

APPENDIX

A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-3645

United States of America

Plaintiff - Appellee

v.

Charmar Brown

Defendant - Appellant

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:06-cr-00116-LSC-2)

JUDGMENT

Before BENTON, BEAM and ERICKSON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

February 15, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
For the Eighth Circuit

No. 17-3645

United States of America

Plaintiff - Appellee

v.

Charmar Brown

Defendant - Appellant

Appeal from United States District Court
for the District of Nebraska - Omaha

Submitted: November 15, 2018
Filed: February 15, 2019

Before BENTON, BEAM, and ERICKSON, Circuit Judges.

BENTON, Circuit Judge.

In 2007, a jury convicted Charmar Adonis Lareese Brown of one count of conspiring to distribute more than 1,000 kilograms of marijuana (*count 1*), one count of possessing with intent to distribute more than 100 kilograms of marijuana (*count 6*), and three counts of using and carrying a firearm during a drug-trafficking crime (*counts 2, 4, 7*). At sentencing, the district court orally sentenced him to concurrent terms of life and 480 months on counts 1 and 6, and to consecutive terms of 120

months, 300 months, and 300 months on counts 2, 4, and 7. The judgment form erroneously said that the sentence on count 6 was life.

Brown appealed. This court vacated his conviction on count 7, but otherwise affirmed. *United States v. Brown*, 560 F.3d 754, 772 (8th Cir. 2009). On remand, at the resentencing hearing, the parties agreed the court's only job was to vacate the sentence on count 7. The court entered a new judgment, removing the 300-month sentence on count 7 but leaving the other sentences unchanged. Brown did not appeal.

Brown filed his first 28 U.S.C. § 2255 motion in 2011. The district court denied it; this court denied a certificate of appealability. He filed a second 2255 motion in 2013. The district court denied it as a successive 2255 motion that the court of appeals had not authorized under 2255(h). This court denied a certificate of appealability. He filed a third 2255 motion in 2016, asserting (in part) that sentencing and resentencing counsel were ineffective for failing to object to the unconstitutional life sentence on count 6. The district court denied the motion as successive without authorization, and denied a certificate of appealability. Brown asked this court to remand or, in the alternative, to issue a certificate of appealability. This court directed the district court "to correct its judgment to reflect that Appellant Charmar Brown's sentence on Count 6 is 480 months." This court then denied the motion to remand as moot and dismissed the appeal. The district court corrected the judgment on count 6 as instructed and filed a Second Amended Judgment with a sentence of 480 months on count 6.

Brown now appeals that Judgment. He argues that it is a substantive change and a new judgment. He then seeks to raise numerous challenges to the Second Amended Judgment.

Under the Antiterrorism and Effective Death Penalty Act of 1996, a federal prisoner must receive certification from the court of appeals to file a "second or

successive” 2255 motion. **28 U.S.C. § 2255(h)**. “Second or successive” is a question of law this court reviews de novo. See *United States v. Sellner*, 773 F.3d 927, 931 (8th Cir. 2014). A 2255 petition challenging a new sentence is not successive. See *Magwood v. Patterson*, 561 U.S. 320, 339, 341-42 (2010) (If petitioner is resentenced between first and second 2254 petitions, second petition—raising claims that could have been raised in a previous petition—is not successive under 2244(b) because it is the “first application challenging that intervening judgment.”); *Dyab v. United States*, 855 F.3d 919, 923 (8th Cir. 2017) (“import[ing] *Magwood*’s inquiry about entry of a new judgment to the 2255 context.”). The inquiry is “whether a district court has entered a new, intervening judgment.” *Id.* For a 2255 motion, “it is well established that ‘[t]he sentence is the judgment.’” *Id.*, quoting *Berman v. United States*, 302 U.S. 211, 212 (1937). If Brown’s Second Amended Judgment is a new sentence, then his petition is not successive.

Brown’s Second Amended Judgment is not a new sentence. The judge orally sentenced him to 480-months’ imprisonment on count 6. “The oral pronouncement by the sentencing court is the judgment of the court.” *United States v. Tramp*, 30 F.3d 1035, 1037 (8th Cir. 1994). See also **Fed. R. Crim. P. 35(c)** (“As used in this rule, ‘sentencing’ means the oral announcement of the sentence.”). Though the written judgment said life on count 6, “when an oral sentence and the written judgment conflict, the oral sentence controls.” *United States v. Mayo*, 642 F.3d 628, 633 (8th Cir. 2011). Here, the oral sentence of 480 months’ imprisonment controlled. This court’s order directing the district court “to correct its judgment to reflect that Appellant Charmar Brown’s sentence on Count 6 is 480 months” did not change the sentence. Rather, that order ensured that the written judgment reflected his sentence of 480 months.

The district court noted that the correction was under Criminal Rule 35(a). That was wrong. Rule 35(a) authorizes a court to “correct a sentence that resulted from arithmetical, technical, or other clear error” within “14 days after sentencing.”

Fed. R. Crim. P. 35(a). The court here corrected the judgment years after sentencing. *See, e.g., United States v. Medina-Mora*, 796 F.3d 698, 700 (7th Cir. 2015) (“Under Federal Rule of Criminal Procedure 35(a), the district court lost any power it may have had to correct an ‘arithmetical, technical, or other clear error’ in the sentence fourteen days after pronouncing sentence.”); *United States v. Winfield*, 665 F.3d 107, 114 (4th Cir. 2012) (Rule 35(a) does not authorize district court to amend sentence four months later).

This court may affirm the Second Amended Judgment for any reason supported by the record. *See, e.g., United States v. Price*, 851 F.3d 824, 826 (8th Cir. 2017). The district court’s correction of the written judgment was authorized by Criminal Rule 36. *See Fed. R. Crim. P. 36* (“[T]he court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.”).

“Correction of a clerical or typographical error pursuant to Criminal Rule 36 . . . does not justify disregarding prior § 2255 motions in the ‘second or successive’ calculus.” *Dyab*, 855 F.3d at 923. “Fixing typographical errors and the like does not substantively alter a prisoner’s sentence, so a § 2255 motion filed after such a correction is still a challenge to the original judgment.” *Id.*, citing *Marmolejos v. United States*, 789 F.3d 66, 70-71 (2d Cir. 2015). When this court directed the district court to correct its judgment, it was correcting an error in the record. This correction in the Second Amended Judgment did not create a new sentence for the purposes of Brown’s 2255 petition. His petition is successive, and his substantive arguments are barred.

* * * * *

The Second Amended Judgment is affirmed.

APPENDIX

C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-3645

United States of America

Appellee

v.

Charmar Brown

Appellant

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:06-cr-00116-LSC-2)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 28, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX

D

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

CHARMAR BROWN,

Defendant.

DOC. 172 PG. 219

ORDER TO DISMISS

THIS MATTER is before the Court on oral motion of the County Attorney for an order dismissing the above captioned case without prejudice. The Court, being fully advised in the premises, finds that such an order should be entered.


IT IS THEREFORE ORDERED that the above captioned case is dismissed without prejudice.

DATED this 4th day of April 2008.

BY THE COURT:


DISTRICT COURT JUDGE

DONALD W. KLEINE, County Attorney


WILLIAM H. OUREN
Deputy County Attorney

COPY

AP DOCKET

NO.

172

219

WITNESSES

DISTRICT COURT
DOUGLAS COUNTY

THE STATE OF NEBRASKA

VS

CHARMAR BROWN

*B. BOGDANOFF #1161
OPD

*R. LANEY #1206
OPD

I N F O R M A T I O N

C H A R G E

MURDER IN THE FIRST DEGREE;
USE OF A DEADLY WEAPON
TO COMMIT A FELONY;
MURDER IN THE FIRST DEGREE;
USE OF A DEADLY WEAPON
TO COMMIT A FELONY;
MURDER IN THE FIRST DEGREE;
USE OF A DEADLY WEAPON
TO COMMIT A FELONY

FILED: January 10, 2007

JOHN M. FRIEND, CLERK

BY: *Terry A. DeLaughter*
DEPUTY

RECORDED: JOURNAL

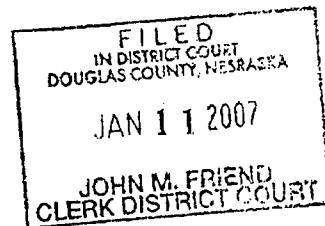
PAGE

DONALD W. KLEINE
COUNTY ATTORNEY

AR#K26494 RB#F10536
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060141699 060141700

ASSIGNED TO JUDGE:
LAR:LR3 17669

Cobbey



STATE OF NEBRASKA)) SS
COUNTY OF DOUGLAS)

that on or about the 5th day of December, 2006,

late of the county of Douglas and State of Nebraska, then and there being,

did then and there purposely and with deliberate and premeditated malice, kill Benigno "Jimmy" Dominguez,

Furthermore the State hereby provides notice to the defendant, Charmar Brown, that at the sentencing phase of the defendant's trial on his conviction for this charge of First Degree Murder of Jimmy Dominguez, the State intends to adduce evidence of the following aggravating circumstances:

- (b) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime.
- (c) The murder was committed for hire, or for the pecuniary gain, or the defendant hired another to commit the murder for the defendant.
- (e) At the time the murder was committed, the offender also committed another murder.

COUNT II

AND I, The said Leigh Ann Retelsdorf, Deputy County Attorney, in and for the County of Douglas in the said State of Nebraska, who prosecutes for and in behalf of the said State, in the District Court of the said District, sitting in and for said County of Douglas, and duly empowered by law to inform of offenses committed in the said County of Douglas, come now here in the name and by the authority of the State of Nebraska, and give the Court to understand and be informed,

that on or about the 5th day of December, 2006,

CHARMAR BROWN

late of the county of Douglas and State of Nebraska, then and there being,

did then and there use a deadly weapon to wit: a firearm, to commit a felony, which may be prosecuted in a court of this state, or did then and there unlawfully possess a deadly weapon to wit: a firearm, during the commission of a felony, which may be prosecuted in a court of this state,

COUNT III

AND I, The said Leigh Ann Retelsdorf, Deputy County Attorney, in and for the County of Douglas in the said State of Nebraska, who prosecutes for and in behalf of the said State, in the District Court of the said District, sitting in and for said County of Douglas, and duly empowered by law to inform of offenses committed in the said County of Douglas, come now here in the name and by the authority of the State of Nebraska, and give the Court to understand and be informed,

that on or about the 5th day of December, 2006,

CHARMAR BROWN

late of the county of Douglas and State of Nebraska, then and there being,

did then and there purposely and with deliberate and premeditated malice, kill Faustino Garcia,

Furthermore the State hereby provides notice to the defendant, Charmar Brown, that at the sentencing phase of the defendant's trial on his conviction for this charge of First Degree Murder of Faustino Garcia, the State intends to adduce evidence of the following aggravating circumstances:

- (b) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime.
- (c) The murder was committed for hire, or for the pecuniary gain, or the defendant hired another to commit the murder for the defendant.
- (e) At the time the murder was committed, the offender also committed another murder.

COUNT IV

AND I, The said Leigh Ann Retelsdorf, Deputy County Attorney, in and for the County of Douglas in the said State of Nebraska, who prosecutes for and in behalf of the said State, in the District Court of the said District, sitting in and for said County of Douglas, and duly empowered by law to inform of offenses committed in the said County of Douglas, come now here in the name and by the authority of the State of Nebraska, and give the Court to understand and be informed,

that on or about the 5th day of December, 2006,

CHARMAR BROWN

late of the county of Douglas and State of Nebraska, then and there being,

did then and there use a deadly weapon to wit: a firearm, to commit a felony, which may be prosecuted in a court of this state, or did then and there unlawfully possess a deadly weapon to wit: a firearm, during the commission of a felony, which may be prosecuted in a court of this state,

COUNT V

AND I, The said Leigh Ann Retelsdorf, Deputy County Attorney, in and for the County of Douglas in the said State of Nebraska, who prosecutes for and in behalf of the said State, in the District Court of the said District, sitting in and for said County of Douglas, and duly empowered by law to inform of offenses committed in the said County of Douglas, come now here in the name and by the authority of the State of Nebraska, and give the Court to understand and be informed,

that on or about the 5th day of December, 2006,

CHARMAR BROWN

late of the county of Douglas and State of Nebraska, then and there being,

did then and there purposely and with deliberate and premeditated malice, kill Frank Wilkinson Jr.,

Furthermore the State hereby provides notice to the defendant, Charmar Brown, that at the sentencing phase of the defendant's trial on his conviction for this charge of First Degree Murder of Frank Wilkinson Jr., the State intends to adduce evidence of the following aggravating circumstances:

- (b) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime.
- (c) The murder was committed for hire, or for the pecuniary gain, or the defendant hired another to commit the murder for the defendant.
- (e) At the time the murder was committed, the offender also committed another murder.