NOS. 07-13701-HH and 07-14422-HH

In the United States Court of Appeals For the Eleventh Circuit

DEMARICK HUNTER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida, No. 1:06-cv-22555

DARIAN ANTWAN WATTS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida, No. 8:07-cv-00665

BRIEF FOR CRIMINAL LAW AND HABEAS CORPUS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF THE JUDGMENTS BELOW

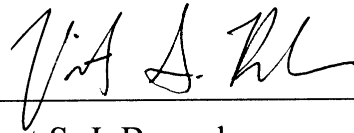
Adam K. Mortara
Vincent S. J. Buccola
BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP
54 W. Hubbard Street, Suite 300
Chicago, IL 60654
Tel: (312) 494-4400
Fax: (312) 494-4440
Attorneys for Amici Curiae

Hunter v. United States, **No. 07-13701-HH**

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, counsel for *Amici* hereby certifies that the following additional persons not listed in the parties' statements of interested persons have an interest in the outcome of this case:

Buccola, Vincent S.J. (counsel for *Amici*)



Vincent S. J. Buccola
Counsel for Amici

Watts v. United States, **No. 07-14422-HH**

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

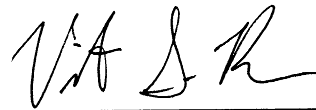
In accordance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, counsel for *Amici* hereby certifies that the following additional persons not listed in the parties' statements of interested persons have an interest in the outcome of this case:

Bibas, Stephanos (*Amicus*)

Buccola, Vincent S.J. (counsel for *Amici*)

Mitchell, Jonathan F. (*Amicus*)

Mortara, Adam K. (*Amicus* and counsel for *Amici*)



Vincent S. J. Buccola
Counsel for Amici

STATEMENT REGARDING ORAL ARGUMENT

The United States argues that the district court judgments should be vacated in both cases, a position which pits all parties against the judgments below. *See* Gov't Br. 7. *Amici* support affirmance. If the Court orders oral argument in these cases, *Amici* stand ready to defend the judgments below.

TABLE OF CONTENTS

Page(s)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (HUNTER) ii

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (WATTS).. iii

STATEMENT REGARDING ORAL ARGUMENT iv

TABLE OF CONTENTS.. v

TABLE OF AUTHORITIES vii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

STATEMENT OF JURISDICTION 1

PRELIMINARY STATEMENT 2

ARGUMENT AND CITATIONS OF AUTHORITY 3

I. Erroneous Application of a Sentencing Rule Does Not Automatically Deprive a Criminal Defendant of Due Process 4

A. The decisions of this and other courts show that sentencing error is not always constitutional error... 5

B. The Supreme Court authority that Watts and the Government cite indicates only that "arbitrary" disregard for the law constitutes a deprivation of due process............................. 8

C. Supreme Court precedent precludes Hunter and Watts from arguing "actual innocence."... 11

II. The Parties' Suggestions For Vacatur Would Evade the Appellate Jurisdiction Restrictions of the AEDPA 14

III. Assuming *Arguendo* the Validity of Appellants' Proposed Constitutional Rule, *Teague v. Lane* Bars Its Application on Collateral Review 16

Page(s)

IV. Jurisdictional and Procedural Defects Also Create Independent Bars to Relief in this Court 20

A. The Court may lack jurisdiction in *Watts* 20

B. Hunter and Watts procedurally defaulted their claims to deprivation of due process 23

1. Hunter 23

2. Watts 25

CONCLUSION 26

CERTIFICATE OF COMPLIANCE WITH RULE 32(A) 27

CERTIFICATE OF SERVICE 28

TABLE OF AUTHORITIES

Page(s)

Cases

Advanced BodyCare Solutions, LLC v. Thione Int'l, Inc.,
No. 09-13151 (11th Cir. August 25, 2010) 21

**Almendarez-Torres v. United States*,
523 U.S. 224, 118 S. Ct. 1219 (1998) 11, 12, 13

Atkins v. Virginia,
536 U.S. 304, 122 S. Ct. 2242 (2002) 18, 19

Ayuso v. United States,
No. 09-13818, 2010 U.S. App. LEXIS 1468 (11th Cir. Jan. 22, 2010) 6

Bailey v. United States,
516 U.S. 137, 116 S. Ct. 501 (1995) 16, 17, 18

Barefoot v. Estelle,
463 U.S. 880, 103 S. Ct. 3383 (1983) 3

Battle v. United States,
419 F.3d 1292 (11th Cir. 2005) 15

Beard v. Banks,
542 U.S. 406, 124 S. Ct. 2504 (2004) 16

Begay v. United States,
553 U.S. 137, 128 S. Ct. 1581 (2008) 17, 18

Bousley v. United States,
523 U.S. 614, 118 S. Ct. 1604 (1998) 15, 17, 18

Bowles v. Russell,
551 U.S. 205, 127 S. Ct. 2360 (2007) 1

Bowles v. Russell,
551 U.S. 205, 127 S. Ct. 2360 (2007) 21

Brady v. United States,
397 U.S. 742, 90 S. Ct. 1463 (1970) 17

Page(s)

Buggs v. United States,
153 F.3d 439 (7th Cir. 1998) 6

**Burke v. United States*,
152 F.3d 1329 (11th Cir. 1998) 6, 7

Curtis v. United States,
294 F.3d 841 (7th Cir. 2002) 19

Davis v. United States,
417 U.S. 333, 94 S. Ct. 2298 (1974) 13

Dretke v. Haley,
541 U.S. 386, 124 S. Ct. 1847 (2004) 18, 19

Ex parte Lange,
85 U.S. (18 Wall.) 163 (1874) 8

Gilbert v. United States,
609 F.3d 1159 (11th Cir. 2010) 13, 15

Gray-Bey v. United States,
209 F.3d 986 (7th Cir. 2000) (per curiam) 18

Hart v. Hodges,
587 F.3d 1288 (11th Cir. 2009) 14

Herrera v. Collins,
506 U.S. 390, 113 S. Ct. 853 (1993) 2

Hicks v. Oklahoma,
447 U.S. 343, 100 S. Ct. 2227 (1980) 8, 9, 10

Housel v. Head,
238 F.3d 1289 (11th Cir. 2001) 19

Jackson v. Virginia,
443 U.S. 307, 99 S. Ct. 2781 (1979) 17, 18, 19

**Lewis v. Jeffers*,
497 U.S. 764, 110 S. Ct. 3092 (1990) 5, 7, 9, 10

Page(s)

Lynn v. United States,
365 F.3d 1225 (11th Cir. 2004) 23

McCoy v. United States,
266 F.3d 1245 (11th Cir. 2001) 4, 16

McMillan v. Norton,
No. 09-15304, 2010 U.S. App. LEXIS 16456 (Aug. 9, 2010) 15

Murray v. Carrier,
477 U.S. 478, 106 S. Ct. 2639 (1986) 24

Murray v. United States,
145 F.3d 1249 (11th Cir. 1998) 3, 15

Pacelli v. deVito,
972 F.2d 871 (7th Cir. 1992) 4

Powell v. Alabama,
287 U.S. 45, 53 S. Ct. 55 (1932) 10

**Pulley v. Harris*,
465 U.S. 37, 104 S. Ct. 871 (1984) 5, 7, 9, 10

Rhode v. United States,
583 F.3d 1289 (11th Cir. 2009) 3

Roper v. Simmons,
543 U.S. 551, 125 S. Ct. 1183 (2005) 18

Russell Corp. v. Am. Home Assurance Co.,
264 F.3d 1040 (11th Cir. 2001) 21

Schriro v. Summerlin,
542 U.S. 348, 124 S. Ct. 2519 (2004) 19

Slack v. McDaniel,
529 U.S. 473, 120 S. Ct. 1595 (2000) 3

Smith v. Murray,
477 U.S. 527, 106 S. Ct. 2661 (1986) 23

Page(s)

Teague v. Lane,
489 U.S. 288, 109 S. Ct. 1060 (1989) .... passim

Thompson v. Louisville,
362 U.S. 199, 80 S. Ct. 624 (1960) 11, 18

United States v. Adams,
No. 09-13820, 2010 U.S. App. LEXIS 7681 (11th Cir. Apr. 14, 2010) 11, 12

United States v. Al-Arian,
514 F.3d 1184 (11th Cir. 2008) 19

United States v. Booker,
543 U.S. 220, 125 S. Ct. 738 (2005) 5, 6, 7, 25

United States v. Burr,
25 F. Cas. 30 (No. 14692D) (C.C. Va. 1807) 14

United States v. Cepero,
224 F.3d 256 (3d Cir. 2000) 6

United States v. Coleman,
451 F.3d 154 (3d Cir. 2006) 11

United States v. Coley,
No. 08-15962, 2009 U.S. App. LEXIS 15607 (11th Cir. July 14, 2009) (unpublished) 23

United States v. Frady,
456 U.S. 152, 102 S. Ct. 1584 (1982) 23

United States v. Harris,
608 F.3d 1222 (11th Cir. 2010) 19, 24

United States v. Montano,
398 F.3d 1276 (11th Cir. 2005) 15

United States v. Rodriguez,
612 F.2d 906 (1980) 9

United States v. Segler,
37 F.3d 1131 (5th Cir. 1994) 7

Page(s)

United States v. Seher,
562 F.3d 1344 (11th Cir. 2009) 14

United States v. Shipp,
589 F.3d 1084 (10th Cir. 2009) 12

United States v. Watts,
No. 05-12248, 2005 U.S. App. LEXIS 28262 (11th Cir. Dec. 16, 2005) 25

Weiss v. United States,
510 U.S. 163, 114 S. Ct. 752 (1994) 5

Whalen v. United States,
445 U.S. 684, 100 S. Ct. 1432 (1980) 8, 9, 10

Whitehead v. Cowan,
263 F.3d 708 (7th Cir. 2001) 24

Statutes and Rules

11th Cir. R. 22-1(a) 22

18 U.S.C. §922(g) 12

18 U.S.C. §924(c)(1) 16, 17

18 U.S.C. §924(e)(1) 12

28 U.S.C. §1746 22

28 U.S.C. §2106 14

28 U.S.C. §2241 .... 15, 16

28 U.S.C. §2241(a) 16

*28 U.S.C. §2253(c) 8

28 U.S.C. §2253(c)(1)(B) 22

28 U.S.C. §2253(c)(2) 3

*28 U.S.C. §2255 .... passim

Page(s)

28 U.S.C. §2255(a) .... passim

Fed. R. App. P. 26(a)(1) 22

Fed. R. App. P. 28(a)(4)(C) 22

Fed. R. App. P. 4(a)(1)(A) 22

Fed. R. App. P. 4(a)(1)(B) 21

Fed. R. App. P. 4(a)(4)(A)(iv) 21

Fed. R. App. P. 4(c)(1) 22

Fed. R. Civ. P. 59(e) 21

Fed. R. Civ. P. 6(a)(1) 22

Other Authorities

Michael Abramowicz and Maxwell Stearns, *Defining Dicta*,
57 Stan. L. Rev. 953 (2005) 10

Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*,
81 N.Y.U. L. Rev. 1249 (2006) 9

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are scholars who write and teach about criminal law and *habeas corpus* jurisprudence. Stephanos Bibas is Professor of Law at the University of Pennsylvania, where he researches and teaches 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, where he teaches courses in federal courts and habeas corpus.

Amici have a professional interest in illuminating this Court's consideration of the important and complicated questions these cases present. The Court invited *Amici* to participate in Demarick Hunter's appeal, later consolidated with the appeal of Darian Antwan Watts, by order of March 4, 2010.

STATEMENT OF JURISDICTION

The Statement of Jurisdiction in Watts's brief does not comply with Federal Rule of Appellate Procedure 28, because it does not state "the filing dates establishing the timeliness of the appeal," and therefore does not establish appellate jurisdiction. *See Bowles v. Russell*, 551 U.S. 205, 127 S. Ct. 2360 (2007). For the reasons stated *infra*, at 20–22, *Amici* believe there is a question whether this Court has appellate jurisdiction over the *Watts* case.

PRELIMINARY STATEMENT

These appeals test the "unhappy" truth that "not every problem was meant to be solved by the United States Constitution." *Herrera v. Collins*, 506 U.S. 390, 428 n.*, 113 S. Ct. 853, 875 n.* (1993) (Scalia, J., concurring). Because of an erroneous interpretation of the Armed Career Criminal Act, Demarick Hunter and Darian Antwan Watts received extended sentences. They contend that the sentencing judges' rulings deprived them of their right to due process, even though the rulings were proper under this Court's then-existing precedents. But the error was statutory, not constitutional. The Antiterrorism and Effective Death Penalty Act therefore bars this Court from ordering relief.

ARGUMENT AND CITATIONS OF AUTHORITY

Until 1996, a prisoner attacking his sentence collaterally could appeal from the district court's adverse ruling if he made "a substantial showing of the denial of [a] federal right." *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 3394 (1983). The AEDPA changed that. Today, a federal prisoner may still move in the district court for collateral relief on any number of enumerated grounds: 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(a). But appeals are confined to cases in which the prisoner makes a substantial showing of the denial of a "constitutional" right. 28 U.S.C. §2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 1603 (2000). Even then, the appellate court may review only the constitutional issues specified in the certificate of appealability. *Rhode v. United States*, 583 F.3d 1289, 1290–91 (11th Cir. 2009) (citing *Murray v. United States*, 145 F.3d 1249, 1250 (11th Cir. 1998)).

Demarick Hunter and Darian Antwan Watts contend that when their respective sentencing judges treated them as armed career criminals, they were deprived of due process. This argument mistakes the Constitution for "a plastic document with a remedy for every wrong." *See Pacelli v. deVito*, 972 F.2d 871,

879 (7th Cir. 1992) (Easterbrook, J.). Numerous decisions confirm that the sentencing judges' errors were non-constitutional, and appellants offer no principle distinguishing the rule they advance from the general proposition that the Constitution guarantees criminal defendants error-free process. Appellants' sentences may be contrary to statute, but the sentencing process did not offend the Constitution. This distinction prevents the Court from reversing.

Both the United States and Watts suggest that this Court vacate and remand these cases for correction of the statutory sentencing error. It is an invitation to evade the AEDPA's restriction on appellate review that this Court should decline.

Even if this Court agreed with Hunter and Watts as to the constitutional issue, *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), and appellants' procedural default would bar relief below and provide a basis for affirmance.[1]

I. ERRONEOUS APPLICATION OF A SENTENCING RULE DOES NOT AUTOMATICALLY DEPRIVE A CRIMINAL DEFENDANT OF DUE PROCESS

Hunter and Watts contend that if a sentencing error results in a longer sentence than is proper, then a due process violation has occurred, Hunter Br. 10; Watts Br. 23—no matter how reasonable the proceedings were. Decisions of this and other circuits reject such a rule. The text of §2255(a) itself draws a distinction

[1] Although the Court's appellate review is limited to the constitutional issues specified in the COA, it can affirm on procedural grounds that would preclude adjudication of the merits. *McCoy v. United States*, 266 F.3d 1245, 1248 n.2 (11th Cir. 2001).

between sentences imposed "in excess of the maximum authorized by law" and those "imposed in violation of the Constitution." 28 U.S.C. §2255. What is more, the rule Hunter and Watts propose is overbroad. The Due Process Clause guarantees "a fair trial in a fair tribunal," *see Weiss v. United States*, 510 U.S. 163, 178, 114 S. Ct. 752, 761 (1994). It thus prohibits "arbitrary or capricious" adjudication and "egregious" error. *Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S. Ct. 3092, 3102 (1990); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S. Ct. 871, 875 (1984). What the Due Process Clause does not guarantee is error-free adjudication.

A. The decisions of this and other courts show that sentencing error is not always constitutional error.

Prior to *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), the Federal Sentencing Guidelines were mandatory. A sentencing judge who determined that an enhancement applied to the defendant's conduct lacked discretion to ignore it, just as sentencing judges today lack discretion to ignore the armed career criminal status under the ACCA. It was precisely this mandatory aspect of the Guidelines that led the Supreme Court to hold them unconstitutional as written. *Id.* at 233, 125 S. Ct. at 750 ("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."). Just like a finding of

recidivism under the ACCA, judicial findings under the Guidelines could force district judges to increase the punishments they imposed. If the parties are correct that error in applying the ACCA is a Due Process violation, then error in the application of the pre-*Booker* Guidelines would be, too.

Yet since long before *Booker*, this Court has held that misapplication of the Guidelines does not amount to a constitutional deprivation. *E.g., Burke v. United States*, 152 F.3d 1329 (11th Cir. 1998); *Ayuso v. United States*, No. 09-13818, 2010 U.S. App. LEXIS 1468 (11th Cir. Jan. 22, 2010). In *Burke*, the movant was convicted of a bank robbery. Because he had been a fugitive, the district court increased his Guidelines range under an obstruction-of-justice enhancement. Subsequent to sentencing, an amendment to the Guidelines clarified that his fugitive status should not have resulted in the enhancement—or so he argued. This Court rejected the claim, holding that a "sentence imposed contrary to a post-sentencing clarifying amendment is a non-constitutional issue. . . ." *Burke*, 152 F.3d at 1332.

Burke is consistent with the decisions of three of this Court's sister circuits. *See United States v. Cepero*, 224 F.3d 256 (3d Cir. 2000) (en banc) (holding that a certificate of appealability should not issue for claimed errors under the mandatory Sentencing Guidelines, because such errors are non-constitutional); *Buggs v. United States*, 153 F.3d 439 (7th Cir. 1998) (same); *United States v. Segler*, 37

F.3d 1131, 1134 (5th Cir. 1994) ("Applying the §4B1.1 criteria to determine whether to sentence as a career offender does not implicate any constitutional issues."). Like *Burke*, these three decisions predate *Booker*. They show that ordinary error in the application of mandatory sentencing rules does not offend the Constitution. The Government and the appellants cannot distinguish these authorities, and a panel of this Court cannot overrule *Burke*.

Supreme Court decisions confirm that errors in sentencing can be non-constitutional. In *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871 (1984), the Court rejected a prisoner's claim that he was denied state-mandated proportionality review. In the Justices' view, even the erroneous deprivation of such review would not constitute a federal due-process violation. *Id.* at 41, 104 S. Ct. at 874–75. And in *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092 (1990), the Court rejected the notion that erroneous application of an aggravating-circumstances enhancement poses a constitutional problem. *Id.* at 780, 110 S. Ct. at 3102. *Habeas* relief would lie, the Justices said, only if "the state court's finding was so arbitrary and capricious as to constitute an independent due process or Eighth Amendment violation." *Ibid.*

The AEDPA's text shows that this was Congress's view as well. The statute contemplates that some kinds of errors of federal law can be fixed by the district court upon a motion, but not by the appellate court's review of the district court.

Compare §2255(a), with 28 U.S.C. §2253(c). Unless the language Congress chose is to be rendered meaningless, there must be some class of error within the district court's authority to correct, but outside the appellate court's. In other words, there must be cases in which a sentence imposed is illegally high, yet where its imposition did not deprive the defendant of due process. The parties' understanding renders nugatory §2255(a)'s reference to a "sentence … in excess of the maximum authorized by law" as an independent ground for relief, because according to the parties all such sentences violate the Constitution.

B. The Supreme Court authority that Watts and the Government cite indicates only that "arbitrary" disregard for the law constitutes a deprivation of due process.

Watts relies on two Supreme Court decisions—*Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432 (1980), and *Hicks v. Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227 (1980)—neither of which contradict the understanding advanced above. *See* Watts Br. 23–28.[2] Citation of *Whalen* is surprising because the Court decided it on

---

[2] The Government cites *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874), for the proposition that "any punishment that Congress has not authorized for a crime" deprives a defendant of due process. Gov't Br. 33. In its quotation, the Government omits the first clause of the sentence where the Court explains that it did *not* so hold. 85 U.S. at 170 ("It is *not* necessary in this case to insist … that when a party has had a fair trial before a competent court and jury, and has been convicted, that any excess of punishment deprives him of liberty or property without due course of law.") (emphasis added). *Lange* is a double jeopardy case. *See, e.g.*, *id.* at 168 ("If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same

double jeopardy grounds and made only passing reference to due process in a footnote that is dictum. *Hicks* is more to the point, but only in the sense that unlike *Whalen* it considered the meaning of due process. Neither case suggests that all sentencing error is unconstitutional. If either could ever have been so liberally read, subsequent decisions such as *Pulley* and *Lewis* foreclose such an interpretation today. *Hicks* and the *Whalen* dictum are best read as reinforcing the doctrine that arbitrary judicial behavior is unconstitutional.

The petitioner in *Whalen* was convicted of rape and murder. Congress provided a single punishment for the two crimes, yet the trial court imposed consecutive sentences. The Court reasoned that the multiple sentences violated the Double Jeopardy clause of the Fifth Amendment. *Whalen*, 445 U.S. at 695, 100 S. Ct. at 1439–40. Watts cites the decision because of an opaque statement at the end of footnote 4. Ruminating on the case's potential application to state-court prosecutions, the Court suggested that the Double Jeopardy clause might not apply in the same way. "[P]resumably," though, the Court added, the Fourteenth Amendment's Due Process clause would "prohibit state courts from depriving" a

---

offence."). The Government suggests that the Fifth Circuit's off-handed (and erroneous) interpretation of *Lange* in a footnote to *United States v. Rodriguez*, 612 F.2d 906, 921 n.43 (1980), governs. But whatever consideration the Fifth Circuit gave *Lange* is not a holding that binds this Court, because the Fifth Circuit there *affirmed* defendants' sentences over double jeopardy challenges. *See id.* at 908; *see also* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249 (2006).

person of liberty in excess of the term allowed by law. *Id.* at 689 n.4, 100 S. Ct. at 1436. A footnote about what the law would *presumably* be in a situation not presented by the case *sub judice* is dictum by any measure. *See generally* Michael Abramowicz and Maxwell Stearns, *Defining Dicta*, 57 Stan. L. Rev. 953 (2005). And here the Court later confirmed that the dictum was incorrect. *Lewis*, *supra*; *Pulley*, *supra*.

Hicks presented the Court with a claim concerning the seemingly arbitrary application of state law. The defendant was sentenced under a state habitual-offender statute that required imposition of a 40-year sentence. The Court of Criminal Appeals affirmed the judgment. But there was one problem: the same Court had recently invalidated the statute on constitutional grounds. 447 U.S. at 345, 100 S. Ct. at 2229. The Court held that this disparate treatment amounted to a deprivation of a federal right to fair treatment. "Such an arbitrary disregard of the petitioner's right to liberty," the Court explained, "is a denial of due process of law." *Id.* at 346, 100 S. Ct. at 2229. This principle dates at least to *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55 (1932), but the parties have not suggested that the district courts in these cases capriciously misapplied controlling case law. Again *Lewis* and *Pulley* confirm that the Court has not adopted the broad reading of *Hicks* that Watts advances.

C. Supreme Court precedent precludes Hunter and Watts from arguing "actual innocence."

Reaching for a thread of doctrine, Hunter and Watts frame their arguments in part as claims of "actual innocence." Without three predicate violent felonies, they argue, they are "actually innocent" of being armed career criminals. Hunter Br. 7–9; Watts Br. 20, 28–31. The label will not avail, however, because the Supreme Court has held that recidivism is a sentencing factor rather than an element of a crime. *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998). Being an armed career criminal under the ACCA is not a "crime" of which a defendant can be "innocent." It is a status the district court determines at sentencing. *E.g.*, *United States v. Adams*, No. 09-13820, 2010 U.S. App. LEXIS 7681, at *15 (11th Cir. Apr. 14, 2010) (*Almendarez-Torres* forecloses argument that recidivism should have been pled in indictment and proved to the jury); *United States v. Coleman*, 451 F.3d 154, 159–61 (3d Cir. 2006). Watts argues that this is a case of "'continued incarceration' of a defendant on conviction for 'a crime without proving the elements.'" Watts Br. 30. Watts cites the inapposite *Thompson v. Louisville*, 362 U.S. 199, 80 S. Ct. 624 (1960),[3] but neglects the far more recent holding of *Almendarez-Torres* that recidivism enhancements like Watts's are not elements at all.

[3] *Thompson* is inapposite because it deals with constitutionally insufficient evidence of guilt on the *elements* of an offense, not a sentencing factor. *Id.* at 206, 121 S. Ct. at 629.

In *Almendarez-Torres*, the Court heard a constitutional challenge to a criminal immigration statute that provided a sentence of no more than two years for first-timers, but no fewer than two years (and up to twenty) for recidivists. *Almendarez-Torres* argued that the law in effect created two crimes, a recidivist crime and a first-timer crime, and that the government had not properly charged and proved his guilt as a recidivist. The Court disagreed, concluding that the subsection at issue "is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime." 523 U.S. at 226, 118 S. Ct. at 1222.

The same reasoning applies to the ACCA. *Adams*, *supra*. That is why Hunter is wrong to say he "was sentenced to 68 months more than the statutory maximum for his offense of conviction." Hunter Br. 9.[4] Hunter's only offense of conviction was for possession of a handgun by a prohibited felon, 18 U.S.C. §922(g). The same is true for Watts. The ACCA requires district judges to give extended sentences to recidivists. The words of 18 U.S.C. §924(e)(1) speak clearly enough: an armed career criminal who is convicted under §922(g) must be

---

[4] *United States v. Shipp*, 589 F.3d 1084 (10th Cir. 2009), errs just as Hunter and Watts do. The Tenth Circuit incorrectly asserted that the "statutory maximum" penalty for the crime of being a felon in possession of a firearm is ten years. *See id.* at 1088. Only if the Supreme Court overruled *Almendarez-Torres* could *Shipp* be correct.

sentenced to at least fifteen years. A defendant erroneously categorized as an armed career criminal is "innocent" of nothing.

Hunter and Watts advance the "actual innocence" argument in reliance on ill-advised language in a panel's recent opinion in *Gilbert v. United States*, 609 F.3d 1159 (11th Cir. 2010), a case in which the United States has petitioned for en banc rehearing. *Gilbert* uses the phrase "innocent of the statutory 'offense'" to describe a person erroneously sentenced as a career offender under the Sentencing Guidelines. *Id.* at 1166. *Gilbert* was incorrectly decided and is incorrect on this point in light of *Almendarez-Torres*, but in any event *Gilbert* does not control here. Hunter concedes as much. Hunter Br. 12 (recognizing that "*Gilbert* is not directly on point"). *Gilbert* decides when a motion under §2255 is "inadequate or ineffective" within the meaning of the so-called savings clause of that statute. *Gilbert* does not purport to interpret the Constitution; and indeed, the Supreme Court decision on which *Gilbert* most heavily relies, *Davis v. United States*, 417 U.S. 333, 94 S. Ct. 2298 (1974), held the statutory claim at issue in that case cognizable precisely because §2255(a) authorizes post-conviction relief for *non-constitutional* errors. *Id.* at 345, 94 S. Ct. at 2304 (a claim grounded in the "laws" rather than the Constitution is cognizable in a §2255 proceeding).

II. THE PARTIES' SUGGESTIONS FOR VACATUR WOULD EVADE THE APPELLATE JURISDICTION RESTRICTIONS OF THE AEDPA

The Government and Watts ask the Court to vacate or otherwise remand these cases. Both suggestions are wrongheaded.

For its part, the Government suggests that this Court should use 28 U.S.C. §2106 to vacate the district court judgments. Gov't Br. 27–30. This is a remarkable proposal. It would accomplish through the back door what the AEDPA says the Courts of Appeals must not do through the front—addressing the district courts' statutory error in this appeal.[5] The Government's suggestion would frustrate the AEDPA's text and its evident purpose to restrict appellate review to constitutional errors. Vacatur of a correct constitutional decision for the purpose of correcting statutory error would therefore abuse the discretion §2106 grants this Court. "[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States v. Burr*, 25 F. Cas. 30, 35 (No. 14692D) (C.C. Va. 1807) (Marshall, C.J.). Vacatur would also work a *sub silentio* overruling of this Court's oft-

---

[5] The Government cites two cases in support of its view that "th[is] Court has the power to summarily vacate the judgments": *Hart v. Hodges*, 587 F.3d 1288 (11th Cir. 2009), and *United States v. Seher*, 562 F.3d 1344 (11th Cir. 2009). *See* Gov't Br. 27. But both *Hart* and *Seher* were cases in which this Court had jurisdiction to review and reverse on the issues it ultimately elected to remand on. The AEDPA presents a different case because it explicitly prohibits appellate courts from reviewing non-constitutional bases of alleged error.

announced holding that "review is limited to the issues specified in the COA." *See, e.g., McMillan v. Norton*, No. 09-15304, 2010 U.S. App. LEXIS 16456, at *2 (Aug. 9, 2010) (citing *Murray*, 145 F.3d at 1250–51). The Court should affirm the judgments unless it finds an error within the scope of the COAs.[6]

What Hunter and Watts should do is file a separate 28 U.S.C. §2241 *habeas corpus* petition in the district court for the district in which they are incarcerated, and move for judgment on the pleadings on the strength of *Gilbert*. The Government concedes that they are eligible for that relief. Gov't Br. 51–52. In *Amici*'s view *Gilbert* is erroneous, but it provides Hunter and Watts with a potential avenue for relief from their sentences. *Amici* do not know why Hunter and Watts have continued to pursue this constitutional argument rather than secure their speedy resentencing under a controlling panel decision.

Finally, Watts is mistaken to suggest that this Court can remand these appeals under §2241. *See* Watts Br. 21–22. Each of the two consolidated cases is an appeal from the denial of a motion under §2255. Such a motion must be made

---

[6] *See* Gov't Br. 28 n.10. The decisions Watts cites are not to the contrary. *See* Watts Br. 43. *United States v. Montano*, 398 F.3d 1276 (11th Cir. 2005), reversed the denial of a §2255 motion on a constitutional ground, *i.e.*, that the plea was unknowing or involuntary. *Id.* at 1285 ("As Appellant has pled guilty to the firearms charge, he is seen as contending that the plea was not knowingly tendered, as was the case in *Bousley v. United States* [523 U.S. 614, 118 S. Ct. 1604 (1998)]."). *Battle v. United States*, 419 F.3d 1292 (11th Cir. 2005), affirmed the district court's denial of relief. It could not possibly be read to overrule *Murray sub silentio*.

in "the court which imposed sentence," 28 U.S.C. §2255(a), while a petition for a writ of *habeas corpus* is made in "the district wherein the restraint complained of is had," 28 U.S.C. §2241(a). The districts of sentencing and incarceration are not necessarily the same; they may not even be in the same circuit. Watts confuses proceedings under §§ 2241 and 2255.

III. ASSUMING *ARGUENDO* THE VALIDITY OF APPELLANTS' PROPOSED CONSTITUTIONAL RULE, *TEAGUE V. LANE* BARS ITS APPLICATION ON COLLATERAL REVIEW

This Court should affirm the judgments below for procedural reasons as well. Hunter and Watts's constitutional rule is "new" within the framework of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), which prohibits federal post-conviction courts from granting relief based on new rules of criminal procedure. *Beard v. Banks*, 542 U.S. 406, 413, 124 S. Ct. 2504, 2511 (2004); *see also McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001) (*Teague* applies to collateral review of federal convictions).

The scenario in this case is similar to the fallout from the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501 (1995). *Bailey* held that "using" a firearm during a drug crime in violation of 18 U.S.C. §924(c)(1) requires "active employment of the firearm." *Id.* at 144, 116 S. Ct. at 506. Prior to *Bailey*, some lower federal courts allowed convictions under §924(c)(1) for the mere presence of a firearm during commission of a drug crime.

Id. at 142, 116 S. Ct. at 505. *Bailey* changed the substantive definition of the §924(c)(1) offense, just as *Begay v. United States*, 553 U.S. 137, 128 S. Ct. 1581 (2008), changed the applicability of the ACCA sentencing enhancement.

Of course, many imprisoned under §924(c)(1) sought post-conviction relief based on the new decision in *Bailey*. The Supreme Court held in *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604 (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 620–21, 118 S. Ct. at 1609–10.

The Government as well as Hunter and Watts note that *Begay* is retroactive. *See* Gov't Br. 5; Hunter Br. 7; Watts Br. 14. That does not resolve the *Teague* inquiry in these cases. Hunter and Watts seek relief on a constitutional ground, not on the statutory *Begay* claim.

Again, *Bailey* is instructive. After *Bailey*, some §924(c)(1) convicts asserted legal-innocence claims in their post-conviction proceedings. Many, like Hunter and Watts, asserted constitutional challenges to their convictions. Those convicted in a jury trial invoked *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979), and claimed that the evidence at trial was insufficient to support their convictions in light of *Bailey*. Those who pleaded guilty attacked their pleas under *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1468–69 (1970), which requires valid guilty pleas to be "voluntary" and "intelligent."

In both situations, these §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, 118 S. Ct. at 1610 ("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 (7th Cir. 2000) (per curiam) (recognizing that the constitutional rule in *Jackson* is "not 'new' by any measure").

Hunter and Watts are in a different situation. Their only "constitutional" claim is that their ACCA enhancements are constitutionally insufficient given *Begay*. Watts admits as much. Watts Br. 30 (citing *Thompson*, 362 U.S. at 206, 80 S. Ct. at 629). But unlike the *Bailey* movants who raised *Jackson* claims to the evidence supporting their convictions, Hunter and Watts are launching a constitutional challenge to the evidence supporting a sentencing enhancement.

The problem is that the Supreme Court has not extended *Jackson* and *Thompson* to those claiming to be "innocent" of a sentencing factor. *See Dretke v. Haley*, 541 U.S. 386, 395, 124 S. Ct. 1847, 1853 (2004) (acknowledging that the Court has not extended *Jackson* to sufficiency-of-the-evidence claims based on sentencing errors). It is true enough that *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002), and *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), are retroactive. *See* Gov't Br. 42–44. But the Court has never extended the rule to

non-capital cases. And the fact that *Haley* postdates *Atkins* shows that in the Court's view this is an important distinction.

Hunter and Watts's *Jackson*-style claim is not itself "substantive" within the meaning of the *Teague* exception because it does not redefine the elements of the crimes they committed. *See Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523 (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 (7th Cir. 2002) (Easterbrook, J.) (the rule of *Apprendi* is not substantive even though it deals with the "quantum of evidence required for a sentence" because it does not deal with "what primary conduct is unlawful"). Hunter and Watts advance a new constitutional rule, and *Teague* bars its application on collateral review.

Nor should this Court accept the Government's purported waiver of *Teague*. *See* Gov't Br. 37. The Government did not waive reliance on *Teague* before the district courts in these cases. Although the district courts did not reach *Teague*, they could have because courts can address *Teague sua sponte*. *Housel v. Head*, 238 F.3d 1289, 1297 (11th Cir. 2001). And it is a familiar principle that this Court "may affirm for any reason supported by the record, even if not relied upon by the district court." *E.g., United States v. Harris*, 608 F.3d 1222, 1227 (11th Cir. 2010) (quoting *United States v. Al-Arian*, 514 F.3d 1184, 1189 (11th Cir. 2008)). The

Government cannot waive *Teague* for the first time on appeal in an effort to undermine the judgments below, the propriety of which turns on the record the parties developed there. The Government's current zeal for this Court to reach the constitutional issues does not prevent this Court from affirming based on alternative non-constitutional bases such as *Teague*.

IV. JURISDICTIONAL AND PROCEDURAL DEFECTS ALSO CREATE INDEPENDENT BARS TO RELIEF IN THIS COURT

As *Amici*'s Statement of Interest says, the orderly development of criminal and *habeas corpus* law is what justifies and motivates *Amici*'s participation in these cases. *Supra*, at 1. Yet as officers of the Court, *Amici* are obliged to bring to the Court's attention jurisdictional and procedural frailties in appellants' cases that might prevent adjudication on the merits.

Neither Hunter nor Watts is eligible for relief—whether or not the Court agrees with their arguments about the Constitution's meaning. If it concludes that Watts's notice of appeal was untimely, the Court should dismiss his appeal. Moreover, both Watts and Hunter failed to preserve the constitutional arguments they now advance. Relief is procedurally barred.

A. The Court may lack jurisdiction in *Watts*.

This Court should not reach the merits of Watts's appeal without further inquiry. Watts appears to have been out of time in seeking review of the judgment

below. If he was, then the Court lacks appellate jurisdiction. *E.g., Russell Corp. v. Am. Home Assurance Co.*, 264 F.3d 1040, 1043 (11th Cir. 2001) ("This court has a duty to independently examine [its] appellate jurisdiction and dismiss when [its] jurisdictional limits are exceeded.").

Federal Rule of Appellate Procedure 4(a)(1)(B) provides that when the United States is a party in the district court, either side has 60 days to appeal an adverse judgment. Failure by either party to file a timely notice of appeal deprives the appellate court of jurisdiction. *E.g., Advanced BodyCare Solutions, LLC v. Thione Int'l, Inc.*, No. 09-13151 (11th Cir. August 25, 2010) (citing *Bowles v. Russell*, 551 U.S. 205, 214, 127 S. Ct. 2360, 2366–67 (2007)). Because Watts filed a motion to alter or amend under Fed. R. Civ. P. 59(e), his time to appeal began to run from entry of the decision disposing of his motion. Fed. R. App. P. 4(a)(4)(A)(iv). The 60-day interval thus began on July 16, 2007. *See* Watts Doc. 13; Gov't Br. 3.[7]

Watts filed his notice of appeal (which was also styled as an application for a certificate of appealability) on September 17, 2007. *See* Watts R.E. 15; Gov't Br. 3. But September 17 was 63 days after July 16. The rules specify that when the 60th day falls on a weekend or court holiday, the would-be appellant can file his

---

[7] "Watts R.E." and "Hunter R.E." refer to the tabbed documents in Watts's and Hunter's respective record excerpts; "Watts Doc." refers to the district court docket entries.

notice of appeal on the first weekday following the 60th day. Fed. R. App. P. 26(a)(1); Fed. R. Civ. P. 6(a)(1). But the 60th day after the district court entered the order denying Watts's post-judgment motion was Friday, September 14, 2007 (not a legal holiday). That makes the notice of appeal untimely.[8]

The existence of a certificate of appealability does nothing to fix the problem. Watts presumably thinks otherwise, since the only date he mentions in his Statement of Jurisdiction is the date on which this Court granted him a COA. Watts Br. 1-A; cf. Fed. R. App. P. 28(a)(4)(C) (the appellant's jurisdictional statement must provide, among other things, "the filing dates establishing the timeliness of the appeal or petition for review"). Yet under the AEDPA, a COA is a necessary but not a sufficient condition to appeal. *See* 28 U.S.C. §2253(c)(1)(B). Nothing in the AEDPA undermines ordinary rules of appellate jurisdiction. 11th Cir. R. 22-1(a).

[8] While a notice is typically deemed filed when the clerk enters it on the docket, *see* Fed. R. App. P. 4(a)(1)(A), prisoners are afforded a special rule. An inmate's notice of appeal is timely "if it is deposited in the institution's internal mail system on or before the last day for filing." Fed. R. App. P. 4(c)(1). To take advantage of this exception, the inmate "must set forth the date of deposit and state that first-class postage has been prepaid" in a declaration complying with 28 U.S.C. §1746 or by a notarized statement. *Ibid.* (For an example of such certification, see Hunter's notice of appeal in this case. Hunter R.E. 18 at 4.) As far as *Amici* can tell, Watts did not take advantage of the prisoner exception. Watts does not mention Rule 4(c)(1) in his jurisdictional statement.

B. Hunter and Watts procedurally defaulted their claims to deprivation of due process.

At sentencing and on direct review, both Hunter and Watts declined to argue that the Fifth Amendment prohibited them from being sentenced as an armed career criminal. Having failed to present the argument when it was ripe, they may not do so now in a collateral attack. *United States v. Frady*, 456 U.S. 152, 102 S. Ct. 1584 (1982); *Lynn v. United States*, 365 F.3d 1225 (11th Cir. 2004).

.

1. Hunter

Hunter failed to present his due-process claim during direct review. His §2255 motion affirmatively states that he did not raise the issue in his direct appeal. Hunter R.E. 1 at 4 (explaining that he did not make the claim "because [he] received ineffective assistance of counsel during the direct appeal, when appellate counsel ignored the due process violation"). Only if there were cause and prejudice could Hunter now be heard. *Frady*, 456 U.S. at 167, 102 S. Ct. at 1594. But Hunter suggests no excuse: the perceived futility of presenting an argument is not "cause." *Smith v. Murray*, 477 U.S. 527, 534–35, 106 S. Ct. 2661, 2666–67 (1986); *United States v. Coley*, No. 08-15962, 2009 U.S. App. LEXIS 15607, at *2, 7 (11th Cir. July 14, 2009) (unpublished) (holding that a §2255 movant had defaulted the claim that carrying a concealed firearm is not a "crime of violence" even though circuit law at the time precluded the contention).

If Hunter had received ineffective assistance of counsel, the sixth-amendment deprivation might provide cause for this Court to overlook his procedural default. See *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986). Yet the certificate of appealability omits from review Hunter's claim that his lawyer furnished ineffective assistance. The contention was insubstantial; counsel is not ineffective simply for having omitted to make an argument that was foreclosed by controlling decisional law. *Whitehead v. Cowan*, 263 F.3d 708, 731–32 (7th Cir. 2001). Default without cause is the end of the story.[9]

The Government purports to waive the benefit of default. *See* Gov't Br. 38–39. Yet procedural default was the United States' primary argument in the proceedings below. The district court did not reach the question, preferring to deny relief on the merits. Hunter R.E. 10 at 3–4 (magistrate report); Hunter R.E. 13 at 1 (adopting magistrate report). Hunter's default is nevertheless an alternative ground upon which this Court may affirm the judgment. *See United States v. Harris*, 608 F.3d at 1227. This Court's obligation is to decide whether the district court erred by denying Hunter's motion in light of the record and arguments before it, and the fact of default is one more reason supporting its judgment.

---

[9] Default is not excused. In *Coley*, this Court refused to excuse a prisoner's default in making the analogous argument that carrying a concealed weapon is not a "crime of violence" under the Sentencing Guidelines. For the reasons discussed above, Hunter and Watts do not present claims of "actual innocence."

2. Watts

The same default bars relief in *Watts*, for the same reasons. But Watts also failed even to raise his constitutional claim *in his §2255 motion papers below*. *See* Watts Doc. 8 at 14–15 (arguing statutory but not constitutional error). One cannot fault the able district court for failing to grant relief on a ground Watts never even suggested. Even Watts's application for a COA failed to argue that his sentence offended due-process principles. *See* Watts R.E. 15 at 1–2. Staring the record in the face, Watts insists that he "has raised and preserved his claims at every stage." Watts Br. 33 n.3. Nothing more can be said other than that the record and a prior decision of this Court say otherwise. *See United States v. Watts*, No. 05-12248, 2005 U.S. App. LEXIS 28262, at *5 (11th Cir. Dec. 16, 2005) (describing Watts's arguments on direct appeal as consisting of (1) statutory error under ACCA and (2) sixth amendment (*Booker*) deprivation of jury right). No matter how Watts protests, he defaulted the constitutional claim he now asserts and has suggested no cause.

CONCLUSION

Because Watts was apparently untimely in seeking appellate review of the district court's judgment, this Court should dismiss his appeal for want of jurisdiction unless he can cure the defect. Even if Watts timely appealed, he and Hunter are both ineligible for relief on appeal. Because neither appellant has been denied a constitutional right, this Court should affirm the judgments below.

Dated: September 17, 2010

Respectfully Submitted,

Adam K. Mortara
Vincent S. J. Buccola
BARTLIT BECK HERMAN
PALENCHAR & SCOTT LLP
54 W. Hubbard Street, Suite 300
Chicago, IL 60654
Tel : (312) 494-4400
Fax : (312) 494-4440

Counsel for *Amici Curiae* Criminal Law and
Habeas Corpus Scholars

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6229 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2007 in 14-point Times New Roman.

Vincent S. J. Buccola

Dated: September 17, 2010

CERTIFICATE OF SERVICE

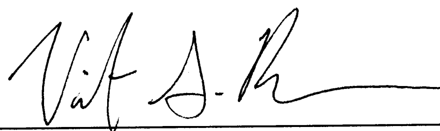
I hereby certify that on September 17, 2010, I served a true and correct copy of the Brief for Criminal Law and Habeas Corpus Scholars as *Amici Curiae* in Support of the Judgment Below, by FedEx and electronic mail, upon the following:

William Mallory Kent (kent@williamkent.com)
The Law Office of William Mallory Kent
1932 Perry Place
Jacksonville, FL 32207-3443

Rosemary T. Cakmis (rosemary_cakmis@fd.org)
Federal Public Defender
201 S. Orange Avenue, Suite 300
Orlando, FL 32801
Counsel for Demarick Hunter

Alan E. Untereiner (auntereiner@robbinsrussell.com)
Rachel S. Li Wai Suen (rliwaisuen@robbinsrussell.com)
Matthew M. Madden (mmadden@robbinsrussell.com)
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
Counsel for Darian Antwan Watts

Michael A. Rotker (michael.rotker@usdoj.gov)
United States Department of Justice, Criminal Division
950 Pennsylvania Avenue, N.W., Suite 1264
Washington, D.C. 20530
Counsel for the United States



Vincent S. J. Buccola