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IN THE

Supreme Court of the United States

DEMARICK HUNTER,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under *Begay v. United States*, 128 S. Ct. 1581 (2008), a prior conviction for carrying a concealed weapon constitutes a “violent felony” under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e).

2. Whether a legally erroneous application of ACCA, which resulted in a mandatory minimum sentence five years above the otherwise applicable statutory maximum for the offense, violates due process.

3. Whether the decision of the Eleventh Circuit denying a certificate of appealability (“COA”) on habeas review should be summarily reversed when the Solicitor General has confessed that it was error to deny the COA.

PARTIES TO THE PROCEEDING

There are no additional parties to the proceedings other than those listed in the caption.

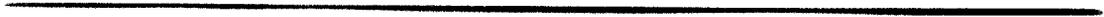


TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION..	11
I. HUNTER’S ENHANCED SENTENCE UNDER ACCA IS ERRONEOUS AS A MATTER OF LAW AND VIOLATES HIS DUE PROCESS RIGHTS.....	12
A. The Misapplication of ACCA to Enhance Hunter’s Sentence Is an Undisputed Error of Law...	13
B. The Erroneous Application of ACCA Violated Hunter’s Due Process Rights.	15

	PAGE
C. Hunter Has Established Grounds for a Certificate of Appealability.	20
II. THIS COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW.....	21
CONCLUSION	23
APPENDIX	
Opinion of the Court of Appeals for the Eleventh Circuit on Remand Denying Certificate of Appealability, No. 07-13701-J, dated Feb. 24, 2009	1 a
Order of the Court of Appeals for the Eleventh Circuit on Remand Denying Certificate of Appealability, No. 07-13701-J, dated Feb. 4, 2009	5 a
Order of the Supreme Court Granting Petition for Writ of Certiorari, Vacating, and Remanding, No. 07-11550, dated Nov. 17, 2008....	6 a
Order of the Court of Appeals for the Eleventh Circuit Denying Motion for Reconsideration, No. 07-13701-J, dated Jan. 24, 2008	7 a

	PAGE
Order of the Court of Appeals for the Eleventh Circuit Denying Motion for Certificate of Appealability, No. 07-13701-J, dated Dec. 4, 2007 ...	8 a
Order of the District Court for the Southern District of Florida Denying Motion for Certificate of Appealability, No. 06-22555-CIV-UUB, dated Aug. 6, 2007	9 a
Order of the District Court for the Southern District of Florida Affirming Report of Magistrate Judge, No. 06-22555-CIV-UUB, dated April 16, 2007	10a
Report of Magistrate Judge on Motion Under 28 U.S.C. § 2255, No. 06-22555-CIV-UUB (S.D. Fla.), dated March 20, 2007.....	12a

TABLE OF AUTHORITIES

Cases:	PAGE
<i>Begay v. United States</i> , 128 S. Ct. 1581 (2008).....	<i>passim</i>
<i>BMW of N. Am. v. Gore</i> , 517 U.S. 559 (1996)	19
<i>Bousley v. United States</i> , 523 U.S. 614 (1998)	9, 21
<i>Buggs v. United States</i> , 153 F.3d 439 (7th Cir. 1998)	8, 19
<i>Calero-Toledo v. Pearson Yacht Leasing Co.</i> , 416 U.S. 663 (1974)	19
<i>Danforth v. Minnesota</i> , 128 S. Ct. 1029 (2008)	20
<i>Foucha v. Louisiana</i> , 504 U.S. 71 (1992).....	19
<i>Gagnon v. Scarpelli</i> , 411 U.S. 778 (1973)	19
<i>Hicks v. Oklahoma</i> , 447 U.S. 343 (1980).....	9, 16, 17
<i>Johnson v. United States</i> , 805 F.2d 1284 (7th Cir. 1986).....	18
<i>Jones v. Arkansas</i> , 929 F.2d 375 (8th Cir. 1991)	18
<i>Jones v. United States</i> , 463 U.S. 354 (1983)	19

	PAGE
<i>King v. Hoke</i> , 825 F.2d 720 (2d Cir. 1987)	18
<i>Leocal v. Aschroft</i> , 543 U.S. 1 (2004)	6
<i>Maryland v. Dyson</i> , 527 U.S. 465 (1999)	21
<i>Mateo v. United States</i> , 310 F.3d 39 (1st Cir. 2002)	22
<i>Mateo v. United States</i> , 276 F. Supp. 2d 186 (D. Mass. 2003), <i>aff'd</i> , 398 F.3d 126 (1st Cir. 2005)	22
<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972)	19
<i>Peisch v. Ware</i> , 8 U.S. (4 Cranch) 347 (1808)	19
<i>Richardson v. Evans</i> , 99 F.3d 1150 (10th Cir. 1996)	17
<i>Schriro v. Summerlin</i> , 542 U.S. 348 (2004)	9, 21
<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000)	12, 20
<i>Southwestern Tel. & Tel. Co. v. Danaher</i> , 238 U.S. 482 (1915)	19
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	9, 20, 21
<i>Townsend v. Burke</i> , 334 U.S. 736 (1948)	18

	PAGE
<i>TXO Prod. Corp. v. Alliance Res. Corp.</i> , 509 U.S. 443 (1993)	19
<i>United States v. Archer</i> , 531 F.3d 1347 (11th Cir. 2008).....	<i>passim</i>
<i>United States v. Bajakajian</i> , 524 U.S. 321 (1998)	19
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	5
<i>United States v. Cepero</i> , 224 F.3d 256 (3d Cir. 2000)	19
<i>United States v. Eakman</i> , 378 F.3d 294 (3d Cir. 2004)	17
<i>United States v. Flores</i> , 477 F.3d 431 (6th Cir. 2007)	14
<i>United States v. Hall</i> , 77 F.3d 398 (11th Cir. 1996)	6
<i>United States v. Haste</i> , 292 F. App'x 249 (4th Cir. 2008)	14
<i>United States v. Hunter</i> , 559 F.3d 1188 (11th Cir. 2009)	1, 10
<i>United States v. Redeemer</i> , No. 07-15837, 2009 WL 684749 (11th Cir. Mar. 17, 2009)	14
<i>United States v. Segler</i> , 37 F.3d 1131 (5th Cir. 1994)	19
<i>United States v. Serafin</i> , 562 F.3d 1105 (10th Cir. 2009)	14

	PAGE
<i>United States v. Townsley</i> , No. 08-13517, 2009 WL 929986 (11th Cir. Apr. 8, 2009)	4, 14
<i>United States v. Whitfield</i> , 907 F.2d 798 (8th Cir. 1990)	14
<i>Vitek v. Jones</i> , 445 U.S. 480 (1980)	18
<i>Wasko v. Vasquez</i> , 820 F.2d 1090 (9th Cir. 1987)	17
<i>Watts v. United States</i> , No. 08-7757	<i>passim</i>
<i>Whalen v. United States</i> , 445 U.S. 684 (1980)	9, 15, 16
<i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974)	19
 Constitutional Provisions, Statutes, and Rules	
U.S. CONST. amend. V	1
18 U.S.C. § 922(g)	1, 2
18 U.S.C. § 922(g)(1)	2, 3, 8
18 U.S.C. § 924(a)(2)	4
18 U.S.S. § 924(e)	i, 1, 5
18 U.S.C. § 924(e)(1)	4
18 U.S.C. § 924(e)(2)(B)	4, 7
18 U.S.C. § 924(e)(2)(B)(ii)	13

	PAGE
28 U.S.C. § 1254	1
28 U.S.C. § 2253(c)	2, 8
28 U.S.C. § 2253(c)(2).....	6, 20
28 U.S.C. § 2254	17
28 U.S.C. § 2255	18
28 U.S.C. § 2255(a).....	10, 22
U.S.S.G. § 2K2.1(a)(4).....	5
U.S.S.G. § 2K2.1(b)(4).....	5
U.S.S.G. § 4A1.1	4, 5
U.S.S.G. § 4B1.2(a)	4
U.S.S.G. § 4B1.4(b)(3)(B).....	4
 Other Authorities:	
Eugene Gressman et al., <i>Supreme Court Practice</i> (9th ed. 2007)	21



OPINIONS BELOW

The decision of the Eleventh Circuit denying petitioner's motion for a certificate of appealability ("COA") after remand from this Court is reported at *United States v. Hunter*, 559 F.3d 1188 (11th Cir. 2009). App. 1a-4a. The Eleventh Circuit's earlier denials of the COA are not reported. App. 5a, 7a, 8a. The district court's denial of habeas relief, and its denial of a COA, are not reported. App. 9a, 10a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on February 24, 2009. App. 1a-4a. On May 6, 2009, Justice Thomas extended the time to file a petition for a writ of certiorari to and including June 24, 2009. On June 12, 2009, he granted a further extension to and including July 24, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides in relevant part:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides in relevant part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in

section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

Title 28 U.S.C. § 2253, governing appeals in a habeas proceeding, provides in relevant part:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . .

. . .

(B) the final order in a proceeding, under section 2255[.]

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

This petition represents the second time petitioner Demarick Hunter has sought relief from this Court to correct a concededly unlawful sentence that more than tripled his term of imprisonment. In a misapplication of the Armed Career Criminal Act (“ACCA”), Hunter was sentenced under its mandatory minimum provisions to 188 months in prison, based upon a ruling that his two prior convictions

for carrying a concealed weapon were “violent felonies” under ACCA. The Solicitor General has acknowledged that that holding was in error under *Begay v. United States*, 128 S. Ct. 1581 (2008). All of the other circuits that have ruled on the issue have held that firearm possession does not qualify as an ACCA predicate offense. And the Eleventh Circuit itself has since agreed. But the court below again refused to grant Hunter a certificate of appealability (“COA”) to raise the error on habeas review, even after this Court vacated and remanded its earlier denial. The Eleventh Circuit’s misguided efforts to preserve an admittedly unauthorized and unjust sentence should be firmly rejected by this Court. This is the rare case in which summary reversal is the only appropriate remedy.

1. On June 8, 2004, following a jury trial in the United States District Court for the Southern District of Florida, Hunter was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Hunter had been a passenger in a vehicle on the evening of August 15, 2003, in Miami-Dade County, Florida, when the vehicle was stopped by the police for a possible traffic violation. In the course of the traffic stop, the police observed an empty gun holster in the back seat of the vehicle where Hunter had been seated, and a gun beneath the right front passenger seat. At trial, the driver of the vehicle testified that Hunter had thrown a gun onto the right front passenger seat before he had pulled over and that the other passenger had attempted to conceal the weapon under that seat. It was also established at trial, by stipulation of the parties, that Hunter had a prior felony conviction.

The dominant legal concern at sentencing was Hunter's criminal history. Without the application of any sentencing enhancement under ACCA, Hunter faced a statutory sentencing range of zero to 10 years. 18 U.S.C. § 924(a)(2). Hunter, however, had two prior convictions in 1996 and 1999 for carrying a concealed firearm and one prior conviction in 2001 for possession with intent to sell or deliver cocaine. The district court decided that these three prior convictions qualified as "violent felonies" or "serious drug offenses" under ACCA, which made Hunter subject to a 15-year mandatory minimum sentence. 18 U.S.C. § 924(e)(1). These predicate offenses therefore added a *minimum* of 5 years to Hunter's statutory exposure.

The court also determined that the predicate offenses constituted "crimes of violence" or "controlled substance offenses" under the Sentencing Guidelines.¹ Accordingly, Hunter's offense level was set at 33 because of his three prior felony convictions, including the concealed weapons offenses. U.S.S.G. § 4B1.4(b)(3)(B). Hunter also had a criminal history category of IV. U.S.S.G. § 4A1.1. Based upon an offense level of 33 and a criminal history category of IV, Hunter's applicable Guidelines range was 188 to 235 months.²

¹ The definitions of "violent felony" under ACCA and "crime of violence" under the Sentencing Guidelines are identical in relevant part. Both apply to "any crime punishable by imprisonment for a term exceeding one year . . . that . . . otherwise involves conduct that presents a serious potential risk of physical injury to another." See 18 U.S.C. § 924(e)(2)(B); U.S.S.G. § 4B1.2(a); see also *United States v. Townsley*, No. 08-13517, 2009 WL 929986, at *2-3 (11th Cir. Apr. 8, 2009) (unpublished).

² The sentencing calculations detailed above and in footnote 3 are based upon the figures in the government's appellate

The district court sentenced Hunter to 188 months, which was at the low end of the Guidelines range and also met the 15-year mandatory minimum term required by ACCA. If Hunter's prior concealed weapon convictions had not been treated as predicate offenses for purposes of ACCA, or aggravating factors under the Sentencing Guidelines, Hunter would have been subject to a Guidelines range of 63-78 months—more than 10 years less.³ Indeed, Hunter, who has been in custody since his arrest in August 2003, has now served nearly six years in prison, which already may exceed the lawful sentence.

2. Hunter appealed his conviction and sentence to the Eleventh Circuit. He challenged his sentence on the ground that the mandatory minimum sentence violated the constitutional holding in *United States v. Booker*, 543 U.S. 220 (2005). The Eleventh Circuit affirmed.

Hunter did not challenge on direct appeal the sentencing enhancements under ACCA or the Sentencing Guidelines relating to his prior convictions for carrying a concealed weapon. At the time of his

brief on direct review, and are assumed to be correct for the purposes of this petition.

³ In the absence of the statutory and Guidelines enhancements, Hunter's base offense level would have been set at 20 because he committed the offense after having sustained one felony conviction for a controlled substance offense. U.S.S.G. § 2K2.1(a)(4). He would have received an extra two points (to 22) because the firearm had a partially obliterated serial number. *Id.* § 2K2.1(b)(4). Because of his eight criminal history points, his criminal history category would have remained at category IV. *Id.* § 4A1.1. Based upon an offense level of 22 and a criminal history category of IV, Hunter's applicable Guidelines range would have been 63-78 months.

appeal, the established law in the Eleventh Circuit, as set forth in *United States v. Hall*, 77 F.3d 398 (11th Cir. 1996), held that carrying a concealed weapon created a “serious potential risk of physical injury” and thus constituted a predicate offense—a “violent felony”—for purposes of the enhancement provisions of ACCA. *Hall*, 77 F.3d at 401-02.

3. On October 6, 2006, Hunter filed a pro se petition for a writ of habeas corpus, asserting that his two prior convictions for carrying a concealed weapon did not qualify as violent felonies under ACCA or the Sentencing Guidelines. He further alleged that both his trial and appellate counsel rendered ineffective assistance by failing to challenge those enhancements.⁴ The district court denied the petition, holding that his challenge to his sentence was foreclosed under *Hall, supra*. For similar reasons, it rejected the ineffective assistance claim. App. 10a-11a, 12a-19a.

Thereafter, Hunter moved pro se in the district court for a COA on the question of whether *Hall* remained good law after *Leocal v. Ashcroft*, 543 U.S. 1 (2004), which interpreted a statutory sentencing enhancement analogous to the ACCA provision. The district court denied the motion for a COA in a short form order. App. 9a. On December 4, 2007, the Eleventh Circuit summarily denied issuance of a COA in a single-sentence order, stating that Hunter “has failed to make a substantial showing of the denial of a constitutional right.” App. 8a. (citing 28 U.S.C. § 2253(c)(2)). The court adhered to that decision upon reconsideration in an almost identical short form order. App. 7a.

⁴ Hunter also claimed a Speedy Trial Act violation that is not relevant to this petition.

On April 23, 2008, Hunter filed a pro se petition for writ of certiorari, asking this Court to determine whether a concealed weapon conviction constituted an ACCA predicate offense. In response, the Solicitor General recommended that the case be GVR'ed for reconsideration in light of *Begay v. United States*, 128 S. Ct. 1581 (2008). As the Solicitor General noted, *Begay* limited the residual provision in the statutory definition of a “violent felony” under ACCA to only those felonies that present “a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B). This Court held that a conviction for driving while under the influence of alcohol or drugs is not a violent felony under the statute. Moreover, by that time, the Eleventh Circuit had already reconsidered in light of *Begay* whether carrying a concealed firearm qualified as a crime of violence under the Sentencing Guidelines, holding that it did not. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). On November 17, 2008, this Court GVR'ed for reconsideration in light of *Begay*. App. 6a.

4. On remand, surprisingly, the Eleventh Circuit did not solicit further briefing from either party. Instead, it summarily denied Hunter's motion for a COA yet again.⁵ The Eleventh Circuit acknowledged that “*Begay* provides good reason to conclude that [Hunter] was erroneously sentenced as an armed career criminal,” and that its own precedents to the contrary “had been undermined to the point of abrogation.” App. 2a. It nevertheless held that a sentencing error alone does not amount to “a

⁵ This was actually the *fourth* ruling by the Eleventh Circuit denying the COA for the same reason. *See* App. 1a, 5a, 7a, 8a.

substantial showing of the denial of a constitutional right”—the same reason it gave more than a year earlier when it denied the COA the first time. *Id.* (quoting 28 U.S.C. § 2253(c)). The court relied heavily on cases involving challenges to errors in the application of the Guidelines, which it said were “‘generally not cognizable in a collateral attack.’” *Id.* (quoting *Buggs v. United States*, 153 F.3d 439, 443 (7th Cir. 1998)). The court also rejected the ineffective assistance claim, reasoning that because its precedents (since abrogated) had foreclosed Hunter’s arguments on direct review, his counsel could not have been ineffective for failing to raise them. *Id.* at 4a.

5. Pending before this Court is another petition for a writ of certiorari to the Eleventh Circuit, *Watts v. United States*, No. 08-7757, which presents the identical issue: whether carrying a concealed weapon is an ACCA predicate offense. Because of the close similarity and precedential relationship between these cases, the disposition of *Watts* will have a significant bearing on the disposition of this matter. In her response to the *Watts* petition, the Solicitor General stated that the denial of the COA was an error *both in Watts and in this case*.

Like Hunter, Watts was convicted of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) and erroneously sentenced as an armed career criminal to a mandatory minimum term of 15 years based, in part, on the determination that a prior concealed weapon conviction was a predicate felony under ACCA. After the Eleventh Circuit affirmed Watts’s sentence in reliance on *Hall*, it affirmed the denial of habeas relief and denied his request for a COA.

In May 2009, the Solicitor General confessed error, asking this Court to GVR the petition in *Watts* with explicit directions to the court of appeals to issue a COA. The government reasoned that the decisions of this Court in *Begay* and the Eleventh Circuit in *Archer* held that a concealed weapon conviction does not qualify as an ACCA predicate offense as a matter of law. Contrary to the Eleventh Circuit's ruling, those precedents provided grounds for a "substantial showing" that Watts's sentence violated due process, entitling him to a COA. According to the government, the erroneous application of ACCA presents an issue of constitutional magnitude, because the resulting sentence both exceeded "the maximum term authorized by law," and "deprive[d] . . . the court [of its] discretion to impose a lower sentence than the maximum." Brief of the United States, dated May 2009 ("U.S. *Watts* Br.") at 8-9 (citing *Whalen v. United States*, 445 U.S. 684, 690 (1980) and *Hicks v. Oklahoma*, 447 U.S. 343, 346-47 (1980)). The government further explained that *Begay* and *Archer* should be given retroactive effect as substantive sentencing rules. *See id.* at 10 (citing *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004); *Bousley v. United States*, 523 U.S. 614, 620-21 (1998)).⁶ The government expressly rejected the Eleventh Circuit's reliance on Guidelines cases because those decisions concerned the misapplication of law within a court's sentencing authority, while the ACCA error increased the statutory maximum. *Id.* at 7.

Recognizing that the decision below in *Hunter* presented precisely the same issue, the government

⁶ In any event, the Solicitor General stated that she would not rely on *Teague v. Lane*, 489 U.S. 288 (1989), as a procedural bar to the issuance of a COA in *Watts*. *Id.* at 13.

made clear that the Eleventh Circuit's denial of a COA in this case was equally wrong. "The sentencing errors both [in *Watts*] and in *Hunter* implicate the defendants' due process rights and give rise to a substantial showing of the denial of a constitutional violation." *Id.* at 11.

The Solicitor General concluded her submission in *Watts* with an unusual and expansive request for remedial action. First, she asked the Court to GVR the case with explicit instructions to the court of appeals to issue a COA. *Id.* at 11. She explained that this was necessary because the Eleventh Circuit would otherwise be bound by its incorrect decision in this case. Next, she recommended that the Eleventh Circuit remand the case to the district court to allow reconsideration of the constitutional claim under the change in law effected by *Begay* and *Archer*. As a final step, the Solicitor General suggested that, on remand to the district court, she would not oppose the court's consideration of a claim for collateral relief based upon the statutory ground that the sentence was in "excess of the maximum authorized by law," which would avoid the constitutional issue. *Id.* at 13 (quoting 28 U.S.C. § 2255(a)). *Watts* remains pending before this Court.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's refusal to grant Hunter a COA to allow him to challenge a concededly unlawful and plainly unjust sentence constitutes a clear error of law that warrants review and a summary reversal by this Court.

There is no dispute that Hunter's sentencing to a mandatory 15-year term was erroneous as a matter of law. In the decision below, following this Court's prior order of remand, the Eleventh Circuit acknowledged that it was a legal error to sentence Hunter as an armed career criminal under the recidivist enhancement provision of ACCA. The result of that error was to impose a sentence that exceeds by more than five years the maximum sentence available under a correct application of the law. In addition, the district court was deprived of its discretion to impose a far shorter sentence. Under the most fundamental principles of due process and justice, Hunter's illegal sentence cannot stand. There is simply no legal doctrine or constitutional basis that can justify preserving a sentence that would incarcerate Hunter, depriving him of his liberty, for a term that far exceeds the maximum punishment that is allowed by applicable law.

Accordingly, the error in the Eleventh Circuit's refusal to grant a COA and allow collateral review of Hunter's unauthorized sentence is apparent. The Solicitor General has conceded in *Watts* that the erroneous application of the career criminal enhancement provision in ACCA is a violation of potentially constitutional dimension. She further has conceded that the substantive rulings in *Begay* and *Archer* are retroactively applicable on habeas review. Thus, she

has agreed in these circumstances that there is a “substantial showing of the denial of a constitutional right” required for a COA. Therefore, there can be no dispute that Hunter has met the standard for a COA because, at the least, “reasonable jurists [can] debate” that the denial of Hunter’s habeas petition “should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

The fundamental liberty interests that are at stake here, as well as the government’s unqualified confession of error, justify—indeed require—a remedy that will promptly rectify the errors by the courts below. A summary reversal of the court of appeals’ ruling and issuance of a COA is the first and necessary step. The government has proposed further remedial action in the companion case of *Watts* that is equally just and appropriate here. The court of appeals should return the matter to the district court so that Hunter’s habeas application may be reconsidered and, ultimately, he may be resentenced de novo.

I. HUNTER’S ENHANCED SENTENCE UNDER ACCA IS ERRONEOUS AS A MATTER OF LAW AND VIOLATES HIS DUE PROCESS RIGHTS.

In the absence of ACCA, Hunter faced a statutory sentencing range of zero to 10 years’ imprisonment for his offense of conviction. But the application of ACCA elevated his statutory sentencing range to a minimum term of 15 years. That interpretation was erroneous as a matter of law. Furthermore, because

the resulting sentence violated due process, Hunter was entitled to a COA on his claim that he should have been sentenced to a lower term.

A. The Misapplication of ACCA to Enhance Hunter’s Sentence Is an Undisputed Error of Law.

In *Begay*, this Court significantly narrowed the class of crimes that would qualify as predicate offenses under the residual clause of ACCA, 18 U.S.C. § 924(e)(2)(B)(ii). To warrant an enhancement based upon a prior “violent felony” offense—an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another”—the prior offense must be similar in kind, and in degree of risk posed, to the examples of burglary, arson, extortion, and offenses involving the use of explosives enumerated in the statute. 128 S. Ct. at 1584-85. Because ACCA is concerned with punishing offenders who create a special risk of public harm by virtue of their prior criminal history, qualifying predicate offenses “typically involve purposeful, violent, and aggressive conduct.” *Id.* at 1587 (internal quotation marks omitted). Viewing ACCA in light of this purpose, this Court in *Begay* held that the crime of driving while under the influence of alcohol or drugs did not constitute a “violent felony” within the meaning of the statute, because it differed from the category of intentional offenses typically associated with a likelihood of future violent conduct.

Since *Begay*, the circuits that have addressed the issue in the firearm context have unanimously held that a weapon possession offense does not qualify as a violent felony under ACCA because it consti-

tutes a passive act that does not, without more, involve purposeful, violent, or aggressive conduct. *See, e.g., United States v. Serafin*, 562 F.3d 1105 (10th Cir. 2009) (possession of an unregistered weapon is not a violent felony under ACCA); *United States v. Haste*, 292 F. App'x 249 (4th Cir. 2008) (possession of a weapon of mass destruction is not a violent felony under ACCA); *see also United States v. Flores*, 477 F.3d 431 (6th Cir. 2007) (before *Begay*, ruling that carrying a concealed weapon is not a violent felony under ACCA); *United States v. Whitfield*, 907 F.2d 798 (8th Cir. 1990) (same). The Solicitor General has agreed, explaining that under the standard articulated by this Court in *Begay*, carrying a concealed weapon is not a qualifying offense under ACCA. U.S. *Watts* Br. at 10.

The Eleventh Circuit itself now concedes that its pre-*Begay* precedents were wrong. In *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008), the court already acknowledged that carrying a concealed weapon cannot be considered a “crime of violence” under the career offender enhancement of the Sentencing Guidelines, and that therefore its prior holdings to the contrary (in the context of the Guidelines and ACCA) have been “undermined to the point of abrogation.” *Id.* at 1352. In the decision below, the court conceded there was “good reason to conclude that Hunter was erroneously sentenced as an armed career criminal.” App. 2a. Now, in the few months since that decision, the Eleventh Circuit has flatly held that carrying a concealed weapon is not an ACCA predicate. *See Townsley*, 2009 WL 929986, at *3 (vacating enhanced sentence where prior concealed weapon offense was counted as a violent felony); *United States v. Redeemer*, No. 07-15837,

2009 WL 684749, at *1 (11th Cir. Mar. 17, 2009) (unpublished) (same).

Accordingly, this is a case in which all legal authorities—including the very court whose decision is under review—agree that the statutory basis for the imposed sentence is wrong. And yet, the Eleventh Circuit refused to allow Hunter even to argue that he should be resentenced in accordance with the law.

B. The Erroneous Application of ACCA Violated Hunter’s Due Process Rights.

The Eleventh Circuit erred when it held that the admittedly improper application of ACCA’s sentencing enhancement did not violate Hunter’s due process rights. As the Solicitor General has demonstrated, this Court’s precedents hold that sentencing a defendant to a term of imprisonment based upon a statute that indisputably does not apply to him violates basic principles of due process. U.S. *Watts* Br. at 8-11.

In *Whalen v. United States*, 445 U.S. 684 (1980), this Court articulated the fundamental rule that a defendant has a “constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress.”⁷ 445 U.S. at

⁷ In *Whalen*, the defendant was erroneously sentenced to consecutive prison terms for murder and rape, the latter of which should have been merged into the former for sentencing purposes. *Id.* at 686-87. The Court reversed the defendant’s sentence because of the “guarantee against double jeopardy, [and] also the constitutional principle of separation of powers,” *id.* at 689, noting that although states are not bound by the doctrine of separation of powers, “[t]he Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit state courts

690. Within the federal constitutional framework, “the legislative power, including the power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress.” *Id.* at 689. Where a court exceeds its sentencing authority by imposing punishment more severe than Congress contemplated, it “trenches particularly harshly on individual liberty.” *Id.* Accordingly, no criminal defendant can be subject to a penalty of imprisonment in the absence of a clear legislative mandate authorizing such a penalty.

This Court set forth a related principle in *Hicks v. Oklahoma*, 447 U.S. 343 (1980), which held that a habitual offender is denied due process when the sentencer is erroneously prevented from exercising its statutory discretion to impose a lesser sentence. *Id.* at 346-47. The defendant in *Hicks* was sentenced to a 40-year mandatory minimum prison term under a state habitual offender statute that was declared unconstitutional subsequent to his conviction. *Id.* at 344-45. The state appellate court affirmed, reasoning that because the sentence was within the range of punishment available, the jury might have exercised its discretion to impose the same sentence. *Id.* at 345. Reversing, this Court observed that a defendant has a substantial and legitimate expectation that he will be sentenced within a legal framework that properly defines the upper and lower limits of the district court’s discretion. *Id.* at 346. Recognizing the fundamental unfairness of a sentence that is fashioned based upon the district court’s misapprehension of its own sentencing authority, this

from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law.” *Id.* at 689 n.4.

Court held that the defendant in *Hicks* was denied his right to “be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion.” *Id.*

A number of circuits have followed the lessons in these cases and held that sentences imposed inconsistently with the law violate due process. The Tenth Circuit, citing *Whalen* and *Hicks*, held that when a defendant “receive[s] a sentence patently in excess of the maximum permitted[, t]his claim implicates due process concerns” and requires a resentencing in which the improper enhancement is not considered. *Richardson v. Evans*, 99 F.3d 1150, 1996 WL 603278, at *4 (10th Cir. 1996) (unpublished).⁸ The Ninth Circuit followed *Hicks* and *Whalen* in reversing a sentence erroneously altered by the state Department of Corrections under the wrong California statute, stating that because the defendant had “a liberty interest in the correct sentence of eight months, it was a due process violation to order him to a full two-year term.” *Wasko v. Vasquez*, 820 F.2d 1090, 1091 n.2 (9th Cir. 1987). Other courts have held the same in analogous contexts. *See United States v. Eakman*, 378 F.3d 294, 296-97 (3d Cir. 2004) (granting defendant’s motion for habeas relief

⁸ In *Richardson*, the defendant challenged his sentencing enhancement under Oklahoma’s subsequent offender statute, where the prior conviction that provided the basis for his enhancement was a nonqualifying misdemeanor under Oklahoma law, but a qualifying felony under Texas law. 1996 WL 603278, at *3. The Tenth Circuit remanded the case for resentencing upon defendant’s 28 U.S.C. § 2254 petition, stating that “[t]he Due Process Clause of the Fourteenth Amendment prohibits state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law.” *Id.* at *4.

because the sentencing court violated his due process rights by relying upon its own misunderstanding of the Bureau of Prisons' authority to assign a prisoner to a community corrections center, and thus denied him the ability to argue for a downward departure); *Jones v. Arkansas*, 929 F.2d 375, 377-78 (8th Cir. 1991) (reversing defendant's erroneous sentence under the Arkansas habitual offender statute and holding that he was "denied due process because he was sentenced under a statute that was not in effect at the time he committed his crime").⁹

Imposing punishment inconsistent with what the law authorizes raises distinct constitutional concerns in a variety of other contexts. For instance, this Court has held that a convicted felon's involuntary commitment violates due process when it occurs without evidence that he is mentally ill. *Vitek v. Jones*, 445 U.S. 480 (1980). This is because "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," and a defendant has the constitutional right to be punished in a way that is reasonably related to the pur-

⁹ Similarly, the circuits have adhered to this Court's teaching in *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948), that a sentence violates due process when it is premised upon erroneous facts. See, e.g., *King v. Hoke*, 825 F.2d 720, 724-25 (2d Cir. 1987) (observing that "it is well-established that '[m]isinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process'") (citation omitted); *Johnson v. United States*, 805 F.2d 1284, 1288 (7th Cir. 1986) (noting that a defendant may be entitled to assert a challenge to his sentence under 28 U.S.C. § 2255 if "the district court relied on false information in sentencing him, [because] he may have been denied due process of law").

pose of his punishment. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *see also Jones v. United States*, 463 U.S. 354, 361 (1983). This Court has extended due process protections to similar types of governmental actions that restrict a defendant's liberty beyond what the law allows, including decisions that improperly revoke parole, *see Morrissey v. Brewer*, 408 U.S. 471 (1972), revoke probation, *see Gagnon v. Scarpelli*, 411 U.S. 778 (1973), eliminate good-time credits, or impose solitary confinement, *see Wolff v. McDonnell*, 418 U.S. 539 (1974).¹⁰

The Eleventh Circuit ignored these fundamental principles when it held that the acknowledged sentencing error here is of the type "generally not cognizable in a collateral attack." App. 4a. In doing so, it relied upon cases stating that errors in the application of the Sentencing Guidelines are generally not subject to collateral attack. *Id.* (citing *United States v. Cepero*, 224 F.3d 256, 267-68 (3d Cir. 2000); *Buggs v. United States*, 153 F.3d 439, 443 (7th Cir. 1998); *United States v. Segler*, 37 F.3d 1131, 1134 (5th Cir. 1994)). These decisions, however, are inap-

¹⁰ In a parallel context, this Court has prohibited imposing "grossly excessive" punishment upon tortfeasors, recognizing that due process creates substantive limits beyond which certain penalties may not go. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-55 (1993). Thus, a court may not award punitive damages in a way that amounts to changing the nature of the conduct for which the tortfeasors were found responsible and deprives them of property without due process. *See United States v. Bajakajian*, 524 U.S. 321, 324 (1998); *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996). Similarly, this Court has applied due process protections to punitive forfeitures of property when they are not authorized by law. *See Peisch v. Ware*, 8 U.S. (4 Cranch) 347 (1808); *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688-90 (1974); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915).

posite. As the government observed in *Watts*, the authorities cited by the Eleventh Circuit involved technical misapplications of the Sentencing Guidelines and concerned sentences that were within the court's authority and discretion to impose. U.S. *Watts* Br. at 7. By contrast, the excessive sentences under ACCA at issue in *Watts* and here were beyond the court's authority and discretion to impose. Accordingly, the Eleventh Circuit's improper application of ACCA to Hunter's sentence violated his due process rights.

C. Hunter Has Established Grounds for a Certificate of Appealability.

As demonstrated above, Hunter's sentence in excess of the maximum term authorized by law violates due process. In order to qualify for a COA, however, Hunter is required to make only a "*substantial showing* of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (emphasis added). The test is whether "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 483-84 (internal quotation marks omitted). Recognizing the strength of the precedents on Hunter's side, the Solicitor General conceded in *Watts* that Hunter has "at least" done that. U.S. *Watts* Br. at 8, 10. Accordingly, Hunter should have been granted a COA.¹¹

¹¹ The government indicated in *Watts* that it would not rely upon the procedural bar in *Teague v. Lane*, 489 U.S. 288 (1989), which precludes the application of intervening precedent on collateral review in certain cases. U.S. *Watts* Br. at 13 n.6 (citing *Danforth v. Minnesota*, 128 S. Ct. 1029, 1046 (2008)). Presum-

II. THIS COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW.

The most appropriate and expeditious disposition of this case would be for this Court to grant the writ and summarily reverse the Eleventh Circuit's decision. This case, in fact, presents the classic situation warranting a summary reversal, which has been described as the "kind of reversal order [that] usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a 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* 344-45 (9th ed. 2007) (also noting that summary reversal is appropriate when federal respondents have confessed error).¹² The Eleventh Circuit's decision that Hunter could not make a substantial showing of a constitutional violation was manifestly wrong, as the Solicitor General has conceded in *Watts*. Moreover, it is a decision to which the Eleventh Circuit has

ably, it will take the same position here as a matter of equity. In any event, as the government concedes, *Teague* would not apply because the decisions in *Begay* and *Archer* constitute substantive holdings concerning eligibility for a recidivist enhancement that are entitled to retroactive effect on collateral review. *Id.* at 10 & 13 n.6. See *Schriro*, 542 U.S. at 353 ("A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes"); *Bousley*, 523 U.S. at 620-21 ("decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct" are retroactive on collateral review).

¹² See, e.g., *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (explaining that summary reversal was appropriate because the case did not "decide any new or unanswered question of law, but simply correct[ed] a lower court's demonstrably erroneous application of federal law").

incorrectly adhered in four separate rulings—both before this Court’s GVR and after.¹³

The Solicitor General has indicated that after remand in *Watts*, she would ask the Eleventh Circuit to remand the matter to the district court for consideration of the due process claim in light of *Begay* and the Eleventh Circuit’s decision in *Archer*. She further has submitted that, on remand, habeas relief may be available under the non-constitutional ground in § 2255(a) authorizing relief from a sentence “in excess of the maximum authorized by law.” See U.S. *Watts* Br. at 13; see also *Mateo v. United States*, 310 F.3d 39 (1st Cir. 2002) (*Mateo I*), and *Mateo v. United States*, 276 F. Supp. 2d 186 (D. Mass. 2003) (*Mateo II*), *aff’d*, F.3d 126 (1st Cir. 2005) (holding that if, on a “quick look,” a habeas petitioner’s constitutional claim is not completely without merit, the appellate court should grant the COA and remand, whereupon the district court should consider both constitutional and non-constitutional arguments for habeas relief). Indeed, the Solicitor General has stated that she would not oppose such reconsideration “on the facts of this case.” That same course of action should be followed here, allowing Hunter to obtain habeas relief from his equally excessive sentence.

¹³ As an alternative to summary reversal, Hunter’s petition could be granted and the case set for plenary review.

CONCLUSION

For all the aforementioned reasons, the petition for a writ of certiorari should be granted.

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