CRIMINAL LAW — SENTENCING ENHANCEMENTS — SEVENTH CIRCUIT HOLDS THAT CONVICTIONS FOR FAILING TO REPORT TO JAIL CONSTITUTE VIOLENT FELONIES UNDER 18 U.S.C. § 924(e). — *United States v. Golden*, 466 F.3d 612 (7th Cir. 2006), *reh'g and suggestion for reh'g en banc denied*, No. 06-1326, 2007 U.S. App. LEXIS 1646 (7th Cir. Jan. 8, 2007).

Though the phrase "violent felony" may seem redundant in common parlance, the law should be more discerning. The federal government uses this designation for the purpose of sentencing enhancement,[1] but courts have struggled to contain it. The greatest source of trouble is a catch-all provision sweeping in all felonies that "otherwise . . . present[] a serious potential risk of physical injury to another."[2] In determining whether the risk of violence presented by an offense is sufficient to trigger a violent felony enhancement under this catch-all provision, courts have applied a "categorical" approach, considering only the statutory definition of the crime at issue and not the conduct underlying conviction.[3] Recently, in *United States v. Golden*,[4] the Seventh Circuit held that failure to report to jail is a violent felony for the purpose of an 18 U.S.C. § 924(e) sentencing enhancement.[5] Although the court purported to rest its conclusion on a categorical analysis, it in fact flouted such an approach by relying on conduct similarities and by glossing over distinctions in the offenses as statutorily defined. *Golden* thus illustrates how inconsistent approaches to violent felony analysis can lead to unwarranted expansion of sentencing enhancement directives.

On November 10, 2005, Reggie Golden pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).[6] A pre-sentence investigation report suggested enhancing Golden's sentence under § 924(e), which mandates a minimum sentence of fifteen years imprisonment for individuals convicted of a felon-in-possession charge who have at least three prior convictions for violent felonies.[7] At the sentencing hearing, Golden disputed the applicability of this enhancement provision, objecting to the classification of his two convictions for failure to report to county jail as violent felonies.[8] The

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[1] *See, e.g.*, 18 U.S.C.A. § 924(e) (West 2000 & Supp. 2006); 18 U.S.C. § 3559(c) (2000 & Supp. IV 2004); *see also* U.S. SENTENCING GUIDELINES MANUAL §§ 4B1.1–4B1.2 (2006).

[2] 18 U.S.C.A. § 924(e)(2)(B)(ii); U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2).

[3] *See* Taylor v. United States, 495 U.S. 575, 600–01 (1990).

[4] 466 F.3d 612 (7th Cir. 2006), *reh'g and suggestion for reh'g en banc denied*, No. 06-1326, 2007 U.S. App. LEXIS 1646 (7th Cir. Jan. 8, 2007).

[5] *Id.* at 615.

[6] *Id.* at 613.

[7] *Id.*

[8] *Id.*

district court held that Golden's failure-to-report convictions were violent felonies, thus making the sentencing enhancement provision applicable.[9] Pursuant to this enhancement, the court sentenced Golden to 200 months of imprisonment and five years of supervised release.[10]

The Seventh Circuit affirmed, holding that failure to report to county jail constitutes a violent felony under § 924(e).[11] Writing for the court, Judge Bauer began by paraphrasing the definition of a violent felony under § 924(e)(2)(B) as "any crime punishable by imprisonment exceeding one year" that either "has [as] an element the use, attempted use, or threatened use of physical force against the person of another" or "is burglary, arson, or extortion, involves the use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*."[12] Recognizing that neither use nor threatened use of physical force was an element of the failure to report,[13] Judge Bauer framed the relevant question as whether failure to report fits within the catch-all provision.[14]

Relying on both Supreme Court precedent[15] and an analogous Seventh Circuit case,[16] Judge Bauer asserted that this inquiry demanded a categorical approach, which looks to the statutory definition of the relevant crime rather than to the facts specific to the defendant's conduct. He then reasoned that under the categorical approach, the court's earlier holding in *United States v. Bryant*[17] was controlling.[18] In *Bryant*, the court held that the defendant committed a crime of violence for federal sentencing purposes when he failed to return to a halfway house after a permitted absence and was convicted of "escape."[19] The *Bryant* court declined to apply a fact-specific approach in assessing whether the offense was a crime of violence, arguing that its broad, categorical focus on the crime of escape was demanded by

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[9] *Id.*

[10] *Id.*

[11] *Id.* at 615.

[12] *Id.* at 613 (citing 18 U.S.C.A. § 924(e)(2)(B) (West 2000 & Supp. 2006)).

[13] Golden's two failure-to-report convictions arose under a Wisconsin statute that declared: "Any person who receives a stay of execution of a sentence of imprisonment of 10 or more days to a county jail . . . and who intentionally fails to report to the county jail as required under the sentence is guilty of a . . . felony," WIS. STAT. § 946.425(1m)(b) (2003). *See Golden*, 466 F.3d at 613.

[14] *Golden*, 466 F.3d at 613–14.

[15] Taylor v. United States, 495 U.S. 575, 600–01 (1990) (adopting the categorical approach in holding that a defendant's prior burglary conviction constituted a violent felony under § 924(e)).

[16] United States v. Franklin, 302 F.3d 722, 725 (7th Cir. 2002) (adopting the categorical approach in holding that escape is a violent felony).

[17] 310 F.3d 550 (7th Cir. 2002).

[18] *Golden*, 466 F.3d at 614.

[19] *Bryant*, 310 F.3d at 552, 554. Bryant was convicted under the federal escape statute, which criminalizes "escapes or attempts to escape . . . from any institution or facility in which [a person] is confined . . . under the laws of the United States," 18 U.S.C. § 751(a) (2000). *See Bryant*, 310 F.3d at 552.

precedent.[20] Because Judge Bauer could see no "principled distinction" between failure to report and failure to return under the categorical approach,[21] he concluded that failure-to-report offenses are violent crimes.[22] In doing so, he rejected Golden's argument that failure to report was distinguishable from escape because the former represents "passive inaction" while the latter is a "deliberate action."[23] Judge Bauer asserted that the risk of violence in escape cases arises when officers attempt recapture and that there is no useful distinction between the risk entailed by recapture and that entailed by capture.[24]

Judge Rovner concurred. She agreed that the court's holding was a "logical extension" of its *Bryant* decision, stating that the risk of a violent confrontation "is likely the same in capture as it is in recapture."[25] However, she wrote separately to point out that the court did not know the actual risks inherent in recapture versus capture, as the government had provided no data in support of its contention that failure to report to jail presented a serious potential risk of violence.[26] Judge Rovner further suggested that the risk of physical confrontation might be greater following an escape than after a failure to report, reasoning that only in the former situation has the defendant demonstrated a "specific inclination to resist or evade restraint."[27] She cautioned that the court's disregard for this potential distinction, combined with its use of the categorical approach, had set it on a "path to determining that comparable crimes," such as probation violations, are also violent felonies.[28] Judge Rovner concluded that if evidence does not support the court's assumption regarding the risk inherent in a failure to report, the court might have to reconsider its decision.[29]

Judge Williams dissented, arguing that failure to report to jail is not a violent felony under § 924(e).[30] Judge Williams stated that her conclusion followed from a close reading of the enhancement statute, in particular the language defining as violent an offense that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[31] Under the canon of *ejusdem generis*, the scope of the

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[20] *Bryant*, 310 F.3d at 553–54 (citing *Taylor*, 495 U.S. at 601; *Franklin*, 302 F.3d at 723).
[21] *Golden*, 466 F.3d at 614.
[22] *Id.* at 614–15.
[23] *Id.* at 614.
[24] *Id.*
[25] *Id.* at 615 (Rovner, J., concurring).
[26] *Id.*
[27] *Id.*
[28] *Id.* at 615–16.
[29] *Id.* at 616.
[30] *Id.* at 616 (Williams, J., dissenting).
[31] *Id.* at 616 (quoting 18 U.S.C.A § 924(e)(2)(B)(ii) (West 2000 & Supp. 2006)) (internal quotation marks omitted).

vague "or otherwise" clause is limited by the specific examples listed, such that a violent felony must present a risk of injury similar to or greater than that entailed by burglary, arson, extortion, or crimes involving explosives.[32] Judge Williams contended that the alternative interpretation advanced by Judge Bauer — that a crime need only present a "possibility" of violent confrontation to be deemed violent[33] — was an unlikely reading of the statute and would render all felonies "violent."[34] She also rejected the majority's contention that *Bryant* was controlling, noting that the relevant statute in *Bryant* punished intentional departures from custody, whereas failure to report is merely a "crime of omission."[35] Finally, Judge Williams voiced concern that § 924(e) does not provide fair warning to a layperson that a failure-to-report conviction will subject him to this sentencing enhancement, raising due process concerns.[36]

Both Judge Bauer, writing for the court, and Judge Rovner, in her concurrence, claimed that *Bryant* compelled the conclusion that failure to report is a crime of violence.[37] In so arguing, they purported to root their analyses in the categorical approach. In fact, their analyses focused on conduct similarities — which the categorical approach directs courts not to examine — and ignored differences in the crimes as statutorily defined.

Looking to the *Bryant* precedent, Judge Bauer reasoned that there was "no principled distinction between the failure to report to jail and the failure to report back to a halfway house after being absent on a work release."[38] Regardless of the merits of this comparison, it is not the one called for under the categorical approach, which explicitly instructs courts "to look only to the fact of conviction and the statutory definition of the prior offense"[39] and "not to the particular facts underlying those convictions."[40] Far from being dispositive, the similarity of

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[32] *Id.* at 616–17.

[33] *Id.* at 614 (majority opinion).

[34] *Id.* at 617 (Williams, J., dissenting). Judge Williams argued that if Congress had intended to define as violent all felonies that raised the possibility of violence, it would have had little reason to include a list of crimes that obviously posed a risk of injury. *Id.*

[35] *Id.* at 617–18. Judge Williams did not elaborate on this distinction, but cited opinions from other circuits questioning whether failure-to-return crimes posed the same risk of danger as active escape crimes. *Id.* at 618 (citing United States v. Piccolo, 441 F.3d 1084, 1088 (9th Cir. 2006); United States v. Adkins, 196 F.3d 1112, 1119 (10th Cir. 1999) (McKay, J., concurring)).

[36] *Id.* at 618–19.

[37] *See id.* at 614 (majority opinion); *id.* at 615 (Rovner, J., concurring).

[38] *Id.* at 614 (majority opinion). Similarly, Judge Rovner suggested that "treating failure to report to jail as a violent felony is a logical extension of our earlier decision treating failure to return to a halfway house as a violent felony." *Id.* at 615 (Rovner, J., concurring).

[39] Taylor v. United States, 495 U.S. 575, 602 (1990); *accord* United States v. Franklin, 302 F.3d 722, 723 (7th Cir. 2002).

[40] *Taylor*, 495 U.S. at 600; *accord* United States v. Bryant, 310 F.3d 550, 554 (7th Cir. 2002); *Franklin*, 302 F.3d at 723; United States v. Fife, 81 F.3d 62, 64 (7th Cir. 1996).

the conduct underlying the convictions in *Bryant* and *Golden* should not have entered into consideration.

Under a proper application of the categorical approach, *Bryant* would not be controlling. Despite the similar *conduct* in each case, the *crimes* for which the defendants were convicted differed significantly. Perhaps the most important difference is that the federal escape statute in *Bryant* penalized all "escapes or attempts to escape"[41] from custody — generally suggesting affirmative acts — whereas the statute in *Golden* pertained only to failures to report[42] — more aptly characterized as crimes of omission.[43] Traditionally, the criminal justice system has treated omissions with considerably less severity than affirmative misconduct, in part because it is more difficult to deduce pertinent intentionality from the former.[44] The difficulty in proving intentionality is particularly relevant to the comparison of escape and failure-to-report crimes. As ably pointed out by Judge Rovner, a defendant who has escaped from custody has through this act evinced "a specific inclination to resist or evade restraint," but a defendant who has failed to report to jail on time has demonstrated little more than a "willingness to disobey an order."[45] Intuitively, one would predict that a violent confrontation would more likely occur during capture of a person who has demonstrated an inclination to resist restraint than during capture of one who has not. Moreover, other circuits that have labeled escape a violent crime have relied on not just the escapee's inclination, but also on the fact that he is "intent on his goal of escaping" and thus is more likely to resort to violence to "avoid jeopardizing the success of the escape."[46] The Seventh Circuit itself relied on the "escapee's desire to avoid detection and recapture" in finding that escape created a significant risk of violence.[47] Those who have failed to report to jail on time have not demonstrated a similar specific intent to evade capture. This distinction between the relationships of the two crimes to capture can be summarized quite simply: escape is thwarted by capture; failure to report is not.

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41 18 U.S.C. § 751(a) (2000).

42 WIS. STAT. § 946.425(1m)(b) (2003).

43 *See Golden*, 466 F.3d at 618 (Williams, J., dissenting).

44 *See, e.g.*, Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 618–20 (2001) (noting that criminal liability for omissions raises a "genuine doctrinal puzzle" about mens rea because "at any one time there are so many potentially legally relevant things [one is] not doing" that the fact of not doing them does not clearly imply intentional nonfeasance); *see also* Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 604 (1958) (explaining that if a person at home is asked whether he is currently climbing Mount Everest, and responds no, this awareness does not imply that he is intentionally not climbing Mount Everest).

45 *Golden*, 466 F.3d at 615 (Rovner, J., concurring).

46 United States v. Hairston, 71 F.3d 115, 118 (4th Cir. 1995); *accord* United States v. Jackson, 301 F.3d 59, 62–63 (2d Cir. 2002) (quoting *Hairston* and adopting its reasoning).

47 United States v. Franklin, 302 F.3d 722, 724 (7th Cir. 2002).

Similarly, other circuits that have deemed escape a violent felony rely on the "supercharged nature"[48] or the "supercharged emotions"[49] of escape crimes, qualities that do not aptly describe failures to report. Again, this conjecture regarding the offender's mental state arises from the understanding that an escapee is seeking to avoid recapture, and doing so in the face of significant risk; it does not clearly apply where an offender has merely failed to appear as ordered. Finally, while the willingness to disobey an order evinced by one who fails to report to jail on time may itself be troublesome, such willingness is just as clearly demonstrated when a person acts in contempt of court,[50] and can be reasonably inferred whenever someone knowingly breaks the law.[51]

Judge Bauer glossed over these substantive distinctions between the two crimes, concluding without offering any support that both escape and failure to report "involve the same potential for a violent confrontation" during capture or recapture because both offenses "involve a defendant whose guilt has been adjudicated, who has received a sentence, and who knows what the future holds: incarceration."[52] This is simply too broad a generalization; it rests almost entirely on speculation regarding a defendant's likely conduct in light of his future prospects — jail — while ignoring the predictive value of the defendant's behavior leading up to the capture or recapture situation.

This analysis does not prove conclusively that failure to report is *not* a crime of violence; even if the offense poses significantly less risk than escape, this may still be enough.[53] However, it does suggest that the court was too quick to conclude that the crime is one of violence. More significantly, it illuminates the potential for inconsistent application of the categorical approach, which could lead to disconcerting consequences. By focusing on a subcategory of escape involving intuitively less dangerous conduct — the failure to return to a halfway house following permitted departure presented in *Bryant* — rather than the general category of escape, the court distorted the relevant standard of comparison. As the D.C. Circuit has pointed out, even the

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[48] *Hairston*, 71 F.3d at 118.

[49] United States v. Gosling, 39 F.3d 1140, 1142 (10th Cir. 1994); *see also* United States v. Luster, 305 F.3d 199, 202 (3d Cir. 2002) (citing *Gosling*, 39 F.3d at 1142).

[50] *See Golden*, 466 F.3d at 615 (Rovner, J., concurring).

[51] Although it may be argued that the examples are distinguishable in that failure to report to jail may require police to engage in an inherently volatile "capture," apprehension of most lawbreakers presents a situation similar in volatility.

[52] *Golden*, 466 F.3d at 614.

[53] Judge Williams's *ejusdem generis* analysis, for example, implies that if the crime of failure to report does in fact pose a risk of violence comparable to that of a crime enumerated in § 924(e)(2)(B), it should fall within the definition of a violent felony. *See Golden*, 466 F.3d at 616–17 (Williams, J., dissenting); *see also* United States v. Thomas, 361 F.3d 653, 659–60 (D.C. Cir. 2004).

offenses specifically named as examples of violent felonies in § 924(e) encompass both conduct that poses little to no risk of violence and conduct that is clearly dangerous: for example, extortion can be committed without much risk of violence if the offender threatens only reputation interests.[54] Thus, in comparing the risk posed by a newly considered crime to that of extortion, the appropriate reference point is not the risk presented by the subcategory of reputational extortion, but that presented by the category of extortion as a whole.[55] Understanding § 924(e) otherwise would allow courts to manipulate the amount of risk a crime must pose to be designated "violent" by focusing comparisons on subgroups within established violent felonies that pose a greater or lesser risk of violence. Through such reference group manipulation, courts can substantially expand or contract the definition of a violent felony, effectively supplanting Congress's role in defining crimes for sentencing purposes and creating unjustified inconsistency in the law.

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[54] *See Thomas*, 361 F.3d at 659–60 (noting further that burglary can be committed without posing much threat of violence if the burglar enters unarmed and targets only unoccupied homes, and that a similar logic applies to the arsonist who only burns abandoned, isolated buildings); *cf.* United States v. Piccolo, 441 F.3d 1084, 1086 (9th Cir. 2006) (asserting that a crime is not categorically violent if the statutory definition "would support a conviction not defined as a crime of violence").

[55] A look at the case law since *Taylor* shows that there is a surprising amount of ambiguity about what is meant by reference to the risk presented by a category. Some decisions suggest that there is a certain amount of risk "inherent" in a category of crimes. *See, e.g.*, United States v. Livingston, 442 F.3d 1082, 1085 (8th Cir. 2006) ("[T]he criminal conduct contemplated by the offense must present 'the "inherent potential for harm to persons."'" (quoting United States v. McCall, 439 F.3d 967, 971 (8th Cir. 2006))); United States v. Kaplansky, 42 F.3d 320, 324 (6th Cir. 1995) ("[T]he potential for violence against the victim is an inherent aspect of the crime of kidnapping . . . ."). Others focus on the frequency of violence or of circumstances creating a high risk of violence. *See, e.g.*, United States v. Aragon, 983 F.2d 1306, 1315 (4th Cir. 1993) (comparing the frequency of risky situations arising out of the crime of aiding escapees to that of storehouse break-ins). Another possibility is that the risk referred to is that presented by some prototypical version of the crime.

However, the Seventh Circuit has adopted an approach that looks generally to the average frequency of violence or highly volatile situations. *See, e.g.*, United States v. Davis, 16 F.3d 212, 217 (7th Cir. 1994) (emphasizing that whether execution of a crime "*often*" or in "*most* cases" creates a risk of violent confrontation is the benchmark for considering whether it is violent (quoting United States v. Taylor, 495 U.S. 575, 588 (1990); United States v. Custis, 988 F.2d 1355, 1364 (4th Cir. 1993) (emphases added))). In *United States v. Chambers*, No. 06-2405, 2007 U.S. App. LEXIS 447 (7th Cir. Jan. 9, 2007), the court questioned the *Golden* decision by asking whether failure to report is "a crime that typically or often" presents a serious risk of violence. *Id.* at *2. The court further suggested that the U.S. Sentencing Commission conduct an empirical comparison of the frequency of violence arising from escapes versus failures to return and remarked that if the high proportion of escapes executed by simply walking out of low security custody brought the total frequency of violence arising from escape too low, the court might be compelled to conclude that escape is not a crime of violence. *Id.* at *7; *see also* United States v. Babul, No. 05-4538, 2007 U.S. App. LEXIS 2932, at *11–12 (7th Cir. Feb. 9, 2007) ("Many parts of the Guidelines . . . pose the question whether a particular activity creates a risk of bodily injury or death. Numbers rather than words must supply the answers.").

Moreover, inconsistent analyses of the "violent felony" definition can build upon each other sequentially to create end results that are not supportable under any approach. The *Bryant-Golden* sequence is demonstrative: the court first used the statutory language of escape in *Bryant* to conclude that failure to return to a halfway house is a violent crime,[56] even though a conduct-based inquiry may have surfaced relevant distinctions between this and more classic escapes, but then used a conduct comparison in *Golden* to extend this designation to the category of failure to report.[57] Importantly, the court's second conclusion — regarding failures to report — might have differed if the court had consistently applied either a categorical or conduct-based approach.

As more and more crimes — from walk-away escapes,[58] to drunk driving,[59] to pickpocketing[60] — are designated violent for purposes of sentencing enhancement, it becomes important to step back and evaluate the bases for such extensions. Reflecting broadly on *Golden* in a recent opinion, a Seventh Circuit panel opined that much of this expansion has rested on the unsupported intuitions of judges regarding the perceived risk of various crimes.[61] Perhaps that panel was correct in arguing that judges should base these decisions on research cataloging the actual incidence of physical injury resulting from various crimes.[62] But until such information is available, courts will have to continue to make judgments as best they can. *Golden* demonstrates why, in the absence of data, consistent and transparent adherence to the categorical approach is critical in protecting against unwarranted expansion of violent felony sentencing enhancements.

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[56] *See* United States v. Bryant, 310 F.3d 550, 553–54 (7th Cir. 2002). In *Bryant*, the court rejected the defendant's request that it use a fact-specific approach to distinguish failure to return to prison from other types of escape, arguing that it had to take the categorical approach. *Id.* at 554.

[57] *See Golden*, 466 F.3d at 614.

[58] *See Bryant*, 310 F.3d at 554.

[59] *See* United States v. Begay, 470 F.3d 964, 975 (10th Cir. 2006).

[60] *See* United States v. Mobley, 40 F.3d 688, 696 (4th Cir. 1994).

[61] *See* United States v. Chambers, No. 06-2405, 2007 U.S. App. LEXIS 447, at *6 (7th Cir. Jan. 9, 2007). Writing for the panel, Judge Posner refrained from overruling *Golden*, but argued that judicial willingness to make assertions regarding the risk of violence posed by various crimes absent evidence represents "an embarrassment to the law." *Id.*

[62] *See id.* at *7 (suggesting that the Sentencing Commission, Congress, or scholars could substantially aid the judiciary in making appropriate classification decisions by studying the relative frequency of violence arising from classical escapes versus failures to report or to return).