

IN THE SUPREME COURT OF THE UNITED STATES

LONNELL PORTER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

W. CONNOR WINN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's placement at a residential reentry center was "by virtue of" his conviction under 18 U.S.C. 751(a) when that placement was ordered as a modified condition of his supervised release.

RELATED PROCEEDINGS

United States District Court (N.D. Iowa) :

United States v. Porter, No. 09-cr-2005 (Oct. 24, 2019)
(revocation judgment)

United States Court of Appeals (8th Cir.):

United States v. Porter, No. 19-3325 (Sept. 11, 2020)

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-7137

LONNELL PORTER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 18 F.4th 281.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2021. The petition for a writ of certiorari was filed on February 7, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Iowa, petitioner was convicted of

escaping from custody, in violation of 18 U.S.C. 751(a). Pet. App. 2; Judgment 1. The district court sentenced petitioner to 12 months and one day of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-4.

1. In 2009, petitioner was convicted of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). D. Ct. Doc. 27, at 3 (Jan. 16, 2020). He was sentenced to 104 months of imprisonment, to be followed by three years of supervised release. Ibid.

In July 2019, the probation office asked the district court to modify petitioner's conditions of supervised release to require him to spend the first 120 days in a residential reentry center. D. Ct. Doc. 27, at 3-4. That "request was made because [petitioner]," whose transition from incarceration to supervised release was imminent, "'did not have a release plan and would be considered homeless'" and the probation officer submitting the request "believe[d] that placement in the Residential Reentry Center w[ould] allow [petitioner] to secure a residence and employment." Id. at 4. Petitioner "agreed to the modification," and the court "granted the agreed-upon Request." Ibid. The new condition of petitioner's supervised release provided that, "[i]mmediately following release from custody," petitioner would "reside in a Residential Reentry Center for a period of up to 120 days," to be decided by the probation office and the court. Ibid.

Petitioner would have "work release privileges," but he was required to "abide by all rules and regulations of the facility."

Ibid.

In August 2019, petitioner began his term of supervised release and, consistent with the modified conditions of his supervised release, was placed at the Waterloo Residential Reentry Center, subject to the supervision of the probation office. D. Ct. Doc. 27, at 4. Petitioner was not free to leave that facility without authorization. Ibid. And "[a]lthough [petitioner] had work release privileges," the residential reentry center required him to "sign out when leaving for employment." Id. at 4-5. When leaving for employment, petitioner was supposed to "perform the employment for which he had signed out, and then immediately return to the Waterloo Residential Reentry Center after completing his work shift." Id. at 5.

On September 16, 2019, petitioner represented that he was going to work and left the residential reentry center. D. Ct. Doc. 27, at 5. Officers discovered later that day that petitioner had not gone to work, and his supervising probation officer directed him to return to the residential reentry center. Ibid. Petitioner refused and remained at large for several weeks. Id. at 5-6; Pet. App. 2. After he was apprehended, the district court revoked his supervised release and imposed a revocation sentence of 14 months of imprisonment, to be followed by two years of supervised release. D. Ct. Doc. 27, at 6.

2. Petitioner was indicted by a federal grand jury in the Northern District of Iowa on a charge of escaping from custody, in violation of 18 U.S.C. 751(a). Pet. App. 2; Indictment 1. As relevant here, Section 751(a) prohibits a person from escaping "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." 18 U.S.C. 751(a). Section 751(a) sets forth a five-year maximum term of imprisonment "if the custody or confinement is by virtue of * * * conviction of any offense." Ibid.

Petitioner proceeded to a bench trial on a stipulated record. D. Ct. Doc. 27, at 1. Petitioner claimed that his placement at the residential reentry center was not "by virtue of" his original unlawful-firearm-possession conviction, on the theory that this phrase in Section 751(a) refers only to the "immediate cause" of his placement at the center, which he viewed as his impending homelessness rather than his conviction. D. Ct. Doc. 24, at 3 (Jan. 10, 2020). The district court rejected that claim, explaining that the phrase "by virtue of" does not require an immediate-cause standard and that petitioner's placement at the residential reentry center was "by virtue of" his conviction because it was a condition of the supervised-release term imposed on the basis of his firearm conviction. D. Ct. Doc. 27, at 8. The court accordingly found petitioner guilty of escaping from

custody, in violation of 18 U.S.C. 751(a), Pet. App. 2, and imposed a sentence of 12 months and one day of imprisonment, to be followed by three years of supervised release, Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1-4. Like the district court, the court of appeals rejected petitioner's argument that Section 751(a) requires an immediate-cause standard. Relying on the "plain and ordinary meaning of the phrase 'by virtue of,'" the court explained that the conviction need only "be a cause of the custody or confinement, whether 'immediate' or not." Id. at 3-4. The court highlighted dictionary definitions defining the phrase "by virtue of" as "broad enough to include multiple causes, 'remote' or 'immediate,' as long as each was a 'reason' or 'ground' for placing [petitioner] in custody." Id. at 4 (brackets and citation omitted). And because petitioner "never would have been at a residential reentry center had he not first been convicted of a crime," ibid., the court found that his placement there was "'by virtue of' a 'conviction,'" id. at 3 (citation omitted).

ARGUMENT

Petitioner renews his contention (Pet. 6-15) that his escape from the residential reentry center where he was required to reside as a condition of the supervised-release portion of his sentence for a firearm conviction was not "by virtue of" that conviction. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or

another court of appeals. The petition for a writ of certiorari should be denied.

1. Section 751(a) prohibits "escape[] * * * 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," and includes a five-year maximum penalty of imprisonment for custody imposed "by virtue of * * * conviction of any offense." 18 U.S.C. 751(a). Because the statute does not contain its own definition of "by virtue of," the phrase receives its "ordinary meaning." Burrage v. United States, 571 U.S. 204, 210 (2014). The phrase "by virtue of" is commonly understood to mean "[b]ecause of, through, or in pursuance of." Black's Law Dictionary 263 (3d ed. 1933) (Black's); see also Webster's New International Dictionary of the English Language 2849 (2d ed. 1934) ("Through the force of; by authority of."). And this Court has explained that, absent "textual or contextual indication to the contrary," the ordinary meaning of similar phrases -- "because of," "based on," "by reason of," and "results from" -- indicates "but-for causality." Burrage, 571 U.S. at 212-213 (citations and internal quotation marks omitted).

Accordingly, the courts of appeals have uniformly understood "by virtue of" in Section 751(a) as setting forth "a but-for causation test." United States v. Rosa-Ortiz, 348 F.3d 33, 38 (1st Cir. 2003); see United States v. Patterson, 230 F.3d 1168, 1171 (9th Cir. 2000) ("[A] defendant would not be on supervised

release" or subject to custody for violating its conditions "but for the underlying criminal conviction."); see also United States v. Evans, 159 F.3d 908, 913 (4th Cir. 1998) ("Without the § 922(g) conviction, his sentence that included a term of supervised release, and the alleged violation of the terms of the supervised release, there was no legal basis for federal authorities to apprehend and incarcerate Evans."); United States v. Edelman, 726 F.3d 305, 310 (2d Cir. 2013) (adopting the reasoning of Evans), cert. denied, 571 U.S. 1175 (2014). And the court of appeals in this case correctly rejected petitioner's contention that Section 751(a) requires an immediate-cause standard.

Looking to dictionary definitions, the court of appeals explained that the phrase "by virtue of" is "broad enough to include multiple causes, 'remote' or 'immediate,' as long as each was a 'reason' or 'ground' for placing [petitioner] in custody." Pet. App. 4 (brackets and citation omitted). Here, petitioner's placement at the residential reentry center was "'by virtue of' a 'conviction,'" because petitioner "never would have been at a residential reentry center had he not first been convicted of a crime." Id. at 3-4. Petitioner's conviction caused him to receive a sentence that included three years of supervised release, D. Ct. Doc. 27, at 3; see also Johnson v. United States, 529 U.S. 694, 697 (2000) (describing supervised release as a component of a criminal sentence), which in turn gave the district court the authority to order his placement at a residential reentry center

as a condition of that supervised release, D. Ct. Doc. 27, at 3-4; see 18 U.S.C. 3563(b) (11) (authorizing as a probation condition placement at a community corrections facility); 18 U.S.C. 3583(d) (authorizing the same for supervised release); 18 U.S.C. 3583(e) (2) (authorizing modification of supervised-release conditions); Fed. R. Crim. P. 32.1(c) (same).

Petitioner does not dispute (see Pet. 8) that his conviction is part of the "causation chain" that led to his placement at the residential reentry center, and he acknowledges (see Pet. 9) that dictionary "definitions do not cleanly" support his crabbed interpretation of Section 751(a). Petitioner's reliance (Pet. 13-14) on the "presumption of consistent usage" is misplaced.

Under that presumption, "words repeated in different parts of the same statute generally have the same meaning," Law v. Siegel, 571 U.S. 415, 422 (2014), and each instance where Section 751 uses the phrase "by virtue of" to link the word "custody" with possible reasons for a defendant's custody is consistent with that phrase's plain meaning -- namely, "[b]ecause of, through, or in pursuance of," Black's 263, prescribing a broad causal relationship between "custody" and the possible grounds for the custody. Furthermore, petitioner's interpretation would create a disunion between Section 751(a)'s coordinate halves, the first proscribing conduct and the second tailoring punishment based on the severity of that conduct. Petitioner does not dispute (see Pet. 13) that under the first half of Section 751(a), he escaped from "custody under or by

virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge," 18 U.S.C. 751(a), yet his interpretation would fail to punish that crime at all under the second half of the statute. He offers no plausible argument that his custody was based on "an arrest on a charge of felony" (which would likewise trigger the five-year minimum) or was "for extradition, or for exclusion or expulsion proceedings under the immigration laws, or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction" (which would trigger the alternative one-year minimum), ibid., so he would leave the statute without any sentencing provision applicable to his conduct.

Petitioner's invocation (Pet. 14) of the rule of lenity is likewise meritless. The rule of lenity applies only when a statute suffers from "grievous ambiguity or uncertainty." Shaw v. United States, 137 S. Ct. 462, 469 (2016) (quoting Muscarello v. United States, 524 U.S. 125, 138-139 (1998)). No such ambiguity or uncertainty exists here because the phrase "by virtue of" unambiguously establishes a broad causation standard. Petitioner notes (Pet. 14) that the federal supervised-release regime did not exist when Congress enacted Section 751(a), but "'the fact that a statute has been applied in situations not expressly anticipated by Congress' does not demonstrate ambiguity" -- let alone the sort of grievous ambiguity necessary to trigger the rule of lenity -- "instead, it simply 'demonstrates the breadth' of a legislative command,'" Bostock v. Clayton County, 140 S. Ct. 1731, 1749 (2020)

(quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)) (brackets omitted).

2. Petitioner does not assert that the decision below conflicts with any decision of another court of appeals. To the contrary, the only other court of appeals to consider the specific contention that custody at a residential reentry center is not "'by virtue of'" a conviction if it "was due to a modification of [a] condition of [a defendant's] supervised release" squarely "reject[ed] this argument." Edelman, 726 F.3d at 310 (citation omitted). And petitioner himself acknowledges that multiple decisions of the courts of appeals have affirmed the application of Section 751(a) to defendants who escaped from residential reentry facilities to which they were confined after violating the terms of their supervised release. See Pet. 8-12 (discussing, *inter alia*, Evans, 159 F.3d at 913; Patterson, 230 F.3d at 1170-1171). Just as post-revocation custody is "attribute[d]" "to the original conviction," Johnson, 529 U.S. at 701, the same is equally -- if not more -- true of petitioner's placement, because it was imposed as a condition of the supervised-release component of his original sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE JR.
Assistant Attorney General

W. CONNOR WINN
Attorney

JUNE 2022