guidelines, courts have noted its continuing nature. In *Thomas*, 361 F.3d at 657, the D.C. Circuit considered the federal escape statute which encompasses walkaway escapes from a halfway house and and the failure to report to unsecured locations, and noted that the crime of escape does not end until the defendant is returned to custody. *Id.* at 660. The "risk of injury" must therefore be "evaluated not only at the time of the defendant's escape from imprisonment, but at the time of his reapprehension as well." *Id.* (citing *Jackson*, 301 F.3d at 63).[10]

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[10] In this regard, the D.C. Circuit rejected dicta in an earlier decision, *United States v. (Toumani) Thomas*, 333 F.3d 280, 282 (D.C. Cir. 2003), which had suggested agreement with the notion that any lawbreaker, like any escapee, poses the same risk of violent encounter with the police. *See Thomas*, 361 F.3d at 657; *see also United States v. Adewani*, 467 F.3d 1340, 1342-43 (D.C. Cir. 2006) (re-affirming its holding that escape is a violent felony in any circumstance and explicitly rejecting *Piccolo*).

The Connecticut escape statute at issue here is similar in scope to the federal escape statute, and a violation of the Connecticut statute presents the same serious potential risk of physical injury as conduct proscribed by the federal statute. *See State v. Lubus*, 581 A.2d 1045, 1048 (Conn. 1990) (defining "escape" in related Conn. Gen. Stat. § 53a-169(a)(2) as "contemplat[ing] an unauthorized departure from, *or failure to return to*, a 'community residence'") (emphasis added); *see also Bryant*, 310 F.3d at 552 (holding that conviction under federal escape statute for failure to return to halfway house categorically constitutes a crime of violence under the Guidelines).

What Mills asked the district court to do, and urges this Court to do as well, is to go behind his escape conviction and evaluate the underlying circumstances. His request is completely at odds with the categorical approach of the Supreme Court in *Taylor* and this Court's decision in *Jackson*. Indeed, the defendants in *Thomas* urged the D.C. Circuit to find that the crime of escape was not a crime of violence because it could be committed in non-violent ways. The court in *Thomas* rejected that position, noting that such an approach would eviscerate the notion of a "categorical" definition." 361 F.3d at 658; *see also United States v. Franklin*, 302 F.3d 722, 724 (7th Cir. 2002) (stating that the issue is not "whether one can postulate a nonconfrontational hypothetical scenario") (internal quotations omitted). Rather, "the benchmark [is and] should be the possibility of violent confrontation." *Franklin*, 302 F.3d at 725.[11]

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[11] The Supreme Court recently echoed the same (continued...)

The pursuit and apprehension of a prisoner who commits the crime of escape by leaving the location where he has been transferred while he remains an inmate and under the jurisdiction of the Commissioner of Corrections and failing to report to that location or to the Corrections officer who supervises him clearly presents the possibility of violent confrontation and the potential risk of injury. Indeed, a person who has already made a conscious, affirmative decision to remove himself from official custody clearly poses a higher risk of confrontation upon apprehension than would otherwise be posed by other potential arrestees as a group, since that desire to avoid apprehension is precisely what may spark violence upon detection. Accordingly, the district court properly found that Mills' escape conviction was a violent felony under the "otherwise" clause of § 924(e)(2)(B)(ii), and Mills was correctly sentenced as an armed career criminal.

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[11] (...continued)
sentiment. "We do not view [the categorical] approach as requiring that every conceivable factual offense covered by a statute must necessarily present a serious risk of potential injury before the offense can be deemed a violent felony." *James v. United States*, __ U.S. __, 127 S.Ct. 1586, 1597, 167 L.Ed.2d 532 (2007).

II. THE DISTRICT COURT DID NOT ERR IN ELECTING NOT TO GRANT THE DEFENDANT A DOWNWARD DEPARTURE FROM HIS APPLICABLE GUIDELINE RANGE.

A. Relevant Facts

In his sentencing memorandum, Mills raised a number of bases for a downward departure, including his purported extraordinary rehabilitation, the alleged effect on him of the suicide of certain family members when he was a child, and his claim that he had been subject to more restrictive terms of incarceration in the state system due to the federal detainer that had been lodged. He also argued that his escape conviction was not a "typical crime of violence" and that this circumstance justified a departure. GA-50-52.

At the sentencing hearing, and after arguing at length about whether his escape conviction should lead to his being sentenced as an armed career criminal, Mills urged the district court to depart down to the statutory mandatory minimum sentence of 180 months, relying primarily on his purported claim that he had rehabilitated himself while in prison. GA-97-99. He did not address the other grounds raised in his memorandum. The government opposed any departure, arguing that Mills' extensive criminal history and the fact that Mills sold the gun at issue to a dangerous criminal warranted a sentence at or near the top of the applicable Guideline range. GA-111-119.

The district court determined that Mills' adjusted offense level was 31 and that his criminal history category was VI, given both the calculation of his criminal history points and his status as an armed career criminal. GA-95. With this offense level and criminal history category, the applicable Guidelines range was 188 to 235 months of imprisonment. PSR ¶ 81. The court noted that it had to take the Guideline calculation into consideration but was not "obliged" to follow it. GA-95. The court also noted its obligation to consider the factors set forth in Section 3553(a). *Id.*

The district court then heard the arguments of counsel for both sides, heard from Mills directly, and also heard the statements of numerous family members of Mills. At the conclusion of these presentations, the district court spoke at length about the reasons for the sentence that would be imposed. The judge discussed Mills' sustained unwillingness to abide by the law and the foreseeability to him that his sale of the gun to a known drug dealer might lead to further criminal activity. GA-122-126. The judge noted that he had also considered "each and every one of the factors that Congress mandated be considered in imposing sentence" and discussed them and how the combination of those factors affected the sentence in this case. GA-124. The court stated that it was not inclined to impose a sentence at the top of the Guideline range, as urged by the government, because the court believed that Mills had "manifested a redirection of [his] life" and had "made some effort at rehabilitation." GA-127. Referencing the seriousness of the offense, however, the court stated its belief that "in reaching for what is a reasonable sentence, . . . going below the guideline range

is [not] warranted." *Id.* The district court then imposed a sentence at the bottom of the range, 188 months of imprisonment. GA-127-128.

When asked after imposition of the sentence whether he had any questions about what the court had done, defense counsel said he had none. GA-130. At the conclusion of the hearing, the court addressed Mills directly and stated, "I do sense and have accounted for in the sentencing, the prospect that the rehabilitation and change in the way that you've approached life continues, and I hope it does." GA-131.

B. Governing Law & Standard of Review

After the Supreme Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), rendering the Sentencing Guidelines advisory rather than mandatory, a sentencing judge is required to: (1) calculate the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider the Guidelines range, along with the factors set forth in 18 U.S.C. § 3553(a); and (3) impose a reasonable sentence. *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

This Court reviews a sentence for reasonableness. *Rita v. United States*, 127 S.Ct. 2456 (2007); *Fernandez*, 443 F.3d at 26-27; *United States v. Castillo*, 460 F.3d 337, 354 (2d Cir. 2006). The reasonableness standard is deferential and focuses "primarily on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v.*

Canova, 412 F.3d 331, 350 (2d Cir. 2005). This Court does not substitute its judgment for that of the district court. "Rather, the standard is akin to review for abuse of discretion." *Fernandez*, 443 F.3d at 27. This Court has noted that "in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in particular circumstances." *Id.*; *see also Rita*, 127 S.Ct. at 2463-65 (courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range).

Consideration of the Guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *Fernandez*, 443 F.3d at 29. The requirement that the district court consider the Section 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Id.*; *Rita*, 127 S.Ct. at 2468-69 (affirming a brief statement of reasons by a district judge who refused downward departure; judge noted that the sentencing range was "not inappropriate"). There is no "rigorous requirement of a specific articulation by the sentencing judge." *Crosby*, 397 F.3d at 13. Indeed, a court's reasoning can be inferred by what the judge did in the context of what was argued by the parties and contained in the PSR. *United States v. Jiménez-Beltre*, 440 F.3d 514, 519 (1st Cir. 2006) (en banc).

> As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates a misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred.

United States v. Fleming, 396 F.3d 95, 100 (2d Cir. 2005).

Absent the sentencing court having committed an error of law or being unaware of its power to depart, the court's refusal to give the defendant a downward departure is not reviewable on appeal. *See United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam).

C. Discussion

Mills claims on appeal that the district court failed to follow the dictates of *Crosby* because the court did not state that it had considered the grounds for departure and refused to depart. While acknowledging that the district court discussed Mills' purported rehabilitation, explained the effect of this factor on the sentence, and noted its belief that a sentence below the Guideline range was not warranted, Mills posits that the court's remarks were somehow insufficient.

Neither Mills nor his counsel expressed such a sentiment at the time of the sentencing, however. Mills and his attorney addressed the court at length, focusing much of their argument on the facts underlying his escape conviction and the efforts Mills had made in jail towards

rehabilitation. After the court discussed its rationale and imposed sentence, neither Mills nor his counsel objected to the explanation (or lack thereof), suggested to the court that it had failed to consider grounds for departure, or expressed any uncertainty about what the court had done and why. *See United States v. Ayers*, 428 F.3d 312, 315 (D.C. Cir. 2005) (when defendant fails to object to the lack of an explanation on the record for a sentence within the Guidelines range, the appellate court reviews the sentence with the presumption that the district court knew and applied the law correctly), cited by this Court in *Fernandez*, 443 F.3d at 30. Indeed, when asked if they had any question about the court's actions, defense counsel assured the court that he had none. GA-130.

As in *Rita*, the record here amply demonstrates that the district court considered all of the § 3553 factors, as well as the arguments raised by Mills in support of a more lenient sentence. The court allowed Mills to file a written memorandum setting forth his reasons and heard extensive oral argument from both counsel and Mills himself at the proceeding. The court calculated the Guidelines range and noted that it was obliged to consider it. The court discussed the factors set forth in 18 U.S.C. § 3553(a) and stated that the import of those factors was "mixed" in this case. GA-126. The court then addressed the parties' arguments, noting that Mills' extensive criminal history, his demonstrated unwillingness to abide by the law, and the seriousness of the instant crime, all factors argued by the government, supported a sentence within the Guideline range. The court then stated that Mills' efforts towards rehabilitation, something he and his counsel had emphasized, deserved some credit, but that a sentence

below the applicable range, something requested by Mills, was not reasonable in the court's view. GA-127-128. In other words, the court made clear that it understood its authority to depart from the range, down to the statutory mandatory minimum sentence, *see* GA-97, that it had considered the statutory factors that shape the determination of the sentence, *see* GA-122-127, and that it had concluded that a sentence within the Guideline range was reasonable while a sentence below the range was not. It is hard to imagine what more the court could have said that would demonstrate its fulfillment of its statutory obligations and the dictates of *Crosby*.[12]

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[12] Mills mentioned in his memorandum as a basis for downward departure the death of a family member and his claim that he had been denied certain privileges in a state correctional facility due to the federal detainer that had been lodged against him. Other than the mention of these circumstances in his memorandum, Mills did not reiterate them during the sentencing proceeding and provided no factual or legal support for them as a basis for departure. Thus, these arguments were not discussed by the court during the sentencing proceeding. The district court is not obligated to address every argument made by a litigant, however, *see United States v. Cooper*, 437 F.3d 324, 329 (3d Cir. 2006), especially where, as in this case, a defendant provides no support for the claimed basis for a departure. *Jiménez-Beltre*, 440 F.3d at 519 (the proponent of a departure ground or factor that might work in that party's favor has to provide the basis to support it). A sentencing judge need not address every consideration or recite any "magic words" to demonstrate to the parties and a reviewing court that the judge has fulfilled his responsibility to consider relevant factors when sentencing a (continued...)

The sentencing record shows that the district court was aware of the statutory requirements and the applicable Guidelines range, that the court understood the relevance of these things, and gave them due consideration when sentencing Mills to 188 months in prison. Accordingly, that sentence should be upheld.

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[12] (...continued)
defendant. *See Crosby*, 397 F.3d at 13; *United States v. Contreras-Martinez*, 409 F.3d 1236, 1242 (10th Cir. 2005). It is sufficient if the court calculates the applicable range correctly and explains why, if the sentence is outside the range, the defendant deserves more or less. *United States v. George*, 403 F.3d 470, 472-73 (7th Cir. 2005).

CONCLUSION

For the foregoing reasons, the Court should affirm the defendant's sentence.

Dated: July 17, 2007

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,890 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

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Addendum

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

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

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

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

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

> As used in this subsection . . . the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglarly, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

Conn. Gen. Stat. § 53a-169(a)(2). Connecticut General Statutes § 53a-169(a)(2) provides in relevant part:

> A person is guilty of escape in the first degree . . . if he escapes from any public or private, nonprofit halfway house, group home or mental health facility or community residence to which he was transferred pursuant to subsection (e) of section 18-100 or section 18-100c and he is in the custody of the Commissioner of Correction or is required to be returned to the custody of said commissioner upon his release from such facility.

U.S.S.G. § 4B1.4 (2006). Section 4B1.4 of the Sentencing Guidelines provides as follows:

> (a) A defendant who is subject to an enhanced sentence under the provisions of 18 .S.C. § 924(e) is an armed career criminal.
>
> (b) The offense level for an armed career criminal is the greatest of:
>
> (1) the offense level applicable from Chapters Two and Three; or
>
> (2) the offense level from § 4B1.1 (Career Offender) if applicable; or

(3) (A) 34, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in § 4B1.2(a), or a controlled substance offense, as defined in § 4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. 5845(a)*; or

(B) 33, otherwise.*

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

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

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

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in

§ 4B1.2(a), or a controlled substance offense, as defined in § 4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. 5845(a); or

(3) Category IV.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Mills

Docket Number: 07-0308-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 7/17/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: July 17, 2007