04-3769-cr(L)

To be Argued By:
ERIC J. GLOVER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-3769-cr(L);
04-3773-cr(XAP)

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

-vs-

JOSE RIVERA,
Defendant-Appellant-Cross- Appellee.

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

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REPLY BRIEF FOR THE UNITED STATES OF AMERICA IN SUPPORT OF ITS CROSS-APPEAL

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I. THE SUPREME COURT'S DECISION IN *BOOKER* DOES NOT ELIMINATE THE NEED FOR THIS COURT TO RESOLVE THE GOVERNMENT'S CROSS-APPEAL FROM THE DEFENDANT'S SENTENCE.

In *United States v. Booker*, 543 U.S. __, 2005 WL 50108 (U.S. Jan. 12, 2005), the Supreme Court held that the Sentencing Reform Act of 1984, which mandated

imposition of a sentence in conformity with the United States Sentencing Guidelines, violates the Sixth Amendment principles set forth in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge by a preponderance of the evidence violates a defendant's right to trial by jury. As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines to be "effectively advisory." *Booker*, 2005 WL 50108, at *16.[1] Nevertheless, "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id.* at *27. A sentence is subject to review by this Court for "reasonableness." *Id.* at *24.

Because the defendant has not appealed his sentence or invoked *Blakely* or *Booker*, and because the government's cross-appeal challenges the district court's imposition of a sentence below the statutory mandatory minimum of 15 years under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), this Court should not simply vacate the sentence and remand for resentencing in light of *Booker*. Rather, this Court should decide the issues presented on appeal, including the defendant's challenge to his conviction. If the Court affirms the conviction and agrees with the government that the ACCA applies, it should vacate the sentence and remand for resentencing under the

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[1] The Supreme Court also excised the statutory provision setting forth the standard of appellate review, 18 U.S.C. § 3742(e). *Id.* at *24.

ACCA consistent with the principles set forth in *Booker*. Such a resentencing, of course, should include proper consideration of the Sentencing Guidelines, including U.S.S.G. § 4B1.4, which concerns armed career criminals. *See Booker*, 2005 WL 50108, at *29 (remanding for the district court to "impose a sentence in accordance with" the Court's decision).

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE DEFENDANT'S ESCAPE CONVICTION DID NOT CONSTITUTE A VIOLENT FELONY FOR PURPOSES OF THE ARMED CAREER CRIMINAL ACT.

The defendant argues that this Court should not follow its decision in *United States v. Jackson*, 301 F.3d 59 (2d Cir. 2002), and the cases upon which *Jackson* relied, including *United States v. Gosling*, 39 F.3d 1140 (10th Cir. 1994), and *United States v. Hairston*, 71 F.3d 115 (4th Cir. 1995). *See Jackson*, 301 F.3d at 62 ("adopt[ing] the reasoning and holding of these cases"). The defendant claims that *Gosling* and *Hairston* did not "involve[] an escape that was of the completely non-violent and non-confrontational nature of a failure to return from furlough." Def.'s Br. at 6-7. But this simply begs the question at issue in this appeal. Moreover, as in *Jackson*, the *Gosling* court did not even recite the facts underlying the conviction at issue, but rather based its ruling upon its conclusion that during the course of an escape, "violence could erupt at any time," and that "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 escapee] and attempt to place him in custody." *Gosling*, 39 F.3d at 1142; *see also Hairston*, 71 F.3d at 118 (concluding similarly notwithstanding that it assumed *arguendo* that, as the defendant asserted, "the vast majority of felony escapes from custody in North Carolina are undertaken by stealth, and of those, most are from minimum security prisons").

Although the defendant addresses *Jackson*, *Gosling*, and *Hairston*, he does not acknowledge the cases in which four Courts of Appeals have held that even the failure to return to a halfway house involves conduct that presents the risk of serious potential risk of physical injury to another. *See United States v. Thomas*, 361 F.3d 653, 657-58 (D.C. Cir.), *petition for cert. filed*, -- U.S.L.W. -- (U.S. Oct. 12, 2004) (No. 04-6811)[1]; *United States v. Bryant*, 310 F.3d 550, 553-54 (7th Cir. 2002); *United States v. Turner*, 285 F.3d 909, 915 (10th Cir.), *cert. denied*, 537 U.S. 895 (2002); *United States v. Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999). Nor does the defendant address the point that "escape is a 'continuing offense,' which does not end until the defendant is returned to custody," *Thomas*, 361 F.3d at 660, and thus the "risk of injury" must be "evaluated not only at the time of the defendant's escape from imprisonment, but at the time of his

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[1] The defendant refers twice (Def.'s Br. at 5-6 & 7) to dicta in *United States v. (Toumani) Thomas*, 333 F.3d 280, 282 (D.C. Cir. 2003), which suggested that any lawbreaker presents the same potential risk of violent encounter with law enforcement as an escapee. But the D.C. Circuit expressly rejected this dicta in *Thomas*, 361 F.3d at 657.

reapprehension as well," *id.* (citing *Jackson*, 301 F.3d at 63). Simply put, every Court of Appeals that has been presented with the question of whether pursuing and apprehending an escapee presents a serious potential risk of physical injury to others has answered it in the affirmative.

The defendant further states that the conduct underlying his escape conviction did not involve "actual violence," and that the "charging document did not provide any details of the offense and did not allege any acts of violence on [the defendant's] part." Def.'s Br. at 5, 9. But these facts are irrelevant under the categorical approach employed by the Supreme Court in *Taylor v. United States*, 495 U.S. 575, 602 (1990), and by this Court in *Jackson*, as it is undisputed that the defendant was convicted of first-degree escape for failing to return from furlough. Indeed, as the defendant acknowledges (Def.'s Br. at 6), this Court did not even describe Jackson's escape offense conduct. *See Jackson*, 301 F.3d at 61. Rather, this Court simply took note of the conduct required for conviction under the statute and determined that it categorically constituted a "violent felony" under the ACCA. *Id.* at 61-62. This was in accord with *Taylor*, which makes clear that a district court should not engage in an "elaborate factfinding process regarding the defendant's prior offenses," and that the particular facts of the underlying offense are not relevant to the inquiry of whether the predicate offense qualifies as a violent felony. *See Taylor*, 575 U.S. at 601-02.

Although the defendant concedes that "some risk [may be] present during escape from custody," he nonetheless

argues that "it is not categorically true that a serious potential for physical injury to another exists in any and all cases where capture is possible." Def.'s Br. at 8. However, the "otherwise" clause of § 924(e)(2)(B)(ii)--which renders a felony violent if it "involves conduct that presents a serious potential risk of physical injury to another"--"calls for an assessment of risk rather than actual outcomes, and the risk that someone will get hurt during recapture (or flight to avoid recapture) does not depend on how the offender got away in the first place." *United States v. Howze*, 343 F.3d 919, 922 (7th Cir. 2003); *see also id.* (noting that in *Bryant* the defendant "failed to return to a halfway house after a spell of work release; he broke no walls and did nothing illegal other than to remain outside the halfway house beyond the permitted time").

The defendant counters that if every form of escape were "deemed to categorically present a serious risk of potential injury, then the risk of injury inherent when any offender faces arrest for any offense would require finding all offenses to be violent crimes." Def.'s Br. at 8. But this alleged slippery slope does not hold up to analysis. Although the defendant may be correct that the arrest of an individual also presents a potential risk of physical injury to others, the ACCA calls for an assessment of whether the offense which serves as the defendant's underlying felony conviction categorically presents a serious potential risk of physical injury to others, not whether an event ancillary to a conviction for an offense (*e.g.*, arrest) presents such a risk. *Cf. Howze*, 343 F.3d at 922 (holding that *the crime* of flight to avoid apprehension constitutes a violent felony under the ACCA).

Moreover, an escape initiated while on furlough--just like an escape from a halfway house, a work site or a prison--involves a person who, unlike a person subject to arrest because he or she has been accused of a crime or a person who fails to appear for a court date, is *in custody* after having been convicted of a crime and sentenced to serve time in prison or some other custodial facility. *See also Howze*, 343 F.3d at 921-22 (noting that "escape *from custody* is always a 'crime of violence'") (emphasis added). By the act of escaping from that custody, the escapee has expressed a clear willingness to resist a lawfully imposed restraint on liberty and to risk incurring further punishment for doing so upon re-apprehension. When law enforcement seeks to reimpose those lawful restraints on liberty by re-apprehending the escapee, there is clearly a potential risk that the escapee will not passively accept recapture, but rather will again take action to avoid what the escapee sought to flee--the restraint of the escapee's liberty. The apprehension of an escapee, regardless of the manner of the initial departure from custody, thus necessarily poses a serious potential risk of physical injury to others, especially to those who pursue and attempt to recapture them.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Government's Response Brief, the Court should affirm the defendant's conviction, vacate the district court's sentence and remand for imposition of a sentence under the ACCA and the Sentencing Guidelines consistent with the principles set forth in *United States v. Booker*.

Dated: January 26, 2005

Respectfully submitted,

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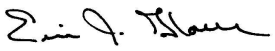

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