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

REPLY BRIEF FOR PETITIONER

Gregory L. Poe
Counsel of Record
Alan E. Untereiner
Rachel S. Li Wai Suen
Matthew M. Madden
Robbins, Russell, Englert,
Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Suite 411L
Washington, D.C. 20006
(202) 775-4500

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

Statutes

Other Authorities

REPLY BRIEF FOR PETITIONER

Confessing error, the government correctly states that petitioner has made a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and is entitled to a certificate of appealability ("COA"). See Gov't Br. 8. Petitioner was sentenced to a prison term exceeding 15 years under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), because he had sustained a prior conviction for carrying a concealed weapon. As the government recognizes, that prior conviction does not qualify as a "violent felony" within the meaning of the ACCA. Gov't Br. 9-10. Petitioner's sentence is thus "in excess of the maximum authorized by law" (28 U.S.C. § 2255(a)) and violates petitioner's right to due process. Gov't Br. 9; see also *id.* at 13-14 (stating that government "would not oppose" resentencing in the district court to a term of imprisonment not exceeding 10 years).

Although the parties agree on what the outcome of this case should be, the government's suggested procedure—that this Court grant the petition, vacate the decision below, and remand ("GVR") with instructions that the Eleventh Circuit issue a COA (Gov't Br. 6, 14)—is flawed. The government frames the question presented as whether a COA should have been issued. Gov't Br. i. But two questions are actually subsumed within that question: (1) whether petitioner's prior conviction for carrying a concealed weapon is a qualifying ACCA predicate; and (2) whether petitioner was denied a constitutional right when he was sentenced to a prison term that exceeded

the 10-year statutory maximum. While the *parties* agree on the answers to both questions, the Eleventh Circuit has held as to the second question that an ACCA sentence based on a non-qualifying predicate is nothing more than "sentencing error" that does not violate due process. See *Hunter* v. *United States*, 559 F.3d 1188, 1190-91 (11th Cir. 2009). That decision, as the government recognizes, is manifestly incorrect. Gov't Br. 7-9, 11. Accordingly, the appropriate disposition is a summary reversal (abrogating *Hunter*, 559 F.3d 1188) with an instruction to issue a COA.[1]

1. The parties agree that, after petitioner's conviction and sentence became final on direct appeal (see *United States* v. *Watts*, 159 Fed. App'x 923 (11th Cir. 2005)), it has become clear that the crime of carrying a concealed weapon is not a qualifying ACCA predicate. In *Hunter*, the court of appeals acknowledged that *Begay* v. *United States*, 128 S. Ct. 1581 (2008), "provides good reason to conclude" that the crime of carrying a concealed weapon is not a "violent felony" under the ACCA. 559 F.3d at 1190. Similarly, in *United States* v. *Archer*, 531 F.3d 1347 (11th Cir. 2008), the court of appeals held that the crime of carrying a concealed weapon is not a "crime of violence" within the meaning of U.S.S.G. § 4B1.2 because it "does not, without more, * * * involve any aggressive or violent behavior" or "necessarily involve purposeful conduct." 531 F.3d at 1351. As the court of appeals noted in

[1] A petition for a writ of certiorari has not yet been filed in *Hunter* but is due no later than June 24, 2009. See docket, *Hunter* v. *United States*, No. 08A962 (order of Justice Thomas extending time to file petition).

Archer, that holding logically applies to the ACCA's "virtually identical" definition of a violent felony. *Id.* at 1352 (quotation marks omitted).

Since *Archer* was decided, the Eleventh Circuit has vacated ACCA sentences in at least two cases on precisely the ground identified in *Archer*. See *United States* v. *Townsley*, No. 08-13517, 2009 WL 929986, at *3 (11th Cir. Apr. 8, 2009) (unpublished) ("In light of this Court's decision in *Archer*, the district court erred in counting these convictions [for carrying a concealed weapon] as violent felonies."); *United States* v. *Redeemer*, No. 07-15837, 2009 WL 684749, at *1 (11th Cir. Mar. 17, 2009) (unpublished) (vacating a sentence in light of the government's concession "that the crime of carrying a concealed weapon is not a 'violent felony' for purposes of the Armed Career Criminal Act"). Those decisions recognize that *United States* v. *Hall*, 77 F.3d 398 (11th Cir. 1996), which held that the crime of carrying a concealed weapon *is* a "violent felony" under the ACCA, *id.* at 401, is no longer good law. *Townsley*, 2009 WL 929986, at *2-3; *Redeemer*, 2009 WL 684749, at *1. And they are in line with the position taken by every other circuit that has considered the issue. See *United States* v. *Flores*, 477 F.3d 431, 435-36 (6th Cir. 2007); *United States* v. *Whitfield*, 907 F.2d 798, 800 (8th Cir. 1990); see also *United States* v. *Phelps*, 17 F.3d 1334, 1341 (10th Cir. 1994).

2. As the government explains (Gov't Br. 6, 8-9), petitioner has made a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), because he was sentenced to a term of imprisonment that

exceeds the 10-year statutory maximum as a result of having been erroneously classified as an armed career criminal. The government correctly states that "a federal defendant has a 'constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress.'" Gov't Br. 8 (quoting *Whalen* v. *United States*, 445 U.S. 684, 690 (1980)); see *Hicks* v. *Oklahoma*, 447 U.S. 343, 346-47 (1980); see also *Wasko* v. *Vasquez*, 820 F.2d 1090, 1091 n.2 (9th Cir. 1987) (concluding that a sentence exceeding the maximum term authorized by law violates due process). And, for the reasons explained by the government, the law-of-the-case doctrine (invoked by the district court below, see Pet. App. A at 7-8) has no bearing on petitioner's claim for relief. See Gov't Br. 12. Because petitioner's term of imprisonment exceeds the maximum sentence permitted by statute, he is entitled to be resentenced to a term of imprisonment not exceeding 10 years.

3. Although the government states that this Court should GVR with an instruction to the Eleventh Circuit to issue a COA, the appropriate disposition is instead a summary reversal (abrogating *Hunter*, 559 F.3d 1188), together with an instruction to issue a COA. But for the existence of *Hunter* as precedent the Eleventh Circuit would doubtless agree that petitioner is entitled to relief. See, *e.g.*, *Townsley*, 2009 WL 929986, at *2-3. But a GVR (although pregnant with meaning) would not dislodge *Hunter* as circuit precedent unless the Eleventh Circuit decided to reconsider that

decision *en banc*. See *Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964) (GVR order does not "amount to a final determination on the merits").

In *Hunter*, the district court imposed an enhanced sentence under the ACCA because defendant, as in petitioner's case, previously had been convicted of the crime of carrying a concealed weapon. See *Demarick* v. *United States*, Nos. 06-22555-CIV, 03-20712-CR, 2007 WL 6065303, at *3 (S.D. Fla. Apr. 16, 2007). After having been denied a COA by the Eleventh Circuit, the defendant in *Hunter* filed a petition for a writ of certiorari. See *Hunter* v. *United States*, 129 S. Ct. 594 (2008). While that petition was pending, this Court decided *Begay*. This Court then issued a GVR order in *Hunter* and remanded for reconsideration in light of *Begay*. See *Hunter*, 129 S. Ct. 594.

On remand, the Eleventh Circuit once again denied Hunter's request for a COA. As explained by the government (Gov't Br. 7-10), the court held—relying on cases involving the application of the sentencing guidelines—that the sentence imposed under the ACCA was simply a result of "sentencing error" that did not violate due process and that Hunter therefore could not make a substantial showing that he had been denied a *constitutional* right. 559 F.3d at 1190-91. As explained above (at 3-4) and by the government (Gov't Br. 7-10), the holding in *Hunter* plainly contradicts the law.

The government's proposed disposition of the petition in this case is flawed because a GVR would not obligate the court of appeals to grant the

relief that the parties agree is appropriate. That is why a summary reversal is the proper disposition. A summary reversal is especially appropriate where—as here—"the lower court result is so clearly erroneous [in light of] controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time." Eugene Gressman et al., *Supreme Court Practice* 344 (9th ed. 2007); see also *ibid.* (referring to summary reversal as a "common" disposition).[2]

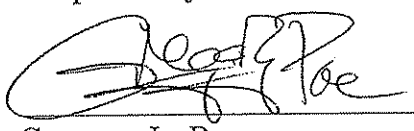
Finally, in light of the government's position that *Hunter* was decided incorrectly, the government presumably will confess error in that case once the petition for certiorari (now due on June 24, 2009) is filed. Accordingly, there is no reason to delay the resentencing of petitioner—who has been incarcerated since June 2004—by holding this case and disposing of it next Term only after the Court acts in *Hunter*.[3]

---

[2] In the alternative, either this Court (or Justice Thomas as Circuit Justice for the Eleventh Circuit) could treat the petition for certiorari as a request for a COA and issue the COA to petitioner (see 28 U.S.C. § 2253(c)). That course of action would entitle petitioner to take his appeal to the Eleventh Circuit, moot the Eleventh Circuit's decision to deny the COA, and render *Hunter*'s precedential effect irrelevant.

[3] The government suggests that, following a remand from this Court, the court of appeals should in turn remand to the district court for consideration of petitioner's constitutional claim. Gov't Br. 11-12. Instead, this Court should instruct the court of appeals to remand to the district court for resentencing subject to a 10-year statutory maximum.

Respectfully submitted.



Gregory L. Poe
Counsel of Record
Alan E. Untereiner
Rachel S. Li Wai Suen
Matthew M. Madden
Robbins, Russell, Englert,
Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Suite 411L
Washington, D.C. 20006
(202) 775-4500

May 2009