No. 13-__

IN THE

Supreme Court of the United States

JODY EDELMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal "escape" statute, 18 U.S.C. § 751(a), makes it a federal felony, punishable by five years' imprisonment, to "escape" from "custody." In acknowledged conflict with a decision of the Ninth Circuit, the Second Circuit in this case joined the Sixth and Tenth Circuits in holding that a person who resides in a halfway house on supervised release and freely leaves the halfway house, but does not return when required, has committed an "escape" from "custody" under § 751(a). The following question is presented:

Whether an individual who freely leaves but fails to return to the halfway house where he resides on supervised release has committed the felony offense of "escape" from "custody" under 18 U.S.C. § 751(a).

PARTIES TO THE PROCEEDING

Petitioner is Jody Edelman, appellant below.

Respondent is the United States of America, appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 726 F.3d 305, and is reprinted in the Appendix to the Petition ("App.") at 1a-11a. The opinion of the district court and its order denying reconsideration of that decision are unreported and are reprinted at App. 12a-33a (opinion), and App. 34a-50a (order).

JURISDICTION

The court of appeals issued its decision on August 9, 2013. App. 1a-11a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 751 of Title 18 of the U.S. Code provides in part:

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be

> fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 751(a).

STATEMENT OF THE CASE

A. Factual Background

1. In 1993, petitioner Jody Edelman was convicted of a federal drug offense and sentenced to seven years' imprisonment followed by three years' supervised release. App. 3a. In 2002, Edelman pleaded guilty to a New York controlled substance offense, and received a sentence of six years to life. *Id.* He was released from state custody on September 25, 2007, and began serving his term of federal supervised release. At the same time, Edelman was subject to lifetime parole supervision by the State of New York. *Id.* In early 2008, Edelman was twice arrested and charged with misdemeanors, which violated his state parole. *Id.*

In light of Edelman's parole violation, both New York and federal authorities recommended that the district court impose more restrictive conditions on his supervised release. App. 3a. On March 25, 2008, Edelman signed a waiver agreeing to more restrictive conditions, *viz.*, that he would reside in a "residential reentry facility"—commonly known as a halfway house—for five months. App. 3a-4a.

The district court agreed to the waiver and new conditions on April 21, 2008. App. 4a. On May 30, Edelman's parole was revoked and then restored on the condition that he abide by the terms of his federal supervised release. *Id.* On June 6, Edelman entered the residential reentry facility, the Syracuse

Pavilion. *Id.* The rules of the Pavilion, as written on a "Checklist" provided to Edelman, permitted residents to "leave the building for up to 12 hours at a time" so long as residents notified staff of their departure, although residents were not permitted to "combine work, leisure, or other activities" and "had to return to the facility and sign out separately before each activity." App. 4a-5a. The Checklist also notified Edelman that "[r]esidents are subject to search of their persons and property by staff at any time." App. 5a.

On August 29, 2008, "Edelman walked past Pavilion's entrance monitor, left, and never returned." *Id.* The district court issued a warrant for his arrest, and on October 2, 2008, the U.S. Marshals arrested Edelman in the lobby of a Syracuse apartment building. *Id.* Officers found drugs and other "evidence of drug trafficking" in the apartment in which Edelman had been staying. *Id.*

2. Edelman and a co-defendant were charged with three federal drug counts. App. 5a-6a. Edelman alone was also charged with escape from custody in violation of 18 U.S.C. § 751(a), the only charge relevant here. App. 6a.

B. Procedural History

1. Edelman moved the district court to dismiss the escape charge as legally insufficient, contending that residence in a halfway house as a condition of his supervised release did not constitute "custody" under § 751(a). App. 19a-25a. Edelman also moved to suppress evidence related to the drug counts obtained during the post-arrest search of his Syracuse apartment. App. 25a-32a.

The district court denied both motions. Relying on several out-of-circuit cases, the court held that residence in a halfway house qualifies as custody for purposes of the federal penal "escape" statute. App. 19a-25a. The court dismissed two district court cases holding the opposite to be "aberrations." App. 24a. As to the motion to suppress, the district court held that Edelman's supposed "escape" from the halfway house rendered him "no more than a 'trespasser on society'" and therefore without a legitimate expectation of privacy. App. 31a (citing *United States v. Roy*, 734 F.2d 108, 111 (2d Cir. 1984)).

The court denied Edelman's motion for reconsideration on essentially the same grounds. In its decision denying reconsideration, the district court recognized that the Ninth Circuit had held in *United States v. Baxley*, 982 F.2d 1265 (9th Cir. 1992), that "halfway-house confinement did not constitute 'custody' for purposes of the escape statute given the facts of that case." App. 39a. But the court distinguished *Baxley* on the ground that it "involved a person confined to a halfway house as a condition of his personal recognizance bond before trial," and not, as here, residency in a halfway house as a condition of supervised release. *Id.* The district court's decision predated the Ninth Circuit's holding in *United States v. Burke*, 694 F.3d 1062 (9th Cir. 2012), that under *Baxley*, residence in a halfway house as a condition of supervised release is not "custody" under § 751(a). *Id.* at 1063-65.

The district court also declined to reconsider its denial of the motion to suppress. The request for reconsideration "primarily hinge[d] ... on [Edelman's] belief that the Court incorrectly determined that he

escaped from custody and that, therefore he was a trespasser on society." App. 50a. But because the court was unpersuaded that it had erred "in determining that the Indictment sufficiently allege[d] escape," the court found "no reason … to reconsider" its ruling that Edelman lacked any expectation of privacy. *Id.*

At Edelman's jury trial, the court granted the U.S. Marshals' request (over Edelman's objection) that he be shackled, based on his "record of escaping from custody." C.A. App. Vol. II A167. Edelman was convicted of escape under § 751(a) and of three drug-related offenses. The district court sentenced Edelman to the statutory maximum on the escape count—a five-year term of imprisonment—in addition to the 10 months' imprisonment it had previously ordered Edelman to serve for violating the terms of his supervised release by discontinuing his residence at the Pavilion. App. 54a; Judgment on Revocation, *United States v. Edelman*, No. 5:93-cr-00205-FJS-1 (N.D.N.Y. Oct. 9, 2008) (10-month term). The court sentenced Edelman to 200 months for the drug counts, with all time to run concurrently. App. 54a.

2. The court of appeals affirmed. The court explained that "it is an open question in our circuit whether residence in a halfway house constitutes 'custody' under Section 751(a)," and further observed that the "circuits are divided over the issue." App. 7a. "[T]he Sixth Circuit," the court explained, "held that the defendant's placement in a community treatment center, which allowed him to leave during the day for work and meals, constituted custody." App. 7a-8a (citing *United States v. Rudinsky*, 439 F.2d 1074, 1076 (6th Cir. 1971)). And "the Tenth

Circuit held that the defendant's pretrial release into a halfway house constituted custody." App. 8a (citing *United States v. Sack*, 379 F.3d 1177, 1179 (10th Cir. 2004)).

By contrast, the court of appeals recognized, "the Ninth Circuit has interpreted 'custody' more narrowly, holding that, under the statute, pretrial residence at a halfway house does not constitute custody, and placement in a halfway house due to the violation of the terms of post-incarceration supervised release does not constitute custody." *Id.* (citing *Baxley*, 982 F.2d at 1269-70, and *Burke*, 694 F.3d at 1063-65). Finally, the court noted that within the Second Circuit, "two cases in the Western District of New York have reached opposite conclusions." *Id.*

The court concluded that "[u]pon consideration, we find the Sixth and Tenth Circuits persuasive, and hold that residence in a halfway house as a condition of post-incarceration supervised release is 'custody' for purposes of Section 751(a)." App. 8a-9a. The court recognized that "Edelman's residence at [the halfway house] was different from incarceration" but reasoned that the residence "subjected him to a restraint on his activities and limited the amount of time he could spend out of the facility," and was thus "custody" within the meaning of § 751(a). App. 9a.

The court of appeals also affirmed the denial of Edelman's motion to suppress, agreeing with the district court that a person whose legitimate privacy expectations were severely curtailed could not expand those expectations by escaping. App. 10a-11a (citing *Roy*, 734 F.2d at 111-12).

REASONS FOR GRANTING THE PETITION

The decision below exacerbates an acknowledged, outcome-determinative conflict over whether walking out of a halfway house constitutes "escape" from "custody" under the federal escape statute, 18 U.S.C. § 751(a). The issue is an important and recurring one, and this case presents an ideal vehicle for resolving it. The Second Circuit, moreover, answered the question incorrectly. The Court should grant certiorari to resolve the conflict in the lower courts on this important question, and should reverse the judgment below.

A. The Courts Of Appeals Are Divided On The Question Whether Walking Out Of A Halfway House Is "Escape" From "Custody" Under The Federal Escape Statute

As the Second Circuit expressly recognized below, the courts of appeals are divided on the question presented in this case. The Ninth Circuit has held that residence at a halfway house—both pretrial and as a condition of supervised release—is not "custody" under § 751(a), and that leaving a halfway house in such circumstances is thus not a violation of that felony statute. The Second, Sixth, and Tenth Circuits have held the opposite.

1. In *United States v. Baxley*, 982 F.2d 1265 (9th Cir. 1992), the Ninth Circuit held that pretrial residence at a halfway house is not "custody" under § 751(a). The court noted that "restrictions on Baxley's activities were slight: he was required to report regularly to pretrial services and was subject to travel limitations, but he could remain employed (indeed, he was required to be employed) and could

come and go during the day as he pleased, as long as he logged the time, purpose, and duration of his trips away from the Center." *Id.* at 1269. "In no way did Baxley's conditions of confinement approach those of incarceration sufficient to constitute 'custody' under § 751(a)." *Id.* (quotation, citation, and alteration omitted). Rather, the "conditions of Baxley's release were much more analogous to probation than they were to imprisonment or 'custody.'" *Id.* The court further explained that its analysis was "bolstered by the application of the rule of lenity," because "the term 'custody' is ambiguous; its meaning varies depending on the context in which it is used and in the statutory scheme in which it arises." *Id.* at 1270. "Put simply," the court held, "Baxley did not escape from 'custody': his conviction for violating 18 U.S.C. § 751(a) therefore cannot stand." *Id.*

The Ninth Circuit's more recent decision in *United States v. Burke*, 694 F.3d 1062 (9th Cir. 2012), involved a case (like this case) where the defendant had been a resident at a halfway house "as a condition of his supervised release." *Id.* at 1063. The district court, relying on *Baxley*, dismissed the § 751(a) charge. The government appealed, and the court of appeals affirmed.

The Ninth Circuit recognized that it had previously held in *Baxley* that "a defendant released on a personal recognizance bond and ordered by a court to reside at a halfway house pending trial is not in 'custody' for purposes of that statute," *id.* at 1064, and held that the result is no different when residence at a halfway house is a condition of supervised release. The court noted that the restrictions on Burke—which imposed a "curfew, limited visitors, assigned

beds, restricted telephone use, and required residents to advise staff of their comings and goings in order to leave the premises"—"mirrored standard supervised release conditions." *Id.* And it agreed with the district court that "Burke was not in 'custody' when he left the [halfway house]": "He was not serving a prison sentence, nor was he confined to [the halfway house] under conditions equivalent to custodial incarceration." *Id.* Rather, "his failure to return to [the halfway house] was a violation of his release conditions punishable by revocation of release, not an escape from 'custody' within the meaning of § 751(a)." *Id.* at 1065.

The Ninth Circuit recognized that the Tenth Circuit's decision in *United States v. Sack*, 379 F.3d 1177 (10th Cir. 2004), had "expressly rejected *Baxley* and adopted a definition of 'custody' far broader than the one recognized by our Circuit." *Burke*, 694 F.3d at 1065. The court "decline[d] to disregard [its] own precedent in favor of *Sack*'s expansive reading of the term," however, and maintained that the Ninth Circuit's own "approach is supported by the rule of lenity." *Id.*

2. In contrast to the Ninth Circuit, which holds that leaving a halfway house is not "escape" from "custody" under § 751(a) because the constraints imposed at a halfway house are not comparable to those imposed during incarceration, the Second, Sixth, and Tenth Circuits have held that halfway-house residence is "custody" because the defendant does not have full freedom of movement and association.

a. As the Ninth Circuit acknowledged in *Burke*, the Tenth Circuit in *Sack* expressly rejected the Ninth Circuit's earlier precedent in *Baxley*, which involved a "factual setting" similar to *Sack*. *Sack*, 379 F.3d at 1180. In particular, the court noted that because prior circuit precedent held "that custody may be minimal or even constructive, we are not persuaded by the reasoning in *Baxley*." *Id.* at 1180-81. And based on prior precedent construing the meaning of "custody for the purposes of the sentencing guidelines," and on other precedents "treat[ing] custody under § 751 broadly," the court "conclude[d] that Sack was in custody for the purposes of § 751 when he left the halfway house." *Id.* at 1179-81.

b. In *United States v. Rudinsky*, 439 F.2d 1074 (6th Cir. 1971), the Sixth Circuit similarly held that residence in a halfway house qualifies as "custody" under § 751(a). The court reasoned that a "person may still be in custody, even though not under constant supervision of guards, so long as there is some restraint upon his complete freedom." *Id.* at 1076. Rudinsky was in custody, the court concluded, because the halfway house's "restrictions deprived [him] of his freedom of movement and association." *Id.*

c. The Second Circuit below expressly acknowledged this conflict among the circuits, and sided with the Sixth and Tenth Circuit decisions: "Upon consideration, we find the Sixth and Tenth Circuits persuasive, and hold that residence in a halfway house as a condition of post-incarceration supervised release is 'custody' for purposes of Section 751(a)." App. 8a-9a. While Edelman's residence at the halfway house "was different from incarceration," it nev-

ertheless "subjected him to a restraint on his activities and limited the amount of time he could spend out of the facility." App. 9a. And the Second Circuit—in contrast to the Ninth Circuit—expressly rejected application of the rule of lenity to this case. *Id.*

3. In light of this split of authority, the question whether a person who fails to return to a halfway house has "escape[d]" from "custody" under § 751(a) turns entirely upon the jurisdiction in which the defendant is indicted under that statute (presumably, the jurisdiction in which the halfway house is located). That differential treatment of potential defendants, based solely on the jurisdiction in which charges are brought, should not be allowed to persist, particularly in the context of a criminal statute that authorizes imprisonment of up to five years (the sentence Edelman actually received in this case). 18 U.S.C. § 751(a).

B. The Petition Presents A Recurring Question Of National Importance, And This Case Presents An Ideal Vehicle For Resolving It

1. The question whether walking out of a halfway house is "escape" from "custody" within the meaning of § 751(a) is a recurring issue of national importance, as evidenced by the multiple published circuit precedents already addressing the issue. Numerous other district court decisions have simi-

larly confronted that question and divided over the proper interpretation of the statute.[1]

The frequency with which courts have been confronted with the question presented is no surprise. In November 2008, the U.S. Sentencing Commission published an analysis of federal escape convictions from 2006 and 2007. *See* U.S. Sentencing Commission: Report on Federal Escape Offenses in Fiscal Years 2006 and 2007 (Nov. 2008), *available at* http://www.ussc.gov/Research_and_Statistics/Resear

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[1] *Compare United States v. Fico*, 16 F. Supp. 2d 252, 253-54 (W.D.N.Y. 1998) (holding that defendant's halfway house walkaway did not constitute "escape" where defendant was placed at halfway house pursuant to court-ordered modification of supervised release conditions and supervised release term was part of sentence for underlying crime); *United States v. Evans*, 886 F. Supp. 800, 803-04 (D. Kan. 1995) (granting defendant's motion to dismiss where defendant was residing at halfway house as a condition of pretrial release on bond for underlying charge); *United States v. Miranda*, 749 F. Supp. 1062, 1064-65 (D. Colo. 1992) (granting defendant's motion to vacate sentence where court ordered defendant to reside at halfway house as a condition of bond and his release thereon pending sentencing), *with United States v. Kates*, 2011 WL 1256848, at *1-2 (W.D.N.Y. Apr. 1, 2011) (motion to dismiss complaint denied where defendant was placed at halfway house pursuant to court-ordered modification of supervised release conditions and supervised release term was part of sentence for underlying crime); *United States v. Hollingshed*, 2008 WL 170420, at *1-2 (S.D. Iowa Jan. 18, 2008) (ordering that defendant's halfway house walkaway constituted "escape" where defendant was placed at halfway house pursuant to court-ordered modification of supervised release conditions and supervised release term was part of sentence for underlying crime); *Perez-Calo v. United States*, 757 F. Supp. 1, 2 (D.P.R. 1991) (holding that defendant who was placed in halfway house on parole in order to receive substance abuse treatment was in the "custody of the Attorney General" and could be convicted of escape).

ch_Projects/Escape/200811_FY_06_07_Escape_Offenses_Report.pdf. Of the 461 escape convictions that the Commission analyzed, 424 of them were for violation of § 751. *Id.* at 4 & n.10. And of the 414 total cases for which the Commission could obtain sufficient information, 177 of them involved leaving "nonsecure custody" like a halfway house, while another 118 involved failing to return to "custody" (which would only apply to facilities, like halfway houses, that allow residents to leave in the first place). *Id.* at 4-5. In other words, over just one recent two-year period, *hundreds* of people were convicted of a federal offense for conduct that, in many circumstances, is *not even a crime* within the vast jurisdiction of the Ninth Circuit.

A circuit conflict affecting such a great number of criminal prosecutions is intolerable. But the question presented here is particularly important because of the severe consequences of conviction under § 751(a). Conviction under that statute is punishable by up to five years in prison. And harsh prison terms are not reserved for escapees from incarceration—Edelman received a full five-year sentence for his escape conviction (after he was forced to spend the trial on that charge in shackles).

2. This case also presents an ideal vehicle for resolving the circuit conflict. The question whether Edelman could be convicted of "escape" in violation of § 751(a) turned on whether residence at a halfway house counts as "custody" under that provision (and thus whether walking out of a halfway house counts as "escape" from "custody"). If this Court were to reject the Second Circuit's approach and instead adopt the Ninth Circuit's, Edelman's § 751(a) conviction

would necessarily be reversed. And reversal of that conviction would provide several bases for revisiting the other counts of conviction as well (a matter to be resolved on remand).[2] This case therefore squarely presents the question whether walking out of a halfway house is "escape" from "custody" under § 751(a).

C. The Court Of Appeals Erred In Holding That Walking Away From A Halfway House Is "Escape" From "Custody" Under The Federal Escape Statute

The court of appeals erred in holding that Edelman "escape[d]" from "custody" in violation of § 751(a) by freely leaving his residence at the halfway house, but failing to return when required. That decision cannot be squared with the ordinary meaning of the statutory text, this Court's decisions interpreting § 751(a), or the relevant statutory context. And to the extent there is any residual ambiguity whether walking away from a halfway house could constitute escape, the statute must be interpreted in Edelman's favor under the rule of lenity. This Court should grant certiorari and reverse the court of appeals.

1. a. The relevant portion of § 751(a) makes it a crime to "escape" from "custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge." The "statute does not define [those] term[s]," so the

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[2] Among other things, if Edelman were not guilty of escape, the district court's ruling on his privacy interest would be subject to question, as would the court's decision to keep him shackled throughout his jury trial.

Court should "give the phrase its ordinary meaning." *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011). In this context, the term "custody" is commonly understood as "[i]mprisonment," New Shorter Oxford English Dictionary 577 (4th ed. 1993), or "[t]he state of being detained or held under guard, especially by the police," American Heritage Dictionary 450 (4th ed. 2000); *accord* Webster's New International Dictionary 650 (2d ed. 1955) ("as to persons, imprisonment").

This Court has understood the term "custody" under § 751(a) in precisely that sense. In *United States v. Bailey*, 444 U.S. 394 (1980), the Court held that "the prosecution fulfills its burden under § 751(a) if it demonstrates that an escapee knew his actions would result in his *leaving physical confinement* without permission." *Id.* at 408 (emphasis added). The Court then considered the question whether escape was a continuing offense and concluded that it must be because of "the continuing threat to society posed by *an escaped prisoner*." *Id.* at 413 (emphasis added). The Court also held that an individual seeking to assert duress as a defense to charges under § 751(a) must offer evidence that he attempted to return to confinement because "the express purpose of Congress in enacting [§ 751(a)] was to punish escape from *penal custody*." *Id.* at 415 & n.11 (emphasis added). The Court explained that it did not want to negate Congress's judgment regarding "escape from prison." *Id.* at 415 & n.11. The Court nowhere suggested that § 751(a) could be understood to extend to an individual who had already served his term of incarceration and was residing at a halfway house, a facility that he was not only al-

lowed but in fact required to leave on a regular basis to maintain gainful employment in the community.

Indeed, it makes no sense to describe a person on "supervised *release*" as being in "custody." As this Court explained in *United States v. Johnson*, 529 U.S. 53 (2000), "the word 'release' in the context of imprisonment ... means 'to loosen or destroy the force of; to remove the obligation or effect of; ... [t]o let loose again; to set free from restraint, confinement, or servitude; to set at liberty; to let go.'" *Id.* at 57 (quoting Webster's New International Dictionary 2103 (2d ed. 1949)). Because the "commonsense meaning of release" is "to be freed from confinement," the Court in *Johnson* expressly distinguished a term of supervised release from "the custody of the Bureau of Prisons" and held that the two could not run at the same time. *Id.*; *accord Gozlon-Peretz v. United States*, 498 U.S. 395, 401 (1991) (Congress decided upon supervised release "as its preferred means of postconfinement monitoring").

The Court confirmed that understanding in *Reno v. Koray*, 515 U.S. 50 (1995), where it held that individuals residing in a halfway house as a condition of their pretrial release are not entitled to have that time credited against their sentence of imprisonment. As the Court explained, "[i]t would be anomalous to interpret [the relevant statute] to require sentence credit for time spent confined in a community treatment center where the defendant is not subject to [the Bureau of Prisons'] control, since Congress generally views such a restriction on liberty as part of a sentence of 'probation,' ... or 'supervised release,' ... rather than part of a sentence of 'imprisonment.'" *Id.* at 59.

The conditions governing Edelman's supervised release were in fact "much more analogous to probation than they were to imprisonment." *Burke*, 694 F.3d at 1064 (quoting *Baxley*, 982 F.2d at 1269); *see* 18 U.S.C. § 3583(d) (authorizing district courts to impose the same conditions for supervised release as are authorized for probation). And "[i]f an individual violates probation, he is not tried for escape; rather, his probation is revoked, and he can be indicted for escape only if he *thereafter* fails to report for custodial incarceration." *Baxley*, 982 F.2d at 1269-70. The same should have been true here: Edelman's "failure to return to [the Pavilion] was a violation of his release conditions punishable by revocation of release, not an escape from 'custody' within the meaning of § 751(a)." *Burke*, 694 F.3d at 1065.

b. Even if the word "custody" could in a vacuum be read as the court of appeals read it—i.e., to include any restriction on freedom of movement or association—that reading is implausible in light of the requirement that the defendant "*escape*" from "custody." 18 U.S.C. § 751(a) (emphasis added). To "escape" is ordinarily understood to mean "to break loose from confinement; get free," American Heritage Dictionary 607 (4th ed. 2000), or to "[b]reak free from captivity," New Shorter Oxford English Dictionary 849 (4th ed. 1993); *accord* Webster's New International Dictionary 871 (2d ed. 1955) ("to break away, get free, or get clear, *from* or *out of* detention …; as, to *escape* from prison"). Section 751(a), in other words, is concerned only with the type of "custody" from which one can "break loose." People do not "break loose" from a halfway house—they simply walk out the door.

Congress intended the ordinary meaning of "escape" when it adopted the text eventually codified at § 751(a). As this Court has explained, the federal escape statute was enacted to address Congress's concern that escapes present a "most serious problem of penal discipline" because they are "often violent, menacing ... the lives of guards and custodians, and carry in their wake other crimes attendant upon procuring money, weapons and transportation and upon resisting recapture." *United States v. Brown*, 333 U.S. 18, 21 & n.5 (1948).

None of those dangers is presented by an individual who freely walks out of a halfway house and simply does not return when required. As the Seventh Circuit concluded after analyzing relevant studies, such "walkaways produced no deaths or injuries." *United States v. Templeton*, 543 F.3d 378, 382 (7th Cir. 2008). It is thus hardly surprising that published circuit decisions have repeatedly held that these types of departures are not crimes of violence under the Armed Career Criminal Act or the U.S. Sentencing Guidelines. *See*, *e.g.*, *United States v. Clay*, 627 F.3d 959, 969 (4th Cir. 2010); *United States v. Lee*, 586 F.3d 859, 874 (11th Cir. 2009); *United States v. Ford*, 560 F.3d 420, 426 (6th Cir. 2009); *Templeton*, 543 F.3d at 383; *United States v. Piccolo*, 441 F.3d 1084, 1087-90 (9th Cir. 2006). *But see United States v. Delgado*, 320 F. App'x 286 (5th Cir. 2009) (per curiam) (holding that walkaway from community treatment center was a crime of violence) (unpublished).

2. a. Statutory context likewise confirms that Edelman was not in custody under § 751(a). As noted above, § 751(a) does not define the term "custody."

In 1965, however, Congress amended another statute to clarify when an individual serving a sentence of extended confinement was in the custody of the Attorney General. Congress provided that "[t]he willful failure of a prisoner … to return within the time prescribed to an institution or facility designated by the Attorney General"—including a "residential community treatment center"—"shall be deemed an escape from the custody of the Attorney General" under § 751(a). 18 U.S.C. § 4082(a), (c).

That provision only applies to individuals who are "prisoners" still serving sentences of incarceration but who are completing those sentences at a "facility" (again, including a "residential community treatment center") "designated by the Attorney General." *Id.* It thus does not apply to individuals like Edelman, who have completed a sentence of incarceration and are at liberty on supervised release. But if walking out of a halfway house could naturally be understood as "escape" from "custody" in any context, Congress would not have needed to enact § 4082 at all. In fact, if residence at a halfway house as part of a *sentence of imprisonment* would not be considered "custody" absent § 4082, then a fortiori the same must be true for residence in a halfway house as a condition of *supervised release*.

Other provisions—including those that govern supervised release—confirm the distinction between custody and halfway-house residence. Under 18 U.S.C. § 3583(d), district courts are permitted to include as a term of supervised release "any condition set forth as a discretionary condition of probation in [18 U.S.C. §] 3563(b)." Section 3563(b), in turn, expressly distinguishes between an order requiring an

individual to "remain in the *custody* of the Bureau of Prisons" and an order that a defendant "*reside* at, or participate in the program of, a community corrections facility (including a facility maintained or under contract to the Bureau of Prisons)." 18 U.S.C. § 3563(10), (11) (emphases added); *accord* 18 U.S.C. § 4042(c)(2) (referring to "the custody of the Bureau of Prisons" and "an individual's expected place of residence following release").

b. The severity of the punishment authorized by § 751(a) is further evidence that the statute was not designed to cover conduct like Edelman's. Section 751(a) authorizes as punishment a sentence of imprisonment for up to five years—the sentence Edelman received here. Those five years are in addition to whatever punishment the purported escapee receives for violating the terms of his supervised release—a term of incarceration that itself may stretch for more than an additional five years. U.S.S.G. § 7B1.4 (permitting up to 63 months' imprisonment upon revocation of supervised release).

As noted above, an escape charge also carries with it significant collateral consequences. Here, it caused the district court to deny a motion to suppress the drugs at issue in the other counts. The court also forced Edelman (over his objection) to wear shackles throughout his jury trial on both the drug and escape charges because of his "record of escaping from custody." C.A. App. Vol. II A167. And an individual (like Edelman) sentenced for more than one year and one month imprisonment will accrue at least three additional points to his criminal history score under the Sentencing Guidelines if later convicted of another offense—a result that would

authorize an additional six months of imprisonment for even the most minor of crimes, and many more months as the seriousness of the crime escalates. U.S.S.G. § 4A1.1; Ch.5, Pt. A. Congress could not have intended for those disproportionate consequences to apply to individuals who merely violate the terms of their supervised release by failing to return to their halfway house residence.

3. Finally, the court of appeals' decision is foreclosed by the rule of lenity. As explained above, the ordinary meaning of the terms "custody" and "escape," the Court's precedents interpreting those terms, and statutory context all confirm that walking out of a halfway house does not constitute criminal "escape." To the extent there is any arguable ambiguity, however, the rule of lenity requires an interpretation that favors Edelman. *See Baxley*, 982 F.2d at 1270. "Under a long line of [the Court's] decisions, the tie must go to the defendant." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). By "requir[ing] ambiguous criminal laws to be interpreted in favor of the defendants subjected to them," that rule "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain." *Id.* Here, for example, Edelman testified that, had he believed he "was committing the crime of escape by quitting the program, [he] would not have left." C.A. App. Vol. II A217. And if § 751(a) is, as the court of appeals held, to be interpreted to reach conduct far afield from the ordinary understanding of escape, custody, and supervised release, then Congress should say so explicitly, rather than forcing

the "courts ... [to] mak[e] criminal law in Congress's stead." *Santos*, 553 U.S. at 514 (plurality opinion).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 7, 2013