

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2007

4 (Argued: May 30, 2008
5 Final briefs submitted
6 February 4, 2009

Decided: June 26, 2009)

7 Docket No. 07-0308-cr

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9 UNITED STATES OF AMERICA,

10 Appellee,

11 - v -

12 GARY MILLS, also known as G KNOCKER,

13 Defendant-Appellant.
14 -----

15 Before: KEARSE, SACK, and LIVINGSTON, Circuit Judges.

16 Appeal from a judgment of conviction of the United
17 States District Court for the District of Connecticut (Peter C.
18 Dorsey, Judge), sentencing defendant-appellant Gary Mills
19 principally to a term of imprisonment of 188 months under the
20 Armed Career Criminal Act, 18 U.S.C. § 924(e). Mills challenges
21 the district court's determination that his prior conviction for
22 escape under Connecticut law is a violent felony for statutory
23 sentencing-enhancement purposes. Based on the Supreme Court's
24 recent decision in Chambers v. United States, 129 S. Ct. 687
25 (2009), we conclude that Mills's conviction for escape based on
26 his failure to abide by the terms of his "transitional

1 supervision" was not a violent felony within the meaning of the
2 Armed Career Criminal Act. Mills's sentencing, conducted
3 pursuant to the Act, was therefore improper.

4 Remanded.

5 KAREN L. PECK, Assistant United States
6 Attorney (Kevin J. O'Connor, United
7 States Attorney, District of
8 Connecticut; John H. Durham, Deputy
9 United States Attorney; William J.
10 Nardini, Assistant United States
11 Attorney, of counsel), New Haven, CT,
12 for Appellee.

13 RICHARD S. CRAMER, Hartford, CT, for
14 Appellant.

15 PER CURIAM:

16 Defendant-Appellant Gary Mills appeals from a judgment
17 of conviction of the United States District Court for the
18 District of Connecticut (Peter C. Dorsey, Judge) by which he was
19 sentenced principally to a term of imprisonment of 188 months
20 under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e).
21 The ACCA applies to persons who violate 18 U.S.C. § 922(g) and
22 who have "three previous convictions . . . for a violent felony
23 or a serious drug offense, or both." 18 U.S.C. § 924(e)(1).
24 Mills met the first requirement inasmuch as he pled guilty to
25 being a felon in possession of a firearm in violation of 18
26 U.S.C. § 922(g)(1). He argues, however, that he did not have
27 three prior convictions for violent felonies or serious drug
28 offenses, and that he therefore should not have been sentenced
29 under the ACCA. Specifically, Mills asserts that his prior
30 conviction for first-degree escape in violation of Conn. Gen.

1 Stat. § 53a-169 should not have been treated as a violent felony
2 within the meaning of the statute. The government concedes that
3 under the Supreme Court's recent decision in Chambers v. United
4 States, 129 S. Ct. 687 (2009), the matter should be remanded for
5 resentencing without reference to the ACCA. Because we agree
6 with both Mills and the government that under Chambers, Mills's
7 prior conviction for escape in the first degree was not a violent
8 felony, we remand to the district court to vacate the sentence
9 and to resentence Mills.

10 Mills contends further that his sentence was
11 procedurally unreasonable because the sentencing court failed to
12 address his request for a downward departure. Because we remand
13 for resentencing in any event, we need not and do not resolve
14 this issue.

15 **BACKGROUND**

16 On February 18, 2003, Mills was indicted on one count
17 of being a felon in possession of a firearm in violation of 18
18 U.S.C. § 922(g)(1). On October 19, 2006, he pled guilty. The
19 United States Probation Office prepared a presentence
20 investigation report ("PSR") recommending that Mills be sentenced
21 under the ACCA because he had three prior convictions for a
22 violent felony or serious drug offense. Mills objected, arguing
23 that one of the three predicate offenses identified in the PSR,

1 first-degree escape in violation of Conn. Gen. Stat. § 53a-169,
2 was not a violent felony.¹

¹ In 1997 the statute provided, in pertinent part:

A person is guilty of escape in the first degree (1) if he escapes from a correctional institution or (2) if he escapes from any public or private, nonprofit halfway house, group home or mental health facility or community residence to which he was transferred pursuant to subsection (e) of section 18-100 and he is in the custody of the Commissioner of Correction or is required to be returned to the custody of said commissioner upon his release from such facility or (3) if he escapes from a work detail or school on the premises of the correctional institution or (4) if he fails to return from a furlough . . . or (5) if he fails to return from work release or education release as authorized under sections 18-90a and 18-100 or (6) if he escapes from a hospital for mental illness in which he has been confined . . . or (7) if, while under the jurisdiction of the Psychiatric Security Review Board, but not confined to a hospital for mental illness, he leaves the state without authorization of the board.

Conn. Gen. Stat. § 53a-169(a). Connecticut law further provides:

If the Commissioner of Correction deems that the purposes of this section may thus be more effectively carried out, the commissioner may transfer any person from one correctional institution to another or to any public or private nonprofit halfway house, group home or mental health facility or, after satisfactory participation in a residential program, to any approved community or private residence. Any inmate so transferred shall remain under the jurisdiction of said commissioner.

Conn. Gen. Stat. § 18-100(e).

1 At an evidentiary hearing in the district court,
2 defense counsel established the circumstances of Mills's
3 conviction in state court for first-degree escape. On July 15,
4 1997, Mills was released from prison and placed in "transitional
5 supervision," under which he was authorized to reside in a
6 private residence. By statute, however, he remained under the
7 jurisdiction of the Connecticut Commissioner of Correction, see
8 Conn. Gen. Stat. § 18-100(e), and was required to satisfy
9 conditions similar to those required of parolees, including
10 reporting regularly to a community enforcement officer.

11 On July 16, 1997, the day after his release, Mills
12 reported as scheduled to his community enforcement officer. He
13 was required to do so thereafter on a weekly basis. Following
14 that appointment, however, he failed to appear for the meetings.

15 When Mills missed his next appointment, the enforcement
16 officer attempted to find Mills by visiting the private residence
17 in which he had been authorized to reside. Mills was not there.
18 In light of Mills's continued missed appointments and the
19 officer's continued inability to locate him, Mills was charged
20 with first-degree escape in violation of Conn. Gen. Stat. § 53a-
21 169(a). On June 2, 1998, he was convicted of this crime. The
22 PSR relied on this conviction as a predicate violent felony
23 conviction in recommending that Mills be sentenced under the
24 ACCA.

25 At a sentencing hearing held on January 22, 2007, the
26 district court rejected Mills's objection to the classification

1 of this offense as a violent felony for purposes of sentencing
2 him under the ACCA. Employing the "categorical approach," see
3 Taylor v. United States, 495 U.S. 575, 602 (1990), and relying on
4 United States v. Jackson, 301 F.3d 59, 63 (2d Cir. 2002) (holding
5 that escape is categorically a violent felony under the ACCA),
6 the court concluded that it was required to classify Mills's
7 conviction for escape as a violent felony and sentence him
8 accordingly under the ACCA. As a result, the court concluded
9 that the statutory mandatory minimum sentence was 180 months and
10 the advisory sentencing range under the United States Sentencing
11 Guidelines was 188 to 235 months.

12 Defense counsel argued for a below-Guidelines sentence
13 equal to the mandatory minimum, 180 months, based on the non-
14 violent nature of Mills's "escape" and his "extraordinary
15 rehabilitation" while incarcerated prior to sentencing. Mills
16 also filed a sentencing memorandum setting forth two additional
17 grounds for a below-Guidelines sentence: the restrictive
18 conditions of his confinement while in state custody under a
19 federal detainer and "the profound effect upon Mr. Mills during
20 his formative years" of the suicides of his sister and godfather.

21 The district court explicitly discussed the sentencing
22 factors enumerated in 18 U.S.C. § 3553(a). "The credit you are
23 entitled to," the district judge said, "includes an accommodation
24 for the fact that you have manifested a redirection of your
25 life . . . and I think you're entitled to some credit for that,
26 but on the other hand, the seriousness of the offense . . . is

1 something I cannot ignore. . . . I am not inclined to think that
2 in reaching for what is a reasonable sentence, that going below
3 the [G]uideline range is warranted." Transcript of January 22,
4 2007, Sentencing Hr'g (page unnumbered); Government Appendix at
5 126-27. The court therefore imposed a sentence of 188 months,
6 which was at the bottom of the Guidelines range and eight months
7 above the mandatory minimum sentence under the ACCA.

8 DISCUSSION

9 I. Applicability of the ACCA

10 A. Standard of Review

11 "We review de novo the district court's determination
12 of whether a prior offense is a 'violent felony' under the ACCA."
13 United States v. Lynch, 518 F.3d 164, 168 (2d Cir. 2008).

14 B. Analysis

15 Mills was convicted in state court of escape in the
16 first degree under Conn. Gen Stat. § 53a-169, the text of which
17 is set forth in the margin at note 1 above. A person is guilty
18 of this crime if, inter alia, he or she "escapes from a
19 correctional institution," Conn. Gen Stat. § 53a-169(a)(1), or
20 "escapes from any public or private, nonprofit halfway house,
21 group home or mental health facility or community residence to
22 which he was transferred pursuant to subsection (e) of section
23 18-100 and he is in the custody of the Commissioner of Correction
24 or is required to be returned to the custody of said commissioner
25 upon his release from such facility," id. at § 53a-169(a)(2).
26 The Connecticut Supreme Court has interpreted "escape" within the

1 meaning of Section 53a-169 to mean any "unauthorized departure
2 from, or failure to return to, whatever may be designated as [the
3 defendant's] place of incarceration or confinement." State v.
4 Lubus, 581 A.2d 1045, 1048 (Conn. 1990).

5 "In Taylor[,] . . . the [Supreme] Court endorsed a
6 'categorical approach' to determining whether a prior conviction
7 qualifies as a 'violent felony' under the ACCA. The sentencing
8 court generally must 'look only to the fact of conviction and the
9 statutory definition of the prior offense.'" United States v.
10 Rosa, 507 F.3d 142, 151 (2d Cir. 2007) (quoting Taylor, 495 U.S.
11 at 602). But where, as in Taylor, Rosa, and the instant case,
12 "the statutory definition of the state crime of conviction
13 encompasses both crimes that would qualify as a 'violent felony'
14 and crimes that would not, . . . the Taylor Court concluded that
15 a broader inquiry is permissible." Id. When a statute
16 encompasses both violent and non-violent felonies, as Conn. Gen
17 Stat. § 53a-169 does, we make a limited inquiry into which part
18 of the statute the defendant was convicted of violating.

19 The inquiry is an easy one here. The government
20 concedes that Mills's prior conviction for escape was pursuant to
21 Conn. Gen Stat. § 53a-169(a)(2). The Connecticut Supreme Court
22 has made clear that a violation of this section of the statute is
23 consistent with both an affirmative escape from custody and a
24 mere failure to return. See Lubus, 581 A.2d at 1048 ("We
25 conclude . . . that § 53a-169(a)(2) employs the term 'escape' to
26 contemplate an unauthorized departure from, or failure to return

1 to, a 'community residence.'). Moreover, the government also
2 concedes that, having the burden of proof on the issue, see Rosa,
3 507 F.3d at 151, it "did not establish, pursuant to [Shepard v.
4 United States, 544 U.S. 13, 26 (2005) (limiting court's review to
5 specific documents when deciding under which provision of a
6 statute encompassing both violent and non-violent crimes a
7 defendant was convicted)], that the defendant had been convicted
8 of an affirmative escape from custody rather than a failure to
9 return." Government's Supplemental Letter Br. 2 (Feb. 4, 2009).

10 The government therefore concluded:

11 For this reason, the record would not
12 support, in the wake of Chambers, a
13 conclusion that the defendant had been
14 convicted in state court of an "escape" crime
15 that generically qualifies as a violent
16 felony under § 924(e)

17 [E]ven the facts outside the scope of
18 Shepard, if they could have been considered,
19 would have narrowed Mills'[s] conviction only
20 to either a failure to report or a walkaway
21 escape from a non-secure facility
22 [T]he Government concedes that a simple
23 walkaway escape from a nonsecure community
24 residence does not constitute the sort of
25 purposeful, aggressive and violent behavior
26 that is required . . . to constitute a
27 "violent felony" for the purposes of §
28 924(e).

29 Id. at 2-3.

30 We need not address whether a "walkaway escape" is, as
31 the government says, not a violent felony for these purposes
32 under Chambers. Cf. Jackson, 301 F.3d at 63 (holding, prior to
33 Chambers, that a walkaway escape is categorically a violent
34 felony). For the purpose of deciding this appeal, it is

1 sufficient to note our agreement with the government that after
2 Chambers, a failure to report or failure to return is not a
3 violent felony under the ACCA, and that the government concedes
4 it has not proved -- and cannot prove -- that Mills was convicted
5 of anything more than a failure to return. See Chambers, 129 S.
6 Ct. at 693 ("[W]e conclude that the crime here at issue [failure
7 to report to a penal institution, in violation of Ill. Comp.
8 Stat., ch. 720, § 5/31-6(a)] falls outside the scope of ACCA's
9 definition of 'violent felony.'"); see also id. at 691 ("we
10 believe that a failure to report (as described in the statutory
11 provision's third, fourth, fifth, and sixth phrases)[, including,
12 (3) failing to report to a penal institution, (4) failing to
13 report for periodic imprisonment, (5) failing to return from
14 furlough, (6) failing to return from work and day release,] is a
15 separate crime, different from escape (the subject matter of the
16 statute's first and second phrases)[, including (1) escape from a
17 penal institution and (2) escape from the custody of an employee
18 of a penal institution]").

19 Mills's sentencing was thus improper, if understandably
20 so. The district court's determination that Mills was an armed
21 career criminal under the ACCA had two effects on his sentencing:
22 (1) it required a mandatory minimum sentence of 180 months under
23 18 U.S.C. § 924(e) (1); and (2) it changed Mills's base offense
24 level from 24 to 33 pursuant to U.S.S.G. § 4B1.4(b) (3) (B), which
25 led to a Guidelines imprisonment range of 188 to 235 months. As
26 noted, the district court sentenced Mills to a term of 188

1 months, at the bottom of this range. Because the district
2 court's calculation of the applicable Guidelines range was
3 affected by its determination -- which, in light of Chambers, we
4 now recognize was incorrect -- that Mills was an armed career
5 criminal under the ACCA, we remand to the district court to
6 vacate the sentence and to resentence Mills.² Cf. United States
7 v. Fagans, 406 F.3d 138, 141 (2d Cir. 2005) ("In many
8 circumstances, an incorrect calculation of the applicable
9 Guidelines range will taint . . . [a sentence that] may have been
10 explicitly selected with what was thought to be the applicable
11 Guidelines range as a frame of reference.").

12 II. Whether Mills's Sentence
13 Was Procedurally Unreasonable

14 We doubt that Mills's sentence was imposed in a
15 procedurally unreasonable manner. See Rita v. United States, 127
16 S. Ct. 2456, 2468 (2007) ("The sentencing judge should set forth
17 [reasoning] enough to satisfy the appellate court that he has
18 considered the parties' arguments and has a reasoned basis for
19 exercising his own legal decisionmaking authority."); see also
20 United States v. Villafuerte, 502 F.3d 204, 210 (2d Cir. 2007)
21 (stating that although "[n]on-frivolous arguments for a
22 non-Guidelines sentence" may require some discussion, "we do not
23 insist that the district court address every argument the

² We intimate no view as to the appropriate course of action when an improper application of the ACCA does not affect the district court's calculation of the applicable sentencing range.

1 defendant has made or discuss every § 3553(a) factor
2 individually"). Inasmuch as we are remanding for resentencing,
3 however, this is not an issue we need resolve.

4 **CONCLUSION**

5 For the foregoing reasons, we remand to the district
6 court to vacate the sentence and to resentence Mills.