NO. 07-14422-HH

In the United States Court of Appeals for the Eleventh Circuit

DARIAN ANTWAN WATTS,

Petitioner–Appellant,

v.

UNITED STATES OF AMERICA,

Respondent–Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF PETITIONER-APPELLANT DARIAN ANTWAN WATTS

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11TH CIR. R. 26.1-1, the undersigned counsel for Petitioner-Appellant Darian Antwan Watts certifies that the following persons and entities have an interest in the outcome of this appeal, No. 07-14422-HH:

1. Bucklew, Susan C. (United States District Court Judge for the Middle District of Florida);
2. Fitzgerald, Timothy J. (Farmer & Fitzgerald, PA), trial counsel for Petitioner-Appellant;
3. Grandy, Todd B. (United States Attorney's Office), counsel for Respondent-Appellee;
4. Li Wai Suen, Rachel S. (Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP), appellate counsel for Petitioner-Appellant;
5. Loesch, Sheryl L. (United States Attorney's Office), counsel for Respondent-Appellee;
6. Madden, Matthew M. (Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP), appellate counsel for Petitioner-Appellant;
7. O'Neill, Robert E. (United States Attorney's Office), counsel for Respondent-Appellee;

CERTIFICATE OF INTERESTED PERSONS (continued)

8. Phipps, Tamra (United States Attorney's Office), counsel for Respondent-Appellee;
9. Poe, Gregory L. (Law Offices of Gregory L. Poe PLLC), appellate counsel for Petitioner-Appellant;
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11. Rotker, Michael A. (United States Department of Justice), counsel for Respondent-Appellee;
12. Toro-Font, Eduardo E. (United States Attorney's Office), counsel for Respondent-Appellee;
13. United States of America, Respondent-Appellee;
14. Untereiner, Alan E. (Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP), appellate counsel for Petitioner-Appellant; and
15. Watts, Darian Antwan, Petitioner-Appellant.

Respectfully submitted,

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—(continued)

Page(s)

TABLE OF AUTHORITIES—(continued)

Page(s)

TABLE OF AUTHORITIES—(continued)

Page(s)

TABLE OF AUTHORITIES—(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES—(continued)

Page(s)

Miscellaneous

STATEMENT REGARDING ORAL ARGUMENT

There is no dispute that Petitioner-Appellant Darian Antwan Watts's 17½-year sentence exceeds the 10-year statutory maximum term that applies to his offense. The government agrees with us, and Circuit law on that issue is now clear. Nevertheless, this Court by a 2-1 vote has denied Watts's motion for summary reversal, which sought an order reversing or vacating the district court's denial of Watts's Section 2255 motion based on his sentence being "in excess of the maximum term authorized by law" and "in violation of the . . . laws of the United States." 28 U.S.C. § 2255(a). In light of that ruling, Watts respectfully submits that oral argument will assist the Court in the resolution of the case.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the district court's denial of a Section 2255 motion under 28 U.S.C. §§ 1291, 2253(a), and 2255(d). This Court granted Watts a certificate of appealability on March 4, 2010. See *id.* § 2253(c).

STATEMENT OF THE ISSUES

The parties agree that Watts is serving a prison sentence that is 7½ years longer than the 10-year statutory maximum (18 U.S.C. § 924(a)(2)) that applies to his felon-in-possession conviction (*id.* § 922(g)).

At sentencing, the district court held that Watts's prior conviction for carrying a concealed weapon qualified as a "violent felony" under the Armed Career Criminal Act ("ACCA"), *id.* § 924(e), and on that basis sentenced Watts to a term of imprisonment above the ACCA's 15-year mandatory minimum. Watts has moved for correction of his sentence under 28 U.S.C. § 2255(a). Since Watts filed his motion, this Court has repudiated the legal conclusion that carrying a concealed weapon is a "violent felony." *United States* v. *Canty*, 570 F.3d 1251, 1252, 1255 (11th Cir. 2009). The issues on appeal are:

1. Whether Watts is entitled to the correction of his sentence under 28 U.S.C. § 2255(a) because the district court's imposition of a sentence 7½ years over the maximum term authorized by Congress, its erroneous application of a mandatory minimum to restrict its discretion to impose a substantially lower sentence, and Watts's actual innocence of the ACCA enhancement, deprived Watts of his liberty without due process of law "in violation of the Constitution . . . of the United States."

2. Whether Watts is entitled to the correction of his sentence under 28 U.S.C. § 2255(a) because his 17½-year sentence is "in excess of the maximum authorized by law," "in violation of . . . the laws of the United States," and "otherwise subject to collateral attack."

PRELIMINARY STATEMENT

Petitioner-Appellant Watts and the United States agree in this Section 2255 appeal that Watts is serving a 17½-year sentence for an offense that, in his case, carries a 10-year maximum prison term. 28 U.S.C. § 2255(a) provides, in relevant part, that a federal prisoner

> claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the district court which imposed the sentence to vacate, set aside or correct the sentence.

Watts's sentence to a term of imprisonment that exceeds the statutory maximum meets multiple, independent bases for Section 2255 relief. His current sentence is "in excess of the maximum term authorized by law," "in violation of the . . . laws of the United States," and "otherwise subject to collateral attack." 28 U.S.C. § 2255(a). As explained below, those are more than enough reasons to reverse the decision below, and to remand the case for a correction of Watts's sentence. See *infra* Part II. Watts's above-maximum sentence is, moreover, a deprivation of his liberty without due process of law, "in violation of the Constitution . . . of the

United States." 28 U.S.C. § 2255(a). See *infra* Part I. Accordingly, if the Court decides to reach that constitutional issue, it no less calls for a reversal and remand.

A. The government has confessed error with respect to Watts's sentence. See No. 08-7757 U.S. Br. 9-10, 13 (U.S. May 8, 2009). Both parties agree that the case should be remanded for resentencing so that the unlawful sentence can be corrected. The government previously authorized Watts's counsel to inform this Court that the United States agreed with Watts's Motion for Summary Reversal or Vacatur and for Remand, filed on March 24, 2010. The panel that heard the motion nevertheless decided, by a 2-1 vote, not to take summary action in this case, although the majority did so for procedural reasons and did "not necessarily disagree . . . that the ultimate resolution of this appeal may well be the relief sought by [Watts] in [his] unopposed motion." Order, No. 07-14422-HH (May 3, 2010).

B. Watts was convicted of having been a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Unless a statutory enhancement applies, Congress has authorized "not more than 10 years" of imprisonment for a Section 922(g) offense. See *id.* § 924(a)(2). At sentencing, however, the district court applied such an enhancement: It held that Watts's prior conviction for carrying a concealed weapon is a "violent felony" under the ACCA, and on that basis it applied the ACCA's 15-year mandatory *minimum* (*id.* § 924(e)) rather than the otherwise applicable, 10-year statutory *maximum* (*id.* § 924(a)(2)).

In relevant part, the ACCA defines the term "violent felony" to "mean[] any crime punishable by imprisonment for a term exceeding one year . . . that . . . [1] is burglary, arson, or extortion, involves use of explosives, or [2] otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B). When a defendant convicted under Section 922(g)(1) has had "three previous convictions" for a "violent felony," Section 924(a)(2)'s 10-year maximum term no longer applies and a sentence must be imposed at or above the ACCA's 15-year mandatory minimum. See *id.* § 924(e).

Applying now-abrogated Circuit law (see *United States* v. *Hall*, 77 F.3d 398 (11th Cir. 1996)), the district court held that a conviction for carrying a concealed weapon came within the ACCA's definition of a "violent felony" because it "otherwise involves" a "serious potential risk of physical injury to another"—the ACCA's so-called "residual clause." See 18 U.S.C. § 924(e). When coupled with Watts's two other qualifying convictions, that ruling subjected Watts to the ACCA's mandatory minimum. And on that basis, the district court sentenced Watts to 210 months of imprisonment—7½ years above the otherwise applicable 10-year maximum.

There is no longer any question, however, that carrying a concealed weapon is *not*, in fact, a "violent felony" under the ACCA. See *Canty*, 570 F.3d 1251, 1252, 1255 (11th Cir. 2009) (abrogating *Hall*); see also *Begay* v. *United States*,

553 U.S. 137, 128 S. Ct. 1581 (2008); *United States* v. *Archer*, 531 F.3d 1347 (11th Cir. 2008). Watts should have been sentenced at or below Section 924(a)(2)'s 10-year-maximum term of imprisonment, and he is serving a sentence 7½ years over that limit.

There are multiple grounds—statutory and constitutional—on which this Court can resolve Watts's long-asserted claim that his sentence is grievously in error to the tune of 90 months' imprisonment not authorized by law. The Court should reverse the district court's decision to deny Watts's Section 2255 motion and remand for resentencing because his 210-month sentence is far "in excess of the maximum term authorized by law," is "in violation of the Constitution or laws of the United States," and is "otherwise subject to collateral attack." See 28 U.S.C. § 2255(a).

If the Court is not otherwise inclined to grant relief, it should vacate the decision below and remand Watts's Section 2255 motion for the district court's reconsideration in light of *Begay* and *Canty*. And if all else fails (although it shouldn't), this Court should follow the path set forth in *Gilbert* v. *United States*, 2010 WL 2473560, No. 09-12513 (11th Cir. June 21, 2010), and afford Watts the relief he seeks under 28 U.S.C. § 2241.

STATEMENT OF THE CASE

A. The Trial, Sentencing, and Direct Appeal

On July 21, 2004, a grand jury returned a one-count indictment charging Watts with knowingly possessing a firearm after having been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. § 922(g)(1). See Indictment, *United States* v. *Watts*, No. 08-cr-00314-SCB-MAP; see also Presentence Investigation Report ("PSR") ¶ 1. Watts was tried before a jury on January 10, 2005, and the jury returned a guilty verdict. PSR ¶ 4.

In calculating the guideline range, the probation office determined that—without any ACCA enhancement—Watts's total adjusted offense level would have been 26. See PSR ¶¶ 20-28. At that offense level, applying the criminal history category determined by the district court, Watts's guidelines range would have been 110-137 months. See U.S.S.G. § 5A (sentencing table). Without an ACCA enhancement, that range would have been capped at 120 months because of 18 U.S.C. § 924(a)(2)'s 10-year maximum term of imprisonment. See U.S.S.G. § 5G1.1(c)(1).

The indictment had alleged, however, that Watts had three prior convictions that made him eligible for the ACCA's 15-year, mandatory minimum sentence. See PSR ¶ 1. The district court held, at sentencing, that those convictions—including the concealed-carry conviction—amounted to three "violent felon[ies]"

that triggered the ACCA's mandatory minimum. Transcript of Sentencing Proceedings at 22:1-24:9, No. 8:04-CR-314-T (M.D. Fla. April 15, 2005). Watts's counsel objected: "[A]s to the qualifying offense of carrying a concealed firearm," he argued, "we would object for the record that it is not a violent felony, as required under [18 U.S.C. § 924(e)]." *Id.* at 23:20-23. The district court overruled that objection based on then-prevailing Circuit precedent. See *id.* at 23:20-24:9.

Qualifying Watts for sentencing under the ACCA's 15-year mandatory minimum caused a corresponding increase in Watts's sentencing guidelines range—from 110-120 months to 210-262 months. See PSR ¶ 29; U.S.S.G. § 5A (sentencing table). In the end, the district court sentenced Watts to the bottom of the ACCA-enhanced guideline range.

Watts appealed his sentence, arguing, *inter alia*, "that . . . carrying a concealed weapon is not a violent felony" under the ACCA because it "is not conduct that poses a serious potential risk of physical injury" under Section 924(e)'s residual clause. No. 05-12248-EE Watts Br. 19 (11th Cir. Aug. 10, 2005). Watts conceded, however, that Circuit law at the time took the opposite view. *Ibid.* (citing *Hall*, 77 F.3d 398). The government opposed Watts's appeal for that reason, explaining that *Hall*'s "controlling authority" was sufficient to affirm Watts's ACCA-enhanced sentence. See No. 05-12248-EE U.S. Br. 11-12 (11th Cir. Sept. 16, 2005) (stating that *Hall* had "expressly rejected" Watts's argument).

Watts nonetheless reiterated his objection to *Hall* in his reply brief. See No. 05-12248-EE Watts Reply Br. 11 (11th Cir. Oct. 4, 2005).

This Court affirmed Watts's 210-month sentence, relying on *Hall* for the proposition that "Watts's prior conviction for carrying a concealed weapon is a qualifying offense" under the ACCA. *United States* v. *Watts*, 159 F. App'x 923, 926 (2005) (per curiam). The Supreme Court denied *certiorari* on April 17, 2006. *Watts* v. *United States*, 547 U.S. 1091 (2006) (mem.).

B. The Section 2255 Proceedings

1. *The District Court Proceedings*. On April 11, 2007, Watts submitted a *pro se* motion to vacate his sentence under Section 2255. Docket No. ("Dkt.") 1, *United States* v. *Watts*, No. 8:07-cv-00665 (M.D. Fla.). The district court denied Watts's motion without prejudice on April 20, 2007, because Watts had not filed his motion on the proper form. Dkt. 2. The district court gave Watts until May 15, 2007, to file a conforming motion. *Ibid.*

Still appearing *pro se*, Watts timely filed his first amended motion, using the authorized form. Dkt. 3. That motion, too, was denied without prejudice, this time for a lack of "adequate information" about each of Watts's claims (not all of which are pressed on appeal). Dkt. 4. The district court gave Watts until May 31, 2007, to file a second amended motion. *Ibid.* Watts did so, timely filing a second amended Section 2255 motion and supporting memorandum. Record Excerpts

("R.E.") Tab 7 (mot.), Tab 8 (mem.). Watts moved for correction of his sentence because, *inter alia*, the "Trial Court erred in finding that a conviction for carrying [a] concealed weapon qualified as a violent felony under the Armed Career Criminal Act." R.E. Tab 7, at 7; see also *id.* at 8 (arguing that "[t]he district court erred in finding that a conviction of carrying a concealed weapon is a qualifying predicate under the ACCA"). Watts also characterized this error as a "Due Process Violation." *Id.* at 7.

In his supporting memorandum, Watts again argued that "carrying a concealed weapon is not a violent felony" under Section 924(e). R.E. Tab 8, at 14. As he had on direct appeal, Watts noted that *Hall* was contrary authority in this Circuit, but he also directed the district court to the Sixth Circuit's contrary conclusion in *United States* v. *Flores*, 477 F.3d 431 (6th Cir. 2007), which held that "'the crime of carrying a concealed weapon does not involve such 'conduct that presents a serious potential risk of physical injury to another' that a conviction . . . should properly be considered a conviction for a violent felony under the ACCA.'" R.E. Tab 8, at 14 (quoting *Flores*, 477 F.3d at 435-36).

The district court denied Watts's motion. R.E. Tabs 10 & 11. As for Watts's contention that carrying a concealed weapon is not a "violent felony" under the ACCA, the court held that because that claim had been "raised and resolved in Watts's direct appeal," it could not be "re-litigated" in a Section 2255

proceeding. R.E. Tab 10, at 8 (citing *United States* v. *Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000)). The district court also denied Watts a certificate of appealability ("COA") under 28 U.S.C. § 2253(c). *Id.* at 8-9.

Watts timely moved for an alteration or amendment of the judgment under Fed. R. Civ. P. 59(e). Dkt. 12. In addition to the arguments made in his Section 2255 motion, Watts pointed to the Supreme Court's then-recent analysis of the ACCA in *James* v. *United States*, 550 U.S. 192, 127 S. Ct. 1586 (2007). Dkt. 12, at 3. The district court denied Watts's Rule 59(e) motion on July 16, 2007, concluding that no new facts or law justified an alteration or amendment of its judgment. R.E. Tab 13, at 1-2. In the same order, the district court again denied Watts a COA. *Id.* at 2-3. The court explained that Watts had not made "the requisite showing" that either "'reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong'" (*ibid.* (quoting *Tennard* v. *Dretke*, 542 U.S. 274, 282, 124 S. Ct. 2562, 2569 (2004)) (internal quotation marks omitted)), or that "'the issues presented were adequate to deserve encouragement to proceed further'" (*ibid.* (quoting *Miller-El* v. *Cockrell*, 537 U.S. 332, 335-36, 123 S. Ct. 1029, 1039 (2003))). See also 28 U.S.C. § 2253(c)(2).

On September 13, 2007, Watts filed a notice of appeal and an application for a COA in the district court. R.E. Tab 15. As one of his grounds for appeal, Watts asserted that "in light of a recent Supreme Court[] decision announced in

James . . . a prior conviction for carrying a concealed firearm falls outside the 'violent felony' offense defined within §924(e)(2)(B)(ii)." *Ibid.* The district court once again denied Watts a COA on September 24, 2007. R.E. Tab 17.

2. *The Appeal and Supreme Court Review.* After docketing Watts's notice of appeal, this Court construed it to include a motion for a COA. See Fed. R. App. P. 22(b)(2); 11th Cir. R. 22-1(b). In an order entered on November 16, 2007, this Court denied that motion on the ground that Watts "failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2)." Order, No. 07-14422-HH (11th Cir. Nov. 16, 2007).

Watts timely filed a *pro se* petition for a writ of *certiorari* in the United States Supreme Court, arguing that carrying a concealed weapon is not a "violent felony" and that therefore the district court had inappropriately sentenced him to an enhanced sentence under the ACCA. In his petition, Watts explained that the Eleventh Circuit's position on the issue was in direct conflict with decisions of the Sixth and Eighth Circuit (citing *Flores*, 477 F.3d 431 (6th Cir. 2007), and *United States* v. *Whitfield*, 907 F.2d 798 (8th Cir. 1990)), as well as with the Supreme Court's decision in *James*, 550 U.S. 192, 127 S. Ct. 1586. See No. 08-7757 Pet. 8-9 (U.S. Feb. 13, 2008).

While Watts's petition was pending, the Supreme Court decided *Begay*. The Court held that "the [ACCA's] listed examples—burglary, arson, extortion, or

crimes involving the use of explosives—illustrate the kinds of crimes that fall within the statute's scope. Their presence indicates that the statute covers only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'" 553 U.S. at 142, 128 S. Ct. at 1584-85. The common thread among the listed offenses, the Court explained, is that "all typically involve purposeful, violent, and aggressive conduct." 553 U.S. at 144-45, 128 S. Ct. at 1586 (internal quotation marks omitted). Therefore, courts "should read the examples as limiting the crimes that [the ACCA's residual clause] covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves." 553 U.S. at 143, 128 S. Ct. at 1585; see also 553 U.S. at 144-48, 128 S. Ct. at 1586-88 (holding that a prior conviction for DUI is not a "violent felony").

Shortly after *Begay*—in a case that the Supreme Court had remanded for reconsideration in light of *Begay*—this Court held in *Archer*, 531 F.3d at 1349, that "the crime of carrying a concealed weapon . . . is not a 'crime of violence' within the meaning of [Sections 4B1.1(a) and 4B1.2 of the] Sentencing Guidelines." Noting that "the definition of a 'crime of violence' under [the Sentencing Guidelines]" is "'virtually identical'" to "the definition of 'violent felony' under [the ACCA]" (*id.* at 1352 (quoting *United States* v. *Rainey*, 362 F.3d 733, 735 (11th Cir. 2004))), this Court concluded that "[c]arrying a concealed weapon does

not involve the aggressive, violent conduct that the Supreme Court noted is inherent in the enumerated crimes" because it "is a passive crime centering around *possession*, rather than around any overt action" (*id.* at 1351). This Court held that Florida's statute prohibiting the carrying of a concealed weapon—the same statute that is at issue in Watts's case—did not have the requisite element of "purposeful" or "deliberate" conduct. *Ibid.* (After Watts's case had been submitted to the Supreme Court, this Court further held that "pursuant to recent decisions of the Supreme Court and [the Eleventh Circuit], convictions for carrying a concealed firearm should not be treated as violent felonies under the [ACCA]. *Canty*, 570 F.3d at 1252. The Court "agree[d] . . . that carrying a concealed weapon is not a violent felony that may be used as a predicate conviction to enhance a defendant's sentence under the ACCA." *Id.* at 1255 (citing *Archer*, 531 F.3d at 1352).)

In a May 8, 2009, brief filed in this case in the Supreme Court, the Solicitor General of the United States "agree[d]" that this Court had erred when it denied Watts a COA. No. 08-7757 U.S. Br. 6. The government conceded that Watts "received a sentence seven and one-half years longer than the ten-year statutory maximum term authorized by Congress because he was erroneously categorized as an armed career criminal under the ACCA." *Id.* at 9. "[I]n light of *Begay*," the brief explained, Watts's prior conviction for carrying a concealed weapon "does not qualify as an ACCA predicate offense." *Id.* at 6. Watts therefore had made "a

substantial showing that, because an improper recidivist enhancement increased his term of incarceration beyond the otherwise applicable legal maximum and also prevented the exercise of the district court's discretion to impose a still-lesser sentence, he has been denied due process." *Id.* at 10-11; see also *id.* at 6 ("[Watts] can make a 'substantial showing'" that his erroneous ACCA sentence "violates due process."); *id.* at 8 ("[Watts] can make a substantial showing that it violates due process to impose a sentence on a defendant in excess of the maximum term authorized by law, as well as to deprive him of the court's discretion to impose a lower sentence than the maximum."). The government added that "*Begay* and *Archer* constitute substantive holdings concerning eligibility for a recidivist enhancement, and they are entitled to retroactive effect on collateral review" (*id.* at 10), and, in any event, the government disclaimed any "procedural bar" argument based on "the principles of *Teague* v. *Lane*, 489 U.S. 288 (1989)," which govern the retroactive effect of new *procedural* holdings on collateral review (No. 08-7757 U.S. Br. 13 n.6).

Thereafter, and while Watts's petition remained pending, a petition for a writ of *certiorari* was filed in *Hunter* v. *United States*, No. 09-122 (U.S. July 24, 2009)—a case that, on remand, has been consolidated with Watts's appeal for briefing and argument. Hunter, like Watts, had been sentenced under the ACCA based on the district court's conclusion that carrying a concealed weapon is a

"violent felony." See *Hunter* v. *United States*, 559 F.3d 1188, 1189 (11th Cir. 2009), vacated, 130 S. Ct. 1135 (2010) (mem.). In December 2007, this Court initially denied Hunter a certificate of appealability in his Section 2255 proceedings on the ground that a conceal-carry conviction is a "violent felony," but the Supreme Court vacated that denial for reconsideration in light of *Begay*. See *ibid.* On remand, this Court recognized that *Begay* provided a "good reason to conclude that Hunter was erroneously sentenced as an armed career criminal," but denied Section 2255 relief on the ground that "a sentencing error does not alone amount to 'a substantial showing of the denial of a constitutional right.'" *Ibid.* (quoting 28 U.S.C. § 2253(c)(2)).

In response to Hunter's petition for *certiorari*, which had been filed while *Watts*'s petition was pending, three "criminal law and habeas corpus scholars" who asserted a "professional interest" in "illuminating" the Supreme Court's "consideration" of the issues raised by Hunter's petition, filed an *amici curiae* brief. No. 09-122 *Amici* Br. 1 (U.S. Aug. 27, 2009). *Amici* contended that Hunter was not entitled to a COA because: (1) he could not make a substantial showing of the denial of a *clearly established* constitutional right, (2) an above-maximum sentence does not offend the Due Process Clause, and (3) his claim was *Teague*-barred and procedurally defaulted. On that last point, *Amici*—although not filing their brief in *Watts*, in which they lacked leave or consent to file and in which the

time to file had long since expired (see Sup. Ct. R. 37.2(a))—claimed that Watts, too, had procedurally defaulted on his resentencing claim by having failed to assert a constitutional challenge in his Section 2255 motion. As in *Watts*, the Solicitor General filed a brief in support of Hunter's petition. No. 09-122 U.S. Br. (U.S. Nov. 25, 2009). In addition to rejecting *Amici*'s various arguments against Hunter's entitlement to a COA (see *id.* at 8-24), the Solicitor General also responded to *Amici*'s "inappropriate[]" "arguments concerning the procedural history of a different case [*Watts*]," and in any event pointed out that those arguments "lack merit" because "Amici are incorrect that Watts failed to assert a due process challenge to his ACCA sentence in the district court" (*id.* at 22-23 n.5).

In both *Watts* and *Hunter*, the Solicitor General recommended to the Supreme Court how this case should proceed after a remand. After granting a COA on remand, the Solicitor General explained, this Court should further remand the case to the district court for its reconsideration of Watts's Section 2255 motion in light of *Begay*, *Archer*, and *Canty*. See No. 08-7757 U.S. Br. 11-12; No. 09-122 U.S. Br. 24-26. On such a remand, "the district court would also be entitled to consider, as a threshold question antecedent to the constitutional issue, whether relief should be granted as a statutory matter because . . . [Watts's] sentence exceeds the maximum term authorized," which is itself "a cognizable ground for

relief under Section 2255." No. 08-7757 U.S. Br. 13 (citing 28 U.S.C. § 2255(a)); see also 09-122 U.S. Br. 25.

On January 19, 2010, the Supreme Court granted Watts's petition for *certiorari*, vacated this Court's denial of Watts's request for a COA, and remanded the case for reconsideration in light of the position advanced by the Solicitor General in her May 8, 2009, brief. See *Watts* v. *United States*, 130 S. Ct. 1134 (2010) (mem.). The Supreme Court similarly disposed of Hunter's petition. See *Hunter* v. *United States*, 130 S. Ct. 1135 (2010) (mem.).

3. *The Certificate of Appealability*. On remand, this Court granted Watts a COA "to determine whether his sentence under the Armed Career Criminal Act, after the decisions in *Begay* v. *United States*, 553 U.S. 137 (2008), and *United States* v. *Canty*, 570 F.3d 1251 (11th Cir. 2009), violated his right to due process under the Fifth Amendment, U.S. Const. Amend V. See 28 U.S.C. § 2253(c)(2)-(3)." Order, *Watts* v. *United States*, No. 07-14422-HH (Mar. 4, 2010); see also Order, No. 07-13701 (Mar. 4, 2010) (granting COA in *Hunter* and *sua sponte* directing the Clerk to invite several legal academics to file an *amicus* brief in *Hunter* on remand).

Watts then moved to clarify (or, in the alternative, to modify) that COA to make plain that it encompasses what the Solicitor General called (at No. 08-7757 U.S. Br. 13) the "threshold question antecedent to the constitutional issue" in this

case: "whether [Watts's] sentence exceeds the maximum term authorized," which is an independent basis for relief under Section 2255(a). See Mot. for Clarification or Modification of Certificate of Appealability, No. 07-14422-HH (Mar. 24, 2010). Judge Marcus denied that motion, without further comment, on April 7, 2010.

With the government's agreement, Watts also moved for summary reversal by the original merits panel assigned to this case. Agreed Mtn. for Summary Reversal or Vacatur and for Remand, No. 07-14422-HH (Mar. 25, 2010). Watts explained that because all parties agree that he is now entitled to relief from his above-maximum sentence, reversal or vacatur of the decision below without full briefing and argument is appropriate. See *id.* at 1-3. This Court denied the motion for summary reversal in a 2-1 decision on May 3, 2010. Order, No. 07-14422-HH. Although the majority stated that it did "not necessarily disagree . . . that the ultimate resolution of this appeal may well be the relief sought by [Watts] in [his] unopposed motion," it nonetheless elected to observe "the regular appellate process in considering this appeal." *Id.* at 1-2. Judge Martin dissented on the ground that the government "has promised that it will not oppose the relief [Watts] seeks on statutory grounds" and "[p]resumably this path is not barred by law, as it is the path suggested by the Solicitor General in her brief to the United States Supreme Court in this case." *Id.* at 3. Judge Martin would have granted Watts's motion for

summary reversal, remanded this case to the district court, and allowed the parties to resolve the case there on statutory grounds. *Ibid.*

STANDARD OF REVIEW

In a Section 2255 proceeding, this Court reviews legal issues de novo and factual findings for clear error. *Thomas* v. *United States*, 572 F.3d 1300, 1303 (11th Cir. 2009). This appeal involves legal issues only.

SUMMARY OF ARGUMENT

Watts, the United States, and Circuit law are in agreement: the district court improperly sentenced Watts to 17½ years of imprisonment based on a now-abrogated legal precedent that Watts's prior conviction for carrying a concealed weapon qualified as a "violent felony" under the ACCA, triggering that statute's 15-year mandatory minimum. In fact, Watts should have been sentenced to no more than 10 years under 18 U.S.C. § 924(a)(2), and he is therefore serving a sentence 90 months more than the maximum authorized by law.

This Court should reverse the district court's denial of Watts's Section 2255 motion and remand for resentencing on either of two grounds.

First, the district court's imposition of a sentence in excess of the statutory maximum violates a defendant's right to due process of law. See *Whalen* v. *United States*, 445 U.S. 684, 690, 100 S. Ct. 1432, 1437 (1980); see also *United States* v. *Shipp*, 589 F.3d 1084 (10th Cir. 2009) (resolving a similar ACCA case on

that ground). The erroneous application of a mandatory minimum also unconstitutionally limits the sentencing court's discretion, compounding the due process violation in this case. See *Hicks* v. *Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227 (1980). And the application of a recidivist sentencing enhancement for which the defendant is actually innocent likewise deprives the defendant of his right to the due process of law. See *Fiore* v. *White*, 531 U.S. 225, 228-29, 121 S. Ct. 112, 113 (2001); *Gilbert*, 2010 WL 2473560, at *6-*7 & n.11. For all of these reasons, Watts's sentence is "in violation of the Constitution . . . of the United States," which is a ground for correction under Section 2255(a).

Second, this Court can avoid reaching the constitutional issues raised in this appeal by reversing and remanding on narrower, non-constitutional grounds. Under Section 2255(a), sufficient grounds for correction of a sentence are that it is "in excess of the maximum authorized by law," in "violation of the . . . laws of the United States," or "otherwise subject to collateral attack." Watts's sentence satisfies each of those independent standards. Because those determinations are threshold issues antecedent to the due process question, this Court can (and should) resolve this appeal on any of those grounds alone. Doing so accords with this Court's jurisdiction to resolve this Section 2255 appeal on its merits now that a COA has issued, and is consistent with sound principles of judicial administration and constitutional avoidance.

Even if this Court decides not to reverse the judgment below on any of the foregoing grounds, it should at least vacate the district court's decision and remand for reconsideration of the denial of Watts's Section 2255 Motion in light of intervening legal developments. The district court reached its decision without the benefit of the "circuit law busting, retroactive Supreme Court decision" in *Begay* (*Gilbert*, 2010 WL 2473560, at *5), and this Court's decisions in *Archer* and *Canty*, at a time when the district court was bound to follow Circuit law that was abrogated by those later decisions. Under these circumstances, this Court has ample authority to return this case to the district court for reconsideration in light of intervening changes in the law. See 28 U.S.C. § 2106 (court of appeals "may . . . vacate" or "set aside" any judgment and may remand for "such further proceedings . . . as may be just under the circumstances"); *Lawrence* v. *Chater*, 516 U.S. 163, 166-68, 116 S. Ct. 604, 606-07 (1996) (per curiam). Indeed, that course of action is a logical alternative to reversal because it would allow this Court to avoid questions regarding not only the scope of the Due Process Clause, but also the meaning of 28 U.S.C. § 2253(c) and the scope of the COA issued in this case. Moreover, the government has agreed that, on such a remand, it will not oppose Watts's resentencing.

Finally, even if this Court were to hold that Watts is not entitled to *any* relief under Section 2255 (including a vacatur order and remand), a fundamental defect

in Watts's sentence would nonetheless exist permitting Watts to obtain relief under 28 U.S.C. § 2241 and Section 2255's savings clause. See *Gilbert*, 2010 WL 2473560. In that event, judicial economy and fundamental fairness would be served by construing Watts's motion as a Section 2241 petition. On that basis, the Court could and should vacate the sentence and remand for a resentencing within the 10-year statutory maximum as permitted by 28 U.S.C. § 2106.

ARGUMENT

I. THIS COURT SHOULD REVERSE AND REMAND BECAUSE WATTS'S SENTENCE WAS IMPOSED IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES

The government concedes that Watts is serving a 17½-year (210 month) sentence for an offense that, in his case, carries a maximum prison term of 10 years (120 months). See No. 08-7757 U.S. Br. 9-10 (Watts's concealed-carry conviction is a "nonqualifying offense [under the ACCA] as a matter of law"). At sentencing, the district court erroneously held that Watts's prior conviction for carrying a concealed weapon was a "violent felony" under the ACCA, and on that incorrect premise it applied the ACCA's 15-year mandatory *minimum* (18 U.S.C. § 924(e)) rather than the otherwise applicable, 10-year statutory *maximum* (*id.* § 924(a)(2)). As this Court later held in *Canty*, however, carrying a concealed weapon is *not* a "violent felony" under the ACCA. 570 F.3d at 1255.

Watts's sentence to a term of imprisonment that exceeds the maximum term authorized by Congress for his offense is a violation of his fundamental right not to be deprived of liberty without due process of law. He is thus entitled to Section 2255 relief because his sentence is "in violation of the Constitution . . . of the United States." See 28 U.S.C. 2255(a). This Court should reverse the denial of Watts's Section 2255 motion, and remand for resentencing to a term less than 10 years.

1. A court that imposes a federal prison sentence exceeding the maximum term of imprisonment that Congress has authorized for a particular offense deprives the defendant of his liberty without due process of law. As this Court recently recognized, "[t]here can be no doubt that" an erroneous sentencing enhancement "calls into question the fundamental legality of [a defendant's] conviction and sentence," and for that reason the defect "may be of constitutional dimensions, since the right not to be imprisoned for a nonexistent offense is probably inherent in the modern interpretation of substantive due process." *Gilbert*, 2010 WL 2473560, at *6 & n.11; see also *Hammond* v. *Hall*, 586 F.3d 1289, 1335 n.19 (11th Cir. 2009) (referring to "the constitutional right not to be subject to a higher sentence than the law allows").

As the government has recognized, the Supreme Court has spoken clearly in this area. In *Whalen* v. *United States*, 445 U.S. 684, 100 S. Ct. 1432 (1980), the

Court held that the district court had misinterpreted a federal statute to permit consecutive sentences for two related offenses, and that it should have instead sentenced the defendant to concurrent sentences (resulting in a lower term of imprisonment overall). "[T]hat error," the Court held, "denied the petitioner his *constitutional right* to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." 445 U.S. at 690, 100 S. Ct. at 1437 (emphasis added). That is the precise constitutional error that Watts asserts here: Congress has "authorized" no more than 10 years' "punishment" for his "criminal conduct," and the district court's misinterpretation of the ACCA caused it to unconstitutionally deprive Watts of his liberty for 7½ years longer than that 10-year-maximum term of imprisonment.

To be sure, the sentencing error at issue in *Whalen* also violated the Fifth Amendment's "specific guarantee against double jeopardy." 445 U.S. at 689, 100 S. Ct. at 1436. But the Court went out of its way to explain that the imposition of a sentence unauthorized by Congress *also* infringed generally on "the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress." *Ibid.* When a district court "exceeds its own authority" by imposing a "punishment[] not authorized by Congress, it violates . . . the constitutional principle of separation of

powers in a manner that trenches particularly harshly on individual liberty." *Ibid.*; see also 445 U.S. at 689 n.4, 100 S. Ct. at 1436 n.4 (explaining that, likewise, "[t]he Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit state courts from depriving persons of liberty or property as a punishment for criminal conduct except to the extent authorized by state law"). The Supreme Court could hardly have been clearer: There is a "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." 445 U.S. at 690, 100 S. Ct. at 1437. On *Whalen*'s authority alone, therefore, this Court should reverse the district court's denial of Watts's Section 2255 motion.

Other circuits have faithfully implemented the Supreme Court's teachings in *Whalen*. The Tenth Circuit, for example, recently reversed the denial of a Section 2255 motion that raised the same due process claim at issue in this case. See *Shipp*, 589 F.3d 1084. Like Watts, Shipp had been convicted of violating Section 922(g)(1). Shipp had been sentenced to more than 15 years' imprisonment under the ACCA, based on the district court's holding that his conviction for walkaway escape from a penal institution was a "violent felony" under the statute. Shipp argued on direct appeal that his escape offense was not a predicate "violent felony" under the ACCA, but the Tenth Circuit affirmed in light of then-prevailing circuit precedent. See *id.* at 1086. Shipp then filed a Section 2255 motion, again

asserting that a walkaway escape is not a "violent felony." The district court denied the motion, and Shipp applied for a COA. While that petition was pending, the Supreme Court decided *Chambers* v. *United States*, 129 S. Ct. 687 (2009), which held that the crime of failing to report for penal confinement is not, in fact, a "violent felony." *Shipp*, 589 F.3d at 1086-87.

The Tenth Circuit reversed the denial of Shipp's Section 2255 petition, and remanded the case with directions to correct the erroneously ACCA-enhanced sentence in light of *Chambers*. 589 F.3d at 1091. The court held that "[i]ndeed, 'due process requires . . . that the sentence for the crime of conviction not exceed the statutory maximum." *Id.* at 1088 (quoting *United States* v. *Grier*, 475 F.3d 556, 573 (3d Cir. 2007) (en banc) (Rendell, J., concurring)). The Tenth Circuit concluded that—as here—there was no longer any doubt that the defendant's sentence improperly exceeded Section 924(a)(2)'s 10-year statutory maximum, and that Shipp therefore had "received 'a punishment that the law cannot impose upon him.'" *Id.* at 1091 (quoting *Schriro* v. *Summerlin*, 542 U.S. 348, 352, 124 S. Ct. 2519, 2523 (2004)). "Where [the defendant] was sentenced beyond the statutory maximum for his offense of conviction," the court held, "his due process rights were violated." *Id.* at 1091. The same is true here.

2. The due process problem identified in *Whalen* is compounded in this case, moreover, because the district court also set an erroneous *floor* on its

sentencing discretion. As the Supreme Court concluded in *Hicks* v. *Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227 (1980), a defendant is entitled under due process principles to a sentence that is based on the full range of permissible sentencing discretion authorized by law. In *Hicks*, the trial court had instructed the jury (responsible for sentencing under Oklahoma law) that a guilty verdict carried a mandatory minimum sentence of 40 years for the defendant under the state's habitual offender statute. 447 U.S. at 344-45, 100 S. Ct. at 2228-29. The jury imposed a sentence at the 40-year minimum. *Ibid.* After sentencing, however, a state court held that the habitual offender statute's mandatory minimum was unconstitutional, and the defendant sought resentencing on direct appeal. The state appellate court conceded the unconstitutionality of the mandatory minimum that had been applied, but it refused to order a resentencing because the defendant's 40-year sentence was—unlike in Watts's case—nonetheless below the still-applicable statutory maximum.

The Supreme Court reversed. Where the law has provided "for the imposition of criminal punishment in the discretion" of a sentencing entity—a jury in *Hicks* and the district court in this case—"[t]he defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by [the sentencing entity] in the exercise of its statutory discretion." 447 U.S. at 346, 100 S. Ct. at 2229. The guarantees of due process—

in *Hicks* provided by the Fourteenth Amendment and here secured by the Fifth Amendment—preserve that liberty interest "against arbitrary deprivation by the State." *Ibid.* The erroneous application of a mandatory minimum had deprived Hicks of the full range of available sentencing discretion—the exercise of which may well have resulted in a sentence less than 40 years. That, the Court held, was "an arbitrary disregard of the petitioner's right to liberty" and "a denial of due process of law." *Ibid*; see also 447 U.S. at 348, 100 S. Ct. at 2230 (Rehnquist, J., dissenting) (disputing whether Oklahoma's mandatory minimum for habitual offenders was, in fact, unconstitutional, but explaining that absent that disagreement he would have "less difficulty agreeing with the Court that petitioner was entitled to a new jury sentencing under principles of due process").

So, too, here. It is indisputable that Watts was deprived of the full range of sentencing discretion authorized by law. Operating under the mistaken view that Watts was subject to a mandatory enhancement under the ACCA, the district court did not realize that it had any discretion to impose a sentence less than 15 years (and mistakenly believed that it lacked such authority).

3. There is still more. To paraphrase this Court's recent decision in *Gilbert*, *Begay* and *Canty* have made it clear that Watts is not now, and never has been, an armed career criminal under the ACCA. Like Watts, Gilbert was given a sentence that had been erroneously enhanced under the career offender provision of the

sentencing guidelines based on the conclusion that a prior conviction for carrying a concealed weapon is a "crime of violence." *Gilbert*, 2010 WL 2473560, at *1. After the decision in *Begay*, this Court granted habeas corpus relief under Section 2241,[1] vacated his erroneous sentence, and remanded his case for resentencing without the career offender enhancement. *Id.* at *8-*9. In doing so, this Court explained that an illegal career offender enhancement is a sentence for "'an act that the law does not make criminal'" and "calls into question the fundamental legality of [the defendant's] conviction and sentence." *Id.* at *6 (quoting *Davis* v. *United States*, 417 U.S. 333, 346, 94 S. Ct. 2298, 2305 (1974)). As *Gilbert* makes clear, Watts is "innocent of the statutory 'offense'" of being an armed career criminal—*i.e.*, "[h]is sentence was enhanced . . . based on [the] nonexistent offense" of being

[1] Gilbert had been sentenced as a career offender under Section 4B1.1 of the Sentencing Guidelines based on two prior convictions for "crime[s] of violence." 2010 WL 2473560, at *1. On direct appeal and in an initial Section 2255 motion, Gilbert unsuccessfully argued that the sentencing enhancement was illegal because his prior conviction for carrying a concealed weapon was not a "crime of violence." *Ibid.* After the Supreme Court's "circuit law busting, retroactive . . . decision" in *Begay* (*id.* at *5), Gilbert filed a new Section 2255 motion. The district court characterized that motion as a "second or successive motion," and dismissed it under 28 U.S.C. § 2255(h) because the Supreme Court had not *expressly* made *Begay* retroactive to cases on collateral review. 2010 WL 2473560, at *3. In his reply brief to the district court, Gilbert suggested that his motion could be treated, in the alternative, as a petition for a writ of habeas corpus under Section 2241, because federal prisoners can seek such relief under Section 2255's "savings clause" when "the remedy by [Section 2255] motion is inadequate or ineffective to test the legality of [the] detention." 28 U.S.C. § 2255(e). The district court also denied that proposal, and this Court reversed. 2010 WL 2473560, at *3.

an armed career criminal with only two prior "violent felon[ies]." *Ibid.*; 18 U.S.C. § 924(e).

A sentence based on a recidivist enhancement for which one is actually innocent is a due process violation. As the Supreme Court has held, the government's "continued incarceration" of a defendant on conviction for "a crime without proving the elements" violates due process, leading to "[t]he simple, inevitable conclusion" that the "Federal Constitution's demands" have not been satisfied. *Fiore*, 531 U.S. at 228-29 (2001); see also *Thompson* v. *City of Louisville*, 362 U.S. 199, 206, 80 S. Ct. 624, 629 (1960) ("[I]t is a violation of due process to convict and punish a man without evidence of his guilt."). This Court recognized as much in *Gilbert*, in which it cited *Fiore* and explained that "the right not to be imprisoned for a nonexistent defense is probably inherent in the modern interpretation of substantive due process." See 2010 WL 2473560, at *6 n.11. This, too, is a ground for concluding that Watt's 17½-year sentence was imposed "in violation of the Constitution . . . of the United States." 28 U.S.C. § 2255(a).

In sum, punishing Watts for 7½ years more than the maximum term authorized by law, and failing to afford him the district court's discretion to sentence him *below* the ACCA's 15-year mandatory minimum, deprived Watts of his liberty—at least 90 months of it—without due process of law. As *Whalen* and *Hicks* make plain, the imposition of a sentence above the statutory maximum,

pursuant to an improperly-applied mandatory minimum, and without consideration of sentencing discretion actually possessed by the sentencing authority under the law, is a cognizable due process violation. And in light of *Gilbert*, Watts's actual innocence of the ACCA enhancement is yet another reason that his ACCA-enhanced sentence tramples on his due process rights.

4. The various arguments pressed by *Amici* in their brief to the Supreme Court in *Hunter* in no way detract from the foregoing conclusions.[2] Watts does not assert "a due-process right to a sentence that is free of *any* legal error that increases his punishment." No. 09-122 *Amici* Br. 8. Nor is his claim one of mere "error[] in defining the legally permissible sentencing range" from *within* the district court's statutory authority. *Id.* at 14; see also *Hunter*, 559 F.3d 1188, 1190, vacated, 130 S. Ct. 1135. Indeed, this Court in *Gilbert* recently rejected that very argument: a "*Begay*/[*Canty*] claim does not assert mere factual error in the application of the sentencing guidelines," but rather "asserts error of fundamental dimension—enhancement of [a] sentence based on a nonexistent offense"—that is readily

[2] Although *Amici* filed their Supreme Court brief only in *Hunter*, they chose to attack Watts's then-pending petition for certiorari in the same document. See *supra* pages 15-16. Presumably, if *Amici* accept this Court's invitation to file a brief in *Hunter*, which has been consolidated with this case, they will advance the same arguments that they made in the Supreme Court. For the record, Watts does not consent to the filing of such a brief in *his* case (see Fed. R. App. P. 29(a))—although such procedural niceties did not deter *Amici* in front of the Supreme Court (see No. 08-7757 U.S. Br. 22-23 n.5 (calling *Amici*'s arguments in *Hunter* about Watts's case "inappropriate")).

cognizable on collateral attack. 2010 WL 2473560, at *5; see also *Welch* v. *United States*, 604 F.3d 408, 412 (7th Cir. 2010) ("[A]rguments of the sort at issue here, where a change in law reduces the defendant's statutory maximum sentence below the imposed sentence, have long been cognizable on collateral review." (internal quotation marks omitted)). Accordingly, this Court should hold that Watts is entitled to the correction of his sentence because its imposition violated his due process rights "in violation of the Constitution of the United States." 28 U.S.C. § 2255(a).

No procedural bar prevents this Court from granting Watts the relief that he seeks, and to which the government concedes that he is entitled, and neither law-of-the-case nor non-retroactivity principles prevent this Court from reaching that result. The district court denied Watts's Section 2255 application on the ground that its overruling of Watts's sentencing objection, and this Court's affirmance of that holding on direct appeal, were law of the case and not subject to "re-litigation" on collateral review. See R.E. Tab 10. But law-of-the-case principles no longer hold sway here because there has been a change in controlling law. See *Davis* 417 U.S. at 342, 94 S. Ct. at 2303 (Section 2255 applicant is entitled to the benefit of any change in law since his direct appeal); *Thomas*, 572 F.3d at 1304 (law of the case doctrine is binding in a Section 2255 proceeding "'unless . . . an intervening change in the controlling law dictates a different result, or the appellate decision is

clearly erroneous and, if implemented, would work a manifest injustice'" (quoting *Litman* v. *Mass. Mut. Life Ins. Co.*, 825 F.2d 1506, 1510 (11th Cir. 1987)).

Equally inapposite in Watts's appeal are the non-retroactivity principles associated with *Teague* v. *Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). Even if *Teague* applies to Section 2255 cases (but cf. *Danforth* v. *Minnesota*, 552 U.S. 264, 269 n.4, 128 S. Ct. 1029, 1034 n.4 (2008) (reserving that question)), this Court recently called *Begay* a "circuit law busting, retroactive Supreme Court decision" (*Gilbert*, 2010 WL 2473560, at *5), and the Seventh Circuit has reached the same conclusion (*Welch*, 604 F.3d at 413-14). See also *Shipp*, 589 F.3d at 1088-91 (applying a similar ACCA decision—*Chambers* v. *United States*, 129 S. Ct. 687 (2009)—retroactively). And, in any event, the government has expressly waived any possible reliance on *Teague* as a bar to collateral review in this case. See No 08-7757 U.S. Br. 13 n.6; see also *Danforth*, 552 U.S. at 289, 128 S. Ct. at 1046 ("States can waive a *Teague* defense, during the course of litigation, by expressly choosing not to rely on it.").[3]

[3] In the Supreme Court, the *Hunter Amici* mischaracterized the record in claiming that Watts was procedurally barred from gaining relief under Section 2255. No. 09-122 *Amici* Br. 23-25; *supra* pages 15-16. As Watts (and the government) pointed out in the Supreme Court, Watts has raised and preserved his claims at every stage. No. 08-7757 Pet. Supp. Br. 5-6 (Dec. 8, 2009); No. 09-122 U.S. Br. 22-23 n.25. And, needless to say, the record in Watts's case is distinct and must be analyzed as such.

II. THIS COURT SHOULD REVERSE AND REMAND BECAUSE WATTS'S SENTENCE EXCEEDS THE MAXIMUM TERM AUTHORIZED BY LAW, IS IN VIOLATION OF THE LAWS OF THE UNITED STATES, AND IS OTHERWISE SUBJECT TO COLLATERAL ATTACK

In addition to the constitutional violation, Watts's sentence is "in excess of the maximum authorized by law," "in violation of . . . the laws of the United States," and "otherwise subject to collateral attack." Those provisions are grounds for relief antecedent to Watts's due process claim, and offer sufficient reasons, in their own right, for this Court to reverse the decision below and remand for resentencing. See 28 U.S.C. § 2255(a). We respectfully submit that this Court need address no more than one of those threshold issues to resolve this appeal in Watts's favor. Doing so, moreover, would be consistent with prudential considerations favoring constitutional avoidance.

1. Before reaching the due process implications of an above-maximum sentence, this Court must first conclude that Watts's sentence exceeds the statutory cap. That conclusion is undisputed by the government, compelled by *Canty*, and inexorably leads to multiple grounds for relief under Section 2255(a). First, a 17½-year sentence for an offense carrying a 10-year maximum term of imprisonment is a "sentence . . . in excess of the maximum authorized by law." 28 U.S.C. § 2255(a). Second, the above-maximum sentence is "in violation of the . . . laws of the United States" for the same reason. *Ibid.* And third, this Court's recent

decision in *Gilbert* compels the conclusion that Watts's sentence is "otherwise subject to collateral attack" (*ibid.*) because he is "actually innocent" of the ACCA enhancement. See 2010 WL 2473560; see also *United States* v. *Angelos*, 763 F.3d 859, 861 (7th Cir. 1985) (Where a defendant "can show that under no possible view of his conduct was he guilty of a federal crime, the [sentence] will be set aside as 'otherwise subject to collateral attack.'").

As the Solicitor General explained to the Supreme Court, the statutory basis for Watts's Section 2255 relief is "a threshold question antecedent to the constitutional issue" concerning due process principles. See No. 08-7757 U.S. Br. at 13. Indeed, the statutory and constitutional bases for correcting Watts's sentence are practically joined at the hip: to address Watts's claim that imposition of a sentence above the statutory maximum violates due process, the Court must first determine whether Watts has, in fact, received a sentence that exceeds the maximum term that Congress authorized. The latter determination—on which *Canty* predisposes a ruling in Watts's favor—provides a sufficient and independent ground for granting Watts's Section 2255 motion. See 28 U.S.C. § 2255(a). Resolving this case on that ground also "accord[s] with bedrock principles of constitutional avoidance" (No. 08-7757 U.S. Br. 13-14 (citing *Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)); see also *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 345, 118 S. Ct. 1279, 1283 (1998) (holding

that courts should first ascertain whether there is a statutory basis on which to resolve a case before undertaking a constitutional inquiry)), and allows this Court and the parties to avoid "[u]nnecessary litigation of constitutional issues" (*Pearson* v. *Callahan*, 129 S. Ct. 808, 818 (2009); see also *id.* at 821 (noting "the older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." (internal quotation marks omitted)).

2. In proceedings before the Supreme Court, the *Hunter Amici* suggested that 28 U.S.C. § 2253(c) restricts this Court's jurisdiction to grant an appeal on any of those statutory grounds. See No. 09-122 *Amici* Br. 12-13. But as we explain below, that objection rests on a misguided view of the statute. Moreover, this Circuit's practice of addressing Section 2255 appeals only on the grounds specified in a COA is no bar to addressing a plainly implicated, threshold ground for relief. Concerns that motivate the limitation to specified issues—unfair surprise and everything-but-the-kitchen-sink habeas appeals—are not implicated by consideration of Watts's non-constitutional grounds for relief. In short, nothing about Section 2253(c)'s COA requirement prevents this Court from reversing on the ground that Watts's sentence is "in excess of the maximum authorized" by 18 U.S.C. 924(a)(2) or that it is "in violation of . . . the laws of the United States" and "otherwise subject to collateral attack."

On March 4, 2010, on remand from the Supreme Court, this Court granted Watts a COA. Section 2253(c) makes such a COA prerequisite to an appeal on the merits, stating that "an appeal may not be taken . . . from . . . the final order in a proceeding under section 2255," "[u]nless a circuit justice or judge issues a [COA]." 28 U.S.C. § 2253(c)(1). Moreover, a COA "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). To ensure that courts pay heed to that requirement, and to allow decisions to grant COAs to be reviewed effectively by superior courts, Section 2253(c)(3) requires the judge or justice who issues a COA to "indicate which specific issue or issues satisfy" the "substantial showing of the denial of a constitutional right" filter.[4]

[4] It would be a mistake to view Section 2253(c)(3) as having a purpose greater than that. As leading habeas corpus scholars have explained:

> Section 2253(c)(3) does not appear to limit appeals, much less the jurisdiction to hear them, to issues certified as appealable by the district court or a circuit judge or court. . . . On its face, that is, [Section 2253(c)(3)] sets a *floor* on additional review, which is to occur only in cases in which a certifying judge has determined that one or more specified issues warrant an appeal, but does not set a *ceiling* on review by limiting it to the specified issues. As is true of other rules governing habeas corpus practice, moreover, this provision's facially clear "floor" requirement of an express specification of one or more issues deemed sufficient to justify additional review serves an obvious purpose—facilitation of appellate review of the decision to permit further proceedings—without reading it to do more than it says and to include a "ceiling" limitation on the particular issues to be considered upon further review.

Congress added this COA requirement to Section 2255 proceedings as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")), and this Court has recognized that it

> is a threshold or gateway requirement which serves to filter out from the appellate process *cases* in which the possibility of reversal is too unlikely to justify the cost in the system of a full appellate examination. See *Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S. Ct. 1029, 1040 (2003) (By enacting the certificate of appealability provisions in the AEDPA, 'Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not.').

Gonzalez v. *Sec'y for Dep't of Corrections*, 366 F.3d 1253, 1264 (11th Cir. 2004) (emphasis added). Here, Watts's COA specifies such a "substantial" issue that satisfies Section 2253(c)(2)'s requirement: "whether his sentence under the Armed Career Criminal Act, after the decisions in *Begay* . . . and . . . *Canty* . . . violated his right to due process under the Fifth Amendment." Order at 1-2, No. 07-14422-HH (11th Cir. Mar. 10, 2004). Watts's "case" has been identified, therefore, as one "in which the possibility of reversal" is sufficiently "substantial" to warrant this Court's full review. *Gonzalez*, 366 F.3d at 1264; see also 28 U.S.C. § 2253(c)(2). Now that the COA has issued, this Court may proceed to the merits and reverse on the ground that Watts's sentence exceeds the statutory maximum, is in violation of the laws of the United States, and is otherwise subject to collateral

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2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 35.4b, at 1763-64 (2005).

attack—each an independent ground for Section 2255 relief that is antecedent to the closely-related due process issue identified in the COA.

That view of the Court's jurisdiction is consistent with the statutory framework. Section 2255(a) sets forth multiple grounds for collateral attack on a sentence—including that the sentence is above the statutory maximum. *Any* meritorious collateral attack under that section implicates either the violation of a constitutional right or "a 'fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure.'" *Burke* v. *United States*, 152 F.3d 1329, 1331 (11th Cir. 1998) (quoting *Reed* v. *Farley*, 512 U.S. 339, 348, 114 S. Ct. 2291, 2297 (1994)). Once an "order is entered on the motion," Section 2255(d) provides that "[a]n appeal may be taken to the court of appeals . . . as from a final judgment on application for a writ of habeas corpus." And Section 2255(d) does not limit such an appeal to only a subset of Section 2255(a)'s grounds for relief. Similarly, Section 2253(a) states that "[i]n a . . . proceeding under section 2255 before a district judge, *the final order* shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held." Once again, the statute on its face contains no limitation on the scope of such an appeal.

In light of those provisions, there is no reason to imply that Section 2253(c)(3)'s gatekeeping function places any wider constraint on appellate

jurisdiction in Section 2255 proceedings once its express function has been satisfied. Any such implication is inconsistent with the well-established principle that implied limitations on previously-extant appellate jurisdiction are strongly disfavored. See, *e.g.*, *Felker* v. *Turpin*, 518 U.S. 651, 660, 116 S. Ct. 2333, 2338 (1996). Moreover, it would be inexplicable for Congress to have intended that *state* prisoners could turn to the federal appellate courts when challenging "fundamental defect[s]" stemming from federal statutory violations in their conviction or sentence while barring *federal* prisoners from doing so. See *Adams* v. *Lankford*, 788 F.2d 1493 (11th Cir. 1986) (permitting federal appeal after district court's denial of writ of habeas corpus to state prisoner on claim that state conviction was procured only by means of core violations of the federal wiretap statutes).

Nor is there good reason to believe that Congress intended Section 2253(c) of the AEDPA to extinguish the appeal rights of federal prisoners with respect to statutory violations. Section 2253(c)'s requirement that both federal and state prisoners obtain a "certificate of appealability" is modeled after the pre-AEDPA requirement that state prisoners obtain a "certificate of probable cause" to qualify for appellate review. *Barefoot* v. *Estelle*, 463 U.S. 880, 103 S. Ct. 3383 (1983), held that a prisoner met the prerequisites for a certificate of probable cause by making a "substantial showing of the denial of a *federal* right." 463 U.S. at 881,

103 S. Ct. at 3388 (emphasis added). Congress used that term—"federal right"—to express the same concept in related provisions of the AEDPA, making it apparent that it viewed the term "constitutional right" to be interchangeable with the term "federal right" in this context. See, *e.g.*, 28 U.S.C. § 2262(b)(3) (describing authorization to appeal as requiring a "substantial showing of the denial of a Federal right"); see also 1 HERTZ & LIEBMAN § 9.1, at 495-96 ("The haphazard—and, at times, downright arbitrary—nature of the discrepancies among these provisions . . . should make courts think twice, even in an era of 'plain meaning' statutory interpretation, before placing too much emphasis on their nuances."). There is no indication that Congress intended to alter the *Barefoot* standard; to the contrary, the legislative history of the AEDPA shows that Congress meant to codify the *Barefoot* "federal right" standard for entitlement to an appeal. See H.R. REP. NO. 104-23, at 9 (1995) ("The bill thus enacts the standard of *Barefoot* v. *Estelle*, 463 U.S. 880 (1983).").[5]

Furthermore, threshold non-constitutional questions are routinely the basis for reversing a district court's denial of a Section 2255 motion. In *Slack* v. *McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 1603 (2000), for instance, "the

[5] Several courts have recognized that Section 2253(c) is correctly read to permit appeals that raise purely statutory claims. See, *e.g.*, *Gomez* v. *Dretke*, 422 F.3d 264, 267-68 (5th Cir. 2005) (holding that Congress's use of the term "constitutional right" in Section 2253(c) falls short of the "clear statement" needed to eliminate the appeal rights of federal prisoners on statutory grounds).

State [of Nevada] contend[ed] that no appeal can be taken if the District Court relies on procedural grounds to dismiss the petition" and the Supreme Court "reject[ed] this interpretation" of Section 2253(c). In *Slack*, the Court held that the appeal could proceed so long as the appellant could show that both the procedural grounds relied on by the district court, and the constitutional issue that the district court did not reach, were "substantial." 529 U.S. at 484-85, 120 S. Ct. at 1604. And the Court held that it could dispose of such an appeal on the procedural grounds *alone*, without ever reaching the constitutional question. See *ibid.* As the Seventh Circuit has explained, *Slack* authorizes courts to resolve a Section 2255 appeal based on a substantial statutory claim so long as a COA is granted on a substantial constitutional claim. See *Beyer* v. *Litscher*, 306 F.3d 504, 506 (7th Cir. 2002) ("If the certificate identifies [a substantial constitutional issue,] *Slack* held, then the judge may add a substantial statutory claim for resolution under supplemental jurisdiction."); *Ramunno* v. *United States*, 264 F.3d 723, 725 (7th Cir. 2001) ("If the case presents a substantial constitutional question, then an independently substantial statutory issue may come along for the ride. This is one holding of *Slack*."); *Owens* v. *Boyd*, 235 F.3d 356, 358 (7th Cir. 2000) ("If the prisoner's underlying constitutional objection . . . is itself substantial, then the district court may issue a certificate on *that* issue . . . and append the statutory

ground as an antecedent issue to be resolved on appeal if it, too, is substantial." (citing *Slack*, 529 U.S. at 484-85, 120 S. Ct. at 1604)).

Consistent with *Slack*, this Court, too, has disposed of Section 2255 appeals on non-constitutional grounds. In *United States* v. *Montano*, 398 F.3d 1276 (11th Cir. 2005), for example, this Court reversed and remanded the denial of a Section 2255 motion based *solely* on its construction of Section 924(c) (which criminalizes certain use or possession of a gun during a crime of violence or drug trafficking crime). This Court noted, in passing, that Montano's motion for leave to file an untimely Section 2255 motion had "formally claimed a Fifth Amendment due process violation," but this Court's decision on appeal turned *entirely* on whether, under a correct construction of Section 924(c), Montano was actually innocent of the offense. *Id.* at 1278 n.1; see also *id.* at 1278 (COA presented the question: "[D]oes bartering guns for drugs constitute 'use' of a firearm within the meaning of § 924(e)?"). Likewise, in *Battle* v. *United States*, 419 F.3d 1292 (11th Cir. 2005), this Court addressed six different challenges raised by a Section 2255 movant; four were constitutional in nature, but two were strictly statutory, see *id.* at 1301-02 (addressing claimed violations of Rule 24(c) of the Federal Rules of Criminal Procedure (regarding the discharge of alternate jurors) and of 18 U.S.C. § 3593(b)(1) (providing that a sentencing hearing be conducted "before the jury that determined the defendant's guilt")).

We recognize that this Court has applied a prudential rule that its "scope of review is limited to the issues specified in the COA." *Rhode* v. *United States*, 583 F.3d 1289, 1290-91 (11th Cir. 2009) (citing *Murray* v. *United States*, 145 F.3d 1249, 1250 (11th Cir. 1998)). That rule is inapplicable, however, where the strictly unspecified issue is a necessary antecedent to the specified one (as in this case). This is not a case, for example, in which an appellant has attempted to raise a brand new, entirely distinct, and insubstantial ground for appeal in an opening brief. Cf. *Rhode*, 583 F.3d at 1290-91 (declining to consider petitioner's wide-ranging ineffective assistance claims that were well outside the scope of the COA); *Maharaj* v. *Sec'y for the Dep't of Corr.*, 432 F.3d 1292, 1302-03 & n.1 (11th Cir. 2005) (declining a request to brief, among other things, allegations of prosecutorial misconduct, *Giglio* violations, and international law transgressions where the COA specified only *Brady*-related issues and ineffective assistance of counsel claims). The statutory ground is part and parcel of the constitutional one, and therefore it is within the scope of the COA as issued.

But even if this Court's prudential rule is deemed to apply, the Court should expand the COA so that it can resolve the appeal on the statutory ground for Watts's Section 2255 motion, consistent with principles of constitutional avoidance. See Fed. R. App. P. 27(c); 11th Cir. R. 27-1(g); see also *Clark* v. *Crosby*, 335 F.3d 1305, 1307 (11th Cir. 2003) (expanding a COA after oral

argument); *Jones* v. *United States*, 224 F.3d 1251, 1256 (11th Cir. 2000) (expanding a COA after petitioner's request); *Welch*, 604 F.3d at 411-12 (expanding the scope of a COA to consider a statutory, ACCA-based sentencing claim). There is no surprise here: Out of an abundance of caution, Watts moved at the first opportunity—and prior to briefing on the merits—for a clarification or expansion of the scope of his COA. (Judge Marcus denied that motion.) Compare *Jones*, 224 F.3d at 1256 (expanding COA where petitioner asked for reconsideration of a COA's limitations) with *Hodges* v. *Att'y Gen., State of Fla.*, 506 F.3d 1337, 1339-40 (11th Cir. 2007) (faulting a Section 2255 appellant for failing to seek reconsideration of a limited COA). Moreover, at least one other circuit routinely treats an appellant's briefing of issues not specified in the COA as an implicit (and sufficient) request for an expansion of the COA, see, *e.g.*, *Rittenhouse* v. *Battles*, 263 F.3d 689, 693 (7th Cir. 2001); *Ouska* v. *Cahill-Masching*, 246 F.3d 1036, 1045-46 (7th Cir. 2001). To the extent that any clarification or expansion of Watts's COA is necessary to facilitate this Court's resolution of this case, Watts requests such a clarification or expansion of the COA to encompass the threshold issue to his purely constitutional claim for Section 2255 relief. See 11th Cir. R. 27-1(g) (merits panel may "alter, amend, or vacate" orders relating to previously-decided motions).

III. IF THE COURT DECLINES TO REVERSE, IT SHOULD AT LEAST VACATE AND REMAND UNDER EITHER SECTION 2255 OR SECTION 2241

1. We respectfully submit that reversal and remand for resentencing under Section 2255(a) is the most direct and equitable resolution of this appeal. There already has been protracted litigation over Watts's Section 2255 motion and there is no reason to invite yet another round of litigation before the district court. That is especially so in an advisory guidelines regime in which Watts has served a significant portion of his sentence. And the government concedes that Watts's sentence is unlawful and agrees that he should be resentenced to a lower sentence on remand.

If the Court for whatever reason declines to reverse, however, it should at least vacate the district court's denial of Watts's Section 2255 motion and remand the matter for reconsideration in light of *Canty* and *Begay*. The government has suggested that this Court do precisely that. See No. 08-7757 U.S. Br. 13-14. Vacatur is an appropriate remedy in Section 2255 appeals (see, *e.g.*, *Mateo* v. *United States*, 310 F.3d 39, 42 (1st Cir. 2002) (granting COA, summarily vacating decision below dismissing the Section 2255 petition, and remanding to district court for further proceedings)), and is particularly appropriate where, as here, the district court has not had an opportunity to consider intervening changes in Circuit law that bear on the petitioner's motion (see *Lawrence*, 516 U.S. at 167-68,

116 S. Ct. at 606-07 (1996)). See also 28 U.S.C. § 2106; *Thomas* v. *United States*, 460 F.2d 1222, 1223-24 (5th Cir. 1972) (vacating denial of Section 2255 motion and remanding for reconsideration in light of Supreme Court decision rendered while appeal was pending); No. 08-7757 U.S. Br. 13 (recommending that approach in Watts's case). A vacatur and remand would have the further advantage of allowing this Court to avoid deciding the various issues raised in this appeal concerning the scope of the Due Process Clause, the meaning of 28 U.S.C. § 2253(c), and the scope of the COA issued in this case.

2. If this Court concludes for any reason that Watts cannot take advantage of *Begay* and *Canty* on appeal to obtain relief from his above-maximum sentence on either Section 2255(a)'s statutory or constitutional grounds, then this Court can—and should—still vacate the decision below and remand for resentencing *under Section 2241*. If Section 2255 cannot be an avenue for Watts's relief, then there would be a "fundamental defect in [his] . . . sentence accompanied by no prior or present opportunity for review and correction," which would "trigger[] § 2255's savings clause" and allow Watts to obtain a writ of habeas corpus under 28 U.S.C. § 2241. *Gilbert*, 2010 WL 2473560, at *5; *supra* pages 28-30 & n.1 (discussing *Gilbert*). There would be no reason for delay while Watts initiated a new Section 2241 proceeding in the district court. For reasons of judicial efficiency and fundamental fairness, therefore, this Court should construe Watts's

motion as a Section 2241 petition for a writ of habeas corpus, vacate Watts's sentence, and remand for a resentencing within the 10-year statutory maximum if it is not inclined to grant relief under Section 2255. See 28 U.S.C. § 2106 (authorizing an appellate court to "affirm, modify, vacate, set aside or reverse any judgment" and to "remand the cause and direct the entry of such appropriate judgment, decree, or order . . . as may be just under the circumstances").

CONCLUSION

For the foregoing reasons, this Court should reverse (or at least vacate) the district court's denial of Watts's Section 2255 motion, and remand the case for resentencing below a ten-year maximum term consistent with Section 924(a)(2).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) and Eleventh Circuit Rule 32-4. This brief contains 11,985 words.

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Matthew M. Madden

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2010, I sent the foregoing via Federal Express to the Clerk of the Court, as well as to the following recipients:

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