No. 06-11206

IN THE SUPREME COURT OF THE UNITED STATES

DEONDERY CHAMBERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH 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, 18 U.S.C. 924(e).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 473 F.3d 724.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2007. A petition for rehearing was denied on February 16, 2007. Pet. App. 14a. The petition for a writ of certiorari was filed on May 8, 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 Southern District of Illinois to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g). He was sentenced to 188 months of imprisonment under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e). The court of appeals affirmed. Pet. App. 1a-6a.

1. The ACCA mandates a minimum prison term of 15 years of imprisonment for any person convicted of being a felon in possession of a firearm if that person has "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e). The ACCA defines "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).[1]

2. A federal grand jury charged petitioner with possessing a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Following petitioner's arraignment on the felon in possession charge, the government filed an information charging him with an enhanced sentence under the ACCA because of his three prior

[1] Where the ACCA does not apply, Section 924(a)(2) provides for a 10-year maximum term of imprisonment for persons convicted of violating Section 922(g).

Illinois felony convictions, for aggravated robbery in 1998, for unlawful delivery of a controlled substance within 1,000 feet of public housing in 1999, and for escape in 1999. Pet. C.A. Br. App. 8.

Petitioner did not challenge the use of his first two convictions, but he did challenge the characterization of his escape conviction as a violent felony, because it involved his failure to return from furlough or work release on three occasions. Pet. C.A. Br. 4-5. The district court overruled that objection and held that petitioner was an armed career criminal. The court determined that petitioner's advisory guidelines range was 188 to 235 months of imprisonment, and it imposed a prison sentence of 188 months. Gov't C.A. Br. 4.

The court of appeals, adhering to its precedents -- including United States v. Golden, 466 F.3d 612 (7th Cir. 2006), pet. for cert. pending, No. 06-10751; and United States v. Bryant, 310 F.3d 550 (7th Cir. 2002) -- held that petitioner's prior escape conviction fell within Section 924(e)(1)'s requirement that the offense "involves conduct that presents a serious potential risk of physical injury to another." Pet. App. 2a-4a. While the court expressed some doubt as to whether the type of escape offense at issue here involved a serious potential risk of physical injury, the court deemed itself bound by its recent precedent, and it noted that it lacked empirical data to support distinguishing between

walkaway escapes and other escapes with respect to the potential for violence. Id. at 4a-6a.

ARGUMENT

Petitioner renews his claim (Pet. 8-19) that escape accomplished by a failure to return to confinement is not a violent felony under the ACCA. That claim lacks merit and does not warrant further review by this Court.

1. A prior conviction for a "crime punishable by imprisonment for a term exceeding one year" qualifies as a "violent felony" under Section 924(e) if the offense meets certain criteria set out in the statute or "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). This Court held in Taylor v. United States, 495 U.S. 575 (1990), that 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). 495 U.S. at 600-602. 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.

In United States v. Moudy, 132 F.3d 618, 620 (1998), the Tenth Circuit held that the crime of escape meets the Section 924(e)(2)(B)(ii) definition of a violent felony because the offense poses "a serious potential risk of physical injury to another." As

the court 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.

Ibid. (quoting United States v. Gosling, 39 F.3d 1140 (10th Cir. 1994)).

Petitioner argues (Pet. 15-17) that a "failure to report" offense creates no risk of injury to another because it is a "passive offense." Petitioner is incorrect. As explained above, whether an offense creates a serious risk of injury to another does not depend on the particular facts underlying a conviction, but rather on the statutory definition of the offense. As a general matter, escape itself -- whether or not accomplished in a violent manner -- presents a "powder keg" situation and gives rise to a serious risk of physical injury. Moudy, 132 F.3d at 620. As the Tenth Circuit stated in United States v. Turner, 285 F.3d 909 (2002), in finding that an escape conviction based on a failure to return from work release was a crime of violence, "[e]ven 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." Id. at 915-916. That rationale also applies to offenders who fail to report to jail following work release or furloughs.

2. Other circuits have agreed that an escape conviction qualifies categorically as a "violent felony" under the ACCA. United States v. Wardrick, 350 F.3d 446, 455 (4th Cir. 2003), cert. denied, 541 U.S. 966 (2004); United States v. Franklin, 302 F.3d 722, 724 (7th Cir. 2002), cert. denied, 537 U.S. 1095 (2002); United States v. Jackson, 301 F.3d 59, 62 (2d Cir. 2002), cert. denied, 539 U.S. 952 (2003); United States v. Hairston, 71 F.3d 115, 117-118 (4th Cir. 1995), cert. denied, 517 U.S. 1200 (1996).[2] The Tenth Circuit, like the Eighth Circuit, has reached the same conclusion about "failure to return" offenses. See United States v. Maddox, 388 F.3d 1356, 1368-1369 (10th Cir. 2004) (failure to return from work-release program); United States v. Adams, 442 F.3d 645 (8th Cir. 2006) ("We see no material distinction between

[2] Numerous courts have held that escape convictions categorically constitute a "crime of violence" under the identical language of the career offender Guideline, § 4B1.2. 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 and remanded 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); United States v. Dickerson, 77 F.3d 774, 777 (4th Cir.), cert. denied, 519 U.S. 843 (1996).

'walkaway' escape and failure to return to confinement."), cert. denied, 127 S. Ct. 2095 (2007); see also United States v. Golden, 466 F.3d 612 (7th Cir. 2006) (holding that conviction for failure to report to county jail is a violent felony under the ACCA).

Petitioner relies (Pet. 11) on United States v. Piccolo, 441 F.3d 1084 (2006), where the Ninth Circuit disagreed with the uniform view of the other circuits, see n.2, supra, and concluded that a walkaway escape from a halfway house was not a "crime of violence" under Guidelines § 4B1.2(a)(2). 441 F.3d at 1086-1090.[3] Review is not warranted based on that decision. Although the reasoning of the Ninth Circuit in Piccolo appears to signal that the court would reach the same conclusion with regard to the question whether escape is a violent felony under the ACCA, to date it has only addressed the analogous question under the Sentencing Guidelines.[4] 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

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[3] Petitioner also relies on dictum in United States v. Thomas, 333 F.3d 280 (D.C. Cir. 2003), where the court expressed doubt whether a walkaway escape would qualify as an escape under § 4B1.2 of the Guidelines. Id. at 282-283. The court ultimately held, however, that the offense involved in that case -- escape from a police officer -- was a violent felony under the Guidelines. Id. at 283.

[4] Petitioner notes (Pet. 13) that the Ninth Circuit has applied Piccolo to other escape offenses, but all of those cases have involved the classification of escapes under the Guidelines, not the ACCA.

clarifying revisions to the Guidelines conflicting judicial decisions might suggest," Braxton v. United States, 500 U.S. 344, 348 (1991), the Ninth Circuit's decision in Piccolo does not warrant review of the statutory question presented in this case. See also 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.").[5]

3. This Court's decision in James v. United States, 127 S. Ct. 1586 (2007), provides no basis for granting the petition in this case. James held that attempted burglary of a dwelling under Florida law is a "violent felony" within the meaning of the ACCA. This case, in contrast, concerns the crime of escape from a penal institution, and therefore presents a different question from the one presented in James. The Court in James, moreover, made clear that Taylor's categorical approach does not "requir[e] that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can

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[5] Petitioner relies (Pet. 14, 18) on Judge McKay's concurring opinion in United States v. Adkins, 196 F.3d 1112, 1118 (10th Cir. 1999), but the Adkins decision in fact affirmed the imposition of an ACCA-enhanced sentence based in part upon a prior escape conviction. In any event, the Tenth Circuit's established position, as expressed in Moudy and United States v. Turner, 285 F.3d 909 (2002), is that escape convictions of all types are predicate offenses under the ACCA.

be deemed a violent felony." 127 S. Ct. at 1597. Following this Court's decision in James, the Court denied petitions for writs of certiorari presenting virtually the same question as the petition in this case in Adams v. United States, 127 S. Ct. 2095 (2007) (No. 06-6541), and Ballard v. United States, 127 S. Ct. 2094 (2007) (No. 06-5729).[6] There is no reason for a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Petitioner notes (Pet. 18) that Judge Posner in this case desired to see statistics on how often failure-to-report or walkaway escapes present a serious potential risk to the public or to law enforcement officers. While such statistics may he helpful, James indicates that they are not required. 127 S. Ct. at 1598. And petitioner acknowledges that he has no statistics to support his suggestion that walkaway escapes pose a lesser danger than is required to satisfy the ACCA.