No. 13-569

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

REPLY BRIEF FOR PETITIONER

KENNETH M. MOYNIHAN
120 East Washington St.
Syracuse, N.Y. 13202
(315) 424-4944

JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
ANTON METLITSKY
KATHRYN E. TARBERT
DEANNA M. RICE
RAGHAV AHUJA
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Petitioner Jody Edelman

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATUTES

REPLY BRIEF FOR PETITIONER

The question presented is whether an individual's failure to return to a halfway house constitutes an "escape" from "custody" under 18 U.S.C. § 751(a). There is a direct, repeatedly acknowledged, and intractable circuit conflict on that question, which is squarely presented by the facts of this case.

The government's response acknowledges the circuit conflict, but nevertheless urges denial of certiorari, principally on the ground that the conflict *might* not be implicated in this case, because the facts here *might* present a § 751 crime even under the Ninth Circuit rule rejected by the Second Circuit below. Even if that argument were correct, it would only confirm the case for certiorari. Federal criminal laws—especially serious felony offenses—should not be subject to the uncertainty the government emphasizes, particularly when the uncertainty turns entirely on the coincidence of where the conduct occurred. In any event, the government's argument is wrong: the Ninth Circuit's rule is completely categorical, and it would unambiguously compel reversal of petitioner Jody Edelman's conviction on the record here. This case thus presents an ideal vehicle for resolving the circuit conflict and establishing clarity and uniformity in the application of this federal criminal statute.

The government's only other argument against certiorari is makeweight. The government says review should be denied because even if the Court reverses Edelman's § 751 conviction, Edelman's overall sentence would be unaffected because of his separate drug convictions. But his § 751 conviction plainly

tainted his drug convictions. And even if it had not, this Court routinely grants certiorari to review criminal convictions without regard to their effect on the overall sentence.

The remainder of the government's response—which is to say, *most* of the government's response—is devoted to the merits of the question presented. The government's merits arguments are wrong, but more important, they are *merits* arguments. If anything, the sheer length of the government's merits response bespeaks the seriousness of the interpretive dispute at issue. This Court should grant certiorari to address that dispute, resolve the circuit conflict, and reverse the decision below.

A

As the court below recognized, the "circuits are divided over the issue" whether "residence in a halfway house constitutes 'custody' under Section 751(a)." Pet. App. 7a.[1] The Second, Sixth, and Tenth Circuits believe it does; the Ninth Circuit squarely disagrees. Pet. 7-11; Pet. App. 7a-8a.

The government does not deny the existence of a circuit conflict, acknowledging that the Ninth Circuit "has adopted a narrower view of the types of restrictions that may constitute 'custody.'" Opp. 19.

[1] The government says Edelman's conduct falls under both the second and third clauses of § 751(a)—i.e., that he was in "custody" both "by direction of the Attorney General" and "under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge." Opp. 9-10. But the Second Circuit recognized that only the third clause is relevant. Pet. App. 7a. And the government does not contend that the distinction affects the conflict or the outcome of the case.

Nor does the government deny that the conflict concerns an important and recurring question of federal criminal law. Pet. 11-14.

Instead, the government seeks to minimize the conflict on the asserted ground that the Ninth Circuit has "not … established a per se rule that residence in a halfway house can never constitute custody," but rather has "treated the restrictiveness of such placements as a factual question to be decided under the circumstances of each case." Opp. 19. The government thus suggests the "possibility" that in the Ninth Circuit, "some halfway-house placements would be sufficiently restrictive to constitute 'custody' within the meaning of the escape statute." Opp. 21.

If there is space left under the Ninth Circuit rule at all, it only is for a halfway house that is not actually a halfway house. The Ninth Circuit rule categorically excludes from "custody" under § 751 all halfway house confinement that is not "equivalent to custodial incarceration." *United States v. Burke*, 694 F.3d 1062 (9th Cir. 2012). The court in *Burke* described the question in categorical terms: "[W]hether an individual who has completed his term of imprisonment and is residing at a halfway house or residential reentry center according to the court-ordered conditions of his supervised release is in 'custody' within the meaning of § 751(a)." *Id.* at 1064. The same question is presented here. The Ninth Circuit's answer in *Burke* was likewise categorical: Burke was "not in 'custody' when he left" the halfway house because "[h]e was not serving a prison sentence, nor was he confined to SRRC under conditions equivalent to custodial incarceration."

Id.[2] The same categorical answer applies here. In the Ninth Circuit, Edelman's conduct simply was not a § 751 crime.

The government suggests that Edelman might be considered in "custody" in the Ninth Circuit because Edelman was "required to remain at the halfway house unless he obtained express prior authorization to leave," whereas in *Burke* the defendant supposedly was "free to leave" without prior authorization. Opp. 20-21. The government starkly misrepresents *Burke*, as its *own brief* in *Burke* shows. That brief stated that Burke—exactly like Edelman—was required to obtain express prior authorization before leaving. *See* U.S. *Burke* Br., 2011 WL 9684108, at *7 ("All requests for absence from [Burke's] facility must be submitted and approved in advance."); *id.* at *16 ("Burke was not free to come and go as he pleased, he had to have authorization for a legitimate purpose and had to sign-in and sign-out"). Both the majority and the dissent agreed that resi-

[2] The government thus errs in asserting that "[e]very court of appeals that has considered the question" has held that "custody" may be minimal or constructive under § 751(a). Opp. 10. *Burke* flatly rejects that position. The government cites the Ninth Circuit's earlier decision in *United States v. Keller*, 912 F.2d 1058 (9th Cir. 1990), but that case fell under 18 U.S.C. § 4082 (*see* 912 F.2d at 1058, 1059 & n.2), which creates a special rule for a "prisoner" in the "custody of the Attorney General," 18 U.S.C. § 4082(a), i.e., an individual covered by the first clause of § 751(a). Pet. 19. The government does not contend that Edelman was a "prisoner," concedes that he was not in the "custody of the Attorney General" under the first clause of § 751(a), and also concedes that § 4082 does not address "offenders (like petitioner) who" allegedly "violate other clauses of Section 751(a)." Opp. 9, 17.

dents could leave only "with permission." *Burke*, 694 F.3d at 1064; *see id.* at 1067-68 (Callahan, J., dissenting) ("[A]ll requested absences from the RRC required advance approval and had to be for narrowly permitted purposes."). There was no "factual dispute" in *Burke* "concerning the facility's rules," as the government now pretends. Opp. 20 n.6. There was instead a purely legal disagreement over whether residence in a halfway house, as opposed to custodial incarceration, constitutes "custody" under § 751.[3]

The Second Circuit certainly did not read *Burke* as requiring a fact-intensive inquiry about a facility's precise rules. The court instead read *Burke* as adopting the clear rule that "placement in a halfway house due to the violation of the terms of post-incarceration supervised release does not constitute custody." Pet. App. 8a. The Second Circuit disagreed, adopting the equally clear but opposite rule that "residence in a halfway house as a condition of post-incarceration supervised release is 'custody' for purposes of Section 751(a)." Pet. App. 8a-9a.[4]

---

[3] The government also inexplicably emphasizes that unlike in *Burke*, the district court here stated that the supervised release order "was expressly designed to place petitioner in 'custody.'" Opp. 21. The district court may well have *intended* to place Edelman in "custody," but the very question presented here is whether its supervised release order achieved that result.

[4] The Second and Ninth Circuit also squarely disagree over whether "custody" under § 751 depends on conditions equivalent to "incarceration." *Compare* Pet. App. 9a *with Burke*, 694 F.3d at 1064.

In short, Edelman's conduct is a § 751 crime in the Second Circuit (and Sixth and Tenth Circuits), but not in the Ninth Circuit. That conflict is as direct as it is intolerable. No federal crime—much less a serious felony offense—should be subject to such differential interpretation based solely on geographical coincidence.

B

The government also contends that this case presents a poor vehicle through which to answer the question presented because Edelman's 60-month sentence for his § 751 conviction (the statutory maximum) was imposed to run concurrently with a longer sentence for drug convictions, so his sentence will be unaffected no matter what happens here. Opp. 21-22. That contention is both wrong and irrelevant.

1. Edelman's escape conviction is tied to his drug convictions because the district court's holding that Edelman had "escaped" directly resulted in the denial of his motion to suppress evidence supporting his drug convictions. Pet. App. 31a. The government erroneously asserts (Opp. 22) that the Second Circuit upheld the denial of Edelman's motion to suppress based merely on his supervised release status, not his "escape" under § 751. In fact, the court explained that "Edelman's residence in Apartment 509 began *after he escaped from a halfway house in violation of Section 751(a)*," and expressly held that a "person whose legitimate privacy expectations [are] severely curtailed cannot expand his legitimate expectations of privacy *by escaping*." Pet. App. 11a (emphases added; quotation omitted).

It is irrelevant that Edelman's drug convictions are "otherwise final." Opp. 22. Those convictions were upheld over Edelman's evidentiary objection only because Edelman had been convicted of escape. If this Court reverses that conviction, Edelman on remand will be able to urge reconsideration of the motion-to-suppress rulings on the ground that those rulings erroneously assumed Edelman had "escaped" under § 751.[5]

2. Even if reversing Edelman's escape conviction would not alter his sentence, there would be no impediment to this Court's review. This case cleanly presents the exact question that has divided the circuits, and Edelman's drug convictions will in no way prevent the Court from answering that question and reversing his escape conviction. Moreover, this Court has repeatedly explained that there is independent significance to a separate criminal conviction "even if it results in no greater sentence," *Ball v. United States*, 470 U.S. 856, 865 (1985), because an additional conviction carries its own collateral consequences, *see*, *e.g.*, *id.*; *Rutledge v. United States*, 517 U.S. 292, 301-03 (1996); *Benton v. Maryland*, 395 U.S. 784, 790 (1969); *Sibron v. New York*, 392

[5] The § 751 escape charge also led to Edelman being shackled in irons during trial, over his objection. Pet. 20. The government says irons were imposed not because of § 751 but because of Edelman's "history of absconding." Opp. 23. The court's order, however, was explicitly based on Edelman's alleged "record of escaping from custody"—§ 751's precise language. C.A. App. Vol. II A167. The government also asserts that the shackles were not "visible to jurors" (Opp. 23), but the cited transcript passage says only that the irons were not "*glaring*" to jurors, a very different point. C.A. App. Vol. II A168 (emphasis added).

U.S. 40, 54-56 (1968). The Court thus routinely grants review in criminal cases—including one just last Term—even when a ruling for the defendant would not reduce his sentence.[6]

In short, the ultimate effect of a reversal on Edelman's separate conviction and sentence is a matter the lower courts can resolve. It is irrelevant to the merits and reviewability of his § 751 conviction. What matters here is that Edelman has been convicted of a federal felony offense he did not commit, which this Court cannot allow.

C

The government's labored defense of its position on the merits (Opp. 10-18) proves only the weakness of that position. It does not justify permitting an acknowledged circuit conflict on an important issue of federal criminal law to persist.

---

[6] *See, e.g.*, *Smith v. United States*, 133 S. Ct. 714, 718 (2013) (reviewing only conspiracy conviction when petitioner was convicted of conspiracy and substantive offenses, and was sentenced to life in prison on both types of offenses, U.S. C.A. Br., 2011 WL 8193753, at *5); *Boulware v. United States*, 552 U.S. 421, 426 n.4 (2008) (reviewing conviction on tax counts but not conspiracy count, even though defendant was sentenced to 60-month concurrent sentences on both counts, *United States v. Boulware*, 470 F.3d 931, 933 (9th Cir. 2006)); *Holloway v. United States*, 526 U.S. 1, 3-4 & n.2 (1999) (reviewing only carjacking convictions where defendant was sentenced to 151-month concurrent sentences on both carjacking and chop-shop counts, U.S. Br., 1998 WL 464935, at *3); *Rutledge*, 517 U.S. at 296 (granting certiorari to decide whether concurrent life sentences may be imposed for conspiracy and continuing criminal enterprise, even though petitioner would have been subject to life imprisonment either way).

1. The government does not dispute that "custody" is typically defined as imprisonment or detention under guard, and "escape" generally means to break loose from confinement or to get free. Pet. 15-17. The government nevertheless contends that those statutory terms should not be interpreted consistent with their ordinary meaning. Opp. 10-15. But undefined statutory terms are always given their ordinary meaning, absent some specific indication that a specialized meaning was intended. *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011). The government cites no such indication here. Indeed, this Court's precedents confirm that the ordinary meaning of "custody" and "escape" controls. Pet. 15-17 (discussing *United States v. Bailey*, 444 U.S. 394 (1980); *United States v. Johnson*, 529 U.S. 53 (2000); and *Reno v. Koray*, 515 U.S. 50 (1995)).

The government responds that those cases did not expressly decide the specific question presented here. Opp. 12-14. Of course not—there would be no circuit conflict if they had. Each decision, however, does construe key statutory terms in a way that contradicts or undermines the Second Circuit's conclusion that an individual on supervised release "escapes" from "custody" by simply walking away from the halfway house where he resides. *See Bailey*, 444 U.S. at 408, 413, 415 & n.11 (construing "custody" in § 751(a) to mean "physical confinement," "penal custody," and imprisonment); *Johnson*, 529 U.S. at 57 (distinguishing supervised release from penal incarceration); *Koray*, 515 U.S. at 59 (refusing to credit time in court-ordered, pre-sentencing halfway house residence as part of sentence of imprisonment); Pet. 15-17.

The government grossly exaggerates the petition as arguing that "escape" extends only to those situations in which the offender "'break[s] loose' in a dangerous or violent manner" (Opp. 14 (citing Pet. 17-18)), implicating "the most extreme risks of violence" (Opp. 15). The petition argues no such thing. The more modest—but indisputable—point is that escape ordinarily means "break loose," "break free," or "break away" (Pet. 14-15 (quoting various dictionaries)), which in turn sheds light on the meaning of "custody" as used in § 751, i.e., the type of restraint one must ordinarily use force or guile to shed, as opposed to simply walking away from.

There is likewise no merit to the government's assertion that "failure to punish" walking out of a halfway house in these circumstances "may adversely affect penal discipline." Opp. 14 n.4 (quotations omitted). Individuals who prematurely leave their halfway house residence *are already subject to punishment* for violating the terms of their supervised release—to sentences that may exceed five years' imprisonment. Pet. 20. The government cannot explain why an *additional* five-year term under § 751(a) is needed to "protect the public from the danger associated with federal criminals remaining at large." Opp. 15 (alterations omitted).

2. The broader statutory context confirms that walking away from a halfway house is not "escape" from "custody." The government misunderstands the significance of 18 U.S.C. § 3563(b). Opp. 17-18. That statute distinguishes between BOP "custody" on the one hand, and halfway house "residence" on the other. Pet. 19-20; *see also* 18 U.S.C. § 4042(c)(2) (similarly distinguishing between "residence" and

"custody"). Where "Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012). Section 3563 shows that "residence" is not "custody."

The government also fails to recognize the significance of 18 U.S.C. § 4082. Opp. 15-17. That statute specially provides that, in the context of a "prisoner" in the "custody of the Attorney General"—a situation the government concedes does not apply here, *see supra* note 2—failure to return to a halfway house "shall be *deemed* an escape" under § 751(a). 18 U.S.C. § 4082(a) (emphasis added); Pet. 18-20. Congress did not thereby recognize "that failure to return to a halfway house may constitute 'escape' from 'custody' under Section 751(a)." Opp. 17. To the contrary, if a walkaway *already* constituted an "escape" under § 751, it would have been unnecessary for Congress to devise a special rule, unique to the context of a "prisoner" in the "custody of the Attorney General," that "deem[s]" a walkaway to be "escape" in that one circumstance. Pet. 18-19.

Finally, the government ignores the numerous harsh consequences that result from "escape" convictions, including a possible 5-year prison sentence and a significant increase in an individual's criminal history category. Pet. 20-21. Such consequences may make sense where an individual has actually escaped from actual custody, but they make no sense when the individual has simply violated his terms of supervised release by walking out of a halfway house.

Any conceivable doubt remaining from the text, structure, and context of § 751 is resolved by the rule of lenity. Pet. 21-22. Walking away from a halfway house may violate supervised release terms, and it may subject the defendant to punishment for that violation, but it cannot be treated as the independent felony offense of "escape" from "custody."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH M. MOYNIHAN
120 East Washington St.
Syracuse, N.Y. 13202
(315) 424-4944

JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
ANTON METLITSKY
KATHRYN E. TARBERT
DEANNA M. RICE
RAGHAV AHUJA
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

January 13, 2014