

IN THE SUPREME COURT OF THE UNITED STATES

DARIAN ANTWAN WATTS, 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's motion for a certificate of appealability on his claim that his prior conviction for carrying a concealed firearm was not a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. 924(e).

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OPINIONS BELOW

The decision of the court of appeals denying petitioner's motion for a certificate of appealability (Pet. App. B) is not reported. The opinion of the district court (Pet. App. A1-A9) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2007. The petition for a writ of certiorari was filed on February 13, 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 Middle 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). The court found him to be an armed career criminal under 18 U.S.C. 924(e) and sentenced him to 210 months of imprisonment. The court of appeals affirmed. Petitioner then filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court denied the motion, see Pet. App. A1-A8, and also denied petitioner's pro se motion for a certificate of appealability (COA), see id. at A8-A9. The court of appeals also denied petitioner's motion for a COA. Id. at B.

1. Petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). The ordinary maximum penalty for a Section 922(g) offense is ten years of imprisonment. 18 U.S.C. 924(a)(2).

At sentencing, the district court found that petitioner was subject to an increased penalty under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(1), which 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."¹ The court found that petitioner's two prior

¹ As relevant here, the ACCA's definition of the term "violent felony" includes crimes that "involve[] conduct that presents a serious potential risk of physical injury to another."

convictions for robbery and one prior conviction for carrying a concealed weapon qualified as "violent felon[ies]," and it sentenced petitioner to 210 months of imprisonment. Pet. App. A3.

2. On December 16, 2005, the court of appeals affirmed. As relevant here, petitioner argued that his prior conviction for carrying a concealed weapon was not a valid predicate conviction under the ACCA. The court of appeals rejected that argument based on circuit precedent holding that carrying a concealed weapon is a "violent felony." United States v. Watts, 159 Fed. Appx. 923, 926 (11th Cir. 2005) (per curiam) (citing United States v. Hall, 77 F.3d 398, 401 (11th Cir. 1996)). On April 17, 2006, this Court denied certiorari. Watts v. United States, 547 U.S. 1091 (2006).

3. Petitioner subsequently filed a motion in the district court to vacate his sentence under 28 U.S.C. 2255. He argued, inter alia, that the sentencing court had violated his due process rights by erroneously "finding that a conviction for carrying a concealed weapon qualified as a violent felony" under the ACCA. Pet. App. A7.

On June 26, 2007, the district court rejected that claim because it had already been pressed and rejected on direct appeal. Pet. App. A8 (citing United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000)). The district court also denied petitioner's

18 U.S.C. 924(e)(2)(B)(ii). That portion of the "violent felony" definition is commonly known as the "residual clause."

motion for a COA. Id. at A8-A9. The court explained that it could issue a COA "'only if the applicant has made a substantial showing of the denial of a constitutional right,'" id. at A9 (quoting 28 U.S.C. 2253(c)(2)), and it concluded that petitioner "ha[d] not made the requisite showing in these circumstances," ibid.

4. Petitioner filed a pro se application for a COA in the court of appeals, asserting, as relevant here, that in light of this Court's decision in James v. United States, 550 U.S. 192 (2007), carrying a concealed firearm does not constitute a "violent felony" under 18 U.S.C. 924(e)(2)(B)(ii). On November 16, 2007, the court of appeals denied petitioner's motion for a COA. Pet. App. B.

5. On February 13, 2008, this petition for a writ of certiorari was filed. On April 16, 2008, this Court decided Begay v. United States, 128 S. Ct. 1581, in which it held that the ACCA's residual clause covers only crimes that "typically involve purposeful, violent, and aggressive conduct." Id. at 1586 (internal quotation marks omitted). On June 26, 2008, the Eleventh Circuit decided United States v. Archer, 531 F.3d 1347, in which it considered whether, in light of Begay, a conviction for carrying a concealed weapon is a "crime of violence" under Sentencing Guidelines § 4B1.2. The court of appeals held that carrying a concealed weapon is not a "crime of violence" because it "does not involve[] aggressive, violent conduct" or "purposeful conduct."

531 F.3d at 1351. The Eleventh Circuit also suggested that its holding would apply in the ACCA context, noting that the ACCA's definition of "violent felony" is "virtually identical" to the Sentencing Guidelines' definition of "crime of violence." Id. at 1352 (internal quotation marks omitted).

On November 17, 2008, this Court granted the petition for a writ of certiorari in Hunter v. United States, 129 S. Ct. 594. As in this case, the federal habeas petitioner in Hunter had argued that his prior conviction for carrying a concealed weapon was not a "violent felony" under the ACCA. Before this Court had issued its decision in Begay, the Eleventh Circuit had denied Hunter a COA on that question. This Court vacated the Eleventh Circuit's judgment and remanded the case to the Eleventh Circuit for further consideration in light of Begay.

On February 24, 2009, the Eleventh Circuit, without seeking the views of the government, issued its decision on remand in Hunter and again denied the petitioner's motion for a COA. The court noted that "Hunter contends that his due process rights were violated when he was sentenced as an armed career criminal based on two prior convictions for carrying a concealed weapon," 559 F.3d 1188, 1190, and it acknowledged that "Begay provides good reason to conclude that Hunter was erroneously sentenced as an armed career criminal," ibid. The court held, however, that "a sentencing error alone does not amount to 'a substantial showing of the denial of a

constitutional right.'" Ibid. (quoting 28 U.S.C. 2253(c)(2)). The court concluded that "[a]lthough Hunter presents his arguments for a certificate of appealability as involving a denial of due process * * * , Hunter's sentencing error did not give rise to a violation of the Constitution. Hunter was afforded due process at his sentencing hearing, and sentencing errors are generally not cognizable in a collateral attack." Id. at 1191 (citations and internal quotation marks omitted).

DISCUSSION

Petitioner contends that the court of appeals erred in denying him a certificate of appealability (COA). The government agrees. Petitioner can make a "substantial showing" that his sentence under ACCA on the basis of a prior conviction that, in light of Begay, does not qualify as an ACCA predicate offense violates due process. 28 U.S.C. 2253(c)(2). This Court should therefore grant the petition, vacate the judgment below, and remand this case with instructions for the court of appeals to issue a COA.

1. To obtain a COA under 28 U.S.C. 2253(c)(2), "a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that * * * includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S.

473, 483-484 (2000) (internal quotation marks and citation omitted). Petitioner can make that showing.

In Hunter, the Eleventh Circuit reasoned that "sentencing errors are generally not cognizable in a collateral attack." Hunter, 559 F.3d at 1191 (internal quotation marks omitted). For that proposition the court cited cases holding that errors in applying the Sentencing Guidelines may generally not be collaterally attacked. See United States v. Cepero, 224 F.3d 256, 267-268 (3d Cir. 2000) (en banc); Buggs v. United States, 153 F.3d 439, 443 (7th Cir. 1998); United States v. Segler, 37 F.3d 1131, 1134 (5th Cir. 1994). Those decisions are correct, but they do not resolve this case. 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. Rather, petitioner's claim is that he was improperly sentenced under the ACCA, with the result that, instead of facing a term of imprisonment up to ten years, he faced a term of imprisonment from 15 years to life. He asserts that the imposition of that illegal sentence violated due process.

The Constitution permits sentencing courts "wide discretion in determining what sentence to impose," United States v. Tucker, 404 U.S. 443, 446 (1972), but "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause," Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality

opinion). Although this Court has not directly confronted the precise due process question implicated by this case, its precedents do provide grounds for a defendant to make (at least) a substantial showing of the denial of a constitutional right.

Petitioner 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, as well as to deprive him of the court's discretion to impose a lower sentence than the maximum. This Court has held that a federal defendant has a "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." Whalen v. United States, 445 U.S. 684, 690 (1980).² The Court has also found a due process violation when a defendant was sentenced to the maximum term authorized by state law, after the sentencing jury was erroneously prevented from exercising the discretion permitted

² In Whalen, the Court held that Congress had not authorized consecutive sentences for the defendant's two offenses and that the "error denied the petitioner his constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." 445 U.S. at 690. The Court rested its decision "not only [on] the specific guarantee against double jeopardy, but also [on] the constitutional principle of separation of powers," id. at 689, which, the Court stated, permits courts created by Congress "constitutionally [to] impose only such punishments as Congress has seen fit to authorize," id. at 689 n.4. The Court then added that, although the States are not bound by the Constitution's doctrine of separation of powers, "[t]he 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." Ibid.

under state law to impose a lower sentence. Hicks v. Oklahoma, 447 U.S. 343, 346-347 (1980).³ Here, petitioner received a sentence seven and one-half years longer than the ten-year maximum term authorized by Congress because he was erroneously categorized as an armed career criminal under the ACCA. In addition, he was deprived of the possibility that the district court would have exercised its discretion, as it could for a non-ACCA defendant, to impose a term of imprisonment shorter than ten years.⁴

Petitioner was eligible for sentencing under the ACCA only if he had three prior convictions for a "violent felony" or a "serious drug trafficking offense." 18 U.S.C. 924(e). While the ACCA, as

³ In Hicks, a state statute provided that the sentencing jury was required to impose a mandatory 40-year sentence on a habitual offender. 447 U.S. at 345. After Hicks was sentenced to a mandatory 40-year term under that provision, the Oklahoma Court of Criminal Appeals, in another case, invalidated that statute as unconstitutional. Ibid. The result, as a matter of state law, was that Hicks's jury should have been instructed that it had the authority to impose any sentence "not less than ten . . . years." Id. at 346. The state court nevertheless affirmed Hicks's sentence, on the ground that it was "within the range of punishment that could have been imposed in any event." Id. at 345. Finding a due process violation, this Court reversed. Id. at 347. The Court stated that "[t]he defendant * * * has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." Id. at 346 (citation omitted).

⁴ Although the sentencer that was improperly deprived of its discretion in Hicks was the jury, at least one court has stated that the rule in Hicks "is not, however, limited to imposition of sentences by juries." Prater v. Maggio, 686 F.2d 346, 350 n.8 (5th Cir. 1982).

construed at the time of his offense and direct appeal, permitted a sentencing court to count petitioner's concealed-weapon conviction as a "violent felony," intervening judicial decisions rendered that prior conviction a nonqualifying offense as a matter of law. The decisions in Begay and Archer constitute substantive holdings concerning eligibility for a recidivist enhancement, and they are entitled to retroactive effect on collateral review. Cf. Schriro v. Summerlin, 542 U.S. 348, 353 (2004) ("A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes."); Bousley v. United States, 523 U.S. 614, 620-621 (1998) ("decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct" are retroactive on collateral review). Accordingly, in light of this Court's decision in Begay and the Eleventh Circuit's decision in Archer, there is "good reason to conclude that [petitioner] was erroneously sentenced as an armed career criminal." United States v. Hunter, 559 F.3d at 1190. Based on Whalen and Hicks, petitioner can therefore make a substantial showing that, because an improper recidivist enhancement increased his term of incarceration beyond the otherwise applicable legal maximum and also prevented the exercise of the district court's discretion to impose a still-lesser

sentence, he has been denied due process.⁵

The court of appeals therefore erred in denying petitioner a COA on that issue. This Court should grant the petition, vacate the judgment below, and remand this case for further proceedings.

2. Because the Eleventh Circuit on remand would otherwise be bound by its decision in Hunter, this Court should also instruct the court of appeals to issue a COA. In Hunter, the Eleventh Circuit concluded that "a sentencing error alone does not amount to a "substantial showing of the denial of a constitutional right.'" Hunter, 559 F.3d at 1191 (quoting 28 U.S.C. 2253(c)(2)). As set forth above, that holding was incorrect as applied in this case and Hunter. The sentencing errors both here and in Hunter implicate the defendants' due process rights and give rise to a substantial showing of a constitutional violation.

Once the court of appeals issues a COA, it should remand the

⁵ As one court has reasoned:

The Due Process Clause of the Fourteenth Amendment prohibits state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law. See Whalen v. United States, 445 U.S. 684, 689 n.2 (1980); see also Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (rejecting argument that defendant's interest in the jury's exercise of sentencing discretion is merely a matter of state procedural law). Here, Richardson claims he received a sentence patently in excess of the maximum permitted. This claim implicates due process concerns.

Richardson v. Evans, 99 F.3d 1150, 1996 WL 603278, at *4 (10th Cir. 1996) (unpublished).

case to the district court. That court, in the first instance, should have the opportunity to reconsider petitioner's constitutional claim in light of the change in law since its decision. See 28 U.S.C. 2106 (authorizing an appellate court to "remand the cause and * * * require such further proceedings to be had as may be just under the circumstances"). The district court had declined to consider petitioner's contention that carrying a concealed weapon is not a violent felony on the ground that it had been pressed and rejected on direct appeal. Pet. App. A7-A8. As a general rule, under law of the case principles, "[o]nce a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255." United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000) (quoting United States v. Natelli, 553 F.2d 5, 7 (2d Cir. 1977)). But the intervening decisions in Begay and Archer now provide grounds for petitioner to obtain reconsideration of that claim in his motion under 28 U.S.C. 2255. Davis v. United States, 417 U.S. 333, 342 (1974) (rejecting court of appeals' reliance on "the law of the case" when there was "an intervening change in law") (internal quotation marks omitted); see United States v. Becker, 502 F.3d 122, 127-129 (2d Cir. 2007) (relying on intervening change in the law to justify reconsideration on Section 2255 of claim

rejected on direct appeal).⁶

If the court of appeals were to remand to the district court for consideration of the due process claim, the district court would also be entitled to consider, as a threshold question antecedent to the constitutional issue, whether relief should be granted as a statutory matter because, in light of Begay and Archer, petitioner's sentence exceeds the maximum term authorized. That is a cognizable ground for relief under Section 2255. See 28 U.S.C. 2255(a) (permitting relief, inter alia, where the movant's "sentence was in excess of the maximum authorized by law"); cf. Davis, 417 U.S. at 342-346 (holding that statutory as well as constitutional claims are cognizable under Section 2255, if the error of law constitutes a fundamental defect). "The prospect of a constitutional argument is needed to permit the COA to be granted; but once back in district court [petitioner] is free - on a first Section 2255 motion - to proffer non-constitutional claims." Mateo v. United States, 310 F.3d 39, 41 (1st Cir. 2002). Consideration of a statutory claim for relief, which the United States would not oppose on the facts of this case, would accord

⁶ In many circumstances, the principles of Teague v. Lane, 489 U.S. 288 (1989), would preclude the application of intervening precedent on collateral review under Section 2255. In this case, the decisions in Begay and Archer are retroactive as substantive sentencing rules, and the due process claims that petitioner may assert may qualify either as substantive rules or as rules that are not new. In any event, the government does not rely on Teague in this case as a procedural bar to the issuance of a COA. See Danforth v. Minnesota, 128 S. Ct. 1029, 1046 (2008).

with bedrock principles of constitutional avoidance. See Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals with instructions to issue a COA.

Respectfully submitted.

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