No. 07-668

In the Supreme Court of the United States

JASON DANIEL TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH 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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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 489 F.3d 1112.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2007. A petition for rehearing was denied on August 20, 2007. Pet. App. 22a. The petition for a writ of certiorari was filed on November 16, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Florida, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to 72 months of imprisonment, to be

followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-13a.

1. The Armed Career Criminal Act (ACCA) imposes a mandatory minimum term of 15 years of imprisonment for any person convicted of possession of a firearm by a felon if that person had "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1) (2000 & Supp. V 2005). The 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. On July 24, 2004, petitioner, who had six prior felony convictions, sold a rifle to a pawn shop in Tallahassee, Florida. After the Bureau of Alcohol, Tobacco, and Firearms investigated the sale, petitioner was charged with one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g). Petitioner later pleaded guilty to the count. Presentencing Report paras. 7-13 (PSR); Gov't C.A. Br. 2-3.

The probation officer recommended in the PSR that petitioner be sentenced under the ACCA's 15-year minimum sentence because he had previously been convicted of three violent felonies (two burglaries and one escape). PSR paras. 22, 70. At sentencing, petitioner argued that his escape conviction was not a violent felony.[1] The district court overruled petitioner's objection and held that he was an armed career criminal. After determining

[1] The escape conviction was for violation of a Florida state law which prohibits any "prisoner confined in any prison, jail, road camp, or other penal institution," from "escap[ing] or attempt[ing] to escape from such confinement[.]" Fla. Stat. Ann. § 944.40 (1998).

that petitioner's advisory Sentencing Guidelines range was 180-210 months of imprisonment, the court imposed a sentence of 72 months of imprisonment—below the Guidelines range and the statutory minimum—based on the government's motion, pursuant to Sentencing Guidelines § 5K1.1, for a reduction in petitioner's sentence because of substantial assistance. See 5/25/06 Sent. Tr. 13-14; Gov't C.A. Br. 2;

3. The court of appeals affirmed. Pet. App. 1a-11a. The court followed its ruling in *United States* v. *Gay*, 251 F.3d 950 (11th Cir. 2001), which held that the Georgia offense of escape is a violent felony for the purposes of determining armed career criminal status under the Sentencing Guidelines. Pet. App. 2a-3a.

The court of appeals rejected petitioner's invitation to distinguish between his "non-violent 'failure to return' to a halfway house and other types of escapes," Pet. App. 4a n.3, explaining that such a distinction was foreclosed by its decision in *Gay*, as well as this Court's mandate in *Taylor* v. *United States*, 495 U.S. 575 (1990), that courts apply a categorical approach to violent felony determinations. Pet. App. 4a n.3. The court also noted that the Second Circuit had previously determined in *United States* v. *Jackson*, 301 F.3d 59 (2d Cir. 2002), that a conviction under the same Florida escape statute was always a violent felony under Section 924(e). Pet. App. 4a n.3

Judge Hill wrote a separate concurring opinion, which Judge Wilson joined. Pet. App. 4a-11a. While Judge Hill agreed that the court of appeals' decision in *Gay* compelled the decision in this case, he "wish[ed] to join a tiny, but growing, chorus[] of doubt that a district court is permitted to enhance a sentence under the ACCA based in part upon a 'failure to return' prior es-

cape conviction," *id.* at 4a-5a, and to "express [his] agreement with those who reject the rule that escape is categorically a violent felony," *id.* at 10a.

ARGUMENT

Petitioner argues (Pet. 7-12) that escape accomplished by a failure to return to confinement is not a violent felony under the 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 the 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 the 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." *Id.* at 600.

The categorical 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 always 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)).

Petitioner errs in asserting (Pet. 11-12) that a failure-to-report offense, unlike an escape accompanied by violence, creates no risk of injury in the ordinary case. As an initial matter, the Florida offense at issue here is not limited to failures to return to custody. Instead, it applies whenever "[a]ny prisoner confined in any prison, jail, road camp, or other penal institution, state, county, or municipal, working upon the public roads, or being transported to or from a place of confinement * * * escapes or attempts to escape from such confinement[.]" Fla. Stat. Ann. § 944.40 (1998). Under the categorical approach any argument about 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 persuasive. See Pet. App. 4a & n.3 (rejecting petitioner's argument that the

court should "distinguish between his non-violent 'failure to return' to a halfway house and other types of escapes").

In any event, an escape accomplished by a failure to return to custody presents a "powder keg" situation because the subsequent recapture of an escapee gives rise to a serious potential risk of physical injury, even if that risk does not ripen into actual violence. *Gosling*, 39 F.3d at 1142. "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). While petitioner contends (Pet. 11-12) that apprehension of any "lawbreaker" 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." *United States* v. *Mathias*, 482 F.3d 743, 748 (4th Cir. 2007), petition for cert. pending, No. 07-61 (filed July 12, 2007); see *United States* v. *Jackson*, 301 F.3d 59, 63 (2d Cir. 2002) ("[E]scape invites pursuit; and the pursuit, confrontation, and recapture of the escapee entail serious risks of physical injury to law enforcement officers and the public."), cert. denied, 539 U.S. 952 (2003).

2. Petitioner greatly overstates (Pet. 8-10) the extent to which courts of appeals are divided over the question whether a felony escape conviction constitutes a violent felony under the ACCA or a crime of violence under the Sentencing Guidelines. In fact, every circuit to have confronted the specific question presented here, whether a felony escape offense categorically constitutes a violent felony under the ACCA, has answered in the affirmative. See, *e.g.*, *United States* v. *Lancaster*, 501

F.3d 673, 679-681 (6th Cir. 2007), petition for cert. pending, No. 07-7987 (filed Nov. 29, 2007); *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); *Mathias*, 482 F.3d at 748 ("walkaway" from work release program).

a. Petitioner is mistaken in contending (Pet. 9-10) that the conflict between this case and the Sixth Circuit's decision in *United States* v. *Collier*, 493 F.3d 731 (6th Cir. 2007), warrants this Court's review. In *Collier*, the Sixth Circuit drew a narrow exception to its general rule that a felony escape conviction is a violent felony under the ACCA for state escape offenses that a State deems not a continuing offense, but instead complete upon the defendant's departure from custody. *Id.* at 735; see *Lancaster*, 501 F.3d at 679-680 (stressing that escape is generally viewed as a continuing offense, and that only six states "arguably" take a contrary view). *Id.* at 680. Because the Florida escape statute, like the Michigan statute at issue in *Collier*, defines the offense of escape as complete when a defendant leaves custody without having been discharged, the Eleventh Circuit's opinion in this case conflicts with the decision in *Collier*. This case would be a particularly poor vehicle to address that question, however, because petitioner did not raise the issue in the district court or on direct appeal. Accordingly, reversal would be appropriate only if petitioner could show plain error, which he cannot. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993). Be-

cause the courts of appeals have overwhelmingly concluded that felony escape convictions categorically constitute violent felonies within the ambit of § 924(e), any error could not be "clear" or "obvious." *Ibid.*

b. Contrary to petitioner's contention (Pet. 8), the court of appeals' decision does not conflict with 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).[2] *Piccolo*, 441 F.3d at 1088. Significantly, *Piccolo* interpreted the Sentencing Guidelines, not the ACCA. Because the Sentencing Commission is charged by Congress with "periodically review[ing] the work of the 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 con-

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[2] Additionally, this case does not conflict with any decision from the D.C. Circuit. The language petitioner cites (Pet. 11-12) from the D.C. Circuit's decision in *United States* v. *Thomas*, 333 F.3d 280, 282 (2003), was merely dicta. See *id.* at 283 (reserving 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 (D.C. Cir. 2004), vacated on other grounds, 543 U.S. 1111 (2005).

tinue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."); see also *Kimbrough* v. *United States*, 128 S.Ct. 558, 574 (2007) ("While [*Booker*] render[ed] the Sentencing Guidelines advisory * * * "we have nevertheless preserved a key role for the Sentencing Commission."). Although some of *Piccolo*'s reasoning may suggest that the Ninth Circuit would hold that walkaway escapes are not violent felonies for purposes of the ACCA, to date the Ninth Circuit has not reached that question.

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. 06-9320); *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 the 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). To the extent that this Court has decided to hold petitions claiming that escape is a violent felony, *e.g.*, *Mathias* v. *United States*, petition for cert. pending, No. 07-61 (filed July 12, 2007), the Court should accord similar treatment to this peti-

tion by holding it for *Begay* and then disposing of it as appropriate in light of the decision in that case.

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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JANUARY 2008