No. 09-122

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

REPLY BRIEF

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In her brief, the Solicitor General confesses error and agrees that a COA should issue. Indeed, she acknowledges that the just result in this case would be for Hunter to receive relief in the district court from his unlawful sentence. However, her suggested remedy—a GVR from this Court—would not guarantee that result, and might only delay an already prolonged process. Only a summary reversal would establish the error of the decision below and ensure that Hunter is permitted to take the next step toward obtaining the ultimate relief to which he is entitled.

I. THE ELEVENTH CIRCUIT COMMITTED LEGAL ERROR WHEN IT DENIED A COA TO REVIEW HUNTER'S CONCEDEDLY UNLAWFUL SENTENCE.

There is uniform agreement that the 188-month sentence Hunter is currently serving is unlawful and exceeds the maximum sentence authorized under the statute by more than five years. As the government now concedes, the application of ACCA's enhancement provisions to Hunter's sentence was a "pure legal error." U.S. Br. 24. Indeed, the Eleventh Circuit itself—joining every other circuit that has addressed the question—has recently held definitively that a conviction for carrying a concealed weapon does not constitute a "violent felony" under ACCA. *See United States v. Canty*, 570 F.3d 1251, 1255 (11th Cir. 2009) (citing *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008)).

It is also undisputed that Hunter satisfied the legal standard for receiving a COA. As the government concedes, due process prohibits imposition of a sentence that exceeds the statutory maximum, or depri-

vation of the sentencing court's discretion to impose a lesser sentence than the maximum. U.S. Br. 20-22 (citing *Whalen v. United States*, 445 U.S. 684 (1980), and *Hicks v. Oklahoma*, 447 U.S. 343 (1980)). Therefore, at the very least, it is beyond dispute that Hunter has demonstrated that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983).

Furthermore, for the reasons given in the government's brief, the arguments of Amici Criminal Law and Habeas Corpus Scholars, attempting to defend the Eleventh Circuit's decision, are unsound and fallacious. *See* U.S. Br. 13-22. It is untrue that a COA is limited to disputes concerning established constitutional theories. The relevant authority of this Court and the text and purpose of 28 U.S.C. § 2253(c)(2) establish that a COA may issue where debatable issues regarding the constitutional nature of a claim are presented. *See id.* at 8-13. Amici's comparison between habeas challenges to the application of the sentencing guidelines and the issue presented here is also flawed because the former do not concern sentences that exceed the sentencing court's statutory authority. *See id.* at 15-17. Moreover, one line of cases that Amici contend is analogous to the instant case—habeas challenges to wrongful convictions—specifically demonstrates that a criminal conviction premised on a statutory interpretation later held invalid violates due process. *See id.* at 17-20 (citing *Fiore v. White*, 531 U.S. 225 (2001), and *Bunkley v. Florida*, 538 U.S. 835 (2003)).

Accordingly, Hunter's entitlement to receive a COA is not in dispute.

II. THIS COURT SHOULD SUMMARILY REVERSE THE ELEVENTH CIRCUIT'S DECISION.

Although the Solicitor General concedes that the decision below is manifestly incorrect, she contends that the appropriate remedy is to issue a GVR order so that the Eleventh Circuit can reconsider its decision in light of the government's position. U.S. Br. 24. That remedy might be appropriate in a situation where the lower court previously actually relied on the position of the government, or where its views were not already well entrenched. But here, after the last remand from this Court to reconsider the denial of the COA in light of *Begay v. United States*, 128 S. Ct. 1581 (2008), the Eleventh Circuit did not even wait for the government to express its views before rendering an essentially identical decision for the same reason. U.S. Br. 6. That was, in fact, the *fourth* consecutive decision by the court of appeals erroneously denying Hunter a COA for failure to show the denial of a constitutional right. Pet. App. 1a-4a, 5a, 7a, 8a. A GVR by definition would not tell the Eleventh Circuit that any of those rulings was incorrect, *see Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964), and it would not preclude that court from making the wrong decision for a fifth time. Under these circumstances, a GVR would not serve its purpose of "improv[ing] the fairness and accuracy of judicial outcomes." *Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (per curiam).

Moreover, there is no need for an open-ended remand to decide whether some other obstacle—such as discretionary procedural defenses—stands

in the way of issuing the COA. The Solicitor General states that in the "interests of justice" the government "did not invoke *Teague* or procedural default as a basis for denying the COA in the court of appeals, nor does the government seek to interpose such arguments at this stage of the proceedings." U.S. Br. 23-24. This Court has indicated that an express waiver of a procedural defense is binding and would prevent the lower court from applying any such bars. *See, e.g., Day v. McDonough*, 547 U.S. 198, 202 (2006) ("[W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense."). Here, that waiver comes from the highest level of the Department of Justice.

Finally, a GVR would only introduce further unwarranted uncertainty and delay into these exceedingly protracted proceedings. *See* U.S. Br. 24 n.6 (also expressing concern about the length of this litigation). Hunter has spent the last two-and-a-half years litigating the threshold question of his right to bring an appeal to challenge his unlawful sentence, and will be no closer after a GVR. He has already served nearly 76 months of that sentence. Another round of litigation carries the significant risk that he will end up serving more time than he will receive upon resentencing—a resentencing that the government supports. *See* Pet. Br. 5. Under these circumstances, a GVR is an inadequate remedy and inferior to summary reversal. *See Lawrence*, 516 U.S. at 168 ("[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 itself advocates, "the interests of justice warrant relief" here. U.S. Br. 24. That end

is best served by resolving this matter in a correct and timely manner, as only summary reversal can accomplish.

CONCLUSION

For the foregoing reasons, the judgment below should be summarily reversed.

December 9, 2009

Respectfully submitted,

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