
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

NO. _____

Lonnell Porter,

Petitioner,

-vs.-

United States of America,

Respondent.

**Petition for Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit
(8th Cir. Case No. 20-2088)**

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QUESTION PRESENTED

- I. WHETHER THE EIGHTH CIRCUIT MISCONSTRUED 18 U.S.C. § 751(a) TO FIND THAT AN ESCAPE FROM CUSTODY IMPOSED “BY VIRTUE OF . . . CONVICTION” INCLUDES PLACEMENT IN A RESIDENTIAL REENTRY CENTER BECAUSE THE DEFENDANT WOULD OTHERWISE BE HOMELESS?**

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
PETITION FOR WRIT OF CERTIORARI.....	1
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT.....	6
I. MR. PORTER WAS NOT AT THE WATERLOO RRC "BY VIRTUE OF . . . CONVICTION"	6
CONCLUSION.....	15

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<i>Bryan v. United States</i> , 524 U.S. 184 (1998).....	14
<i>Dowling v. United States</i> , 473 U.S. 207 (1985).....	14
<i>United States v. Burnette</i> , 363 F.Supp.3d 106 (D.D.C. 2019).....	9
<i>United States v. Castleman</i> , 572 U.S. 157 (2014).....	13
<i>United States v. Clark</i> , 984 F.2d 319 (9th Cir. 1993).....	12
<i>United States v. Evans</i> , 159 F.3d 908 (4th Cir. 1998).....	9, 10-11
<i>United States v. Paskow</i> , 11 F.3d 873 (9th Cir. 1993).....	12
<i>United States v. Patterson</i> , 230 F.3d 1168 (9th Cir. 2000).....	9, 11-12
<i>United States v. Pynes</i> , 5 F.3d 1139 (8th Cir. 1993).....	9, 10, 11
<i>United States v. Soto-Olivas</i> , 44 F.3d 788 (9th Cir. 1995).....	12
<u>Statutes and Rules</u>	<u>Pages</u>
18 U.S.C. § 751(a).....	2, 3, 7, 14
18 U.S.C. § 922(g)(1).....	3
18 U.S.C. § 924(a)(2).....	3
28 U.S.C. § 1254(1).....	1
28 U.S.C. § 1291.....	1
Supreme Court Rule 10(c).....	6

Other

<https://www.macmillandictionary.com/us/dictionary/american/by-virtue-of-something> (visited 1/9/20).....8

<https://dictionary.cambridge.org/us/dictionary/english/by-virtue-of-something> (visited 1/9/20).....8

<https://www.collinsdictionary.com/us/dictionary/english/by-virtue-of-something> (visited 1/9/20).....9

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Lonnel Porter, respectfully requests that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit in this matter.

OPINION BELOW

On November 9, 2021, the United States Court of Appeals for the Eighth Circuit entered its Opinion and Judgment, App. 1, 4, affirming the May 19, 2020, Judgment of the United States District Court for the Northern District of Iowa.

JURISDICTION

The Eighth Circuit's jurisdiction was based on 28 U.S.C. § 1291. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Eighth Circuit filed its Opinion and Judgment on November 9, 2021. App. 1, 4. Mr. Porter did not file a Petition for Rehearing and Rehearing En Banc. This Petition for Writ of Certiorari is timely filed within ninety (90) days of the filing of the Eighth Circuit's Opinion and Judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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; or if the custody or confinement is 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, be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 751(a).

STATEMENT OF THE CASE

Lonnell Porter was charged with Escape From Custody, in violation of 18 U.S.C. § 751(a). (Indictment - DCD 2).¹ Mr. Porter, while on supervised release, left the Waterloo, Iowa, Residential Reentry Center ("RRC") and did not return. Mr. Porter pled not guilty, raising a legal issue.

The District Court convicted Mr. Porter after a bench trial. (Findings of Fact, Conclusions of Law and Verdict - DCD 27). The parties submitted a Joint Stipulation in Lieu of Trial Evidence. (DCD 21 – hereinafter “Stip.”). The legal issue presented was whether Mr. Porter had been placed at the RRC "by virtue of . . . conviction" within the meaning of § 751(a) or whether he had been placed there because he had nowhere else to live after release from prison.

Mr. Porter had previously been convicted in the Northern District of Iowa on April 20, 2009, of being a Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), in Case No. 09-CR-2005.² (Stip. ¶ 1). In July of 2019, he was nearing the end of his term of incarceration and ready to commence his term of supervised release.

¹“DCD” refers to the District Court's docket in *United States v. Porter*, N.D. Iowa No. 19-CR-2069.

²His term of incarceration had been extended by a subsequent conviction for Assault on a Correctional Officer Causing Injury in the Northern District of West Virginia, No. 1:12CR00110. (PSIR ¶ 31 – DCD 32). That 27 month prison sentence was made consecutive, with no additional supervised release term imposed.

On July 15, 2019, the United States Probation Office filed a Request for Modifying the Conditions or Term of Supervision With the Consent of the Offender. (Stip. ¶ 2). The Probation Office requested that Mr. Porter's special conditions of supervised release be modified to require placement and residence in a Residential Reentry Center for up to 120 days. This request was made because Mr. Porter "did not have a release plan and would be considered homeless." The Probation Officer submitting the Request stated that "This officer believes that placement in the Residential Reentry Center will allow the defendant to secure a residence and employment." Mr. Porter agreed to the modification and signed a written waiver of hearing to modify conditions of supervised release, and the Court granted the agreed-upon Request.

On July 15, 2019, the District Court modified Mr. Porter's conditions of supervised release to provide:

Immediately following release from custody, the defendant must reside in a Residential Reentry Center for a period of up to 120 days, or until discharged by the United States Probation Office, after consultation with the Court. This placement will be in the community corrections component with work release privileges. While a resident of the Residential Reentry Center, the defendant must abide by all rules and regulations of the facility. The defendant must report to the Residential Reentry Center at the time and date to be determined by the Bureau of Prisons, the Residential Reentry Center, and the United States Probation Office.

Stip. ¶ 3.

On August 2, 2019, Mr. Porter commenced his term of supervised release and was placed at the Waterloo Residential Reentry Center subject to the supervision of the United States Probation Office. (Stip. ¶ 4). On September 16, 2019, Mr. Porter left the Waterloo Residential Reentry Center, stating that he was going to his place of employment. (Stip. ¶ 5). When officers checked later that day on defendant's whereabouts, Mr. Porter was not at his place of employment and had not been there that day. *Id.* On September 17, 2019, Mr. Garrett Frommelt, Mr. Porter's supervising United States Probation Officer, contacted Mr. Porter by telephone and directed Mr. Porter to return to the Waterloo Residential Reentry Center. (Stip. ¶ 6). Mr. Porter refused to do so. *Id.* Mr. Porter was arrested by the United States Marshals Service on October 2, 2019. (Stip. ¶ 8).

The issue at the bench trial was whether Mr. Porter had been placed at the RRC "by virtue of . . . conviction." After hearing, the District Court ruled that Mr. Porter had been placed at the RRC "by virtue of . . . conviction" and found Mr. Porter guilty. (Ruling, DCD 27).

The District Court then sentenced Mr. Porter to 12 months and 1 day imprisonment. (Judgment – DCD 39).

Mr. Porter then appealed to the United States Court of Appeals for the Eighth Circuit, arguing that the District Court had incorrectly interpreted the statute to find that Mr. Porter had been placed at the RRC "by virtue of . . .

conviction.”³ The Eighth Circuit disagreed. (App. 1). The Eighth Circuit found that “by virtue of” should be broadly construed to include both remote and immediate causes. (App. 4).

REASONS FOR GRANTING THE WRIT

Certiorari is properly granted as the Eighth Circuit's decision in this case decides an important question of federal law that has not been, but which should be decided by this Court. *See* Supreme Court Rule 10(c).

I. MR. PORTER WAS NOT AT THE WATERLOO RRC "BY VIRTUE OF . . . CONVICTION"

As the date for Mr. Porter's release from imprisonment and commencement of his three-year term of supervised release approached, Mr. Porter had no place to live. Consequently, the United States Probation Office, with Mr. Porter's consent, filed a Request for Modifying the Conditions or Terms of Supervision with the Consent of the Offender. (Stip. ¶ 2). The Request was made because Mr. Porter "did not have a release plan and would be considered homeless." *Id.* The Probation Officer also stated that "This officer believes that placement in the

³Mr. Porter also raised an issue as to whether his sentence should have been imposed consecutively to a sentence imposed for revocation of his supervised release on the prior charge. The Eighth Circuit found this issue to be moot as Mr. Porter had been released from imprisonment from both sentences. This issue is not raised in this Petition for Writ of Certiorari.

Residential Reentry Center will allow the defendant to secure a residence and employment." *Id.* Mr. Porter was then placed at the RRC upon commencement of his term of supervised release. (Stip. ¶ 4).

On September 16, 2019, Mr. Porter left the RRC purporting to go to his place of employment, did not go to his place of employment, and did not voluntarily return to the RRC. (Stip. ¶¶ 5, 6)

The Indictment charged Mr. Porter with a violation of 18 U.S.C. § 751(a). (DCD 2). That statute 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; or if the custody or confinement is 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, be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 751(a) (emphasis added). Thus, the portion of the statute applicable provides that "Whoever escapes . . . from any custody under or by virtue of any process issued under the laws of the United States by any court . . . if the custody is by virtue of . . . conviction of any offense" violates the statute.

The question presented is whether Mr. Porter's placement at the RRC rendered him in custody "by virtue of . . . conviction of any offense." The answer to that question depends on the construction and interpretation of "by virtue of." That is a question of causation.

The immediate cause of Mr. Porter's placement at the RRC was the lack of a stable and approved place to live upon commencement of supervised release. Of course, going back further in the causation chain, one of the conditions of supervised release is having an approved residence. Ultimately, supervised release is imposed as part of the defendant's sentence and the sentence is imposed as the result of a conviction for a federal criminal offense. Thus, the question is: how far back in the chain of causation does "by virtue of" look? This is a question of statutory construction and interpretation. It is also a question not clearly answered by case law.

The Court should consider the common meaning of "by virtue of" as well as cases construing that term. However, dictionary definitions are not of much help. Various dictionaries define "by virtue of" as:

"because of, or as a result of" --
<https://www.macmillandictionary.com/us/dictionary/american/by-virtue-of-something> (visited 1/9/20)

"as a result of something"
<https://dictionary.cambridge.org/us/dictionary/english/by-virtue-of-something> (visited 1/9/20)

"because of; on the grounds of"

<https://www.collinsdictionary.com/us/dictionary/english/by-virtue-of> (visited 1/9/20)

While illustrating that "by virtue of" is a concept of causation, those definitions do not cleanly answer the question of whether "by virtue of" refers to the immediate cause or more remote causes. The District Court, as did the Eighth Circuit, correctly concluded that "by virtue of" is a causation concept. (DCD 27 at 8; App. 3). However, the Eighth Circuit and the District Court adopted a broad interpretation of causation, reasoning that Mr. Porter had been placed in the RRC because he was on supervised release, and was on supervised release because of his firearms conviction. *Id.* The Eighth Circuit did not cite any case law in support of its conclusion, limiting its analysis to dictionary definitions. (App. 4).

There is little case law that addresses the precise question before the Court, *i.e.*, whether a defendant placed at an RRC because he has no other place to live is at the RRC "by virtue of . . . conviction." There is case law holding that a defendant who leaves a residential reentry center without authorization after revocation of supervised release violates 18 U.S.C. § 751. *See United States v. Pynes*, 5 F.3d 1139 (8th Cir. 1993); *United States v. Evans*, 159 F.3d 908 (4th Cir. 1998); *United States v. Patterson*, 230 F.3d 1168 (9th Cir. 2000); *United States v. Burnette*, 363 F.Supp.3d 106 (D.D.C. 2019). Those cases are distinguishable as Mr. Porter was not at the RRC because he had violated his terms of supervised

release and had his supervised release revoked. He was there because he had no place to live upon commencing his term of supervised release.

Further, the main prior Eighth Circuit case, *Pynes*, is distinguishable for another reason. Although the decision lacks full detail of the facts of the case, those details can be readily inferred. Pynes' supervised release had been revoked and he was placed at the federal correctional institute in Englewood, Colorado. *See Pynes*, 5 F.3d at 1139. He was furloughed to a half-way house in Sioux Falls, South Dakota. He was apparently allowed to travel on his own to Sioux Falls. He failed to report to the half-way house. Most significantly, he was apparently still in the custody of the Federal Bureau of Prisons relating to his revocation sentence at the time he failed to report. As he was in the custody of the Bureau of Prisons, obviously failing to go where directed by the Bureau constitutes an escape. In contrast, on September 16, 2019, Mr. Porter was no longer in the custody of the Federal Bureau of Prisons; he was under the supervision of the District Court and the United States Probation Office.

At first blush, the Fourth Circuit's opinion in *Evans* would appear to be contrary to Mr. Porter's position as the Fourth Circuit concluded that supervised release is part of the "conviction." However, the underlying rationale for the Fourth Circuit's decision is that "the term of supervised release, the revocation of that term, and any additional imprisonment imposed for violating the term of

supervised release are all part of the original sentence." *Evans*, 159 F.3d at 913 (emphasis added). In Mr. Porter's case, the placement of Mr. Porter at the RRC was not a term of supervised release imposed at the time of original sentencing as part of his conviction. It was a modification to the terms of supervised release, with Mr. Porter's consent, at the start of his commencement of his term of supervised release because he had no other place to live. Further, Mr. Porter was not serving an additional term of imprisonment imposed as a result of revocation of supervised release. Mr. Porter was on supervised release. In contrast, Mr. Evans was no longer on supervised release at the time of his escape, he was serving a term of imprisonment.

Patterson contains the clearest statement exemplifying the logic of *Patterson*, *Pynes* and *Evans* and why that logic is not applicable to Mr. Porter:

Both *Evans* and *Pynes* chiefly rely upon a simple logical argument. If the defendant had not been convicted of the original crime, he would not have been sentenced to supervised release. If he had not been sentenced to supervised release, he would not have been under the conditions that he violated. Had he not violated the restrictions of his supervised release, the court could not have revoked his release status and returned him to custody. His final custody, therefore, is "by virtue of" his original conviction. *Evans*, 159 F.3d at 913; *Pynes*, 5 F.3d at 1140.

While the Ninth Circuit has never ruled on this precise question, this court has consistently held in other contexts that revocation of supervised release is a punishment imposed for the original offense.

As we stated in *United States v. Paskow*, 11 F.3d 873 (9th Cir. 1993), "it is the original sentence that is executed when the defendant is returned to prison after a violation of the terms of . . . supervised release. " 11 F.3d at 881 (considering the question for ex post facto purposes). Considering the relationship between a revocation of supervised release and the original sentence for double jeopardy purposes, we stated that:

"[b]y the plain language of the statute, supervised release, although imposed in addition to the period of incarceration, is a part of the sentence . . . the entire sentence, including the period of supervised release, is the punishment for the original crime, and it is the original sentence that is executed when the defendant is returned to prison after a violation of the terms of his release."

United States v. Soto-Olivas, 44 F.3d 788, 790 (9th Cir. 1995) (holding that double jeopardy was not implicated where defendant's conduct was the basis for both criminal prosecution and the revocation of his supervised release.); *see also United States v. Clark*, 984 F.2d 319, 321 (9th Cir. 1993) (defendant was on both probation and supervised release (for separate convictions); after his escape, punishment for the probation and supervised release violations was not precluded by double jeopardy because punishment was for conduct underlying original convictions.)

Patterson, 230 F.3d at 1170-71 (emphasis added).

Thus, all three cases, *Pynes*, *Evans*, and *Patterson*, reason that when a defendant escapes from custody after revocation of supervised release, the custody imposed for the revocation is part of the custody for the original sentence imposed as a result of the conviction. That is not true in Mr. Porter's case. He was not placed at the RRC as imprisonment for a violation of the terms of supervised

release. He was placed at the Waterloo RRC as a modified term of supervised release, one which had not been imposed at his original sentence. That reason was not punitive. It was imposed as part of the rehabilitation objective of supervised release, *i.e.* to provide Mr. Porter with a stable and approved place to live. It was imposed "by virtue of" his lack of a place to live.

Mr. Porter also notes, a point completely ignored by the Eighth Circuit, that "by virtue of" is used twice in the statute. In the first instance, it is used in the clause "by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge." That provision clearly refers to and means the Court Order itself, the immediate cause. A principle of statutory interpretation is "the presumption of consistent usage—the rule of thumb that a term generally means the same thing each time it is used. [] the presumption is most commonly applied to terms appearing in the same enactment." *United States v. Castleman*, 572 U.S. 157, 174 (2014) (citations omitted). In this case, the Court Order that placed Mr. Porter at the RRC was not issued as a result of a conviction (in other words, it was not a judgment committing Mr. Porter to the custody of the Attorney General). It was issued as a modification of supervised release conditions because Mr. Porter had no where else to live.

Based on the presumption of consistent usage, "by virtue of" in the second instance of the clause stating "if the custody or confinement is by virtue of an

arrest on a charge of felony, or conviction of any offense," should also be limited to the immediate cause. In this case, that immediate cause is the lack of any other place for Mr. Porter to live, not the more remote cause of his conviction.

Finally, to the extent that "by virtue of" and, by extension § 751(a), are ambiguous, the rule of lenity requires construing the statute in favor of Mr. Porter. *See Dowling v. United States*, 473 U.S. 207, 214 (1985) ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."). *See also Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.").

The Eighth Circuit found that the rule of lenity did not apply because it found the statute unambiguous. (App. 4). However, the statute is ambiguous, in that it does not clearly cover the situation at issue in this case. In fact it could not as supervised release did not exist at the time § 751(a) was enacted.


For the above stated reasons, the placement of Mr. Porter at the RRC was not "by virtue of . . . conviction of any offense." He was placed at the RRC because he had no where else to live, *i.e.*, "by virtue of" his anticipated homelessness. His absence without authorization from the RRC is not an escape within the meaning of 18 U.S.C. § 751(a). Certiorari should be granted as the

Eighth Circuit has incorrectly construed the statute. His conviction must be reversed and this matter remanded for dismissal of the case.

CONCLUSION

Petitioner Lonnel Porter respectfully requests this Court to grant certiorari in this matter. Petitioner Porter further requests this Court to reverse and remand this matter to Court of Appeals for the Eighth Circuit with directions to remand to the District Court for dismissal.

Respectfully Submitted,



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