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

BRIEF FOR CRIMINAL LAW AND HABEAS CORPUS SCHOLARS AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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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 Government has confessed that it was error to deny the COA.

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INTEREST OF *AMICI*

Amici curiae are law scholars who write and teach about this Court's criminal law and habeas corpus jurisprudence.[1] Stephanos Bibas is Professor of Law at the University of Pennsylvania, where he researches and teaches on criminal law and procedure. Jonathan F. Mitchell is Assistant Professor of Law at George Mason University; his research and teaching include criminal procedure and habeas corpus. Adam K. Mortara is Lecturer in Law at the University of Chicago Law School, and teaches courses in federal courts and habeas corpus.[2]

Amici have a professional interest in illuminating this Court's consideration of the important and complicated questions presented in this case.

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[1] The parties have consented to the filing of this brief and such consents are being lodged herewith. The parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

[2] The views and positions taken in this brief are the authors' own, and are not intended to represent the views of their respective academic institutions.

REASONS FOR DENYING THE PETITION

The Eleventh Circuit correctly denied Hunter's request for a COA, and this Court should not disturb that decision.

First, the Government's confession of error does not compel the issuance of a COA. Whether Hunter deserves a COA under 28 U.S.C. 2253(c)(2) is a jurisdictional question this Court must determine without regard to the parties' stipulations.

Second, Section 2253(c)(2) allows COAs only for applicants who make "a substantial showing of the denial of a *constitutional* right." Hunter has not demonstrated that the constitutional right he asserts even exists.

Third, Hunter's "constitutional" right (to the extent it exists at all) is *Teague*-barred and therefore undeserving of a COA.

Fourth, Hunter has procedurally defaulted on both his statutory sentencing error claim and his "constitutional" claim.

Fifth, both Hunter and Watts should pursue their statutory *Begay* claim in habeas proceedings under 28 U.S.C. 2241, by asserting that Section 2255 is "inadequate or ineffective" to test the legality of their detention. 28 U.S.C. 2255(e).

This Court should therefore deny both petitions. Alternatively, the Court should grant certiorari to consider these important questions regarding the

meaning of Section 2253(c)(2) and the Due Process Clause.

I. This Court Should Not Summarily Dispose Of This Case In Light Of The Government's Confession of Error

In the related petition in *Watts* v. *United States*, No. 08-7757, the Government confesses error in *Watts* and this case. See Brief for the United States in No. 08-7757 ("Gov't *Watts* Br.") at 11. The Government asks this Court to grant the *Watts* petition and vacate and remand to the Eleventh Circuit *with instructions to grant a COA*. *Id.* at 14. The Government will presumably ask this Court for the same action in this case. *Amici* believe such a disposition inappropriate.

When this Court "GVRs" cases in light of a confession of error, it nearly always allows the lower court to reconsider the case in the first instance, and refrains from directing the resolution on remand. See, *e.g.*, *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (collecting cases, none of which involved instructions on how to dispose of the merits); *id.* at 171 (referring to "the legitimacy of GVRs on the basis of confessions of error *without determining the merits*") (emphasis added); *Stutson* v. *United States*, 516 U.S. 163, 182-183 (1996) (Scalia, J., dissenting) (questioning but accepting the practice of GVR in light of a confession of error with no merits examination). What the Government seeks from this Court

in *Watts* is instead an unexplained ruling that *Watts* gets a COA. Such an order would disguise a summary reversal as a GVR.

Such a summary disposition is further inappropriate because the Government confesses error as to a *jurisdictional* issue—the issuance of a COA. See *Miller-El* v. *Cockrell*, 537 U.S. 322, 335-336 (2003) (describing the COA as a "jurisdictional prerequisite" to an appeal from a district court's denial of post-conviction relief). The Government cannot stipulate that Hunter and Watts satisfy Section 2253(c)(2)'s requirements for a COA, any more than it could stipulate that an interlocutory order satisfies the "collateral order" doctrine's requirements for appellate jurisdiction.[3] See *Sell* v. *United States*, 539 U.S. 166, 175-177 (2003); cf. also *Young* v. *United States*, 315 U.S. 257, 258-259 (1942) (holding that the Government's confessions of error "does not relieve this

[3] For the same reason, the Government further errs in suggesting that the Court can avoid the constitutional questions in this case by instructing the Eleventh Circuit to remand to the District Court. Gov't *Watts* Br. 12-13. Without a COA no appellate court has jurisdiction to vacate the District Court's order denying Hunter's Section 2255 motion. Cf. *Miller-El*, 537 U.S. at 349 (Scalia, J., concurring) (criticizing appellate courts for bypassing COA determination in order to address the merits). And no COA can issue unless Hunter shows the "denial of a constitutional right." The Government's citation of 28 U.S.C. 2106 is not relevant. Gov't *Watts* Br. 12. As the Government acknowledges, the Eleventh Circuit must first issue a COA before it can remand the case to the District Court under Section 2106. *Id.* at 11.

Court of the performance of the judicial function. . . . [O]ur judicial obligations compel us to examine independently the errors confessed.").

II. The Eleventh Circuit Correctly Denied Hunter's COA Application Because It Did Not Present A "Constitutional" Claim Under 28 U.S.C. 2253(c)(2)

A. Section 2253(c)(2) Does Not Permit COAs For "Debatably Constitutional" Claims

Section 2253(c)(2) prohibits certificates of appealability unless an applicant makes "a substantial showing of the denial of a *constitutional* right."

Congress enacted this statute in 1996. The previous regime allowed habeas petitioners to appeal if they made "a substantial showing of the denial of [a] *federal* right." *Barefoot* v. *Estelle*, 463 U.S. 880, 893 (1983). The 1996 amendment thus eliminated appeals from post-conviction proceedings that present non-constitutional claims, such as violations of federal statutory rights or treaty obligations. See *Slack* v. *McDaniel*, 529 U.S. 473, 483 (2000) ("[W]e give the language found in § 2253(c) the meaning ascribed it in *Barefoot*, with due note for the substitution of the word 'constitutional.'"); *Medellin* v. *Dretke*, 544 U.S. 660, 666 (2005) (per curiam). See also *United States* v. *Cepero*, 224 F.3d 256, 264 (CA3 2000) (en banc) ("The term 'constitutional right' means something very

different from the term 'federal right,' and . . . we give effect to the change.") (citation omitted).

Slack held that Section 2253(c)(2) requires COA applicants to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S. at 484. This formulation presumes that the COA applicant presents a viable constitutional theory. The circuit justice or judge must then assess whether reasonable jurists could disagree about its application to the case at hand. In other words, in order to make "a substantial showing of the denial of a constitutional right" that right should at least exist at the time the petitioner presents his habeas petition.

In contrast, the Government argues that a COA may issue whenever the applicant presents a *debatably constitutional* claim, *i.e.*, whenever it is debatable whether the claim is constitutionally cognizable. Gov't *Watts* Br. 8. But *Slack* is the authoritative construction of 28 U.S.C. 2253(c)(2). And *Slack* requires a constitutional claim whose application to the facts is debatable, not a claim that is only "debatably constitutional."

The Government's interpretation would have perverse consequences. Under the Government's rule, petitioners could use the Supremacy Clause or the Due Process Clause to bootstrap any statutory violation (state or federal), or even a treaty violation, into a "debatably constitutional" claim. See, *e.g.*, *Medellin* v. *Dretke*, No. 04-5928 Petr's Reply Br. 20

(arguing that an alleged violation of the Vienna Convention on Consular Relations "should be regarded as a violation of a constitutional right under the Supremacy Clause for purposes of 28 U.S.C. § 2253(c)(2)."). And the Government's view invites COA applicants to evade the COA gatekeeping function by inventing "debatable" and tailor-made "constitutional claims" built from their specific facts.

The Government's proposed interpretation disrespects Congress' decision to eliminate non-constitutional and specious claims from COA eligibility. To succeed, Hunter must rely on an existing constitutional right, not a hypothetical one. Since the constitutional right Hunter asserts does not exist, he cannot obtain a COA.

B. This Court's Precedents, And Those Of The Courts Of Appeals, Reject The Notion That Sentencing Errors Present "Constitutional" Claims Under 28 U.S.C. 2253(c)(2)

Hunter argues that the Due Process Clauses prohibit a court from sentencing a defendant through statutory misinterpretation. See Petn. 15 ("[S]entencing a defendant to a term of imprisonment based upon a statute that indisputably does not apply to him violates basic principles of due process."). The Government's position is more hedged; it argued in *Watts* that this proposition is debatable enough to warrant a COA. See Gov't *Watts* Br. 8 (arguing that

Watts "can make a substantial showing that it violates due process to impose a sentence on a defendant in excess of the maximum term authorized by law."). But this Court's precedents and the precedents of the Courts of Appeals are incompatible with either view.

In *Lewis* v. *Jeffers*, 497 U.S. 764 (1990), a habeas petitioner claimed that the Arizona courts had misinterpreted a statutory aggravating circumstance that rendered the petitioner eligible for capital punishment. The Court refused to entertain the claim because "habeas corpus relief does not lie for errors of state law." *Id.* at 780. The only circumstance in which such a sentencing error might present a constitutional claim is if "the state court's finding was so arbitrary or capricious as to constitute an independent [procedural] due process or Eighth Amendment violation." *Id*. *Pulley* v. *Harris*, 465 U.S. 37 (1984), involved a due-process claim based on the state's denial of an allegedly state-law mandated proportionality review. The Court again denied the constitutional nature of the claim. *Id.* at 41; cf. also *Estelle* v. *McGuire*, 502 U.S. 62, 67-69 (1991) (holding that introducing recidivism evidence in alleged violation of state law does not violate due process).

Hunter asserts a due-process right to a sentence that is free of *any* legal error that increases his punishment. Although Hunter's alleged ACCA error may have violated a federal statute, this cannot present a *constitutional* claim unless the sentencing court's errors were "arbitrary or capricious" or "egregious." *Lewis*, 497 U.S. at 780; *Pulley*, 465 U.S.

at 875. Hunter does not even contend that his sentencing court acted in such a fashion. Nor could he, given that his sentence was consistent with the law as it existed prior to *Begay* v. *United States*, 128 S.Ct. 1581 (2008).[4]

In reaching its conclusion that Hunter's claim is statutory and not constitutional (and therefore not the proper subject of a COA), the Eleventh Circuit cited *United States* v. *Cepero*, 224 F.3d 263 (CA3 2000) (en banc) and *Buggs* v. *United States*, 153 F.3d 439, 443 (CA7 1998). Petn. 4a. At a time when the Sentencing Guidelines were mandatory, these decisions held that error in Guidelines application raises no constitutional claim and therefore cannot justify a COA under Section 2253(c)(2). Cf. *United States* v. *Segler*, 37 F.3d 1131, 1133-1134 (CA5 1994) (contention that district court misapplied mandatory guidelines as to career offender status is not constitutional error).

Hunter and the Government concede that *Cepero* and *Buggs* were correctly decided. Petn. 20; Gov't *Watts* Br. 7. Yet these cases are indistinguishable from Hunter's.

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[4] Both *Lewis* and *Pulley* deal with complaints about state court implementation of state sentencing law, but there is no distinction between state and federal law with respect to the due-process claim Hunter makes—and Hunter offers none, citing state and federal law cases interchangeably. Petn. 16-18.

In *Cepero*, the petitioner sought relief from a mandatory sentence enhancement related to his conspiracy to distribute cocaine base. *Cepero*, 224 F.3d at 267. *Buggs* is even more like the present case. There, a change in the Sentencing Guidelines made after Buggs' direct appeal would have lowered the range applicable to him at sentencing. *Buggs*, 153 F.3d at 442-443. Both *Cepero* and *Buggs* held that error in imposing a mandatory enhancement under the Guidelines cannot meet Section 2253(c)(2)'s required "denial of a constitutional right." *Cepero*, 224 F.3d at 268; *Buggs*, 153 F.3d at 443.

The Government's attempt to distinguish *Cepero* and *Buggs* amounts to an *ipse dixit* based on a false premise. See Gov't *Watts* Br. 7 ("Here, the Sentencing Guidelines are not at issue, and petitioner does not claim a misapplication of law concerning a sentence *that the court had discretion to impose*.") (emphasis added). Hunter just parrots the Government's line. See Petn. 20 ("[T]he authorities cited by the Eleventh Circuit . . . concerned sentences that were within the court's authority and discretion to impose.").

But at the time of *Cepero* and *Buggs* and prior to *United States* v. *Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines were mandatory just like the ACCA. Sentencing courts did not have "discretion" to ignore or misapply the guidelines at issue in *Cepero* and *Buggs*, and the Government's suggestion to the contrary is false. See *Booker*, 543 U.S. at 233 ("This conclusion rests on the premise . . . *that the relevant sentencing rules are mandatory and impose binding*

requirements on all sentencing judges.") (emphasis added); *id.* at 233 ("If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment."); *id.* at 237-238 (rejecting any distinction between Congressional statutes and the Commission's Guidelines in connection with the Sixth Amendment *Apprendi* analysis).

The Government and Hunter fail to raise any accurate distinction between this case and *Cepero* or *Buggs*. To summarily dispose of the Eleventh Circuit's judgment here would also set aside the considered opinions of the Third and Seventh Circuits on the same subject.

C. The Court's Prior Decisions In Analogous Contexts Show That Hunter's Claim Is Not Constitutional

The theoretical underpinning of the right Hunter calls "constitutional" is a liberty interest to be free from unlawful imprisonment. Hunter's specific claim is that garden-variety error in statutory interpretation violates the Due Process Clause whenever it increases the punishment for a defendant's action beyond what a statute directs. Yet the Court has refused to characterize such interpretive errors as constitutional violations *even when they lead to wrongful convictions*.

In *Davis* v. *United States*, 417 U.S. 333 (1974), the petitioner had been convicted under Selective Service regulations that this Court held invalid in a case decided after the petitioner's conviction became final. *Id.* at 337-338. The lower federal courts rejected Davis' Section 2255 motion, but the Court reversed and held that Davis' claim was cognizable under Section 2255. Yet the Court refused to adopt the theory that courts violate a defendant's constitutional due-process rights whenever they misinterpret laws governing conviction (or sentence). Instead, the Court allowed Davis' claim only because Section 2255(a) explicitly authorizes post-conviction relief for certain *non-constitutional* errors, including "custody in violation of the . . . laws of the United States. . . ." 28 U.S.C. 2255(a).

The same is true when a trial court mis-instructs the jury as to the law of the offense, such as in the definition of an element. Consistent with *Davis*, such errors are not constitutional. See *Gilmore* v. *Taylor*, 508 U.S. 333, 344 (1993) ("[I]nstructional errors of state law generally may not form the basis for federal habeas relief").

Section 2255(a) differs from Section 2253(c)(2), which limits appeals to *constitutional* claims and excludes non-constitutional claims such as the claim in *Davis* and Hunter's claim in this case. Such claims of statutory error are still cognizable in Section 2255 proceedings, but do not qualify for a COA. As the Seventh Circuit has explained:

> [A statutory claim] presented in an initial petition under the approach of *Davis*, and rejected by the district judge, may not be appealed. *Davis* itself shows why. Justice Rehnquist's dissent in *Davis*—where, recall, the claim was that a decision of the Supreme Court after Davis' conviction established that his acts were not crimes—argued that the petition should have been rejected because it was not based on the Constitution. The majority might have replied that any legally unwarranted conviction violates the due process clause. But the Court did not say this. Instead it emphasized that § 2255 permits relief when the sentence violates "the Constitution *or laws* of the United States" (emphasis added). The difference between § 2255 ¶ 1 and § 2253(c)(2) is clear: one authorizes relief when the sentence violates the Constitution or laws of the United States, and the second authorizes appeal when there has been a substantial showing that the sentence violates the Constitution. If the district court denies a petition based on a statutory issue, § 2253(c)(2) precludes an appeal.

Young v. *United States*, 124 F.3d 794, 799 (CA7 1997) (Easterbrook, J.) (internal citations omitted).

Davis and *Gilmore* demonstrate that a trial court's error in defining a criminal offense fails to qualify as a "constitutional" claim. If errors in defining the substantive scope of the criminal offense itself are not constitutional due-process violations, it

follows that errors in defining the legally permissible sentencing range cannot be either.

D. The Court's Decisions In *Whalen* v. *United States* And *Hicks* v. *Oklahoma* Do Not Recognize The Constitutional Right Hunter Asserts

Hunter attempts to manufacture a "constitutional" claim out of the statutory ACCA error by invoking *Whalen* v. *United States*, 445 U.S. 684 (1980), and *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980). Petn. 15-18. The Government in *Watts* likewise relies on these two cases. Gov't *Watts* Br. 8-10. Yet neither *Whalen* nor *Hicks* gives Hunter (or Watts) a constitutional claim under the Due Process Clause.

The defendant in *Whalen* had been convicted of both rape and first-degree murder, and was sentenced to consecutive prison terms. 445 U.S. at 685. On direct review, the Court concluded that Congress had not authorized consecutive terms for those crimes. The Court held that the Double Jeopardy Clause "precludes federal courts from imposing consecutive sentences unless Congress has authorized them to do so." *Id.* at 689. The *Whalen* Court further noted that unauthorized consecutive sentences "violate[ ] 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." *Id*.

Whalen recognizes only that the Double Jeopardy Clause prohibits consecutive sentences when Congress intended multiple convictions to be treated as a single criminal offense. *Whalen*, 445 U.S. at 688-689, 693. In a footnote, the Court's opinion further muses about how this principle might apply in state-court proceedings. 445 U.S. at 689 n.4. The Court said that because "the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States," it is

> possible, therefore, that the Double Jeopardy Clause does not, through the Fourteenth Amendment, circumscribe the penal authority of state courts in the same manner that it limits the power of federal courts. The Due Process Clause of the Fourteenth Amendment, however, 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.

Id. Hunter and the Government seize on this last sentence to support their contentions that Hunter and Watts are presenting "constitutional" claims. Petn. 15, Gov't *Watts* Br. 8 & n.2.

This dictum from a footnote in *Whalen* does not give federal and state prisoners a constitutional due-process claim whenever they complain that their sentences were unauthorized. First, such a view contradicts the Court's more recent holdings in cases such as *Lewis* and *Pulley*, *supra*, which rejected the

notion that claims that a state court had misinterpreted state sentencing law were constitutional. It also contradicts *Davis* and *Gilmore*, *supra*, which refused to endorse the same idea with respect to instructional error. Finally, *Whalen* itself reinforces that there is no general due-process right to be free from sentences that exceed the maximum penalty authorized by law. If that were the law, the *Whalen* Court would have rested its holding there, rather than plumbing the depths of Double Jeopardy doctrine.

Hicks is even less helpful to Hunter than *Whalen*. The defendant in *Hicks* was a recidivist offender, and the trial court had instructed his jury that it was required to impose a 40-year sentence under Oklahoma's recidivist-offender statute. 447 U.S. at 344-345. While Hicks' case was on direct review, the Oklahoma Court of Criminal Appeals declared this recidivist-offender statute unconstitutional in a different case. *Id.* at 345. Yet when Hicks' case reached that court, it affirmed his sentence. The state court reasoned that Hicks suffered no prejudice because the jury's 40-year sentence fell within the range of punishment that it could have imposed under Oklahoma's other criminal statutes.

The Court reversed Hicks' conviction on direct review, holding that "Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender

provision." *Id.* at 346 (emphasis in original). Withholding this procedural right to a jury sentence while the case was on direct review represented "an *arbitrary* disregard of the petitioner's right to liberty" and therefore a denial of due process. *Id.* (emphasis added).

The due-process violation in *Hicks* had nothing to do with a sentence that exceeded a statutory maximum. Hicks' sentence was *within* the legally permissible boundaries. The problem was that Oklahoma had denied to Hicks the *procedural* right to a jury determination of his sentence, a right that state law vested in all convicted defendants. *Id.* at 345-346. Here, Hunter makes no claim that his sentencing court forbade him a procedural right specified in federal law; he alleges only that the court erred in calculating his sentence under ACCA. Hunter cannot use *Hicks* to bootstrap this alleged statutory violation into a constitutional due-process claim.

III. Hunter's Novel Constitutional Right Is *Teague*-Barred

Teague v. *Lane*, 489 U.S. 288 (1989), prohibits federal post-conviction courts from granting relief based on new rules of constitutional law. *Beard* v. *Banks*, 542 U.S. 406, 413 (2004). It also permits courts to deny COAs when the applicant fails to make a substantial showing that *Teague* would not bar collateral relief. Cf. *Miller-El*, 537 U.S. at 349 (Scalia, J., concurring); *id.* at 341-342; *Slack*, 529 U.S. at 485;

Hughes v. *Dretke*, 160 Fed. Appx. 431, 434 (CA5 2006) (denying a COA as to a *Teague*-barred claim). Hunter makes no such showing, nor could he. *Teague* would bar relief even if his constitutional theory were correct, and so a COA should not issue.

Under *Teague*, the Court must determine whether Hunter advances a new rule—*i.e.*, any rule that was not "dictated by then-existing precedent" at the conclusion of his case on direct review. *Beard*, 542 U.S. at 413. The Government recognizes that Hunter's due-process claim implicates a new rule. See Gov't *Watts* Br. 8 (admitting that "this Court has not directly confronted the precise due process question implicated by this case. . . .") The question here is whether Hunter's new rule fits within one of the recognized exceptions to the *Teague* bar—is it a "watershed rule of criminal procedure" or a rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"? *Teague*, 489 U.S. at 311 (internal quotation omitted).

This scenario is similar to the fallout from the Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995). *Bailey* held that "using" a firearm during a drug crime in violation of 18 U.S.C. 924(c)(1) requires the Government to prove "active employment of the firearm." *Id.* at 144. Prior to *Bailey*, some lower federal courts allowed convictions under Section 924(c)(1) for the mere presence of a firearm. *Id.* at 142. *Bailey* changed the substantive definition

of the Section 924(c)(1) offense, just as *Begay* changed the applicability of the ACCA sentencing enhancement.

Of course, Section 924(c)(1) prisoners sought post-conviction relief based on the new decision in *Bailey*. The Court held in *Bousley* v. *United States*, 523 U.S. 614 (1998), that *Bailey*'s statutory rule was not *Teague*-barred because it was a substantive decision within the "primary conduct" or "substantive" *Teague* exception. *Id.* at 620-621.

Reasoning from *Bousley*, the Government and Hunter note that *Begay* is also retroactive. Gov't *Watts* Br. 9; Petn. 9. That does not, however, resolve the *Teague* inquiry in this case. Hunter is not seeking a COA on the *statutory Begay* claim because Section 2253(c)(2) prohibits a COA for statutory error. Instead the *Teague* analysis must apply to Hunter's constitutional claim.

Again, *Bailey* is instructive. After *Bailey*, some Section 924(c)(1) convicts asserted legal-innocence claims in their post-conviction proceedings. Many of these convicts, like Hunter and Watts, asserted *constitutional* challenges to their convictions. Those convicted in a jury trial invoked *Jackson* v. *Virginia*, 443 U.S. 307 (1979), and claimed that the evidence at trial was insufficient to support their convictions in light of *Bailey*. Those that pleaded guilty attacked their pleas under *Brady* v. *United States*, 397 U.S. 742, 748 (1970), which requires valid guilty pleas to be "voluntary" and "intelligent."

In both situations, these Section 2255 movants relied on "old rules" of constitutional law that were established before their convictions became final. *Teague* presented no barrier to relief. See *Bousley*, 523 U.S. at 620 ("The only constitutional claim made here is that petitioner's guilty plea was not knowing and intelligent. There is surely nothing new about this principle. . . ."); *Gray-Bey* v. *United States*, 209 F.3d 986, 989 (CA7 2000) (per curiam) (recognizing that the constitutional rule in *Jackson* is "not 'new' by any measure").

Hunter's situation is different. His only conceivable "constitutional" claim is that the *evidence supporting his ACCA enhancement* was constitutionally insufficient given *Begay*. Unlike the *Bailey* movants who raised *Jackson* claims to the evidence supporting their *convictions*, Hunter is launching a constitutional challenge to the evidence supporting *a sentencing enhancement*.

Hunter's problem is that this Court has not extended *Jackson* to those claiming to be "innocent" of a *sentencing factor*. See *Dretke* v. *Haley*, 541 U.S. 386, 395 (2004) (acknowledging that the Court has not extended *Jackson* to sufficiency-of-the-evidence claims based on sentencing errors).[5] *Haley* proves that

[5] Prior convictions that increase a defendant's possible maximum sentence are not elements of an offense entitled to the protections of the Court's *Apprendi* line of cases. See *Haley*, 541 U.S. at 395 (citing *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998)). The Court has referred to the possibility of being

(Continued on following page)

the constitutional right on which Hunter relies is *new*, *i.e.*, not "dictated by precedent"—unlike the rights asserted by Bousley and the other post-*Bailey* Section 2255 movants.

And Hunter's *Jackson*-style claim is not itself "substantive" within the meaning of the *Teague* exception because it does not redefine the elements of the crime Hunter committed. See *Schriro* v. *Summerlin*, 542 U.S. 348, 353 (2004) (holding that a rule was not substantive where the rule had "nothing to do with the range of conduct a State may criminalize"); *Curtis* v. *United States*, 294 F.3d 841, 843 (CA7 2002) (Easterbrook, J.) (holding that rule of *Apprendi* is not substantive even though it deals with "quantum of evidence required for a sentence" because it does not deal with "what primary conduct is unlawful"). Hunter advances a new constitutional rule, and *Teague* bars its application on collateral review.

The Government purports to "waive" any application of *Teague* to the *Watts* case (and presumably to this case as well). Gov't *Watts* Br. 13 n.6. The Government's *post hoc* "waiver" of *Teague* (or any other procedural barrier) is of no moment because it says nothing about the soundness of the Eleventh Circuit's decision denying the COA. See *Schiro* v.

"actually innocent" of the death penalty. *Schlup* v. *Delo*, 513 U.S. 298 (1995). But that is not "innocence" of a sentencing factor, but instead innocence of the greater offense of capital murder. *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111-112 (2003) (plurality opinion).

Farley, 510 U.S. 222, 228-229 (1994) (reaching *Teague* defense not raised below); *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982). It is the Eleventh Circuit's *judgment* that is under the review in this Court, and if that judgment is not in error then this Court should not summarily vacate or reverse it. The Government did not waive *Teague* below and a proper application of *Teague* supports the Eleventh Circuit's denial of a COA.

IV. Hunter And Watts Have Procedurally Defaulted On Their Constitutional Claims And Watts Has Waived His Constitutional Claim As Well

By his own admission, Hunter failed to object to his ACCA sentencing enhancement on direct appeal. Petn. 5-6. Hunter made neither a statutory sentencing claim nor his new constitutional claim. *Id.* He has thus procedurally defaulted on both the statutory and constitutional claims under *United States* v. *Frady*, 456 U.S. 152, 167 (1982).[6] To surmount this default, Hunter must demonstrate either "cause and prejudice," or that he is factually innocent of the

[6] No court below addressed Hunter's procedural default. The procedural-default defense is waivable. *Banks* v. *Dretke*, 540 U.S. 558, 705 (2004). The Government has not waived it in this case, having presented it in opposition to Hunter's Section 2255 motion in the district court. *Amici* App. 7a-10a. And for the reasons above with respect to *Teague*, any *post hoc* "waiver" the Government may attempt in this Court says nothing about the soundness of the Eleventh Circuit's judgment.

crime of conviction. *Bousley*, 523 U.S. at 622. Unless Hunter can demonstrate that he can overcome his procedural default, a COA should not issue. See *Slack*, 529 U.S. at 484-485; *Miller-El*, 537 U.S. at 349 (Scalia, J., concurring).

Hunter's petition does not even attempt to explain why this Court (or why the Eleventh Circuit on remand) should overlook his procedural default. He cannot satisfy the "cause and prejudice" exception because he cannot demonstrate "cause" for his default. Below he argued that his counsel was ineffective for failing to contest the ACCA enhancement on direct appeal. Petn. 6; see *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986) (acknowledging that ineffective assistance of counsel can overcome a procedural default). That contention was meritless; Eleventh Circuit precedent foreclosed the *Begay* argument at the time, and counsel does not violate the Sixth Amendment by forbearing to make a losing argument. See, *e.g.*, *Whitehead* v. *Cowan*, 263 F.3d 708, 731-732 (CA7 2001). Nor does futility provide "cause" to excuse a procedural default. *Bousley*, 523 U.S. at 622-623.

Hunter's only hope is to rely on the "actual innocence" exception. To do so he must ask this Court to extend the exception to those who are "innocent" of non-capital sentencing enhancements. That is what the Court refused to do in *Haley*, as discussed earlier.

And Watts is in an even worse position than Hunter. Not only did Watts procedurally default on his constitutional claim by not raising it on direct

review, *Watts did not even present the constitutional claim in his Section 2255 proceedings or in his COA application*.

First, procedural default. Watts failed to raise his *constitutional* sentencing claim on direct review. See *Amici* App. at 41a (objecting to violent felony ACCA enhancement on statutory grounds only). And for the same reasons as Hunter, Watts cannot satisfy the cause and prejudice or "actual innocence" requirements to excuse his procedural default.

Second, waiver. An examination of Watts' Section 2255 moving papers and COA request shows that he again did *not* raise a constitutional objection to the "violent felony" ACCA classification of his prior conviction. See *Amici* App. 61a-62a (Section 2255 motion), 67a (COA request), 69a-75a (Rule 59(e) motion for reconsideration). Watts made a variety of *other* constitutional claims, including ineffective assistance of counsel and an *Apprendi* claim arising from the ACCA enhancement (*i.e.*, a request to overrule *Almendarez-Torres* and have the jury find the prior conviction facts). *Id.* at 50a-53a, 53a-61a. But Watts' argument that his prior conviction carrying a concealed weapon is not a "violent felony" under the ACCA contains no mention of the Constitution. It is a pure statutory argument. *Id.* at 61a-62a.

Watts did proceed *pro se* below (though his Section 2255 and COA filings are near verbatim copies of his counsel-drafted direct appellate brief). But this Court cannot fault the Eleventh Circuit for

denying Watts a COA where: (a) Watts failed even to mention the Constitution in connection with the "violent felony" argument and (b) the constitutional right the Government, Hunter, and Watts now assert does not exist. Accusing the Eleventh Circuit of error in not appreciating Watts' claim as constitutional would take liberal construction of *pro se* pleading to absurd lengths.

The Government does not address Watts' waiver, and implies that Watts raised a constitutional basis for the "violent felony" ACCA claim below. See Gov't *Watts* Br. 3. Instead of citing Watts' actual Section 2255 and COA moving papers, the Government cites an ambiguous sentence from the district court denial of Watts' Section 2255 motion. See *id.* (citing *Watts* Petn. App. A7). In that sentence, the district court conflated Watts' unrelated *Apprendi* due-process attack (called "ground two") with his "violent felony" argument (called "ground three"). *Watts* Petn. App. A7. But the district court recognized that these were the identical claims Watts presented on direct appeal. *Watts* Petn. App. A7-A8. All of Watts' papers on direct and collateral review divide his *Apprendi* claim from his statutory sentencing claim. And Watts never invoked a constitutional argument in support of the latter. See *Amici* App. at 41a, 61a-62a, 67a; see also *id.* at 72a-75a (re-urging "ground three" in Rule 59(e) motion and without mention of any due process basis). The Government mischaracterizes the record. Watts waived the constitutional "violent felony" claim below.

Both Hunter and Watts face significant procedural hurdles because of their defaults and failure to raise their constitutional ACCA claims at the proper time. These hurdles represent serious vehicle problems.

V. Hunter And Watts May Be Able To Pursue Section 2241 Habeas Corpus Petitions To Get The Relief They Seek

The Court should deny the petitions in *Hunter* and *Watts*. But even without executive clemency (which should be forthcoming given the Government's plea to this Court to help these defendants), they may be able to use 28 U.S.C. 2241 to obtain relief.

Hunter and Watts may be able to avail themselves of the so-called "savings clause" of Section 2255(e), which permits a federal prisoner to petition for habeas corpus when it "appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." See *Wofford* v. *Scott*, 177 F.3d 1236, 1244-1245 (CA11 1999) ("[T]he only sentencing claims that may conceivably be covered by the savings clause are those based upon a retroactively applicable Supreme Court decision overturning circuit precedent"). Their constitutional claims are *Teague*-barred, but their *Begay* statutory claims (which cannot get a COA) are not. Hunter would still need to overcome his procedural default of even the statutory claim.

The potential availability of relief under Section 2241 counsels in favor of denying the petitions in these cases.

CONCLUSION

For the foregoing reasons, we urge this Court to deny Hunter's petition, as well as Watts'. Alternatively, the Court should grant certiorari and order merits briefing and oral argument.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-22555-CIV-UNGARO
(CASE NO. 03-20712-CR-UNGARO)

HUNTER DEMARICK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent. /

UNITED STATES' RESPONSE TO DEMARICK'S PETITION PURSUANT TO 28 U.S.C. 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE

COMES NOW, The United States of America, by and through the undersigned Assistant United States Attorney, and files its response to Hunter Demarick's petition pursuant to Title 28, United States Code, Section 2255. In his petition, Demarick is seeking to have his judgment and sentence vacated, arguing violation of the Speedy Trial Act, a Fifth Amendment Due Process violation, and ineffective assistance of both trial and appellate counsel. Demarick's petition should be denied.

PROCEDURAL AND FACTUAL BACKGROUND

I. Course of Proceedings

A federal grand jury sitting in the Southern District of Florida returned an indictment charging

petitioner Hunter Demarick with possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (DE 7). The indictment also sought the forfeiture of the firearm (*id.*). Demarick entered a plea of not guilty (DE 8) and went to trial (DE 104). The jury returned a verdict of guilty (DE 81).

The probation office prepared a presentence investigation report (PSI), to which Demarick did not object. Applying the United States Sentencing Guidelines (U.S.S.G.) this court sentenced Demarick to 188 months' imprisonment, followed by five years of supervised release, imposed a fine of $3,000.00, and a special assessment of $100.00 (DE 89). Demarick filed a timely notice of appeal (DE 91). Demarick's conviction and sentence was affirmed by the Eleventh Circuit Court of Appeals on August 10, 2005 (DE 115). On October 6, 2006, Demarick filed the instant petition, which is timely filed (DE: 116). Demarick is currently incarcerated.

II. Statement of the Facts

A. The Offense Conduct

At approximately 6:30 p.m. on the evening of August 15, 2003, Miami-Dade Police Detective Andrew Giordani was patrolling the Carol City area of Miami-Dade County, Florida in an unmarked vehicle when he observed a black Lexus commit a traffic violation (DE 104:10-13). Detective Giordani activated his vehicle's lights and siren in order to conduct a traffic

stop (DE 104:14). From his vantage point directly behind the Lexus, Detective Giordani could see that there were two passengers in the Lexus; the passenger in the front seat was later identified as Spencer Robinson, and the passenger in the back seat was later identified as petitioner Hunter Demarick (DE 104:14-15). The driver, later identified as Sebastian Rivera, made eye contact with Detective Giordani through the rear-view mirror, but he did not stop the Lexus (DE 104:15-17).

Detective Giordani observed that Demarick was moving around a lot in the backseat and appeared to be nervous (DE 104:15). Detective Giordani then observed Robinson lean forward in the front passenger seat, as if he were placing something beneath his seat (DE 104:16).

After a couple of blocks, the Lexus pulled over (DE 104:17). Detective Giordani approached the Lexus, obtained the names of the driver and passengers, and upon checking the computer, learned there was an outstanding warrant for Demarick's arrest (DE 104:18-19, 45-46). Detective Nicole Romero arrived at the scene, and both detectives approached the Lexus (DE 104:20). Detective Giordani asked Demarick to step out of the car and advised him he was under arrest based on the warrant (DE 104:20-21). When Demarick stepped out of the car, the detectives observed an empty gun holster on the backseat of the car where Demarick had been sitting (DE 104:21-22, 28, 63).

Detective Giordani asked Robinson to step out of the car, and when Robinson complied, Detective Giordani saw the butt of a firearm emerging from beneath the right front passenger seat (DE 104:23-24). The firearm was later identified as a .380 caliber semiautomatic pistol, loaded with eight rounds of ammunition (DE 104:25, 108-09).[1] The detectives retrieved the pistol and arrested Demarick and the driver, Rivera (DE 104:26, 62).

Rivera testified at trial that he was giving Demarick a ride to the laundromat on that day (DE 104:71). Demarick noticed the police following their car and told Rivera to "hit the back streets" (DE 104:72). Rivera testified that he did not immediately stop for the police because Demarick urged him to keep driving, saying he was "dirty," that is, carrying something illegal (DE 104:72-73). Demarick, who was in the backseat, threw the gun to Robinson in the front seat and told Robinson to throw the gun out the window (DE 104:72-73). When Rivera decided to stop for the police, Robinson put the gun under his seat (DE 104:75). Demarick told Rivera to take his gun "back to the building for him" if the police arrested him (DE 104:76). After the police ordered them all out of the car, Rivera told the police that the gun belonged to Demarick (DE 104:78-79). The parties

[1] The pistol fit inside the holster found on the backseat (DE 104:111).

stipulated that Demarick had been convicted of a felony in 2001 (DE 104:113).

B. Sentencing

The PSI reported Demarick's criminal history. Significantly, Demarick was convicted in 1996 for carrying a concealed firearm (PSI ¶ 21). He was again convicted in 1999 for carrying a concealed firearm (PSI ¶ 22). He was also convicted in 2001 for possession with the intent to sell or deliver cocaine (PSI ¶ 26).

Applying the 2003 United States Sentencing Guidelines (USSG), the PSI set Demarick's base offense level at 24, pursuant to USSG § 2K2.1(a)(2), the guideline applicable to violations of 18 U.S.C. § 922(g) where the defendant committed the firearm offense subsequent to two felony convictions for a crime of violence or a controlled substance offense (PSI ¶ 10). His offense level was increased by two, pursuant to USSG § 2K2.1(b)(4), because the firearm had a partially obliterated serial number (PSI ¶¶ 5, 11). Thus, his total adjusted offense level was 26 (PSI ¶ 15).

Demarick qualified as an armed career criminal, pursuant to USSG § 4B1.4, because he had at least three prior convictions for a "violent felony" or "serious drug offense" and therefore was subject to an enhanced sentence under 18 U.S.C. § 924(e) (PSI ¶ 16; see PSI ¶¶ 21, 22, 26). Thus, Demarick's total

offense level was increased to 33, pursuant to USSG § 4B1.4(b)(3)(B) (PSI ¶¶ 16, 18).

Demarick had six criminal history points (PSI ¶ 27). Because he committed the offense within two years of his release from custody, two additional criminal history points were added, pursuant to USSG § 4A1.1(e), giving him eight criminal history points and a criminal history category of IV (PSI ¶¶ 28, 29). Furthermore, because Demarick qualified as an armed career criminal, his criminal history category was IV, pursuant to USSG § 4B1.4(c)(3) (PSI ¶ 29).

Based on an offense level of 33 and a criminal history category of IV, Demarick's guideline imprisonment range was 188 to 235 months (PSI ¶ 61). The statutory minimum term of imprisonment was 15 years (180 months) and the maximum term was life, pursuant to 18 U.S.C. § 924(e) (PSI ¶ 60).

Demarick did not file any objections to the PSI. At the sentencing hearing, defense counsel stated that he had reviewed the PSI with Demarick and confirmed that he had no objections (DE 105:2). In fact, Defense counsel stated: "Your Honor, I tore this upside down, pulled it from side to side, and there was nowhere to go" (*id.*). The district court adopted the findings of the probation office and imposed a sentence of 188 months' imprisonment (DE 105:3-5).

ARGUMENT

Demarick raises four issues in his motion to vacate: that (1) the conviction was obtained and the sentence imposed in violation of the Speedy Trial Act, (2) the court violated his Fifth Amendment rights of Due Process when it sentenced him as an armed career criminal pursuant to §4B1.4 of the U.S. Sentencing Guidelines, since a conviction for carrying a concealed firearm is not a "violent felony," (3) he received ineffective assistance of trial counsel because his attorney did not challenge the armed career criminal designation, and (4) he received ineffective assistance of appellate counsel because his attorney did not challenge the armed career criminal designaation based upon the Supreme Court's ruling in *Leocal v. Ashcroft*, 255 S.Ct. 377 (2004).

I. Demarick's First Two Claims Are Procedurally Barred Because He Failed to Assert His Claims on Direct Appeal

In order to obtain relief under 28 U.S.C. § 2255, a prisoner serving a federal sentence must establish "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255.

As a general rule, relief is available only "for transgressions of constitutional rights and for that

narrow compass of other injury that could not have been raised on direct appeal and, would, if condoned, result in a complete miscarriage justice." *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981) (citation omitted). Thus, "sentences imposed within the statutory limits are insulated from section 2255 review." *Fernandez v. United States*, 941 F.2d 1488, 1494 (11th Cir. 1991).

Demarick's conviction and sentence were affirmed by the Eleventh Circuit Court of Appeals on August 10, 2005. He did not seek a *writ of certiorari* to the United States Supreme Court. As such, he cannot now raise claims involving an alleged violation of the Speedy Trial Act or an alleged Fifth Amendment Due Process violation which caused sentencing errors, absent a showing of "cause" for procedurally defaulting such claims and "actual prejudice" from his failure to raise these issues on appeal. *Belford v. United States*, 975 F2d 310 (7th Cir. 1992).

Claims not raised in a defendant's original criminal proceeding, whether at the district court level or on appeal, are subject to dismissal when they are raised for the first time in a collateral proceeding. *United States v. Frady*, 456 U.S. 152, 167-69 (1982); *Parks v. United States*, 832 F.2d 1244, 1245-46 (11th Cir. 1987). Once the government sets forth the circumstances constituting a defendant's procedural default, it becomes the defendant's burden to disprove his default and to establish "cause and prejudice" for the failure to previously assert his claims. *McClesky v. Zant*, 499 U.S. 567, 493-94. Where a defendant

makes no showing of cause and prejudice regarding his failure to raise issues on direct appeal that are raised for the first time in a § 2255 petition, summary dismissal of those claims is warranted. *Parks*, 832 F.2d at 1246. Demarick's habeas petition inexplicably states that he has "established the cause and prejudice test under **Strickland**" (DE: 116).

"'[C]ause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot be fairly attributed to h[im]." *Coleman v. Thompson* 501 U.S. 722, 753 (1991). "Objective factors that constitute cause," include "interference by officials," *McClesky*, 111 S.Ct. at 1470, or "a showing that the factual or legal basis for a claim was not reasonably available to counsel," *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To establish prejudice, a petitioner must demonstrate prejudice so substantial that it undermines the integrity of the entire proceeding. *Frady*, 456 U.S. at 152. Moreover, if a petitioner cannot show cause for his failure to raise his claims previously, the court need not consider whether he was prejudiced by his procedural default. *See Billy-Eko v. United States*, 8 F.3d 111, 114 (2d Cir. 1993).

Demarick's explanation of why he failed to raise the issues raised in the instant Petition on direct appeal, rest with his ineffective assistance of appellate counsel allegations. His petition is silent as to why these issues were not raised at the district court level. As such, his first two claims fail the "cause" prong of the analysis. Additionally, all of the issues

raised by Demarick, if addressed on the merits, will fail. Demarick cannot, therefore, demonstrate that he will suffer any prejudice if his claims are procedurally barred from being addressed by this court. Accordingly, Demarick does not, and cannot, meet his burden of establishing cause and prejudice for his failure to raise these claims in a timely fashion. Thus, Demarick is procedurally barred from raising these issues in the instant § 2255 Petition, and the merits of such claims should not be considered by this court. *Macklin v. Singletary*, 24 F.3d 1307 (11th Cir. 1994), *cert. denied*, 513 U.S. 1160 (1995). These claims should be summarily dismissed.

II. Notwithstanding the Fact that Demarick's First Two Claims are Procedurally Barred, Such Claims are Nevertheless Without Merit and Should be Dismissed

For the following reasons, Demarick's claims do not merit relief, and his petition should be denied without a hearing. *See Machibroda v. United States*, 368 U.S. 487, 495 (1962); *Tejeda v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991), *cert. denied*, 502 U.S. 1105 (1992).

A. The Conviction and Sentence Were not Obtained in Violation of the Speedy Trial Act

Demarick contends that the district court erred in conducting the jury trial in violation of the Speedy

Trial Act (DE 116:8). Demarick argues that the court failed to adequately set forth its reasons in granting "ends of justice" continuances (*id*).

The Speedy Trial Act requires that the trial of an indicted defendant commence within 70 days from the later of either the filing date of the indictment or the date on which the defendant first appears before the court in which his case is pending. 18 U.S.C. § 3161(c)(1); *United States v. Twitty*, 107 F.3d 1482, 1487 (11th Cir. 1997).[2] Certain periods are excluded from the 70-day limit, including any period of delay resulting from other proceedings concerning the defendant. *United States v. Williams*, 197 F.3d 1091, 1093 (11th Cir. 1999) (citing 18 U.S.C. § 3161(h)(1)). While more than 70-days elapsed between Demarick's arraignment and his trial, there was no violation of the Speedy Trial Act (STA) because this court correctly excluded time as provided by the STA.

Demarick's arraignment was held on September 2, 2003 (DE 8). Because the date of arraignment is not counted as one of the 70 days for purposes of 18 U.S.C. § 3161(c)(1), the Speedy Trial Act count did not

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[2] Title 18 U.S.C. § 3161(c)(1) provides as follows:

In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

begin until the following day, September 3, 2003. *See United States v. Severdija*, 723 F.2d 791, 793 (11th Cir. 1984) (day that triggers speedy trial limits excluded from the 70-day limit). The trial of this matter was continued on seven occasions. The time was excludable under 18 U.S.C. § 3161(h)(1)(F).[3] Specifically, Demarick claims that this court erred in excluding time after granting the "ends of justice" continuances that Demarick requested (DE 48, 62). Demarick claims that this court's orders were insufficient because they failed to set forth the reasons for its "ends-of-justice" finding (DE 116:8).

Section 3161(h)(8) excludes time when the trial court makes specific findings, whether orally or in writing, of its reasons for finding that the ends of justice served by granting a continuance, outweigh the best interests of the public and the defendant in a speedy trial. The court is to make its findings at the time it grants the continuance. *United States v. Elkins*, 795 F.2d 919, 924 (11th Cir. 1986); *United States v. Sarro*, 742 F.2d 1286, 1300 (11th Cir. 1984). However, the court is not required "to enunciate its findings when it grants the continuance so long as there is sufficient evidence in the record indicating that it considered the factors identified in the statute when it granted the continuance." *United States v. Vasser*, 916 F.2d 624, 626 (11th Cir. 1990). *See also,*

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[3] Section 3161(h)(1)(F) provided that "delay resulting from any pretrial motion" is excludable.

United States v. Mathis, 96 F.3d 1577, 1580 (11th Cir. 1996)(The court need not enunciate its findings where the reasons are evident from the record). In *Vasser*, the Eleventh Circuit Court of Appeals found that because the record, *inter alia*, showed that the defense needed more time to prepare its case, there was no abuse of discretion in finding that the ends of justice would be served by granting a continuance. In *United States v. McKay*, 30 F.3d 1418, 1419-20 (11th Cir. 1994), the Eleventh Circuit Court reviewed the record and found that the ends of justice had been served where the defense stated that it had yet to receive certain discovery and failed to state an objection to the trial date. Finally, in *United States v. Henry*, 698 F.2d 1172, 1173-74 (11th Cir. 1983), the Court of Appeals found no error in the district court's decision to grant the defendant a continuance based upon the request of defense counsel. The Court stated that a trial judge "must be given broad discretion in attempting to comply with the mandates of the Speedy Trial Act and the exclusions thereto." *Id.*

In this case, Demarick complains that the "granting of the last continuance on February 13, 2004, failed to protect movant's speedy trial right simply because trial did not begin until June 7, 2004, some 114 days late" (DE 6:13). Demarick fails, however, to mention several key points. The fourth continuance granted on January 16, 2004, was based upon the defendant's Motion for Continuance of Trial filed on January 6, 2004 (DE 51, 48). In addition, the seventh, and final continuance, was granted on April

8, 2004, once again based upon the defendant's Motion for Continuance of Trial filed on March 25, 2004 (DE 62, 63). Moreover, the defendant filed an Emergency Motion to Continue Trial or in the Alternative to Exclude Witness on June 4, 2004 (DE 74). Demarick's argument that the court's orders granting continuances did not satisfy the Speedy Trial Act and thus his conviction and sentence should be vacated is meritless.

On March 23, 2004, Demarick filed a Motion for a Continuance of Trial requesting more time in order to "adequately prepare this matter for trial" (DE 62). The motion referenced the fact that Demarick's present counsel had received the file from the Federal Public Defender and needed to review a number of interesting and complex issues (*id*). Demarick's motion specifically requested a 30-day continuance (*id*). Demarick's motion also stated that defense counsel certified that the motion was "made in good faith, the best interest of justice, and not for any purpose of delay" (*id*). Significantly, Demarick's motion indicated that "the defendant is aware of this request and waives the speedy trial time" (*id*). Demarick did not object to the time being excludable and does not now claim that the court erred in granting his motion. He only claims that the court made insufficient findings. His claim should be rejected as the record, including the defendant's own motions as well as his change of counsel, sufficiently support the court's conclusion that the ends of justice were served.

B. The Application Of The United States Sentencing Guidelines Armed Career Criminal Designation Based Upon Prior Convictions Pursuant to U.S.S.G. § 4B1.4, Did Not Violate His Fifth Amendment Rights

Demarick argues that his Fifth Amendment Due Process rights were violated when this court sentenced him as an armed career criminal. He cites *Leocal v. Ashcroft*, 255 S.Ct. 377 (2004) in support of such claim.[4]

Section 4B1.4 of the U.S. Sentencing Guidelines provides that a defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. 924(e) is an armed career criminal. This provision outlines the offense level for an armed career criminal and the corresponding criminal history category. In the case at bar, Demarick's base offense level was determined to be 33 with a criminal history category of IV. Notably, the Application Notes provide that "The terms "violent felony" and "serious drug offense," are defined in 18 U.S.C. 924(e)(2)." Demarick was convicted in 1996 for carrying a concealed firearm (PSI ¶ 21). He was again convicted in 1999 for carrying a concealed firearm (PSI ¶ 22). He was

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[4] *Leocal v. Ashcroft*, 255 S.Ct. 377 (2004) held that alien's conviction for driving under the influence of alcohol (DUI) and causing serious bodily injury in an accident, in violation of Florida law, was not a "crime of violence," and therefore, was not an "aggravated felony" warranting deportation.

also convicted in 2001 for possession with the intent to sell or deliver cocaine (PSI ¶ 26).

In this case, Demarick had the opportunity to challenge the accuracy and legitimacy of his prior convictions, but he did not do so. In fact, he filed no objections to the PSI and did not argue this issue on direct appeal. He now claims that the armed career criminal designation was unconstitutional under the Fifth Amendment because a conviction for carrying a concealed firearm is not a "violent felony" under §4B1.4. Contrary to his assertion, however, not only is the law clear that carrying a concealed weapon falls within the definition of a violent felony under 18 U.S.C. 924(e),[5] but the provisions of §2K2.1 also provide that a defendant, such as Demarick, who is convicted of unlawful possession of a firearm by a felon and has one or more prior felony convictions for a crime of violence or a controlled substance offense; and is sentenced under the provisions of 18 U.S.C. 924(e) warrant the application of §4B1.4 armed career criminal guidelines.

III. Demarick Was Not Denied Effective Counsel

Demarick argues he was denied effective assistance of counsel because both his trial and appellate attorneys failed to argue that the conviction

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[5] *See United States v. Hall*, 77 F.3d 398 (11th Cir. 1996).

and sentence violated his Sixth Amendment Right to a Speedy Trial. An essential component of an ineffective assistance claim is that there be prejudice. Since there was no violation of Demarick's right to a Speedy Trial, there was no prejudice and no violation of the Sixth Amendment right to receive effective assistance of counsel. *Puentes-Germes v. United States*, 2005 WL 503147 (S.D.N.Y. 2005). Demarick complains that this court erred in excluding time after granting the "ends of justice" continuances that Demarick requested (DE 48, 62). Demarick contends that this court's orders were insufficient because they failed to set forth the reasons for its "ends-of-justice" finding (DE 116:8).

As stated above, it is clear that the statutory time-limits pursuant to the Speedy Trial Act were complied with correctly. Demarick has shown no violation of the Speedy Trial Act following his arraignment on September 2, 2003. Demarick did not object to the time being excludable and does not now claim that the court erred in granting his motion. He only claims that the court made insufficient findings. His claim should be rejected as the record, including the defendant's own motions as well as his change of counsel, sufficiently support the court's conclusion that the ends of justice were served. Moreover, there is no basis to support a claim that there was a violation of his rights under Fifth Amendment Due Process Clause due to his designation as an armed career criminal pursuant to U.S.S.G. §4B1.4.

Although Demarick's counsel must be able to present "an intelligent and knowledgeable defense," *Carawav v. Beto*, 421 F.2d 636, 637 (5th Cir. 1970), he is not obliged to pursue avenues clearly of no evidentiary value. *See, Jones v. Estelle*, 632 F.2d 490 (5th Cir. 1980), *cert. denied*, 451 U.S. 916 (1981); *United States v. Johnson*, 615 F.2d 1125 (5th Cir. 1980); *Mavs v. Estelle*, 610 F.2d 296 (5th Cir. 1980). Furthermore, because "counsel is not ineffective for failing to raise claims "reasonably considered to be without merit,'" counsel was not ineffective in this case. *United States v. Nyhuis*, supra, 211 F.3d 1340, 1344 (11th Cir. 2000), *quoting Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984). There is virtually nothing in this record to support that there was a reasonable probability that but for his counsels' alleged errors in not challenging the armed career criminal designation or arguing that the conviction and sentence violated his Sixth Amendment Right to a Speedy Trial that the result of the proceeding would have been any different. The statutory minimum term of imprisonment was 15 years (180 months) and the maximum term was life, pursuant to 18 U.S.C. § 924(e) (PSI ¶ 60). And, an attorney is under no duty to raise issues which have no merit. *See Card v. Dugger*, 911 F.2d 1494, 1520 (11th Cir. 1990). Hence, Demarick's ineffective assistance of counsel claims fail.

CONCLUSION

WHEREFORE, the United States requests that this Court deny the Petition.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 21, 2006, I electronically filed the foregoing document ***UNITED STATES' RESPONSE TO DEMARICK'S PETITION PURSUANT TO 28 U.S.C. 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE*** with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served today by **U.S. Mail** for those counsel and/or parties who are not authorized to receive or did not receive

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2005 WL 4664919 (C.A.11)

United States Court of Appeals,
Eleventh Circuit.
UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
Darian WATTS, Defendant-Appellant.
No. 05-12248-EE.
August, 2005.

On Appeal from the United States District Court
for the Middle District of Florida Tampa Division
District Court Case No.: 8:04-CR-314-T-24MAP
Hon. Susan C. Bucklew, United States District Judge

Initial Brief of Appellant Darian Watts

Timothy J. Fitzgerald, Esq., 708 E. Jackson Street, Tampa, FL 33602, (813) 228-0095; Fax (813) 224-0269, Counsel for Appellant.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested, as the issues in this case have not been recently decided authoritatively and oral argument may assist the decisional process.

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STATEMENT OF JURISDICTION

This Court's jurisdiction is provided by 28 U.S.C. § 1291 and by 18 U.S.C. § 3742(a)(1).

STATEMENT OF THE ISSUES

I.

WHETHER THE TRIAL COURT ERRED IN SENTENCING APPELLANT AS AN ARMED CAREER CRIMINAL IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS

II.

WHETHER 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

III.

WHETHER THE TRIAL COURT ERRED IN FINDING THE DEFENDANT TO BE AN ARMED CAREER CRIMINAL WITHOUT FINDING THAT

THE PREDICATE CONVICTIONS OCCURRED ON OCCASIONS DIFFERENT FROM ONE ANOTHER

STATEMENT OF THE CASE

I. *Course of the Proceedings and Disposition in the Court Below*

Darian Antwan Watts is currently incarcerated, serving a term of imprisonment of 210 months. Doc. 64.

On July 21, 2004, a federal grand jury indicted a single defendant, Darian Watts. Doc. 13. The sole count of the indictment alleged that on May 23, 2004 Watts possessed a firearm after previously being convicted of a felony, in violation of Title 18 U.S.C. §§ 922(g)(1) and 924(e). Doc. 13. Watts entered a plea of not guilty on August 16, 2004. Doc. 18.

The case proceeded to trial on January 10, 2005. Doc. 77. After the government rested its case, Watts moved pursuant to Federal Rule of Criminal Procedure 29 for a judgment of acquittal. Doc. 77. Among other grounds, Watts moved for a judgment of acquittal based on the government's failure to prove that he had previously been convicted of three violent felonies which occurred on separate occasions, in violation of Title 18 United States Code § 924(e). Doc. 78 – Pg. 4. This motion was denied, as was Watts' renewed motion for judgment of acquittal following the conclusion of his case-in-chief. Doc. 78 – Pgs. 6, 13. On January 11, 2005, the jury found Watts guilty of possessing a firearm as a convicted felon. Doc. 52.

On January 21, 2005 Watts filed a renewed motion for a Rule 29 judgment of acquittal, again alleging that the government failed to prove to the jury that he had previously been convicted of three prior violent felonies. Doc. 58. The district court denied the renewed motion for a Rule 29 judgment of acquittal. Doc. 60. Watts was sentenced on April 15, 2005. Doc. 63.

Prior to his sentencing hearing Watts objected to the Presentence Report (PSR), which found him to be an armed career criminal, and he requested a jury trial on the issue. PSR Addendum. The district court, over Watts' objections and denying his request for a jury trial, found Watts to be an armed career criminal pursuant to Title 18 U.S.C. § 924(e). Doc. 81 – Pgs. 22 and 23. The court sentenced Watts as an armed career criminal to 210 months in prison. Doc. 64. Watts filed a timely notice of appeal, and this appeal follows. Doc. 66.

II. *Statement of the Facts*

Darian Watts was charged in a one count indictment alleging that, on or about May 23, 2004, he possessed a firearm after being convicted of a felony, in violation of Title 18 U.S.C. §§ 922(g) and 924(e). Doc. 13. The indictment alleged that Watts had previously been convicted of the following:

Possession of cocaine and carrying a concealed firearm, felony crimes each punishable by a term of

imprisonment exceeding one year, Case No. 94-CF-002148 on or about May 23, 1995, in the Circuit Court 13th Judicial District, in and for Hillsborough County, Florida;

Robbery, a felony crime punishable by a term of imprisonment exceeding one year, Case No. 94-CF-016767, on or about November 26, 1997(sic),[1] in the Circuit Court 13th Judicial District, in and for Hillsborough County, Florida; and

Robbery, a felony crime punishable by a term of imprisonment exceeding one year, Case No. 95-CF-000103, on or about May 23, 1997(sic),[2] in the Circuit Court 13th Judicial District, in and for Hillsborough County, Florida.

The indictment did not allege these convictions were violent felonies or that they were committed on separate occasions. Doc. 13. However, the indictment did allege that Watts violated Title 18 U.S.C. § 924(e). Doc. 13. Watts entered a plea of not guilty on August 16, 2005. Doc. 18.

The case proceeded to trial on January 10, 2005. Doc. 77. Prior to the trial the government requested Watts stipulate that he was a convicted felon. The defendant so stipulated, but Watts did not stipulate that he had previously been convicted of three violent

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[1] The date was actually May 23, 1995.

[2] The date was actually May 23, 1995.

felonies as proscribed in Title 18 United States Code § 924(e). Doc. 57.

After the government rested its case, Watts moved for a judgment of acquittal pursuant to Fed. R. Crim P. 29. Doc. 77 – Pg. 298.; Doc. 78 – Pg. 4. As a basis for the motion for judgment of acquittal, Watts alleged, among other things, that the government failed to prove he had previously been convicted of three qualifying violent felonies under Title 18 U.S.C. § 924(e). Doc. 78 – Pg. 4. At trial, the government presented no evidence of Watts' prior convictions other than to introduce his stipulation that he was a convicted felon at the time of the offense. Doc. 77 – Pg. 57. The court nonetheless denied Watts' motion for judgment of acquittal at the close of the government's case-in-chief. Doc. 78 – Pg. 6.

Watts rested his case without presenting any evidence. Doc. 78 – Pg. 14. Watts then renewed his motion for a Rule 29 judgment of acquittal, again alleging the government failed to prove he had previously been convicted of three violent felonies and, as a result, requested the court to dismiss the title 18 U.S.C. § 924(e) portion of the indictment. Doc. 78 – Pg. 13. The court again denied the motion for the judgment of acquittal. Doc. 78 – Pg. 13. The jury returned a verdict of guilty. Doc. 52. On January 21, 2005, Watts filed a renewed motion for judgment of acquittal or, alternatively motion for a new trial. Doc. 58. The post-trial motion for judgment of acquittal renewed Watts' request for a judgment of acquittal as to the title 18 U.S.C. § 924(e) portion of the

indictment. Doc. 58 The court denied the motion for judgment of acquittal and motion for new trial. Doc. 60.

Watts was sentenced on April 15, 2005. Doc. 81. Prior to his sentencing Watts objected to the Presentence Report. PSR Addendum. Specifically, Watts objected to his classification as an armed career criminal, asserting both his Sixth Amendment right to trial on that issue and his Fifth Amendment right to remain silent as to the felony convictions in his Presentence Report. Doc. 81 – Pg. 23, PSR Addendum. Watts argued that the Presentence Report classification as an armed career criminal was incorrect. Doc. 81 – Pg. 23. The classification changed the statutory maximum from 10 years in prison, to life with a mandatory minimum of 15 years in prison. The guideline range was increased by this classification from offense level 24 to offense level 33. Presentence Report (hereinafter PSR). To determine if Watts was an armed career criminal, the district court examined records provided by the probation office. Doc. 81 – Pg. 22. The Court first reviewed an information[3] with case number 94-2148, charging a Darian Watts with carrying a concealed firearm on February 16, 1994, and then inspected a judgment indicating that a Darian Watts pled guilty, and was so adjudicated, of carrying a concealed firearm the same

[3] An information is a charging document in the Florida State system.

case. Doc. 81 – Pg. 22. The district court then reviewed an information alleging a Darion Watts committed a robbery in case number 94-16767, and a judgment in the same case that indicated a Darion Watts pled guilty and was convicted of robbery on May 23, 1995. Doc. 81 – Pg. 22. Finally, the court reviewed information number 95-103, which alleged a Darion Watts committed a robbery on November 30, 1995 and an accompanying judgment that indicated a Darion Watts pled guilty to a robbery that same case on May 23, 1995. Doc. 81 – Pg. 23. The court then concluded that the defendant had three prior qualifying offenses under the Armed Career Criminal Act. Doc. 8 – Pg.23. The Court then asked Watts if he disputed the finding that he had three qualifying convictions. Doc. 81 – Pg. 23. The court and defense counsel had the following colloquy:

> THE COURT: . . . Mr. Fitzgerald, did you want me just to go through and verify that or did you have really some dispute with any of it?
>
> MR. FITZGERALD: Judge, I'm trying to maintain his plea of not guilty to these offenses and maintain his right and request for a jury trial to those offenses, and, in light of the Shepard case, make sure that the Court complies at least with what Shepard requires –
>
> THE COURT: Okay.
>
> MR. FITZGERALD: – in the finding. We don't – we – while we're asking you to find

those specific things, we do not waive our right to a jury trial that we believe we have.

THE COURT: Okay.

As to the convictions used by the sentencing Court to determine the defendant to be an armed career criminal, the defendant at all times asserted his Sixth Amendment right to a jury trial to dispute the nature of any convictions, and whether they qualified as violent felonies under Title 18 U.S.C. § 924(e). Doc. 81 – Pg. 23. Watts' Objections to PSR. Watts contended that his classification as an armed career criminal was inappropriate and his that his Sentencing Guidelines enhancement under U.S.S.G. § 4B1.4 was improper. PSR Addendum; Watts' Objections to PSR. Watts argued that he should have been sentenced to a total offense level 26 and a guideline range of 92-115 months in prison. Watts' Objections to PSR.

Over Watts' objection to being classified as an armed career criminal and his request for a jury trial on the issue, the court found Watts to be an armed career criminal, and sentenced him accordingly. Doc. 81 – Pgs. 23, 24.

III. *Standard of Review*

The defendant raises a constitutional objection to his sentence which is reviewed *de novo. United States v. Miles, 290 F. 3d, 1341 (11th Cir. 2002).*

The district court's factual findings are reviewed for clear error and its application of the Sentencing Guidelines to those facts are reviewed *de novo.* Whether two crimes constitute a single criminal episode or two separate felonies for the purpose of § 924(e) is an issue of law which is reviewed *de novo. United States v. Miles,* 290 F.3d 1341 (11th cir. 2002) *citing to United States v. Richardson,* 230 F. 3d 1297 (11th Cir. 2000), *cert. denied,* 532 U.S. 983, 121 S.Ct. 1626, 149 L.Ed. 488 (2001).

SUMMARY OF THE ARGUMENT

The district court erred, first, by sentencing Mr. Watts as an armed career criminal under the ACCA. In so doing, the court violated Mr. Watts' Sixth Amendment right as established in *Apprendi v. New Jersey,* 530 U.S. 466 (2000). This case presents the issue *of whether Almendarez-Torres v. United States,* 523 U.S. 224, 118 S. Ct. 1219 (1998), continues to survive in light of *Apprendi* and its progeny, including *Shepard v. United States, 544 U.S. 13, 161 L.Ed. 2d 205, 125 S. Ct. 1254 (2005).* Mr. Watts contends that the lone exception to the *Apprendi* rule – namely the facts relating to the existence and nature of prior convictions – is no longer valid, and that these facts like all other sentence-enhancing facts must be both charged and proved to the jury beyond a reasonable doubt. Watts further contends that the nature of his convictions, and whether they occurred on occasions different from one another, must be charged and proven to a jury beyond a reasonable doubt.

Acknowledging adverse case authority, Mr. Watts also submits that the district court erred in finding that the offense of carrying a concealed weapon is a violent felony for purposes of 18 U.S.C. § 924(e).

Finally, Mr. Watts contends that the district court erred by sentencing him as an armed career criminal without determining that the three predicate offenses on which the court relied in fact occurred on three separate occasions.

ARGUMENT

I.

THE TRIAL COURT ERRED BY SENTENCING APPELLANT AS AN ARMED CAREER CRIMINAL IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS.

Mr. Watts was convicted following a jury trial of possession of a firearm by a convicted felon. The sole count in the indictment alleged a violation of both 18 U.S.C. § 922(g) (possession fo a firearm by a convicted felon), and a violation of 18 U.S.C. § 924(e), the Armed Career Criminal Act. The Armed Career Criminal Act (hereinafter referred to as the ACCA), 18 U.S.C. § 924(e)(1), provides a fifteen year mandatory prison sentence for a person who violates § 922(g)(1) (possession of a firearm by a convicted felon), and who has three or more convictions for a violent felony, a serious drug offense, or both. The statute expressly requires that the prior offenses

must have been committed on occasions different from one another.

Under 18 U.S.C. § 924(e)(2)(B), a "violent felony" is an offense that: (i) has as an element the use, attempted use, or threatened use of physical force; or (ii) is burglary, arson, extortion, or other offenses involving conduct that presents a serious risk of physical injury to another. Under 18 U.S.C. § 924(e)(2)(A)(ii), a "serious drug offense[s]" defined by the ACCA as certain drug offenses that are punishable by maximum term of imprisonment of ten years or more. Additionally, the ACCA cannot be applied in this case because the jury merely found that Mr. Watts possessed a firearm and was a convicted felon. The maximum penalty based upon the specific jury findings in the case is ten years. *See* 18 U.S.C. § 922(g)(1).

In *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 348 (2000), the United States Supreme Court held that, "Other than the fact of a prior conviction, any fact which increases the penalty beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 490; 120 S.Ct. At 2363-64. In *Apprendi,* the Court additionally found that it was unconstitutional to remove from the jury's consideration the assessment of any facts that increase the prescribed range of penalties to which a criminal defendant is exposed. 530 U.S. at 491-92; 120 S.Ct. At 2363. The issue before the Court in *Apprendi* involved the constitutionality of New Jersey criminal statutes that

permitted an increased sentence if the offense was determined to be, in effect, a hate crime. *Id.*

Prior to finding the New Jersey statute unconstitutional in *Apprendi,* the Supreme Court *decided Almendarez-Torres v. United States,* 523 U.S. 224, 118 S. Ct. 1219 (1998). In that case, the Court held that a prior conviction need not be alleged in the indictment in order to trigger an enhanced statutory maximum under 8 U.S.C. § 1326 for illegally reentering the United States after deportation. In so ruling, the Court in *Almendarez-Torres* relied upon a principle seemingly rejected in *Apprendi:* "[An indictment] need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime." 523 U.S. at 229, 118 S. Ct. at 1223. The premise *of Almendarez-Torres,* therefore, was not that prior convictions are different from other facts that are essential to punishment, but that any factual finding, that only impacts the sentence is not required to be alleged in the indictment and found by the jury beyond a reasonable doubt. This premise did not survive *Apprendi. See Blakely,* 124 S. Ct at 2253 ("[A]s *Apprendi* held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to punishment") (emphasis in original).

Of course, in order to find the New Jersey statute unconstitutional *in Apprendi,* it was not necessary to overrule *Almendarez-Torres,* because the facts relevant to the sentencing enhancement were not merely prior convictions. Rather than doing so in *dicta,* the

Apprendi Court excepted the fact of a prior conviction from its express holding. *See Apprendi* 530 U.S. at 490, 120 S. Ct. at 2362-2363. Although the *Apprendi* Court did not *overrule Almendarez-Torres,* it signaled its inevitable demise, stating: "[I]t is arguable that *Almendarez-Torres* was incorrectly decided, and that our reasoning today should apply if the recidivist issue were contested." *Apprendi,* 530 U.S. at 489-490, 120 S. Ct. at 2362. Indeed, *Apprendi made* no secret that it was retreating from the broader constitutional implications of *Almendarez-Torres,* describing it as "at best as an exceptional departure from the historic practice we have described." *Apprendi,* 530 U.S. at 487, 120 S. Ct. At 2361. *Apprendi* thus evidently recognized that *Almendarez-Torres* did not fit comfortably within its clarified understanding of the Sixth Amendment.

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While awaiting the Supreme Court to *readdress Almendarez-Torres,* appellate courts have recognized the obvious difficulty in applying it *after Apprendi. See, e.g., United States v. Davis* 260 F.3d 965, 968 (8th Cir. 2001) (observing that "a close examination of Supreme Court cases casts doubt on the future viability of *Almendarez-Torres.*"); *Jones v. Smith,* 231 F.3d 1227, 1235 (9th Cir. 2000) (concluding that "*Apprendi* calls *Almendarez-Torres* into serious question").

Since *Apprendi* was decided, the Supreme Court has never tested the *Almendarez-Torres* holding in a

case, such as Mr. Watts', which the constitutionality of the sentence that the government seeks squarely depends on the validity, after *Apprendi,* of the exception.

Mr. Watts suggests that exempting recidivism findings from the *Apprendi* rule is not supported by logic. Indeed, it is supported only by *Almendarez-Torres* itself, a decision whose premise has been undermined by subsequent cases. *See Monge v. California,* 524 U.S. 721, 741, 118 S. Ct. 2246, 2257 (1998) (Scalia, J. dissenting) (describing *Almendarez-Torres* as "a grave constitutional error affecting the most fundamental of rights").

Any continued reliance by the government *on Almendarez-Torres* was further undermined by the Supreme Court's recent decision in *Shepard v. United States, 544 U.S. ___, 161 L.Ed. 2d 205, 125 S. Ct.* 1254 (2005) (observing that in light *of Apprendi, Almendarez-Torres* does not authorize the sentencing court to resolve disputed facts as to whether a prior conviction is a qualifying prior for purposes of the Armed Career Criminal Act). *See Shepard,* 125 S. Ct. at 1262-1263. Concurring *in Shepard,* Justice Thomas acknowledged that "a majority of this Court now recognizes that *Almendarez-Torres* was wrongfully decided." *Id* at 1464 (Thomas, J., concurring) Indeed, Justice O'Connor, whose dissent in *Blakely v. Washington,* 124 S. Ct. 2531, 2558-2560 (2004) foreshadowed the demise of the mandatory Sentencing Guidelines, recognized that the majority in *Shepard*

had engrafted, for the first time, *an Apprendi* requirement on recidivist enhancements:

> [I]t is one thing for the majority to apply its *Apprendi* rule within its own bounds, and quite another to extend the rule into new territory that *Apprendi* and succeeding cases had expressly and consistently disclaimed. Yet today's decision reads *Apprendi* to cast a shadow possibly implicating recidivism determinations, which until now have been safe from such formalism.

Shepard, 125 S. Ct. at 1269 (O'Connor, J., dissenting)

Obviously, Mr. Watts recognizes that this Court lacks the authority to overrule *Almendarez-Torres,* regardless of how inevitable it is that the Supreme Court will do so at the first opportunity. *See United States v. Thomas,* 242 F.3d 1028, 1034-1035 (11th Cir. 2001) (refusing to reconsider the holding in *Almendarez-Torres* in light of the "very basic fact that we cannot overrule Supreme Court decisions"). However, the foregoing cases make clear that the reasoning of *Almendarez-Torres* has been "gravely wounded" by subsequent decisions of the Supreme Court. Therefore, this Court should not strain to expand the reach of *Almendarez-Torres* beyond its express holding. *Cf. Jefferson County v. Acker,* 210 F. 3d 1317, 1320 (11th Cir. 2001) ("[I]f the facts of a gravely wounded Supreme Court decision do not line up closely with the facts before us – if it cannot be said that decision 'directly controls' our case – then, we are free to apply the reasoning in later Supreme Court

decisions to the case at hand. We are not obligated to extend by even a micron a Supreme Court decision which that Court itself has discredited.").

In *Almendarez-Torres,* the defendant admitted to the existence of the prior convictions during his plea colloquy. *See Almendarez-Torres,* 523 U.S. at 227, 118 S. Ct. at 1222 ("At a hearing, before the District Court accepted his plea, Almendarez-Torres admitted that he had been deported, that he had later unlawfully returned to the United States, and that the earlier deportation had taken place 'pursuant to' three earlier 'convictions' for aggravated felonies."). Therefore, *Almendarez-Torres* was limited to the Fifth Amendment rights to indictment, due process, and notice, and did not address the Sixth Amendment right to a jury trial. *Id. See also Apprendi,* 530 U.S. at 488, 120 S. Ct. at 2361 (noting that, because *Almendarez-Torres* had admitted the earlier aggravated felony convictions during plea colloquy, no question concerning the right to jury trial or standard of proof would apply).

Unlike in *Almendarez-Torres,* Mr. Watts *did not* stipulate to anything beyond the mere fact that he was a convicted felon. Therefore, these alleged prior convictions were not removed from the facts that were required under *Apprendi* to be proven to a jury beyond a reasonable doubt. Therefore, even if the offenses alleged in the indictment by the government had been sufficient to trigger the ACCA, the sentencing court could still not increase Mr. Watts' 10 year maximum sentence and increase the guideline

range beyond the statutory maximum established by the jury's verdict, based upon judicial fact-finding, without violating his Sixth Amendment right to a jury trial. Mr. Watts has a Sixth Amendment right to have a jury determine if he has three prior convictions that qualify as "violent felonies" under the ACCA and if those prior convictions occurred on occasions different from one another.

While the Eleventh Circuit has held *Almendarez-Torres* to remain law even *post-Shepard,* its rationale still allows Watts relief. In *United States v. Orduno-Mireles,* 405 F. 3d 960, 962 (11th Cir. 2005) the court held that every fact other than a prior conviction, which increases the statutory maximum must be proven to a jury because a prior conviction must itself be established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. However, Watts sentence was not enhanced merely by prior convictions. It was enhanced by a judicial determination that the prior convictions occurred on "occasions different from one another." Watts has a right for a jury to determine if his prior convictions occurred on "occasions different from one another." There has not been an establishment that the procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees for this element have been met. Watts is entitled to a jury trial on the existence of his prior convictions, the nature of his prior convictions, and whether they occurred on occasions different from one another.

II

THE TRIAL COURT ERRED IN FINDING THAT A CONVICTION FOR CARRYING A CONCEALED WEAPON QUALIFIED AS A VIOLENT FELONY UNDER ARMED CAREER CRIMINAL ACT

The district court found Watts to be an armed career criminal in part by finding that a conviction for carrying a concealed firearm was a violent felony under Title 18 U.S.C. § 924(e). Doc. 81 – Pg. 22. Watts objected to this finding, arguing that carrying a concealed firearem was not a violent felony. *Id.* at 23. The court overruled Watts' objection. *Id.* at 23. This Court has previously held that carrying a concealed firearm is a violent felony under § 924(e) and U.S.S.G. § 4B1.4. *United States v. Hall,* 77 F.3d 398 (11th Cir. 1996). However, the defendant contends that merely carrying a concealed weapon is not a violent felony, as it is not conduct that poses a serious potential risk of physical injury. Counsel raises this argument for the record, acknowledging the adverse authority above.

III.

THE TRIAL COURT ERRED IN FINDING THE DEFENDANT TO BE AN ARMED CAREER CRIMINAL ACT WITHOUT FINDING THAT THE PREDICATE CONVICTIONS OCCURRED ON OCCASIONS DIFFERENT FROM ONE ANOTHER

The defendant timely objected to his classification as an armed career criminal. PSR Addendum.

The defendant maintained at sentencing that he was not an armed career criminal, asserted his Fifth Amendment right to remain silent and his Sixth Amendment right to a jury trial on the issue of whether he was subject to the ACCA and the Guideline enhancement of an armed career criminal under U.S.S.G. § 4B1.4. Doc.81 – Pg. 23. Overruling the objections, the court found the defendant to be an armed career criminal. Doc. 81 – Pg. 24. The defendant maintains that the court never made a factual determination that the three predicate offenses used to qualify the defendant under the ACCA were "committed on occasions different from one another" as required by § 924(e)(1). The district court found that case number 94-2148, carrying a concealed weapon, occurred on February 16, 2004. Doc. 81 – Pg.22 The court further found that case number 95-103 occurred on or about the 30th day of November 1994. *Id.* at 23. The district court made no finding of when case number 94-16767 occurred. Doc. 81.

Section 924(e) provides that any person, who violates 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or serious drug offense, or both, committed on occasions different from one another, shall be imprisoned for not less than 15 years. 18 U.S.C. § 924(e)(1). Once the government has shown the defendant has three prior qualifying offenses committed on occasions different from one another, the burden shifts to the defendant to establish the convictions were unconstitutional.

United States v. Miles, 290 F. 3d 1341 (11th Cir. 2002).

In *Miles,* the sentencing court found that Miles had committed the requisite three prior convictions for "violent felonies." *Id.* at 1347. However, the court did not articulate on the record the basis for finding that the offenses were committed on separate occasions. *Id.* at 1348. The appellate court held that the district court had not made sufficient factual findings, and ordered the matter remanded for resentencing. *Id.* at 1347. In the instant case, the court also failed to make a factual determination that the 924(e) predicate offenses were committed on occasions different from one another. Doc. 81. Without this determination the statutory maximum is ten years in prison. The case should be remanded for resentencing consistent with the district court's findings.

CONCLUSION

In conclusion, Mr. Watts requests this Court to remand this case for resentencing with instructions not to sentence him as an armed career criminal. Alternatively, Mr. Watts requests this Court remand this case with instructions to have Mr. Watts resentenced before a jury.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DARIAN WATTS,
Petitioner,
vs.
UNITED STATES
OF AMERICA,
Respondent. /

Case No. 8:04-CR-286 MAP
[8:07-cv-665]

PETITIONER'S MOTION AND MEMORANDUM OF LAW IN SUPPORT OF RELIEF REQUESTED PURSUANT TO TITLE 28 U.S.C. § 2255

COMES NOW the Petitioner, DARIAN WATTS, pro se pursuant to 28 U.S.C. §2255, and files this memorandum of law in support to the relief requested for violations of Title 18 U.S.C. Sections 922(g)(1) and 924(e).

Petitioner brings his clams without the formal training in the legal drafting as an attorney, and accordingly asks for "liberal construing of the pleading." *See Haines v. Kerner*, 404 U.S. 519, 520 (1972).

STATEMENT OF FACTS

One June 3, 2004, Petitioner was arrested as a result of a criminal complaint issued that same day form the Honorable Magistrate Judge Mark A. Pizzo. (Doc. 1).

On June 30, 2004, Petitioner was finally taken to his initial appearance hearing held before the Honorable Elizabeth A. Jenkins. (Doc. 3). On that same day, the court appointed a federal public defender to represent Petitioner and further ordered that Petitioner be temporary detained. (Doc. 5 & 6).

On or about July 6, 2004, Attorney Timothy Fitzgerald filed his notice of appearance to represent Petitioner in the instant case. (Doc. 8).

Thereafter, Attorney Fitzgerald visited Petitioner at the Pinelles County Jail. At this time, Petitioner informed counsel that he (Petitioner) had bee placed in custody for approximately one month and no indictment had been issued.

Counsel then informed Petitioner that he would file a motion to have the complaint filed against Petitioner dismissed pursuant to a violation of 18 U.S.C. §3161(b), which counsel actually filed on August 2, 2004. (Doc. 11, *See* Exhibit "1").

However, without any consultation with Petitioner on any plausible argument, on August 5, 2004, counsel, without the consent of Petitioner, moved to withdraw the previous filed motion to dismiss complaint for a Title 18 U.S.C. §3161(b) violation. (Doc. 12, Exhibit "2").

Although counsel's motion to withdraw conceded that the government filed the indictment timely in this case, counsel nevertheless failed to submit

exactly the actual date of Petitioner's arrest. *See* Exhibit 2, ¶3.

The sole count of the indictment alleged that on May 23, 2004, Petitioner possessed a firearm after previously being convicted of a felony, in violation of Title U.S.C. §922(g)(1) and §924(e). (Doc. 13).

On August 16, 2004, Petitioner entered a plea of not guilty. (Doc. 18).

The case proceeded to trial on January 10, 2005. (Doc. 77). After the government rested its case, Petitioner moved pursuant to Federal Rules of Criminal Procedure, Rule 29, for a judgment of acquittal. (Doc. 77). Among other grounds, Petitioner moved for a judgment of acquittal based on the government's failure to prove that the Petitioner had previously been convicted of three violent felonies which occurred on separate occasions, in violation of Title 18 U.S.C. §924(e). (Doc. 78, pg. 4). This motion was denied, as was Petitioner's renewed motion for judgment of acquittal following the conclusion of Petitioner's case-in-chief. (Doc. 78, pg. 6, 13).

On January 11, 2005, the jury found Petitioner guilty of possessing a firearm by a convicted felon. (Doc. 52).

On January 21, 2005, Petitioner filed a renewed motion for a Rule 29 judgment of acquittal, again alleging that the government failed to prove to the jury that he had previously had been convicted of three prior violent felonies. (Doc. 58). The district

court denied the renewed the motion for a Rule 29 judgment of acquittal. (Doc. 60). Petitioner was sentenced on April 15, 2005. (Doc. 63).

Prior to Petitioner's sentencing hearing, Petitioner objected to the Presentence Investigation report (PSI), which found Petitioner to be an armed career criminal, and Petitioner requested a jury trial on the issue. *See* PSI Addendum. The district court, over Petitioner's objections, and denying Petitioner's request for a jury trial, found Petitioner to be an armed career criminal pursuant to Title 18 U.S.C. §924(e). (Doc. 81, pgs. 22 & 23). The court sentenced Petitioner as an armed career criminal to 210 months in prison. (Doc. 64). Petitioner filed a timely notice of appeal. (Doc. 66).

Following the direct appeal in this case, on or about February 18, 2007, Petitioner received the actual arrest history of this case from the Hillsborough County Sheriff's Office. *See* Exhibit "3".

The arrest report revealed that Petitioner was initially arrested and charged under Booking No. 04032854, on March 23, 2004, and that after the State of Florida dropped the charges, Petitioner was rearrested on the criminal complaint under Booking No. 04035200, on June 3, 2004.

Thereafter, on March 5, 2007, Petitioner forwarded Attorney Fitzgerald a written communication informing him of the facts overlooked in this case. In the written communication, it was also requested that attorney Fitzgerald file a Section 2255 motion in

this case as a result of counsel's errors. *See* Exhibit "4".

On March 8, 2007, Petitioner received a response back from Mr. Fitzgerald informing Petitioner to file his §2255 motion as soon as possible. However, in his response, Mr. Fitzgerald failed to provide any explanation for his moving to withdraw Petitioner's motion to dismiss without investigating the facts of the case first. *See* Exhibit "5".

INEFFECTIVE ASSISTANCE OF COUNSEL

In the context of an ineffective assistance of counsel claim, the issue is whether Petitioner was deprived of adequate and effective assistance of counsel in accordance with his Sixth Amendment rights. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1094), where the United States Supreme Court held that in order to establish a constitutional violation of the right to effective assistance of counsel, Petitioner must meet two prongs. First, he must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed to a defendant by the Sixth Amendment. This prong is met by showing that counsel's omissions did not meet an objective standard of reasonableness.

Second, a Petitioner must show that he was prejudiced by counsel's performance. The second prong of the test is met by showing the existance of a

reasonable probability that, but for counsle's deficient performance, the results of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

In this case, it cannot be reasonable argued that counsel's performance did not fall below a reasonable objective, that was prejudicial to the Petitioner, when counsel failed to challenge the use of the ACCA offender application and the nature of Petitioner's prior convictions at sentencing, in light of the Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004); and, *United States v. Booker*, 125 S.Ct. 738 (2005). Because these decisons laid the foundation for the arguments claimed in the instant petition, counsel was obligated to make the appropriate objections at sentencing, and as a result of counsel's failure to do so, Petitioner was clearly prejudiced. *See United States v. Pipkins*, 412 F.3d 1251 (11th Cir. 2005) ("holding that although argument defendant sought to raise in supplemental brief was foreclosed by circuit precedent at the time of initial appeal brief, defendant still had to raise issue in initial brief arguing prior precedent was wrongly decided.")

Although this circuit has not agreed that the existance of prior convictions and ACCA offender enhancements must be charged in indictments and proven to a jury beyond a reasonable doubt in light of *Apprendi, Blakely,* and *Booker*, nevertheless, as of

this date, the United States Supreme Court has not agreed with this circuit's analysis of prior convictions and counsel should have argued the issue. *United States v. Holland*, 380 F.Supp.2d 1279 (M.D. Fla. 2005) ("holding

CLAIM ONE:

COUNSEL WAS INEFFECTIVE WHEN COUNSEL ERRONEOUSLY WITHDREW PETITIONER'S MOTION TO DISMISS COMPLAINT FOR TITLE 18 U.S.C. §3161(b) VIOLATION WITHOUT INVESTIGATING FACTS OF THE CASE

Under the Speedy Trial Act, the government must indict a defendant within thirty days from the date on which the defendant was arrested or served with a summons. 18 U.S.C. §3161(b).

If an indictment is not filed within the Act's time limit, the charges against the individual that were contained in the criminal complaint "shall be dismissed." 18 U.S.C. §3162(a)(1); *see also United States v. Derose*, 74 F.3d 1177, 1183 (11th Cir. 1996) (explaining that when the indictment violates the Speedy Trial Act, a court generally should dismiss "only the charge[s] contained in the criminal complaint"). The court must then determine to dismiss the charges in the complaint with or without prejudice. The facts of this case are clear in that Petitioner was arrested on the criminal complaint on July 21, June 3, 2004, and the indictment was not filed by the government until July 21, 2004. Because

the indictment was returned in this case nearly 48 days after Petitioner's arrest, it is beyond dispute that a competent attorney familiar with the facts of this case would not have withdrew the motion to dismiss in light of the Title 18 U.S.C. §3161(b) violation.

The only question now left is whether the indictment should have been dismissed with or without prejudice. In making this decision, the court must consider three factors: (1) the seriousness of the offense; (2) the facts and circumstances of the case which led to the dismissal; and (3) the impact of a reprosecution on the administration of the Act and on the Administration of justice. *United States v. Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984). "[W]here the crime charged is serious, the court should dismiss [with prejudice] only for a correspondingly severe delay." *Russo*, 740 F.2d at 1267. Therefore, Petitioner's indictment should be dismissed for the following reasons:

1. <u>Seriousness of Offense</u>

Because the fact finding elements of the offense in that Petitioner was convicted carries from no prison time to 10 years imprisonment, it cannot be argued that the crime is a serious offense. *See* 18 U.S.C. §922(g)(1). It also should be noted that the charge was previously dropped by the State of Florida and, therefore, could not have been to be considered a serious offense.

2. Facts and Circumstances Leading to the Dismissal

Because the government was well aware of the fact that defense counsel's motion to withdraw the dismissal of the indictment contained erroneous facts and the government failed to correct the fact that the indictment was not timely filed as required by 18 U.S.C. §3161(b), a dismissal of the indictment without prejudice would clearly be prejudicial to Petitioner. As argued in counsel's motion to dismiss complaint, "A failure to dismiss the case with prejudice will allow a third arrest of Petitioner for the same conduct. And because all allegations in the complaint were witnesses of law enforcement the 18 day delay was not necessary." Additionally, a retrial would be prejudicial to Petitioner at this point where as to a passage of time since the violation, witnesses Petitioner would be able to call, may have an elapse of memory due to the passage of time, and all to no fault of Petitioner.

3. Impact of Reprosecution On the Administration of the Act and on the Administration of Justice

As argued above, because all of the witnesses in the complaint were law enforcement, there was no reason for the 18 day delay in filing the indictment. The unreasonable delay by the government in bringing the indictment would in no question have an impact of reprosecution on the administration of the Act and on the Act and on the administration of

justice, as to the prejudice Petitioner would receive in a reprosectuion of the instant offense. Also, as explained above, because the State of Florida already found that the charges were not so serious that they dropped them and failed to reseek prosecution, this fact demonstrates that the indictment should be dismissed with prejudice for the unreasonable delay in indicting Petitioner.

Because counsel failed to investigate the facts of this case before filing the motion to withdraw the dismissal of the complaint, counsel's actions were ineffective that caused undue prejudice to Petitioner as presented herein and as a result, the indictment in this case must be dismissed with prejudice.

CLAIM TWO:

THE TRIAL COURT ERRED BY SENTENCING PETITIONER[1] AS AN ARMED CAREER CRIMINAL IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHTS

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[1] Although Petitioner concedes that this claim as raised on direct appeal, but because the holdings of *Apprendi*, *Blakely* and *Booker* cast doubt on the holding announced in *Almendarez-Torres* this court has authority to revisit this claim. *Messinger v. Anderson*, 225 U.S. 436, 444 32 S.Ct. 739, 56 L.Ed 1152 (1912) ("The courts are understandably reluctant to reopen a ruling once made . . . Reluctance, however, does not equal lack of authority. The constraint is a matter of discretion. So long as a case remains alive, there is power to alter or revoke earlier rulings." WRIGHT, MILLER & COOPER, FEDERAL PRACTICE and PROCEDURE: Jurisdiction: 2D §4478, at 637 (2002).

Petitioner was convicted following a jury trial of possession of a firearm by a convicted felon. The sole count in the indictment alleged a violation of both 18 U.S.C. §922(g) (possession of a firearm by a convicted felon), and a violation of 18 U.S.C. §924(e), the Armed Career Criminal Act. (ACCA). The ACCA, 18 U.S.C. §924(e)(1), provides a fifteen year mandatory prison sentence for a person who violates §922(g)(1) (possession of a firearm by a convicted felon), and who has three or more convictions for a violent felony, a serious drug offense, or both. The statute expressly requires that the prior offenses must have been committed on occasions different from one another.

Under 18 U.S.C. §924(e)(20(B), a "violent felony" is an offense that: (i) has as an element the use, attempted use, or threatened use of physical force; (ii) is burglary, arson, extortion, or other offenses involving conduct that presents a serious risk of physical injury to another. Under 18 U.S.C. §924(e)(2)(A)(ii), a "serious drug offense[s]" defined by the ACCA as certain drug offenses that are punishable by maximum term of imprisonment of ten years or more. Additionally, the ACCA cannot be applied in this case because the jury merely found that Petitioner possessed a firearm and was a convicted felon. The maximum penalty based upon the specific jury findings in the case is ten years. *See* 18 U.S.C. §922(g)(1).

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court held that, "Other than the fact of a prior conviction, any fact which increases the penalty beyond the prescribed statutory

maximum must be submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 490. In *Apprendi,* the court additionally found that it was unconstitutional to remove from the jury's consideration the assessment of any facts that increase the prescribed range of penalties to which a criminal defendant is exposed. 520 U.S. at 491-92. The issue before the court in *Apprendi* involved the constitutionality of New Jersey criminal statutes that permitted an increased sentence if the offense was determined to be, in effect, a hate crime. *Id.*

Prior to finding the New Jersey statute unconstitutional in *Apprendi,* the Supreme Court decided *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998). In that case, the court held that a prior conviction need not be alleged in the indictment in order to trigger an enhanced statutory maximum under 8 U.S.C. §1326 for illegally reentering the United States after deportation. In so ruling, the court in *Almendarez-Torres* relied upon a principle seemingly rejected in *Apprendi*: "[An indictment] need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime." 523 U.S. at 229, 118 S.Ct. at 1223. The premise of *Almendarez-Torres,* therefore, was not that prior convictions are different from other facts that are essential to punishment, but that any factual finding, that only impacts the sentence is not required to be alleged in the indictment and found by the jury beyond a reasonable doubt. This premise did not survive *Apprendi*. *See Blakely v. Washington,* 124

S.Ct. at 2253. ("[A]s *Apprendi* held, every defendant has the **right** to insist that the prosecutor prove to a jury all facts legally essential to punishment") (emphasis in original).

Of course, in order to find the New Jersey statute unconstitutional in *Apprendi,* it was not necessary to overrule *Almendarez-Torres*, because the facts relevant to the sentencing enhancement were not merely prior convictions. Rather than doing so in dicta, the *Apprendi* court excepted the fact of a prior conviction from its express holding. *See Apprendi,* 530 U.S. at 490. Although the *Apprendi* court did not overrule *Almendarez-Torres,* it signaled its inevitable demise, stating: "[I]t is arguable that *Almendarez-Torres* was incorrectly decided and that our reasoning today should apply if the recidivist issue were contested. *Apprendi,* 530 U.S. at 489-490. Indeed, *Apprendi* made no secret that it was retreating from the broader constitutional implications of *Almendarez-Torres,* describing it as "at best as an exceptional departure from the historic practice we have described." *Apprendi,* 530 U.S. at 487. *Apprendi* thus evidently recognized that *Almendarez-Torres* did not fit comfortably within its clarified understanding of the Sixth Amendment.

While awaiting the Supreme Court to readdress *Almendarez-Torres*, appellate courts have recognized the obvious difficulty in applying it after *Apprendi*. *See e.g., United States v. Davis,* 260 F.3d 965, 968 (8th Cir. 2001) (observing that "a close examination of Supreme Court cases casts doubt on the future

viability of *Almendarez-Torres*."); *Jones v. Smith,* 231 F.3d 1227, 1235 (9th Cir. 2000) (concluding that "*Apprendi* calls *Almendarez-Torres* into serious question").

Since *Apprendi* was decided, the Supreme Court has never tested the *Almendarez-Torres* holdings in a case, such as Petitioner's, which the constitutionality of the sentence that the government sought squarely depended on the validity, after *Apprendi,* of the exception.

Petitioner suggests that exempting recidivism findings from the *Apprendi* rule is not supported by logic. Indeed, it is supported only by *Almendarez-Torres* itself, a decision whose premise has been undermined by subsequent cases. *See Monge v. California*, 524 U.S. 721, 741, 118 S.Ct. 2246, 2257 (1998) (Scalia, J. dissenting) (describing *Almendarez-Torres* as "a grave constitutional error affecting the most fundamental of rights").

Any continued reliance by the government on *Almendarez-Torres* was further undermined by the Supreme Court's recent decision in *Shepard v. United States,* 544 U.S. ___ 161 L.Ed. 2d 205, 125 S.Ct. 1254 (2005) (observing that in light of *Apprendi, Almendarez-Torres* does not authorize the sentencing court to resolve disputed facts as to whether a prior conviction is a qualifying prior for purposes of the Armed Career Criminal Act). *See Shepard,* 125 S.Ct. at 1262-1263. Concurring in *Shepard*, Justice Thomas acknowledged that "a majority of this Court

now recognizes that *Almendarez-Torres* was wrongfully decided." *Id.* at 1464 (Thomas, J., concurring). Indeed, Justice O'Connor, whose dissent in *Blakely v. Washington,* 124 S.Ct. 2531, 2558-2560 (2004) foreshadowed the demise of the mandatory Sentencing Guidelines, recognized that the majority in *Shepard* had engrafted, for the first time, an *Apprendi* requirement on recedivist enhancements:

> [I]t is one thing for the majority to apply its *Apprendi* rule within its own bounds, and quite another to extend the rule into new territory that *Apprendi* and succeeding cases had expressly and consistently disclaimed. Yet today's decision reads *Apprendi* to cast a shadow possibly implicating recidivism determinations, which until now have been safe from such formalism.

Shepard, 125 S.Ct. at 1269 (O'Connor, J., dissenting).

Obviously, Petitioner recognizes that this court lacks the authority to overrule *Almendarez-Torres,* regardless of how inevitable it is that the Supreme Court will do so at the first opportunity. *See United States v. Thomas,* 242 F.3d 1028, 1034-1035 (11th Cir. 2001) (refusing to reconsider the holding in *Almendarez-Torres* in light of the "very basic fact that we cannot overrule Supreme Court decisions"). However, the foregoing cases make clear that the reasoning of *Almendarez-Torres* has been "gravely wounded" by subsequent decisions of the Supreme Court. Therefore, this court should not strain to expand the reach of *Almendarez-Torres* beyond its

express holding. Cf. *Jefferson County v. Acker,* 210 F.3d 1317, 1320 (11th Cir. 2001)("[I]f the facts of a gravely wounded Supreme Court decision do not line up closely with the facts before us – if it cannot be said that decision 'directly controls' our case-then we are free to apply the reasoning in later Supreme Court decisions to the case at hand. We are not obligated to extend by even a micron a Supreme Court decision which that court itself hs discredited.").

In *Almendarez-Torres,* the defendant admitted to the existence of the prior convictions during his plea colloquy. *See Almendarez-Torres,* 523 U.S. at 227, 118 S.Ct. at 1222. ("At a hearing, before the district court accepted his plea, Almendarez-Torres admitted that he had been deported, that he had later unlawfully returned to the United States, and that the earlier deportation had taken place 'pursuant to' three earlier 'convictions' for aggravated felonies."). Therefore, *Almendarez-Torres* was limited to the Fifth Amendment rights to indictment, due process, and notice, and did not address the Sixth Amendment right to a jury trial. *Id. See also, Apprendi,* 530 U.S. at 488. (Noting that, because *Almendarez-Torres* had admitted the earlier aggravated felony convictions during plea colloquy, no question concerning the right to jury trial or standard of proof would apply).

Unlike in *Almendarez-Torres* Petitioner **did not** stipulate to anything. Therefore, these alleged prior convictions were not removed from the facts that were required under *Apprendi* to be proven to a jury

beyond a reasonable doubt. Therefore, even if the offenses alleged in the indictment by the government had been sufficient to trigger the ACCA, the sentencing court could still not increase Petitioner's 10 year maximum sentence and increase the guideline range beyond the statutory maximum established by the jury's verdict, based upon judicial fact-finding, without violating his Sixth Amendment right to a jury trial. Petitioner has a Sixth Amendment right to have a jury determine if he has three prior convictions that qualify as "violent felonies" under the ACCA and if those prior convictions occurred on occasions different from one another.

While the Eleventh Circuit has held *Almendarez-Torres* to remain law even post-*Shepard,* its rationale still allows Petitioner relief. In *United States v. Orduno-Mireles,* 405 F.3d 960, 962 (11th Cir. 2005), the court held that every fact other than a prior conviction, which increases the statutory maximum must be proven to a jury because a prior conviction must itself be established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. However, Petitioner's sentence was not enhanced merely by prior convictions. It was enhanced by a judicial determination that the prior convictions occurred on "occasions different from one another." Petitioner has a right for a jury to determine if his prior convictions occurred on "occasions different from one another." There has not been an establishment that the procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees for

this element have been met. Petitioner is entitled to a jury trial on the existence of his prior convictions, the nature of his prior convictions, and whether they occurred on occasions different from one another.

CLAIM THREE:

THE TRIAL COURT ERRED IN FINDING THAT A CONVICTION FOR CARRYING A CONCEALED WEAPON QUALIFIED AS A VIOLENT FELONY UNDER ARMED CAREER CRIMINAL ACT

The district court found Petitioner to be an armed career criminal in part by finding that a conviction for carrying a concealed firearm was a violent felony under 18 U.S.C. §924(e). Petitioner objected to this finding, arguing that carrying a concealed firearm was not a violent felony. The court overruled the objection. This circuit has previously held that carrying a concealed firearm is a violent felony under §924(e) and U.S.S.G. §4B1.4. *United States v. Hall,* 77 F.3d 398 (11th Cir. 1996). However, Petitioner contends that merely carrying a concealed weapon is not a violent felony, as it is not conduct that poses a serious potential risk of physical injury. Petitioner raises this argument for the record, acknowledging the adverse authority herein. *See United States v. Flores,* No. 06-1152 (6th Cir. Feb. 23, 2007).

In a recent opinion by Judge Richard Allen Griffin, the Sixth Circuit sided with the Eigth and declared that "the crime of carrying a concealed

weapon does not involve such 'conduct that presents a serious potential risk of physical injury to another' that a conviction . . . should properly be considered a conviction for a violent felony under the ACCA."

The court pointed out that §924(e)(2)(B)(ii) identifies "burglary, arson, or extortion, [or] use of explosives" as examples of conduct that presents "serious potential risk of physical injury" and it noted that each of those crimes involves "affirmative and active conduct that **is not** inherent in the crime of carrying a concealed weapon." More tellingly,", the court added, the statute provides that it is the "use", as opposed to the "possession", of explosives that qualifies as a violent felony.

Although the Eleventh Circuit has not reviewed such argument, Petitioner seeks to preserve this claim as it is anticipated that the United States Supreme Court will resolve the circuit split in the near future.

A. <u>Ineffective Assistance of Counsel</u>

At sentencing and on appeal, counsel in this case did, in fact, contest the application of the ACCA as to the use of, carrying a concealed weapon, as not a qualifying prior conviction udner the ACCA. However, counsel failed to argue the analysis reached by the Sixth Circuit as to the specific context of §924(e)(2)(B)(ii), in that carrying a concealed weapon does not present affirmative and active conduct as provided in that provision, the carrying of a concealed

weapon is not a qualifying predicate for the ACCA. Because counsel failed to present this specific argument, his assistance was ineffective and prejudiced Petitioner as well. Therefore, Petitioner is entitled to be resentenced absent the ACCA to a term of imprisonment not to exceed 10 years as provided in 18 U.S.C. §922(g)(1).

CLAIM FOUR:

PETITIONER WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL, AT SENTENCING WHEN COUNSEL FAILED TO OBJECT TO THE NATURE OF PETITIONER'S PRIOR CONVICTIONS AND THAT SUCH PRIOR CONVICTIONS DID NOT QUALIFY FOR THE ACCA AS MANDATED UNDER THE PROCEDURES ANNOUNCED IN *TAYLOR* AND *SHEPARD*

In *Taylor v. United States,* 495 U.S. 575 (1990), and, *Shepard v. United States*, 544 U.S. 13 (2005), the Supreme Court set standards to determine whether a prior conviction can be used to enhance a Petitioner's sentence. There exists two approaches to determine whether a prior conviction is a violent or qualifying felony under the Career Offender provision. The approaches are the "categorical approach" and the "modified approach", both of which were sanctioned in *Taylor*. *Taylor*, 495 U.S. at 602. Under the categorical approach, "federal courts do not examine the facts underlying the prior offense, but 'look only to the fact of conviction and the statutory definition of

the offense. *United States v. Corona-Sanchez,* 291 F.3d 1201, 1203 (9th Cir. 2002) (en banc) (quoting *Taylor,* 495 U.S. at 602, 110 S.Ct. at 2143'". Under the "modified approach", the court may consult limited categories of documents to determine whether the facts underlying the conviction necessarily established that the Petitioner committed the generic offense. *Taylor,* 495 U.S. at 602, 110 S.Ct. at 2160.

In this case, Petitioner argues that had counsel made the proper objections under the two approaches, the district court would have concluded that Petitioner's prior convictions were not predicates for the armed career offender provision. Therefore, Petitioner should be resentenced with effecitve assistance of counsel, without the armed career offender enhancement being applied to his case as a result of counsel's deficient performance, because the "**nature**" and not the "fact" of Petitioner's prior convictions would have qualified the relief requested.

CONCLUSION

WHEREFORE, from the Laws submitted herein, Petitioner prays that this Honorable Court will find that the indictment should be dismissed with prejudice or, alternatively, Petitioner should be resentenced absent the ACCA, or for any other relief this court deems just and proper in this premise.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

This 11 day of April, 2007.

Respectfully Submitted,

/s/ Darian Watts

Darian Watts, Pro Se
Reg. No. 42122-018
FCC – Medium (C-2)
P.O. Box 1032
Coleman, FL 33521-1032

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DARIAN ANTWAN WATTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent. /

Case No.
8:04-Cr-314-T-24MAP
8:07-Cv-665-T-24MAP

NOTICE OF APPEAL AND APPLICATION FOR CERTIFICATE OF APPEALABILITY

(Filed Sept. 17, 2007)

COMES NOW, Petitioner, Darian Antwan Watts, pro se, notifying this Honorable Court of his intent to appeal the denial of his §2255 motion entered on June 26, 2007, and also the denial of his motion for reconsideration, pursuant to Fed.R.Civ.P. 59(e), entered on July 16, 2007. (Doc. No's. 10 & 13). Petitioner also requests this Honorable Court to issue a Certificate of Appealability as to the following issues:

GROUND ONE

DISTRICT COURT ERRED IN FAILING TO FIND COUNSEL'S PERFORMANCE DEFICIENT WHEN COUNSEL ERRONEOUSLY WITHDREW PETITIONER'S VALID SPEEDY TRIAL MOTION WHEN INDICTMENT WAS RETURNED IN VIOLATION OF TITLE 18 U.S.C. §3161(b)

GROUND TWO

IN LIGHT OF RECENT SUPREME COURT'S DECISION ANNOUNCED IN *JAMES V. UNITED STATES*, ___ S.Ct. ___ (2007), A PRIOR CONVICTION FOR CARRYING A CONCEALED FIREARM FALLS OUTSIDE THE "VIOLENT FELONY" OFFENSE DEFINED WITHIN §924(e)(2)(B)(ii)

WHEREFORE, Petitioner prays this Honorable Court filed his Notice of Appeal, and issue a Certificate of Appealability for the foregoing issues, and for such other relief as this court deem just and proper in this premise.

This 13 day of September,

2007

Respectfully Submitted,

/s/ Darian Antwan Watts
DARIAN ANTWAN WATTS,
PRO SE
Reg. No. 42122-018
FCC-Medium (C-2)
P.O. Box 1032
Coleman, FL 33521-1032

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided to the Office of the U.S. Attorney, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602, via first class U.S. Mail, postage prepaid, this 13 day of September, 2007.

/s/ Darian Antwan Watts
DARIAN ANTWAN WATTS,
PRO SE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DARIAN ANTWAN WATTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent. /

Case No.
8:04-Cr-314-T-24MAP
8:07-Cv-665-T-24MAP

MOTION FOR RECONSIDERATION AS PROVIDED IN FEDERAL RULES OF CIVIL PROCEDURE, RULE 59(e)

COMES NOW, Petitioner, DARIAN ANTWAN WATTS, pro se requesting this Honorable Court to reconsider the facts of this Court's Order denying Petitioner's Title 28 U.S.C. §2255 motion under the Federal Rules of Civil Procedure, Rule 59(e). The Petitioner argues that the instant motion should be granted for the following reasons:

GROUND ONE

COUNSEL ERRONEOUSLY WITHDREW PETITIONER'S VALID SPEEDY TRIAL VIOLATION MOTION WHEN INDICTMENT WAS RETURNED IN VIOLATION OF TITLE 18 U.S.C. § 3161(b)

As this Court correctly found in the Order denying Petitioner's motion for relief under 28 U.S.C. §2255, "In order to trigger the thirty day time limit under the Federal Speedy Trial Act (the Act), both a federal complaint and a federal arrest and/or federal summons are required. An 'arrest', under the Act, consists of a federal arrest on a federal charge. A federal complaint and federal detainer filed against a defendant in state custody does not constitute an 'arrest' for purposes of the Act. Thus, the thirty-day speedy trial period never begins to run against a defendant who is subject of a federal complaint, arrest warrant, and detainer while in state custody until he is placed under federal arrest." Citing *United States v. McGrier*, 848 F.Supp. 649 (S.D.W.Va. 1994), decision aff'd, 55 F.3d 144 (4th Cir. 1995) and aff'd, 891 F.3d 135 (4th Cir. 1996). *See* Doc. No. 10 at pg. 6.

While the Court correctly noted that the Petitioner was arrested and detained by state authorities on May 23, 2004, released on a surety bond on May 24, 2004, and then re-arrested on June 3, 2004, the June 3, 2004 re-arrest, however, was by federal authorities, *not state*, and was held under a federal

detainer.[1] *See* Exhibit "A". Although at the time of the federal arrest on June 3, 2004, Petitioner was additionally arrested on state charges, those charges were all resolved and/or dismissed by the state as a result of the federal complaint all on June 17, 2004. Specifically, on June 7, 2004, Petitioner received ten (10) days county jail time with time credit from June 3, 2004, as a result of the possession of marijuana offense in Case No. 04-CM-12317 which was a part of the June 3, 2004 arrest. *See* Exhibit "B", attached. Thereafter, on June 14, 2004, the State of Florida dismissed all of the remaining charges from the June 3, 2004 arrest as a result of the federal criminal complaint. *See* Exhibit "C".

Therefore, it is the argument of the Petitioner that the government, at the very most, had until July 14, 2004 to file a timely indictment in this case to be valid pursuant to 18 U.S.C. §3161(b), because the record in this case is beyond dispute that Petitioner was not being held on any other state charges after the State of Florida dismissed the charges against Petitioner as a result of the pending federal complaint on June 14, 2004.

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[1] The arresting officer was John Armao.

GROUND THREE

A PRIOR CONVICTION FOR CARRYING A CONCEALED FIREARM IS NOT A VIOLENT FELONY AS DEFINED IN THE ACCA

As the U.S. Supreme Court recently established in the case of *James v. United States*, 81 CrL 88 (U.S. 2007), that if a prior offense does not fall within the specific violent offense definitions as found in §924(e)(2)(B)(ii), the district court should look to the closet enumerated offense to conclude whether the prior offense presents a serious potential risk of physical injury to another, where the court said:

> "The specific offenses enumerated in [the residual provision] provide one baseline from which to measure whether other similar conduct 'otherwise. . . . presents a serious potential risk of physical injury'. In this case, we can ask whether the risk posed by attempted burglary is comparable to that posed by its closets analog among the enumerated offenses – here, completed burglary."

Petitioner asserts that using this analogy from *James*, since carrying a concealed firearm is not defined within §924(e)(2)(B)(ii), the closets enumerated offense would be a State of Florida's conviction for felon in possession of a firearm, and since this Court has previously held that such conviction is not a crime of violence as defined in the ACCA, this Court should find that under *James*, it

was error to clasify Petitioner's prior conviction as a crime of violence. *United States v. Davis*, ___ F.3d ___ (5th Cir. 2007) (acknowledging that *James* articulated a new test for determining whether a prior offense falls within the ACCA's catch-all clause of §924(e)(2)(B)(ii)).

a. Ineffective Assistance of Counsel

Additionally, as Petitioner argued in his initial §2255 motion, because counsel did not raise the specific argument demonstrated above, his assistance fell below a reasonable standard of objectiveness. Specifically, on direct appeal, the Eleventh Circuit found that Petitioner was not entitled to any relief because carrying a concealed firearm was a crime of violence within the definition of the ACCA. Citing *United States v. Hall*, 77 F.3d 398 (11th Cir. 1996). However, because in *Hall* the defendant never raised the specific argument as raised herein (that the court must use a different categorical approach to determine whether or not a prior conviction falls within §924(e)(2)(B)(ii) when the prior offense is not in the specific definitions of that subsection), it cannot be reasonably argued that the issue raised herein was raised on direct appeal or resolved in *Hall.*

In concluding, the Petitioner asserts that reconsideration of this claim should be given where the fact remains that the *Hall* court did not have the benefit of *Shepard v. United States*, 544 U.S. 13 (2005), or *James v. Untied States*, ___ U.S. ___ (2007),

and if the court did have those decisions at the time of the ruling, the court could not have reached the same conclusion, therefore, in the interest of justice, this Court should resolve the issue.

Moreover, this Court should further reconsider whether the State of Florida's carrying a concealed firearm conviction is a crime of violence within the ACAA, where the State of Florida was the State of Michigan, has passed a law after Petitioner's conviction, allowing qualifying citizens to carry concealed firearms. Furthermore, it is inconceivable that the Florida Legislature would pass a law that condones the involvement of conduct that creates and carries a "serious potential risk of physical injury to another." *United States v. Flores*, 477 F.3d 431 (6th Cir. 2007) (taking into consideration that the State of Michigan passed a law that allows citizens to carry concealed firearms, therefore a prior conviction of carrying a concealed firearm does not qualify as a "violent felony" within the ACCA).

CONCLUSION

WHEREFORE, after due consideration, Petitioner's prays that the instant motion be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Reconsideration has been provided to the below named individual on this 7 day of July, 2007, via first class U.S. Mail, postage prepaid:

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