

No. 06 -

IN THE
SUPREME COURT OF THE UNITED STATES

Deondery Chambers — PETITIONER
(Your Name)

VS.

United States — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

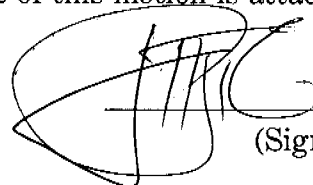
The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

7th Circuit - pursuant to 18 U.S.C. § 3006A
U.S. District Court, Southern Illinois - same

Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.



(Signature)

No. 06-

IN THE
Supreme Court of the United States

DEONDERY CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant's failure to report for confinement "involves conduct that presents a serious potential risk of physical injury to another" such that a conviction for escape based on that failure to report is a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e).

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those appearing in the caption to this petition.

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DEONDERY CHAMBERS,
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UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

Petitioner Deondery Chambers respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on January 9, 2007. It has been officially reported and can be found at *United States v. Chambers*, 473 F.3d 724 (7th Cir. 2007). It is reproduced in the Appendix at 1a-7a. The district court held a sentencing hearing on May 12, 2006 at which the judge orally ruled that the defendant's prior conviction for escape under Illinois law was a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The relevant portion of the transcript is reproduced in the Appendix at 18a-27a.

JURISDICTION

The court of appeals issued its opinion on January 9, 2007. Petitioner timely sought rehearing, which was denied on February 16, 2007. Pet. App. 14a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

18 U.S.C. 924(e) provides, in pertinent part, as follows:

(e)(1) In the case of a 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, 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).

(2) As used in this subsection—

* * * *

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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.

STATEMENT OF THE CASE

This case presents a mature split of authority regarding a recurring issue that members of this Court have recently acknowledged requires this Court's attention. The Armed Career Criminal Act ("ACCA") provides an enhanced 15 year mandatory minimum sentence, and up to life imprisonment, for anyone guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), who had previously been convicted of three serious drug and/or violent felonies. 18 U.S.C. § 924(e). Without the ACCA enhancement, the statutory maximum sentence for a violation of § 922(g)(1) is ten years.

The Courts of Appeals have diverged over whether a prior conviction for escape based on a failure to report to confinement is a "violent felony" within the meaning of the ACCA. Unlike a prison break from secure custody, a failure-to-report escape does not involve breaking free from the physical custody of an officer of the state or a secure detention facility. Failure-to-report escapes occur when a detainee is, for any of a number of reasons, provided the opportunity to move about the community without supervision for a limited period of time, but fails to return or report to his or her facility within the appointed time. It is a crime of omission.

There is a 10 to 2 split of authority on whether all escapes should be treated as violent crimes for purposes of career offender status. The Ninth Circuit has held that a failure-to-report escape is not a violent crime. *United States v. Piccolo*, 441 F.3d 1084, 1088-90 (9th Cir. 2006). The D.C. Circuit has also indicated that it would not treat a failure-to-report escape as a violent crime, and recognized that failure-to-report escapes are different from both prison breaks from secure facilities and escapes from the physical custody of an officer. *United States v. Thomas*, 333 F.3d 280, 282-83 (D.C. Cir.

2003).¹ In the decision below, Judge Posner acknowledged “[a]s an original matter, one might have doubted whether failing to report to prison, as distinct from escaping from a jail, prison, or other form of custody, was a crime that typically or often ‘involves conduct that presents a serious potential risk of physical injury to another.’” Pet. App. 2a (quoting *United States v. Golden*, 466 F.3d 612, 616-17 (7th Cir. 2006) (Williams, J., dissenting)). But the Seventh Circuit panel below was bound by prior Seventh Circuit decisions which had held that all escapes are violent crimes. *Id.* Nine other circuits have so held. *United States v. Winn*, 364 F.3d 7, 12 (1st Cir. 2004); *United States v. Rivera*, 127 F. App’x 543, 545 (2d Cir. 2005) (citing *United States v. Jackson*, 301 F.3d 59 (2d Cir. 2002)); *United States v. Luster*, 305 F.3d 199, 202 (3d Cir. 2002); *United States v. Mathias*, No. 06-4109, 2007 WL 1097952, at *3-5 (4th Cir. Apr. 13, 2007); *United States v. Ruiz*, 180 F.3d 675, 676-77 (5th Cir. 1999); *United States v. Anglin*, 169 F. App’x 971, 975 (6th Cir. 2006) (citing *United States v. Harris*, 165 F.3d 1062 (6th Cir. 1999)), *cert. denied*, 127 S. Ct. 1249 (2007); *United States v. Nation*, 243 F.3d 467, 472 (8th Cir. 2001); *United States v. Turner*, 285 F.3d 909, 915-16 (10th Cir. 2002); *United States v. Gay*, 251 F.3d 950, 952-55 (11th Cir. 2001) (per curiam).

This well developed split of authority warrants this Court’s review, especially in light of this Court’s recent decision in *James v. United States*, 127 S. Ct. 1586 (2007). The relevant provision of the ACCA defines “violent felony” by reference to a list of specific, enumerated offenses (burglary, arson, extortion or crimes involving the use of explosives). 18 U.S.C. § 924(e)(2)(B)(ii). The ACCA also includes a residual provision, covering any unenumerated felony that “otherwise involves conduct that presents a serious potential risk of

¹ *Thomas* involved an escape from the physical custody of an officer, not a failure to report. 333 F.3d at 282-83. As a result, the D.C. Circuit did not have an occasion in *Thomas* to apply its view that failure-to-report escapes “may not inherently create a risk of harm to others.” *Id.* at 283.

physical injury to another.” *Id.* Because *James* involved a crime analogous to an enumerated offense (attempted burglary), the majority opinion declined to provide a standard for determining whether an offense that is not analogous to an enumerated offense is a “violent felony” within the meaning of the ACCA. *James*, 127 S. Ct. at 1598. The dissenting opinion argued that leaving such a substantial gap in the interpretation of a frequently invoked federal criminal statute ill serves courts and counsel. *Id.* at 1601-02 (Scalia, J., dissenting). The majority did not disagree that this Court’s guidance is needed. It merely noted that a case involving a crime analogous to an enumerated offense was not an appropriate vehicle for an opinion that provides a standard for determining when a crime that is not analogous to an enumerated offense is a “violent felony.”

This case is an excellent vehicle to address this substantial gap in the interpretation and application of the ACCA. Failure-to-report escapes occur frequently, and as the body of appellate decisions ruling on whether such escapes are violent crimes indicates, they are often relied upon to support an enhanced sentence for armed career offenders. Failure-to-report escapes are not analogous to any of the crimes specifically enumerated as violent felonies in the ACCA. There is no ambiguity in the record that petitioner’s prior conviction for “escape” under Illinois law was for a failure to report to confinement, not a physical break from a secure facility or the custody of a state official.

In short, this case provides a strong vehicle for this Court to address a question of statutory interpretation that its own recent decision indicates is urgently needed. There is a well developed split of authority on the question that, as Judge Posner’s opinion indicates, will persist by force of circuit precedent in the absence of action by this Court. The petition should be granted.

1. Petitioner pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Pet. App. 1a. The

indictment also charged that petitioner had violated 18 U.S.C. § 924(e), the ACCA provision that provides for a mandatory minimum sentence of 15 years in prison for those violating § 922(g) who have previously committed three serious drug and/or violent felonies. *Id.* at 15a. The prosecution subsequently filed an information identifying the three predicate convictions it claimed were qualifying felonies under the ACCA that supported sentencing under 18 U.S.C. § 922(e). One of the convictions was for escape under Illinois law on June 30, 1999. *Id.* at 16a.

Illinois law defines an escape to include both breaking free from physical confinement (one who “escapes from any penal institution or from the custody of an employee of that institution”) and also failure-to-report escapes (one who “knowingly fails to report to a penal institution or to report for periodic imprisonment at any time or knowingly fails to return from furlough or from work and day release or who knowingly fails to abide by the terms of home confinement”). 720 ILCS 5/31-6(a). There is no dispute that Chambers’s “escape” was a failure-to-report, the Illinois charging document made clear that petitioner had been charged with knowingly failing to report for incarceration on various dates. Pet. App. 22a.

The trial court held a sentencing hearing at which petitioner challenged the categorization of his failure-to-report escape conviction as a “violent felony” within the meaning of the ACCA. The district court, citing Seventh Circuit precedent, stated that “for reasons of simplicity ... escape is escape. And we’re not going to get into the nuances of it for purposes of the sentencing statute.” Pet. App. 27a. Following Seventh Circuit authority, the district court refused to treat a failure-to-report escape as different from a custodial escape, and thus concluded that petitioner was an armed “career offender under the statute.” *Id.*

The conclusion that petitioner was an armed career offender under § 924(e) substantially enhanced his sentence, raising

his statutory minimum from 0 to 15 years, and his maximum from 10 years to life. Treating him as an armed career criminal, the district court also applied Section 4A1.4 of the Sentencing Guidelines, which incorporates the ACCA, resulting in a Guidelines range of 188 to 235 months. The district court sentenced petitioner to the low end of that range, 188 months, which is slightly above the statutory mandatory minimum of 15 years under the ACCA. Had he not been treated as an armed career criminal, petitioner's guidelines range would have been 130 to 162 months. Pet. App. 1a-2a. But he would not have been sentenced to more than 120 months because that would have been the statutory maximum for his offense.

2. Petitioner appealed his sentence, and the Seventh Circuit affirmed. Judge Posner's opinion for the court begins by noting that it "might [be] doubted" that a failure-to-report escape is typically or often a crime that poses a serious risk of physical harm to others. Pet. App. 2a. The opinion also explicitly acknowledges a split of authority regarding the treatment of failure-to-report escapes as a violent crime under the ACCA. *Id.* at 2a-3a. And the opinion further recognizes the propriety and ease of distinguishing a failure-to-report escape from "jail or prison breaks" for the purpose of determining whether the escape at issue is a violent crime under the ACCA. *Id.* at 3a.

Nonetheless, the panel chose to adhere to its own court's precedent and held that petitioner's failure-to-report escape was properly considered a violent felony under the ACCA. Pet. App. 3a-4a. Nonetheless, the opinion notes that the rule treating failure-to-report escapes like prison breaks "is an embarrassment to the law" because it is based on "a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses." *Id.* at 4a. The decision further criticizes the reasoning of the "head of the line of cases that lump all escapes together, *United States v. Gosling*, 39 F.3d 1140,

1142 (10th Cir. 1994)”—that every escape carries the potential for violence because of the “supercharged emotions” that may cause an escapee to “feel threatened by police officers, ordinary citizens, or even fellow escapees.” Pet. App. 4a. According to the court, this rationale amounted to “ruminations [that] should not be treated as authoritative” for failure-to-report escapes. *Id.* at 5a. The Seventh Circuit casts further doubt on the majority view by noting that “if the courts insist on lumping all escapes together in determining whether escape is a crime of violence, the enormous preponderance of [failure-to-reports (according to a recent study, nearly 90%)] could well compel a conclusion that escape is never a crime of violence.” *Id.* at 6a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit’s opinion acknowledges two critical facts about the treatment of failure-to-report escapes: (1) there is a well developed split of authority regarding whether a failure-to-report escape should be deemed a “violent felony,” and (2) the rationale for treating a failure-to-report escape as a “violent felony” is weak. These facts alone would warrant this Court’s review. But review in this case has been made even more compelling by this Court’s decision in *James*, which exposed the urgent need for this Court to address the proper standard for determining whether a crime, such as a failure-to-report escape, that is not analogous to those violent crimes specifically enumerated in the ACCA should be treated as a “violent felony” for purposes of the ACCA.

1. Ten courts, including the Seventh Circuit below, have stated that all escapes should be treated as a violent crime. Pet. App. 3a-4a (decision below); *Winn*, 364 F.3d at 12 (failure to return to halfway house); *Rivera*, 127 F. App’x at 545 (failure-to-report escape is a violent crime under ACCA) (citing *United States v. Jackson*, 301 F.3d 59 (2d Cir. 2002) (prisoner walking off from work program)); *Luster*, 305 F.3d at 202 (treating a conviction as a crime of violence even when

“the statute clearly extends to a ‘walk away’ from custody not involving any contemporary violence”); *Mathias*, 2007 WL 1097952, at *3-5 (walkaway from a work release program); *Ruiz*, 180 F.3d at 676-77 (walkaway from prison camp without barriers and armed guards); *Anglin*, 169 F. App’x at 975 (reasoning that any conviction under the federal escape statute, 18 U.S.C. § 751, is a crime of violence even though the statute extends to conduct as simple as reporting late to serve a sentence) (citing *United States v. Harris*, 165 F.3d 1062 (6th Cir. 1999)); *Nation*, 243 F.3d at 472 (stating that “every escape, even a so-called ‘walkaway’ escape” is a crime of violence); *Turner*, 285 F.3d at 915-16 (failure to return to halfway house); *Gay*, 251 F.3d at 952-55 (walkaway from non-secure diversion center).² As the decision below notes, the rationale for this view that has been repeatedly cited and followed by various circuits was articulated by the Tenth Circuit in *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994). *Gosling* was actually not a failure-to-report case, but involved “‘willfully, unlawfully, and feloniously escap[ing] from ... [a] County Jail.’” *Id.* at 1142 (alterations and omission in original). Nonetheless, the *Gosling* court reasoned broadly:

every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so. A defendant who escapes from a jail is likely to possess a variety of

² Several of the cases involve appeals challenging the treatment of an escape as a “crime of violence” under the Sentencing Guidelines, U.S.S.G. § 4B1.2. The definition of “crime of violence” provided in that guideline provision is nearly identical to the definition of “violent felony” in the ACCA. Compare U.S.S.G. § 4B1.2, with 18 U.S.C. § 924(e)(2)(B). For that reason, lower courts have treated cases interpreting this guideline provision as no different from cases interpreting the ACCA, and vice-versa. See *Winn*, 364 F.3d at 9 n.1 (noting uniform view of courts that interpretation and application of Guidelines provision can be applied to ACCA).

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.

Id. (internal citation omitted). The Tenth Circuit's reasoning was a material (and unnecessary) extension of the case upon which it relied, *United States v. Aragon*, 983 F.2d 1306 (4th Cir. 1993). In *Aragon*, the Fourth Circuit had held that escape from a federal prison was a crime of violence because of the circumstances of the prison custodial setting. *Id.* at 1313. That limited rationale would have been sufficient to support treating Gosling's escape from jail as a crime of violence. But the Tenth Circuit went further, looking beyond the circumstances of the case to the potential circumstances of the escapee's later apprehension.

Gosling's speculation regarding the potential for violence during recapture has proved the essential justification for treating failure-to-report escapes as violent crimes just like jail or prison breaks. *Winn*, 364 F.3d at 12 (treating failure to return to halfway house as violent crime because "there is still a serious potential risk that injury will result when officers find the defendant and attempt to place him in custody"); *Luster*, 305 F.3d at 202 (emphasizing that "the escapee must continue to evade police and avoid capture"); *Mathias*, 2007 WL 1097952, at *4 ("Even if the escape itself could somehow sidestep any potential risk of injury, the circumstances of recapture necessarily encompass just such a risk."); *Turner*, 285 F.3d at 916 ("there is no way to predict what an escapee will do when encountered by the authorities"). Indeed, the Seventh Circuit decision which bound the panel below specifically relied on the argument that "the potential for a violent confrontation arises between the defendant and law

