No. 13-569

In the Supreme Court of the United States

JODY EDELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Pursuant to a district court order, and at the direction of the Attorney General, petitioner was placed in a residential reentry center operated under contract with the federal Bureau of Prisons as a condition of his supervised release.

The question presented is whether petitioner's having absconded from that facility constituted an "escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which [the individual] 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," in violation of 18 U.S.C. 751(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 726 F.3d 305.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2013. The petition for a writ of certiorari was filed on November 7, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of New York, petitioner was convicted of possession of 100 grams or more of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(B) (2006) (Count 1); possession of 500 grams or more of cocaine with intent to distribute it, in violation of

21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(B) (2006) (Count 2); possession of 50 grams or more of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(A) (2006) (Count 3); and escape from custody, in violation of 18 U.S.C. 751(a) (Count 4). The district court sentenced petitioner to concurrent terms of 200 months of imprisonment on Counts 1 through 3 and 60 months of imprisonment on Count 4, to be followed by eight years of supervised release. The court of appeals affirmed. Pet. App. 1a-11a, 51a-56a.

1. In 1993, petitioner was convicted of federal drug charges, for which he was sentenced to 84 months of imprisonment, to be followed by three years of supervised release. Pet. App. 3a, 15a. In 2002, petitioner pleaded guilty in New York state court to additional drug charges, for which he received a sentence of six years to life imprisonment, to be followed by a lifetime of state parole. *Id.* at 3a, 15a n.1. Because of his state conviction, petitioner did not begin serving his federal term of supervised release until September 25, 2007. *Id.* at 3a, 15a. Within months, petitioner was arrested and charged with two misdemeanors (in violation of the terms of both his federal supervision and state parole) and was remanded to state custody. *Id.* at 3a, 16a.

As a consequence of petitioner's repeated violations of the terms of his release, the United States Probation Office and the New York State Parole Board jointly requested that the federal district court impose stricter conditions on petitioner's supervised release. Pet. App. 3a, 16a. The district court agreed and ordered petitioner to spend five months in a residential reentry center (RRC), followed by an additional four

months in home detention with electronic Global Positioning System (GPS) monitoring. *Id.* at 3a-4a, 16a; see Gov't Resp. to Def. Omnibus Mots., Ex. A (Gov't Resp.). Shortly thereafter, a New York state judge revoked petitioner's state parole and "release[d] [him] to the federal Bureau of Prisons" on condition that he "reside[] at a Bureau of Prisons halfway house." 2 C.A. App. A108-A109.

On June 6, 2008, the Bureau of Prisons (BOP) directed that petitioner serve his five-month RRC placement at the Syracuse Pavilion Residential Reentry Center (Pavilion). See Pet. App. 4a, 16a; Gov't Trial Ex. 3 (BOP designation form).[1] The Pavilion is a federally designated reentry facility operated under contract with the United States Department of Justice and BOP. Pet. App. 4a, 16a n.2.

The district court's order committing petitioner to an RRC required that he "observe the rules of that facility." Gov't Resp. Ex. A. These rules (to which petitioner expressly agreed upon entering the Pavilion) imposed strict limitations on petitioner's liberty and freedom of movement. For example, petitioner was prohibited from leaving the facility without notifying Pavilion staff or from being gone from the facility for more than 12 hours at a time. Pet. App. 4a; see also Gov't Resp. Ex. B (Pavilion Orientation Checklist). When petitioner was permitted to leave, his work or leisure destination had to be approved in advance by Pavilion staff. *Ibid.* Petitioner was also prohibited from having visitors except during designated visiting hours; from possessing any form of

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[1] BOP is part of the Department of Justice and is subject to the supervision and control of the Attorney General. See, *e.g.*, Act of May 14, 1930, ch. 274, 46 Stat. 325; 28 C.F.R. 0.96.

contraband (including cell phones, cameras, aerosol cans, chewing gum, open-faced razor blades, toothpicks, poppy seeds, alcohol, medicines, or "anything that could be considered to be a weapon"); and from interacting with other residents except in designated common areas. Gov't Resp. Ex. C (Pavilion Client Rules & Regulations). Petitioner was subject to random drug and alcohol screenings, and his person and property were "subject to search * * * by staff at any time." *Ibid.*

Petitioner also signed an agreement with BOP as a condition of his placement. See Gov't Trial Ex. 6. Like the district court's order, this agreement required petitioner "to abide by the rules and regulations promulgated by" the Pavilion. *Ibid.* The agreement further stated that, when petitioner was eventually moved to home confinement, he would "legally *remain* in the custody of the Bureau of Prisons and/or the U.S. Attorney General[.] * * * [F]ailure to remain at the required locations may result in disciplinary action and/or prosecution for escape." *Ibid.* (emphasis added).

2. Petitioner's term at the Pavilion was short-lived. Within weeks of his arrival, petitioner was cited three times for violations of the facility's rules, including failure to confirm his whereabouts while he was supposedly at work and failure to return to the facility on schedule. See Gov't Resp. Ex. F (Pavilion Termination Report). It was later determined that petitioner's employment was a sham and that he was actually using his time outside the facility to distribute drugs. Presentence Investigation Report (PSR) ¶ 15. On the evening of August 29, 2008, shortly after receiving his third citation, petitioner walked past the Pavilion's

door monitor, left the building, and never returned. Pet. App. 5a, 17a.

The Pavilion reported petitioner's escape to BOP and the U.S. Probation Office, and a warrant was issued for his arrest. Pet. App. 5a, 17a. United States Marshals eventually tracked petitioner to an apartment in Syracuse, New York, where they found large quantities of drugs, drug-trafficking paraphernalia, and $12,000 in cash. *Id.* at 5a, 18a-19a.

3. A federal grand jury charged petitioner with three counts of drug trafficking, in violation of 21 U.S.C. 841(a)(1), 21 U.S.C. 841(b)(1)(A) and (B) (2006); and one count of escape, in violation of 18 U.S.C. 751(a). Section 751(a) provides:

> 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). Petitioner filed a pretrial motion to dismiss the escape charge on the ground that his alleged conduct, even if true, would not satisfy the requirements of Section 751(a). See Pet. App. 20a. The district court denied petitioner's motion. *Id.* at 22a-25a. The court held that petitioner had been committed to the Pavilion's custody pursuant to a court order

imposed by virtue of his prior felony conviction, and thus petitioner's having absconded from that facility clearly constituted an "escape" under Section 751(a). *Id.* at 24a-25a.

The district court reaffirmed this ruling in response to petitioner's motion for reconsideration. Pet. App. 34a-50a. The court concluded that it is "well-settled that a defendant's placement in a halfway house as part of his supervised release constitutes 'custody' or 'confinement' for purposes of the escape statute." *Id.* at 38a-39a (citing cases). The court found it immaterial that petitioner was committed to the Pavilion as a condition of his supervised release, rather than as part of his term of imprisonment. *Id.* at 42a-43a. As the court explained, regardless of whether petitioner's placement in the halfway house was a "'modification' or 'revocation'" of his supervised release, "it does not change the fact that this [c]ourt issued an Order, pursuant to the laws of the United States, requiring [petitioner] to reside in the halfway house." *Id.* at 42a (emphasis omitted). And as the court also found, "[Petitioner] was under this [c]ourt's jurisdiction during his period of supervised release by virtue of his original felony conviction and * * * the [c]ourt ordered his confinement in the halfway house pursuant to that authority." *Id.* at 43a.

The district court further noted that the indictment "properly allege[d] that [petitioner] was 'confined by direction of the Attorney General following his conviction for a felony offense'" and that he was "[in] custody by virtue of process issued under the laws of the United States by a court." Pet. App. 43a (quoting Second Superseding Indictment 3). The court con-

cluded that those allegations, if proved, would meet the requirements of the escape statute. *Ibid.*

Petitioner was convicted on all counts. The district court sentenced petitioner to 200 months of imprisonment on each of the three drug-trafficking counts and to 60 months of imprisonment for the escape count, with all sentences to run concurrently. Pet. App. 54a.

4. The court of appeals affirmed. Pet. App. 1a-11a. Petitioner argued, *inter alia*, that he "was not in statutory 'custody' at Pavilion" because his placement at the Pavilion was a condition of his supervised release, not part of a term of imprisonment, and he was permitted to leave the facility under certain circumstances. Pet. C.A. Br. 22-24, 31-36. Petitioner contended that any ambiguity in this regard should be resolved in his favor under the rule of lenity. *Id.* at 29. Petitioner also asserted that, even if he were in "custody," it would have been by virtue of violations of the terms of his supervised release and not his underlying felony conviction. *Id.* at 38-39.

The court of appeals rejected these arguments. The court noted some disagreement among the circuits concerning the circumstances in which "residence in a halfway house as a condition of post-incarceration supervised release is 'custody' for purposes of Section 751(a)," with the Sixth and Tenth Circuits holding that the conditions of residence in a halfway house are usually sufficiently restrictive to constitute "custody," and the Ninth Circuit "interpret[ing] 'custody' more narrowly." Pet. App. 8a-9a (citing cases). The court concluded that the approach of the Sixth and Tenth Circuits was more faithful to the statutory text because the concept of "custody" has never been thought to "require direct physical

restraint. Custody may be minimal and, indeed, may be constructive." *Id.* at 9a (quoting *United States* v. *Sack*, 379 F.3d 1177, 1179 (10th Cir. 2004), cert. denied, 544 U.S. 963 (2005)). The court also found no "grievous ambiguity or uncertainty in the language and structure of the statute" that would support applying the rule of lenity. *Ibid.* (citation omitted).

The court of appeals further held that petitioner had been placed in the Pavilion's custody "by virtue of" his prior felony conviction for drug trafficking. Pet. App. 9a-10a. The court noted specifically that petitioner's term of supervised release, and the additional restrictions imposed as a consequence of his violations of the conditions of that release, were "part of the original sentence for his 1993 conviction for conspiracy to distribute cocaine." *Ibid.* (citing *United States* v. *Evans*, 159 F.3d 908, 913 (4th Cir. 1998)).[2]

ARGUMENT

Petitioner contends (Pet. 7-14) that this case "presents an ideal vehicle for resolving [a] circuit conflict" concerning whether an individual in a halfway house is in "custody" for purposes of Section 751(a). Petitioner further argues (Pet. 14-22) that an offender is not in the "custody" of a halfway house (and cannot "escape" from that facility) unless he is serving a term of imprisonment. The text of Section 751(a) refutes petitioner's claims, and no circuit conflict exists concern-

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[2] The court of appeals also rejected petitioner's challenge to the U.S. Marshals' warrantless search of his apartment, holding that petitioner's privacy expectations were "severely curtailed" by the conditions of his supervised release (which authorized warrantless searches of his person and property "at any time"). Pet. App. 10a-11a. Petitioner does not challenge this aspect of the court of appeals' decision in his petition.

ing the applicability of that statute to circumstances like those here. Moreover, because petitioner does not challenge his drug-trafficking convictions (for which he received concurrent terms of imprisonment that greatly exceed his sentence for escape), further review could have no effect on petitioner's sentence. The petition should be denied.

1. Section 751(a) has four clauses defining the types of custody from which escape is prohibited:

> [1] from the custody of the Attorney General or his authorized representative, or [2] from any institution or facility in which he is confined by direction of the Attorney General, or [3] 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 [4] from the custody of an officer or employee of the United States pursuant to lawful arrest.

18 U.S.C. 751(a). Each of those clauses is separated from the others by the disjunctive term "or," and violating the statute accordingly requires proof only that the defendant escaped from any of the types of custody described.

The government alleged and proved that petitioner's conduct satisfied the second and third clauses of Section 751(a). Petitioner was committed to the Pavilion "by direction of the Attorney General following his conviction for a felony." Second Superseding Indictment 3; see 5/25/10 Trial Tr. 79 (testimony of Mark Walker, U.S. Probation Officer);[3] Gov't Trial Ex. 3

[3] Probation Officer Walker explained that, upon receiving the district court's order directing that petitioner be placed in an RRC, the Probation Office "submit[ted] a referral request to the

(RRC Referral Letter). Petitioner's commitment to the Pavilion was also pursuant to a federal court order "modifying conditions of supervised release imposed on [petitioner] as a result of said felony conviction and directing that he reside in a residential reentry center or other suitable facility for a period of five months and observe the rules of that facility." Second Superseding Indictment 3; see also Pet. App. 3a-4a, 16a; Gov't Resp. Ex. A (district court order). Those facts, coupled with petitioner's conduct, therefore fully supported his conviction under Section 751(a).

2. Petitioner contends (Pet. 14-22) that the terms "custody" and "escape" in Section 751(a) only apply to offenders who break out of prisons, jails, and other traditional penal institutions, and not halfway houses. That assertion is inconsistent with the plain language of the statute and with this Court's precedent.

a. Petitioner errs in contending that an individual cannot be in "custody" unless he is "[i]mprison[ed]" or "held under guard." Pet. 15 (quoting various dictionary definitions). Every court of appeals that has considered the question has concluded that, in determining whether an escapee was in "custody" for purposes of Section 751(a), "it is not necessary that the escapee at the time of the escape be held under guard or under direct physical restraint or that the escape be from a conventional penal housing unit such as a cell or cell block; the custody may be minimal and, indeed, may be constructive." *United States* v. *Cluck*, 542 F.2d

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community corrections manager's office * * * . They're the agency that does the designations for inmates or persons that are being placed at a residential reentry center, they are part of the Bureau of Prisons under the Attorney General." 5/25/10 Trial Tr. 79.

728, 731 (8th Cir.) (citing cases), cert. denied, 429 U.S. 986 (1976); see also, *e.g.*, *United States* v. *Depew*, 977 F.2d 1412, 1414 (10th Cir. 1992); *United States* v. *Keller*, 912 F.2d 1058, 1059 (9th Cir. 1990), cert. denied, 498 U.S. 1095 (1991); *United States* v. *Rudinsky*, 439 F.2d 1074, 1076-1077 (6th Cir. 1971); accord Pet. App. 9a.

The conditions of petitioner's confinement at the Pavilion went well beyond "minimal" or "constructive." As explained, petitioner was confined to the Pavilion facility at all times unless he had specific permission to leave. See Pet. App. 4a; Gov't Resp. Ex. B (Pavilion Orientation Checklist); see also 5/26/10 Trial Tr. 149 (testimony of Susan Fennessy, Executive Director of Pavilion) (explaining that Pavilion residents "have to have permission" to leave the facility and are "[a]bsolutely not" permitted to "come and go at will"). When petitioner did leave the Pavilion grounds, he could only go to a location that had been previously approved by Pavilion staff and had to return within 12 hours. See Pet. App. 4a; Gov't Resp. Ex. B.

While confined to the Pavilion, petitioner was subject to a number of restrictions that mirror those in traditional penal environments: he was prohibited from having visitors except during specified visiting hours; he could not enter other residents' rooms or interact with them outside of designated common areas; he was forbidden from possessing a wide range of "contraband," including common items such as cell phones, cameras, razor blades, toothpicks, and chewing gum; and he was subject to random drug and alcohol screenings and searches of his person and property at any time. See Gov't Resp. Ex. C (Pavilion Client

Rules & Regulations). The full terms and conditions of petitioner's placement at the Pavilion make it clear that virtually every aspect of his daily life was tightly controlled. See Gov't Resp. Ex. B, C; see also Gov't Trial Ex. 6 (additional BOP rules governing placement); *id.* 7 (Pavilion Conditions of Work Release).

Petitioner does not address these aspects of his confinement. Instead, he contends (Pet. 15) that this Court's decision in *United States* v. *Bailey*, 444 U.S. 394 (1980), supports a narrower interpretation of "custody" under Section 751(a). *Bailey*, however, did not address the meaning of "custody" at all; "[i]t [was] undisputed" in *Bailey* that the "respondents were in the custody of the Attorney General as the result of either arrest on charges of felony or conviction" at the time they escaped from jail (by removing a bar from a window and sliding down a knotted bedsheet). *Id.* at 396, 407. Rather, the question in *Bailey* was whether (as the court of appeals had held) Section 751(a)'s *mens rea* requirement encompasses only an intent to escape from the "normal aspects of 'confinement'" and excludes an intent to avoid "non-confinement" conditions, such as "beatings" and sexual assaults. *Id.* at 400-401, 408 (citation omitted).

The Court in *Bailey* found the court of appeals' requirement of "an intent to avoid confinement" and its "narrow definition of confinement" to be "quite unsupportable," and held that the government had satisfied its burden by showing that the "escapee knew his actions would result in his leaving physical confinement without permission." 444 U.S. at 408. The Court did not hold that "physical confinement" is a prerequisite for custody in all cases arising under Section 751(a), and, in any event, the Court's broad

understanding of "confinement" would surely encompass petitioner, who was required to remain at the Pavilion at all times unless he had specific permission to leave for a pre-approved purpose. Although the respondents in *Bailey* were locked behind bars and under constant guard, nothing in the Court's decision suggests that those conditions are an irreducible minimum for "custody."

Petitioner also cites *United States* v. *Johnson*, 529 U.S. 53 (2000), and *Reno* v. *Koray*, 515 U.S. 50 (1995), for the proposition that "custody" and "supervised release" are mutually exclusive. Pet. 16. Those decisions do not assist him. *Johnson* holds that the Sentencing Reform Act of 1984, 18 U.S.C. 3624(e), ordinarily precludes the concurrent running of terms of imprisonment and supervised release, and thus a defendant who has been incarcerated beyond his proper term of imprisonment is not entitled to a corresponding reduction in the term of his supervised release. 529 U.S. at 56-57. Nowhere does *Johnson* suggest that "imprisonment" and "custody" are synonymous, and the fact that imprisonment and supervised release do not generally run together says nothing about whether petitioner was in "custody" for purposes of Section 751(a).

Koray interprets another provision of the Sentencing Reform Act of 1984, 18 U.S.C. 3585(b), to exclude time spent in a treatment center while on pretrial release from "official detention" that may be credited against an eventual term of imprisonment. 515 U.S. at 65. The Court reasoned that because the Bail Reform Act of 1984 (enacted at the same time as the Sentencing Reform Act of 1984) lists time in a treatment center as a permissible condition of pretrial "release" but

not of pretrial "detention," see 18 U.S.C. 3142, Congress did not intend to allow pretrial releasees to obtain the credit. 515 U.S. at 57-58. Again, this has no bearing on whether petitioner was in "custody" for purposes of Section 751(a). See *United States* v. *Sack*, 379 F.3d 1177, 1179-1180 (10th Cir. 2004) (distinguishing *Koray* in this context), cert. denied, 544 U.S. 963 (2005).

b. Petitioner also errs in contending (Pet. 17-18) that "escape" under Section 751(a) requires the offender to "break loose" in a dangerous or violent manner. This Court explained in *Bailey* that escape merely "means absenting oneself from custody without permission." 444 U.S. at 407. Section 751(a) has long been applied to "crimes ranging from violent jailbreaks to non-violent walkaways to failures to report for incarceration or return to custody." *United States* v. *Gowdy*, 628 F.3d 1265, 1268 (11th Cir. 2010). Petitioner cites (Pet. 18) cases holding that Section 751(a) and similar state statutes do not necessarily require the use of force or violence in effectuating an "escape"—and thus do not categorically qualify as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. 924(e), or a "crime of violence" under Sentencing Guidelines § 4B1.1—but those cases directly contradict his proposed definition of "escape."

Of course, "some of the more serious considerations leading to the adoption of" Section 751(a) included the concern that escapes "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) (quoting U.S. Br. at 10,

Brown (Oct. Term 1947, No. 100)). Contrary to petitioner's assertion (Pet. 18), leaving any custody can trigger violence or future crimes to avoid recapture, and "[t]he escape statute is designed to *discourage* conduct which endangers the welfare of the defendant's custodians and to discourage the crimes that often follow an escape." *Sack*, 379 F.3d at 1180 n.2 (emphasis added). The deterrent effect of the statute would be substantially reduced if it were construed to apply only to forms of custody that posed the most extreme risks of violence.

"[T]he underlying purpose of [Section] 751(a) [is] to protect the public from the danger associated with federal criminals remaining at large." *Gowdy*, 628 F.3d at 1268. As illustrated here, that concern applies with equal force to criminals who abscond from an RRC or halfway house: upon escaping from the Pavilion, petitioner resumed committing crimes, including running a large-scale drug distribution enterprise.[4]

c. Finally, petitioner errs in contending (Pet. 18-21) that 18 U.S.C. 4082(a) supports his proposed definitions of "custody" and "escape." That statute specifies that "[t]he willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to an institution or facility designated by the Attorney General, shall be deemed an escape from the custody of the Attorney General" under Section 751(a). The term "facility" includes "a residential community treatment center."

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[4] Moreover, and as this Court has noted, failure to punish an escape may adversely affect "penal discipline." *Brown*, 333 U.S. at 21 n.5. That is surely true of the Pavilion, which enforces strict rules to ensure good order and discipline.

18 U.S.C. 4082(c). Petitioner argues (Pet. 19) that this provision implies that *only* those serving a term of imprisonment may violate Section 751(a) by absconding from an RRC or halfway house.

Petitioner significantly misapprehends the meaning of Section 4082(a). Congress enacted this statute "[i]n order to nullify the ruling in United States v. Person, 223 F. Supp. 982 (S.D. Cal. 1963)," which had held that a prisoner's failure to return to a halfway house was not an "escape" under Section 751(a). *United States* v. *Vaughn*, 446 F.2d 1317, 1318 (D.C. Cir. 1971). In approving a package of reforms authorizing work release, furloughs, and other forms of community confinement for federal prisoners, Congress sought to ensure that a prisoner's failure to return from a furlough "to visit a dying relative" or failure to return to a designated facility or halfway house following temporary work release, for example, "would be punishable as an escape." S. Rep. No. 613, 89th Cong., 1st Sess. 3-4 (1965).

Section 4082(a) merely reflects Congress's desire, in approving the expansion of alternatives to incarceration for federal prisoners, to clarify that courts should not deem such prisoners to be exempt from the first clause of Section 751(a) (escape from the custody of the Attorney General). See *McCullough* v. *United States*, 369 F.2d 548, 549-550 (8th Cir. 1966) (Section 4082(a) "removes any ambiguity that might, by a strained construction, have existed in the application of [Section] 751 to prisoners who fail to remain within their 'extended limits of confinement.' [It] definitely authorizes punishment for such a failure even though such an authorization is probably not necessary under the broad terms of [Section] 751."). Section 4082(a)

expresses no congressional intention to affect the application of Section 751(a) to individuals confined to a BOP halfway house or RRC as a condition of supervised release. See *United States* v. *Ko*, No. 13-3064, 2014 WL 28639, at *3 (10th Cir. Jan. 3, 2014) ("Section 4082 extends the list of what 'shall be deemed an escape' under [Section] 751; it does not purport to limit escape to its terms.") (quoting 18 U.S.C. 4082(a)). Indeed, Section 4082(a) predates the advent of supervised release by almost 20 years. Nor does it address, by negative implication or otherwise, offenders (like petitioner) who violate other clauses of Section 751(a) (escape from confinement directed by the Attorney General and escape from custody ordered by a court) by absconding from confinement without permission, rather than simply failing to return. Moreover, Congress's recognition in Section 4082(a) that failure to return to a halfway house may constitute "escape" from "custody" under Section 751(a) refutes petitioner's assertion that those terms only relate to violent attempts to break free from a prison or jail.

Petitioner briefly argues (Pet. 19-20) that 18 U.S.C. 3563(b) supports his position because it authorizes a court to require, as conditions of supervised release, that an offender "remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time" and "reside at, or participate in the program of, a community corrections facility (including a facility maintained or under contract to the Bureau of Prisons)." Nothing in this provision suggests that an offender who is ordered by a court to reside at an RRC operated by or under contract with BOP, under conditions that greatly restrict his liberty and free-

dom of movement, is not in "custody" for purposes of Section 751(a).[5]

3. Contrary to petitioner's claim (Pet. 7-11), no circuit conflict concerning the application of Section 751(a) is implicated by the circumstances of this case. The Sixth and Tenth Circuits have held that the conditions of residence at a halfway house ordinarily are sufficiently restrictive to constitute "custody" for purposes of Section 751(a). See *Sack*, 379 F.3d at 1178-1179 (10th Cir.) (holding that defendant committed to halfway house as condition of pretrial release was in "custody" for purposes of Section 751(a) because he was "permitted to leave the halfway house for employment purposes, but was required to return to the halfway house after each work day"); *Rudinsky*, 439 F.2d at 1076-1077 (6th Cir.) (same where treatment center's restrictions "deprived appellant of his freedom of movement and association"). These decisions have "treated custody under [Section] 751 broadly," *Sack*, 379 F.3d at 1179, based largely on the recognition 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," *Rudinsky*, 439 F.2d at 1076. Cf. *United States* v. *Swanson*, 253 F.3d 1220, 1224 (10th Cir.)

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[5] Petitioner's reliance on the rule of lenity (Pet. 21) is misplaced. "A statute is not ambiguous for purposes of lenity merely because there is a division of judicial authority over its proper construction. The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Koray*, 515 U.S. at 64-65 (internal quotation marks and citations omitted). As the court of appeals held (Pet. App. 9a), there is no "grievous ambiguity or uncertainty" in Section 751(a) that would warrant application of that rule. See *Maracich* v. *Spears*, 133 S. Ct. 2191, 2209 (2013).

("Life at a halfway house undoubtedly entails fewer restrictions than life in prison, but one who lives there under court order is not free to come and go at will. In that respect, residence at a halfway house is a form of 'custody.'"), cert. denied, 534 U.S. 1007 (2001). The court of appeals found the "Sixth and Tenth Circuits persuasive" and adopted a similarly broad definition of "custody." Pet. App. 8a-9a.

The Ninth Circuit, although agreeing with other circuits that "custody" under Section 751(a) "need not involve direct physical restraint," *Keller*, 912 F.2d at 1059, has adopted a narrower view of the types of restrictions that may constitute "custody." The Ninth Circuit has not, however, established a per se rule that residence in a halfway house can never constitute custody; rather, it has treated the restrictiveness of such placements as a factual question to be decided under the circumstances of each case. See *United States* v. *Burke*, 694 F.3d 1062, 1064 (2012); *United States* v. *Baxley*, 982 F.2d 1265, 1269 (1992); see also *Burke*, 694 F.3d at 1066 (Callahan, J., dissenting) ("We have eschewed bright-line rules defining 'custody' under [Section] 751(a) and have consistently held that the definition varies 'in meaning when used in different contexts.' In the residential reentry center/halfway house context, our case law has developed a definition of 'custody' by focusing on the circumstances of the release and the extent of the restrictions on the defendant's freedom.") (quoting *Baxley*, 982 F.2d at 1269; internal citation omitted); *id.* at 1066 n.2 ("[T]he definition of 'custody' is [to be] analyzed on a case-by-case basis".).

In *Baxley*, for example, the court of appeals held that a defendant residing in a halfway house while on

personal recognizance before trial was not in "custody" for purposes of Section 751(a). 982 F.2d at 1269-1270. The court noted several specific facts supporting its holding. Baxley was "permitted * * * to come and go as he pleased during the day as long as he logged the time, duration, and purpose of his visits to the outside world." *Id.* at 1266, 1269. The district court had expressly declined to place Baxley in the facility's "custody" and told Baxley that he could leave the facility altogether if he posted a bond or cash assurance. *Ibid.* Baxley also attempted to check in with the facility several times after leaving and made no effort to hide his whereabouts. *Id.* at 1267.

In *Burke*, the district court placed the defendant in an RRC as a condition of his supervised release, where (according to the panel majority) he was required to "advise staff of [his] comings and goings" and had to obey certain "restrictions on telephone use or meal times," but was otherwise free to leave the facility. 694 F.3d at 1064.[6] As in *Baxley*, the district court expressly declined to enter a "custodial order." *Id.* at 1063. The court of appeals concluded that, under these circumstances, Burke was not subject to restraints that would amount to "custody." *Id.* at 1064-1065.

Although other circuits would quite likely find the circumstances in *Burke* and *Baxley* to be sufficiently restrictive to constitute custody, those cases do not create a conflict warranting this Court's review here.

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[6] A factual dispute appears to have existed in *Burke* concerning the facility's rules. See 694 F.3d at 1067-1068 (Callahan, J., dissenting) (stating that "all requested absences from the RRC required advance approval and had to be for narrowly permitted purposes").

The Ninth Circuit has not categorically foreclosed the possibility that some halfway-house placements would be sufficiently restrictive to constitute "custody" within the meaning of the escape statute. Rather, it has examined the specific facts of each case to make that assessment. See *Burke*, 694 F.3d at 1064. And it is far from clear that the Ninth Circuit would place the circumstances of this case outside the escape statute. As explained above, and in contrast to *Burke*, petitioner was required to remain at the halfway house unless he obtained express prior authorization to leave, and he was required to remain there pursuant to a court order which, as the same court later confirmed, was expressly designed to place petitioner in "custody." See pp. 3-4, 6, *supra*. The Ninth Circuit could distinguish the facts here from those in *Burke* and find that a person like petitioner was in "custody." See *Burke*, 694 F.3d at 1064 (noting that residents in Burke's halfway house were required "to advise staff of their comings and goings in order to leave the premises," but not indicating that they required prior approval).

The fact-dependent nature of the different approaches in the courts of appeals makes the need for this Court's intervention highly questionable. At the very least, the factual differences between petitioner's placement and the circumstances of *Baxley* and *Burke* make this case a poor candidate for seeking to resolve any disagreement among the circuits.

4. This case is also an unsuitable vehicle for addressing the question presented because a decision in petitioner's favor would have no effect on his sentence. Petitioner's 60-month sentence for escape was imposed concurrently with three 200-month sentences

for drug trafficking. Pet. App. 54a. Petitioner does not challenge his drug-trafficking convictions or sentences, and thus he will serve 200 months of imprisonment whether or not his 60-month sentence for escape is vacated.

Petitioner asserts (Pet. 14 n.2, 20-21) that a ruling in his favor would relieve certain "collateral consequences" of his escape conviction, but that is incorrect. Petitioner states, for example, that the escape charge "caused" the district court to deny his motion to suppress the drugs found in the apartment where he was living, suggesting (presumably) that the evidence supporting his drug-trafficking convictions might be suppressed if his escape conviction were overturned. Pet. 20. Petitioner does not explain how a decision vacating his escape conviction would permit him to reopen his otherwise final convictions for drug trafficking (which he has not challenged before this Court). And even assuming that it would, his legal objection to his escape conviction provides no basis for questioning the denial of his suppression motion. The court of appeals held that petitioner was subject to search as a condition of his supervised release and thus lacked a reasonable expectation of privacy. Pet. App. 10a-11a; see *Samson* v. *California*, 547 U.S. 843, 852 (2006) (holding that parolees "have severely diminished expectations of privacy by virtue of their status alone"). For example, petitioner was specifically required to

> submit his * * * person, and any property, house, [or] residence, * * * to search at any time, with or without a warrant, by any federal probation officer, or any other law enforcement officer from whom the Probation Office has request-

> ed assistance, with reasonable suspicion concerning a violation of a condition of probation or supervised release or unlawful conduct by the defendant.

Pet. App. 59a. Whether or not petitioner's having absconded from the Pavilion constituted "escape" under Section 751(a), it is undisputed that he violated the terms of his supervised release and was not lawfully permitted to reside in the apartment where he was found. See *id.* at 10a-11a, 30a-31a. The warrantless search of the apartment was therefore valid.

Petitioner also contends (Pet. 20) that his ankles might not have been shackled during his trial had he not been charged with escape. It is difficult to see what difference this makes, since the shackles were not visible to the jury and played no role in petitioner's trial. See 2 C.A. App. A168. And in any event, the decision to shackle petitioner was based on his history of absconding, and not as a consequence of his having been charged with a specific offense under Section 751(a). *Id.* at A167-A168.

Finally, petitioner argues (Pet. 20-21) that his escape conviction will add three additional criminal history points to his criminal history category under the Sentencing Guidelines, which could prejudice him if he were "later convicted of another offense." Petitioner's future recidivism is, of course, entirely within his control, and the possibility of a future conviction is speculative. In any event, because petitioner was arrested for escape and drug trafficking at the same time, was charged with those offenses "in the same charging instrument," and was sentenced for those offenses "on the same day," his drug-trafficking and escape convictions would be counted as a "single sentence" for purposes of assigning criminal history

points. Sentencing Guidelines § 4A1.2(a)(2). Vacating petitioner's escape conviction would thus have no effect on his criminal history score.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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