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

REPLY BRIEF OF PETITIONER-APPELLANT DARIAN ANTWAN WATTS

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REPLY BRIEF OF PETITIONER-APPELLANT WATTS

The government agrees that Darian Antwan Watts's 210-month sentence is "unauthorized, illegal, and unconstitutional" because "the constitutional guarantee of due process of law allows a court to deprive a convicted offender of his liberty only as authorized by Congress." U.S. Br. 7. Although many grounds for relief exist in this case, this Court need only apply *Whalen* v. *United States*, 445 U.S. 684, 100 S. Ct. 1432 (1980), to resolve it. In *Whalen*, the Supreme Court held that a defendant has a "*constitutional right* to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress," and therefore that "federal courts[] may *constitutionally* impose only such punishments as Congress has seen fit to authorize." 445 U.S. at 689-90 & n.4, 100 S. Ct. at 1436-37 & n.4 (emphasis added). That fundamental principle—premised on the separation of powers between the courts and Congress—is "determinative of the question presented." U.S. Br. 7.

For their part, *Amici* stand on the startling premise that a term of imprisonment exceeding the statutory maximum by 7½ years does not reflect error "egregious" enough to implicate the Due Process Clause. See *Amici* Br. 5. That premise depends largely on *Amici*'s conflation of this case with inapposite cases involving mere "sentencing error." Those cases, however, revolve around the unexceptional proposition that an erroneous sentence falling within the

congressionally authorized statutory maximum, but mistakenly calculated under the Guidelines to be higher than it should have been, is generally not a cognizable ground for Section 2255 *at all*. The courts in those cases simply had no occasion to address the issue before *this* Court: whether a sentence that *is* in excess of the statutory maximum violates a defendant's due-process rights.

In short, *Whalen* dictates reversal. No procedural or non-retroactivity defenses are available to the government in Watts's case. And if they were, the government has expressly waived them. Accordingly, this Court should remand for resentencing to a term of imprisonment no greater than the 10-year statutory maximum applicable to Watts's offense.

Although *Whalen* alone compels a reversal and remand, Watts has at least four additional, independent bases for relief. *First*, despite the government's reluctance to say so, a due process violation exists in this case based on at least two theories independent of *Whalen*. *Second*, this Court may reverse on the *Begay*/*Canty* statutory ground alone, thereby avoiding the constitutional issue raised in the certificate of appealability ("COA"). Once a COA has properly issued, nothing in Section 2253(c) prohibits this Court from resolving an appeal properly before it on any ground cognizable under Section 2255. And if this Court concludes that it must expand the scope of the COA before addressing the purely statutory ground for relief, it has the authority to do so. *Third*, this Court may

vacate the decision below because of intervening, controlling legal developments never considered by the lower court and order a remand so that the district court may consider, in the first instance, the effect of *Begay* and *Canty*. See 28 U.S.C. § 2106. *Fourth*, if this Court were to conclude for some reason that its hands are tied and that Watts is not entitled to relief under Section 2255, then it may treat this matter as one arising under Section 2241 and remand for resentencing on that basis.[1]

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[1] In their tireless efforts to ensure that Mr. Watts remains locked up serving an unlawful sentence, *Amici* law scholars (who until now have claimed an interest in a proper decision on the legal issues raised in this case) now suggest that a jurisdictional bar to Watts's appeal may exist and this Court accordingly should dismiss the appeal without deciding those issues. According to *Amici*, the record is insufficient to demonstrate that Watts timely placed his Notice of Appeal in his prison's legal mail, consistent with the so-called "prison mailbox rule." See Fed. R. App. P. 4(c)(1). Despite having scoured the record for any perceived deficiencies (out of an asserted duty to do so as "officers of the court" (*Amici* Br. 20)), *Amici*'s discussion of Watts's Notice of Appeal leaves out a critical fact: the Notice of Appeal is *dated* September 13, 2007, and it contains a certificate of service bearing the same date. See also Watts Br. 10 ("On September 13, 2007, Watts filed a notice of appeal and an application for a COA in the district court.").

Watts does not concede that he is under any obligation to provide "evidence" of such a timely filing under the terms of Fed. R. App. P. 4(c)(1), which states that timely filing "may" be shown through a declaration or notarized statement. See also, *e.g.*, *Price* v. *Philpot*, 420 F.3d 1158, 1165 (10th Cir. 2005) (holding that a prisoner's declaration is not required if (as here) he complied with the prison mailbox rule by using the prison's legal mail system).

Nonetheless, Watts is filing a motion to supplement the record that attaches a declaration in the form contemplated by 28 U.S.C. § 1746. In that declaration, he has declared, under penalty of perjury, that he placed his Notice of Appeal in his prison's legal mail system on September 13, 2007, and that first class postage was prepaid. Such a declaration is evidence of timely filing, not a condition precedent to timely filing, and so it can be filed after the notice of appeal. See *United States*

I. THE PARTIES AGREE THAT AN ABOVE-MAXIMUM SENTENCE VIOLATES THE DUE PROCESS CLAUSE

A. *Whalen* Controls

The government and Watts agree that "[l]ongstanding precedent dictates the conclusion that the imposition of a sentence that exceeds the otherwise-applicable statutory maximum sentence authorized by Congress for a crime violates basic notions of due process." U.S. Br. 24-25. That conclusion is perhaps most ardently expressed in *Whalen*, which turned on the "basic principle that within our federal constitutional framework the legislative power, including the power to define the criminal offenses and to prescribe the punishments to be imposed on those found guilty of them, resides wholly with the Congress." 445 U.S. at 689, 100 S. Ct. at 1436; see also U.S. Br. 35 ("*Whalen* serves as a powerful reaffirmation of a bedrock constitutional principle—that extrastatutory punishments implicate structural separation-of-powers concerns regarding the authority of a federal court as well as a defendant's fundamental liberty interest—embodied in both the double

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v. *Murphy*, 578 F.3d 719, 720 (8th Cir. 2009) (holding that such a declaration, filed in the court of appeals "[a]fter briefing," "satisfies us that the appeal is timely"); see also *United States* v. *Ceballos-Martinez*, 371 F.3d 713, 716 n.4 (10th Cir 2004) (stating that an appellant may "subsequently file[] a declaration in complaince with Rule 4(c)(1)); *Grandy* v. *United States*, 269 F.3d 913, 917 (8th Cir. 2001) (holding that Rule 4(c)(1) "does not specify when a prisoner must file an affidavit or notarized statement" and "reject[ing] the claim that "a prisoner's declaration or statement must accompany his legal filing")).

jeopardy and due process clauses of the Fifth Amendment."). The Court's holding in *Whalen* follows directly from that "basic principle":

> Because we have concluded that the District of Columbia Court of Appeals was mistaken in believing that Congress authorized consecutive sentences in the circumstances of this case, and *because that error denied the petitioner his constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress*, we reverse the judgment of the Court of Appeals.

445 U.S. at 690, 100 S. Ct. at 1437. *Whalen* thus conclusively answers the question specified in Watts's COA.

Whalen was not, as *Amici* contend (at 8-9), limited to "double jeopardy grounds." In fact, the Court went out of its way to emphasize that the Double Jeopardy Clause is "*simply one aspect* of the *basic principle*" that governed the case. 445 U.S. at 689, 100 S. Ct. at 1436. "If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress," the Court continued, "it violates *not only* the *specific* guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty." *Ibid.* (emphasis added); see also *United States* v. *Shipp*, 589 F.3d 1084, 1091 (10th Cir. 2009).[2]

[2] *Amici* devote only a footnote to *Shipp* (at 12 n.4), and invite this Court to create a Circuit split. But *Shipp* was correctly decided, and provides persuasive authority that Watts's above-maximum, ACCA-enhanced sentence (like Shipp's) violates his right to due process of law.

For reasons unknown, *Amici* discuss *none* of the pertinent analysis in *Whalen*, and even ignore the relevant holding quoted above. Instead, they assert that Watts "cites the decision" only for "an opaque statement at the end of footnote 4" in which the Court supposedly "[r]uminat[ed] on the case's potential application to state-court prosecutions." *Amici* Br. 9. But that is simply untrue, as even the most cursory review of petitioner's opening brief makes clear. See Watts Br. 23-25. Based on their mischaracterization of Watts's position—and of *Whalen*—*Amici* then claim that the cited passage is a dictum, and therefore assert that *Whalen* is not controlling. *Amici* Br. 9, 10. As discussed above, however, *Whalen*'s holding and relevant discussion (even putting aside footnote 4) are directly on point and binding on this Court.[3]

[3] What is more, *Amici*'s exclusive focus (at 9) on *Whalen*'s observation concerning state courts at the "end of footnote 4" utterly ignores the *rest* of that footnote, which contradicts *Amici*'s distorted view of the case. Earlier in that footnote, the Court pointed out that "the courts of the District of Columbia . . . no less than other federal courts, *may constitutionally impose only such punishments as Congress has seen fit to authorize*." 445 U.S. at 689 n.4, 100 S. Ct. at 1436 n.4 (emphasis added). *Whalen* arose in the District of Columbia, and so that conclusion, which was a necessary logical step leading to the decision, is not a dictum. Only after taking that step did the Court go on to observe that the same point would almost surely be true with respect to a sentence imposed by a *state* court, because "[t]he Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." *Ibid.*

Amici likewise contest (at 8 n.2) the government's citation of *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1874), labeling it, too, "a double jeopardy case." Although double jeopardy issues were present in *Lange*, the question presented—as in *Whalen*—concerned the scope of legislative authorization for a particular sentence. See *id.* at 165-66 (stating the question as "whether the Circuit Court, in the sentence which it had pronounced, and under which the prisoner was held, had not exceeded its powers"). And the Supreme Court, relying on reasoning that applies with equal force to Watts, squarely held that the imposition of a sentence "in excess of the authority of the Court" is "forbidden by the Constitution":

> If a justice of the peace, having jurisdiction to fine for a misdeameanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or if on an indictment for treason the court should render a judgment of attaint, . . . it would be void as to the attainder, because in excess of the authority of the court, *and forbidden by the Constitution*.

Id. at 176-77 (emphasis added). Here, too, a district court that Congress has authorized to impose a term of imprisonment not exceeding ten years cannot impose a 210-month sentence without taking an action that is "forbidden by the Constitution." *Id.* at 177.

B. Sentencing Above The Statutory Maximum Is Not Mere "Sentencing Error"

Amici, who are self-described scholars in this field, assert a "professional interest in illuminating this Court's consideration of the important and complicated questions" presented here. *Amici* Br. 1. But see *supra* note 1. Instead of shedding light on the questions before the Court, however, *Amici* mischaracterize Watts's position, and spill much ink knocking down straw men of their own creation. To illustrate: *Amici* assert (at 4) that Watts offers "no principle distinguishing the rule [he] advance[s] from the general proposition that the Constitution guarantees criminal defendants error-free process." In a similar vein, *Amici* claim that Watts is not entitled to relief unless he can demonstrate that *Whalen* may be "liberally read" to "suggest[] that *all* sentencing error is unconstitutional." *Id.* at 9 (emphasis added).

Whalen holds that a sentence in excess of the maximum term authorized by Congress offends due process principles. That is a straightforward proposition. As Watts's brief makes clear, and as the government recognizes, Watts has argued for no wider rule. U.S. Br. 24 ("[T]he *Whalen* theory . . . is limited to sentences (like [the one] imposed here) that exceed the statutory maximum penalty authorized by Congress, and would not apply to the overwhelming majority of sentences, including those under the federal Sentencing Guidelines, that are imposed within

the authorized statutory maximum."). Whether *other* sentencing errors may or may not implicate the Constitution is beside the point.

Amici conflate the legal issue specified in the COA with the questions presented in inapposite cases that say nothing about sentences exceeding congressionally authorized statutory maxima. As they did before the Supreme Court, *Amici* rely primarily on *Pulley* v. *Harris*, 465 U.S. 37, 104 S. Ct. 871 (1984), and *Lewis* v. *Jeffers*, 497 U.S. 764, 110 S. Ct. 3092 (1990), for the proposition that some "errors in sentencing *can be* nonconstitutional." *Amici* Br. 7. *Amici* mischaracterize both of those cases, but, in any event, Watts has not claimed (and need not claim) that *all* sentencing errors violate due process. Instead, Watts is entitled to relief based on *Whalen*'s conclusion that a sentence greater than the authorized statutory maximum is unconstitutional. On that issue, *Harris* and *Jeffers* are simply irrelevant. See 09-122 U.S. Br. 14 (U.S. Nov. 25, 2009).

In *Harris*, one of petitioner's claims was that California law prohibited a death sentence in the absence of a comparative proportionality review of sentences imposed in similar cases. Petitioner had not been given such a review and asserted that his sentence was contrary to state law. See 465 U.S. at 41-42, 104 S. Ct. at 874-75. But the Supreme Court rejected the premise that California law imposed any such requirement, and so held that the petitioner could not assert a federal habeas claim on that ground "*[e]ven if*" such an "error of state law"—had one

existed—*would* have amounted to a due process violation. 465 U.S. at 875, 104 S. Ct. at 41 (emphasis added).[4] *Harris* did not hold, as *Amici* claim (at 7), that if existing California law *had* mandated a proportionality review, "the erroneous deprivation of such review would not constitute a federal due-process violation." Moreover, even if that *had* been *Harris*'s holding, it would *still* have nothing to do with whether a sentence greater than the statutory maximum offends the Due Process Clause.

Amici's reliance on *Jeffers* is equally far-fetched. There, the Arizona courts had held that state law authorized petitioner's death sentence, and that the trial court had properly applied a valid standard to find an aggravating circumstance based on the evidence in the case. 497 U.S. at 769-71; 110 S. Ct. at 3096-97. It was in *that* context—and that context only—that the Court held that a federal habeas claim would lie against a state court's conclusion that state law authorized a sentence only if that conclusion was "arbitrary and capricious." See 497 U.S. at 780; 110 S. Ct. at 3102. But *federal* courts interpret federal sentencing statutes, and Watts's sentence was *unauthorized* by law. *Jeffers* simply has no bearing on whether (as here) an unauthorized sentence in excess of the statutory maximum

[4] The bulk of the Court's decision in *Harris* addressed whether the Eighth Amendment invariably requires such a comparative review of death sentences. See 465 U.S. at 41-51, 104 S. Ct. at 874-79. *Amici* do not contend that this portion of *Harris* has any relevance to Watts's appeal.

infringes on the safeguards of individual liberty afforded by the Fifth Amendment's Due Process Clause.[5]

What is more, *Whalen* co-exists with this Circuit's rule that when a sentencing error *does not* transcend the maximum punishment that Congress has authorized, it is rarely the basis for collateral attack. In particular, there is no tension between the rule in *Whalen* and the pre-*Booker* cases in which this Court (and others) rejected collateral attacks on deviations from the then-mandatory Sentencing Guidelines. See *Burke* v. *United States*, 152 F.3d 1329, 1331 (11th Cir. 1998) ("[A] claim that the sentence imposed is contrary to a subsequently enacted clarifying amendment [to the Guidelines] is a non-constitutional issue that does not provide a basis for collateral relief in the absence of a complete miscarriage of justice."); see also *United States* v. *Cepero*, 224 F.3d 256, 267-68 (3d Cir. 2000) (en banc) (sentence imposed contrary to subsequent clarifying amendment not cognizable under Section 2255); *Buggs* v. *United States*, 153 F.3d 439, 443 (7th Cir. 1998) (same); *United States* v. *Segler*, 37 F.3d 1131, 1154 (5th Cir. 1994) (same).

Contrary to *Amici*'s apparent belief (see Br. 5-6), the top of the once-mandatory Guidelines range has never had the same legal force and effect as the

[5] Nor did *Pulley* v. *Harris* or *Lewis* v. *Jeffers* "confirm" that anything the Supreme Court said in *Whalen* was "incorrect." But see *Amici* Br. 10. Neither case mentions *Whalen* at all.

statutory maximum sentence. As the Supreme Court has explained, "the top sentence in a [mandatory] guidelines range *is not really* the 'maximum term . . . prescribed by law' for the 'offense' because guidelines systems typically allow a sentencing judge to impose a sentence that exceeds the top of the guidelines range under appropriate circumstances." *United States* v. *Rodriguez*, 553 U.S. 377, 390, 128 S. Ct. 1783, 1792 (2008) (emphasis added) (citing "upward departures" under the U.S. Sentencing Guidelines). Thus, while it may be true that "ordinary error in the application of mandatory sentencing rules does not offend the Constitution," *Amici* Br. 7, that proposition is far afield from the case before this Court.

In fact, the sort of sentencing-guidelines cases on which *Amici* rely actually *depend* on the difference between sentences in excess of the statutory maximum, on the one hand, and sentences in excess of the properly-calculated Guidelines range, on the other. Those cases conclude that claims challenging a misapplication of the sentencing guidelines are not cognizable under Section 2255 in the first place, because they do *not* state a challenge to a sentence in excess of the term authorized by law. See, *e.g.*, *Taylor* v. *Gilkey*, 314 F.3d 832, 833 (7th Cir. 2002) ("Because the Guidelines are not 'laws' for purposes of § 2255, however, [petitioner's] argument could not support relief."); *Scott* v. *United States*, 997 F.2d 340 (7th Cir. 1993) ("A claim that the judge misapplied the Sentencing Guidelines does not . . . assert that the judge exceeded the statutory maximum.").

C. Watts's Sentence Violates The Due Process Clause Under At Least Two Alternative Theories

The government states that this Court may reverse and remand for resentencing "based solely on *Whalen*." U.S. Br. 26. Watts agrees with that position. There are at least two additional bases for relief, however, under the Due Process Clause.

First, the erroneous application of a mandatory minimum sentence curtails the sentencing authority's exercise of the discretion to impose a lesser sentence, which results in an independent violation of the defendant's due process rights. See *Hicks* v. *Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227 (1980). The government does not actually say that *Hicks* is inapplicable here. Instead, the government states that *Hicks* is less "clearly applicable and relevant" than *Whalen*, because *Hicks* "involved jury sentencing and an unconstitutional jury instruction" whereas Watts's sentence was imposed by a judge pursuant to an erroneous statutory interpretation. U.S. Br. 25. Those are distinctions without a difference. *Hicks* is not limited to jury-sentencing cases (see, *e.g.*, *Dupuy* v. *Butler*, 837 F.2d 699, 703 & n.4 (5th Cir. 1988) (collecting cases)), nor did it affect the analysis in *Hicks* that the error which impermissibly constrained the sentencing authority's discretion happened to be a constitutional one.[6]

[6] *Amici* suggest (at 10) that the "arbitrary disregard of the petitioner's right to liberty" identified in *Hicks* was based on a "disparate treatment" between cases and

Second, the application of a recidivist sentencing enhancement for which the defendant is actually innocent violates due process. See *Gilbert* v. *United States*, 609 F.3d 1159, 1165 n.11 (11th Cir. 2010), pet. for reh'g en banc filed Aug. 8, 2010; see also *Fiore* v. *White*, 531 U.S. 225, 228-29 (2001). Although the government ignores *Gilbert* on this point (see U.S. Br. 26), this Court recognized in *Gilbert* that a recidivist sentence enhancement based on "a nonexistent offense"—here, that of being an armed career criminal with only *two* previous violent felonies—"calls into question the fundamental legality of [a] conviction and sentence." 609 F.3d at 1165. Citing *Fiore*, this Court recognized in *Gilbert* that such an error "may be of constitutional dimensions" under the Due Process Clause. See *id.* at 1165 n.11.[7] *Amici* take an even stranger approach, by suggesting that *Almendarez-Torres* v. *United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998), trumps this Court's decision in *Gilbert*. See *Amici* Br. 13. But *Almendarez-Torres* held that a recidivist enhancement need not be charged in the

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a "federal right to fair treatment." Such reasoning appears nowhere in the *Hicks* decision. And, although *Amici* assert that the *Hicks* Court based its decision on a principle dating to *Powell* v. *Alabama*, 287 U.S. 45, 53 S. Ct. 55 (1932), *Hicks* does not even cite *Powell*.

[7] The government's en banc petition in *Gilbert* rests on a view that the panel misstated the law by suggesting that a defendant can be "actually innocent" of a *Guidelines-based* recidivist enhancement. See U.S. Br. 52 n.23. Even if this Court were to vacate *Gilbert* to undertake en banc review of that question, *Gilbert* would still be persuasive authority for the view that a defendant can be actually innocent of a *statutory* sentencing enhancement (such as the ACCA) that increases the maximum term of imprisonment authorized by law.

indictment and proven beyond a reasonable doubt to a jury. As such, that decision has no bearing on whether one can be "actually innocent" of such an enhancement when its application enables the court to impose a sentence above the otherwise-applicable statutory maximum.

II. THIS COURT CAN ALSO REVERSE ON THE THRESHOLD STATUTORY ERROR, VACATE FOR RECONSIDERATION IN LIGHT OF THE INTERVENING CHANGE IN LAW, OR GRANT RELIEF UNDER SECTION 2241

A. This Court Should Reverse On The Ground That Watts's Sentence Exceeds The Maximum Term Authorized By Law

The government and *Amici* contend that Section 2253(c) prohibits this Court from reversing on the merits based on cognizable grounds for Section 2255 relief other than the "constitutional" issue specified in Watts's COA. See U.S. Br. 28 n.10; *Amici* Br. 3. Not so.

As we recognized in our opening brief (and as *Amici* also point out (at 3)), this Circuit's typical practice is to decline to consider arguments "outside the scope of the COA." *Rhode* v. *United States*, 583 F.3d 1289, 1291 (11th Cir. 2009). But that practice is not truly implicated here, because this Court cannot address whether Watts's above-maximum sentence violates due process without *first* addressing the antecedent statutory question and concluding that he received an above-maximum sentence. It is hardly "outside the scope" of the COA to resolve this appeal on such a threshold ground for relief (see *Slack* v. *McDaniel*, 529 U.S.

473, 483-85, 120 S. Ct. 1595, 1603-04 (2000)), and doing so comports with longstanding principles of judicial restraint. See Watts Br. 34-36.

If, however, the Court considers the threshold *Begay*/*Canty* error to fall "outside the scope" of the existing COA, then it should expand that scope in order to resolve this case on the antecedent statutory ground. For one thing, Watts has requested such an expansion of the COA at every available opportunity. See Watts Br. 44-45. For another, an expansion of the COA will not prejudice the government, which agrees that Watts is entitled to resentencing on the *Begay*/*Canty* ground. See U.S. Br. 29. Finally, a COA can specify substantial statutory grounds for appeal. Even assuming, as the government contends (U.S. Br. 28 n.10), that the word "constitutional" in Section 2253(c)(3) is narrower than the *Barefoot* standard and does not capture all of the cognizable grounds for Section 2255(a) relief (but see Watts Br. 40-41 & n.5), there is nothing in Section 2253(c) that says that a COA can specify *only* constitutional issues. To be sure, a court cannot issue a COA that does not specify at least *one* "substantial," "constitutional" question. See 28 U.S.C. § 2253(c)(2). But so long as that requirement has been satisfied, specifying *other* cognizable grounds for Section 2255 relief on appeal is permitted by the statute's plain text.[8] Cf. *Thomas* v.

[8] At least one other Circuit has adopted that approach, concluding that it is "one holding of *Slack* [v. *McDaniel*]." *Ramunno* v. *United States*, 264 F.3d 723, 725 (7th Cir. 2001); see also, *e.g.*, *Welch* v. *United States*, 604 F.3d 408, 411-12

Crosby, 371 F.3d 782, 784 (11th Cir. 2004) ("The entire point of § 2253's COA requirement is to eliminate those appeals that have little or not merit, thereby preserving judicial resources."). And as explained in our opening brief, that approach is consistent with this Circuit's practice in other cases. See Watts Br. 43.[9]

B. This Court Is Authorized To Vacate And Remand For Further Consideration In Light Of The Intervening Change In Law

If this Court is not inclined to reverse, it may also vacate the decision below and remand Watts's Section 2255 motion for reconsideration in light of the intervening decisions in *Begay* and *Canty*. Although Watts raised his statutory and

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(7th Cir. 2010) (expanding a COA that specified an ineffective assistance claim "to include the issue of whether Mr. Welch's conviction for aggravated fleeing or attempting to elude a police officer properly was classified as a violent felony in light of . . . *Begay*").

[9] *Amici* are incorrect that *United States* v. *Montano*, 398 F.3d 1276 (11th Cir. 2005), "reversed the denial of a § 2255 motion on a constitutional ground, *i.e.*, that the plea was unknowing or involuntary." *Amici* Br. 15 n.6 (citing 398 F.3d at 1285). In fact, this Court expressly indicated that it lacked a record on which to make such a ruling, and left that evaluation for the district court on remand. 398 F.3d at 1285. What is more, this passage from *Montano* demonstrates that, when it is in the interests of justice, this Court does not hesitate to reverse (and, presumably, to vacate) a denial of a Section 2255 motion and to remand the motion for further proceedings without addressing constitutional questions on their merits. See *infra* pages 17-19.

Likewise, *Amici*'s attempt to explain away this Court's review of non-constitutional grounds in *Battle* v. *United States*, 419 F.3d 1292 (11th Cir. 2005), is unpersuasive. Although this Court decided to affirm on both the constitutional and non-constitutional grounds, the salient point is that the Court found such a review to be entirely appropriate.

due process claims in the district court, those two decisions came after judgment was entered against Watts, and so the district court has never had the opportunity, in the first instance, to address Watts's motion in light of these developments. This Court enjoys broad discretion to "vacate . . . any judgment, decree, or order of a court lawfully brought before it for review" and can "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. The "judgment" below has been "lawfully brought before [this Court] for review": A COA has issued (*id.* § 2253(c)(2)) and the district court's final order is now before the Court (*id.* § 2253(a) ("[T]he final order shall be subject to review.")). As the government indicates (at 28), this Court has recently emphasized that it "cannot imagine how the appellate court's discretion could be framed more broadly" than it is in Section 2106. *United States* v. *Martinez*, 606 F.3d 1303, 1304 (11th Cir. 2010). This Court undoubtedly has discretion to vacate the judgment below and to remand in light of intervening developments.

To *Amici*, however, this is a "remarkable proposal" that would "evade the appellate jurisdiction restrictions of the AEDPA." *Amici* Br. 14. But even assuming that there are "appellate jurisdiction restrictions" relevant to this issue, this appeal properly raises a due process challenge to Watts's sentence that the district court has not had the opportunity to consider since *Begay* and *Canty* established that Watts's statutory maximum sentence is ten years. This Court is

entitled, by the plain language of Section 2106, to vacate the order below so that the district court can consider the effect of *Begay* and *Canty* on Watts's motion; it is not required to reverse or affirm on the constitutional issue (compare *Amici* Br. 14), and can take any action "as may be just under the circumstances." 28 U.S.C. § 2106. Nor does anything in the text of Section 2106 prevent this Court from considering the strong policies underlying the doctrine of constitutional avoidance, see *Ashwander* v. *TVA*, 297 U.S. 288, 348, 56 S. Ct. 466, 483 (1936), which is further reason to order a vacatur here and remand rather than reaching out unnecessarily to decide a constitutional issue.

Amici's primary objection, presumably, is that on vacatur, the district court possesses the authority to resolve Watts's motion on purely statutory grounds. But that dynamic, to which *Amici* object, results from Congress's decision (under *Amici*'s reading of 2253(a)) to distinguish between the grounds for Section 2255 relief that a district court can entertain, and the grounds for such relief that a court of appeals can entertain. If *Amici* believe that such a system is insufficiently restrictive of a petitioner's ability to obtain relief after the denial of a Section 2255 motion, their complaint is properly addressed to the Legislative Branch.

C. If Necessary, This Court Can Convert Watts's Section 2255 Motion To A Section 2241 Petition And Grant Relief

The government agrees that if Section 2255 proves "inadequate or ineffective to test the legality of [Watts's] detention," then the courts may entertain

an application for a writ of habeas corpus under Section 2241. 28 U.S.C. § 2255(e). In response to any such a petition, the government states that it "would likely concede, as it has in other ACCA cases presenting the same issue in other courts, that such claims are properly cognizable under Section 2241 and that [Watts is] entitled to substantive habeas relief." U.S. Br. 52 (citation omitted). *Amici*, for their part, essentially concede that Watts is entitled to such relief under binding Circuit law.[10]

As we explained in our opening brief, if this Court were to conclude that relief under Section 2255 is unavailable to Watts on appeal, it can—and should—convert his motion to Section 2241 and remand the case for resentencing on that basis. See Watts Br. 47-48. The government does not expressly object to such a recharacterization (although it seems to assume that Watts would have to file a new a new petition (U.S. Br. 50)). *Amici* note only that because a Section 2255 motion is brought in "the court which imposed sentence" (28 U.S.C. § 2255(a)), and a Section 2241 petition is filed in "the district wherein the restraint complained of is had" (*id.* § 2241(a)), the "districts of sentencing and incarceration are not

[10] *Amici* invite Watts to file such a petition forthwith, and claim to "not know why . . . Watts [has] continued to pursue this constitutional argument rather than secure [his] speedy resentencing under [Section 2241 and] a controlling panel decision." *Amici* Br. 15. But unless this Court rules that it is powerless to reverse or vacate the judgment below under Section 2255, the inadequacy or ineffectiveness of that statute to test Watts's indisputably illegal sentence has not yet been established (something that we suspect would not escape *Amici* were they to pursue Watts's case into Section 2241 proceedings).

necessarily the same; they may not even be in the same circuit." *Amici* Br. 15-16. Whether or not that would present a problem in some other case, it presents no barrier to immediate relief under Section 2241 in this one. Watts is incarcerated at FCI Coleman in the Middle District of Florida, which is also the judicial district in which he was convicted and sentenced and from which he appealed the denial of his Section 2255 motion.

III. AS THE GOVERNMENT AGREES, THERE ARE NO PROCEDURAL BARRIERS TO RELIEF AND, EVEN IF THERE WERE, THE GOVERNMENT HAS EXPRESSLY WAIVED THEM

Amici assert that various procedural barriers to relief exist regardless of the merits. Watts's appeal, however, does not suffer from any procedural default. Nor does it present a non-retroactivity issue under *Teague* v. *Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). And even if such barriers actually existed, the government has expressly waived any reliance on them.

A. Watts's Appeal Does Not Suffer From Procedural Default

Amici argue that "Watts . . . failed . . . to raise his constitutional claim *in his § 2255 motion papers below*" and "never even suggested" the due process ground now pressed on appeal. *Amici* Br. 25. That is simply false. Watts labeled "Ground Three" of his Section 2255 motion a "Due Process Violation," and stated as the basis for such a violation that the "[t]rial 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. What is more, the district court *itself* identified Watts's claim as a constitutional due process claim, writing that "[i]n ground three, Watts alleges that the trial court violated his [d]ue [p]rocess rights. Watts contends that 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 10, at 7. Not only did Watts in fact "suggest" this ground to the district court, but the district court actually considered and rejected it in the judgment below.

Amici made the same erroneous claim about the record before the Supreme Court (see No. 09-122 *Amici* Br. 23-25 (U.S. Aug. 27, 2009)), and at that time both Watts and the government corrected their mistake by pointing to the very same materials we cite again here (see No. 08-7757 Pet. Supp. Br. 5-6 (U.S. Dec. 8, 2009); No 09-122 U.S. Br. 22-23 n.5). It is astonishing that *Amici* have now repeated the same mischaracterization of the record, and that they do so *without even adverting* to these clear references to a "due process violation" in both Watts's motion and the district court's opinion. In short, Watts did more than enough to raise this claim for Section 2255 relief in the district court.

Amici also suggest that Watts defaulted on his constitutional claim by failing to raise it on direct appeal. Here, too, the district court's opinion is to the contrary, and states that Watts "raised" the due process ground "on direct appeal," where it

was "resolved against him." Watts R.E. Tab 10, at 7. There is no doubt that Watts challenged his ACCA-enhanced sentence on direct appeal, even while recognizing that then-prevailing Circuit law doomed any chance of success. See Watts Br. 7-8. It does not require much imagination—particularly under those circumstances—to conclude that a *pro se* prisoner complaining that his sentence exceeds the maximum term permitted by an Act of Congress is invoking the Constitution. Indeed, it was unnecessary for Watts to emphasize the due process aspect of his illegal sentence on direct appeal, because there was no doubt that this Court would address the statutory ground for relief and, if Circuit law had by then changed in Watts's favor, reverse his sentence on that ground. And even if that were not the case, intervening Supreme Court precedent in *Begay*, and Circuit precedent in *Canty*, are sufficient cause for any belated articulation that his objection to his sentence raised a due process challenge. See, *e.g.*, *Napier* v. *United States*, 159 F.3d 956, 961 (6th Cir. 1998); *Bateman* v. *United States*, 875 F.2d 1304, 1307-08 (7th Cir. 1989).

B. *Teague*'s Non-Retroactivity Rule Does Not Apply

Although *Amici* do not come out and say it, they assert that *Teague*'s non-retroactivity rule should prevent collateral attack based upon only what they call Watts's "*Jackson*-style" claim to "actual innocence" of the ACCA enhancement under *Gilbert* and *Fiore*. In *Amici*'s view, "the Supreme Court has not extended

Jackson and *Thompson* to those claiming to be 'innocent' of a sentencing factor." *Amici* Br. 18.

This argument has no bearing on the *Whalen* or *Hicks* theories, each of which independently support the conclusion that Watts's sentence violates his due process rights. As the government agrees (at 41-42), *Whalen* states a substantive rule that puts certain punishments off-limits for certain defendants, and so *Teague* is inapplicable. Nor is the 30-year-old *Whalen* decision a "new" rule. The imposition of a sentence unauthorized by law denies—and has long been known to deny—a defendant of "his constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." *Whalen*, 445 U.S. at 689.

According to the government, *Hicks* does state a procedural rule. See U.S. Br. 43 n.17.[11] But even if so, it is far from a "*new* constitutional rule of criminal procedure." *Teague*, 489 U.S. at 310, 109 S. Ct. at 1075 (emphasis added). In *Bousley* v. *United States*, 523 U.S. 614, 620, 118 S. Ct. 1604, 1610 (1998), for example, the petitioner challenged his guilty plea to the "use" of a firearm on the

[11] The government's supposition, in a footnote, that *Hicks* is procedural rather than substantive does not affect its waiver of such a procedural defense in this case. See, *e.g.*, No. 09-122 U.S. Br. 20, 23-24 (raising *Hicks* as a substantial ground for appeal, and disclaiming *Teague*-based defenses). In light of its express waiver, we understand the government to be preserving its ability to raise a non-retroactivity defense to a *Hicks* claim in other cases, and to be emphasizing its view that the *Whalen*-based theory for a due process claim is the clearest path to the correct result.

ground that *Bailey* v. *United States*, 516 U.S. 137, 116 S. Ct. 501 (1996), had recently held that the relevant statute did not apply to his conduct. The Court rejected a proposed application of *Teague*'s non-retroactivity rule; the only "constitutional claim" being asserted in *Bousley* was the long-standing rule that a guilty plea must be knowing and voluntary. Although that venerable constitutional rule was made newly relevant to Bousley's case by the *Bailey* decision, that decision provided a substantive—not procedural—rule concerning the meaning of a federal criminal law. *Bousley*, 523 U.S. at 620, 118 S. Ct. at 1610. "Accordingly," the Court explained, "it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from replying on our decision in *Bailey* in support of his claim that his guilty plea was constitutionally invalid." 523 U.S. at 621, 118 S. Ct. at 1610.

So, too, here. There is nothing "new" about the sentencing-discretion rule articulated in *Hicks*—and so even if it *is* a procedural rule, it isn't a new one. All that is "new" is its application, in light of *Begay* and *Canty*, to a case in which the defendant received a mandatory minimum sentence on the ground that carrying a concealed weapon is a "violent felony" under the ACCA.

C. The Government Has Expressly Waived Reliance On Any Procedural Barriers To Relief

Even if *Amici* had correctly described the record in Watts's case, and even if his appeal were vulnerable to a *Teague* defense, Watts still would face no barrier to

relief. The government has reiterated in its brief (at 38-40) what it had previously stated to the Supreme Court (No 09-122 U.S. Br. 23-24): It has deliberately and expressly waived any "discretionary procedural defenses"—and in particular those based on non-retroactivity and procedural default. Those are affirmative defenses, which the government can waive at its sole discretion, and so there is no need for this Court to consider them.

Without any basis in law—or citation to authority—*Amici* claim (at 19-20) that the government is powerless to effect such a waiver in its papers on appeal. That is simply untrue. See, *e.g.*, *Hills* v. *Washington*, 441 F.3d 1374 (11th Cir. 2006) (giving effect to the state of Georgia's waiver of a procedural-default defense first asserted on appeal). *Amici*'s unsupported assertion is yet another facet of their quixotic, no-holds-barred effort to defend the judgment below. *Amici* are simply attempting to interpose their own beliefs for decisions committed to the discretion of career prosecutors in the Executive Branch. The government has concluded that the interests of justice in correcting a fundamentally unjust incarceration outweigh any countervailing interests that may be at stake. See U.S. Br. 38. That decision must be given effect, and it deserves this Court's respect.

CONCLUSION

For the foregoing reasons, and as explained in our opening brief, 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 6,994 words.

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 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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