No: 18-7869

IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL DEORIO,

Petition,

-Versus-

WARDEN, FCI JESUP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

PETITIONER FOR WRIT OF CERTIORARI OF

SAMUEL DEORIO

SAMUEL DEORIO
REG NO: 36288-004
PRO SE PETITIONER
FCI JESUP
2680 HWY 301 SOUTH
JESUP, GEORGIA 31599

QUESTIONS PRESENTED

1. Whether 28 U.S.C. §2255(e) may serve as a failsafe mechanism opening the protal to use 28 U.S.C. §2241, to test the legality of an unconstitutional sentence where such claim is based on a new rule of constitutional law, made retroactive to collateral review by the Supreme Court, which was previously unavailable, and where the court of appeals precluded the petitioner from using 28 U.S.C. §2255(h).

2. Whether 28 U.S.C. §2255(h) authorizes a curt of appeals to expand its authority beyond that authorized by the statute and deny an application for leave to file a second or successive habeas petition applying tools of judicial convenience where the petitioner has made a substantial showing of the prima facie required by the statute.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at **Appendix: "A"** to the petition, and is unpublished.

The opinion of the United States District Court for the Southern District of Georgia appears at **Appendix: "B"** of the petition, and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Eleventh Circuit decided my case was **July 05, 2018.**

No petition for rehearing was timely filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. -V-: "No person...shall be deprived of life liberty, or property without due process of law...

18 U.S.C. §922(g)(1): It shall be unlawful for any person: (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, to possess in or affecting commerce, a firearm.

18 U.S.C. §924(e)(b)(i): Defining the term "crime of violence" as applied in the elements clause.

18 U.S.C. §924(e)(B)(ii): Defining the term "crime of violence" as applied to the enumerated offense and residual clause.

U.S.S.G. §4B1.2(1)&(2): Defining crime of violence as applied in the Guideline career offender definition.

STATEMENT OF THE CASE

This is a case about a prisoner, Samuel Deorio, who was sentenced to two concurrent sentences of 262 months each, one as a career offender under §4B1.1 of the mandatory Guidelines for a drug trafficking conspiracy, and the other under 18 U.S.C. §922(g) and §924(e) under the ACCA. Following this Court's decision in Johnson, and Welch, Deorio filed a petition to file a successive §2255 motion as he squarely qualified for a reduction of sentence under this Court's new constitutional rule in Johnson. The Eleventh Circuit however, after acknowledging Deorio qualify for a reduction of his ACCA sentence, denied the petition on grounds not permitted by §2255(h)(2), and without consideration of other matters described below, the Eleventh Circuit held that even if the ACCA sentence was reduced Deorio would still have to serve the concurrent drug sentence.

Procedural Background

The Indictment: Samuel Deorio was charged in a three count superseding indictment in the Southern district of Florida. The indictment charged:

count One: That from March 6, 1999, to May 27, 1999, Samuel Deorio and...conspired to possess with intent to distribute a mixture or substance containing a detectable amount of cocaine in violation of 21 U.S.C. §846, and §841.

Count Two: That on May 27, 1999, Samuel Deorio possessed firearm during and in relation to, and in furtherance of, a drug trafficking offense as charged in count One, in violation of 18 U.S.C. §924(c); and

Count Three: That on May 27, 1999, Samuel Deorio, having been convicted of a crime punishable by imprisonment for a term exceeding one year, possessed a firearm in violation of 18 U.S.C. §922(g), and §924(e)(1)

The Trial: Deorio proceeded to trial. At the conclusion of the trial he was found guilty of all three counts in the indictment.

Presentence Report (PSR): The PSR found that the base guideline offense level was 32. The district court however, after reviewing the prevailing case law (Apprendi v. New Jersey), in effect on November 2000, held that because the indictment failed to charge any amount of drugs, but rather charged a detectable amount of cocaine, and the jury did not make such finding, the defendant's statutory range was defined by 21 U.S.C. §841(b)(1)(C), and his appropriate guideline level for the drug offense was 12. The PSR increased 2-levels pursuant to §3B1.1(c) of the Guidelines for a total offense level of 14.

Chapter Four Enhancement: Using the same Florida State prior convictions used to enhance Deorio under §924(e), the PSR rated Deorio both as a career offender under §4B1.1 of the Guidelines. The PSR cited Florida cases: (1) 89-22293-CF-10A, for a drug conviction; (2) 90-14541-CF-10C, for an alleged crime of violence; and (3) 96-22194-CF-10A, also for an alleged crime of violence.

Prior to trial the government had filed an information under 21 U.S.C. §851 seeking an enhance penalty which would raise Deorio's statutory maximum from 30 years under §841(b)(1)(C), to 30 years. Based on the §851 enhancement, the PSR classified Deorio under §4B.1 and §4B1.4, and increased his guideline level to 34, with a Criminal History Category ("CHC") of VI, as to count One, resulting in a guideline range of 262-327 months of imprisonment.

As to count Two, the §924(c) conviction, the PSR stated that the statutory minimum mandatory was 60 months consecutively to all other sentences. As to Count Three, the §922(g), and §924(e) violations, the PSR found it carried a minimum mandatory of 15 years.

Sentencing hearing: During a sentencing hearing held on December 4, 2000, after listening to both parties, the district court imposed the following sentences: as to count One, the drug trafficking conspiracy, the court imposed a term of 262 months based on the career offender status under §4B1.1 and §4B1.4.

As to Count Three, the §922(g) and §924(e), the court imposed a term of 262 months running concurrently with the 262 months imposed in count One. As to count Two, the §924(c) violation, the court imposed a term of 60 months running consecutively to all other sentences, for a total term of imprisonment of 322 months. (Sent. Transcripts pgs:58-64).

First §2255 motion: After denial of direct appeal, Deorio filed a timely motion to vacate or correct sentence pursuant to 28 U.S.C. §2255. The district court however, denied the motion n May 16, 2006.

Application for Successive §2255: On June 26, 2015, the Supreme Court decided **Johnson v. United States**, 135 S. Ct. 2251 (2015), where the Court announced a new rule of constitutional law that was previously unavailable. On April 18, 2016, this Court made the rule in Johnson, retroactively applicable to collateral review in **Welch v. United States**, 136 S. Ct. 1257 (2016).

On June 2016, Deorio filed a timely application for leave to file a successive §2255 motion in the eleventh Circuit Court of Appeals in light of this Court's decisions in Johnson, and Welch. On July 20, 2016, the Eleventh Circuit Court of Appeals, in a split decision with Circuit Court Judge Martin dissenting, denied the application.

The Eleventh Circuit acknowledge Deorio no longer has three predicate qualifying convictions following this Court's decision in Johnson, but applying the controversial "Concurrent Sentence Doctrine", held that Deorio's concurrent sentence for conspiracy to possess with intent to distribute cocaine as imposed in count One, was unaffected by the removal of his ACCA status and therefore no relief was necessary.

In disagreement with the majority's opinion, Circuit Court Judge Martin dissented and wrote a separate opinion specially stating that Congress did not

uthorized court of appeals to render decisions on applications seeking permission to file a second or successive habeas petition. That the Court's authority is defined by §2255(h)(1)&(2).

On July 25, 2017, Deorio filed a petition pursuant to 28 U.S.C. §2241, which was dismissed on December 4, 2017, holding the court had no jurisdiction to entertain such motion. Deorio filed a notice of appeal and a motion to proceed in forma pauperis. On July 5, 2018, the Court of Appeals for the Eleventh Circuit denied the motion holding that under the court's decision in **McCarthan v. Dir. of Goodwill Inds. Suncoast, Inc.**, 851 F. 3d 1076, 1081 (11th Cir. 2017)(en banc), Deorio's claim was foreclosed, ironically, because he could have brought the claim in a habeas corpus motion pursuant to §2255. This petition ensued.

REASONS FOR GRANTING THE WRIT

A. THE SAVING CLAUSE IN 28 U.S.C. §2255(e)

Ordinarily, a prisoner seeking to attack the validity of his conviction or sentence must file a motion pursuant to 28 U.S.C. §2255 in the district of conviction. **Turner v. Warden, Coleman FCI**, 709 F. 3d 1328, 1333 (11th Cir. 2013). To utilize 28 U.S.C. §2241, to attack the validity of a federal conviction or sentence, a petitioner must show that the remedy afforded under §2255 is "inadequate" or "ineffective". **Taylor v. Warden, FCI Marianna**, 557 F. Appx. 911, 913 (11th Cir. 2014). The saving clause in §2255(e) states:

> An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appear that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is "inadequate" or "ineffective" to test the legality of his detention.

In **Bryant v. Warden FCI Coleman**, 738 F. 3d 1253, 1263 (11th Cir. 2013), the Eleventh Circuit explained that §2255(e) by its own terms applied regardless of whether a federal prisoner "has failed to apply" for §2255 relief. or whether the setencing court has denied him §2255 relief. The Eleventh Circuit explained that the touchstone of the saving clause is whether §2255 would have been "inadequate" or "ineffective" to test the legality of the prisoner's detention.

Based on its prior decisions interpreting §2255(e) in **Wofford v. Scott**, 177 F. 3d 1236 (11th Cir. 1999); **Gilbert v. United States**, 640 F. 3d 1293 (11th Cir. 2011); and **Williams v. Warden**, 713 F. 3d 1332 (11th Cir. 2013), the Eleventh Circuit in Bryant devised a 5-part test which petitioners must meet to show that §2255 was inadequate or ineffective to test the legality of his detention.

On March 14, 2017 however, the Eleventh Circuit decided **McCarthan v. Dir. of Goodwill Industries-Suncoast, Inc.**, 851 F. 3d 1076 (11th Cir. 2017)(en banc), in which the Eleventh Circuit held that the Wofford test, as applied in Bryant,

failed to adhere to the text of §2255(e) and "has proven unworkable". The wording of McCarthan nullifies the 5-step test previously established in Bryant.In other words, the Eleventh Circuit overruled its prior decision allowing the use of §2241 in certain circumstances and replaced it with the McCarthan test which provides:

> To determine whether a prisoner satisfies the saving clause, we ask only whether the motion to vacate is an adequate procedure to test the prisoner's claim. And to answer that question, we ask whether the prisoner would have been able to bring that claim in a motion to vacate [under §2255]. In other words, a prisoner has a meaningful opportunity to test the claim whenever §2255 can provide him a remedy.

In McCarthan however, the Eleventh Circuit conceded that it has incorrectly interpreted §2255(e) at least in five occasions: Wofford, Gilbert, Williams, Bryant, and **Mackey v. Warden FCC Coleman**, 739 F. 3d 657 (11th Cir. 2014). But it asserts that its McCarthan decision is the correct interpretation of §2255(e). Not every judge in the Eleventh Circuit however, agrees that this is the correct interpretation, for instance, Eleventh Circuit Judge Rosenbaum, in a 31 page dissenting opinion in McCarthan, considers that the court's interpretation in McCarthan to be the sixth occasion in which the Eleventh Circuit makes the wrong interpretation of the actual meaning of §2255(e).

Judge Rosenbaum stated that the majority's analysis is not itself faithful to the text of §2255(e)'s saving clause because it does not recognize the crucial constitutiona-failsafe purpose that the saving clause serves, and does not acknowledge the role that the Suspension Clause plays in determining whether a second or successive claim may proceed under the saving clause. As a result, the majority misses the fact that §2255(e) must allow for consideration of second or successive claims that rely on a retroactively applicable new rule of statutory law. Judge Rsenbaum explained that the saving clause serves as a failsafe mechanism to protect §2255 from unconstitutionality by providing a substitute remedy for habeas corpus relief that §2255 otherwise precludes but

Suspension Clause may require. And since the Suspension Clause exist to protect habeas corpus, the Suspension Clause demands, at minimum, that availability of habeas corpus relief to redress federal detention when it violates the very doctrine underpinnings of habeas review. See **McCarthan**, 851 F. 3d at 1121-1122.

Each and every circuit has a different test in how to apply §2255(e). This disparity among circuits will not be resolved until this Court addresses the issue and explains the meaning and use of §2255(e). In the meantime however, neither the Eleventh Circuit or this Court is saying what happens in cases where, as in this case, the petition filed an application for leave to file a second or successive §2255 motion based on a new rule of constitutional law made retroactive by this Court, that was not previously available, such as the rule in Johnson, the court of appeals conceded that the petition made the statutory required "prima facie showing", but goes and denies the application applying impermissible doctrines, or on the merits of the claim which has not even been briefed. This type of decision should effectively renders the remedy by motion inadequate or ineffective to test the legality of the unconstitutional sentence.

B. The Eleventh Circuit's Impermissible Application of the Concurrent Sentence Doctrine to Deny the Second or Successive Application, Effectively Renders the Remedy by Motion Inadequate or Ineffective to Test the Legality of Deorio's ACCA Sentence.

Section 2255(e) allows a prisoner to use §2241 to challenge the legality of his sentence when the prisoner can show that §2255 is rendered inadequate or ineffective to test the legality of his detention. Deorio was charged in a three count indictment with conspiracy to possess with intent to distribute cocaine in count One; possession of a firearm in violation of §924(c), Count Two; and felon in possession of a firearm in violation of §922(g), in Count Three. Counts One and Three were grouped together by the PSR (PSR, ¶.22). He was sentenced to 262 months as to each of counts One and Three to run concurrently, and to 60 months in count Two to run consecutively, for a total term of imprisonment of 322 months.

Following this Court's decision in Johnson, Deorio filed an application seeking an order authorizing the district court to consider a second or successive §2255 motion, because Johnson, as made retroactive by Welch, rendered his ACCA sentence unconstitutional. In deciding his application, the appellate court conceded Deorio had made the "prima facie showing" that he fell within the scope of the new substantive rule announced in Johnson. The court of appeals however, denied his application applying the "concurrent sentence doctrine" allowing the unconstitutional ACCA sentence to remain.

The Concurrent Sentence Doctrine:

The concurrent sentence doctrine provides that: "If a defendant is given concurrent sentences on several counts and the conviction on one count is found to be valid, an appellate court need not consider the validity of the convictions on the other counts, as long as the defendant suffers no adverse collateral consequences". See **United States v. Fuentes**, 750 F. 2d 1495, 1497 (11th Cir. 1985)(explaining the doctrine). Eleventh Circuit precedents however, have held that the concurrent sentence doctrine does "not apply" in cases where, as in here, the defendant would suffer adverse collateral consequences from the unreviewed convictions. **Fuentes**, 750 F. 2d at 1497.

This Court observed in **Benton v. Marryland**, 395 U.S. 784, 791 (1969), that no precedent gave "satisfactory explanation" for the concurrent sentence doctrine. This Court further warned that whatever the underlying justification for the doctrine, and it is clear that in **cannot** be taken to state a jurisdictional bar. Id at 789-90. Following Benton, most courts responded by either eliminating the concurrent sentence doctrine altogether or narrowing its scope. The Eleventh Circuit is among the few courts that still apply a doctrine not favored by this Court.

The Sentencing package Doctrine

Under this doctrine, a sentence is not merely the sum of its parts, instead, because the district court crafts a sentence by considering all of the relevant

factors as a whole, when on of the grounds on which the sentence is based is vacated, this unbundles the entire sentencing package. The district court may then not simply re-enter the non-offending portions of the original sentence but may conduct a new sentencing hearing to reformulate the entire sentencing package. **Pepper v. United States**, 131 S. Ct. 1229, 1251; 179 L. Ed 2d 196 (2011); see also **United States v. Fowler**, 749 F. 3d 1010, 1015-16 (11th Cir. 2014)(relying in Pepper, and explaining that because "a criminal sentence is a package of sanctions that may be undermined by altering one protion of the calculus, the court, when reversing one part of the defendant's sentence, may vacate the entire sentence so that, on resentence, the court can reconfigure the sentencing plan to satisfy the sentencing factors in 18 U.S.C. §3553(a)).

Under the sentencing package doctrine, a criminal sentence in a multi-count case, as in this one, is by its nature a package of sanctions that the district court utilizes to effectuate its sentencing intent consistent with the Sentencing Guidelines, and the §3553(a) factors. See **United States v. Martinez**, 606 F. 3d 1303, 1304 (11th Cir. 2010). The thinking is that when a conviction on one or more of the components is vacated, the district court is free to reconstruct the sentencing package --even if there is only one sentence left in the package-- to ensure that the overall sentence remains consistent with the Guidelines, the §3553(a) factors, and the court's view concerning the proper sentence in light of all changes and circumstances. **Fowler**, 749 F. 3d at 1015.

Thus, because the district court would have had the discretion to review Deorio's entire sentence under the sentencing package doctrine, and take the §3553(a) factors in consideration to modify the related drug sentence as described in Pepper, the court of appeals effectively rendered the remedy by §2255 motion inadequate or ineffective when it denied the application for a second or successive petition on considerations not authorized by the statute. As a result, Deorio is still incarcerated under an unconstitutional sentence.

C. Title 28 U.S.C. §2255(h) Does Not Authorizes a Court of Appeals to Sua Sponte Expand Its authority to Decide a Defendant's Application for Leave to File a Successive §2255 Motion, on the Merits of the Proposed Claim, or by Side Stepping the Requirements of the Statute.

Pursuant to the "Antiterrorism and Effective Death Penalty Act" ("AEDPA"), as codified in 28 U.S.C. §2255(h), a person in federal custody may seek an order from the appropriate court of appeals authorizing the district court to consider a second or successive §2255 motion to vacate, set aside, or correct sentence. Section 2255(h) provides:

> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--
>
> (1) newly discovered evidence that, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convicting evidence that no reasonable fact finder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

In this case, the appellate court's sua sponte expansion of its authority in its application of §2255(h) constitute the type of exceptional circumstances warranting the use of §2241 as is clear that Deorio cannot obtain relief in any other form of any other way, from any other court to test the legality of his ACCA sentence.

By definition, the Eleventh Circuit exceeded its authority under §2255(h)(2), when it decided Deorio's application for a second or successive motion, on the merits of his proposed Johnson based claim, and on an impermissible application of the concurrent sentence doctrine. This decision forced Deorio to remain incarcerated under an illegal and unconstitutional sentence, and suffer the collateral consequences caused by the unreviewed sentence. This effectively precluded him from testing the legality of the ACCA sentence and rendered the remedy afforded by motion inadequate or ineffective.

In the language of §2255(h)(2), Congress intended to authorize courts of appeals to decide applications for leave to file a second or successive §2255

motion on issues beyond those authorized by the statute, such as the merits of the applicant's proposed claim, or the application of doctrines that are regarded as tools of judicial convenience, specially in a proceeding where the petitioner has no opportunity to brief his claim, or to appeal an adverse decision, or to ask for certiorari review to this Court.

When deciding the application for permission to file a second or successive §2255 motion pursuant to §2255(h)(2), Congress authorized courts of appeals to "solely certify whether the applicant made, or made not, a prima facie showing that his motion will contain...a new rule of constitutional law, made retroactive to collateral review by the Supreme Court, that was previously unavailable. Clearly, by the wording of §2255(h)(2), Congress did not authorized courts of appeals to decide a prisoner's application on the merits of his claim or to apply tools of judicial convenience as the Eleventh Circuit did in this case, specially when such decisions are **not** subject to judicial review. It has become a common practice by the Eleventh Circuit to decide applications for successive petitions on the merits of the proposed claim, or on unauthorized applications of tools of judicial convenience such as the one applied in this case. In the wake of Johnson, there are over one hundred defendants affected by this practice and a myriad of dissenting opinions by circuit judges that do not agree with this practice conceding that such practices violate the applicant's due process rights.

In this case, the Eleventh Circuit concluded that Deorio's ACCA sentence was no longer valid, but that his sentence would not be affected under the concurrent sentence doctrine because he had a a concurrent drug sentence for the same period of time. However, the court failed to consider that when one component of the sentencing package is altered, the resentencing court has the discretion of resentencing on all other sentences imposed as part of the sentencing package.

Under the language of §2255(h) a petitioner is not required to show that the claim he proposes to raise in a second or successive §2255 motion will prevail on the merits, nor does it requires at that stage of the application, to brief the merits or the claim, or to defend from the court's impermissible application of tools of judicial convenience. In **Tyler v. Cain**, 533 U.S. 656, 662 (2001), this Court defined the requirements of §2255(h)(2) as:

> Specifically, §2244(b)(2)(A) [analogous to §2255(h)(2)], covers claims that rely on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. This provision establishes three requirements to obtain relief in a second or successive petition. **First**, the rule on which the claim relies must e a "new rule" of constitutional law; **Second**, the rule must have been made retroactive to cases on collateral review by the Supreme Court; and **Three**, the claim must have been previously unavailable. Id. at 662.

Based on this, Eleventh Circuit court precedents show that it had never before barred qualifying prisoners from filing a §2255 motion because the prisoner's sentence for other crimes made the constitutional defect on one sentence harmless. See **In re Williams**, 826 F. 3d 1351 (11th Cir. 2016)(recognizing the court has never before applied harmless error or concurrent sentence doctrine in the context of an application to file a second or successive §2255 motion).

Under the traditional tools of statutory construction, a court should give effect to a statute's clear text before concluding that Congress has adjudicated additional authority not defined in the statute. Nothing in the statute at issue here [28 U.S.C. §2255(h)(2)] suggest that Congress extended a court of appeals authority allowing it to decide cases on the merits of a claim that have not bee briefed, or to apply tools of judicial convenience when deciding whether to grant an application for leave to file a second or successive §2255 motion, specially when the applicant qualifies and has shown the statute's required 'prima facie" showing.

This Court has consistently held that in resolving the meaning of a statute the court's starting point must be the language of the statute itself. **Consumer Product Safety Comm'n v. GTE Sylvania**, 447 U.S. 102, 100 S. Ct. 2501 (1980)("we begin with the familiar cannon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent clear expressed legislative instruction to the contrary, that language must ordinarily be regarded as conclusive").

An analysis of the traditional tools of statutory construction --that is, the statute's text, structure, drafting, history, and purpose-- contained in §2255(h)(2), provided a clear answer here. That section of the statute contains no ambiguity that would permit an interpretation that would allow a court of appeals to decide an application for a second or successive §2255 motion on the merits of the proposed claim, or by the use of tools of judicial convenience.

Indeed, all a petitioner is required to file is a "pro se" barebone form applying for permission to file a second or successive motion, which instructs him in capital letters: "DO NOT SUBMIT SEPARATE PETITIONS, MOTIONS, BRIEFS, OR ARGUMENTS, ETC..." Thus, for a court of appeals to first instruct an applicant not to present any argument or defend from impermissible applications of tools of judicial convenience, and then decide his application speculating on the merits of the unbriefed claim, or applying doctrines from which the applicant cannot possibly defend, will be an ill-intentioned due process violation.

Because the application under §2255(h) involves one of the very few instances under which Congress has authorized federal judges to make legal decisions that are **"NOT"** subject to review, a decision based on considerations outside of those authorized by the statute decides more than the "prima facie" authorized by the statute and effectively makes the remedy by motion inadequate or ineffective for that prisoner to test the legality of his detention.

While the eleventh Circuit had to address hundreds of second successive applications baes on various formulations of Johnson claims, most, as in this case, without counseled briefing and with a very tight window, for both the prisoner and the Court. This increase in applications however, does not authorize the court to jump the fence and decide such applications on unauthorized grounds. For these reasons decisions in applications for second or successive such as the one in Deorio's case, have been repeatedly questioned for their legal correctness and thoroughness. In fact, Eleventh Circuit Court Judge Martin, who dissented in the court's decision n this case, specifically questioned the authority of the majority to apply a tool of judicial convenience where it is clear that all the statute authorizes a court of appeals do to is nothing more than certify whether a proposes §2255 motion will contain a new rule of constitutional law, made retroactive to cases on collateral review by this Court, that was previously unavailable. See **In re Deorio**, 2016 Case No: 16-13718-J (11th Cir. July 20, 2016).

Indeed, several other judges from the Eleventh Circuit have been extremely troubled by, and quite vocal about, how **"wrong"** many of the court's second or successive application's ruling have been. See e.g., **In re William Hunt**, 835 F. 3d 1277, 1284 (11th Cir. 2016)(Jill Pryor, J., concurring joined by Wilson and Rosenbaum, J., "since Supreme Court decided Johnson that this language is unconstitutionally vague, we have repeatedly misinterpreted and misapplied that decision...in throwing up these sort of barriers [to successive §2255 motions] this court consistently got it wrong"); See also **In re Clayton**, 829 F. 3d 1254 (11th Cir. 2016)(Martin, J., concurring, joined by Jill Pryor, J., & Jill Pryor, J., concurring joined by Rosenbaum, J.).

To apply the concurrent sentence doctrine to Deorio's application, the Eleventh Circuit relied in **In re Williams**, 826 F. 3d 1351, 1357 (11th Cir. 2016), to conclude that Deorio is not entitled to relief. Cases where the court

makes successive decisions however, are simply not conducive to conclusive precedential decisions. As Chief Judge Ed Carnes described the "prima facie" process over ten years ago:

> When making the "prima facie" decision we do so based only on the petitioner's submission. We do not hear from the government. We usually do not have access to the whole record. And we often do not have the time necessary to decide anything beyond the "prima facie" question because we must comply with the statutory deadline. See §2244(b)(3)(D)(requiring a decision within 30 days after the motion is filed). Even if we had submissions from both sides, had the whole record before us, and had time to examine it and reach a considered decision on whether the new claim actually can be squeezed within the narrow exception of §2244(b)(2), the statute does not allow us to make that decision at the permission to proceed state. It restricts us to decide whether the petition has made out a "prima facie" case of compliance with the §2244(b) requirements.

Jordan v. Sec'y Dep'r of Corr., 485 F. 3d 1351, 1357-58 (11th Cir. 2007), It is precisely for this reason that orders on second or successive motion have never had binding effect, and --as the Eleventh Circuit has long emphasized-- further proceedings in the district court are always "de novo":

> Things are different in the district court. That court has the benefit of submissions from both sides, has access to the record, has an opportunity to inquire into the evidence, and usually has time to make and explain a decision about whether the petitioner's claim truly does meet the §2244(b) requirements. The statute puts on the district court the duty to make the initial decision about whether the petitioner meets the §2244(b) requirements --not whether he has made out a "prima facie" case for meeting them, but whether he actually meets them.

This "de novo" consideration, stated over 10 years ago in Jordan, has equal in not more bearing today in considering the effect of successive orders issued upon "pro se" barebones applications after Johnson. According to the Eleventh Circuit, even its published orders adjudicating these post-Johnson successive applications have no precedential value outside of that narrow context. See **In re Gomez**, 830 F. 3d 1225, 1228 (11th Cir. 2016)("It is the job of the district court to decide every aspect of Gomez's motion fresh or in the legal vernacular, "de novo", citing **Jordan**, 485 F. 3d at 1358"); **In re Jackson**, 826 F. 3d 1343, 1351 (11th Cir. 2016)("Nothing about our ruling here binds the district court, which must decide the timeliness issue fresh, in the legal vernacular, "de

novo". And when we say aspect, we mean every aspect"); **In re Rogers**, 825 F. 3d 1335, 1340 (11th Cir. 2016)("Nothing we pronounce in orders on applications to file successive §2255 motions binds the district court"). Moreover, for argument sake, even if a published successive order could be persuasive in resolving certain issue of law when deciding a prisoner's successive application, the published order in Williams should not have any persuasive or precedential value in deciding Deorio's petition for the following reasons.

Williams concurrent sentence was a statutory mandatory life sentence pursuant to 21 U.S.C. §841(b)(1)(A) and §851, which could not be invalidated regardless of whether the court would have allowed him to proceed and file the successive motion, or whether the court applied or not the concurrent sentence doctrine. Thus, regardless, William's life sentence was not going to be affected or changed by the review of his ACCA sentence even if the court applied the sentencing package doctrine. Therefore, he will not suffer any adverse collateral consequences from the failure to review the ACCA sentence. Therefore, he will not suffer any adverse collateral consequences from the failure to review the ACCA sentence.

By contrast, Deorio's 262 months sentence on count One could have been affected in a "de novo" resentence under the application of the "sentencing package doctrine". His was not a mandatory sentence. His statutory sentence for count One was 0-30 years, thus, the court was not bound by a minimum mandatory sentence. His Guideline career offender status was for all practical and legal purposes reviewable during a "de novo" resentencing, and prior offenses that qualified only under the residual clause of §4B1.12, would probably no longer qualified to designate him as a career offender under the Guidelines or as n ACCA offender under §4B1.4, not only because of Johnson, but also because effective **August 1, 2016**, the Sentencing Commission promulgated an amendment deleting the residual clause from the definition f violent felony

in §4B1.2(2). Thus, categorically, Deorio would no longer qualify as a career offender under the Guidelines becuase the same offenses used to rate him as an ACCA, are the same offenses used to rate him as a career offender.

Therefore, for all the above reasons, a court of appeals violate a defendant's due process rights when it attributes itself a statutory authority not conveyed by the statute, and proceeds to decide an application for leve to file a second or successive §2255 motion on grounds not authorized by §2255(h)(2). This effectively makes the remedy by motion inadequate or ineffective opening the portal to use §2241.

D. The Concurrent Sentence Doctrine Applies Only to Cases Where the Unreviewed Challenged Sentence Will Not Cause Additional, Adverse Collateral Consequences for the Petitione.

Even assuming the the concurrent sentence doctrine would apply when deciding applications to file a successive §2255 motion, the doctrine would not apply in Deorio's case because it will subject him to adverse collateral consequences. In **In re Davis**, 829 F. 3d 1297 (11th Cir. 2016), a case with identical facts as Deorio's case, the Eleventh Circuit held that the concurrent sentence doctrine did not apply to Davis' case and rejected the court's reasoning in **In re Williams**, 826 F. 3d 1351 (11th Cir. 2016). In Davis, the court explained that in Williams, the applicant received a concurrent "mandatory" life sentence on count One that was unrelated to his ACCA status. The court held that, "unlike Williams, Davis' 327 months sentence in his conspiracy conviction was neither mandatory or unrelated to his ACCA sentence. The court explained that the statutory minimum mandatory for Davis' conspiracy was 5 years, and unlike the mandatory minimum of life in Williams, this was far sort of the 15 minimum mandatory for Davis' ACCA violation.

The court further held that Davis's case was not the case where his non-ACCA sentence was unrelated to his ACCA status. To the contrary, the judge sentenced Davis based on a single sentencing guideline range for the ACCA and

the drug case both combined. Thus, the judge's sentencing decision was informed by Davis' ACCA designation, which means Davis may have suffered "adverse collateral consequences if his ACCA sentence turns out to be unlawful". See **Davis**, 829 F. 3d at 1299.

In Deorio's case, he was sentenced to 262 months on his drug conspiracy which was neither mandatory or unrelated to his ACCA sentence. The minimum mandatory sentence for Deorio was ZERO (0), as his statutory sentencing range was 0-30 years under §841(b)(1)(C), which unlike the mandatory minimum in Williams, and as the 5-year minimum in Davis, this was far short of the 15 years minimum mandatory for Deorio's ACCA status.

Further, Deorio's case is not the case where his non-ACCA sentence was unrelated to his ACCA status. As in Daivs, in Deorio's, the judge sentenced him based on a single sentencing guideline range grouping both counts together, thus, the judge's sentencing decision was also informed by Deorio's ACCA designation. Both Davis and Deorio's case contain identical facts, however, the court reached diametrical opposite decisions.

In **Willets v. United States**, 182 F. Supp. 1278 (M.D.Fla. 2016), the district court rejected the government's argument that the concurrent sentence doctrine should apply. Willets plead guilty to a drug count and a felon in possession of a firearm count. The PSR grouped both counts together as in Deorio, and calculated one single guideline sentencing range, and it enhanced him as a career offender under the guidelines. Following Johnson, Willets filed a §2255 motion challenging his ACCA sentence. The government argued the concurrent sentence doctrine applied, and Willets argued the doctrine would not apply because it will cause adverse collateral consequences, such as BOP classification and eligibility for special programs, and also potentially undesirable consequences apart from the immediate sentence such as longer sentence should he violate supervised release.

The district court held that pursuant to **United States v. Rozier**, 485 F. App'x 352, 355--57 (11th Cir. 2014); and **United States v. Fowler**, 749 F. 3d 1010, 1916-17 (11th Cir. 2014), when an ACCA sentence is vacated, the district court may resentence an individual on interdependent drug counts. The Eleventh Circuit has expressly held that the district court may use the sentencing package doctrine after vacating a sentence in a §2255 proceedings.

Here, Deorio is suffering the same collateral consequences that Willets would have suffered had the concurrent sentence doctrine been applied in his case. For instance, BOP classification maintains Deorio as a violent offender under his ACCA sentence affecting his custody classification and precluding him from being assigned to a low custody facility closer to his family and where he will be able to enroll in pre-release programs to assist him upon release. As in Willets, he could also receive a longer sentence due to his ACCA status should he violate his supervised release in the future.

Thus, because it is clear by the language in §2255(h) that Congress did not authorized appellate courts to apply tools of judicial convenience where it only asked the court to do nothing more that to certify whether the petitioner's proposed §2255 motion will contain...a new rule of constitutional law, made retroactive to cases on collateral review by this Court, that was previously unavailable, the unauthorized application of the concurrent sentence doctrine in Deorio's case renders the remedy afforded by §2255 motion inadequate or ineffective to test the legality of his current ACCA sentence and therefore, he should have been allowed to proceed in a §2241 petition by way of the saving clause in §2255(e).

E. Deorio's ACCA Unconstitutional Sentence Qualifies to be Brought in a §2241 Petition by Way of the Saving Clause in §2255(e).

In McCarthan, the Eleventh Circuit, overruling its prior precedents allowing a prisoner to use §2241 through §2255(e), held that:

> A motion to vacate is inadequate or ineffective t test the legality of a prisoner's detention only when it cannot remedy a particular kind of claim. Even if a prisoner's claim fails under circuit precedent, a motion to vacate remains an adequate and effective remedy for a prisoner to raise the claim and attempt to persuade the court to change its precedent, and failing that, to seek certiorari in the Supreme Court. McCarthan does not qualify for the saving clause because his claim that escape is not a violent felony is cognizable under section 2255. Because he was free to bring this claim about the interpretation of his sentencing law in his initial motion to vacate, the remedy by motion was adequate and effective for testing such argument.

Deorio's case is distinguishable from McCarthan. Deorio's claim is not at the result of this Court's decision involving a statutory interpretation not retroactive to collateral review, but rather the opposite. His claim is that his ACCA sentence is unconstitutional as a result of this Court's decision in Johnson which involves a new constitutional rule, made retroactive to collateral review, that was previously unavailable.

Here, Deorio followed the correct procedure to test the legality of his ACCA sentence. He filed, as allowed by §2255(h)(2), a petition for leave to file a second or successive §2255 motion and indeed, persuaded the court of appeals he had made the required "prima facie" showing that his claim felt within the scope of the new substantive rule announced in Johnson. While the Eleventh Circuit agreed and concluded that Deorio had made the necessary "prima facie" showing required by the statute, the court applied an impermissible concurrent sentence doctrine and contrary to the requirements of the statute denied his application on unrelated grounds.

In McCarthan, the Eleventh Circuit held that he should have brought his claim in his first §2255 motion and failing that, to seek certiorari in the Supreme Court. In Deorio's case however, he did not have the opportunity to seek certiorari from the denial of his application for a second or successive §2255 motion to decide whether §2255(h) would permit an appellate court to apply tools of judicial convenience in deciding an application for leave to file a second §2255 motion, since such applications are unreviewable.

As stated in the dissenting opinion by Judge Jordan, and Rosenbaum in McCarthan, there is more at stake than just an issue of statutory interpretation. The question is one of the proper role of the judiciary in applying the requirements of §2255(h)(2) in cases such as this one. Courts are required to interpret a statute, not to design one at their convenience. Statutory construction dies not allows a court to design or attempt to improve the language of the statute, its duty is to apply what the statutory language states and means, not to expand to what they believe it should authorize. See **T. Mobile S. LLC v. City of Milton, Ga.**, 728 F. 3d 1274, 1285 (11th Cir. 2013).

As the Eleventh Circuit held in **Friends of the Everglades v. S. Fla. Water Mgmt. Dist.**, 570 F. 3d 1210, 1224 (11th Cir. 2009), a court is not allowed to add or subtract from a statute, and certainly cannot rewrite it. The function of the court is to apply the statute, to carry out the expression of the legislative will that is embodied in them, not to improve the statute by altering them. See **Wright v. Sec'y for Dep't of Corr.**, 278 F. 3d 1245, 1255 (11th Cir. 2002).

The Eleventh Circuit has consistently held that it will not do to the statutory language what Congress did not do with it, because the role of the judicial branch is to apply statutory language, not to rewrite it. See **Harris v. Garner**, 216 F. 3d 970, 976 (11th Cir. 2000)(en banc). Even with these precedents the Eleventh Circuit did exactly the contrary not only in Deorio's case, but also in over another hundred plus cases in the wake of Johnson. This kind of hypothetical jurisdiction has been rejected by this Court.

In applying §2255(h)(2) to Deorio's application for leave to file a second or successive §2255 motion under Johnson, the appellate court failed to respect its own precedents and the fundamental principle that it is Congress' role and

not the courts to decide what the statutory law is to be, and Congress made that clear in §2255(h). Therefore, by expanding its authority sua sponte beyond that authorized by §2255(h), the appellate court in this case effectively rendered the remedy by [§2255] motion inadequate or ineffective.

F. Deorio's Florida State Convictions Used to Enhance him, No Longer Qualify as Violent Felonies Following This Court's Decision in Johnson.

The PSR used Florida States case No: 90-14541-CF-10C, and No: 22194-CF-10A, as the violent felonies to enhance Deorio as an ACCA offender and as a career offender under the Guidelines. In the 1990 case Deorio was charged with "aggravated battery" under Fla. Stat. §784.045; and with "Strong Arm Robbery", under Fla. Stat. 812.13(1)&(2)(c). In the 1996 Florida case, he was charged with "burglary of a conveyance" under Fla. Stat. §810.02(1); and with "aggravated stalking" under F;a. Stat. 784.04(8)(3), a third degree felony. The PSR does not state which of these offenses in this cases is used to enhance Deorio under the ACCA or §4B1.1 of the guidelines.

Before a defendant can be classified as an armed career criminal under the ACCA, three prior drug or violent felony convictions are needed to support a sentence under §924(e)(1). The language of subsection (B)(ii) of §924(e)(2) commonly known as the residual clause --serious potential risk of physical injury to another-- is not at issue here because such language was invalidated th this Court in Johnson. Neither is the language of the residual clause in §4B1.2 of the Guidelines because this clause was deleted by the Commission. The inquiry is whether these Florida State convictions qualify under the elements clause as violent offenses to classify Deorio as an ACCA offender, and/or as a career offender under the definition in §4B1.2 of the guidelines.

In deciding whether a prior conviction qualifies as a violent felony for purposes of the ACCA, or §4B1.2 of the Guidelines, This Court held in **Taylor v. United States**, 495 U.S. 575, 110 S. Ct. 2143 (1990), that courts must employ

the "categorical approach" test set forth in that case. This approach require courts to look only to the statutory definition of the statute. This Court held that this means courts must look only to the elements of the offense and not to the underlying facts of the conduct leading to the conviction. **Shepard v. United States**, 544 U.S. 13, 125 S. Ct. 1254 (2005); and **Descamps v. United States**, 133 S. Ct. 2270, 186 L. Ed 2d 438 (2013). Otherwise courts would be invading the province of the jury.

In **Mathis v. United States**, 136 S. Ct. 894, 193 L. Ed 2d 788 (2016), this Court emphasized the use of this "elements only" approach and made a clear distinction between "elements" and "facts". Under the categorical approach an offense can qualify as a "crime of violence" "only" if all the criminal conduct covered by the statute --including the most innocent conduct-- matches or is narrower that the "crime of violence" definition of the genetic. This Court emphasized that whether in fact the person suffering under this particular conviction used, attempted to use, or threatened to use, physical force against the person is "quite irrelevant". **Morcrief v. Holder**, 133 S. Ct. 1678, 1684 (2011)(quoting **Johnson v. United States**, 599 U.S. 133, 137 (2010).

This Court further held that in a narrow range of cases the task becomes more difficult and confusing in identifying "divisible statutes". **Descamps**, 133 S.Ct. at 2289-90. "A divisible statute is one that sets out one of more elements of the offense in the alternative". Id. at 2284. This Court explained that when confronted with a divisible statute the court must determine which version of the crime the defendant was convicted of, without engaging in the type of facts finding that the Sixth Amendment requires to be done by a jury. The only use of this approach is to determine "which element played a part in the defendant's conviction, the reviewing court would be prohibited to use or analyze the defendant's conduct to decide whether violence was involved. **Mathis**, 136 S. Ct. at 2251-2254.

With the above described legal standard in mind, the question is whether Deorio's prior Florida State convictions used to enhance him qualify as crimes of violence under the elements clause for purposes of the ACCA, and/or the career offender definition under the Guidelines. Title 18 U.S.C. §924(e)(1)(B) defines violent felony as:

> (B) the term violent felony means any crime punishable by imprisonment for a term exceeding one year...that:
>
> (i) has an an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is a burglary, arson, extortion, involves explosives, or "otherwise involves conduct that presents a serious potential risk of physical injury to another".

Because the residual clause was invalidated by this Court in Johnson, it is not at issue here. Further, the residual clause found in §4B1.2 of the Guidelines defines "crime of violence" with exactly the same language used in §924(e)(1)(B)(ii), and on **August 1, 2016**, the Sentencing Commission promulgated an Amendment that deleted the residual clause from §4B1.2(a)(2). While in **Beckles v. United States**, 580 U.S. ___, 137 S. Ct. ___, 197 L. Ed 2d 145 (2017), this Court held that Johnson did not apply to the "Advisory Guidelines", it also held that it was not deciding whether it also applied to the mandatory era of the Guidelines. Deorio was sentenced under the mandatory era of the Guidelines.

1. Florida Burglary of a Conveyance: Deorio was convicted of "burglary of a conveyance" in the 1996 case under Florida Statute §810.02. The Eleventh Circuit has found that a Florida Burglary conviction is not considered an ACCA predicate offense under the ACCA enumerated or element offense clause. A crime qualifies as an ACCA predicate under the enumerated offense clause if the elements of the crime are the same as, or narrower than, the genetic offense. Florida burglary has been found to be broader than the genetic offense. See **Miller v. United States**, 2016 U.S. Dist. Lexis 106178 (M.D.Fla. Aug. 11, 2016)(Florida burglary conviction is no an ACCA predicate offense under the elements clause).

In **Mathis v. United States**, 136 S. Ct. 2243 (2016), this Court held that Iowa's burglary statute -similar to that of Florida- covered more conduct than the genetic burglary because it reached a broader range of places beyond a building or other structure. Id. at 2250-51. The Florida burglary statute defines burglary as "entering a dwelling, a structure, or conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter. Fla. Sta. §810.2. Like the Iowa statute, the Florida burglary statute is broader than the genetic burglary because a "dwelling" includes "any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car. See Fla. Stat. §810.011(2)-(3) stating the definition of §810.02. See also **Jones v. United States**, 550 U.S. 192, 212 (2007). Consequently, a Florida burglary conviction is not an ACCA predicate offense under the enumerated or elements clause for ACCA purposes. For same reasons Florida burglary would not qualify as a crime of violence under the definition in §4B1.2 of the Guidelines absent the residual clause as deleted by the Sentencing Commission.

2. **Aggravated Stalking:** Deorio was charged in the 1996 Florida case with "aggravated stalking" under Fla. Stat. §784.04(8)(3), a third degree felony. As the Eleventh Circuit concluded, there is no ACCA case law addressing this offense in this circuit. Further, no definition of this statute is found in the Florida Statutory listing. Stalking however, does not seems to include an element the use, or attempted use, or threatened use of physical force against the person of another. Stalking is defined as: "to pursue or approach", "to stealthily proceed in a steady deliberate manner in following someone". Thus, none of this elements of stalking present any use of violent physical force.

3. **Aggravated Battery:** Deorio was charged in the 1990 Florida case with "aggravated battery". The Florida information charging Deorio does not state

under which provision of §784.045 was Deorio charged and convicted of, whether subsection (1)(a), or (b). Florida Statute §784.03, describes battery as:

> (1) a person commits battery if:
>
> (a) actually and intentionally touches or strikes another person against the will of the other; or
>
> (b) intentionally causes bodily harm to an individual.

Section 784.045 describes aggravated battery as:

> (1) a person commits aggravated battery who, in committing battery:
>
> (a) intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
>
> (b) uses a deadly weapon.

In **United States v. Braun**, 801 F. 3d 1301 (11th Cir. 2015) the Eleventh Circuit considered whether aggravated battery pursuant to Fla. Stat. §784.045 was a violent offense under the elements clause. In Braun, the defendant was convicted of aggravated battery on a pregnant woman. After analyzing the statute, the Eleventh Circuit concluded that Braun's conviction for aggravated battery under §784.045 was not a prior violent felony for purposes of §924(e)(1).

The Eleventh Circuit concluded that in **[Curtis] Johnson v. United States**, 559 U.S. 133, 137, 130 S. Ct. 1265, 1269, 197 L. Ed 2d 1 (2010), this Court considered whether Florida battery involved the use, attempted use, or threatened use, of physical force against the person of another, and that this Court held that because the defendant could have been convicted of merely unwanted touching, this did not involve "physical force". This Court held that the phrase "physical force" means violent force. **[Curtis] Johnson**, 559 U.S. at 140, 130 S. Ct. at 1271.

Because the same Florida Statute that supplied the elements of battery in Braun, is the same statute that supplied the elements in Deorio's case, and because this Court has made it clear that physical force under the ACCA requires

violent contact beyond a mere touching, Deorio's conviction for Florida aggravated battery under §784.045, the same statute under which Braun was convicted, does not constitute a prior violent felony because the statute can be satisfies by mere unwanted touching of another. See also **United States v. Arroyo**, 2016 U.S. Appx. Lexis 134, No: 13-13809 (11th Cir. 2016)(where the court held that battery on a law enforcement officer was not a violent offense under Fla. Stat. §784.03(1)(a)).

Even if we were to assume that the Florida statute's requirement of a threat of bodily harm could be construed as a force element, the quantum of force required under the statute does not match the quantum of force required by §924(e)(2)(B)(i), or by §4B1.2(a)(1) of the Guidelines, since the statute can be satisfied by mere touching of another against the person's will.

In **United States v. Howard**, 742 F. 3d 1334, 1346 (11th Cir. 2014), the Eleventh Circuit held that courts "are bound to follow any state court decisions that define or interpret the statute's substantive elements because state law is what the state Supreme Court says it is". In **State v. Hearns**, 961 So. 2d 211 (Fla. 2007), The Florida Supreme Court decided that battery was not a"forcible felony" for purposes of the state's own career criminal statute. Id. at 219. Thus, following **Howard**, Deorio's offense for aggravated battery cannot be regarded as a violent felony for purposes of the federal ACCA. of the §4B1.2 of the Guidelines.

Threatened injury is not the same as threatening force. The elements of the Florida Statute for battery only require proof of mere touching. Thus, a threat to produce a result (bodily harm) is not a threat of use of a particular means of (physical force). This distinction creates a fundamental mismatch of elements. For these reasons, Deorio's Florida aggravated battery conviction under §784.045 could not be regarded as a violent felony for purposes of ACCA or §4B1.1 of the Guidelines.

4. Strong Arm Robbery: In the 1990 Florida case, Deorio was also charged with "Strong Arm Robbery" under Fla. Stat. §812.13(1)&(2)(c). Under §924(e), this offense is temporally indistinguishable form the offense of 'aggravated battery" above discussed since both arise from the same course of conduct and were charged in the same information. Thus, because neither the PSR or the district court explicitly states which of these two offenses supported Deorio's conviction under ACCA statute, or Guidelines career offender, the case should be remanded for resentence. Florida State §812.13(1) and (c)(2) provide:

> **Robbery.—**
>
> (1) "Robbery" means the taking of money or other property which may be subject to larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear.
>
> (2)(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree punishable as provided in §775.082, §775.083, or §775.084.

Subsection (c)(2), under which Deorio was convicted for robbery by sudden snatching clealy demonstrate that he carried no firearm, deadly weapon, or any other weapon of any kind, thus, he must have been convicted under "the putting in fear" means of the statute.

A pre-1991 conviction for "strong arm robbery" under Fla. Stat. §812.13 must be analyzed as a robbery by sudden snatching. See **United States v. Welch**, 683 F. 3d 1303 (11th Cir. 2012). In Welch, the Eleventh Circuit distinguished **United States v. Lockley**, 636 F. 3d 1238 (11th cir. 2011) finding that Lockely was convicted after Florida State promulgated the "sudden snatching" statute, so snatching from the person might [have] furnished the basis for Welch's 1996 robbery conviction but not in Lockely, Id. at 1312.

In 1999, Florida's statutory scheme for robberies significantly changed. In response to Florida Supreme Court's decision in **Robinson v. State**, 692 So. 2d 883, 886 (Fla. 1997), which clarified that "there must be resistance by the

victim that is overcome by the "physical force" of the offender to establish robbery", the Florida State legislature enacted a separate "robbery by sudden snatching staute". (Fla. Stat. §812.131)[1].

The Florida Supreme Court decision in Robinson, however, placed the lower court and appellate court's decision holding that mere snatching to be sufficient for robbery in doubt. In 1990, when Deorio took a peal of convenience to strong arm robbery, Florida law established that a taking by stealth, as pick pocketing where the victim is not aware of the theft, was merely larceny, and not robbery. See **McCloud v. State**, 335 So. 2d 257, 258-59 (Fla. 1976). The state courts of appeals however, were divided on whether snatching, as of cash from a person's hand, or jewelry on the person's body, amounted to robbery[2]. Based on this division and in response to Florida Supreme Court's decision in Robinson, the Florida Legislature established §812.131.

Deorio plead guilty to "strong arm robbery". or [robbery by sudden snatching] at the time that Florida Courts were divided on whether such offense was regarded as a violent felony, and before the new statute [§812.131] was

---

#1. Robbery by sudden snatching [strong arm robbery] means the taking of money or other property from the victim's person, with the intent to permanently or temporarily deprive the victim or owner of the money or other property, when, in the course of the taking, the victim was or became aware of the taking. In order to satisfy this definition, it is not necessary to show that: (a) the offender used any amount of force beyond that effort necessary to obtain possession of the money or other property; or (b) there was any resistance offered by the victim to the offender or that there was injury to the victim's person. [Fla. Stat. §812.131 (2000)].

#3. See e.g., **goldsmith v. state**, 573 So, 2d 445, 445 (Fla. 2d Dist. Ct. App. (1991)(holding that the "slight force used...to remove the bill for the victim's hand was **"insufficient"** to constitute the crime of robbery"); **S.J. v. State**, 561 So. 2d 1198, 1198 (Fla. 3d Dist. Ct. App. 1990)(holding that "the degree of force used to grab a camera from the victim's shoulder was **"insufficient"** to constitute robbery"); **Larking v. State**, 476 So. 2d 1383, 1385 (Fla. 1st Dist. Ct. App. (1985)(holding that "**sufficient** force was exercised to fulfill the requirements of the robbery statute where the robber grabbed cash out of the victim's hand"); **Ander v. State**, 431 So. 2d 1042, 1043 (Fla. 5th Dist. Ct. App. (1983)(holding that "the act of snatching...money from another's hand is force and that force will support a robbery conviction").

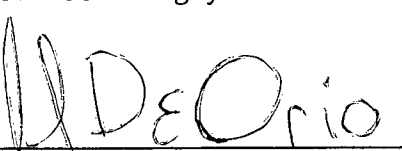
enacted by the Florida Legislature. The eleventh Circuit has held that courts are bound by any decision of the state Supreme Court that interpret the statute's substantive law. **Howard**, 742 F. 3d at 1343, 1346. Thus, following the requirements of Howard, at the time Deorio plead guilty, the issue of whether strong arm robbery was a violent felony was not decided. The Florida Supreme Court resolved the issue in Robinson holding that strong arm robbery needed more force than that necessary to remove property from a person.

In Welch, the Eleventh Circuit agreed that under **[Curtis] Johnson**, the elements clause would no apply to mere snatching. The court held that Welch correctly points out that "physical force" means not merely what "force" what "force" means in physics, but violent force, that is, force capable of causing physical pain or injury to another person. At the time Deorio plead guilty to sudden snatching Florida courts regarded that offense as a non-violent felony.

Therefore, under the categorical approach, Deorio's conviction for strong arm robbery or robbery by sudden snatching, does not qualify as a violent felony for purposes of the ACCA enhancement, and it would also not qualify as a violent felony under the Guidelines career offender enhancement today after the Sentencing Commission deleted the residual clause from §4B1.2 definition of violent felony, or under the elements clause of §4B1.2 either.

CONCLUSION

WHEREFORE, because Deorio clearly, and admittedly by the Eleventh Circuit Court of Appeals does not longer qualify as an ACCA offender, he respectfully request and pray that this Court would grant this petition for a Writ of Certiorari and remand his case to be resentence accordingly.



Samule Deorio, in Pro Se,
Reg. No: 36288-004
FCI Jesup
2680 Hwy 301 South
Jesup, Georgia 31599