

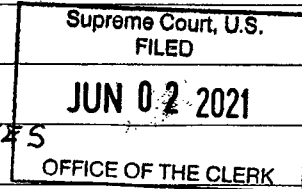
20-8422 ORIGINAL
Petition for Writ of Certiorari

No.

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021



Wayne Porter, Petitioner,

v.

United States of America, Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit Court of Appeals' sanctioning of the district court's refusal to correct errors and omissions of facts from the Fourth Circuit published opinion in United States v. Porter, 821 F.2d 968 (4th Cir. 1987), cert. denied, 485 US 934, 108 S.Ct 1108, 99 L.Ed.2d 269 (1988), pursuant to Rule 36 of the Federal Rules of Criminal Procedure, that sanctioned a sentence that was not authorized by the statute or statutes which govern the penalty for the crime of conviction, warrants this Court's supervisory power.

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THE ERRORS IN THE COURT'S OPINION IN UNITED STATES V. PORTER,
821 F.2d 968 (4th Cir. 1987) THAT PORTER ASK THE COURT
TO CORRECT WERE SUBSTANTIVE ERRORS:

1

Admission of defendant's State guilty plea for purpose of
meeting series element of continuing criminal enterprise was
not erroneous... defendant was put on notice through bill
of particulars that events would be included in proof. . . 5

2

Defendant convicted of continuing criminal enterprise could
not be convicted of conspiracy in connection with the same acts . . . 6

3

He ultimately pled guilty to importation, possession with intent
to distribute, and use of a communication facility in further-
ance of a drug felony in the Middle District of Florida. . . 6

4

We agree with Porter, however, that the court erred in sentencing
him for the conspiracy convictions. The court sentenced Porter
to 75 years on the continuing criminal enterprise conviction. It
imposed concurrent sentences on the conspiracy convictions.
Congress did not intend that an individual be punished under
both § 846 (conspiracy) and § 848 (continuing criminal enterprise).
United States v. Garrett, [sic] 471 US 773, 794... (1985); Jeffers v.
United States, 432 US 137, 154-158... (1977) (plurality opinion).
Therefore, ~~Porter's~~ sentences for his conspiracy convictions,
Counts 1, 18, 19, and 24, must be set aside. In Part VI we reversed
the conviction of conspiracy charged in Count 16. . . 9

5

Also our action in vacating the sentences on the conspiracy convictions
makes the number of conspiracies immaterial. . . 10

6

Count 34 of the indictment alleged that from on or about Septe-
mber or October 1980, and continuing thereafter and including June

✓

1982", Porter engaged in a continuing criminal enterprise. The government offered evidence of two drug transactions that had occurred prior to September of 1980. The first occurred in the spring of 1980 and the second in August of 1980. Porter was not indicted for either of these incidents. The trial court admitted the testimony under Fed. R. of Evid. 404(b) as showing "motive, knowledge, and state of mind." We find no abuse of discretion.

IN THE SUPREME COURT OF THE UNITED STATES

No.

Wayne Porter, Petitioner,

v.

United States of America, Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

Brief For Wayne Porter

Opinions Below

The opinion of the district court for the Western District of North Carolina is attached hereto at pages 17 - 19, the United States Court of Appeals for the Fourth Circuit's Order granting Porter's application to proceed under the Criminal Justice Act on his appeal of the district court's denial of his Federal Rule of Criminal Procedure 36 Motion is attached hereto at page 20, the unpublished per curiam opinion United States Court of Appeals For The Fourth Circuit affirming the district court's order is attached hereto at pages 21 - 22, the Order denying Porter's petition for rehearing en banc is attached hereto at page 23.

Jurisdiction

The judgement of the court of appeals was entered October 8, 2020. A petition for rehearing was denied January 11, 2021, attached hereto at 23. The petition for a writ of certiorari was filed on 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

On July 18, 1982, Porter was indicted in the Middle District of Florida at Jacksonville, case no. 82-70-CR-J-M.¹⁾

Pled guilty to all counts on June 1, 1984, and was sentenced on July 2, 1984, to multiple concurrent sentences—the longest term being 10 years for the conspiracy to distribute marijuana, in violation of 21 U.S.C. § 846.²⁾

On July 16, 1985, while serving the 10 year sentence, and after being granted parole by the United States Parole Commission, but prior to being released on parole, Porter was indicted in the Western District of North Carolina for the greater 21 U.S.C. § 848 Continuing Criminal Enterprise (CCE) offense, that allegedly began in September or October 1980, with a conspiracy to import marijuana and methaqualone tablets (a non-narcotic drug) into the United States at Jacksonville, Florida³⁾ and allegedly ended on July 18, 1982, when Porter was initially indicted in the "Revers Sting" conspiracy in Jacksonville, despite that Porter was already serving a 10 year sentence for the § 846 conviction:

Mr. Logburn: Your Honor] This reverse started in May 1982. If they had never done the stings, the conspiracy would have been complete right then when they were doing the first activity from May to June testified about by Rocky Townsend; and then it culminates in July... This conspiracy went up through and until the sting. And he has pled guilty to it, and we're relying on it as a predicate offense under CCE.

We're relying on that conviction as one of the predicate offenses.

Court: He was convicted of this?

¹⁾ See Indictment Middle District of Florida Appendix A attached hereto at pages 24-27.

²⁾ See Judgement Middle District of Florida Appendix B attached hereto at page: 28.

³⁾ See Indictment Western District of North Carolina Appendix C attached hereto at pages 29-52. (See Count 1, overfs 6-8) at page 32).

Mr. Cogburn: He came in and went down to Jacksonville and ultimately pled guilty in Jacksonville, Florida. [Id. Volume 8, page 59].

Mr. Cogburn: Your Honor, the charge Mr. Porter is charged with in this case is the CCE, and part of that CCE involves the very charge from which he flew from. That is the charge of the reverse deal. We have charged the reverse deal as part of the continuing criminal enterprise. We have informed them in a bill of particulars that that is what we did, and that's what his flight was from. [Id. Volume 8, page 175].

Members of the jury, ~~the jury~~, then comes the "Sea Wife" incident. Now, this is the one where it gets seized, if you remember. This particular incident occurred, Wayne Porter decided he was going to have another deal going. They were going to go down near Jacksonville, Florida and they were going to have a ship called the "Sea Wife." First they bought a little ship called "Sparky." They were going to take some food out to the Colombians, and some gifts and it got stranded on the sand bar. It got stuck when they got out in the middle of the waters. They went ahead and got the "Sea Wife" ready and sent it out as soon as they could, and on board driving, once again, Dennis Wallace, the Captain. [Id. Volume 9, page 38].

You finally heard about the reverse. The reverse is important in the Wayne Porter case, too, because you are entitled to use the fact that he had been convicted in that particular incident in one of the three predicate acts.

You have heard about some predicate acts, members of the jury, but there is also one now he has been convicted of, and that conviction can form the basis of one of the three in determining whether this period of time he had a criminal enterprise on...

You heard on the reverse deal that Wayne Porter was the target of it. That Rocky Townsend ended up bringing close to half a million dollars -- William Ensley brought it down. Rocky Townsend preceeded him down there and checked out the samples of the marijuana and called back and said it was OK. [Volume 9, page 40].

You heard William Ensley testify, on that particular transaction he had been at Wayne Porter's house, and Terry Porter had been helping count out the money and helped him pack the suitcases. She said, Don't go down there. Freddie Ternigan is a snitch. Freddie Ternigan is working with the law. Wayne told her to be quiet. He ended up sending it down there, and Terry Porter proved to be right, because Freddie Ternigan apparently was working for the United States. [Id. Volume 9, page 41] ⁴¹

⁴¹ See Trial Transcripts Volume 8, pages 59 and 175, Volume 9, pages 38, 40, and 41, Appendix D attached hereto at pages 53-59.

After a 10-day trial, a jury convicted Porter of all six of the separately charged conspiracies counts 1, 16, 18, 19, 24, and 34, the overall greater § 848 CCE conspiracy, all in violation of 21 U.S.C. §§ 846 and 848, three counts of distribution 2, 4, and 7, all in violation of 21 U.S.C. § 841, four counts of illegal use of a telephone 26-29, all in violation of 21 U.S.C. § 843, three counts of traveling in interstate commerce 8, 17 and 25, all in violation of 18 U.S.C. § 1952.

On November 6, 1985, the district court sentenced Porter to a consecutive 75 year sentence for the greater 21 U.S.C. § 848 CCE conviction, count 34, multiple 15 year concurrent sentences for the other five separately charged conspiracies counts 1, 16, 18, 19, and 24—plus numerous other sentences on the substantive counts. All sentences that were imposed in the Western District of North Carolina were imposed to be served concurrently with the 75 year § 848 CCE sentence—but consecutively to the 10 year sentence Porter received for the lesser § 846 conspiracy conviction from the Middle District of Florida prosecution. Compare for example, the following excerpt from Porter's Bureau of Prisons Progress Report:

NEW INFORMATION: On November 6, 1985, Porter received an additional 75 year sentence from the Western District of North Carolina. This sentence is a 21-848-Continuing Criminal Enterprise Sentence, thus non-parolable. With his prior sentence, Porter has a total of 79 years.⁵¹

Because the district court did not state at Porter's sentencing, or in its Judgement/Commitment Order⁶¹ whether it intended for Porter to serve the 75 year § 848 CCE sentence concurrently or consecutively to Porter's prior 10 year sentence he was already serving for the § 846 conspiracy conviction from the Middle District of Florida prosecution—Title 18, U.S.C. § 3584 (a) mandated the Bureau of Prisons to treat the two separately imposed sentences as if the

⁵¹ See Bureau of Prisons Progress Report Appendix E attached hereto at pages 60-62.

⁶¹ See Judgement/Commitment Order Appendix F attached hereto at pages 63-64.

court had imposed the sentences in the Western District of North Carolina to be served consecutively to the sentences that were imposed in the Middle District of Florida prosecution. For example, 18 U.S.C. § 3584 (a) states in relevant part: "Multiple terms of imprisonment imposed at different times runs consecutively unless the court orders that the terms are to run concurrently." Thus, making Porter the only defendant, ~~since the promulgation of the new 21 U.S.C. § 848 CCE conspiracy provision as a part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 that has ever been required to serve consecutive~~ 10 and 75 year sentences for § 848 CCE and its lesser included § 846 conspiracy predicate acts, when the only distinguishing characteristics were that the consecutive 10 and 75 year sentences were imposed by two different district courts and in two different federal jurisdiction—where the United States itself conceded, there were only one CCE—and that that "one CCE" also included the Middle District of Florida conspiracy conviction. No other court has ever upheld such a flagrant violation of the Double Jeopardy Clause. Even United States v. Porter, 821 F.2d 963, 979 (4th Cir. 1987), purportedly holds the same.

THE ERRORS IN THE COURT'S OPINION THAT PORTER ASK
THE COURT TO CORRECT WERE SUBSTANTIVE ERRORS

1:

Admission of defendant's state guilty plea for purpose of meeting series element of continuing criminal enterprise was not erroneous... defendant was put on notice through bill of particulars that events would be included in proof.

Id., United States v. Porter, 821 F.2d 971, headnote 26, attached hereto at Appendix G page 68.

A:

To begin with, Porter's Middle District of Florida Indictment is attached hereto as Appendix A pages ²⁴⁻²⁷ Porter's Middle District of Florida Judgment is attached hereto as Appendix B at page 28. Porter has never been charged

by the State of Florida for as much as an illegal parking citation, much, pled guilty to Florida State drug charges. Porter pled guilty to conspiracy to import and distribute marijuana, and in violation of §§ 846 and 963 and was sentenced to 10 years for the § 846 conspiracy conviction. Furthermore it's contrary to the court's finding in *United States v. Porter*, 821 F.2d at 975, attached hereto at page 72.

2:

Defendant convicted of continuing criminal enterprise could not be convicted of conspiracy in connection with the same acts.

Id. *United States v. Porter*, 821 F.2d at 971 headnote 27 attached hereto at Appendix C page 68.

B:

Again, the above finding by the court reporter, was contrary to the court's finding in *Porter* itself, where the court pointed out that: "The crime charged in the Florida indictment was the last of the series of crimes related to drugs on which the government relied to prove that Porter engaged in a continuing criminal enterprise as charged in count 34 of the present indictment." 821 F.2d at 976 attached hereto Appendix C at page 73. See also, Trial Transcripts Western District of North Carolina Volume 8, pages 59 and 175, attached hereto at Appendix D pages 53 - 59, and Volume 9, pages 38, 40, and 41, attached hereto at Appendix D pages 57 - 59, where the court reporter came up with the idea that Porter was not convicted of conspiracy in connection with the CCE is nothing short of astonishing.

3: He ultimately pled guilty to importation, possession with intent to distribute, and use of a communication facility in furtherance of a drug felony in the Middle District of Florida.

Id. *United States v. Porter*, 821 F.2d at 975 - 976, attached hereto at Appendix C pages 72 - 73.

Every crime the court erroneously said Porter pled guilty to in the Middle

District of Florida were substantive offenses. Porter was not even charged with "importation" in the Middle District of Florida. Porter's Middle District of Florida Indictment is attached hereto as Appendix A at pages 24 - 27, and reflects Porter was charged with conspiracy to import marijuana in violation of 21 U.S.C. § 963 (Count 1), and conspiracy to distribute marijuana in violation of 21 U.S.C. § 846 (Count 2), and that Porter possessed with intent to distribute marijuana in violation of 21 U.S.C. § 841 (a)(1) (Count 3); Counts 4-16, reflects Porter used a telephone in North Carolina: "kind spoke by said telephone with [Fredric Holt Jernigan]... who was located in Jacksonville," to "facilitate the commission of the conspiracy set forth in Count One, and the conspiracy set forth in Count Two." Those were the charges Porter pled guilty to, and was sentenced to 10 years for the conspiracy charged in Count Two. See Appendix B: Judgement Middle District of Florida attached hereto at page 28;

^{erroneous} These findings of fact, along with the omission from the court's finding that Porter pled guilty to conspiracy to import and distribute marijuana, completely concealed the double jeopardy violation in Porter's case. This is so, because it had long been the law—long before the promulgation of the § 848 CCE provision—that a substantive crime, and a conspiracy to commit that crime, are not the "same offense" for the agreement to do the act is distinct from the act itself.

In the "First" 21 U.S.C. § 848 CCE case the Supreme Court reviewed, it too, just as Porter case, required the Court to determine whether Jeffers' successive prosecutions for the lesser 21 U.S.C. § 846 conspiracy offense precluded his subsequent prosecution for the greater 21 U.S.C. § 848 CCE offense and "whether cumulative punishments are permissible for violations of §§ 846 and 848." 432 U.S. at 155. The Court concluded that: "a defendant is normally entitled to have the charges on a greater and lesser offense resolved in one proceeding, there is no violation of the Double

Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." 432 U.S. at 152; and that: "The policy reasons usually offered to justify separate punishment of conspiracies and underlying substantive offenses, however, are inapplicable to §§ 846 and 848." 432 U.S. at 156-157.

In 1985, the Supreme Court reviewed its "second" 21 U.S.C. § 848 conviction and ^{sentence and} concluded in *Garrett v. United States*, 471 U.S. 773 (1985), that his successive prosecution and consecutive 5 and 40 year sentences for "importation" and for "CCE" did not violate double jeopardy because: "The presumption when Congress creates two distinct offenses is that it intends to permit cumulative sentences. . ." 471 U.S. at 793, but that: "The same is not true of the substantive offenses created by the Act and conspiracy, and by the same logic, it is not true of the substantive offenses and CCE." 471 U.S. at 794.

The Court affirmed Garrett's successive prosecutions because at the time Garrett was initially indicted in the Western District of Washington for "importation" of marijuana into Neah Bay 471 U.S. at 786: "The continuing criminal enterprise charged against Garrett in Florida had not been completed at the time that he was indicted in Washington." 471 U.S. at 791. Garrett's double jeopardy claim would not have been sustainable even if importation was a lesser offense of CCE in the eyes of the double ^{jeopardy} clause (which it is not). Garrett's guilty plea in Washington was not a grant of immunity for crimes he would ^{make} commit two months later in Florida. Garrett's double jeopardy claim did not ^{make} sense and were contravary to the case law he relied upon. However, neither case authorized consecutive 10 and 75 year sentences for § 848 CCE and its lesser included § 846 conspiracy predicate offenses.

4:

We agree with Porter, however, that the court erred in sentencing him for the conspiracy convictions. The court sentenced Porter to 75 years on the continuing criminal enterprise conviction. It imposed concurrent sentences on the conspiracy conviction. Congress did not intend that an individual be punished under both § 846 (conspiracy) and § 848 (continuing criminal enterprise). United States v. Garrett, [sic] 471 US 773, 794 ... (1985). Jeffers v. United States, 432 US 137, 154-58 ... (1977) (plurality opinion). Therefore, his convictions, counts 1, 18, 19, and 24, must be set aside. In Part VI we reversed the conviction of conspiracy charged in count 16.

Id. United States v. Porter, 821 f.2d at 978 attached hereto at Appendix G page 75.

D:

The court did not sentence Porter to concurrent sentences on the conspiracy convictions. All sentences that were imposed in the Western District of North Carolina, were imposed to be served consecutively to Porter's prior 10 year sentence for the § 846 conspiracy conviction in the Middle District of Florida.

On the same day the Court decided Jeffers, it also decided Brown v. Ohio, 432 U.S. 161, 166 (1977), and held that:

If two offenses are the same ... for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions. See In re Nielsen, 131 US 176, 187-188 ... (1889). Cf. Gavieres v. United States, 220 US 338, (1911). Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings. Unless "each statute requires proof of an additional fact the other does not," Morex v. Commonwealth, 108 Mass 433, 434 (1871), the Double Jeopardy Clause prohibits successive prosecutions as well as cumulative punishment.

Id. Brown v. Ohio, 432 US at 166.

Exactly what the Brown Court said a court could not do—is exactly what the district court did on November 6, 1985, in Porter's case. See Appendix E attached hereto at page: 61 at paragraph 17.

No matter how wrong the district court in the Western District of

North Carolina or the judges in the Fourth Circuit Court of Appeals taught the Brown Court's above holding to be, still, they were duty bound to follow it. Cf. Hutto v. Davis, 454 US 370, 375 (1982), where the Supreme Court, put all inferior courts on notice that: "unless we wish anarchy to prevail within the judicial system... a precedent of this Court must be followed by all federal courts no matter how misguided the judges of those courts may think it to be." 454 US at 375.

The court sentenced Porter to concurrent sentences on the conspiracy convictions charged in Counts 1, 16, 18, 19, and 24, of the Western District of North Carolina Indictment. All sentences imposed in the Western District of North Carolina, were imposed to be served consecutively to Porter's prior §846 conspiracy sentence imposed in the Middle District of Florida prosecution.

D:

Also our action in vacating the sentences on the conspiracy convictions makes the number of conspiracies immaterial.

United States v. Porter, 821 F.2d at 978 attached hereto as Appendix G at p.75.

E:

The court never vacated Porter's 10 year sentence for the §846 conspiracy CCE predicate act conviction in the Middle District of Florida—because it could not! Cf. e.g., United States v. Grayson, 795 F.2d 278 (3rd Cir. 1986):

Jeffers ... stands for the proposition that cumulative punishments for conspiracy under §846 and for CCE under §848 violate the Double Jeopardy Clause. Because the CCE and conspiracy charges are not subject to cumulative punishment, Grayson may not be subjected to sentences for both the CCE and the conspiracy conviction. Given that Grayson's conspiracy conviction is in the district of Maryland, the district court here cannot impose a general sentence on the CCE count and the Maryland conspiracy conviction. Moreover, the district court cannot allow the CCE sentence to run concurrently with the conspiracy sentence. In Ball v. United States, 470 US 856 ... (1985), the Court held that once it is determined that Congress did not intend to punish two offenses cumulatively: The only remedy consistent with Congress' intent is for the district court where the sentencing responsibility resides to exercise its discretion to vacate ... the underlying conviction. The remedy of ordering one of the sentences to be served concurrently with the other cannot be squared with Congress' intent.

Id. United States v. Grayson, 795 F.2d at 287-288.

The Fourth Circuit's conclusion that vacating the sentences on the conspiracy convictions makes the number of conspiracies immaterial, is also in direct conflict with United States v. Reed, 980 F.2d 1568 (11th Cir. 1993) too. The Eleventh Circuit also held that the Double Jeopardy Clause bars successive prosecutions as well as cumulative punishment by two different jurisdictions for conspiracy and CCE:

We hold that Reed's CCE conviction violated the Double Jeopardy Clause of the Constitution. This case is dissimilar to one in which the conspiracy charge and the CCE charge are brought simultaneously. In that situation, the conspiracy would merge into the CCE, and the conspiracy conviction and sentence, rather than the CCE conviction and sentence would be vacated. Jones, 918 F.2d at 910 (citing Jeffers and Baldin; Brantley, 733 F.2d at 1436. We have no jurisdiction, however, to vacate a conspiracy sentence imposed in an earlier, completely different prosecution. Consequently, we reverse Reed's CCE conviction and CCE sentence because we have jurisdiction over these charges only.

Id. United States v. Reed, 980 F.2d at 1581 (emphasis added).

The omissions from the court's failure to find that Porter's Middle District of Florida conviction was for conspiracy is real, and completely concealed the double jeopardy violation in Porter's case.

6:

Count 34 of the indictment alleged that "from on or about September or October 1980 and continuing thereafter and including June 1982" Porter engaged in a continuing criminal enterprise. The government offered evidence of two drug transactions that had occurred prior to September 1980. The first occurred in the spring of 1980, and the second in August of 1980. Porter was not indicted for either of these incidents. The trial court admitted the testimony under Fed. R. of Evid. 404 (b) as showing "motive, knowledge, and state of mind." We find no abuse of discretion.

Id. United States v. Porter, 821 F.2d at 777-78 attached hereto as Appendix B pages 74-75.

F:

On July 30, 1985, Porter was indicted in the Middle District of North Carolina for both of those conspiracies. United States v. Porter, Docket no. CR-85-142-WS, attached hereto as Appendix H pages 78-88. Furthermore, in 1993, Porter was granted a hearing pursuant to 28 U.S.C. § 2255. At this hearing, Magistrate Paul B. Taylor granted Porter's request to subpoena AUSA Max Cogburn. It was then learned, that Mr. Cogburn was responsible for this indictment as well. Cf. e.g., Mr. Cogburn under oath testifying at the 1993 hearing:

Q: So you were actually working in two federal districts?

A: At one point I did, for purposes of prosecuting cases that came out of the Wilco investigation.

Q: Handing you a document which is the Bill of Indictment ... and I'm marking it as Plaintiff's Exhibit 7 for identification purposes. I'm going to ask you to review it.

For the record, Your Honor, that's Case no. CR-85-142-WS, Middle District, Winston Salem.

Q: Did you assist in the drafting of Exhibit 7, Mr. Cogburn?

A: Yes I did.

Q: Did you in fact draft Exhibit 7?

A: I'm not sure that I was the sole drafter of this.

The Court: What is this document? Go ahead and identify it.

The Witness: It's a Bill of Indictment on Wayne Porter in the Middle District of North Carolina.

The Court: Was it ever filed?

The Witness: Yes.

The Court: What date was it filed?

The Witness: July 30, 1985.

Id. Appendix I attached hereto at pages 89-92.

Accordingly, Porter was charged in three separate indictments, and with violating the drug conspiracy provisions no less than 10 times. And, with violating the same drug conspiracy provision 21 U.S.C. § 846 8 times, despite that the government openly conceded to the Fourth Circuit Court of Appeals in its Brief of Appellee Statement of THE FACTS:

Appellant Wayne Porter's Continuing Criminal Enterprise began in 1980 with a load of tons of marijuana and one million quaaludes aboard a boat appropriately named "Pirate" and ended in the summer of 1982 in a reverse sting that netted \$489,000 of Porter's money and caused Porter to flee from arrest.

Defendant Porter's argument confuses the law applicable to a Continuing Criminal Enterprise with that applicable to conspiracy. While it is true that the government could not have dissected Porter's activities into more than one Continuing Criminal Enterprise,

Id. Brief of Appellee Excerpts attached hereto as Appendix J at pages 93-95.

By September or October 1982, Fredrick Holt Terrigan, Rocky Allen Townsend, William Gordon Ensley, Dennis Ernest Wallace, Troy Douglas Harris, and Julio Cantillo Acosta had all entered into plea agreements with the United States that required them to testify against Porter at his up-coming Middle District of Florida "Reverse Sting" conspiracy prosecution. See "Plea Agreements" attached hereto as Appendix K at pages 96 - 99. In fact, Ernst Mueller, representing the United States at Jacksonville, and Florida State Judge, A.C. Soud, had entered into an agreement with Townsend and Ensley that they would be released on probation as soon as the indictments were returned in the Western District of North Carolina. Cf. excerpt quoted from Ferris R. Bond's letter to Mr. Mueller:

Dear Ernst: Both William and Rocky have been extensively debriefed by Government agents, they have been available to give grand jury testimony relative thereto and they signed sworn statements. It is my opinion that their cooperation has been complete...

Charles R. Brewer, the United States Attorney for the Western District of North Carolina, has been advised of this letter and is aware of the extent of both Mr. Townsend and Mr. Ensley's cooperation and concurs with my opinion.

Mr. Townsend and Mr. Ensley has advised me that there is a state judge in Florida who is willing to consider releasing both Mr. Townsend and Mr. Ensley on probation as soon as the indictments are returned based on the information they have provided. In this district we anticipate that date to be around the first part of September, [1983].

I trust that you will make the appropriate authorities aware that the negotiations you entered into have been fruitfull. [emphasis added].

Porter did not pled guilty to the §846 conspiracy charges until June 1, 1984, in the Middle District of Florida prosecution. Accordingly, the plurality opinion in Jeffers v. United States, 432 US 137 (1977), did not authorize Porter's successive prosecutions, and consecutive 10 and 75 year sentences for the greater §848 CCE offense and its lesser included §846 conspiracy predicate acts. Infact, the plurality made it abundantly clear the exact apposite would be true—pointing out that: "The considerations relating to the propriety of a second trial obviously would be much different if any action by the Government contributed to the separate prosecutions on the lesser and greater charges. No hint of that is present in the case before us, since the Government affirmatively sought trial on the two indictments together." 432 US at 152 n. 20, Garrett v. United States, 471 US 773, 792-793 (1985), is not to the contrary either: "[t]he Government's evidence with respect to the CCE charge included acts which took place March 1981, the date of the Washington indictment, and up to and including July 1981. Therefore, the continuing criminal enterprise charged by the Government had not been completed at the time the Washington indictment was returned, and under the Diaz rule evidence of the Neah Bay importation might be used to show one of the predicate offenses." 471 US at 792-793.

In 1985, before Porter was sentenced to the consecutive 75 year sentence in the Western District of North Carolina for the greater 3848 CEF offense that sentence was erroneous—denying Porter his right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress. The district court for the Western District of North Carolina violated Porter's Fifth Amendment guarantee against double jeopardy, and the principle of separation of powers in regard to Porter's sentencing. Cf. e.g., Whalen v. United States, 445 US 684 (1980), where the Supreme Court held:

The Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so.

If a federal court exceeds its own authority by imposing consecutive sentences not authorized by Congress it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty.

Id., 445 US at 689.

REASONS FOR GRANTING THE PETITION

Accordingly, this Court should grant petitioner's Writ of Certiorari. Just because Porter lost his direct appeal and this Court denied certiorari—this Court said in Montgomery v. Louisiana, 577 US —, 136 S Ct —, 193 L Ed 2d 599, 2016 US Lexis 862 (2016): "There is no grandfather clause that permits states to enforce punishment the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees." 193 L Ed 2d at 617. Even a guilty defendant has constitutional rights. "The second conviction even if it results in no greater sentence, is an impermissible punishment." Ball v. United States, 470 US 856, 965 (1985).

Furthermore, in 1988, when the Supreme Court denied Porter's petition for certiorari it did so, because it was completely mislead of the facts and omissions thereof, which have been now contradicted with attached documents.

Respectfully submitted this 26 day of ^{May, 2021.} ~~February~~. By: Wayne Porter

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

APPENDIX

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