

NO. _____

In The
Supreme Court of the United States

DONNIE WAYNE NIPPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Eugene E. Lester III
Counsel of Record
SHARPLESS MCCLEARN LESTER DUFFY, PA
200 South Elm Street, Suite 400
Greensboro, North Carolina 27401
(336) 333-6382
elester@sharplesslaw.com

Counsel for Petitioner

Dated: June 18, 2020

QUESTION PRESENTED

- I. Should Mr. Nipper be resentenced without an armed career criminal enhancement to his guideline range where the government failed to allege prior convictions that support the enhanced penalty, because the government's waiver of a jurisdictional rule presents a bar to this punishment on resentencing under the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution? *United States v. Hodge*, 902 F.3d 420, 431 (4th Cir. 2018) and *United States v. Winbush*, 922 F.3d 227, 232 (4th Cir. 2019)

LIST OF PARTIES TO PROCEEDING BELOW

Petitioner is Donnie Wayne Nipper, who was the Appellant below. Respondent is the United States of America, which was the Appellee below.

STATEMENT OF RELATED CASES

Petitioner is not aware of any related cases.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING BELOW.....	ii
STATEMENT OF RELATED CASES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE PETITION	4
CONCLUSION.....	10
APPENDIX:	
Unpublished Per Curiam Opinion of The United States Court of Appeals For the Fourth Circuit entered May 26, 2020	1a
Judgment of The United States Court of Appeals For the Fourth Circuit entered May 26, 2020	4a
Amended Judgment in a Criminal Case of The United States District Court for The Middle District of North Carolina entered April 4, 2019.....	5a

Order of	
The United States District Court	
For the Middle District of North Carolina	
Re: Appointment of Counsel	
entered January 15, 2018	12a

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Carachuri-Rosendo v. Holder</i> , 560 U.S. 563, 130 S. Ct. 2577, 177 L. Ed. 2d 68 (2010)	6, 9
<i>Collins v. Youngblood</i> , 497 U.S. 37, 46, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)	8
<i>Johnson v. United States</i> , 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)	7
<i>Pepper v. United States</i> , 562 U.S. 476, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011)	3
<i>United States v. Hodge</i> , 902 F.3d 420 (4th Cir. 2018)	2, 5, 6
<i>United States v. Locklear</i> , 935 F.2d 268 (4th Cir. 1991)	6
<i>United States v. Noland</i> , 495 F.2d 529 (5th Cir. 1974)	5-6
<i>United States v. Simmons</i> , 649 F.3d 237 (4th Cir. 2011)	9
<i>United States v. Velazquez</i> , 490 F.2d 29 (2d Cir. 1973)	9
<i>United States v. Winbush</i> , 922 F.3d 227 (4th Cir. 2019)	4, 5, 6, 7
<i>Weaver v. Graham</i> , 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981)	7, 8
<i>Whalen v. United States</i> , 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)	8, 9

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V.....	1
U.S. CONST. Art. I, Sect. 9, Cl. 3.....	1

STATUTES

18 U.S.C. § 2.....	2
18 U.S.C. § 922(g)(1)	2
18 U.S.C. § 922(e).....	2
18 U.S.C. § 924(a)(2)	2
18 U.S.C. § 924(e)(1)	1
18 U.S.C. § 2312.....	2
18 U.S.C. § 3231.....	1
21 U.S.C. § 851.....	5, 6
28 U.S.C. § 1291.....	1
28 U.S.C. § 1254(1)	1

RULE

Sup. Ct. Rule 10.....	4
-----------------------	---

GUIDELINE

U.S.S.G. § 1B1.11(b)(1).....	4
------------------------------	---

Donnie Wayne Nipper respectfully petitions the Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The judgment of the District Court is unreported. (App. 5a-11a). The opinion of the Court of Appeals is unpublished. (App. 1a-3a).

JURISDICTION

The Middle District of North Carolina had jurisdiction of this action pursuant to 18 U.S.C. § 3231. The jurisdiction of the Court of Appeals for petitioner's appeal was invoked under 28 U.S.C. § 1291. The judgment of the Court of Appeals was entered on May 26, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides in pertinent part:

“No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb....”

The Ex Post Facto Clause of the United States Constitution, Article I, Section 9, clause 3, provides in pertinent part:

“No...ex post facto Law shall be passed.”

18 U.S.C.A. § 924 (e)(1) provides in pertinent part:

“In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a

violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years...”

STATEMENT OF THE CASE

Donnie Wayne Nipper was convicted in the Middle District of North Carolina of unlawful transport of stolen motor vehicles in violation of 18 U.S.C. § 2312 and 2, and felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2). (JA 119). At sentencing, Mr. Nipper was subjected to an enhanced penalty of a mandatory minimum 15 years imprisonment under 18 U.S.C. § 922(e) for an armed career criminal classification (hereinafter “ACCA”). The presentence report did not specify the felony convictions that were used for his classification. (JA 208). The sentencing judge did not specify the convictions that supported the classification. (JA 68). An addendum to the presentence report identified possible predicates for the classification as paragraphs 33, 34 and 38 only. (JA 244). The government did not object to the presentence report. (JA 242). Mr. Nipper objected to the presentence report on the grounds that his armed career criminal classification was erroneous. (JA 242). He received a sentence of imprisonment of 195 months. (JA 119).

Mr. Nipper attacked his sentence collaterally on the grounds that he should not have been classified as an armed career criminal. (JA 120). Mr. Nipper prevailed on his 2255 motion under *United States v. Hodge*, 902 F.3d 420, 431 (4th Cir. 2018), pertaining to the armed career classification used at his original

sentencing. (JA 122). Mr. Nipper's judgment was vacated, and his case was remanded to the district court for resentencing. (JA 123, 131).

Mr. Nipper was resentenced on March 15, 2019 as an armed career criminal. (JA 133). He was sentenced to a total of 180 months imprisonment. (JA 199). Mr. Nipper's successful post-conviction rehabilitation allowed the court to consider a variant sentence below the guideline range under *Pepper v. United States*, 562 U.S. 476, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011). (JA 153). An Amended Judgment was entered on April 4, 2019. (JA 199).

A timely notice of appeal was filed on April 4, 2019. (JA 206). On appeal, Mr. Nipper asked to be spared from the ACCA enhancement penalty on resentencing because the government failed to properly identify such predicates at his original sentencing. Mr. Nipper argued that the government's burden of designating ACCA predicates to support an enhanced sentencing penalty was jurisdictional and the government's waiver of a jurisdictional rule results in a bar. Support for such a jurisdictional bar is found in the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution where a defendant cannot be punished for later changes in the law or exposed to multiple litigations for punishment. The Fourth Circuit rejected Mr. Hodge's appeal on the merits, holding that the government could restate its ACCA predicates as many times as it chose, as long as it gave the defendant notice and an opportunity to be heard with regard to such predicates. (App. 1a-3a). Mr. Nipper seeks this petition for

writ of certiorari for review by the United States Supreme Court from the Fourth Circuit's decision in his case.

REASONS FOR GRANTING THE PETITION

This case concerns the propriety of interpreting federal criminal sentencing law based on long standing Constitutional principles, expressly protecting defendants from being exposed to multiple litigations for punishment and adverse changes in the law that occur after conviction. Even the sentencing guidelines used on resentencing cannot be harsher than those applied at an original sentencing. U.S.S.G. § 1B1.11(b)(1). Yet, here, the Fourth Circuit has departed from these principles by allowing a defendant to be resentenced endlessly based on changes in the law favorable to the government. The government's waiver of a jurisdictional rule should result in a bar from further punishment, as required by the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution. This case implicates an important federal question that calls for this Court to exercise its supervisory jurisdiction. Sup. Ct. Rule 10.

Moreover, the decision of the Fourth Circuit was erroneous. This case concerns whether Mr. Nipper is entitled to be resentenced under the appropriate guidelines range, without an armed career criminal enhancement, where the government failed to allege prior convictions that support the enhanced penalty, in light of *United States v. Hodge*, 902 F.3d 420, 431 (4th Cir. 2018) and *United States v. Winbush*, 922 F.3d 227, 232 (4th Cir. 2019). Under *Hodge* the government cannot rely on a prior conviction that was not identified at an original

sentencing as an armed career criminal predicate under the Armed Career Criminal Act (“ACCA”). *United States v. Hodge*, 902 F.3d 420, 430 (4th Cir. 2018). The disagreement here is that the holding in *Hodge* is limited to the context of collateral attack on habeas corpus.

In *Winbush*, the Fourth Circuit applied the rule in *Hodge* as if it were jurisdictional by remanding with instructions to resentence without the ACCA enhancement. *United States v. Winbush*, 922 F.3d 227, 230-32 (4th Cir. 2019) (remanded with directions to resentence defendant without a career offender enhancement). In *Winbush*, the government was barred from identifying new ACCA predicates on resentencing. *Id.* Similarly, applying a jurisdictional bar is consistent with the (1) court’s jurisdictional interpretation of similar notice requirements for sentencing enhancements, and (2) constitutional protections of a criminal defendant’s rights under *ex post facto* and double jeopardy jurisprudence.

The rule in *Hodge* is jurisdictional. Waiver of a jurisdictional rule results in a bar. Here, the failure of the government to identify ACCA predicates prior to sentencing prevents the government from later identifying predicates on resentencing. There are other jurisdictional bars that are applied similarly to notice requirements like *Hodge* and *Winbush* for sentencing enhancements. For example, 21 U.S.C. § 851 allows the government to seek a sentencing enhancement for offenders with prior drug convictions. The statute’s notice requirement is applied jurisdictionally by the court. *United States v. Noland*, 495

F.2d 529 (5th Cir. 1974) (failure to file information of prior conviction before trial deprived district court of jurisdiction to impose an enhanced sentence; case remanded for reduction of sentence to the normal statutory maximum); Accord *United States v. Locklear*, 935 F.2d 268 (4th Cir. 1991) (substantial compliance or harmless error are not valid arguments by the government for excuse from the notice requirements under § 851(a)).

Under § 851 the government must identify any prior convictions before trial. *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 579, 130 S. Ct. 2577, 2588, 177 L. Ed. 2d 68 (2010) (“Underscoring the significance of the § 851 procedures, the United States Attorney’s Manual places decisions with respect to seeking recidivist enhancements on par with the filing of a criminal charge against a defendant.”). The government’s failure to give notice under § 851 before trial bars application of any sentencing enhancement at sentencing. *Locklear*, 935 F.2d 268. A defendant cannot be given an enhanced sentence on remand when an information for enhancement is filed after sentencing. *Id.* In *Noland*, for example, it did not matter that the defendant was advised at arraignment that he would receive the enhancement, knew of his previous conviction from the outset, never challenged its validity, and admitted it at the sentencing hearing, and the trial court received pretrial notice of defendant’s record at a bail hearing. *Noland*, 495 F.2d 529.

Similarly, under *Hodge* and *Winbush*, the government must identify any ACCA predicates prior to sentencing before ACCA’s sentencing enhancement can

apply to the defendant's conviction. As in *Winbush*, the government's failure to properly notice ACCA predicates barred the government from seeking an ACCA enhancement on resentencing.

There are several reasons to apply a jurisdictional bar to the rule in *Hodge*. *Hodge* teaches that a defendant must have actual notice of any ACCA predicates relied on by the government prior to sentencing so a meaningful challenge can be presented. The government accepts this rationale, but maintains that the notice requirement can be cured by an endless cycle of sentencing remands on the issue of the ACCA enhancement. The government's argument fails in light of this Court's constitutional jurisprudence of *ex post facto* and double jeopardy.

Ex post facto expressly prevents a defendant from being punished for later changes in the law. See i.e. *Weaver v. Graham*, 450 U.S. 24, 29, 101 S. Ct. 960, 964, 67 L. Ed. 2d 17 (1981) ("[T]wo critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it."). Although ACCA may not have expressly changed, the predicates under *Johnson* and other laws have changed. For example, after *Johnson* invalidated the residual clause of the armed criminal statute, the government abandoned certain prior offenses while adopting others to support the classification. *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (under the residual clause ACCA violates the Constitution's guarantee of due process).

For this reason, an ACCA predicate at a defendant's original sentencing may or may not subsequently qualify for a sentencing enhancement. While it is completely appropriate to allow a defendant to benefit from a retroactive change in the law, the government enjoys no similar benefit under *ex post facto* with regard to imposition of a criminal penalty. *Weaver*, 450 U.S. 24.

The government in Mr. Nipper's case sought to relitigate his ACCA predicates to punish him because of subsequent changes in the law. "The critical question is whether the law changes the legal consequences of acts completed before its effective date. *Id.* Since Mr. Nipper could not and should not have been enhanced under ACCA at his original sentence, changes in the law that retrospectively disadvantage Mr. Nipper cannot be used to punish him on resentencing. *Collins v. Youngblood*, 497 U.S. 37, 46, 110 S. Ct. 2715, 2721, 111 L. Ed. 2d 30 (1990) (Subtle *ex post facto* violations are no more permissible than overt ones.). The government should not be allowed to relitigate Mr. Nipper's punishment under our Constitutional *ex post facto* jurisprudence.

A further reason for barring the government from seeking an ACCA sentencing enhancement at Mr. Nipper's resentencing is double jeopardy. Double jeopardy protects a defendant not only from multiple punishments, but from exposure to multiple litigations for punishment. *Whalen v. United States*, 445 U.S. 684, 688, 100 S. Ct. 1432, 1436, 63 L. Ed. 2d 715 (1980) ("The Fifth Amendment guarantee against double jeopardy protects not only against a second

trial for the same offense, but also against multiple punishments for the same offense.”).

The government’s argument that it enjoys endless chances to punish a defendant after changes on collateral attack is antithetical to our double jeopardy jurisprudence. The law of double jeopardy precludes relitigating when, “regardless of the label, the trial court has ruled in favor of the defendant on facts going to the merits of the case if these facts were adduced at trial, an evidentiary hearing or if they were stipulated by the parties. *United States v. Velazquez*, 490 F.2d 29, 34 (2d Cir. 1973) (citations omitted). While a defendant may benefit from retroactive changes in the law to reduce his punishment, the government enjoys no such similar benefit. *Whalen*, 445 U.S. 684. In Mr. Nipper’s case, the government wrongly seeks to punish him using predicates that were not or could not be ACCA predicates at the time of his original sentencing. The government’s argument that it may seek multiple sentencing litigations to punish a defendant under ACCA must fail.

The Fourth Circuit’s rulings in *Hodge* and *Winbush* are rooted in “fairness and notice concerns,” but it only addresses the “notice” component. The Fourth Circuit’s decision runs afoul of the principle expressed in *Carachuri-Rosendo* [130 S. Ct. at 2586] that a federal court may not “ex post, enhance the state offense of record just because facts known to it would have authorized a greater penalty under either state or federal law.” See *United States v. Simmons*, 649 F.3d 237, 255 (4th Cir. 2011). The Fourth Circuit’s rejection of any “fairness” considerations

unconstitutionally hollows out the Constitutional protections offered criminal defendants by the *Ex Post Facto* and Double Jeopardy Clauses.

Mr. Nipper's case illustrates that even subsequent notice to a defendant may still be unfair. In Mr. Nipper's case there is only one originally identified predicate that might suffice under ACCA for an enhanced punishment. (Doc. 11). Had Mr. Nipper's original sentence expired prior to subsequent changes in the law, certainly the government could not have hauled Mr. Nipper back to court for resentencing and subject him to further sentencing enhancements. Mr. Nipper should not have been exposed to multiple jeopardy here by allowing the government to seek further punishment based on subsequent changes in the law just because his original sentence had not yet expired.

CONCLUSION

For the reasons contained herein and any additional reasons which may appear to the Court, this Petition for Writ of Certiorari should be granted.

This the 18th day of June 2020.

By: /s/Eugene E. Lester III
Eugene E. Lester III
Attorney for Defendant
N.C. State Bar No. 23255

OF COUNSEL:

Sharpless McClearn Lester Duffy, PA
200 South Elm Street, Suite 400
Greensboro, NC 27401
Telephone: (336) 333-6382
Facsimile: (336) 333-6399
elester@sharplesslaw.com