

No. 07-11550

IN THE SUPREME COURT OF THE UNITED STATES

DEMARICK HUNTER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals correctly denied petitioner a certificate of appealability under 28 U.S.C. 2253(c) on his claim that his counsel rendered ineffective assistance by failing to argue that his prior convictions for carrying a concealed firearm were not "violent felonies" under the Armed Career Criminal Act, 18 U.S.C. 924(e).

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OPINION BELOW

The decision of the court of appeals denying petitioner's motion for a certificate of appealability (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2007. A motion for reconsideration was denied on January 24, 2008. The petition for a writ of certiorari was filed on April 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 188 months of imprisonment, five years of supervised release, a \$3,000 fine, and a special assessment of \$100. On direct appeal, the court of appeals affirmed. Petitioner then filed a motion to vacate his conviction and sentence under 28 U.S.C. 2255. The district court denied the motion and also denied petitioner's motion for a certificate of appealability (COA). The court of appeals denied petitioner's motion for a COA. Upon petitioner's motion to reconsider, the court of appeals again declined to issue a COA.

1. On August 15, 2003, a Miami-Dade police officer made a traffic stop of a car in which petitioner, a convicted felon, was a passenger. During the stop, the officer seized a pistol and a holster inside the car. The driver later testified that the gun and the holster belonged to petitioner. See 04-15136 Gov't C.A. Br. 1-4.

2. The Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(1), provides for a mandatory minimum sentence of 15 years of imprisonment if the defendant has violated 18 U.S.C. 922(g)(1) and has at least three prior convictions for a "violent felony" or a "serious drug offense." Otherwise, the maximum penalty for a

Section 922(g) offense is ten years. See 18 U.S.C. 924(a)(2).

Section 924(e)(2)(B)(ii) defines a "violent felony" as, inter alia, an offense that "presents a serious potential risk of physical injury to another." In addition, the Career Offender Guideline, U.S.S.G. § 4B1.2(a)(2), defines a "crime of violence" as, inter alia, an offense that "presents a serious potential risk of physical injury to another."

The probation office prepared a Presentence Investigation Report (PSR) indicating that petitioner was subject to the mandatory 15-year minimum under the ACCA because he had three prior convictions for "violent felonies" or "serious drug offenses," including convictions for carrying a concealed firearm in 1996 and 1999 and possession of cocaine with intent to sell or deliver it in 2001. At sentencing, petitioner did not challenge the convictions that designated him as an armed career criminal under the ACCA or the Sentencing Guidelines. The district court adopted the PSR's findings and recommendations and sentenced petitioner to 188 months of imprisonment. See 04-15136 Gov't C.A. Br. 4-5.

On direct appeal, petitioner raised only a claim that the district court erred in imposing a mandatory Guidelines sentence under United States v. Booker, 543 U.S. 220 (2005). He did not attack his prior convictions for carrying a concealed firearm that enhanced his sentence under the ACCA. See 04-15136 Pet. C.A. Br. The court of appeals affirmed petitioner's conviction and sentence.

United States v. Demarick, 140 Fed. Appx. 163 (11th Cir. 2005).

3. Petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. He alleged, inter alia, that the court violated his Fifth Amendment right to due process when it sentenced him as an armed career criminal because a conviction for carrying a concealed firearm is not a "violent felony" and that his trial and appellate counsel were ineffective in not challenging the validity of his concealed-firearm convictions as predicate ACCA criminal convictions. The motion was referred to a magistrate judge, who recommended that it be denied. The magistrate judge noted that, at the time of petitioner's sentencing, the Eleventh Circuit had held that the crime of carrying a concealed firearm was a "violent felony" under the ACCA. See United States v. Hall, 77 F.3d 398 (11th Cir.), cert. denied, 519 U.S. 849 (1996). Accordingly, the magistrate judge reasoned, the district court did not err in sentencing petitioner as an armed career criminal based on his prior convictions, nor did his counsel render ineffective assistance in failing to challenge the validity of the concealed-firearms convictions. Pet. App. D2-D4. The district court adopted the magistrate judge's report and denied petitioner's Section 2255 motion. Pet. App. E. By separate order, the district court denied petitioner's motion for a COA. Pet. App. B.

4. Petitioner filed a motion for a COA in the court of appeals, claiming that the district court erred in sentencing him

as an armed career criminal and that his counsel rendered ineffective assistance in failing to challenge the "illegal" enhancement. Mot. for COA 4. The court of appeals denied petitioner's motion for a COA. Pet. App. A. On reconsideration, the court again denied the motion, citing Strickland v. Washington, 466 U.S. 668 (1984), and Hall. Pet. App. C.

DISCUSSION

Petitioner contends that the court of appeals erred in denying him a certificate of appealability (COA). He renews his contention that his two concealed-firearms convictions are not "violent felonies" under the Armed Career Criminal Act (ACCA). On April 28, 2008, this Court granted a writ of certiorari and vacated the judgment in Archer v. United States, 128 S. Ct. 2051 (2008) (No. 07-8394), which presented the related question of whether a conviction for carrying a concealed firearm qualifies as a crime of violence under U.S.S.G. § 4B1.2, and remanded the case for further consideration in light of Begay v. United States, 128 S. Ct. 1581 (2008).¹ On remand, the Eleventh Circuit held that the offense of carrying a concealed firearm is not a crime of violence under the Career Offender Guideline. United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008). The court concluded that its prior

¹ In Begay, this Court held that a conviction for driving while under the influence of alcohol or drugs (DUI) is not a "violent felony" under the "serious potential risk of physical injury to another" prong of Section 924(e)(2)(B)(ii). 128 S. Ct. at 1588.

precedent in United States v. Gilbert, 138 F.3d 1371, 1372 (11th Cir. 1998), which had relied on Hall in holding that the offense of carrying a concealed firearm was a "crime of violence" under Guidelines § 4B1.2, had been "abrogat[ed]" by Begay. Archer, 531 F.3d at 1352.

This case arises in a different procedural posture than Archer, which arose on direct appeal. Nevertheless, the Court should similarly grant the petition for certiorari, vacate the judgment, and remand for further consideration. The Eleventh Circuit denied petitioner's motion for a COA before this Court issued its decision in Begay and before the Eleventh Circuit had the opportunity to consider the effect of Begay in Archer. In light of the Eleventh Circuit's holding in Archer that, after Begay, a conviction for carrying a concealed firearm is not a "crime of violence" within the meaning of U.S.S.G. § 4B1.2, and the likelihood that it would apply the same holding to the ACCA, it would be appropriate to remand this case for the Eleventh Circuit to consider in the first instance whether a COA should issue on petitioner's claim.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded to the court of appeals for further consideration in light of Begay v. United States, 128 S. Ct. 1581 (2008).

Respectfully submitted.

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