

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

MICKEY LEE MOODY,

Petitioner,

v.

Case No. 5:14-cv-396-Oc-10PRL

WARDEN, FCI COLEMAN - LOW,

Respondent.

ORDER

In response to the Petition (Doc. 1), the United States (Doc. 10) cites United States v. Howard, 742 F.3d 1334 (11th Cir. 2014), in which the Eleventh Circuit Court of Appeals, applying Descamps v. United States, ___ U.S. ___, 133 . Ct. 2276 (2013), found that Alabama's third-degree burglary convictions do not qualify as predicate burglary convictions for purposes of the Armed Career Criminal Act (ACCA). However, Howard was determined on direct appeal, whereas this proceeding is brought under 28 U.S.C. § 2241. It appears, therefore, that Descamps would apply in this case, unlike Howard, only if Descamps applies retroactively to proceedings in habeas corpus. The Court is unaware that the Supreme Court of the United States has declared that Descamps should be so applied.

Accordingly, the United States is directed to supplement its response by demonstrating either (1) that Descamps is retroactively applicable to habeas corpus proceedings; or (2) that the petition should nevertheless be granted in the absence of retroactive application of Descamps. The supplement should be filed within

THIRTY (30) DAYS of the date of this order.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 11th day of December, 2014.

W. Penell Hodges

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

MICKEY LEE MOODY,

Plaintiff,

-vs-

Case No.5:14-CV-396-Oc-10PRL

UNITED STATES OF AMERICA,

Respondent.

**NOTICE OF FILING RELATED TO THE COURT'S ORDER OF DECEMBER 11, 2014 REQUIRING
THE GOVERNMENT TO FILE A SUPPLEMENTAL RESPONSE ON RETROACTIVITY**

At the threshold, this court exceeds its authority by sua sponte raising an affirmative defense, which has been expressly waived. See *Wood v. Milyard*, 132 S. Ct. 1826, 1829 (2012); *Day v. McDonough*, 547 U.S. 198 (2006).

The court seems to question whether the non-retroactivity doctrine announce in *Teague v. Lane*, 489 U.S. 288 (1989) prevents the rule in *Descamps v. United States*, 133 S. Ct. 2276 (2013) from applying in this case.^{1/} Mr. Moody makes several points related to this court's order in three contemporaneously filed pleadings.

1. The court's decision offends the most basic American (Human) concepts of fairness and justice.

^{1/}. Since the court does not expressly reference the *Teague* doctrine, but does question the retroactivity of the *Descamps* rule. Further, we understand that the principle of retroactivity concept involved here is an evaluation from the orthodox concept of retroactivity. See, e.g., *United States v. Simmons*, 649 F.3d 237, 249 (4th Cir. 2011)(en banc).

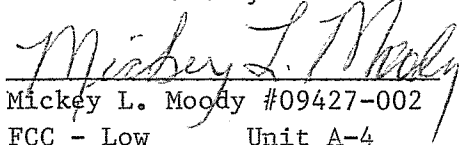
2. The court's decision conflicts with governing authority and offends one of the American adversarial system's core concepts: the party presentation principle. See *Wood*, 132 S. Ct. at 1829; but compare, e.g., *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (permitting sua sponte inquiry into retroactivity when the government forfeits as opposed to waives the defense).
3. The application of the *Descamps* holding to Mr. Moody's facts reveals that the ruling narrows the scope of conduct prohibited by 18 U.S.C. §924(e), thus is a substantive rule of criminal law and outside the *Teague* doctrine's ambit. See *Graham v. Collins*, 506 U.S. 461, 477 (1993).

Mr. Moody addresses the fairness concern in his motion seeking a habeas bond. He addresses the violation of the party presentation principle in his objection to the court's order. And in his memorandum on retroactivity, he explains why the *Descamps* rule is retroactively applicable, and why, even if it was not, the most fundamental miscarriage-of-justice concept requires relief anyway.

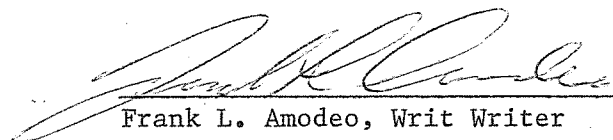
Finally, consistent with local rules,^{2/} we twice unsuccessfully attempted to contact the government to obtain their position or consent to the motions. But in the light of the urgency of the relief in order to avoid irreparable harm, and the holiday mailing delays from Coleman (low), we were forced to file without actually consulting with opposing counsel.

Prepared by Frank L. Amodeo and respectfully submitted this 18th day of

December 2014 by:

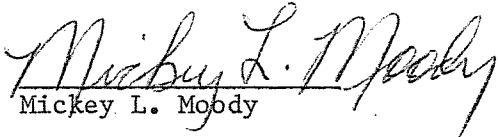

Mickey L. Moody #09427-002
FCC - Low Unit A-4

P.O. Box 1031
Coleman, FL 33521-1031


Frank L. Amodeo, Writ Writer

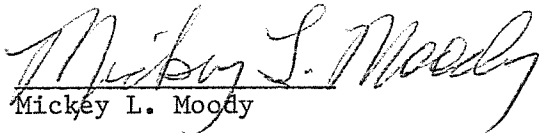
Certificate of Service

This motion was delivered in a pre-addressed, postage-paid envelope to prison authorities on the same day as signed, The United States of America is represented by counsel who is registered with, the CM/ECF docketing system: thus the defendant requests that notice of the filing and service to this motion on the United States occur through that system's electronic medium.


Mickey L. Moody

Verification

Under penalty of perjury as authorized in 28 U.S.C. §1746, I declare the factual allegations and factual statements contained in this motion are true and correct to the best of my knowledge.


Mickey L. Moody

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

MICKEY LEE MOODY,

Plaintiff,

-vs-

Case No.5:14-CV-396-Oc-10PRL

UNITED STATES OF AMERICA,

Respondent.

**OBJECTION TO THE COURT'S SUA SPONTE ASSERTION OF AN AFFIRMATIVE DEFENSE
EXPRESSELY WAIVED BY THE GOVERNMENT**

This court's December 11, 2014 order effectively violates governing authority concerning when a district court may sua sponte consider an affirmative defense abandoned by a party; correspondingly this court abused its discretion by issuing the order requiring a supplemental response. Stated differently, the court's sua sponte attempt to revive the government's expressly waived affirmative defense (non-retroactivity principle) departs from established law. See *Wood v. Milyard*, 132 S. Ct. 1876, 1829 (2012); *Day v.*, *McDonough*, 547 U.S. 198 (2006); see also *Trest v. Cain*, 522 U.S. 87, 89 (1997); *Pierce v. United States*, 976 F.2d 369, 370, n.1 (7th Cir. 1992) (The government may waive an affirmative defense such as procedural default). Of course, the court may sua sponte raise a forfeited defense including whether the *Teague v. Lane*^{1/} doctrine applies. See, e.g., *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994); *United States v. Ishmael*, 343 F.3d 741, 743 (5th Cir. 2003).

1/. *Teague v. Lane*, 489 U.S. 288 (1989) (announcing a new framework for when a rule of criminal procedure applies retroactively to cases on collateral review).

But the principle emerging from **Wood** and **Day** is that when a party expressly waives, rather than forfeits, a non-jurisdictional defense, then a reviewing court may not raise the argument on its own.

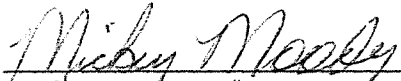
The **Teague** non-retroactivity doctrine is not jurisdictional, thus the argument may be waived. **Caspari**, 510 U.S. at 389. The government expressly conceded that the Supreme Court's decision applied retroactively to Mr. Moody's petition. This court's efforts to circumvent that waiver are exactly what the Supreme court has forbidden. And perhaps even more important, this court's intercession into the litigation strategy violates traditional American concepts of fair play and honest dealing. The Republic's attorneys believed a 10-year punishment is the maximum lawful penalty and Mr. Moody accepts the 10-year punishment as fait accompli; this court^{2/} should not interject its own views, however, intellectually intriguing into an individual case before it. And although not couched in these terms, that is exactly the effect of this court's December 11, 2014 order.

This court should withdraw its order and grant the petition immediately. If the court wishes to pursue the boundaries of the party-presentation doctrine, then it should release Mr. Moody on bail while we pursue that discourse and exposition.^{3/}

2/. Granted, I am of the personal belief that a little more educated paternalism is appropriate, but, frankly, my view and this court's are irrelevant—the rules are the rules, and this court should not attempt to alter them midstream.

3/. I understand that this derivative concept of retroactivity may prove a classic example of the slippery slope, but even a reasonable knowledgeable lay person, like Mr. Moody, is far out of his depth in discussing this concept; he only knows his wife was crushed when he told her about the supplemental order.—FLA

Prepared by Frank L. Amodeo and respectfully submitted this 18th day of
December 2014 by:

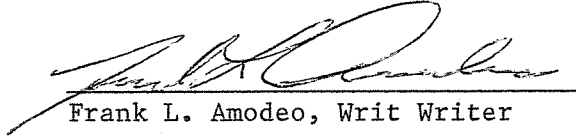


Mickey Moody # 09427-002

FCC - Low Unit A-4

P.O. Box 1031

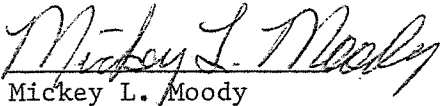
Coleman, FL 33521-1031



Frank L. Amodeo, Writ Writer

Certificate of Service

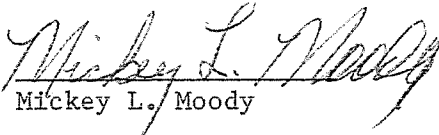
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Mickey L. Moody

Verification

Under penalty of perjury as authorized in 28 U.S.C. §1746, I declare the factual allegations and factual statements contained in this motion are true and correct to the best of my knowledge.



Mickey L. Moody

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
OCALA DIVISION

Mickey Lee Moody,

Movant,

v.

Case No. 5:14-cv-396-0c-10PRL

United States of America,

Respondent.

_____ /

MOTION FOR RELEASE ON RECOGNIZANCE BOND

Mickey Lee Moody seeks immediate release on bail during the pendency of the §2241 proceeding. At the threshold, he emphasizes that, if he prevails and his imprisonment continues, then he will suffer irreparable harm. He has served, with earned good time, more than the maximum statutory sentence (120 months) for his misconduct, thus every extra day of lost liberty is an unmitigatable miscarriage of justice.^{/1}

Legal Standards

First, Mr. Moody is likely to prevail on the merits if, for no other reason, both parties agree on the appropriate resolution, thus the outcome is not in controversy. Second, since the governing law favors Mr. Moody's position,^{/2} this court's merit analysis, like our analysis, and like the

^{/1} See also *Glover v. United States*, 531 U.S. 198, 203 (2001) ([A]ny amount of jail time ...).

^{/2} Mr. Moody's separately filed memorandum on retroactivity and the miscarriage-of-justice doctrine articulates the legal framework.

government's analysis, points to the resolution that Mr. Moody and the government have already agreed to.

Furthermore, granting a habeas bond neither prejudices the government (the government agrees that Mr. Moody should be released) nor threatens the community.^{/3} The government has effectively agreed^{/4} to Mr. Moody's request for bail, because by agreeing that Mr. Moody's sentence should be reduced to 120 months, the government acknowledges Mr. Moody should already be free.^{/5} Therefore, the government will not experience any prejudice by this court granting Mr. Moody release on a habeas bond. Notably, Mr. Moody likely would remain on bail if this proceeds to an appeal on the legal issues, until the appellate court resolves the esoteric and exotic controversy concerning retroactivity, because he meets the criteria for release pending appeal. See 18 U.S.C. §3143(b)(2014).

In order to avoid irreparable harm from his continued imprisonment, Mr. Moody seeks immediate release via the equivalent of a self-recognizance bond, and other such relief as the court deems appropriate or fair. *Gomez v. United States*, 899 F.2d 1124, 1125 (11th Cir. 1990); *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985).

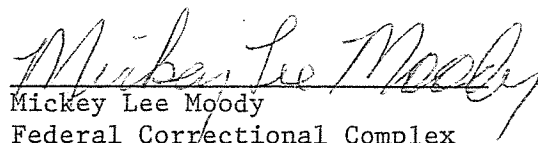
^{/3} First, because Mr. Moody is a man of strong Christian faith. Second, he has a home and a solid support structure. Third, he is poignantly aware that his actions have consequences, such as spending a half generation in prison. And fourth, the Bureau's pretty-good security classification indicates his current Low Custody status should be lowered to Minimum Custody, which, practically speaking, is a no-threat classification.

^{/4} As stated in the Notice of this flurry of filings, in light of the additional notice of appearance, and the local rules, I attempted twice to reach Mr. Downing, but was unsuccessful both times.

^{/5} I realize that some of the government's agents may believe Mr. Moody should not be free despite the law, but realistically, I presume the collective government behaves rationally in following the Constitution and the law.

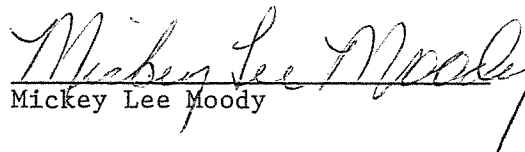
Prepared by Frank L. Amodeo and respectfully submitted this 18th day of
December 2014 by:


Frank L. Amodeo


Mickey Lee Moody
Federal Correctional Complex
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Coleman, Florida 33521-1031

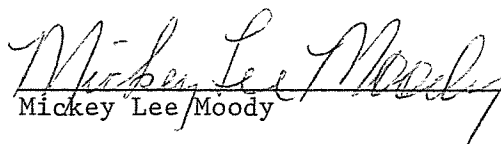
CERTIFICATE OF SERVICE

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Mickey Lee Moody

VERIFICATION

Under penalty of perjury as authorized in 28 U.S.C. §1746, I declare that the factual allegations and factual statements contained in this document are true and correct to the best of my knowledge.


Mickey Lee Moody

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
OCALA DIVISION

Mickey Lee Moody,

Movant,

v.

Case No. 5:14-cv-396-0c-10PRL

United States of America,

Respondent.

_____/

MEMORANDUM ON RETROACTIVITY AND MISCARRIAGE OF JUSTICE

On December 11, 2014, this court gave the government 30 days to file a supplemental response on why the **Descamps** rule is retroactive, or to provide an alternative basis for granting Mr. Moody's §2241 motion. Unfortunately, engaging in this stimulating, intellectual exercise causes a 30-day delay (plus this court's decision time) in Mr. Moody's release from an inalterably unjust imprisonment. In other words, the court's order imposes an unfair deprivation on Mr. Moody, who otherwise (for the first time in 10 years) would spend Christmas and New Year's with his wife of 30 years. Accordingly, we provide a succinct recitation of existing authority that demonstrates: (1) why the **Descamps** holding is "retroactively" applicable to cases in collateral-review proceedings; and (2) why American fairness traditions, as well as the Constitution, favor granting relief regardless of the retroactivity.

Retroactivity

The Supreme Court's rule in **Descamps** as applied to 18 U.S.C. §924(e) is a substantive rule of criminal procedure, since it narrows the range of

prohibited conduct. See *Schiro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (Substantive rules apply retroactively "because they necessarily carry a significant risk that a defendant ... faces a punishment that the law cannot impose upon him"). Stated differently, prior to the Supreme Court's *Descamps* decision, the conduct prohibited by Alabama's 3rd degree burglary statute qualified as an elemental fact for a violation of §924(e) (Armed Career Criminal Act) but after *Descamps*, the Alabama 3rd degree burglary fact no longer proves a §924(e) offense. *United States v. Howard*, 381 F.3d 873 (9th Cir. 2004). In sum, although not a paradigmatic example of a "retroactive" rule, the *Descamps* rule is substantive, because like the decision in *Begay v. United States*, 553 U.S. 137 (2008), the *Descamps* rule "narrowed the scope" of predicate convictions (facts) that are termed a "violent felony" in the context of 18 U.S.C. §924(e). See *Bryant v. Warden*, 728 F.3d 1253, 1278 (11th Cir. 2013).

Miscarriage of Justice

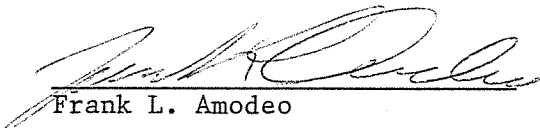
What the *Descamps* rule unquestioningly demonstrates, however, is that the original sentencing court exceeded its authority by imposing a sentence not authorized by Congress. It is beyond peradventure that a miscarriage of justice results from a federal court imposing (or even merely sanctioning) a punishment not authorized by a constitutionally valid legislative act.^{/1}

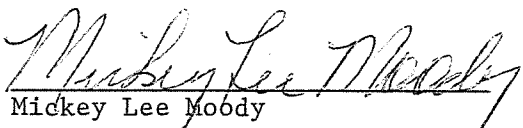
^{/1} *United States v. Lanier*, 520 U.S. 259, 269 n.6 (1997); *Whalen v. United States*, 445 U.S. 684, 689 (1980); *United States v. Bass*, 404 U.S. 336 (1971); *Ex Parte United States*, 242 U.S. 27, 42 (1916) (The authority to define and fix punishment belongs exclusively to the legislative branch); *United States v. Hudson*, 7 Cranch 32, 3 L. Ed. 259 (1812) (Only Congress, not the courts, can make conduct criminal); *United States v. White*, 980 F.2d 1400, 1410 (11th Cir. 1983) (It is axiomatic that a court of the United States may not impose a penalty for either a nonexistent crime or beyond its statutory authority); accord *United States v. Olson*, 716 F.2d 850, 853 (11th Cir. 1983); *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011) (en banc) ("An unlawful or illegal sentence is one imposed without, or in excess of, statutory authority"); *Brown v. Caraway*, 719 F.3d 563 (7th Cir. 2013).

The district court that sentenced Mr. Moody exceeded its constitutional and statutory authority by imposing a sentence greater than 10 years. Regardless that the sentencing court's mistake was innocent, the decision implicates the most fundamental of constitutional errors. The consequence of the court's mistake is that Mr. Moody was not punished by the state or the collective, but rather punished by another individual. The judge's unauthorized action is coram non-judice, thus he acts for himself and not for the nation. An event anathema to American concepts of justice and to the Rule of Law itself, i.e., the archtypical example of a miscarriage of justice.

Many of this court's decisions reflect both a refined sense of history and a respect for principled idealism over mundane practicality. Applying that aspirational perspective, this court has a duty to search for the authority to remedy the injustice. Notably, the Constitutional enshrinement of the writ of habeas corpus and Congress's §2255 savings clause provides this court the power to remedy the undisputed injustice resulting from the mistaken punishment.

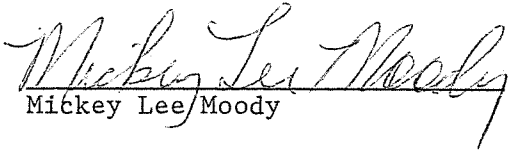
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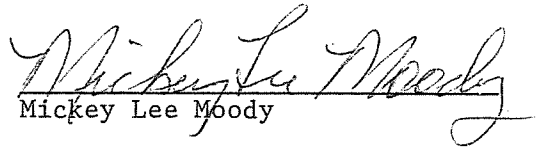
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Mickey Lee Moody

VERIFICATION

Under penalty of perjury as authorized in 28 U.S.C. §1746, I declare that the factual allegations and factual statements contained in this document are true and correct to the best of my knowledge.


Mickey Lee Moody