No. 08-7757

In the Supreme Court of the United States

DARIAN ANTWAN WATTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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Now that the government has confessed error in *Hunter* v. *United States*, No. 09-122, it is even more apparent that a summary reversal is the appropriate remedy in this case. The parties continue to agree that petitioner was sentenced to a term of imprisonment greater than the maximum authorized by statute and that a certificate of appealability (COA) should issue on that basis. Gov't Suppl. Mem. 2; Hunter Gov't Br. 7 n.3; Pet. Reply 1. And, despite the erroneous assertions of the self-described "law scholars" who took the unorthodox step of filing an *amicus curiae* brief in *Hunter* second-guessing the government's confession of error, no procedural obstacles lie in the way of a summary reversal.[1] Further unjustified postponement of petitioner's resentencing—a delay which, without a summary reversal, is entirely possible, and perhaps even likely in light of the history of repeated delays in *Hunter*—simply increases the probability that petitioner will suffer incarceration beyond the term to which he ultimately will be resentenced.

1. In May 2009, the government asked this Court to grant the petition for a writ of certiorari, vacate the judgment below, and remand (GVR) with instructions to the Eleventh Circuit to issue a COA. Gov't Br. 6, 14. Abandoning that position in part, the government now asserts that this

[1] *Amici*, who claim "a professional interest in illuminating this Court's consideration" of the issues presented in *Hunter* and in this case, Amicus Br. 1, did not provide petitioner Watts with a copy of their brief, which directly and repeatedly attacks Watts's position. See *id.* 2-4, 7-8, 14-15, 21-25.

Court should simply GVR so that the court of appeals may "reconsider as a *de novo* matter whether to issue a COA." Gov't Suppl. Mem. 2; Hunter Gov't Br. 7 n.3. The government says that its previous request stemmed from a concern that the court of appeals would deny a COA because it would be bound by its decision in *Hunter*, 559 F.3d 1188 (11th Cir. 2009). Gov't Suppl. Mem. 1-2. Although petitioner shared that concern, we explained why a summary reversal, rather than the government's unusual request for a GVR with "instructions," was the appropriate remedy. Pet. Reply 4-6.

The government's shift in position concerning the COA defies logic. If the Court had adopted the government's proposed GVR-with-instructions approach before the petition in *Hunter* was filed, it would have had the practical effect of abrogating *Hunter*. Now, with the petition in *Hunter* having been filed and the government having confessed error in that case, there is even *better* reason to reverse (and for a COA to issue). But the government instead asks this Court to let the court of appeals start from scratch. Nothing has occurred to suggest that further review by the court of appeals is necessary (or worthwhile). The only change in the legal landscape is that the government has now asked this Court to GVR in *Hunter*.

2. Unlike a summary reversal, a GVR order in this case would force petitioner to endure the risk of more litigation over whether a COA should issue (despite the parties' agreement that a resentencing *itself* should occur). Nor would a corresponding GVR order in *Hunter* necessarily lead to the

result that the government agrees is correct. Merely dislodging *Hunter* as circuit precedent would not obligate the court of appeals to give weight to the government's confessions of error or even to issue a COA. See *Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964) (a GVR order does not "amount to a final determination on the merits"); Eugene Gressman et al., *Supreme Court Practice* 349 (9th ed. 2007) (a GVR order is not the "functional equivalent of a summary reversal order").

What is more, *Hunter*'s procedural history suggests that a GVR order will likely result in unnecessary delay and perhaps even another petition to this Court on questions that now have been fully briefed. Once before, this Court issued a GVR order in *Hunter* for reconsideration of the denial of a COA in light of *Begay* v. *United States*, 553 U.S. 137 (2008). See *Hunter* v. *United States*, 129 S. Ct. 594 (2008). On remand, the Eleventh Circuit acknowledged that *Begay* "provides good reason to conclude" that the crime of carrying a concealed weapon is not a "violent felony" for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). 559 F.3d at 1190-91. Without even seeking the government's views, however, the court of appeals again denied a COA. According to the Eleventh Circuit, a sentence imposed under the ACCA that is based on a non-qualifying predicate offense and that exceeds the otherwise applicable statutory maximum sentence is mere "sentencing error" that in no way violates due process. *Id.*

Although the government provides a compelling explanation for why petitioner should be resentenced (Gov't Br. 7-11; Hunter Gov't Br. 7, 24-26), there is no reason to be confident that the GVR order posited by the government would cause the court of appeals to accept that view. After all, the Eleventh Circuit did not even seek to elicit the government's position after the last GVR order in *Hunter*. There is substantial risk that the court of appeals will merely restate the erroneous view of Section 2253(c)(2) that it adopted the last time around in *Hunter* and refuse to issue a COA. A summary reversal is needed to ensure that this does not happen.

Moreover, summary reversal is especially appropriate where, as here, the judgment below contradicts established law. As the government has persuasively demonstrated, the Eleventh Circuit's decisions in this case and in *Hunter* are plainly at odds with longstanding Supreme Court and circuit precedent. Gov't Br. 7-10; Hunter Gov't Br. 7, 20-22, 24-26; Pet. Reply 3-4. Where, as here, the question presented is purely a matter of law, and the court of appeals had ample opportunity to consider established law and nonetheless reached the wrong conclusion, summary reversal is the appropriate disposition.

3. Principles of fairness and judicial economy also militate in favor of a summary reversal. As the government concedes, petitioner has been incarcerated since June 2004 under a sentence that exceeds the maximum term permitted by law. If the decision below is merely vacated, instead of

reversed, petitioner could be mired in unnecessary litigation over his entitlement to a COA that could extend the final disposition of his Section 2255 petition past the point at which he otherwise might have been released after resentencing below the 10-year statutory maximum. Moreover, if this Court issues GVR orders in both *Watts* and *Hunter*, then the matters presumably will be remanded to the respective separate panels of the Eleventh Circuit. Such inefficient use of judicial resources is a further reason to settle the matter through a summary reversal. See *Lawrence* v. *Chater*, 516 U.S. 163, 168 (1996) (per curiam) ("[I]f the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate.").

As the government has noted (Hunter Gov't Br. 22 n.5), the assertions by *amici* in *Hunter* that petitioner has defaulted and waived his Section 2255 claim (Br. 23-25) are utterly baseless. The district court *itself* identified petitioner's claim as a constitutional one: "In 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." *Watts* v. *United States*, Nos. 8:04-cr-314-T-24MAP, 8:07-cv-665-T-24MAP, 2007 WL 1839474, at *5 (M.D. Fla. June 26, 2007). After the district court denied the Section 2255 motion on the merits, petitioner attached the decision (which characterized his claim as a constitutional one) to his notice of appeal and

request for a COA. Notice of Appeal and Application for Certificate of Appealability at Ex. B, *Watts* v. *United States*, Nos. 8:04-cr-314-T-24MAP, 8:07-cv-665-T-24MAP (M.D. Fla. Sept. 17, 2007). In light of those circumstances, the assertion by *amici* (Br. 25) that one would need to take "liberal construction of pro se pleading to absurd lengths" to "[a]ccus[e] the Eleventh Circuit of error in not appreciating [petitioner's] claim as constitutional" is simply fanciful. Had the law scholars accurately described the record in this case, they presumably would have realized that their argument rests on a false premise. In any event, it does not require much imagination 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.[2]

This Court now has before it the views of the parties. They have thoroughly addressed the merits and the procedural issues and have identified why petitioner, who is incarcerated under a sentence that exceeds the maximum authorized by law, is entitled to both a COA and relief under Section 2255. A GVR order, which will result in the parties retreading the same ground in briefs below, simply invites unnecessary delay, more potential error, and potentially unfair incarceration. A summary reversal is

[2] Furthermore, at the time of petitioner's direct appeal, this Court had not yet decided *Begay*, and binding circuit precedent had entirely foreclosed petitioner's due process challenge to his ACCA sentence. See *Napier* v. *United States*, 159 F.3d 956, 961 (6th Cir. 1998) (intervening Supreme Court precedent was sufficient cause for a belated objection to jury instructions). In addition, neither the government nor any court in this case ever has suggested that petitioner defaulted or waived a claim.

the appropriate remedy in this case and will result in the resentencing that the government itself agrees petitioner should receive.

Respectfully submitted.

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December 2009