No. 07-61

In the Supreme Court of the United States

LINWOOD CHARLES MATHIAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior conviction for escape constituted a violent felony under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 482 F.3d 743.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2007. The petition for a writ of certiorari was filed on July 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Eastern District of North Carolina to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 15 years of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-11a.

1. The Armed Career Criminal Act (ACCA) imposes a mandatory minimum term of 15 years of imprisonment on any person convicted of being a felon in possession of a firearm who had "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1) (2000 & Supp. V 2005). ACCA defines a "violent felony," in relevant part, as any crime "punishable by imprisonment for a term exceeding one year" that "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)(ii).

2. Petitioner robbed National Cash Advance, a payday lending service, while brandishing a loaded Glock 9 millimeter semi-automatic pistol. Following a high-speed chase, police arrested petitioner. Pet. App. 3a-4a.

Petitioner pleaded guilty to possessing a firearm after having been convicted of a felony. The Presentence Investigation Report determined that petitioner was subject to ACCA's 15-year minimum sentence because he had previously been convicted of three violent felonies (two burglaries and one escape). Petitioner conceded that the burglaries were violent felonies, but argued that the escape was not. The escape conviction was for violation of Va. Code Ann. § 18.2-479(B) (2004), which prohibits "any person lawfully confined in jail or lawfully in the custody of any court or officer thereof or of any law-enforcement officer on a charge or conviction of a felony," from "escap[ing], otherwise than by force or violence or by setting fire to the jail." See Pet. App. 4a-5a.

The district court overruled petitioner's objection and held that he was an armed career criminal. After determining that petitioner's advisory Sentencing

Guidelines range was 188-235 months of imprisonment, the court imposed a below-Guidelines sentence of 180 months of imprisonment, the statutory minimum. See Pet. App. 4a; Gov't C.A. Br. 5-6.

3. The court of appeals affirmed. Pet. App. 1a-11a. It held that the Virginia escape offense "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), and is thus a violent felony, because it prohibits persons from "unlawfully and feloniously escap[ing] from confinement." Pet. App. 6a. The court noted that "[e]very court of appeals to consider the question has concluded that felony escape convictions categorically constitute violent felonies within the ambit of § 924(e)." *Id.* at 7a.

The court of appeals rejected petitioner's contention that the Virginia offense at issue here is not a violent felony because it applies only to an escape "other than by force or violence or by setting fire to the jail." Va. Code. Ann. § 18.2-479(B) (2004). See Pet. App. 8a-11a. The court explained that ACCA looks to whether an offense poses a "risk" of physical injury to another, not whether it actually has that "result." *Id.* at 9a. Escape presents a serious potential risk of physical injury, the court explained, because "there is always a chance that an escape attempt will be interrupted," which would "lead[] to an immediate and substantial risk that the situation will escalate to one involving physical force." *Ibid.* (internal quotation marks and citation omitted). The court further reasoned that "[e]ven if the escape itself could somehow sidestep any potential risk of injury, the circumstances of recapture necessarily encompass just such a risk." *Ibid.* "Individuals who find custody intolerable to the point of escape are unlikely to calmly succumb to recapture efforts." *Ibid.*

ARGUMENT

Petitioner argues (Pet. 10-19) that escape accomplished by a failure to return to confinement is not a violent felony under ACCA. That argument lacks merit and does not warrant this Court's review.

1. A prior conviction for a "crime punishable by imprisonment for a term exceeding one year" qualifies as a "violent felony" under ACCA if the offense "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). Section 924(e) generally requires a "categorical approach" to determining whether or not a prior offense constitutes a "violent felony" within the meaning of Section 924(e)(2)(B). *Taylor* v. *United States*, 495 U.S. 575, 600-602 (1990). Under that "categorical approach," sentencing courts must "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying th[e] convictions." *Ibid*.

That approach does not, however, "requir[e] that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony." *James* v. *United States*, 127 S. Ct. 1586, 1597 (2007). "Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *Ibid.*

The crime of escape is a violent felony because, in the ordinary case, it poses a serious potential risk of physical injury. As the Tenth Circuit has explained:

> [E]very 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 al-

> ways has the serious potential to do so. A defendant who escapes from a jail 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. Consequently, violence could erupt at any time. Indeed, even in a case where a defendant escapes from a jail by stealth and injures no one in the process, there is still a serious potential risk that injury will result when officers find the defendant and attempt to place him in custody.

United States v. *Moudy*, 132 F.3d 618, 620, cert. denied, 523 U.S. 1036 (1998) (quoting *United States* v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994)); see Pet. App. 7a, 9a-10a.

Petitioner argues (Pet. 18-19) that a failure-to-report offense, unlike an escape accompanied by violence, creates no risk of injury in the ordinary case. Petitioner is incorrect. At the outset, the Virginia offense at issue here is not limited to failures to return to custody. Instead, it applies whenever "any person lawfully confined in jail or lawfully in the custody of any court or officer thereof or of any law-enforcement officer on a charge or conviction of a felony escapes, otherwise than by force or violence or by setting fire to the jail." Va. Code. Ann. § 18.2-479(B) (2004). Under the categorical approach, therefore, the nature of the particular escape at issue here—*i.e.*, that petitioner failed to return as opposed to escaping directly from a jail through the use of force—is not controlling. See Pet. App. 5a (rejecting petitioner's reliance on "the particular circumstances of his escape").

In any event, an escape accomplished by a failure to return to custody presents a serious potential risk of physical injury, even if that risk does not ripen into ac-

tual violence. Escape presents a "powder keg" situation. *Gosling*, 39 F.3d at 1142; Pet. App. 9a. "Even though initial circumstances of an escape may be non-violent, there is no way to predict what an escapee will do when encountered by authorities." *United States* v. *Turner*, 285 F.3d 909, 916 (10th Cir.), cert. denied, 537 U.S. 895 (2002).

Moreover, even if an escape succeeds and does not result in physical injury, the subsequent recapture of the escapee presents a serious potential risk of physical injury. While petitioner contends (Pet. 19) that apprehension of any felon presents some risk of injury, that risk is heightened for escapees. "Individuals who find custody intolerable to the point of escape are unlikely to calmly succumb to recapture efforts." Pet. App. 9a.

2. As the court of appeals explained, "[e]very court of appeals to consider the question has concluded that felony escape convictions categorically constitute violent felonies within the ambit of § 924(e)." Pet. App. 7a; see, *e.g.*, *United States* v. *Maddox*, 388 F.3d 1356, 1368-1369 (10th Cir. 2004) (failure to return from work-release program), cert. denied, 544 U.S. 935 (2005); *United States* v. *Adams*, 442 F.3d 645, 647 (8th Cir. 2006) ("walkaway" escape), cert. denied, 127 S. Ct. 2095 (2007); *United States* v. *Golden*, 466 F.3d 612 (7th Cir. 2006) (failure to report to county jail), petition for cert. pending, No. 06-10751 (filed Apr. 9, 2007).

a. The Sixth Circuit recently drew a narrow exception to that general rule and held that, if a state escape offense is not considered a continuing offense, but instead is complete upon the defendant's departure from custody, it is not a violent felony under ACCA. *United States* v. *Collier*, 493 F.3d 731, 737 (2007); *United States* v. *Lancaster*, No. 06-5668, 2007 WL 2457448, at *5-*6

(Aug. 31, 2007). The Sixth Circuit stressed that escape is generally viewed as a continuing offense, and that only six States—not including Virginia—arguably take a contrary view. *Id.* at *6. Thus, any nascent conflict on the treatment of non-continuing escape offenses has limited scope and is not implicated here.

b. Petitioner relies (Pet. 10-12) on the Ninth Circuit's decision in *United States* v. *Piccolo*, 441 F.3d 1084 (2006), which concluded that a walkaway escape from a halfway house was not a "crime of violence" under Sentencing Guidelines § 4B1.2(a)(2). *Piccolo*, 441 F.3d at 1086-1090. Significantly, however, *Piccolo* interprets the Sentencing Guidelines, not ACCA. Although some of *Piccolo*'s reasoning appears to signal that the Ninth Circuit would hold that walkaway escapes are not violent felonies for purposes of ACCA, to date the Ninth Circuit has not reached that question.[1]

Because the Sentencing Commission is charged by Congress with "periodically review[ing] the work of the

[1] As the court of appeals noted (Pet. App. 8a n.2), the Ninth Circuit's interpretation of the Sentencing Guidelines conflicts with the decisions of every other court of appeals to consider the Guidelines question. See, *e.g.*, *United States* v. *Winn*, 364 F.3d 7, 12 (1st Cir. 2004); *United States* v. *Thomas*, 361 F.3d 653, 657-660 (D.C. Cir. 2004), vacated on other grounds, 543 U.S. 1111 (2005); *United States* v. *Bryant*, 310 F.3d 550, 554 (7th Cir. 2002); *United States* v. *Luster*, 305 F.3d 199, 202 (3d Cir. 2002), cert. denied, 538 U.S. 970 (2003); *United States* v. *Gay*, 251 F.3d 950, 954-955 (11th Cir. 2001) (per curiam); *United States* v. *Ruiz*, 180 F.3d 675, 676-677 (5th Cir. 1999); *United States* v. *Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999). The court of appeals did not, as petitioner contends (Pet. 10), "not[e] that its holding conflicts with" *Piccolo*. To the contrary, the court emphasized that the courts of appeals are in agreement on the ACCA question presented here. Pet. App. 7a. The court then observed in a footnote that the Ninth Circuit disagreed with other circuits on the interpretation of the Guidelines, which are not at issue here. See *id.* at 8a n.2.

courts" in applying the (now-advisory) Guidelines and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest," *Braxton* v. *United States*, 500 U.S. 344, 348 (1991), the Ninth Circuit's Guidelines decision in *Piccolo* does not warrant review of the statutory question presented in this case. See *Rita* v. *United States*, 127 S. Ct. 2456, 2464 (2007) ("The Commission's work is ongoing" and includes responding to court decisions.); *United States* v. *Booker*, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.").

c. Petitioner's reliance (Pet. 12-16) on statements in other opinions is misplaced. *United States* v. *Thomas*, 333 F.3d 280, 282-283 (D.C. Cir. 2003), does not support petitioner's position. In that case, the D.C. Circuit simply reserved the question whether a walkaway escape would qualify as a crime of violence under Guidelines § 4B1.2. That court later held, albeit in a decision vacated on other grounds, that such escapes are violent felonies. *United States* v. *Thomas*, 361 F.3d 653, 658 (2004), vacated on other grounds, 543 U.S. 1111 (2005). Those decisions are distinguishable because they interpret the Guidelines, but they are fully consistent with the decision below in any event.

Petitioner misquotes (Pet. 14) *United States* v. *Chambers*, 473 F.3d 724 (7th Cir. 2007), petition for cert. pending, No. 06-11206 (filed May 8, 2007), for the proposition that holding an escape like petitioner's to be a violent felony is an "embarrassment to the law." Instead, the Seventh Circuit—which held that all escapes are violent felonies—considered it embarrassing to have

to speculate about the risk of physical injury from various types of escapes, as opposed to relying on statistics. 473 F.3d at 726-727. While statistics may be helpful, they are not required. See *James*, 127 S. Ct. at 1598. And when statistics are not available, courts must necessarily rely on the types of considerations discussed above.[2]

3. This Court has recently denied petitions for writs of certiorari presenting virtually the same question as the petition in this case. See, *e.g.*, *Brooks* v. *United States*, 127 S. Ct. 3003 (2007) (No. 06-9681); *Flowers* v. *United States*, 127 S. Ct. 2935 (2007) (No. 06-9220); *Adams* v. *United States*, 127 S. Ct. 2095 (2007) (No. 06-6541); *Ballard* v. *United States*, 127 S. Ct. 2094 (2007) (No. 06-5729). The Court should deny this petition as well.

Alternatively, the Court may wish to hold the petition pending its decision in *Begay* v. *United States*, cert. granted, No. 06-11543 (Sept. 25, 2007), which presents the question whether driving while intoxicated is a "violent felony" under ACCA. While this case and *Begay* involve different crimes, they both involve the question whether a particular crime "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). Thus, this Court may wish to hold this petition for *Begay*, or may conclude

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[2] Petitioner relies (Pet. 12-13) on concurring opinions in *United States* v. *Adkins*, 196 F.3d 1112 (10th Cir. 1999), cert. denied, 529 U.S. 1030 (2000), and *United States* v. *Taylor*, 489 F.3d 1112 (11th Cir. 2007). But those decisions affirmed ACCA-enhanced sentences based in part on prior escape convictions, and those circuits have also held that escape convictions of all types are violent felonies under ACCA. See, *e.g.*, *Moudy*, *supra*; *Taylor*, 489 F.3d at 1114 & n.3.

that the differences between the cases make it unnecessary to do so.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending this Court's disposition of *Begay* v. *United States*, No. 06-11543, and then disposed of as appropriate in light of this Court's decision in that case.

Respectfully submitted.

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