UNITED STATES v. CHAMBERS: NONCUSTODIAL ESCAPES DO NOT ALWAYS CONSTITUTE A VIOLENT CRIME FOR PURPOSES OF THE ARMED CAREER CRIMINAL ACT

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I. INTRODUCTION

A Seventh Circuit panel, on January 9, 2007, affirmed a district court's judgment that Deondery Chambers's conviction under Illinois law for felonious escape[1] constituted a violent felony for purposes of sentencing enhancement under the Armed Career Criminal Act (ACCA).[2] The district court convicted Chambers for felonious escape because he failed to report to a penal institution for weekend confinement following his felony conviction.[3] Chambers claimed that the court should differentiate between noncustodial escape and custodial escape, with only the latter presenting a "serious potential risk of physical injury to another"[4] sufficient to constitute a violent felony for purposes of sentencing enhancement,[5] and argued that his failure to report did not endanger anyone so it should not be considered a violent felony.[6]

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1. Illinois defines felonious escape not only as "intentionally escap[ing] from any penal institution or from the custody of an employee of that institution," but also as "knowingly fail[ing] to report to a penal institution or to report for periodic imprisonment." 720 Ill. Comp. Stat. Ann. 5/31-6 (West 2008).

2. United States v. Chambers (*Chambers I*), 473 F.3d 724, 726 (7th Cir. 2007).

3. *Id.* at 725.

4. 18 U.S.C. § 924(e) (2000).

5. *Chambers I*, 473 F.3d at 726.

6. *See* Brief of the Petitioner at 2, 6, United States v. Chambers, No.06-11206 (7th Cir. July 30, 2008) [hereinafter Petitioner's Brief] (arguing that "the mere failure to report for periodic confinement" does not qualify as a violent felony and explaining how Chambers has disputed likewise).

The Seventh Circuit acknowledged the virtue of categorizing escapes because noncustodial escapes, such as walkaways or failures to report, seem less likely to lead to violence than custodial escapes, such as prison breaks.[7] Nonetheless, the court followed its recent precedents categorizing all felonious escapes as violent felonies and held that Chambers's escape, regardless of its nature, constituted a violent felony pursuant to the ACCA.[8]

The Seventh Circuit denied Chambers's petition for rehearing *en banc* on February 16, 2007,[9] and on October 6, 2008, the United States Supreme Court granted Chambers's petition for a writ of certiorari.[10] On January 13, 2009, the Supreme Court issued its opinion, holding that a "failure to report" escape, as in Chambers's case, is not a "violent felony" within the terms of the ACCA.[11]

II. FACTS

Deondery Chambers, on May 31, 2005, was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g).[12] The government sought to enhance Chambers's sentence by asserting that Chambers had three prior convictions for violent felonies, which qualified him as an armed career criminal under the ACCA.[13] Chambers's three convictions are the following: a July 1998 conviction for robbery and aggravated battery, a February 1999 conviction for escape, and a June 1999 conviction for drug possession and distribution near public housing.[14] Part of his sentence for the first conviction included reporting to the Jefferson County, Illinois, jail for eleven weekends of confinement.[15] Chambers, however, failed to report on four occasions,[16] resulting in his February 1999 conviction

7. *See Chambers I*, 473 F.3d at 726 (explaining that there is "no impropriety in dividing escapes, for purposes of 'crime of violence' classification, into jail or prison breaks on the one hand and walkaways, failures to report, and failures to return, on the other").

8. *Id.*

9. United States v. Chambers (*Chambers II*), No. 06-2405, 2007 U.S. App. LEXIS 5280, at *2 (7th Cir. Feb. 16, 2007).

10. United States v. Chambers (*Chambers I*), 473 F.3d 724 (7th Cir. 2007), *cert. granted*, 128 S. Ct. 2046 (mem.) (U.S. Apr. 21, 2008) (No. 06-11206).

11. United States v. Chambers (*Chambers III*), 129 S. Ct. 687, 689 (2009).

12. Petitioner's Brief, *supra* note 6, at 3, 6.

13. *Id.*

14. *Id.*

15. *Id.* at 3.

16. *Id.*

for felonious escape under Illinois law.[17] Chambers pled guilty to the charge.[18]

At the sentencing hearing, Chambers did not dispute that the first two convictions qualified as predicate offenses under the ACCA.[19] As to the third conviction, however, Chambers asserted that his failure-to-report escape did not present the level of risk required to constitute a violent felony triggering sentencing enhancement.[20]

III. LEGAL BACKGROUND

The ACCA provides for enhanced sentencing of a defendant who is convicted of being a felon in possession of a firearm in violation of § 922(g) and who has three previous convictions for serious drug offenses or violent felonies.[21] Congress intended that the ACCA target "career criminals"[22] who commit serious crimes as "their means of livelihood"[23] and it requires a minimum fifteen year prison sentence.[24]

The ACCA defines "violent felony" as "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 . . . if committed by an adult."[25] Furthermore, the ACCA requires that the crime "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another"[26] or "[be a] burglary, arson, or extortion, involv[ing] use of explosives, or otherwise involv[ing] conduct that presents a serious potential risk of physical injury to another."[27]

A circuit split developed regarding whether *every* escape, regardless of its nature, categorically qualified as a violent felony

17. *Id.*
18. *Id.*
19. *Id.* at 6.
20. *Id.* at 6, 15 (disputing that failure-to-repot escape is not a violent felony because it lacks "purposeful, violent, and aggressive conduct").
21. 18 U.S.C. § 924(e) (2000).
22. Taylor v. United States, 495 U.S. 575, 587 (1990).
23. *Id.*
24. § 924(e).
25. *Id.*
26. *Id.*
27. *Id.*

pursuant to the ACCA.[28] The federal circuits' debates focused on whether all escapes "otherwise involve[] conduct that *presents a serious potential risk of physical injury to another*."[29]

A. Escape as a Violent Felony in the Seventh Circuit

The Seventh Circuit primarily based its holding in Chambers's case on its two prior cases—*United States v. Bryant*[30] and *United States v. Golden*[31]—in which the Circuit dealt with the identical issue of whether a noncustodial escape involving the failure to report to a penal institution constituted a violent felony pursuant to the ACCA. In both cases, the defendants faced an ACCA sentencing enhancement, with failure-to-report escape cited as one of their predicate offenses.

The defendant in *Bryant* was convicted of felonious escape for failing to return on schedule to a halfway house.[32] The defendant objected to the classification of his escape as a violent felony for purposes of a sentencing enhancement.[33] He requested that the court adopt a fact-specific approach in deciding whether his noncustodial escape, which involved merely a failure to return, should be treated as a violent felony.[34]

The court, however, adopted a categorical approach to the issue—examining only the fact of conviction and the statutory elements of the crime, but not the underlying facts—to determine that the defendant's felonious escape constituted a violent felony.[35] The court based its decision on *Taylor v. United States*,[36] in which the Supreme Court rejected a fact-specific, case-by-case approach, and instead offered a categorical approach for determing if an offense qualified as a violent felony for purposes of the "otherwise involves . . ." language of the ACCA,[37] herein referred to as the "residual provision."[38]

28. *See* United States v. Chambers (*Chambers I*), 473 F.3d 724, 726 (7th Cir. 2007) (explaining that except for the D.C. and the Ninth Circuits, the federal circuit courts have held that every escape qualifies as a violent felony under the ACCA).
29. *Id.* (emphasis added).
30. United States v. Bryant, 310 F.3d 550 (7th Cir. 2002).
31. United States v. Golden, 466 F.3d 612 (7th Cir. 2006).
32. *Bryant*, 310 F.3d at 552.
33. *Id.*
34. *Id.* at 553.
35. *Id.* at 554.
36. Taylor v. United States, 495 U.S. 575 (1990).
37. *Bryant*, 310 F.3d at 554.
38. James v. United States, 550 U.S. 192, 197 (2007).

Applying the categorical approach, the *Bryant* court held that all escapes—both custodial and noncustodial—fall within the category of crimes that involve the possibility of a violent confrontation and therefore qualify as violent felonies.[39] To justify treating every escape categorically as a violent felony, the *Bryant* court explained that to hold some escapes as involving less risk of violence because they are closer to "failure to return" than "escape" invites difficult line-drawing problems that the Supreme Court sought to avoid by adopting the categorical approach in *Taylor*.[40]

The *Golden* case, likewise, involved a noncustodial escape and addressed the issue of whether the failure to report to a penal institution falls within the residual clause so as to qualify as a violent felony.[41] Again, the *Golden* court applied the categorical approach and held that escape crimes, as a category, involve the possibility of violent confrontation and therefore constitute violent felonies.[42] According to the *Golden* court, the fact that noncustodial escapes, such as the failure to report, involve passive inaction rather than the deliberate act of breaking out of prison makes no difference—they all qualify as a violent felony.[43]

B. Escape as a Violent Felony in the Ninth and D.C. Circuits

When first addressing sentencing enhancements for escape crimes, neither the D.C. Circuit nor the Ninth Circuit rejected the categorical approach[44] in favor of the fact-specific approach, but both circuits refused to find that *every escape* constitutes a violent felony for sentencing enhancement purposes. For instance, the D.C. Circuit did not reject the classification of all escapes as violent felonies but did express reluctance to apply the categorical approach.[45] Faced with a custodial escape, the D.C. Circuit simply avoided the issue, noting that

39. *Bryant*, 310 F.3d at 554.
40. *Id.*
41. United States v. Golden, 466 F.3d 612, 612 (7th Cir. 2006).
42. *Id.* at 614–15.
43. *Id.* at 614.
44. Again, the categorical approach examines the fact that a defendant was convicted for a particular felony and the statutory elements of the crime, but not the underlying facts, when determining whether the felony constitutes a violent felony. *Bryant*, 310 F.3d at 554.
45. *See* United States v. Thomas, 333 F.3d 280, 282–83 (D.C. Cir. 2003) (explaining that although under the categorical approach, "every offense of escape" involves possible risk of injury to others, the court is "not certain that [it is] prepared to go so far," but need not decide in that particular case whether the categorical approach is the appropriate framework for deciding whether a crime constitutes a violent felony).

it need not decide between the categorical approach and the fact-specific approach because, whichever approach was applied, a custodial escape qualifies as a violent felony.[46] The Ninth Circuit, on the other hand, applied the categorical approach to hold, contrary to the Seventh Circuit, that not every escape *per se* presents a serious potential risk of physical injury to another sufficient to qualify as a violent felony. The Ninth Circuit held instead that noncustodial escapes do not implicate the same risks of physical violence as custodial escapes and therefore should not be treated as a violent crime sufficient to trigger the ACCA sentencing enhancements.[47]

The D.C. Circuit, in *United States v. Thomas*, expressed reluctance in applying the categorical approach, because it was "not certain"[48] that every escape, including noncustodial escapes such as a walkaway, involves sufficient risk to others to qualify as a violent felony under the ACCA.[49] Rather than addressing the uncertainty by creating a separate category for noncustodial escapes, the D.C. Circuit considered the categorical approach itself to be problematic.[50] It asserted that the categorical analysis—as far as escape crimes are concerned—creates arbitrary classifications without regard to the actual risk of violence that a crime presents.[51] Thus, the D.C. Circuit challenged the categorical approach as the appropriate framework for determining if a crime constitutes a violent felony.[52] But it avoided reaching the issue by indicating that the case before it involved a custodial escape and therefore constituted a violent felony under either the categorical or fact-specific approach.[53]

In contrast, the Ninth Circuit expressly rejected in *United States v. Piccolo* a fact-specific approach when deciding whether a felonious escape constituted a violent felony for purposes of sentencing enhancement, and instead adopted the categorical approach outlined

46. *Id.* at 283.

47. United States v. Piccolo, 441 F.3d 1084, 1090 (9th Cir. 2006).

48. *Thomas*, 333 F.3d at 282 (D.C. Cir. 2003).

49. *Id.* at 282–83.

50. *See id.* at 282 (explaining that the categorical approach "proves too much," making the court "reluctant to adopt" it).

51. *See id.* at 283 (concluding that a "prisoner not returning to a half-way house or sneaking away from an unguarded position in the night may not inherently create a risk of harm to others").

52. *See id.* at 282 (concluding that the court is "reluctant to adopt the categorical approach," because one could argue that "under the approach . . . all crimes become crimes of violence").

53. *Id.* at 283.

in *Taylor*.[54] The court's categorical analysis of escape crimes, however, differed from that of the Seventh Circuit in that it treated custodial and noncustodial escapes as two separate categories.[55] It held that convictions under the escape statute, which include both custodial and noncustodial escapes, "sweep too broadly"[56] to be classified into a single category of violent felonies.[57] The court explained that noncustodial escapes, which "do not pose an automatic risk of danger,"[58] do not present the level of risk required to qualify as violent felonies and should be classified as a separate category of nonviolent crimes.[59]

IV. HOLDING

Following its prior analysis in *United States v. Bryant* and in *United States v. Golden* that both custodial and noncustodial escapes are violent crimes, the Seventh Circuit in *United States v. Chambers* applied the categorical approach and held that Chambers's noncustodial, felonious escape was a violent felony.[60] The court noted, however, that for purposes of violent felony classification, "there would be no impropriety in dividing escapes"[61] into custodial escapes on the one hand and noncustodial escapes on the other.[62] The court criticized the categorical analysis of *Bryant* and *Golden* that lumped all escapes together as a single category of violent felonies.[63] The court

54. United States v. Piccolo, 441 F.3d 1084, 1086 (9th Cir. 2006) (citing Taylor v. United States, 495 U.S. 575, 602 (1990)).

55. *See id.* at 1088–89 (explaining that although the categorical approach is the "appropriate framework for determining whether a current offense constitutes a crime of violence," it is also the case that "the circumstances apparent in a walkaway escape are of an entirely different order of magnitude than escapes from jails and prisons").

56. *Id.* at 1090.

57. *See id.* at 1089 (rejecting the description of an escape as a "powder keg, which may or may not explode into violence . . . but which always has the serious potential to do so" as "prov[ing] too much").

58. *Id.* at 1088.

59. *See id.* at 1089-90 (upholding the categorical approach as "the appropriate framework" for analysis and deciding that noncustodial escapes do not necessarily involve the level of risk required to qualify as violent felonies).

60. *See* United States v. Chambers (*Chambers I*), 473 F.3d 724, 726 (7th Cir. 2007) (adhering to precedent that refused to carve out noncustodial from custodial escape, thereby holding that all felonious escapes categorically give rise to the level of risk required to qualify any felonious escape as a violent felony).

61. *Id.*

62. *Id.*

63. *See id.* ("We shall adhere to the precedents for now. But it is an *embarrassment* to the law when judges base decisions of consequence on conjectures, in this case a conjecture as to the

expressed its reluctance in making such a categorization based on "conjectures"[64] about the potential physical risk to others, when noncustodial escapes such as walkways and failures to report seem less violence-prone than custodial escapes such as prison breaks.[65]

To make its point clear, the Seventh Circuit discussed a Tenth Circuit case—*United States v. Gosling*—that many subsequent cases cite for its categorical analysis of escape crimes. In *Gosling*, the Tenth Circuit stated that "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."[66] Many courts have used this language in their categorical analyses of escape crimes to justify categorizing noncustodial escapes and custodial escapes as violent felonies.[67] The *Chambers* court criticized the adoption of the *Gosling* language for failing to recognize that *Gosling* only pertains to custodial escapes and "should not be treated as authoritative in a case that does not involve a jail break."[68]

Despite its criticism of the categorical analysis used in *Bryant* and *Golden*, the *Chambers* court adhered to its precedents.[69] The court described its holding as shrinking away from overruling *Golden*, which was only recently decided relative to *Chambers* and which had "overwhelming support in the decisions of the other circuits."[70] The court, nevertheless, expressed its doubt concerning the precedents by appealing to the Sentencing Commission as well as scholars and criminal justice institutes for research on the frequency of violence in noncustodial escapes versus custodial escapes to determine whether noncustodial escapes were properly categorized as violent felonies.[71] The court asserted that if the frequency of violence in noncustodial escapes could be shown to be very low, it "would provide a powerful reason to reexamine *Bryant* and *Golden*."[72]

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." (emphasis added)).

64. *Id.*

65. *Id.*

66. *Id.* at 726–27 (citing United States v. Gosling, 39 F.3d 1140, 1142 (10th Cir. 1994)).

67. *Id.*

68. *Id.* at 727.

69. *Id.* at 726.

70. *Id.*

71. *See id.* at 727 (holding that "more research will be needed to establish whether failures to report or return have properly been categorized by this and most other courts as crimes of violence").

72. *Id.*

The Supreme Court shared the Seventh Circuit's concern and held that failure-to-report escapes should be treated differently than custodial escapes because noncustodial escapes do not involve the level of risk required to qualify as a violent felony.[73] According to the Court, the Illinois escape statute for ACCA purposes should be treated "as containing at least *two separate crimes*, namely escape from custody on the one hand, and a failure to report on the other."[74] Essentially, the Court upheld the categorical approach, which examines the generic crime of escape, as the correct test for determining whether a crime is a violent felony.[75] However, the Court used statistical analysis in the United States Sentencing Commission report showing that noncustodial escapes are not dangerous "powder kegs" to hold that custodial and noncustodial escapes should be treated as two different crimes, with the latter constituting a separate category of nonviolent crimes.[76]

V. ANALYSIS

Although the Seventh Circuit in *United States v. Chambers* followed its circuit precedents by holding that a noncustodial escape constituted a violent felony, it raised important concerns regarding the application of the categorical approach by casting doubt on its prior decisions. Its holding in *Chambers* tracks the *United States v. Golden* and *United States v. Bryant* opinions, both of which applied the categorical approach to hold that every escape categorically qualified as a violent felony because of the inherent risk of serious injury to another person. But, despite its adherence to precedent, the *Chambers* court explained why the categorical analysis is problematic.

Although the court did not go so far as to question the legitimacy of the categorical approach, it was disturbed by how the prior cases essentially based their categorical analyses on mere speculations about the physical risk to others allegedly inherent with any type of escape.[77] The court worried that the categorical approach's scope might include crimes that pose no serious risk of physical injury to

73. United States v. Chambers (*Chambers III*), 129 S. Ct. 687, 691 (2009).

74. *Id.* (emphasis added).

75. *See generally id.* at 690.

76. *See generally id.* at 692–93.

77. *See* United States v. Chambers (*Chambers I*), 473 F.3d 724, 726 (7th Cir. 2007) (stating that "it is an embarrassment to the law when judges base decisions of consequence on conjectures").

another,[78] a concern obviously implicated by the classification of a failure-to-report escape as a violent felony.[79] Thus, the court criticized *United States v. Gosling*'s description of "every escape scenario" being "powder keg" having the serious potential to explode into violence as being too speculative to justify categorizing noncustodial escapes as violent felonies.[80]

This criticism resonated with the D.C. Circuit's disapproval of the categorical approach. The D.C. Circuit seemed to fear that the categorical approach potentially allows courts to classify any felony as violent under the ACCA: if the "recapture of an escapee inherently contains a risk of violent encounter between the escapee and the arresting officers"[81] that makes noncustodial escape a violent felony, "the same is true as to the capture of any lawbreaker."[82] In other words, courts can describe virtually any felony as a "powder keg" to impose the harsh penalties of the ACCA. For this particular reason, the D.C. Circuit was "reluctant to adopt the categorical approach,"[83] and the Seventh Circuit in *Chambers* recommended requiring courts to base their categorical analyses on research rather than speculation.[84]

The Seventh Circuit raised important policy implications for the Supreme Court to consider. First, if the Supreme Court had ruled against Chambers, courts would be free to categorize virtually any felony as violent under the ACCA based on conjectures and speculations. On the other hand, the Supreme Court's decision in favor of Chambers could have significantly narrowed the scope of what constitutes a violent felony under the ACCA, limiting courts' discretion in their categorical analyses. This risked creating difficult line-drawing problems by forcing the courts essentially to conduct case-by-case examinations, thereby "destroy[ing] the whole benefit of

78. *See id.* (holding that although the court adheres to the precedents, "it is an embarrassment to the law" to base decisions "on conjectures, in this case a conjecture as to the possible danger of physical injury posed by criminals who . . . fail to return").

79. *See id.* at 726–27 (asserting that *United States v. Gosling*, 39 F.3d 1140 (10th Cir. 1994), should not be treated as authoritative in a case involving a noncustodial escape, and concluding that "if courts insist on lumping all escapes together in determining whether escape is a crime of violence, the enormous preponderance of walkaways could well compel a conclusion that escape is never a crime of violence").

80. *Id.*

81. United States v. Thomas, 333 F.3d 280, 282 (D.C. Cir. 2003).

82. *Id.*

83. *Id.*

84. *Chambers I*, 473 F.3d at 727.

the categorical approach."[85] Although it might be easy to carve out noncustodial escapes as a separate category of nonviolent crimes, it is not be so obvious in which categories other types of crimes fall under the ACCA.

Although the Supreme Court ruled in favor of Chambers and thus limited courts' discretion in their categorical analyses, it sought to preserve the merits of the categorical approach by adopting the Seventh Circuit's advice: courts must base their categorical risk analysis on studies and research that empirically show the level of physical risk presented by an act if that act is to be considered a violent crime for sentencing enhancements.[86] This procedure not only limits the scope of what constitutes a violent felony under the ACCA, but also resolves difficult line-drawing problems. The discretion of the courts is replaced by hard figures, providing greater legitimacy and consistency to courts' categorization of crimes for purposes of sentencing enhancement.

The Supreme Court's decision raises other concerns though. As the Seventh Circuit in *Chambers* warned, a court might simply lack sufficient data to determine the proper categorization of a crime.[87] Even if a court were to conduct research or wait for the studies to come out, should it then postpone its decision? Is it realistic for studies to be done on every crime? Requiring courts to base the categorical analysis on studies might stymie the sentencing enhancement process and hurt the ACCA's fundamental purpose of getting violent, recidivist criminals off the street. The Supreme Court, unfortunately, failed to address these questions in *Chambers*.

VI. CONCLUSION

The Supreme Court ruled in favor of Chambers by holding that a failure-to-report escape does not present the serious potential risk of physical injury to another sufficient for it to constitute a violent felony under the ACCA. The Court reconsidered the categorical approach as applied by the majority of the circuits and supported the use of statistics by courts in their categorical analyses. The decision

85. Transcript of Oral Argument at *8, Chambers v. United States, 2008 WL 4892841 (U.S.) (No. 06-11206).

86. *Chambers I*, 473 F.3d at 727.

87. *See id.* at 727 (indicating that "more research will be needed to establish whether failures to report or return have properly been categorized").

will significantly influence how the lower courts apply the categorical approach, but only time will tell how the courts implement the Supreme Court's decision.