No. 06-11206

In the Supreme Court of the United States

DEONDERY CHAMBERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's conviction for escape, based on his knowing failure to report to a penal institution after his conviction for a felony, qualifies as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. 924(e), because it "involves conduct that presents a serious potential risk of physical injury to another."

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OPINION BELOW

The opinion of the court of appeals (J.A. 90-95) 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 (J.A. 96-97). The petition for a writ of certiorari was filed on May 8, 2007, and was granted on April 21, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Southern District of Illinois to possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). He had prior convictions for robbery and aggravated battery, distributing cocaine near public housing, and escape by knowingly failing to report to a penal institution after conviction for a felony. The district court determined that those prior convictions, including the conviction for failure-to-report escape, qualified as "violent felon[ies]" or "serious drug offense[s]" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), and thus required a mandatory minimum 15-year sentence. The court sentenced petitioner to 188 months of imprisonment. The court of appeals affirmed. J.A. 52, 84-85, 90-95, 110-115.

1. Section 922(g)(1) of Title 18, United States Code, makes it unlawful for a person who has been convicted of a felony to possess a firearm. Violation of that prohibition ordinarily carries a maximum term of imprisonment of ten years. 18 U.S.C. 924(a)(2). The ACCA, as amended in 1986, provides a 15-year mandatory minimum sentence for persons convicted of violating Section 922(g)(1) who have three prior convictions "for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year" 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.

18 U.S.C. 924(e)(2)(B).

2. In May 2005, after petitioner and a neighborhood resident exchanged heated words, petitioner drove to his home, got a handgun, loaded it, and returned to the scene of the fight. When he met his adversary there, petitioner pulled out his gun and fired into the air. Petitioner then fled in a car driven by his girlfriend. Police officers tried to stop the fleeing car by positioning a squad car in its path, but petitioner instructed his girlfriend to swerve around the police car and to keep going. The pursuit continued at speeds of up to 80 miles per hour. In the course of the high-speed chase, petitioner threw his gun out of the car window onto the lawn of a residence. The gun was loaded with three rounds of live ammunition. Petitioner was later arrested and detained without bond. He pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). J.A. 3, 27-29, 30, 32, 35, 40-42, 100-103.

3. At sentencing, it was undisputed that petitioner had two prior convictions for a violent felony or serious drug offense: (1) a conviction for robbery and aggravated battery and (2) a conviction for distributing cocaine near public housing. It was also undisputed that petitioner had a prior felony conviction under the Illinois escape statute. Petitioner disputed, however, whether that conviction qualified as a "violent felony" under the ACCA. J.A. 110-115, 135-136.

The Illinois escape statute creates several offenses, which vary in severity depending on the nature of the violation and the underlying charges. The subsection of

the statute that is relevant here creates two offenses, escape from a penal institution or direct custody, which is a Class 2 felony, and escape involving the failure to report or return to penal institution, which is a Class 3 felony:

> A person convicted of a felony or charged with the commission of a felony who intentionally escapes from any penal institution or from the custody of an employee of that institution commits a Class 2 felony; however, a person convicted of a felony 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 is guilty of a Class 3 felony.

720 Ill. Comp. Stat. 5/31-6(a). Petitioner had been convicted of the "class 3 felony" of "knowingly fail[ing] to report * * * to * * * a penal institution" following conviction of a felony. J.A. 67. That offense is punishable by up to five years of imprisonment. 730 Ill. Comp. Stat. 5/5-5-3(b), 5/5-8-1(a)(6).[1]

The district court determined that petitioner's failure-to-report escape qualified as a "violent felony" based on *United States* v. *Bryant*, 310 F.3d 550 (7th Cir. 2002). J.A. 52. *Bryant* held that the federal crime of escape, 18 U.S.C. 751, which includes failure to return to custody after an authorized release, 18 U.S.C. 4082(a),

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[1] Although the state court initially sentenced petitioner to six months in jail (which was stayed), 30 months of probation, and a fine, his probation was subsequently revoked, and he was resentenced to five years of imprisonment. He spent much of his sentence in segregated confinement because of his violence while in prison. J.A. 113-114.

is a "crime of violence" under Sentencing Guidelines § 4B1.2(a) because it "involves conduct that presents a serious potential risk of physical injury to another." 310 F.3d at 553-554. Courts of appeals, including the Seventh Circuit, have interpreted the ACCA's "violent felony" provision to have the same meaning as the Guidelines "crime of violence" provision because the two provisions have materially identical language. See, *e.g.*, *United States* v. *Upton*, 512 F.3d 394, 404 (7th Cir. 2008), petition for cert. pending, No. 07-1024 (filed Mar. 31, 2008).

Bryant rejected the argument that a court should assess a particular defendant's manner of committing the escape, which, in that case, was failing to return to a halfway house after work release. 310 F.3d at 552-554. The *Bryant* court concluded 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." *Id*. at 553 (brackets omitted) (quoting *United States* v. *Franklin*, 302 F.3d 722, 724 (7th Cir.), cert. denied, 537 U.S. 1095 (2002), and *United States* v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994)).

Because petitioner had three prior convictions for a violent felony or serious drug offense, the district court concluded that he was subject to the ACCA's 15-year mandatory minimum. See J.A. 52, 54, 128. Applying the advisory Sentencing Guidelines, the court sentenced petitioner to 188 months of imprisonment, to be followed by five years of supervised release. J.A. 60.

4. The court of appeals affirmed petitioner's sentence, rejecting his argument that failure-to-report escape is not a "violent felony" under the ACCA. J.A. 90-95. Relying on its prior decision in *United States* v.

Golden, 466 F.3d 612 (7th Cir. 2006), petition for cert. pending, No. 06-10751 (filed Apr. 9, 2007), the court held that failing to report for custody, like escaping from custody, "involves conduct that presents a serious potential risk of physical injury to another." J.A. 91. *Golden* held that a conviction under Wisconsin law for failing to report to jail, Wis. Stat. Ann. § 946.425(1m)(b) (West 2005), qualifies as a "violent felony" under the ACCA. 466 F.3d at 615. The court concluded that the risk that failure to report for custody will lead to physical injury is essentially the same as the risk that direct escape from custody will have that result. See *id.* at 614. The court explained that, in both cases, law enforcement officers will attempt to capture the fugitive, a convicted offender who knows that the future holds only incarceration. *Ibid.* Thus, the court reasoned, both offenses create the same potential for a violent confrontation between the offender and law enforcement officials attempting to recapture him. *Ibid.*

In this case, the court of appeals expressed regret that it did not have statistics conclusively establishing the frequency of violence in failure-to-report escapes. J.A. 93-95. But the court noted that *Golden* had squarely held that failure-to-report escape is a "violent felony" under the ACCA and that "[t]he other courts of appeals," except the District of Columbia Circuit—which had reserved the issue—and the Ninth Circuit, were "in accord." J.A. 91-92 (citing cases).[2] The court of appeals

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[2] Although the District of Columbia Circuit had declined to resolve the issue in the decision cited by the court of appeals, see *United States* v. *Thomas*, 333 F.3d 280 (2003), the District of Columbia Circuit later agreed with the majority view that any escape, including a failure to report or return, is a "crime of violence" and a "violent felony." See *United States* v. *Thomas*, 361 F.3d 653, 658-660 (2004) (holding that

therefore held that petitioner was subject to an enhanced sentence under the ACCA. J.A. 93.[3]

SUMMARY OF ARGUMENT

Petitioner's conviction for escape by knowingly failing to report to a penal institution is a "violent felony" under the Armed Career Criminal Act of 1984 (ACCA) because it "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

A. Like attempted burglary, which was held to be a "violent felony" in *James* v. *United States*, 127 S. Ct. 1586 (2007), failure-to-report escape creates a risk of injury comparable in degree to the risk created by the ACCA enumerated offense of burglary. Just as burglary creates the risk of a violent confrontation between the burglar and someone who comes to investigate, failure-to-report escape creates the risk of a violent confrontation between the escapee and law enforcement officers seeking to recapture him.

Law enforcement agencies make vigorous efforts to recapture prisoners who fail to report, and those efforts have a serious potential to become violent. A felon who

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escape, including "[k]nowingly absenting oneself from custody without permission," is categorically a "crime of violence" under Sentencing Guidelines § 4B1.2(a)), vacated on other grounds, 543 U.S. 1111 (2005), reaffirmed in relevant part by *United States* v. *Cook*, 161 Fed. Appx. 7 (D.C. Cir.), cert. denied, 546 U.S. 913 (2005).

[3] After this Court's decision in *Begay* v. *United States*, 128 S. Ct. 1581 (2008), the Seventh Circuit reversed its position and held that "failure to report to custody" is not a "crime of violence" under Guidelines § 4B1.2(a) and thus presumably also not a "violent felony" under the ACCA. *United States* v. *Templeton*, No. 07-2949, 2008 WL 4140616, at * 5 (Sept. 9, 2008). That decision is incorrect for the reasons stated in this brief. See note 13, *infra*.

has refused to submit to custody is likely to possess a volatile state of mind that may cause him to react violently to police officers and others who confront him. The potential dangerousness of such a confrontation is heightened by the fact that the escapee knows that the future holds only incarceration, which he has already found intolerable. Moreover, failure-to-report escapees are, by definition, recidivist felons, and they often have serious criminal records, including convictions for violent crimes. Petitioner, who has prior convictions for robbery, aggravated battery, and cocaine distribution, well illustrates this concern.

B. Failure-to-report escape also satisfies the additional requirement for qualification as a "violent felony" that this Court recognized in *Begay* v. *United States*, 128 S. Ct. 1581 (2008). It is similar "in kind" to the enumerated crimes because it is "purposeful, violent, and aggressive" in the same way as burglary. *Id.* at 1585-1586.

Failure-to-report escape is purposeful like burglary because it requires a mental state of knowledge or intent. There is no sound reason to exclude knowing violations from the ACCA's scope. At least two enumerated offenses require only a mens rea of knowledge, as do numerous crimes that are obviously "violent felonies," such as knowingly using a chemical weapon, 18 U.S.C. 229, and knowingly derailing a train, 18 U.S.C. 1992. Failure-to-report escape is also violent and aggressive in the same way as burglary. Commission of the offense demonstrates that the offender is willing to risk a closely-related, violent confrontation in which law enforcement officers or others could be injured.

Contrary to petitioner's claim, failure-to-report escape involves far more than "*doing nothing.*" Br. 14.

The escapee must make a conscious decision to disobey a legal obligation to report for custody and to achieve a result—his absence from prison—that contravenes that legal duty. Inaction in the face of a duty *is* an act and one that can result in many violent crimes, including arson and burglary. The deliberate nature of the offense conduct and its creation of a clear risk of a violent result make failure-to-report escape purposeful, violent, and aggressive for purposes of the ACCA.

C. Petitioner contends that courts may not consider potential violence or injury unless it would occur "*during the commission of the offense*," Br. 23, which in his view excludes violence during recapture. But that contention ignores the fact that several enumerated offenses are classified as "violent felonies" because of violence that would occur only after commission of the offense. A prohibition on considering post-offense violence has no support in the ACCA's text and would frustrate its purpose.

Even if there were a requirement that the violence risked by an offense must occur while the offense is ongoing, potential violence during recapture would satisfy that test. Failure-to-report escape is a continuing offense. Because the offense is not complete until the escapee returns to custody, violence during recapture occurs during commission of the offense.

Moreover, the risk of violence during recapture is qualitatively greater than the risk of violence in seeking to apprehend ordinary felons. A person who has failed to report to prison has demonstrated an unwillingness to submit to custody; authorities will virtually always attempt to recapture him; and, because he is a recidivist who often has a serious criminal record, he poses a greater danger than an ordinary criminal suspect.

D. The ACCA's "otherwise" clause cannot be limited to "property crimes." Even under petitioner's definition, at least two of the enumerated offenses—extortion and crimes involving the use of explosives—are not "property crimes." In addition, status as a "property crime" is irrelevant to the ACCA's purpose of identifying offenses that make it more likely that the offender would willingly harm others to achieve his goals. Nor is a "property crimes" limitation supported by the ACCA's legislative history or necessary to avoid rendering the ACCA's first clause superfluous.

Although petitioner claims that a "property crimes" requirement is necessary to avoid purported constitutional problems with the serious-risk inquiry mandated by the ACCA, the constitutional concerns identified by petitioner do not exist. The exercise of judicial judgment to determine whether conduct presents a serious risk of causing harm is a familiar aspect of statutory construction, and the serious-risk inquiry is not more difficult to apply here than in *James* or in other contexts.

E. Finally, the rule of lenity does not apply here. Petitioner does not identify any language in the ACCA that is ambiguous. Instead, he disagrees with the court of appeals' conclusion that a convicted felon's deliberate failure to report to prison creates a "serious potential risk of physical injury to another." That standard, although it sometimes requires close examination and comparison of particular offenses, is not ambiguous. And failure-to-report escape clearly satisfies it.

ARGUMENT

PETITIONER'S CONVICTION FOR ESCAPE BY KNOWINGLY FAILING TO REPORT TO A PENAL INSTITUTION QUALIFIES AS A "VIOLENT FELONY" UNDER THE ARMED CAREER CRIMINAL ACT

The Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), defines a "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year" 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." 18 U.S.C. 924(e)(2)(B). Petitioner's conviction for knowingly failing to report to a penal institution (failure-to-report escape), in violation of 720 Ill. Comp. Stat. 5/31-6(a), qualifies as a "violent felony" under that definition because it "otherwise involves conduct that presents a serious potential risk of physical injury to another."

To qualify under that residual clause, an offense must satisfy a two-part test: First, it must create a potential risk of physical injury to others that is "serious." That requirement means that the offense must create a risk comparable in degree to the risk created by one of the specifically enumerated crimes—burglary, arson, extortion, or crimes involving the use of explosives. See *James* v. *United States*, 127 S. Ct. 1586, 1594, 1596-1598 (2007). Second, the offense must be similar in kind to the enumerated crimes. That requirement means that it must be "purposeful, violent, and aggressive" in the way that the enumerated crimes share those characteristics. See *Begay* v. *United States*, 128 S. Ct. 1581, 1585-1588 (2008). Failure-to-report escape satisfies both

parts of that test because it creates a potential risk of injury to others that is comparable in both degree and kind to the risk created by burglary.

A. Failure-To-Report Escape Presents A Serious Potential Risk Of Physical Injury To Others Comparable To The Risk Posed By Burglary

In *James*, this Court held that an offense presents a "serious" potential risk of physical injury to another if the risk of injury that it creates is comparable in degree to the risk posed by one of the enumerated offenses. See 127 S. Ct. at 1594, 1597-1598 (stating that the enumerated offenses provide "a baseline against which to measure the degree of risk that a non-enumerated offense must 'otherwise' present in order to qualify"). In determining whether the risk posed by a crime is comparable in degree to the risk created by an enumerated offense, the Court follows a "categorical approach." *Id.* at 1593. The Court considers the crime generically, measured by the legal definition of the offense rather than how it was committed on a particular occasion. *Id.* at 1593-1594. The categorical approach does not require that every factual scenario encompassed by the offense present the requisite risk of injury. *Id.* at 1597. Instead, the Court examines "the conduct encompassed by the elements of the offense, in the ordinary case." *Ibid.*

The Court in *James* concluded that the potential risk of physical injury presented by attempted burglary is comparable in degree to the risk posed by the enumerated offense of burglary. The Court noted that "[t]he main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to

investigate." *James,* 127 S. Ct. at 1594. Attempted burglary, the Court held, creates a similar "risk of violent confrontation." *Id*. at 1595. Considering both the likelihood of confrontation and the likelihood that any confrontation will result in injury, the Court concluded that the risk posed by attempted burglary is similar in degree to the risk posed by burglary. *Id*. at 1599.

Failure-to-report escape likewise presents a potential risk of physical injury to others that is at least comparable in degree to burglary. Like burglary, failure-to-report escape creates a serious risk of a violent confrontation between the offender and others, because law enforcement officers are likely to pursue and attempt to recapture the escapee, who has already demonstrated a willingness to disobey a legal command to submit to custody.

1. A convicted felon's failure to report to prison creates a serious potential risk of a confrontation with law enforcement officers seeking to recapture him

An offender commits failure-to-report escape if he "knowingly fails to report to a penal institution" following conviction of a felony. See 720 Ill. Comp. Stat. 5/31-6(a). That conduct creates a serious risk of a confrontation between the offender and others because the offender's absence from prison triggers efforts by law enforcement to recapture him. *United States* v. *Thomas*, 361 F.3d 653, 660 (D.C. Cir. 2004) (noting that "escape invites pursuit; and the pursuit, confrontation") (quoting *United States* v. *Jackson*, 301 F.3d 59, 63 (2d Cir. 2002)), vacated and remanded on other grounds, 543 U.S. 111 (2005), reaffirmed in relevant part by *United States* v. *Cook*, 161 Fed. Appx. 7 (D.C. Cir.), cert. denied, 546 U.S. 913 (2005). That risk of confrontation is comparable to the risk of confrontation between a burglar and

the occupants of the burgled premises or the police. Indeed, the risk of a confrontation between a failure-to-report escapee and law enforcement officers seeking to recapture him is likely higher than the risk of a confrontation between a burglar and others. A burglar generally goes out of his way to ensure that his offense goes undetected, casing the premises and breaking in only when he is confident that the occupants are not present. Prison officials, in contrast, know immediately when an offender fails to report for confinement, and they generally take prompt action to return him to custody.

The United States Marshals Service informs us that it assigns a law enforcement officer to seek to capture all criminals who fail to report to prison. Accord General Accounting Office, *Federal Law Enforcement: Information on Use of Investigation and Arrest Statistics* 46 (2004) (explaining that the Marshals Service attempts to locate and arrest federal fugitives who have escaped from custody or failed to make a required appearance). State law enforcement officials also make vigorous efforts to recapture offenders who fail to report or to return to prison. See, *e.g.*, New York Dep't of Corr. Servs., *Temporary Release Program: 2007 Annual Report* 3 (2007) (stating that prison officials are "committed to apprehending absconders [from temporary release] as quickly as possible"); California Dep't of Corr. & Rehab., *Annual Escape Report: Calendar Year 2007* at 10 (2008) (indicating that the average recapture rate for all escapees over the past 30 years has been 99.1%); New York Dep't of Corr. Servs., *Comparison of Temporary Release Absconders and Non-Absconders: 1993-1994* at v (1995) (N.Y. Absconder Report) (observing that "[m]ost inmates [who absconded from temporary

release] were returned to the Department involuntarily").

Nationwide data indicate that approximately 75% of all escapees are recaptured. Richard F. Culp, *Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data*, 85 Prison J. 270, 282 (2005). The recapture rate for absconders from work release programs is 70%. *Ibid.* The fact that the federal government and the States take action to recapture all escapees, including those who fail to return to prison, is not surprising considering that the United States, the District of Columbia, and at least 36 States deem failure to return to be a form of escape or punish it as severely.[4]

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[4] See 18 U.S.C. 751(a), 4082(a); Ala. Code § 14-8-42 (LexisNexis 1995); Ariz. Rev. Stat. Ann. § 13-2501(4) (2001); Cal. Penal Code §§ 4530(c), 4532(d) (West 2000); Colo. Rev. Stat. Ann. §§ 17-27-106(1)(a), 17-27.5-104 (2006); Conn. Gen. Stat. Ann. § 53a-169(a)(4) and (5) (2007); *Smith* v. *State*, 361 A.2d 237, 238 (Del. 1976); *Hines* v. *United States*, 890 A.2d 686, 689 (D.C. 2006); Fla. Stat. Ann. §§ 945.091(4), 951.24(4) (West 2001); Ga. Code Ann. § 16-10-52(a)(5) (2007); *State* v. *Kealoha*, 787 P.2d 690, 691 (Haw. 1990); Idaho Code Ann. §§ 20-101C, 20-242(6) (2004); Kan. Stat. Ann. § 21-3809(b)(2) (1995); Ky. Rev. Stat. Ann. § 520.010(5) (LexisNexis 1999); Me. Rev. Stat. Ann. tit. 17-A, § 755(1)(A) (2006); Mass. Ann. Laws ch. 268, § 16 (LexisNexis 2002); Mich. Comp. Laws Ann. § 750.193(3) (West 2004); Minn. Stat. Ann. § 609.485(1) (West 2003); Miss. Code Ann. §§ 97-9-45, 97-9-49(2) (West 2005); Mont. Code Ann. § 45-7-306(2) (2007); Neb. Rev. Stat. Ann. § 28-912(1) (LexisNexis 2003); Nev. Rev. Stat. Ann. § 212.095(1) (LexisNexis 2005); N.H. Rev. Stat. Ann. § 651:24 (LexisNexis 2007); N.J. Stat. Ann. § 2C:29-5(a) (West 2005); N.C. Gen. Stat. Ann. § 148-45(g)(1) (2007); N.D. Cent. Code § 12.1-08-06(1) (1997); Okla. Stat. Ann. tit. 21, § 443(C) (West 2002); Or. Rev. Stat. § 144.500(2)(b) (2007); 18 Pa. Cons. Stat. Ann. § 5121(a) (West 1983); R.I. Gen. Laws § 11-25-4 (2002); *State* v. *Furlong*, 291 A.2d 267, 270 (R.I. 1972); S.C. Code Ann. §§ 24-3-50, 24-3-210(C) (2007); Tenn. Code Ann. § 39-16-601(3) (2006); Tex. Penal Code Ann. § 38.01(2) (Vernon 2003); Utah Code Ann.

Law enforcement officials have good reasons for their forceful efforts to recapture failure-to-report escapees. Like other escapees, failure-to-report escapees frequently have serious criminal records. For example, in the federal system, approximately 72% of all defendants convicted of failure-to-return escape (18 U.S.C. 4082(a)) between 2003 and 2007 had a criminal history score in the top three categories of the Sentencing Guidelines. See App., *infra*, 4a. Approximately 52% had a criminal history score in the top two categories, and 35% were in the highest category. See *ibid*.

Statistics from the States also indicate that non-custodial escapees frequently have serious criminal records, including convictions for violent crimes. See App., *infra*, 5a (76% of Florida prisoners who escaped while on work release between July 1, 2003, and June 25, 2008, were serving time for violent crimes); *id*. at 6a (72% of Massachusetts prisoners who failed to return from work release or other unsupervised activities from January 1, 2003, to June 30, 2008, were serving sentences for violent crimes); *id*. at 7a-8a (47% of North Carolina prison-

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§ 76-8-309(1)(a)(i) and (4)(c)(i) (West 2003); *State* v. *Ammons*, 963 P.2d 812, 814 (Wash. 1998); Wash. Rev. Code Ann. §§ 9A.76.010, 9A.76.110(1) (West Supp. 2007); W. Va. Code Ann. §§ 61-5-10, 62-11A-4 (2005); Wis. Stat. Ann. §§ 303.065(2), 946.42(1)(a), 946.425 (West 2005); Wyo. Stat. Ann. §§ 7-13-702, 7-16-309, 7-18-112 (2007).

Petitioner is therefore incorrect in suggesting (Br. 4-5 n.1) that most States distinguish failure to report or return from custodial escape and punish it less severely. Petitioner is also mistaken in relying on 18 U.S.C. 3146, which criminalizes bail-jumping and similar offenses as well as failure to surrender for service of sentence. Bail-jumping is not equivalent to the escape offense committed by petitioner because bail-jumping does not entail the refusal to submit to custody by someone who has already been found guilty of a crime and duly sentenced to incarceration.

ers who failed to return from work release, home leave, community volunteering, or other outside activities from January 1, 2003, to June 30, 2008, were serving sentences for violent crimes); *id.* at 9a-10a (77% of Pennsylvania failure-to-return escapees from January 1, 2003, to June 24, 2008, were serving sentences for violent crimes); *id.* at 11a (60% of Washington prisoners who failed to return from work release from January 1, 2003, to July 23, 2008, were serving sentences for violent crimes).[5] Moreover, anyone convicted for failure-to-report escape in Illinois has, by definition, previously committed a felony offense. See 720 Ill. Comp. Stat. 5/31-6(a). Petitioner, for example, was serving time for robbery and aggravated battery. J.A. 12-13, 110, 113.

There is thus no support for petitioner's assertion that "it is far less urgent" for law enforcement to pursue escapees who fail to report for imprisonment than those who escape directly from custody. Br. 25. On the contrary, as the courts of appeals have recognized, any escape, no matter what kind, is a serious matter that warrants prompt recapture efforts by law enforcement. See, *e.g.*, *United States* v. *Mathias*, 482 F.3d 743, 748 (4th Cir. 2007), petition for cert. pending, No. 07-61

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[5] This discussion classifies the following offenses as violent crimes: murder, manslaughter, rape, arson, assault, battery, kidnapping, robbery, burglary (including breaking and entering with intent to commit a felony), attempting to elude a police officer, and "other violent crimes." Also included as violent crimes are drug manufacturing, drug distribution, and possession of drugs with intent to distribute them, because those offenses, unlike simple possession, indicate involvement in the drug trade, which is closely associated with violence. If drug manufacturing and distribution crimes were not included, the percentage of convictions for violent crimes would range between 40% (Washington) and 56% (Massachusetts). See App., *infra*, 4a-11a.

(filed July 2, 2007); *United States* v. *Franklin*, 302 F.3d 722, 724 (7th Cir.), cert. denied, 537 U.S. 1095 (2002).

2. A confrontation between an escapee and law enforcement officers seeking to recapture him has a serious potential to become violent

Efforts to recapture failure-to-report escapees pose a serious potential risk of becoming violent. "[J]ust as the cautious burglar may be startled by the unexpected return of the homeowner," a failure-to-report "escapee may suddenly be confronted by police officers sent to apprehend him, leading to injury to the officers or bystanders." *Thomas*, 361 F.3d at 660. In the same way that a burglar's nervousness about being in a confined, foreign environment may lead him to react violently upon confrontation, a convicted felon who has refused to submit to lawfully imposed custody is likely to experience a number of supercharged emotions that may cause him to feel threatened by those who confront him and therefore to resort to violence. See *United States* v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994) ("[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 failure-to-report escapee is particularly likely to use violence to resist recapture because he knows that, if he is recaptured, incarceration is a certainty. *United States* v. *Golden*, 466 F.3d 612, 614 (7th Cir. 2006), petition for cert. pending, No. 06-10751 (filed Apr. 9, 2007). His deliberate failure to report to prison demonstrates that he finds the incarceration that awaits him to be intolerable. Criminals in that situation "are unlikely to calmly succumb to recapture efforts." *Mathias*, 482 F.3d at 748. Moreover, as described above, failure-to-

report escapees generally have serious and violent criminal histories, as petitioner's criminal history well illustrates. And, in Illinois, every failure-to-report escapee is necessarily not only a felon but (by virtue of his escape) a recidivist, characteristics that are indicative of dangerousness. See 720 Ill. Comp. Stat. 5/31-6(a); *United States* v. *Rodriquez*, 128 S. Ct. 1783, 1789 (2008); *Caron* v. *United States*, 524 U.S. 308, 312, 315 (1998).

The risk of violence is further increased because law enforcement officers know of the fugitive's demonstrated hostility to custody and are prepared to protect themselves. Unlike homeowners, who are frequently unarmed when they confront a burglar, law enforcement officers typically carry firearms. And they necessarily seek to apprehend the escapee, while homeowners may only try to drive the burglar away from the property.

Because recapture efforts present a significant potential for violence, "hair-raising recovery efforts by law enforcement officers [are] far from unusual." *Mathias*, 482 F.3d at 748 (citing examples). Case law and newspapers alike contain descriptions of violent confrontations between failure-to-report escapees and law enforcement officers seeking to recapture them. See, *e.g.*, *United States* v. *Eaglin*, 571 F.2d 1069 (9th Cir. 1977) (fugitive who failed to return from temporary release shot at police officers who surrounded his apartment during unsuccessful recapture attempt), cert. denied, 435 U.S. 906 (1978); *State* v. *Johnson*, 245 S.W.3d 288 (Mo. Ct. App. 2008) (fugitive who failed to report to jail shot at police after leading them on high-speed chase); *State* v. *Jones*, 979 P.2d 898 (Wash. Ct. App. 1999) (same); *West* v. *State*, 923 P.2d 110 (Alaska Ct. App. 1996) (fugitive who failed to report to prison blew up his hideout after standoff with state troopers); Alan J. Keays, *Man in*

Plea Deal on Several Charges, Rutland Herald, Dec. 17, 2007, (law enforcement officers and failure-to-return escapee engaged in armed standoff); Joshua Palmer, *Nowhere to Run—Four Agencies Corner Convicted Sex Offender*, Times-News, Sept. 14, 2006 (failure-to-report escapee brandished gun and engaged in two-hour standoff when law enforcement sought to recapture him); *Victim of Police Shooting at Store Was a Fugitive*, San Jose Mercury News, Feb. 15, 2001, at 2B (police encounter with failure-to-report escapee led to gunfire); *Woman Who Fled With Fugitive Receives Suspended Sentence*, Portland Press Herald, Feb. 2, 2001, at 2B (statewide manhunt for failure-to-report escapee culminated in deadly recapture attempt).

Despite this evidence of the serious potential risk that recapture efforts will lead to violence, petitioner argues (Br. 26-27) that violence is unlikely. He contends that, because a failure-to-report escapee necessarily enjoyed some limited freedom to move about the community, a public official must have made a determination that the escapee does not present a significant danger. That argument is fundamentally flawed because any determination that the offender was not considered dangerous enough to warrant secure confinement was made before his escape. The escapee's deliberate decision to disobey the law and evade custody alters significantly the assessment whether he is likely to use force to resist recapture. Cf., *e.g.*, N.Y. Absconder Report 2 (stating that inmates who have committed "abscondence [or] escape" may not further participate in temporary release programs); Va. Code Ann. § 53.1-131(A) (2005) (providing that an offender who exceeds the limits of work release "shall be ineligible for further participation in a

work release program during his current term of confinement").

3. Statistical data is not necessary to demonstrate the existence of a serious potential risk of physical injury to others

Petitioner also argues (Br. 42) that the Court cannot conclude that failure-to-report escape presents a serious potential risk of injury because there is no hard statistical data documenting the magnitude of the risk. That argument is untenable in light of *James*, in which the Court held that attempted burglary presents the necessary risk despite the absence of "hard statistics." *James*, 127 S. Ct. at 1598. Indeed, even the dissent in *James*, which disagreed with the Court's evaluation of the risk presented by attempted burglary, acknowledged that, under the ACCA, courts must decide, "without hard statistics to guide them, * * * the degree of risk of physical injury posed by various crimes." *Id.* at 1608 (Scalia, J., dissenting) (internal quotation marks omitted).

Petitioner cites no evidence that Congress intended the decision whether an offense presents a serious risk to depend on statistical analysis, rather than judicial judgment based on experience and common sense. Indeed, because hard statistical evidence about that risk is seldom available, almost no crimes would qualify as "violent felonies" under the ACCA's residual clause if hard statistical evidence were required. It is difficult to imagine that Congress intended that result when it included that "broad residual provision." *James*, 127 S. Ct. at 1592.

B. Failure-To-Report Escape Is Purposeful, Violent, And Aggressive In The Same Way As Burglary

Failure-to-report escape also satisfies the second requirement for qualification as a "violent felony" under the ACCA's residual clause. In *Begay*, the Court concluded that the presence of the four enumerated offenses, coupled with the use of the word "otherwise," indicates that the residual clause covers only "crimes that are roughly similar, in kind as well as in degree of risk posed," to the listed offenses. 128 S. Ct. at 1585. To qualify as similar in kind, a crime must, like the enumerated offenses, involve "purposeful, violent, and aggressive" conduct. *Id.* at 1586. That similarity among the listed offenses is "pertinent," the Court reasoned, because it relates to the ACCA's "basic purpose[]": identifying prior crimes the commission of which makes it more likely that the offender, later possessing a gun, would use the gun to harm others. *Id.* at 1586-1587.[6]

The Court held that the New Mexico offense of repeatedly driving under the influence of alcohol (DUI) does not involve purposeful, violent, and aggressive conduct because "the offender need not have had any criminal intent at all." *Begay*, 128 S. Ct. at 1586-1587. For that reason, unlike the enumerated offenses of burglary and arson, which involve "intentional or purposeful conduct," a conviction for DUI does not show an increased likelihood that the offender is the kind of person who might deliberately harm others. *Id.* at 1587.

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[6] The Court also clarified that the determination whether a crime is purposeful, violent, and aggressive, like the determination whether it poses a serious risk, is made under the categorical approach. *Begay*, 128 S. Ct. at 1584.

In contrast to DUI, failure-to-report escape involves conduct that is purposeful, violent, and aggressive in the same way as burglary. Failure-to-report escape is purposeful like burglary because it requires a mental state of intent or knowledge. And failure-to-report escape is violent and aggressive like burglary because the offender's failure to report for imprisonment creates the risk of a closely related, violent confrontation. The offender's deliberate decision not to report to prison, despite the clear risk of a resulting confrontation in which others are injured, makes it more likely that he would be willing to harm others to carry out his plans.

1. Failure-to-report escape is purposeful because the offender acts knowingly or intentionally

Unlike the strict-liability offense in *Begay*, failure-to-report escape is a purposeful crime because it requires a mental state of knowledge or intent. See 720 Ill. Comp. Stat. 5/31-6(a). Knowledge and intent are the most culpable mental states under Illinois criminal law. See *id.* 5/4-4, 5/4-5. They are only subtly different: a person acts "knowingly" if he is *aware* that his conduct is practically certain to cause a proscribed result, whereas a person acts "intentionally" if he affirmatively *desires* that result. Compare *id.* 5/4-5 with *id.* 5/4-4. As this Court has explained, that distinction is not important in most crimes because "there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results." *United States* v. *Bailey*, 444 U.S. 394, 404 (1980) (citation omitted).

Petitioner suggests (Br. 15) that failure-to-report escape does not satisfy *Begay*'s "purposeful" requirement because the crime can be committed knowingly as well as intentionally. But there is no sound reason for

excluding knowing violations from the scope of the ACCA's residual clause. The distinction between intent and knowledge is irrelevant to the ACCA's purpose because both mental states evince a deliberate decision to cause a prohibited result. For example, the arsonist who sets a fire knowing that a building will burn—whatever his purpose may have been—has willingly created a risk of injury to others. That deliberate decision is what increases the probability that the offender, if he later possessed a gun, would use it to harm others. Petitioner does not identify any court of appeals that has held that knowing offenses are not "purposeful" under *Begay*, nor are we aware of any. At least one court of appeals has held to the contrary. See *United States* v. *Williams*, 529 F.3d 1, 3, 7 (1st Cir. 2008).

A requirement that a crime be committed with the mens rea of intent to qualify as a "violent felony" cannot be reconciled with the enumerated crimes. Congress presumably intended the federal arson offense, 18 U.S.C. 81, to qualify as "arson" under the ACCA, but the federal offense may be committed with a mens rea of knowledge. *United States* v. *Doe*, 136 F.3d 631, 635-636 (9th Cir. 1998), cert. denied, 526 U.S. 1041 (1999); *United States* v. *M.W.*, 890 F.2d 239, 240-241 (10th Cir. 1989). In addition, several federal statutes involving the use of explosives do not require the offender to act with intent. See, *e.g.*, 18 U.S.C. 1992(a)(2) (knowingly placing a destructive device on a mass transportation vehicle with reckless disregard for the safety of human life).

Moreover, an intent requirement would exclude from coverage as "violent felonies" numerous offenses that clearly present a serious risk of physical injury to others and indicate an increased likelihood that the offender would be willing to harm others to achieve his plans.

For example, jail-break escape under federal law and the law of many States requires only a mens rea of knowledge,[7] and, in several more States, the offense may be committed with a mens rea of recklessness.[8] Other crimes that would not qualify as "violent felonies" include knowingly using a chemical weapon, 18 U.S.C. 229, and knowingly derailing a train, 18 U.S.C. 1992. Congress could not have intended to exclude those crimes from coverage under the ACCA.

In his effort to show that failure-to-report escape is not purposeful, petitioner suggests (Br. 14) that the offense could be committed by a defendant who made every effort to report on time but was inadvertently delayed by traffic while traveling to prison. That counterintuitive suggestion is not correct. The conduct that petitioner describes would not establish a "knowing" violation. Under Illinois law, a person acts with knowledge of a prohibited result only "when he is consciously aware that such result is practically certain to be caused by his conduct." 720 Ill. Comp. Stat. 5/4-5(b). In peti-

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[7] See *Bailey*, 444 U.S. at 408; Alaska Stat. §§ 11.56.300, 11.56.310, 11.56.320, 11.56.330, 11.81.610 (2006); Ariz. Rev. Stat. Ann. §§ 13-2502, 13-2503, 13-2504 (2001); Colo. Rev. Stat. Ann. § 18-8-208 (2006); *Hines* v. *United States*, 890 A.2d 686, 689-690 (D.C. 2006); *Reynolds* v. *Commonwealth*, 113 S.W.3d 647, 651 (Ky. App. 2003); Md. Code Ann., Crim. Law § 9-404 (West 2008); Mo. Rev. Stat. § 562.021(3) (West 1999); *id.* § 575.210(3) (West 1995); Mont. Code Ann. § 45-7-306(2) (2007); *State* v. *Aldrich*, 466 A.2d 938, 941-942 (N.H. 1983); N.J. Stat. Ann. §§ 2C:2-2, 2C:29-5 (West 2005); Wash. Rev. Code Ann. § 9A.76.110 (West 2000).

[8] See Del. Code Ann. tit. 11, §§ 251(b), 6533 (2007); N.D. Cent. Code §§ 12.1-08-06, 12.1-02-02(2) (1997); 18 Pa. Cons. Stat. Ann. §§ 302(c), 5121 (West 1983); Tenn. Code Ann. § 39-11-301(c), 39-16-605 (2006); Tex. Penal Code Ann. §§ 6.02(c), 38.06 (Vernon 2003); Utah Code Ann. § 76-2-102, 76-8-309 (West 2003).

tioner's example, the hapless traveler never acts or decides not to act while aware that his decision will cause him to be late to prison. Indeed, because the hypothetical defendant has made reasonable efforts to report on time, his failure to report would not even establish the less culpable mental states of "recklessness" or "negligence" under Illinois law. See *id.* 5/4-6, 5/4-7. It necessarily follows that the defendant would not satisfy the more demanding mental state of knowledge. See, *e.g.*, *People* v. *Higgins*, 229 N.E.2d 161, 163 (Ill. Ct. App. 1967) ("[O]ffenses involving the mental state of 'intent' or 'knowledge' require[] a higher degree of mental culpability than an offense involving the mental state of 'recklessness.'").

Petitioner is likewise incorrect in suggesting (Br. 14) that a defendant could commit failure-to-report escape by oversleeping. The failure-to-report statute would apply to a defendant who was asleep at the time he was required to report to prison only if he had earlier "consciously" decided not to report. 720 Ill. Comp. Stat. 5/4-5(b). It is that conscious decision to avoid an imposed term of imprisonment that makes failure-to-report escape purposeful.

2. Failure-to-report escape is violent and aggressive because the offender deliberately commits the crime despite the clear risk of an ensuing violent confrontation

Failure-to-report escape is also "violent" and "aggressive" within the meaning of *Begay*. An offense qualifies as "violent" and "aggressive" if its commission increases the likelihood that the offender would deliberately harm others. See *Begay*, 128 S. Ct. at 1586. An offense may indicate that inclination in one of two ways. First, an offense may indicate the offender's willingness

to inflict injury because the offender knowingly unleashes a force that can directly cause harm to others. For example, a defendant commits the enumerated offense of arson by setting a fire, and a fire can spread quickly and injure others without subsequent human intervention. Alternatively, an offense may indicate the offender's willingness to inflict injury because the offender consciously commits the crime despite the clear risk that it will trigger a violent confrontation in which others may be harmed. The offender's deliberate commission of the crime despite the risk of a closely related, violent confrontation demonstrates his willingness to cause injury to others to achieve his plans.

Burglary is violent and aggressive in the second way. Although the conduct involved in burglary does not in itself cause injury to others, it demonstrates that the offender is willing to risk a closely related, violent confrontation in which law enforcement officers or others might be injured. The commission of burglary thus makes it more likely that the offender might deliberately harm others.

Failure-to-report escape is violent and aggressive in the same way. A knowing failure to report to prison does not in itself cause any physical injury. But the offense conduct, by its nature, creates a clear risk of a confrontation during recapture efforts in which law enforcement officers or bystanders may be injured. The offender's deliberate decision not to report to prison despite the risk of that closely related, violent confrontation makes it more likely that he would willingly harm others.

3. Failure-to-report escape is not disqualified from being a "violent felony" merely because it involves the failure to comply with a legal duty

Petitioner contends (Br. 14-19) that failure-to-report escape cannot qualify as purposeful, violent, and aggressive because it "involves *doing nothing*" (Br. 14) and is "committed by *inaction*" (Br. 19). That characterization of the offense is not accurate. It ignores the fact that the offender must knowingly achieve a result—his absence from prison—that contravenes his legal duty to submit to custody. See 720 Ill. Comp. Stat. 5/31-6(a). As discussed above, the "knowing" requirement means that the offender must make a conscious decision to fail to comply with his duty. See pp. 25-26, *supra*; 720 Ill. Comp. Stat. 5/4-5(b). Because he must make a conscious decision to achieve that result, his conduct is not fairly described as "doing nothing" or "inaction." Whether he takes a plane to the other side of the globe, hides out in a hotel room under an assumed name, or simply remains at home is irrelevant. Whatever means he uses to cause his absence from prison, the offender is deliberately acting in contravention of his legal duty to report.

That kind of deliberate failure to comply with a legal duty can be purposeful, violent, and aggressive. Criminal law considers the refusal to comply with a duty to act to be equally culpable as an affirmative act. See 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.1, at 422 (2d ed. 2003) (LaFave); Model Penal Code § 2.01(1) (1985), *reprinted in* 3 LaFave App. 277. Many violent crimes—most obviously murder and manslaughter—may be committed by the failure to comply with a legal duty. See 2 LaFave § 14.1; *id.* § 15.4. Thus, a ship captain who deliberately decides to let a sailor drown or a railroad switchman who decides to allow two trains to

collide, killing the passengers, by failing to switch one of the trains to another track commits criminal homicide. See 1 LaFave § 6.2(e), at 448 (noting that "one's failure to act to save someone toward whom he owes a duty to act is murder if he knows that failure to act will be certain or substantially certain to result in death or serious bodily injury"). Indeed, at least two of the enumerated offenses may be committed by the failure to comply with a legal duty. A defendant's failure to put out a fire that he accidentally started qualifies as arson if he intends to cause the building to burn down. See *ibid.* And burglary may be committed by the failure to leave a building that one lacks permission to occupy. See *Taylor* v. *United States*, 495 U.S. 575, 598 (1990).

In all these situations, the deliberate nature of the offense conduct and its creation of a clear risk of ensuing violence make the crime purposeful, violent, and aggressive. Failure-to-report escape is purposeful, violent, and aggressive for the same reasons.

C. Courts May Consider Potential Violence During Recapture In Deciding Whether Failure-To-Report Escape Is A "Violent Felony"

Petitioner argues (Br. 19-24) that courts may not consider potential violence during recapture in deciding whether failure-to-report escape (or any escape, for that matter) qualifies as a "violent felony." That argument is unsound.

1. Whether the violence triggered by an offense occurs during commission of the offense itself or afterwards is irrelevant

Petitioner first contends (Br. 19-21, 23) that courts may not consider any potential violence or injury, no matter how closely related to the offense, unless it would

occur "*during the commission of the offense*." Br. 23. That contention lacks any support in the either the text or the purposes of the ACCA.

Petitioner's contention cannot be squared with the ACCA's text because the injury risked by the enumerated crimes often occurs after they are complete. In many crimes involving use of explosives, for example, any injury to others would occur only once the crimes have already been committed. See, *e.g.*, 18 U.S.C. 2275 ("plac[ing]" bombs or explosives in or upon a vessel with intent to injure the vessel or persons on board); 18 U.S.C. 2332f(a) ("plac[ing]" or "attempt[ing]" to "place[], discharge[], or detonate[]" an explosive device in a public place). Similarly, arson is complete when a building has been set on fire or burned, see, *e.g.*, 18 U.S.C. 81, but any injury to persons often occurs afterwards when the fire spreads or creates a smoke hazard.

The same is true of the enumerated crimes that are violent and aggressive because the offender consciously commits them despite the risk of a closely related, violent confrontation. In most States, a defendant commits the crime of extortion by making a *threat* with the intent to acquire something of value. See *James*, 127 S. Ct. at 1604 (Scalia, J., dissenting) (citing 3 LaFave § 20.4(a), at 199); James Lindgren, Blackmail and Extortion *in* 1 *Encyclopedia of Crime and Justice* 102, 104 (2d ed. 2002) (Lindgren). That common, contemporary understanding of extortion presumably provides the definition of generic "extortion" under the ACCA. See *Taylor*, 495 U.S. at 592-598. And, under that definition, any injury to others would occur after the offense is complete, when the offender decides to carry out the threat that he has made. The potential violent confrontation in burglary also may occur after the offense is complete. The

conduct necessary to commit generic burglary is entering or remaining without permission in a building with intent to commit a crime. *Id.* at 598. A violent confrontation between the burglar and an occupant or police officer may often occur only after the defendant is no longer in the building. Indeed, when the Court assessed the risk posed by attempted burglary in *James*, it expressly considered the risk of violence in a confrontation occurring after the crime is completed. See 127 S. Ct. at 1599 (considering the risk of violence when an officer or homeowner pursues a would-be burglar following an attempted burglary).

A prohibition on considering injuries that occur after commission of the offense also has no support in the remaining text of the ACCA. As petitioner notes (Br. 20), the ACCA refers to the "conduct" "involve[d]" in the offense. 18 U.S.C. 924(e)(2)(B)(ii). But the ACCA does not require the offense conduct to involve "potential physical injury." Instead, it requires the conduct to involve a "potential risk of physical injury." *Ibid.* Thus, the offense conduct need not itself entail potential injury but need only create a potential *risk* that injury will follow. That conclusion is reinforced by the absence of any language requiring that the injury occur "in the course of committing the offense." Congress included that precise language when defining a "crime of violence" under 18 U.S.C. 16(b). Its decision not to include similar language in the ACCA is fatal to petitioner's position.[9]

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[9] Petitioner also errs in asserting (Br. 20) that his proposed rule is required by the "'categorical' approach" to the ACCA. That approach requires consideration of "the conduct encompassed by the elements of the offense." *James*, 127 S. Ct. at 1597. But it says nothing about what the offense conduct must entail. The text of the ACCA tells us that: the offense conduct must create a "serious potential *risk* of physical injury,"

A prohibition on considering injuries occurring after commission of the offense also would not advance the ACCA's purpose. As petitioner acknowledges, that purpose is to identify crimes that demonstrate that the offender is willing to engage in conduct "where the risk of harm to others is consciously known." Br. 21. That goal is best served by taking into account all harm that may result from an offense so long as the offense conduct creates a clear risk that the harm will occur. Whether the harm will occur during commission of the offense itself or in its immediate aftermath reveals nothing about the offender's willingness to injure others. Indeed, petitioner's proposed limitation would frustrate the ACCA's purpose. It would exclude an obviously violent crime like placing a biological toxin in a mass transportation vehicle with the intent to endanger the safety of another person, 18 U.S.C. 1992(a)(2), because any injury to others would occur only after the toxin had been placed on the vehicle. That cannot be what Congress intended.

Contrary to petitioner's contention (Br. 21), considering violence that follows the offense is fully consistent with the statement in the government's brief in *Begay* that an offender's "subsequent volitional choice (only tangentially related to the offense . . .)" should not be considered in evaluating whether the offense indicates his willingness to harm others. U.S. Br. at 21, *Begay* (No. 06-11543). That unremarkable proposition concerns post-offense conduct that is "only tangentially related to the offense." *Ibid.* It does not mean that courts may never consider harm caused by human conduct that occurs after the offense. If that were the case,

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regardless of when that injury would occur. 18 U.S.C. 924(e)(2)(B)(ii) (emphasis added).

burglary and extortion would not qualify as "violent felonies," because neither results in injury absent volitional, violent conduct that takes place after the offense has been committed. The inclusion of burglary and extortion as enumerated offenses makes clear that potential violent conduct following the offense may be considered, provided that the potential violence is "closely related" to the offense. *United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.). And potential violence is "closely related" to the offense when—as with burglary, extortion, and failure-to-report escape—the offense conduct itself creates a clear risk that the violence will occur.

2. Because failure-to-report escape is a continuing offense, any violence during recapture occurs during commission of the offense

Even if there were a requirement that the violence risked by an offense must occur while the offense is ongoing, potential violence during a recapture attempt would satisfy that test. Illinois—like the federal government, the District of Columbia, and the overwhelming majority of States—treats failure-to-report escape as a continuing offense. *People* v. *Miller*, 509 N.E.2d 807, 809 (Ill. App. Ct. 1987); see *Bailey*, 444 U.S. at 413; *United States* v. *Lancaster*, 501 F.3d 673, 680 (6th Cir. 2007) (stating that only six States do not consider escape to be a continuing offense), petition for cert. pending, No. 07-7987 (filed Nov. 29, 2007); *Craig* v. *United States*, 551 A.2d 440, 440-441 (D.C. 1988). The conduct involved in failure-to-report escape thus includes not only the offender's initial moment of absence but also his ongoing failure to return to custody. *Ibid.* Consequently, any violence that occurs during the attempt to recapture the

escapee "occurs *during the commission of the offense*." Pet. Br. 23.

Petitioner argues (Br. 24) that courts still should not consider violence during recapture because the continuing nature of failure-to-report escape does not change the minimum conduct necessary to satisfy the offense elements. Whether an offense is a "violent felony" does not, however, turn on the minimum conduct necessary to commit it. "Rather, the proper inquiry" focuses on the offense conduct "in the ordinary case." *James*, 127 S. Ct. at 1597. This Court has rejected the proposition that an offense is not violent because there are "unusual cases" in which it "might not present a genuine risk of injury." *Ibid.* It is difficult to think of a more "unusual" case than one in which the defendant commits only the minimum conduct necessary to satisfy the offense elements. Considering only that minimum conduct would not be consistent with the ACCA's text, which refers broadly to the "conduct" "involve[d]" in the offense, not the "minimum" or "essential" conduct. 18 U.S.C. 924(e)(2)(B)(ii). Nor would petitioner's proposed approach further the ACCA's purpose. Because most offenders engage in significantly more than the minimum conduct necessary to commit the offense, considering only the risk presented by that conduct would not accurately capture the risk posed by the typical offender.

Petitioner also suggests (Br. 24 & n.7) that whether escape is a continuing offense should not affect whether it is a "violent felony" because a crime's classification as continuing has nothing to do with the danger posed by the offender. That is incorrect. Failure-to-report escape is classified as a continuing offense because "an escaped prisoner poses a continuing threat to society" during the entire period he remains at large. *Miller*,

509 N.E.2d at 808; see *Bailey*, 444 U.S. at 413. In other words, failure-to-report escape is a continuing offense precisely because of the risk that the offender may resort to violence during recapture. It is therefore entirely appropriate to consider that risk in deciding whether the crime qualifies as a "violent felony."

3. Considering potential violence during recapture would not lead to absurd results

Petitioner further contends (Br. 21-23) that classifying failure-to-report escape as a "violent felony" based on the risk of violence during recapture would lead to absurd results. He argues that adopting that analysis would require the conclusion that every crime is a "violent felony," because every crime presents some risk of a violent confrontation during the offender's arrest. That argument is incorrect. The risk of violence during recapture establishes that failure-to-report escape is violent and aggressive because that risk is closely related to that specific offense. In contrast, the risk of violence that inheres in every arrest is generally not closely related to the crime for which the defendant is arrested. That is true for two reasons.

First, one commits failure-to-report escape by absenting oneself from custody, which is the very obligation that law enforcement officers seek to impose through recapture. In contrast, the conduct involved in the ordinary crime does not include avoidance of custody. Because the offense conduct that constitutes escape inherently involves avoidance of lawful custody, escape and recapture are related in a way that arrest and the typical crime are not.

Second, failure-to-report escape creates a clear risk that there will be a violent confrontation during an attempted recapture, but not every crime creates a compa-

rable risk that there will be a violent confrontation during arrest. Both the risk of a confrontation and the risk that the confrontation will be violent are greater for failure-to-report escape than for ordinary offenses, such as the financial crimes identified by petitioner (Br. 22). The risk of a confrontation is greater because virtually every failure-to-report escape will generate an effort at recapture, while not every criminal offense will provoke an arrest (because many defendants voluntarily surrender). Moreover, unlike the ordinary criminal suspect, the escapee has already indicated both his willingness to defy the criminal justice system and his unwillingness to submit to custody. That means that the escapee is more likely to resist recapture than the typical suspect is to resist arrest. The risk that the escapee will use violence is also greater than the risk that the ordinary suspect will do so. As discussed above, failure-to-report escapees are by definition recidivist felons, characteristics which suggest that they pose a greater danger than ordinary suspects, who have not yet been convicted of a crime. And failure-to-report escapees frequently have very serious criminal records, including convictions for violent crimes. Finally, escapees have more at stake and less to lose by resorting to violence, because they already know that incarceration is a certainty upon recapture.

D. The ACCA's Residual Clause Is Not Limited To Property Crimes

Petitioner proposes (Br. 13, 27-41) that the Court interpret the ACCA's residual clause to contain an additional requirement for a crime to qualify as a "violent felony"—it must be a "property crime." That proposed interpretation is unfounded.

1. The enumerated offenses are not all "property crimes"

Petitioner does not identify anything in the text of the residual clause that refers to "property crimes" or suggests that the clause is limited to those offenses. Instead, he invokes (Br. 13) the canon of *ejusdem generis* and this Court's reasoning in *Begay*. He argues that a "property crimes" limitation is a necessary extension of this Court's ruling in *Begay* that offenses qualifying under the residual clause must be similar in kind to the enumerated offenses, which petitioner asserts are all "property crimes." That argument fails at the outset because not all the enumerated offenses are "property crimes."

Petitioner proffers a multifaceted definition under which an offense qualifies as a "property crime" if the offender either (1) "physically * * * invade[s] property," (2) attempts "to acquire property from another," or (3) releases a force "that necessarily would damage property." Br. 34. The only characteristic uniting those categories is that they each attempt to describe the enumerated offenses in a way that involves property. Even under petitioner's tailor-made definition, however, at least two enumerated offenses fail to qualify.

Crimes involving use of explosives are not property crimes even under petitioner's definition because they do not necessarily threaten to "damage property." Pet. Br. 34. For example, a violation of 18 U.S.C. 2332f(a), which criminalizes the unlawful detonation of an explosive in a place of public use, need not "target[] property." Pet. Br. 30. One can commit that offense by exploding a bomb in an open field and injuring only people. Explosives offenses are included in the ACCA not because they risk damaging property but because the un-

lawful use of explosives shows the offender's willingness to injure others. In a particular case, use of explosives may damage property that is nearby, but that does not mean that every offense involving use of explosives is a "property crime."

Extortion too is not a property crime, even under petitioner's definition, because it does not necessarily require an attempt to obtain "property." The contemporary understanding of extortion (which, as discussed above, controls under the ACCA) entails an effort to obtain "anything of value." 4 Charles E. Torcia, *Wharton's Criminal Law* § 658, at 492-493 (1996); see Lindgren 102 (stating that extortion includes "obtaining property" or "compelling any action against one's will"); *Black's Law Dictionary* 623 (8th ed. 2004) (defining statutory extortion as "obtaining something or compelling some action" by force or coercion); *James*, 127 S. Ct. at 1606 (Scalia, J., dissenting) (defining extortion under the ACCA as "the obtaining of something of value from another" by certain prohibited means); *id.* at 1605 n.2 (noting that the Court had previously defined generic extortion under the Travel Act and RICO as "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats" (citations omitted)). Extortion may be used to obtain a favor from a public official, a false confession in judicial proceedings, or the use of a business for money laundering. See, *e.g.*, *United States* v. *Nardello*, 393 U.S. 286, 295 n.13 (1969) (explaining that extortion "is typically employed by organized crime" to "infiltrate legitimate businesses[] and obtain control of labor unions"). Extortion is therefore "generally classified as a crime against the administration of justice or against the conduct of

government, rather than as a crime against property." 3 LaFave § 20.4, at 197-198.[10]

Petitioner relies (Br. 29) on the Model Penal Code for the proposition that extortion is a form of theft and therefore targets property. Model Penal Code § 223.4, *reprinted in* 3 LaFave App. 325. But that provision addresses "theft by" extortion and defines only when a person "is guilty of theft." *Ibid.* It does not account for the full range of conduct prohibited by generic extortion. And it does not reflect the ACCA's purpose of identifying offenses that show an offender's willingness to injure others. A person who obtains a false confession by threat of force shows as much willingness to injure others as a person who extorts some tangible good by the same threat. It is the threat, not the benefit obtained, that is important. There is no good reason to conclude that extortion under the ACCA is a "property crime."

Even the enumerated offense of burglary is a "property crime" only in the sense that it requires unlawful entry into or remaining in a building or structure. See *Taylor*, 495 U.S. at 598. Generic burglary does not require an intent to obtain or to damage property, but

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[10] In *Wilkie* v. *Robbins*, 127 S. Ct. 2588 (2007), this Court observed that, "[a]t common law, extortion was a property offense committed by a public official who took any money or thing of value that was not due to him under pretense that he was entitled to such property by virtue of his office." *Id.* at 2605-2606 (quoting *Scheidler* v. *NOW*, 537 U.S. 393, 402 (2003)). In neither *Wilkie* nor *Scheidler*, however, did the Court have occasion to consider whether extortion under the ACCA, which is not coextensive with common-law extortion, see p. 30, *supra*; *Taylor*, 495 U.S. at 592-595, is a property crime. Moreover, a "thing of value" can include benefits, such as access to a legislator or the promise of his vote, that do not constitute "property" in ordinary parlance. The Court's passing reference to common-law extortion as a "property crime" therefore does not support petitioner's argument here.

only an "intent to commit a crime." *Ibid.* That crime need not concern property at all. Thus, petitioner can classify burglary as a "property crime" only by expanding his definition to include offenses that *occur at* certain properties, even if the offender does not seek to harm or wrongfully to obtain any property. By so expanding his definition, petitioner undermines his claim that the enumerated offenses are "property crimes" in any meaningful sense.

2. Status as a "property crime" is irrelevant to the ACCA's purpose

Even if petitioner were correct that all the enumerated offenses are "property crimes," that would not justify limiting the residual clause to that category. A "property crimes" limitation would still not be justified under either the canon of *ejusdem generis* or the Court's reasoning in *Begay* because it would not serve the ACCA's purpose—identifying offenses the commission of which makes it more likely that the offender would use a gun to harm others.

Under the canon of *ejusdem generis*, the Court often construes a general term that follows a list of specific terms in a statute as covering only matters similar to the specific terms. But the Court infers a limitation under that principle only if the limitation advances the statute's purpose. See, *e.g.*, *United States* v. *Powell*, 423 U.S. 87, 90-91 (1975); *United States* v. *Alpers*, 338 U.S. 680, 682-683 (1950); *Gooch* v. *United States*, 297 U.S. 124, 128 (1936). Similarly, in *Begay*, the Court held that offenses covered under the residual clause must, like the enumerated offenses, involve purposeful, violent, and aggressive conduct because that "pertinent" common attribute "matters considerably" for achieving "the Act's basic purposes." 128 S. Ct. at 1586-1587.

A limitation to property crimes, in contrast, would do nothing to advance the ACCA's purpose. Crimes that target people, property, or abstract concepts like the "public order" can all involve the potential that the offender will deliberately injure others. Because all those categories of crimes can indicate the offender's willingness to injure others, all of them should be able to qualify as "violent felonies" under the ACCA.

Indeed, a "property crimes" limitation would affirmatively frustrate the ACCA's purpose. It would exclude from coverage offenses like jail-break escape, 18 U.S.C. 751, inciting a riot, 18 U.S.C. 2101, or using a chemical weapon, 18 U.S.C. 229. Those purposeful, violent, and aggressive offenses create a serious potential risk of physical injury to others, and their commission surely makes it more likely that the offender would willingly harm others to achieve his plans. Excluding them from qualification as "violent felonies" because they are not "property crimes" would therefore undermine Congress's aim in enacting the ACCA.[11]

3. The ACCA's legislative history does not support a "property crimes" limitation

Contrary to petitioner's contention (Br. 31-33), the ACCA's legislative history also does not support a "property crimes" limitation. This Court has stated that

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[11] Petitioner also errs in arguing (Br. 30-31) that the ACCA's structure supports a "property crimes" limitation. He contends that such a limitation would make the ACCA's residual clause coextensive with the "property crimes" nature of subsection (ii) and distinct from the "crimes targeting persons" in subsection (i). But the distinction between the two subsections arises from the focus of subsection (i) on *elements* involving force and the focus of subsection (ii) on *results* involving potential injury. Subsection (ii) need not be further limited by an artificial "property crimes" constraint.

legislative history is relevant only if it "shed[s] a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 567-568 (2005). Petitioner has not pointed to any language in the ACCA that even remotely suggests that the residual clause might be limited to property crimes.

In any event, the legislative history does not indicate that Congress intended a "property crimes" limitation. When Congress amended the ACCA in 1986, its purpose was to expand the predicate offenses beyond robbery and burglary. In response to criticism of the initial proposals to accomplish that goal, Congress focused on a compromise bill. That bill expanded the predicate crimes to cover any "violent felony," which the bill defined to include a crime that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) involves conduct that presents a serious potential risk of physical injury to another.

H.R. 4885, 99th Cong., 2d Sess. 3 (1986) (quoted in *Taylor*, 495 U.S. at 586). The House Report on the compromise bill stated that subsection (ii) included offenses such as "burglary, arson, extortion, [and] use of explosives," which were offenses specifically mentioned in the congressional hearings. See H.R. Rep. No. 849, 99th Cong., 2d Sess. 5 (1986) (quoted in *Taylor*, 495 U.S. at 587); *Armed Career Criminal Legislation: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 15 (1986) (statement of Mr. Knapp). The enhancement provision as finally enacted followed that form, but added to subsection (ii)

the specific offenses that were mentioned in the House Report.

Petitioner emphasizes that the House Report describes subsection (ii) as "add[ing] all State and Federal felonies *against property* * * * where the conduct involved presents a serious risk of injury to a person." Br. 32-33 (quoting H.R. Rep. No. 849, *supra*, at 5). But the House Report does not indicate that Congress believed "violent felonies" would be *limited* to property crimes. To the contrary, the language of the bill covered the specified crimes as a subset of a broad category. And that broad category was defined in terms of the risk of physical injury, not status as a property crime.

4. The canon against surplusage does not support a "property crimes" limitation

Petitioner also argues (Br. 28-29) that limiting the residual clause to property crimes is required by the canon against surplusage. That is not correct.

Petitioner may be right that every offense that satisfies the ACCA's first clause, because it has "as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i), would also satisfy the residual clause, because it would be a purposeful, violent, and aggressive offense that "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii); see *Begay*, 128 S. Ct. at 1585-1586. That does not mean, however, that the first clause is "superfluous." Pet. Br. 28. The first clause provides an objective method for qualifying a prior conviction as a violent felony that does not require a court to engage in the qualitative analysis required by the residual clause. A court can determine that an offense qualifies under the first clause simply by examining the offense elements.

To determine whether the offense qualifies under the residual clause, the court must conduct an analysis of the risk of physical injury that the offense creates. Congress may well have retained the first clause so that courts would not need to engage in the close examination and comparison of crimes whose elements themselves include the use of force.

Furthermore, Congress included the residual clause as a "catch-all" designed to cover violent felonies that might not qualify under the first clause. *James*, 127 S. Ct. at 1592 (quoting *United States* v. *Davis*, 16 F.3d 212, 217 (7th Cir.), cert. denied, 513 U.S. 945 (1994)). In doing so, Congress was likely more concerned about ensuring full coverage than eliminating possible redundancy. Accordingly, "the canon against surplusage has substantially less force when it comes to interpreting a broad residual clause like the one at issue here." *Begay*, 128 S. Ct. at 1591 (Scalia, J., concurring).

In any event, even if the residual clause had to be narrowed to avoid surplusage, that would not justify limiting it to property crimes. Rather, the most natural way to eliminate any surplusage would be to limit the residual clause to offenses that lack the elements specified in first clause. See *Begay*, 128 S. Ct. at 1591 (Scalia, J., concurring) ("[I]t would raise no eyebrows to refer to 'crimes that entail the use of force and crimes that, while not entailing the use of force, nonetheless present a serious risk of injury to another person.'"). That approach would avoid excluding more than what is necessary to eliminate any surplusage.

5. Constitutional concerns do not support a "property crimes" limitation

Petitioner further contends (Br. 34-41) that constitutional problems with the statutorily-mandated inquiry

into whether a crime presents a "serious potential risk of physical injury" require the Court to substitute a "property crimes" limitation. The constitutional quandaries identified by petitioner do not exist, and, in any event, they could not justify the atextual requirement that he proposes.

Petitioner first argues (Br. 39-40) that the serious-risk standard is unconstitutionally vague. This Court already rejected that argument in *James*. The Court explained that, although the standard requires judges to make evaluations that are "sometimes difficult," it is not "so indefinite as to prevent an ordinary person from understanding what conduct it prohibits." *James*, 127 S. Ct. at 1598 n.6. As the Court noted, other federal statutes use "[s]imilar formulations." *Ibid.* (citing 18 U.S.C. 2332b(a)(1)(B) (defining "terrorist act" to include conduct that, among things, "creates a substantial risk of serious bodily injury to any other person")); see 18 U.S.C. 844(f)(2) (providing enhanced penalty for malicious destruction of property by fire or explosive that "creates a substantial risk of injury to any person"); 21 U.S.C. 858 (providing additional penalty where manufacture of controlled substance "creates a substantial risk of harm to human life"). Numerous state statutes also require judicial or jury assessments of the substantiality of risk.[12] The ACCA provides more guidance than many

[12] All or virtually all States have criminal laws that define reckless endangerment, kidnapping, resisting arrest, or other offenses by using some formulation similar to "serious risk of physical injury." See, *e.g.*, Ala. Code § 13A-6-24(a) (LexisNexis 2005) ("substantial risk of serious physical injury"); Alaska Stat. § 11.41.300(a)(2)(B) (2006) (same); *id.* § 11.56.700 ("substantial risk of physical injury"); Ariz. Rev. Stat. Ann. § 13-1201(A) (2001) ("substantial risk of imminent death or physical injury"); *id.* § 13-2508(A)(2) ("substantial risk of causing physical injury"); Ark. Code Ann. § 5-11-103(a) (2006) ("substantial risk of serious

of those statutes on the meaning of its serious-risk standard because the enumerated offenses provide examples of what satisfies that standard.

Petitioner also argues (Br. 40-41) that the serious-risk inquiry violates separation-of-powers principles because it entails "[d]efining crimes and fixing penalties," which are "legislative" rather than judicial functions. Br. 40 (quoting *United States* v. *Evans*, 333 U.S. 483, 486 (1948), and *Ex parte United States*, 242 U.S. 27, 41-42 (1916)). Petitioner's reliance on those cases is unfounded. In *Ex parte United States*, the Court held that a district court exceeds the judicial power when it suspends a sentence that it is required to impose by statute. 242 U.S. at 37-52. This case does not involve a judicial refusal to comply with a statutory command. *Evans* is likewise inapposite. In that case, the Court held that, where Congress has defined a crime but failed to prescribe a penalty for its commission, the Court's selection of a penalty from among several plausible possibilities would be purely speculative and therefore "outside the bounds of judicial interpretation." 333 U.S. at 484-485, 495. In this case, by contrast, Congress has defined the crime in question, and it has fixed the penalties for its commission. This case does not call on the Court to "plug [a] hole in the statute," *id.* at 487; it calls on the Court to interpret the statute. That is a judicial function.

As described above, many federal and state statutes call for a determination whether the risk presented by certain conduct is "substantial" or "serious." Making

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physical injury"); *id.* § 5-13-206(a) ("substantial risk of physical injury"); Cal. Penal Code § 278.6(a)(1)(a) (West 2008) ("substantial risk of physical injury or illness"); Colo. Rev. Stat. § 18-3-208 (2006) ("substantial risk of serious bodily injury").

that determination is well within the constitutional competence of the judiciary. See, *e.g.*, *Farmer* v. *Brennan*, 511 U.S. 825, 828 (1994) (describing an inmate's judicially-administered right under the Eighth Amendment to be free from prison officials' deliberate indifference to a "substantial risk of serious harm").

For similar reasons, petitioner is incorrect in arguing (Br. 34-35, 38) that the Court should substitute a "property crimes" limitation for the serious-risk inquiry because the limitation would be easier to administer. The courts are fully capable of conducting an inquiry into the risk presented by a particular crime, and they must do so in numerous contexts. Moreover, a "property crimes" limitation would not be as easy to administer as petitioner suggests. The difficulty in applying such a limitation is illustrated by the dispute in this case about whether several enumerated crimes would qualify. See pp. 37-40, *supra*. In any event, administrability concerns cannot justify rewriting the ACCA by substituting a requirement that the statute clearly does not impose for one that it clearly imposes.

Although petitioner contends that substitution of a "property crimes" limitation for the serious-risk inquiry "comports with how this Court resolved both *Begay* and *James*" (Br. 35-36), that contention is plainly incorrect. *James* "considered only matters of degree, *i.e.*, whether the amount of risk posed by attempted burglary was comparable to the amount of risk posed by the example crime of burglary." *Begay*, 128 S. Ct. at 1585. And the Court in *Begay* confirmed that the ACCA's residual clause requires consideration of whether an offense is "roughly similar" to the enumerated offenses not only "in kind," but also "in degree of risk posed." *Ibid.* The Court did not inquire into whether the crime at issue

was a "property crime" in either case. There is thus no support for the novel "property crimes" limitation that petitioner proposes.

E. The Rule Of Lenity Does Not Apply

Finally, contrary to petitioner's argument (Br. 43), the rule of lenity does not apply here. That rule is "reserved for cases" that, unlike this one, involve a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted).

Petitioner does not identify any language in the ACCA that is ambiguous. Instead, he simply disagrees (Br. 43) with the court of appeals' conclusion that a convicted felon's deliberate failure to report to prison creates a "serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). The serious-risk standard, although it sometimes requires careful examination of the nature of particular crimes, is not ambiguous. And, for the reasons discussed above, failure-to-report escape clearly satisfies that standard.[13]

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[13] Although the Seventh Circuit, in a recent case, reversed the position that it took below, see note 3, *supra*, that action provides no reason for this Court to decline to resolve the question presented in this case. The Seventh Circuit's change of position increases, rather than decreases, the existing tension among the courts of appeals, and the Court's resolution of the question presented will definitively determine whether petitioner's sentence is legally authorized. The Seventh Circuit's new position is incorrect for the reasons explained above and, if applied to this case, would improperly require petitioner's mandatory minimum 15-year sentence under the ACCA to be set aside.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

RELEVANT STATUTORY PROVISIONS

1. 18 U.S.C. 922 provides in pertinent part:

Unlawful acts

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[,]

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. 18 U.S.C. 924(e) provides in pertinent part:

Penalties

* * * * *

(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 * * * 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.

* * * * *

3. 720 Ill. Comp. Stat. 5/31-6 (West 2003) provides in pertinent part:

Escape; failure to report to a penal institution or to report for periodic imprisonment

(a) A person convicted of a felony or charged with the commission of a felony who intentionally escapes from any penal institution or from the custody of an employee of that institution commits a Class 2 felony; however, a person convicted of a felony 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 is guilty of a Class 3 felony.

4. 730 Ill. Comp. Stat. 5/5-8-1 (West 2007) provides in pertinent part:

Sentence of Imprisonment for Felony

(a) Except as otherwise provided in the statute defining the offense, a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:

* * * * *

(6) for a Class 3 felony, the sentence shall be not less than 2 years and not more than 5 years[.]

5. 730 Ill. Comp. Stat. 5/5-5-3 (West 2007) provides in pertinent part:

Disposition

(b) The following options shall be appropriate dispositions, alone or in combination, for all felonies and misdemeanors other than those identified in subsection (c) of this Section:

(1) A period of probation.

(2) A term of periodic imprisonment.

* * * * *

(4) A term of imprisonment.

* * * * *

(6) A fine.

APPENDIX B

FEDERAL AND STATE STATISTICS

United States
Defendants Convicted of 18 U.S.C. 4082 Escape by Criminal History Category, 2003-2007

Criminal History Category	Number of Convicted Defendants	Cumulative Percentage of Total
VI	39	35%
V	19	52%
IV	22	72%
III	31	100%

Data obtained from United States Department of Justice, Criminal Division, Office of Policy and Legislation, July 2008, using data provided by the United States Sentencing Commission

Florida
Escapes from Work Release Centers Between July 1, 2003, and June 25, 2008, by Primary Offense Group/Primary Offense Description

Offense Group	**Number**
1 -Murder/Manslaughter	9
3 -Robbery	38
4 -Violent, Other	25
5-28 -Burglary, Structure	38
5-29 -Burglary, Dwelling	94
5-30 -Burglary, Armed	5
5-31 -Burglary with Assault	3
5-32 -Burglary/Trespass, Other	2
6-33 -Grand Theft, Other	27
6-34 -Grand Theft, Automobile	35
6-35 -Stolen Property	45
6-36 -Forgery/Counterfeiting	6
6-37 -Worthless Checks	2
6-38 -Fraudulent Practices	8
6-39 -Other Theft/Property Damage	5
7-40 -Drugs, Manufacture/ Sale/Purchase	105
7-41 -Drugs, Trafficking	26
7-42 -Drugs, Possession/Other	51
8 -Weapons	22
9 -Other	39

Data obtained from Florida Department of Corrections, Bureau of Research and Data Analysis, June 2008

Massachusetts
Failure-to-Return Escapees from January 1, 2003, to June 30, 2008, by Incarceration Offense

Incarceration Offense	**Number**
Armed Robbery	3
Armed Assault	1
Assault and Battery with Deadly Weapon	4
Distribution of Class B Cocaine	2
Possession of Class B Cocaine with Intent to Distribute	1
Possession of Class B Substance	1
Larceny over $250	1
Breaking and Entering with Intent to Commit Felony	1
Unarmed Burglary	1
Theft of a Motor Vehicle	2
Weapons Violation	1

Data obtained from Massachusetts Department of Correction, Fugitive Apprehension Unit, July 2008

North Carolina
Offenders Who Failed to Return from Work Release, Home Leave, Community Volunteering, or Other Outside Activities from January 1, 2003, to June 30, 2008

Crime of Incarceration	Number
Armed Robbery	1
Arson 2nd Degree	1
Assault with Deadly Weapon	2
Burglary 1st Degree	4
Burglary 2nd Degree	2
Cheat - Property/Services	1
Common Law Robbery	2
DWI Level 1	1
Felony B&E	5
Habitual Felon	17
Involuntary Manslaughter	1
Kidnapping 2nd Degree of a Minor	1
Kidnapping 2nd Degree	2
Larceny	1
Larceny (Over $200)	1
Larceny of Motor Vehicle	1
Larceny over $1000	3
Malicious Conduct/Prisoner	1
Misdemeanor B&E	3
Murder Second Degree	2
Possess WITS Schedule II	1
Possessing Stolen Goods	1
Possession of Firearm by Felon	2

Rape First Degree	1
Robbery with Dangerous Weapon	4
Sell Schedule II	1

Data obtained from North Carolina Department of Correction, Policy Development Analyst, July 2008

Pennsylvania
Failure-to-Return Escapees from January 1, 2003, to June 24, 2008, by Offense Type

Offense Type	Number
Access Device Fraud	1
Accident with Death-Inj	1
Aggrvtd Aslt	21
Aggrvtd Aslt with SerBodInj	3
Aggrvtd Aslt with Wpn	1
Burglary	26
Contraband/Cntrl Subst	1
Corrupt Orgns	1
Crim Attempt	1
Crim Conspiracy	9
Crim Trespass	4
Drugs- PWID	61
Drugs-PCS	2
DUI	1
Firearm in public	1
Firearm without license	3
Firearms-Unlawful Possess	1
Forgery	4
Kidnapping	1
Murder 3	2
Prostitution	1
Recvng Stolen Prop	4
Retail Theft	3
Robbery	45
Robbery of Mtr Veh	3
Robbery with SerBodInj	4
Simple Aslt	2
Theft	5
Theft by Deception	1

Theft-Movable Prop	4
VOP	3

Data obtained from Pennsylvania Department of Corrections, Bureau of Planning, Research, Statistics, and Grants, July 2008

Washington
Escape by Failure to Return from Work Release from January 1, 2003, to July 23, 2008

Incarceration Offense	**Number**
Arson	1
Assault	70
Attempt to Elude	2
Auto Theft	18
Burglary	39
Criminal Mistreatment	1
Manufacture/Delivery of Drugs	69
Other Drugs	69
Fail to Register Sex Offender	1
Maliscious Mischief	1
Murder 2nd	1
Property (Theft/Forgery/PSP)	50
Public Nuisance Sex	1
Robbery	27
Unlawful Possession of Firearm	1

Data obtained from Washington Department of Corrections, Planning and Research, July 2008