

APPENDIX

A

Michael Lynn Cash #09304-078

Name, Prisoner ID #

P.O. Box 33

Terre Haute, In. 47808

Address

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA

v.

MICHAEL LYNN CASH, Movant

Case No. _____

(To be supplied by the
Clerk)

**MOTION PURSUANT TO 28
USC §2255 TO VACATE,
SET ASIDE, OR CORRECT
SENTENCE BY A PERSON
IN FEDERAL CUSTODY**

NOTE: If movant is attacking a sentence based on a federal conviction to be served in the *future*, the motion should be filed in the federal court which entered the judgment.

- 1) Name and location of the court which entered the judgment of conviction under attack U.S. District Court for the Eastern District of Oklahoma
- 2) Date judgment of conviction was entered 10-10-2012
- 3) Case number CR-11-00057-001-JHP
- 4) Length and terms of sentence 360 Months as amended
- 5) Are you presently serving a sentence imposed for a conviction other than the conviction under attack in this motion? Yes ☐ No ☒
- 6) Name of the judge who imposed sentence under attack in this motion James H. Payne
- 7) Nature of the offense involved (all counts) Possession with Intent to Distribute, (Count 1); Possession of a Firearm in Furtherance of a Drug Trafficking Crime, (Count 2); Felon in Possession of a Firearm, (Count 3).

- 8) What was your plea? (check one)
a) Not Guilty ☒ b) Guilty ☐ c) Nolo Contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: N/A

- 9) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement: N/A

- 10) Kind of trial (check one) a) Jury Trial ☒ b) Judge without a Jury ☐

- 11) Did you testify at trial (if any)? Yes ☐ No ☒

- 12) Did you appeal the judgment of conviction? Yes ☒ No ☐

- 13) If you did appeal, answer the following:

(a) State the name and location of the court where the appeal was filed, the result, the case number and the date of the court's decision (or attach a copy of the court's opinion or order) Tenth Circuit Court of Appeals, Denver, Co.; Affirmed;
Case No.: 12-7072, Date: Nov. 4, 2013

(b) State the issues raised Whether or not officers possessed a
"reasonable suspicion" to extend the duration of the traffic stop.
And, Whether or not Mr. Cash's alleged statements were made
in violation of Miranda.

- 14) If you did not appeal, explain briefly why you did not N/A

a) Did you seek permission to file a late appeal? Yes ☐ No ☒

- 15) Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court? Yes ☒ No ☐

- 16) If your answer to 15 was "Yes", give the following information

a) First petition, application or motion.

1) Name of court Eastern District of Oklahoma

a copy of the court's opinion or order)

N/A

8) If you did not appeal, briefly explain why you did not N/A

c) As to any third petition, application or motion.

1) Name of court N/A

2) Nature of proceeding N/A

3) Grounds raised N/A

4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ☐ No ☐

5) Result N/A

6) Date of result N/A

7) Did you appeal the result to the federal appellate court having jurisdiction? Yes ☐ No ☐. If you did appeal, give the name of the court where the appeal was filed, the result, the case number, citation and date of the court's decision (or attach a copy of the court's opinion or order)

N/A

8) If you did not appeal, briefly explain why you did not

N/A

17) State **concisely** every ground on which you claim that you are being unlawfully held. Summarize **briefly** the **facts** supporting each ground. If necessary, you may attach up to two extra pages stating additional grounds or supporting facts. You should raise in this petition all available grounds for relief which relate to the conviction under attack.

A) (1) Ground One: See Attached Memorandum

(c) At trial Robert Ridenour

(d) At sentencing Terry Weber

(e) On appeal William Dunn

(f) In any post-conviction proceeding Matthew McLain, Florida

(g) On appeal from any adverse ruling in a post-conviction proceeding
Matthew McLain, Florida

21) Were you sentenced on more than one count of an indictment or on more than one indictment, in the same court and at the same time? Yes ☒ No ☐.

22) Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ☐ No ☒.

(a) If so, give name and location of court which imposed sentence to be served in the future N/A

(b) And give date and length of service to be served in the future N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐.

N/A

(2) Supporting facts : See Attached Memorandum

B) (1) Ground Two: See Attached Memorandum

(2) Supporting facts : See Attached Memorandum

C) (1) Ground Three

(2) Supporting facts :

D) (1) Ground Four

(2) Supporting facts :

18) If any of the grounds listed 17 A, B, C, or D were not previously presented, state briefly which grounds were not so presented and briefly give your reason(s) for not presenting them Prior Counsel was Ineffective for Failing to Raise the Issues

19) Do you have any petition, application, motion or appeal now pending in any court, either state or federal, regarding the conviction under attack?
Yes ~~XX~~ No ☒ If "Yes", state the name of the court, case file number (if known), and the nature of proceedings Eastern District of Oklahoma
Rule 60(b)

20) Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Robert Ridenour

(b) At arraignment and plea Robert Ridenour

- 2) Nature of proceeding §2255
- 3) Grounds raised Ineffective Assistance of Counsel
Several 4th Amendment Issues; ACCA Issues;
4B1 Career Offender Issues
- 4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ☐ No ☒
- 5) Result N/A
- 6) Date of result N/A
- 7) Did you appeal the result to the federal appellate court having jurisdiction? Yes ☒ No ☐. If you did appeal, give the name of the court where the appeal was filed, the result, the case number, citation and date of the court's decision (or attach a copy of the court's opinion or order).
Tenth Circuit Court of Appeals
Affirmed
Case No.: 17-7018
March 29, 2018
- 8) If you did not appeal, briefly explain why you did not N/A

b) As to any second petition, application or motion.

- 1) Name of court Eastern district of Oklahoma
- 2) Nature of proceeding Rule 60(b)
- 3) Grounds raised Disrtict Court failed to adjudicate
ALL ~~0~~ issues raised in the §2255 proceeding
(A defect in the §2255 proceedings)
- 4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ☐ No ☒
- 5) Result Pending
- 6) Date of result Pending
- 7) Did you appeal the result to the federal appellate court having jurisdiction? Yes ☐ No ☐. If you did appeal, give the name of the court where the appeal was filed, the result, the case number, citation and date of the court's decision (or attach

Wherefore, movant prays that the court grant him such relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

Signature of Movant

N/A

(Attorney's full address and
telephone number)

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares (or certifies, verifies, or states) under penalty of perjury that he is the plaintiff in the above action, that he has read the above complaint and that the information contained therein is true and correct. 28 USC §1746. 18 USC §1621.

Executed at Terre Haute, In. on _____
(Location) (Date)

Signature

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
Plaintiff,)
V.)
MICHAEL LYNN CASH,)
Defendant.)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
UNDER 28 U.S.C. §2255 TO VACATE, SET ASIDE,
OR CORRECT SENTENCE

COMES NOW Defendant, MICHAEL LYNN CASH, appearing pro se, and hereby submits this motion pursuant to 28 U.S.C. §2255. In support Mr. Cash states:

RELEVANT BACKGROUND

Mr. Matthew McLain represented Mr. Cash during his "first" §2255 proceedings. Upon a finding that Mr. Cash did not qualify for Armed Career Criminal (A.C.C.A/924(e)) enhancements that was specifically placed on his Felon in Possession of a Firearm (922(g)) Count, this Court removed this classification. However, the Government argued that this Court mistakenly placed a 4B1.1 Career Offender enhancement on the wrong count and further argued that Count 2 (924(c)) should've had the career offender enhancement. Critically, the sentencing transcripts clearly establish that this Court did not state it's intentions to enhance Cash's 924(c) (Count 2). In fact, the Court chose the very common "60 months" sentence for Cash's 924(c). For Cash's 922(g) (Count 3), this Court specifically made an "Armed Career Criminal" finding and enhanced Cash's sentence to 360 months. It appears from the transcripts that this Court specifically chose not to

apply the 4B1.1 Career Offender enhancements -that are "advisory"- to Cash's 924(c) sentence.

Regardless, this Court agreed with the Government and found that Cash does not qualify for A.C.C.A enhancements and that Cash's 924(c) should now receive a 4B1.1 Career Offender enhancement. Strangely, this Court also agreed with the Government that Cash was never found to be an Armed Career Criminal in the first place! However, rather than give Mr. Cash a resentencing hearing to address these new changes in Cash's sentence, this Court merely "amended" the judgment. In doing this, Cash did not have any opportunity to object to this entirely new sentence now imposed by this Court. Additionally, by removing Cash's A.C.C.A classification, this removes the "above the statutory maximum" element to Cash's sentence for future litigation.

As a result of this "amended judgment", Mr. McLain -Cash's counsel- appealed to the Tenth Circuit by requesting a C.O.A. which was granted to the extent to address the narrow issue of whether or not the amended judgment should be considered a "resentencing" that would allow new case law to apply. More specifically, Mr. McLain asked:

"Was the district court's correction of Cash's sentence in February of 2017 a resentencing which would entitle Cash to the benefit of case law in effect at that time, or was the district court's correction of Cash's sentence merely an order nunc pro tunc? If Cash was resentenced in February of 2017, what impact -if any- would United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016), Mathis v. United States, 136 S. Ct. 2243 (2016), and Johnson v. United States, 135 S. Ct. 2551

(2015) have on the legality of his sentence?" (See Appellate Case: 17-7018, "Order Granting in Part, and Denying in Part, a Certificate of Appealability", page 6-7).

The Tenth Circuit had no problem finding that the "correction" of Cash's sentence was not a "resentencing". Mr. McLain's question of whether or not the amended judgment was a "resentencing" in no way argues the correct argument that Cash was "ENTITLED" to a resentencing or the question of whether or not the district court even had the authority to amend the judgment or if the changes constitute a "new sentence".

Mr. Cash now argues that:

1. He was entitled to resentencing like the hundreds, if not thousands of defendants who successfully had A.C.C.A status removed, and;
2. Removing A.C.C.A status and adding 4B1.1 Career Offender enhancements to Cash's 924(c) Count is "Constitutional", substantive, and involves significant modifications, and;
3. Prior counsel Mr. McLain was ineffective for failing to correctly argue the case because there is a significant difference in the question he asked the Tenth Circuit and the question Mr. Cash claims is the correct argument.

POINT ONE

MR. CASH WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL

The Tenth Circuit recognizes the effectiveness of appellate counsel in IAC claims. Here, Mr. McLain represented Mr. Cash during Cash's §2255 proceedings including the application for a C.O.A.

Because this is technically Mr. Cash's second in time §2255, he must meet the standards set out in Magwood, 561 U.S. S.Ct. 320

(2010) and other cases addressing the issue.

1. THIS §2255 MOTION IS NOT "SECOND OR SUCCESSIVE"

Mr. Cash acknowledges that "second or successive" §2255 motions must first be authorized by the Tenth Circuit before it can be entertained on the merits. However, Mr. Cash argues that this strict standard does not apply here because this Court changed Cash's sentence and entered an amended judgment following a partially successful §2255 motion.

In U.S. v. Quarry, 2017 U.S. Dist. LEXIS 133920, the Court held "...when a defendant is resentenced as a result of his first §2255 motion, the defendants second or successive §2255 is not a 'second or successive' petition for purposes of §2255(h) because it relates to a new sentence." U.S. V. McGaughy, 670 F.3d, 1149, 1159, n.7 (10th. Cir. 2012).

In U.S. v. Ailsworth, 513 Fed. Appx. 720, 721-23 (10th. Cir. 2013), holding under Magwood, 561 U.S. 320, (2010) that it was debatable whether the district court was correct in determining that a petition was an unauthorized second or successive §2255 motion where the trial court had entered an amended judgment reducing petitioner's term of supervised release following a partially successful §2255 motion and this was petitioner's first §2255 petition challenging the amended judgment."

Here, the amended judgment was the result of a partially successful §2255 motion where Cash's A.C.C.A status was removed and a new 4B1.1 Career Offender enhancement was added to Cash's 924(c) conviction.

As argued herein, these types of "Constitutional" and "substantial" modifications must be regarded as a "new sentence" where Cash can present objections.

The following are more examples that apply to this situation:

U.S. v. Hairston, 754 F.3d, 258, 262, (4th. Cir. 2014)

"[Claim] did not exist when the numerically first [§2255] motion was filed and adjudicated".

Stewart v. U.S., 646 F.3d 856, 865 (11th. Cir. 2011)

"Claim did not exist before his proceedings on his initial §2255 motion concluded".

Leal Garcia v. Quarterman, 573 F.3d 214, 222-24 (5th. Cir. 2009)"... did not arise until after the pror habeas proceeding"

Here, the 4B1.1 Career Offender enhancement was not applied to Cash's 924(c) Count until after the §2255 proceeding. Additionally, for the reasons stated in this §2255 Motion, the amended judgment was a "new sentence" and this is the first §2255 petition filed on the "new sentence" rendering Magwood applicable.

2. PRIOR COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT MR. CASH WAS ENTITLED TO RESENTENCING

Q: When a Defendants A.C.C.A status is removed and/or a new 4B1.1 enhancement -that was previously not present- is added to greatly increase a sentence, is resentencing -or the opportunity to object- required?

In Cash's prior §2255 proceedings, prior counsel failed to make the specific argument that Cash was entitled to resentencing when this Court removed A.C.C.A status, imposing a new sentence for Cash's Felon in Possession of a Firearm (922(g))Count (3) and added 4B1.1 Career Offender classification to Cash's 924(c) Count (2). Mr. Cash argues those issues as follows:

REMOVAL OF A.C.C.A. CLASSIFICATION

As a preliminary matter, Mr. Cash was, in fact, determined to be an "Armed Career Criminal" pursuant to 924(e). Strangely, the Government and this Court have both acknowledged this and have also stated that Cash was never found to be an Armed Career Criminal. This erroneous concept contaminated the Tenth Circuit's Opinion on the issue of the amended judgment in previous rulings.

Regardless, Mr. Cash states that 1). he was found to be an Armed Career Criminal and 2). this classification was removed only when Mr. Cash challenged it in his previous §2255.

Mr. Cash now argues that prior counsel was ineffective for failing to raise the argument that when his A.C.C.A classification was removed, he should've received resentencing like the hundreds, if not thousands of Defendants in the exact same position as Cash. Prior counsel did not highlight a single case in this regard.

EXAMPLES OF TENTH CIRCUIT/DISTRICT "RESENTENCING" (A.C.C.A.) CASES

* U.S. v. Driscoll, 2018 U.S. App. LEXIS 15950, No. 16-8118

"we REVERSE and REMAND with instruction to VACATE Driscoll's sentence and resentence him". (2255 challenge to ACCA sentencing enhancement)

* U.S. v. Wilfong, 2018 U.S. App. LEXIS 8603 No.:16-6342

"The erroneous reliance on the residual clause at Mr. Wilfong's sentencing is not harmless and he is entitled to relief. We REVERSE the district court's denial of Mr. Wilfong's §2255 Motion and remand the case for resentencing".

* U.S. v. Degeare, 884 F.3d 1241 (10th. Cir. 2018)

"Degeare's ACCA sentence is illegal and he is entitled to relief. We therefore reverse the district courts order denying Degeare's §2255 motion, vacate his sentence, and remand for resentencing".

* U.S. v. Ontiveros, 875 F.3d 533 (10th. Cir. 2017)

"Mr. Ontiveros filed a 28 U.S.C. §2255 motion to vacate his prior sentence 1R, 327-31. The district court vacated his sentence, and scheduled him for resentencing. 1R, 340-41". "At resentencing, the new presentence report (PSR) recommended..."

* U.S. v. Kutz, 702 Fed. Appx. 661 (10th. Cir. 2017)

"In late August 2016, the district court resentenced Mr. Kutz without the ACCA enhancement. See United States v. McGaughy, 670 F.3d 1149, 1153 (10th. Cir. 2012). More specifically, as relevant here, the district court conducted "de novo resentencing" and entered a new judgment commensurate with these proceedings".

United States v. West, 646 F.3d 745, 750 (10th. Cir. 2011)(explaining "the default in this circuit is de novo resentencing"); see Magwood v. Patterson, 561 U.S. 320, 338-39"

Like these Defendants, Cash's ACCA was removed after a successful challenge brought by Cash. To respect fairness and Equal Protection of Law, Mr. Cash argues that he should've received a resentencing also. In fact, the "new sentence" placed on Cash's 922(g) Count exceeds the PSR recommendation and Mr. Cash did not have an opportunity to bring an objection to the new sentence without the ACCA enhancement.

Removing ACCA status and imposing a new sentence, if argued correctly, is not "correcting a clerical error" as argued later.

Additionally, Rule 35 is very narrow and can not be used to justify the modifications that took place here. (Removing ACCA status and amending Mr. Cash's sentence),

Q: Why do these Defendants receive "resentencing" when their ACCA status is removed but Mr. Cash did not?

Because prior counsel must have ineffectively argued the issue before this Court and the Tenth Circuit Court of Appeals.

ADDING 4B1 CAREER OFFENDER ENHANCEMENTS TO
MR. CASH'S 924(C) SENTENCE

In addition to removing Cash's ACCA status, this Court also added a 4B1 Career Offender enhancement to Cash's 924(c) (Count 2) that was not previously present. The more significant aspect of this is that nowhere did the Court announce the intention to enhance Cash's 924(c) sentence. In fact, this Court specifically chose to sentence Cash to the common "60 Months" that is typical for this charge.

An enhanced 924(c) was not existing at the time of Cash's first § 2255 proceeding so this is the first §2255 attack on that situation.

Additionally, by amending Cash's sentence to include 4B1 enhancements THAT WERE NOT PREVIOUSLY PRESENT, denies Cash of the right to object violating fundamental fairness in all aspects!

The facts are:

1. This Court DID NOT indicate its intention to enhance Cash's 924(c) at sentencing, and;
2. Because 4B1 enhancements are "advisory", this Court was within it's authority to reject including the enhancement to Cash's 924(c) sentence, and;
3. The Court was without authority to amend Cash's sentence to include this enhancement once the original sentence was imposed, and;
4. Adding 4B1 Career Offender enhancements is a "new sentence" and requires "resentencing" where Cash can object, and;
5. Prior counsel was ineffective for failing to raise this argument.

3. PRIOR COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT CASH'S SENTENCING MODIFICATIONS ARE SUBSTANTIAL, CONSTITUTIONAL, AND NOT THE RESULT OF "CLERICAL" ERRORS

In Mr. Cash's prior §2255 proceedings, the Tenth Circuit held that "the district court's entry of an amended judgment was only a technical correction under Fed. R. Crim. P. 35(a)". (See United States v. Cash, 727 Fed. Appx. 542 (10th Cir. 2018)). This holding is in response to prior counsel's question of if the amended judgment was a resentencing where new case law would apply.

It appears that the Tenth Circuit's decision is based almost entirely on the erroneous concept that this Court never made an ACCA designation and that this Court did announce it's intentions to enhance Cash's 924(c) sentence. Regardless, prior counsel did not make the correct argument in the first place. These erroneous concepts are now officially in dispute and all further issues are to be decided based on the truth.

RULE 35(a)

The law is clear that "the scope of the district court's authority under [Rule 35] is not broad". United States v. Soto-Holguin, 163 F.3d 1217, 1221 (10th Cir. 1999):

In U.S. v. Hendrix, 630 Fed. Appx. 816 (10th cir. 2015), the Tenth Circuit found that "A district court may not invoke Fed.R.Crim. P. 35 to revisit sentencing decisions that are descretionary, not mandatory, such as ordering restitution to victims."

The Court also stated that "A district court may not use 35 to re-open issues previously resolved at sentencing or to alter a sentence for substantive reasons after it has been VERBALLY imposed. As this

language suggests, this does not afford the court or the parties a second bite at the sentencing apple."

As argued throughout this petition, this Court's removing Cash's ACCA status -after a finding- and adding a descretionary 4B1 Career Offender enhancement to Cash's 924(c) Count does not justify amending Cash's judgment under Rule 35(a) without giving Cash the opportunity to make any objections to the "new sentence". As such, this Court was without authority to make said amendment without a new proceeding.

4. PRIOR COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT ALL OF CASH'S PRIOR CONVICTIONS WERE "RELATED" AND COULD ONLY BE ASSESSED AS ONE CRIMINAL HISTORY POINT OR ONE PRIOR CONVICTION

Before Cash filed his previous §2255, it was the ACCA classification that "controlled" Cash's sentence. However, Cash's ACCA status was removed and then it was a 4B1 Career Offender enhancement that is now controlling.

Prior counsel should have raised the meritorious issue that Cash's prior offenses are all "related" under a previous version of §4A1.2(a)(2) which reads: "related cases" included those that resulted from offenses that "(A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing." This version of §4A1.2(a)(2) was in effect at the time Cash committed the prior offenses.

Mr. Cash argues that prior counsel was ineffective for failing to raise the issue that ALL HIS PRIOR OFFENSES WERE RULED AS RELATED IN HIS PREVIOUS FEDERAL CONVICTION. (See Judgment, Ex. 3)

Under §1B1.11 of the Guidelines, courts are instructed to apply the version of the Guidelines in effect on the date that the Defendant

is sentenced, unless the use of the Guidelines would violate the Ex Post Facto Clause of the Constitution. In *Peugh v. United States*, the Supreme Court held that "a retrospective increase in the Guidelines range applicable to a Defendant creates a sufficient risk of a higher sentence to constitute an ex post facto violation." Additionally, courts have consistently held that the retroactive application of the current version of §4A1.2(a)(2) violates the Ex Post Facto Clause when it subjects a Defendant to an increased Guideline range category. Here, Defendant Cash would be subject to an increased Guideline range category if the Court applies the current version of §4A1.2(a)(2).

Because Mr. Cash's prior offenses were already ruled as "related" in a Federal Court where the Government agreed, this Court is obligated to honor the prior holding and the United States is obligated to maintain its position in agreeing that the prior offenses were, in fact, related.

Prior Counsel was ineffective for failing to raise this OBVIOUS argument.

POINT TWO

MR. CASH IS ENTITLED TO AN EVIDENTIARY HEARING

In Cash prior §2255 proceedings, the Tenth Circuit Court of Appeals found that reasonable jurist could debate and that the issues presented were adequate to deserve further encouragement to proceed further in an instance where prior Counsel asked the wrong/losing question. Here, the record is clear that these issues definitely deserve further encouragement to proceed further. Mr. Cash argues that an evidentiary hearing is warranted and needed to resolve the issues presented herein.

DECLARATION

I, Michael Lynn Cash, on this ____ day of _____, hereby declare and affirm under the penalty of perjury as set forth in 28 U.S.C. 1746, that the statements and representations made herein are true and correct to the best of my knowledge and belief..

By: _____
Michael Lynn Cash
Fed. Reg. No.: 09304-078
United States Penitentiary
P.O. Box

CERTIFICATE OF SERVICE

I, Michael Lynn Cash, on this ____ day of _____, hereby certify under the penalty of perjury, that a true and correct copy of the foregoing pleading was sent by first class mail, postage pre-paid, to:

United States District Clerk
P.O. Box 607
Muskogee, Ok. 74401

and

Office of the United States Attorney
520 Denison Avenue
Muskogee, Ok. 74401

By: _____
Michael Lynn Cash
Fed.Reg.No.: 09304-078
United States Penitentiary
P.O.Box

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

U.S.A.,

Plaintiff,

v.

MICHAEL LYNN CASH,

Defendant.

Case No.: 6:19-cv-00126-RAW

Hon. Judge Ronald A. White

SUPPLEMENT TO DEFENDANT CASH'S §2255

COMES NOW MICHAEL LYNN CASH ("MR CASH"), DEFENDANT IN THE ABOVE STYLED AND NUMBERED CASE "MR CASH" RESPECTFULLY FILES THIS SUPPLEMENT TO INCLUDE THE "BROWN", "FAULK", & "WISEMAN" DECISIONS TO FURTHER SUPPORT HIS POSITION IN THIS MATTER ALSO, MR CASH SEEKS TO INTRODUCE A NEW POINT AND CLARIFY EXISTING ISSUES.

POINT ONE:

MR. CASH HAD AN ABSOLUTE RIGHT TO BE PRESENT WHEN THIS COURT ADDED AN ILLEGAL ENHANCEMENT TO HIS SENTENCE, EFFECTING HIS "OVERALL SENTENCING PLAN" IN ITS ENTIRETY.

MR. CASH SUPPLEMENTS THE MOTION TO INCLUDE U.S. v. BROWN 879 F.3d, 1231 (5TH & 11TH CIR. 2018), WHICH ANSWERS THE EXACT ISSUE HERE.

ADDITIONALLY, U.S. v. FAULK, 2019 09-101-00-01 (MLB) U.S.D.C. KAN. AUG. 20, 2019 SUPPORTS THE CONCEPT THAT "NO RIGHT TO BE PRESENT IF SENTENCING PACKAGE NOT EFFECTED." (PARAPHRASED)

HERE, MR. CASH'S OVERALL SENTENCE WAS EFFECTED WHEN THIS COURT REMOVED A.C.C.A. UPON A FINDER THAT HE NO LONGER QUALIFIED, & INCLUDED A DISCRETIONARY GUIDELINE ENHANCEMENT TO HIS 924(M) COUNT(2) THAT WAS NOT PREVIOUSLY IMPOSED AT SENTENCING

ALSO, IN U.S. v. WISERMAN, 2018 U.S. DIST. LEXIS 27325 (10TH DIST.), "THE AMENDED JUDGMENT REDUCED PETITIONER'S OVERALL SENTENCE BY 60 MONTHS. AN AMENDED JUDGMENT UNDER THESE CIRCUMSTANCES CONSTITUTES A "NEW JUDGMENT" (SEE U.S. v. ANSWORTH)

MR. CASH RESPECTFULLY STANDS ON THESE PRINCIPLES APPLIED TO THESE DEFENDANTS WHO'S SITUATIONS WERE IDENTICAL TO CASH'S. MR. CASH HAD A FOURTEENTH AMENDMENT CONSTITUTIONAL RIGHT TO BE PRESENT WHEN "NEW" TERMS OF IMPRISONMENT WERE IMPOSED UPON HIM. IN THE PRIOR § 2255, EVEN THE GOVERNMENT REQUESTED A RESSENTENCING HEARING!

POINT TWO:

ANY PRIOR HOLDING THAT THE AMENDED JUDGMENT WAS TO CORRECT "CLERICAL ERRORS" DOES NOT APPLY TO THIS HABEAS PROCEEDING WHEN THIS COURT CAREFULLY EXAMINES CORRECT, COMPETENT EVIDENCE THAT PRIOR COUNSEL FAILED TO PRESENT TO THE TENTH CIRCUIT

MILITARY THAT IN THE "INEFFECTIVE" APPEAL TAKEN AFTER THE AMENDED JUDGMENT, THE TENTH CIRCUIT HELD THAT THE CORRECTIONS WERE MADE TO

"CORRECT CLERICAL ERRORS," MR. CASH ARGUES, AND THE RECORD SHOWS, THAT THAT DECISION WAS BASED ON PRIOR COUNSEL'S ABSOLUTE FAILURE TO PROVIDE THE EVIDENCE MR. CASH IS PROVIDING IN THIS HABEAS PROCEEDING. MR. CASH DOES NOT ARGUE WHETHER THE 10TH CIRCUIT WAS "INCORRECT" AS THAT WOULD NOT BE PROPER HERE. HOWEVER, MR. CASH ONLY ARGUES THAT BASED ON THE CORRECT, COMPLETE EVIDENCE AND RECORD, IN NO WAY IS THE AMENDED JUDGMENT CORRECTING "CLERICAL" ERRORS. IT CONSTITUTED A "NEW SENTENCE," WHICH ALLOWS THE PRINCIPLES SET OUT IN MAGWOOD & BROWN TO APPLY.

ADDITIONALLY, BECAUSE THE APPEAL TAKEN FROM THE AMENDED JUDGMENT SHOULD HAVE BEEN A DIRECT APPEAL, THIS COURT CAN APPLY THE STRICKLAND STANDARD TO PRIOR COUNSEL'S INEFFECTIVENESS DURING THAT APPELLATE PROCEEDING.

POINT THREE:

MR. CASH'S "MATHIS"-TYPE ARGUMENT RAISED IN HIS FIRST TIMELY FILED § 2255 WAS REVIEWABLE UNDER GENERAL § 2255 PROVISIONS

IN MR. CASH'S PREVIOUS § 2255, PRIOR COUNSEL RAISED A "MATHIS" ARGUMENT CHALLENGING THE ENHANCEMENTS. THE ARGUMENT WAS REJECTED BECAUSE "MATHIS" IS NOT RETROACTIVE IN THE TENTH CIRCUIT. HOWEVER, "MATHIS" DEALS WITH THE USE OF THE MODIFIED CATEGORICAL APPROACH ("MCA") AS SET OUT IN U.S. v. TAYLOR (S. CT) AND DESCAMPS (S. CT) AND IS

NOT "NEW LAW" (SEE MATHIS; "FOR 25 YEARS WE HAVE INSTRUCTED COURTS..." (PARA PHRASED))

THE COURT'S USE OF THE "MCA" WAS ABSOLUTELY REVIEWABLE IN CASH'S FIRST TIMELY FILED §2255 AND DID NOT NEED "RETRO-ACTIVE AUTHORITY" TO BE RAISED. PRIOR COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS OBVIOUS ERROR AND MR. CASH WAS PREJUDICED

CONCLUSION

MR. CASH RESPECTFULLY REQUESTS THAT THIS HONORABLE COURT GRANT HIS §2255 MOTION AND MAKE THE FOLLOWING FINDINGS:

1. BASED ON EFFECTIVE, CORRECT EVIDENCE, THE AMENDED JUDGMENT RESULTED IN A NEW SENTENCE AND WAS NOT CORRECTING CLERICAL ERRORS AND MALWOOD APPLIES; AND,
2. BECAUSE IT WAS A "NEW SENTENCE," CASH HAD A RIGHT TO BE PRESENT.
3. VACATE THE §2255 ORDER AND THE AMENDED JUDGMENT. SCHEDULE A RESENTENCING HEARING.

UNITED STATES DISTRICT COURT

Eastern

District of

Oklahoma

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

MICHAEL LYNN CASH

Case Number:

CR-11-00057-001-JHP

USM Number:

09304-078

Terry L. Weber

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☒ was found guilty on count(s) 1, 2 and 3 of the Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:


Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(1) and 841(b)(1)(C)	Possession with Intent to Distribute Methamphetamine	March 22, 2011	1
18:924(c)(1)(A)	Possession of a Firearm in Furtherance of a Drug Trafficking Crime	March 22, 2011	2
18:922(g)(1) and 924(e)	Felon in Possession of a Firearm	March 22, 2011	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to Title 18, Section 3553(a) of the United States Criminal Code.☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 10, 2012

Date of Imposition of Judgment


 James H. Payne
 United States District Judge
 Eastern District of Oklahoma

E.O.D. 10/11/2012

DEFENDANT'S
EXHIBIT

PAGES 1-3

DEFENDANT: Michael Lynn Cash
CASE NUMBER: CR-11-00057-001-JHP

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of: 240 months on Count 1, 60 months on Count 2 and 360 months on Count 3 of the Indictment

The term of imprisonment imposed on Counts 1 and 3 shall be served concurrently and the term of imprisonment on Count 2 shall be served consecutive to the terms imposed on Counts 1 and 3.

The court makes the following recommendations to the Bureau of Prisons:

That the Bureau of Prisons evaluate the defendant and determine if the defendant is a suitable candidate for the Intensive Drug Treatment Program. Should the defendant be allowed to participate in the program, it is further recommended that the defendant be afforded the benefits prescribed and set out in 18 U.S.C. § 3621(c) and according to Bureau of Prisons' policy.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 12:00 Noon on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

UNITED STATES DISTRICT COURT

Eastern

District of

Oklahoma

UNITED STATES OF AMERICA

AMENDED JUDGMENT IN A CRIMINAL CASE

V.

MICHAEL LYNN CASH

Case Number: CR-11-00057-001-JHP

USM Number: 09304-078

Matthew McLain

Defendant's Attorney

Date of Original Judgment: October 10, 2012
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
☒ Direct Motion to District ☒ 28 U.S.C. § 2255 or
☐ 18 U.S.C. § 3559(c)(7)
☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.
☒ was found guilty on count(s) 1, 2 and 3 of the Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(1) and 841(b)(1)(C)	Possession with Intent to Distribute Methamphetamine	March 22, 2011	1
18:924(c)(1)(A)	Possession of a Firearm in Furtherance of a Drug Trafficking Crime	March 22, 2011	2
18:922(g)(1) and 924(e)	Felon in Possession of a Firearm	March 22, 2011	3

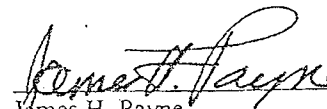
The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
☐ Count(s) _____ Indictment & Superseding Indictment are dismissed upon motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

February 1, 2017

Date of Imposition of Judgment


James H. Payne
United States District Judge
Eastern District of Oklahoma

E.O.D. 2/2/2017

Date

DEFENDANT'S
EXHIBIT

2

PAGES 1-2

DEFENDANT: Michael Lynn Cash
CASE NUMBER: CR-11-00057-001-JHP

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of: *240 months on Count 1, 120 months on Count 2, and 120 months on Count 3 of the Indictment

*The term of imprisonment imposed on Counts 1 and 3 shall be served concurrently and the term of imprisonment on Count 2 shall be served consecutive to the terms imposed on Counts 1 and 3, for a total sentence of 360 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the Bureau of Prisons evaluate the defendant and determine if the defendant is a suitable candidate for the Intensive Drug Treatment Program. Should the defendant be allowed to participate in the program, it is further recommended that the defendant be afforded the benefits prescribed and set out in 18 U.S.C. § 3621(e) and according to Bureau of Prisons' policy.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

4080
311
FOD 4-9-02

FD-244 (Rev. 6-15-85) Sheet 1 - Judgment in a Criminal Case

United States District Court

Eastern District of Texas

UNITED STATES OF AMERICA

v.

MICHAEL LYNN CASH

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 4:01CR00044-007

Clinton Broden

Defendant's Attorney

FILED

U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

APR - 9 2002

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Indictment

☐ pleaded nolo contendere to count(s)
which was accepted by the court.

☐ was found guilty on count(s)
after a plea of not guilty.

Accordingly, the Court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section

Nature of Offense

DAVID J. MALAND, CLERK
BY Samuel
DEPUTY Date Offense Count

21 U.S.C. § 846

Conspiracy to Manufacture, Distribute, or Possess with
Intent to Manufacture, Distribute or Dispense
Methamphetamine

06/14/2001

1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 2, 4, 5, 13, 14 are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. 456-89-4210

Defendant's Date of Birth: 02/09/1976

Defendant's USM No.: 09304-078

Defendant's Residence Address:

Box HC62, 94-10

03/28/2002

Date of Imposition of Judgment

Paul Brown

Signature of Judicial Officer

Durant OK 74701

Paul Brown

United States District Judge

Name & Title of Judicial Officer

Defendant's Mailing Address:

Box HC62, 94-10

U.S. DISTRICT COURT

Durant EASTERN DISTRICT OF TEXAS 74701

Date

April 9, 2002

DEFENDANT'S
EXHIBIT

3

DEFENDANT: MICHAEL LYNN CASH
CASE NUMBER: 4:01CR00044-007

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 120 month(s).

Said sentence shall run concurrent with any sentence which may imposed in cases related to this offense out of Grayson County, Sherman, Texas, Case # 477125, 59th Judicial District Court, and Case #'s 46729, 46547, 46546, & 47832, in the 15th Judicial District Court.

☒ The court makes the following recommendations to the Bureau of Prisons:
That the state institution be designated as place to serve this sentence.

- ☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district:
☐ at _____ a.m./p.m. on _____
☐ as notified by the United States Marshal:

- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☐ before 2 p.m. on _____
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

THE COURT: Michael Lynn Cash, you appear before the court today for the purpose of sentencing, having previously been found guilty on Counts 1, 2, and 3 of the indictment filed in Case No. CR-11-00057, charging you with possession with intent to distribute methamphetamine, in violation of 21 United States Code Sections 841(a) and 841(b)(1)(C); possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 United States Code Section 924(c)(1)(A); and felon in possession of a firearm, in violation of 18 United States Code Section 922(g)(4) and 924(j)(1).

In determining an appropriate sentence in this case, the court has reviewed and considered the nature and circumstances of the offense as well as the characteristics and criminal history of the defendant. Further, the court has taken into consideration the sentencing guideline calculations contained within the presentence report and the court's findings announced in open court today.

Consistent with the Supreme Court decision in *United States v. Booker*, the court recognizes it is not bound by the sentencing guideline calculations contained within the presentence report but the court has considered them

Brian P. Neil, RMR-CRR
United States District Court

1048

and finds them to be advisory in nature. The Court adopts the presentence report as the factual basis for the sentence in this matter.

It's the judgment of this court that the defendant, Michael Lynn Cash, is hereby committed to the custody of the Bureau of Prisons to be imprisoned on Count 1 for a term of 240 months, you're hereby committed to the custody of the Bureau of Prisons to be imprisoned on Count 2 for a term of 60 months; and you're hereby committed to the custody of the Bureau of Prisons to be imprisoned on Count 3 for a term of 360 months. The term imposed in Counts 1 and 3 shall be served concurrently. The term of imprisonment imposed on Count 2 shall be served consecutive to the terms imposed on Counts 1 and 3.

The court recommends that the Bureau of Prisons evaluate and determine if the defendant is a suitable candidate for the intensive drug treatment program. Should the defendant be allowed to participate in the program, it's further recommended he be afforded the benefits prescribed and set out in 18 U.S.C. Section 3621(e) and according to the Bureau of Prisons' policy.

Upon release from confinement, the

Brian P. Neil, RMR-CRR
United States District Court

1049

defendant shall be placed on supervised release for a term of three years on each of Counts 1 and 3. You shall be placed on supervised release for a term of five years on Count 2. The terms of supervised release shall be served concurrently.

Within 72 hours following your release from the custody of the Bureau of Prisons, you shall report in person to the probation office in the district to which you're released. While on supervised release, you shall not commit another federal, state, or local crime, shall not unlawfully possess a controlled substance, shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon, and shall also comply with the standard conditions as set out in the judgment.

As a condition of supervised release, you shall refrain from the unlawful use of controlled substances and submit to one drug test within 15 days of your release. Subsequent to the first test, you shall submit to at least two additional periodic drug tests. You shall submit to DNA testing as directed by the U.S. Probation Office. You shall also comply with the following special condition of supervised release.

One, that is, you shall participate in a

Brian P. Neil, RMR-CRR
United States District Court

1050

program approved by the United States Probation Office for the treatment of narcotic addiction, drug dependency, or alcohol dependency, which will include testing to determine if you have reverted to the use of drugs or alcohol. If it's determined by the probation officer that you are in need of a residential drug/alcohol treatment program, you shall participate in such treatment as directed by the probation officer and remain in treatment in that treatment facility until successfully discharged.

It is further ordered that you shall pay to the United States a special assessment of \$100 on each of Counts 1, 2, 3 for a total of \$300. Said assessment shall be paid through the United States Court Clerk for the Eastern District of Oklahoma and is due immediately. Payment of a fine in this case has been considered but will not be imposed based upon your current financial profile and the uncertainty of your projected earning ability.

This sentence is imposed pursuant to 18 U.S.C. Section 3553(a). The court has considered the U.S. Sentencing Guidelines in this case and imposes a sentence within the guideline options set forth in zone D of the Sentencing table. The

Brian P. Neil, RMR-CRR
United States District Court

1051

Cash then petitioned the Supreme Court of the United States for certiorari. The Court denied the petition on March 24, 2014. Cash v. United States, 134 S. Ct. 1569 (2014).

B

Thereafter, Cash filed this timely § 2255 motion in 2015. Cash argued the district court erred when it enhanced his sentence on Count 3 pursuant to the ACCA, even though Cash's predicate convictions did not support an ACCA sentencing enhancement.³ In response, the government agreed that Cash did not meet the requirements for an ACCA enhancement, and that the district court should not have imposed a 360-month sentence on Count 3. However, the government argued that the district court should have sentenced Cash to a total of 360 months' imprisonment, in part because Cash was eligible for a career offender enhancement on Count 2 under the Sentencing Guidelines.

Without conducting an evidentiary hearing, the district court granted Cash's § 2255 motion in part, and denied it in part. Specifically, the district court agreed with the parties that Cash was not eligible for an enhanced sentence on Count 3 because he did not have three prior qualifying convictions under the ACCA. The district court granted the motion only to reduce Cash's sentence on Count 3 to 120 months and to increase the sentence on Count 2 to 120 months. This resulted in a controlling sentence of 360 months' imprisonment.

³ Cash also argued that he received ineffective assistance from his trial counsel. We declined to grant Cash a COA on that argument and will not address it.

A

A district court has the power to "correct" a sentence within 14 days of sentencing if there is an "arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a). In its notes on the 1991 amendments to Rule 35, the Advisory Committee stated that if a defendant discovers a sentencing error and the Rule 35 period has already elapsed, the defendant may file a § 2255 motion to address "obvious sentencing errors." Fed. R. Crim. P. 35, 1991 Advisory Committee Notes; see also United States v. Palmer, 854 F.3d 39, 48 (D.C. Cir. 2017) (concluding the 1991 Advisory Committee Notes "suggest[] that correction of a sentence pursuant to Section 2255 at least encompasses some of the changes that could have been made under Rule 35 but for timing").

As the D.C. Circuit recently held, corrections for these arithmetical, technical, or other clear errors are "distinguishable from a resentencing, in which the district court has 'chang[ed] its mind about the appropriateness of the [original] sentence.'" Palmer, 854 F.3d at 51 (quoting Fed. R. Crim. P. 35, 1991 Advisory Committee Notes). In so holding, the D.C. Circuit concluded that the text of § 2255 "indicates" that "a sentence correction and resentencing . . . entail different remedies." Id. at 47 (quotation omitted). In listing potential remedies available, § 2255(b) references "resentenc[ing] . . . or correct[ing] the sentence."

Further, when making this distinction between a resentencing and sentence correction, the differences in procedural steps can be instructive. See Palmer, 854 F.3d at

In reviewing the sentencing record, the district court noted that it only cited to the Sentencing Guidelines in finding Cash eligible for a sentencing enhancement. The district court then concluded it should have imposed a 360-month controlling sentence. Rather than imposing a 300-month sentence on either Count 1 or Count 3, which would have combined with the consecutive 60-month sentence on Count 2 to create a 360-month controlling sentence, the district court directed amendment of the judgment to reflect the following sentences:

- Count 1: 240 months, to run concurrently with Count 3 [same as the PSR and the 2012 sentencing]
- Count 2: 120 months, to run consecutively after Count 1 and Count 3 [PSR recommended 60 months; 2012 sentencing was 60 months]
- Count 3: 120 months, to run concurrently with Count 1 [PSR recommended 180 to 300 months; 2012 sentencing was 360 months]

App. at 193–98; see also id. at 183.

The district court denied the remainder of Cash's § 2255 motion.

II

We granted a COA to address whether the district court's February 2017 amended judgment of conviction was a resentencing—requiring the district court to consider recent case law such as Hinkle, Mathis, and Johnson—or a correction of a technical error. In this review of the district court's partial denial of Cash's motion to vacate, set aside, or correct his sentence, we review the district court's legal rulings de novo and its findings of fact for clear error. United States v. Miller, 868 F.3d 1182, 1186 (10th Cir. 2017).

49. For instance, a resentencing includes a sentencing hearing with the defendant present and new PSR—procedural steps which are usually absent from a sentence correction. Id.

With the distinction between resentencing and a sentence correction in mind, we conclude the district court's entry of an amended judgment was only a technical correction. The district court did not conduct a sentencing hearing or receive a new PSR.

Instead, the district court corrected a technical mistake that it made at Cash's sentencing in 2012. Cash properly raised this error in his § 2255 motion. See Fed. R. Crim. P. 35(a), 1991 Advisory Committee Notes. With this opportunity to revisit Cash's sentencing, the district court recognized upon review of the sentencing transcript that it had intended to impose a 360-month term of imprisonment based on Cash's classification as a career offender under the Sentencing Guidelines. To reflect its intended sentence, the district court applied the career offender enhancement to Count 2, and simultaneously reduced Cash's sentence on Count 3.

The effect of the district court's amended judgment was essentially a judgment nunc pro tunc to correct a technical error, and not a full-blown resentencing.

B

Given that the district court merely corrected Cash's sentence we need not consider whether the district court erred in accepting the probation office's recommendation to classify Cash as a career offender under U.S.S.G. § 4B1.1(a). Even though at sentencing the district court explicitly found that Cash was a career offender

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)	
)	
Respondent/Plaintiff,)	
)	
v.)	Case No. CV-19-126-RAW
)	(CR-11-57-RAW)
MICHAEL LYNN CASH,)	
)	
Petitioner/Defendant.)	

ORDER

Before the court is the motion of the petitioner pursuant to 28 U.S.C. §2255. He has also filed an amendment (#209) arguing he was prejudiced by not receiving a resentencing hearing. Petitioner was convicted by a jury of multiple offenses. He was sentenced by Judge Payne of this court. Defendant appealed solely regarding the denial of his motion to suppress, and the decision was affirmed. *See United States v. Cash*, 733 F.3d 1264 (10th Cir.2013).

Petitioner raised sentencing error in his initial §2255 motion. Judge Payne granted the motion in part. This ruling was also affirmed. *See United States v. Cash*, 727 Fed.Appx. 542 (10th Cir.2018). Petitioner then filed a motion pursuant to Rule 60(b) F.R.Cv.P. Judge Payne denied the motion and the Tenth Circuit denied a certificate of appealability and dismissed petitioner's appeal. *See United States v. Cash*, 822 Fed.Appx. 824 (10th Cir.2020).

The government argues that this court does not have jurisdiction because this is a second and successive attempt at collateral review through §2255 which may not be filed without prior authorization from the Tenth Circuit Court of Appeals. Petitioner argues to the

contrary, citing *Magwood v. Patterson*, 561 U.S. 320 (2010), in which the Supreme Court held that where there is a “new judgment” intervening between two habeas petitions, an application challenging the resulting new judgment is not second or successive.

Judge Payne, in partially granting the previous motion, found that he had erroneously sentenced petitioner as an armed career criminal. (#24 in CV-15-117). Judge Payne reduced the “total term of imprisonment from an ACCA sentence of 420 months to a non-ACCA sentence of 360 months.” 822 Fed.Appx. at 831 n.3. Judge Payne granted the motion “only to reduce Cash’s sentence on Count 3 to 120 months and to increase the sentence on Count 2 to 120 months.” 727 Fed.Appx. at 545. The sentence was corrected without an evidentiary hearing. The Tenth Circuit has already made the following characterization: “The effect of the district court’s amended judgment was essentially a judgment nunc pro tunc to correct a technical error, and not a full-blown resentencing.” 727 Fed.Appx. at 546. This passage seems to support the conclusion that Judge Payne’s order does not constitute a “new judgment” for purposes of *Marwood*. See *In re Martin*, 398 Fed.Appx. 326 (10th Cir.2010).

In *Martin*, however, the trial court evidently corrected the sentence *sua sponte*. In *United States v. Ailsworth*, 513 Fed.Appx. 720 (10th Cir.2013), cited by petitioner, the district court granted partial relief based upon a §2255 motion. In review, the appellate court stated: “We have applied the holding in *Magwood* to conclude that a §2255 motion filed after an

amended judgment was not second or successive under §2255(h).” *Id.* at 722. In the case at bar, the sentence was also corrected based upon a §2255 motion.

This court is nevertheless persuaded that (based on the analysis undertaken by the Tenth Circuit in previous appeals involving this petitioner) the conclusion in *Martin* is applicable. The appellate court analogized petitioner’s initial §2255 to one under Rule 35 F.R.Cr.P. to address “obvious sentencing errors.” 727 Fed.Appx. at 546. It drew a distinction between “a resentencing and sentence correction.” *Id.* It concluded that “the district court’s entry of an amended judgment was only a technical correction.” *Id.* *Cf. Lightkep v. Secretary*, 2021 WL 1140221, *5 (M.D.Fla.2021)(sentence correction entered nunc pro tunc is not a new judgment).

Petitioner argues that he was entitled to a full resentencing because “the 4B1.1 Career Offender enhancement was not applied to Cash’s 924(c) Count until after the §2255 proceeding.” (#198 in 11-CR-57 at 5). Such application, however, is driven by the Guidelines text. *See U.S.S.G. §4B1.1(c)*. Moreover, the career offender finding was made at the time of the original sentencing. (*See* #24 in 15-CV-117 at 8). The Tenth Circuit has also already concluded: “Even though at sentencing the district court explicitly found that Cash was a career offender under the Sentencing Guidelines . . . Cash did not challenge this classification on direct appeal, which results in the waiver of the issue on collateral review.” 727 Fed.Appx. at 547.

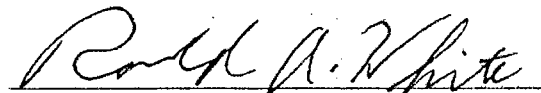
When a second or successive §2255 claim is filed in the district court without the required authorization from the Tenth Circuit, the district court may transfer the matter to the Tenth Circuit if it determines it is in the interest of justice to do so under 28 U.S.C. §1631 or it may dismiss the motion or petition for lack of jurisdiction. *See In re Cline*, 531 F.3d 1249, 1252 (10th Cir.2008). The present motion does not meet the requisites set forth in 28 U.S.C. §2255(h). This court therefore concludes that transfer to the Tenth Circuit would serve no purpose.

If the prisoner's pleading must be treated as a second or successive §2255 motion, the district court does not even have jurisdiction to deny the relief sought in the pleading. *United States v. Nelson*, 464 F.3d 1145, 1148 (10th Cir.2006). Accordingly, the motion will be dismissed.

It is the order of the court that the motion of the petitioner pursuant to 28 U.S.C. §2255 (#197) is hereby dismissed for lack of jurisdiction.

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings, the court denies a certificate of appealability.

ORDERED THIS 10th DAY OF MAY, 2021.



Ronald A. White
United States District Judge
Eastern District of Oklahoma

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,

Respondent/Plaintiff,

v.

MICHAEL LYNN CASH,

Petitioner/Defendant.

**Case No. CV-19-126-RAW
(CR-11-57-RAW)**

JUDGMENT

Pursuant to the order entered contemporaneously, the petition pursuant to 28 U.S.C.
§2255 is dismissed for lack of jurisdiction.

ORDERED THIS 10th DAY OF MAY, 2021.



Ronald A. White
United States District Judge
Eastern District of Oklahoma

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Respondent/Plaintiff,

v.

MICHAEL LYNN CASH,
Petitioner/Defendant.

Case No.: CV-19-126-RAW
(CR-11-57-RAW)

RULE 59(e) MOTION TO ALTER OR AMEND JUDGMENT

COMES NOW MICHAEL LYNN CASH ("Mr. Cash" or "Cash") Petitioner/Defendant in the above styled and numbered case. Mr. Cash seeks reconsideration of the dismissal of his 2255 motion as a manifest injustice currently exists. Mr. Cash offers the following:

POINT ONE:

A MANIFEST INJUSTICE CURRENTLY EXISTS IN THIS CASE

Rule 59(e) Standard

A party seeking relief from a final judgment under this rule must show that there is a need to correct a clear error or manifest injustice. Monge v. R.G. Petro-Mach (Grp.) Co., 701 F.3d 598, 611 (10th Cir. 2012).

The manifest injustice standard may be met where the party demonstrates that the court previously misapprehended the party's position or the controlling law. Paraclete 204 F.3d at 1012.

Introduction

In deciding that the Magwood, 561 U.S. 320 (2010), standard does not apply and that this court lacks jurisdiction to entertain Cash's 2255 motion, this court misapprehended Cash's position, relied on erroneous facts that are in dispute and unresolved, and overlooked exculpatory material facts. As a result, a manifest injustice exists and Mr. Cash respectfully requests that this Honorable court reconsider its prior ruling by applying all the correct facts with the correct arguments.

Additionally, as it stands, this case is not ripe for appellate review because Mr. Cash did not receive a reliable judicial determination on the correct issues raised.

A. MISAPPREHENSION OF MR. CASH'S POSITION

In this court's ORDER dismissing Cash's 2255, this court addressed the position that: "Petitioner argues that he was entitled to a full resentencing hearing because 'the 4B1.1 Career Offender enhancement was not applied to Cash's 924(c) Count until after the 2255 proceeding' (#198 in 11-cr-57 at 5". See "ORDER" (Dk.4), 6:19cv126 at 3.

This is an absolute mischaracterization of Mr. Cash's position resulting in a manifest injustice. That statement was made under the heading titled: "1. THIS 2255 MOTION IS NOT SECOND OR SUCCESSIVE" (#198 at 4) and was not even the complete argument for that issue. This court has completely failed to acknowledge and consider all the elements involved with the issues of this case that argues that the amended judgment resulted in a "new sentence/judgment" and the exact reasons why.

The Correct Argument

As argued multiple times throughout this entire proceeding, Mr. Cash specifically argues that this 2255 proceeding is not second or successive because he received a new sentence/judgment and that he should have received a resentencing hearing when this court changed his overall sentencing plan. He specifically argues that he received a new sentence/judgment because:

1. This court removed A.C.C.A. (924(e)) classification...after a finding, and;
2. This court added a DISCRETIONARY 4B1.1 Career Offender enhancement to his 924(c) sentence that was not pronounced at his sentencing hearing, and;
3. These modifications changed his overall sentencing plan, and;
4. Because this court did not announce any intent to enhance the 924(c) at Cash's sentencing, modifying that sentence cannot be labeled as correcting a clerical error, and;
5. Because the Tenth Circuit Court of Appeals stated in its opinion that the district court "recognized upon review of the sentencing transcript that it had intended to impose a 360- month term of imprisonment based on Cash's classification as a career offender under the Sentencing Guidelines. To reflect its intended sentence the district court applied the career offender enhancement to Count

Count 2, and simultaneously reduced Cash's sentence on Count 3." (See Attachment 1) any holding that the amended judgment was to correct a "clerical error" is in error and based on false information and deserves to be re-evaluated with the truth factoring into the equation.

The other erroneous concept that Cash was never found to be A.C.C.A. (924(e)) is in dispute as well and has greatly impacted this case and has created a great injustice to Cash. Mr. Cash has an absolute right to fundamental fairness, resolved erroneous facts, and a decision based on correct facts. In this 2255, Cash respectfully requests that this Honorable Court re-evaluate whether or not he received a new sentence based on the fact that this court enhanced his 924(c) via an amended judgment when it was NOT PRONOUNCED AT HIS SENTENCING.

POINT TWO:
THE NEED FOR AN EVIDENTIARY HEARING

An evidentiary hearing is required in this case. In Fact, this case presents an excellent example of how much a petitioner is prejudiced by not granting an opportunity to establish a case before an open court. Here, Cash's position has been mischaracterized, material facts remain in dispute and unresolved. Material facts have been ignored....

Mr. Cash has without a doubt demonstrated that if proved, he is entitled to relief. Mr. Cash should receive an evidentiary hearing to assure that the correct issues are being heard and evaluated before this court.

CONCLUSION

Mr. Cash hopes and prays that this Honorable Court GRANT this motion to Alter or Amend the ORDER and GRANT an evidentiary hearing or re-evaluate its prior ruling with the correct facts/arguments being assessed.

Respectfully Submitted,

Michael Cash 09304-078
P.O. Box 24550
Tucson, AZ. 85734

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,)	
Respondent/Appellee,)	District Court Case No.: CIV-19-126-RAW
v.)	Underlying Criminal Case No.: Cr-11-57
MICHAEL LYNN CASH,)	Eastern District of Oklahoma
Petitioner/Appellant.)	

THIS IS AN APPEAL FROM THE DISTRICT COURT'S DENIAL OF MICHAEL LYNN CASH'S PETITION PURSUANT TO 28 U.S.C. 2255 AND RULE 59(e) THE HONORABLE RONALD A. WHITE, JUDGE OF THE EASTERN DISTRICT OF OKLAHOMA, PRESIDING.

APPELLANT'S COMBINED OPENING BRIEF AND APPLICATION
FOR A CERTIFICATE OF APPEALABILITY

ORAL ARGUMENT IS NOT REQUESTED

Michael Lynn Cash
#09304-078
United States Penitentiary
P.O. Box 24550
Tucson, Az. 85734
Pro Se

STATEMENT OF THE FACTS

1. Mr. Cash was sentenced as an Armed Career Criminal (924(e)) and as a Career Offender (4B1.1) where the 924(e) enhancement controlled the overall sentence plan.
2. The sentencing Court did not apply the Career Offender enhancement to Cash's 924(c) Count(2) but instead, sentenced Cash to the very common 60 months.
3. The sentencing Court did not announce any intent to enhance Cash's 924(c) Count (2) at Cash's sentencing hearing.
4. Mr. Cash successfully brought a challenge to his 924(e)/ACCA enhancement on his Felon in Poss. of a Firearm Count (3) in a timely filed 2255.
5. The Government requested a resentencing hearing to argue that Cash remained an Armed Career Criminal despite the challenge.
6. The District Court issued an order agreeing that Cash did not qualify for 924(e) enhancements but that there was a mistake in the sentence.
7. The District Court held that the 360-month term imposed on the Felon in Possession of a Firearm Count (3) was suppose to be placed on the 924(c) Possession of a Firearm in Furtherance of a Drug Trafficking Offense Count (2).
8. The District Court ordered the Clerk to amend the judgment to make the said changes to Cash's sentence.
9. An appeal was taken where counsel argued that the amended judgment should have amounted to a resentencing and that Cash was entitled to the law in effect at the time of the amended judgment.
10. This Honorable Court found that the actions taken by the district court were inconsistent with that of a resentencing and the appeal was denied.

11. This Court also found that the corrections were consistent with correcting clerical errors based on the evidence presented and arguments made by defense counsel.

12. This Court based its decision primarily on the idea that the district court announced its intent to place the 4B1.1 Career Offender enhancement on Cash's 924(c) Count (2) which would then indicate that the changes were, indeed, the result of a clerical error.

13. Because the district court did not announce any intent to place the "discretionary" 4B1.1 Career Offender/Guideline enhancement to Cash's 924(c) Count (2), Mr. Cash was entitled to a resentencing hearing so he could have a fair opportunity to object to the new sentence.

14. Because the modifications that resulted in the amended judgment created a "new sentence", Cash argues that the district court has jurisdiction to entertain the 2255 action brought to challenge the unlawfully imposed sentence.

ISSUE FOR REVIEW

1. Whether the district court erroneously dismissed Mr. Cash's 28 U.S.C. 2255 for lack of jurisdiction.

STATEMENT OF THE CASE

On 3-22-2011, Mr. Cash was arrested from charges stemming from a traffic stop where contraband was found after a warrantless search of his Jeep. Cash was eventually indicted and convicted on three counts:

Count 1- Possession with Intent to Distribute

Count 2- Possession of a Firearm in Furtherance of a Drug Trafficking Crime

Count 3- Felon in Possession of a Firearm (U.S. V. Cash, Case No. 6:11-cr-00057-RAW-1, Indictment, Dkt. #2).

After a finding of guilt on all 3 counts, the district court imposed the following sentence:

Count 1- Possession w/ Intent to Distribute: 240 months

Count 2- Poss. of a Firearm in Furtherance (924(c)): 60 months

Count 3- Felon in Possession of a Firearm (922(g)): 360 months

Count 1 and 3 and to be served concurrently while count 3 is to be served consecutively for a total of 420 months.

A direct appeal of this initial sentence was not taken. However, through counsel, a timely filed 2255 was filed in the district court to address the 924(e)/A.C.C.A enhancement that was placed on the 922(g)- Felon in Poss. of a Firearm, Count 3, that had the "controlling" 360-month term attached to it. (See 2255 Dkt. 1, Case No.: 6:15-cv-00117)

In his motion, Mr. Cash argued that one of his 3 prior offenses did not qualify as a "serious drug offense" under 924(e) because it did not break the 10-year threshold required. The Government responded

and agreed with Mr. Cash that he was initially found to qualify for ACCA/924(e) enhancements and that it was erroneous. (See Gov. Response, Case no.: 6:15-cv-00117-JMP, Dkt. 15, pg. 1).

Additionally, the Government introduced the concept that there were clerical/technical errors in the initial sentencing scheme as well. Specifically, the Government claimed that the sentencing court mistakenly placed the 360-month term to Cash's count 3, the 922(g)- Felon in Poss. of a Firearm sentence instead of the 924(c)- Count 2 and that the sentencing court intended such

Strangely, in justifying this, the Government also claimed that Mr. Cash was never found to be an Armed Career Criminal/924(e) but yet requested a resentencing hearing to address the sentencing issue to see if other charges would qualify Cash for 924(e) Classification after Cash correctly pointed out the fact that one of the three prior offenses used did not qualify.

Nevertheless, before the district court issued an order on the 2255, the Supreme Court issued its decision in Mathis v. U.S., 136 S. Ct. 2243 (2016) which shed light on the use of the Modified Categorical Approach ("MCA") in determining whether a prior offense qualifies for enhancements. This decision was not "new law" and only reinforced the principles outlined in Descamps v. U.S., 570 U.S. 254 (2013) that involved the use of the "MCA". Mr. Cash sought leave -that was granted- to supplement this 2255 with a challenge to the improper use of the MCA in this case. (See 2255 Supplement Case No.: 6:15-cv-00117, Dkt. 20).

The district court issued its order and adopted the Government's positions that Cash did not qualify for ACCA/924(e) enhancements and that the 360-month term was suppose to be applied to Count 2

POINT ONE:

MR. CASH'S "SECOND-IN-TIME" 28 U.S.C. 2255 THAT WAS FILED
PURSUANT TO AN AMENDED JUDGMENT IS NOT SECOND OR SUCCESSIVE
AND THE "MAGWOOD" STANDARD APPLIES

For purposes of this appeal, Mr. Cash needs to demonstrate that the principles in MAGWOOD apply and that this 2255 is not "second or successive" and was erroneously dismissed by the district court. Mr. Cash must demonstrate that the sentencing modifications that resulted in the amended judgment created a "new sentence/judgment" and that any prior decision stating otherwise should be disregarded based on misinformation and ineffective assistance of counsel as prior counsel failed to correctly point out the essential facts presented within this appeal. Mr. Cash was prejudiced by prior counsel's failure to correctly argue the case as this Honorable Court would have found that the sentencing modifications did, in fact, create a new sentence/judgment. In the alternative, even if this Court finds that it cannot revisit the prior decision that the modifications addressed clerical errors, Mr. Cash argues that those types of errors require resentencing nonetheless.

THE MAGWOOD STANDARD

In MAGWOOD V. PATTERSON, 561 U.S. 320 (2010), the Supreme Court held: "where there is a new judgment intervening between two habeas petitions, an application challenging the resulting new judgment is not second or successive at all."

However, in In Re Martin, 398 Fed. Appx. 326, 327 (10th. Cir. 2010) this Court held that an amended judgment to simply correct clerical errors does not amount to a "new judgment".

1. THE AMENDED JUDGMENT CREATED A NEW JUDGMENT

Here, the sentence modifications made to Mr. Cash's sentence were of a "constitutional" level and created a new overall sentencing plan.

ACCA/924(e)

The PSR recommended that Mr. Cash be sentenced as ACCA/924(e) and at sentencing, the Government requested the same. ACCA/924(e) only requires a minimum of 15 years. (See 924(e)). Any term imposed beyond the "15 years" is discretionary after "Booker" and is a "Guideline" sentence. Mr. Cash was given 360-months on his ACCA/924(e) enhanced 922(g) Count 3 after a variance was denied. This 360-months falls within the sentencing courts discretion and because the court did announce that Mr. Cash was found to be "922(g) and 924(e)" -which is an ACCA sentence- there was no reason for Cash to believe that 360-months was not his 924(e) sentence regardless what the PSR recommends.

Regardless, Mr. Cash filed a 2255 to challenge the 924(e) classification/360-month sentence and it was found that Mr. Cash did not qualify for the enhancement because one of his 3 prior offenses do not qualify. This is a finding. The district court removed the enhancement after the challenge.

Mr. Cash argues that this alone amounts to a new sentence and he should have received a resentencing hearing like the thousands of defendants who successfully challenged ACCA/924(e) classification after Johnson issued. It is a disputed fact whether or not Cash was initially found to qualify for 924(e) enhancements and an evidentiary hearing is needed to resolve the issue.

AMENDED JUDGMENT DID NOT "CORRECT CLERICAL ERRORS"

In U.S. V. Cash, 727 Fed. Appx. 542 (2018), this Honorable Court found that the amended judgment was designed to correct clerical/technical errors. Examining the text, it is evident that this Honorable Court relied on the mistaken belief that the district court announced its intent to place the enhancement to Cash's 924(c)/Count 2 in making the decision that the modifications were designed to correct clerical errors:

"Instead, the district court corrected a technical mistake that it made at Cash's sentencing in 2012. Cash properly raised this error in his 2255 motion. See Fed.R.Crim.P. 35(a) 1991 Advisory Committee Notes.

With this opportunity to revisit Cash's sentence, the district court recognized UPON REVIEW OF THE SENTENCING TRANSCRIPT THAT IT HAD INTENDED to impose a 360-month term of imprisonment based on Cash's classification as a career offender under the Sentencing Guidelines. To reflect its intended sentence, the district court applied the career offender enhancement to Count 2 and simultaneously reduced Cash's sentence on Count 3.

The effect of the district court's amended judgment was essentially a judgment nunc pro tunc to correct a technical error, and not a full blown resentencing".

According to the text, this holding is based entirely on the mistaken belief that the sentencing court announced its intention to apply the "discretionary" 4B1.1 Guideline enhancement to Cash's 924(c). This is error and Cash has been significantly prejudiced.

For this Honorable Court to reach this decision, prior counsel was ineffective for failing to present the case as follows:

Mr. Cash was actually ENTITLED to a resentencing hearing when the district court:

1. Removed his ACCA/924(e) status after a finding, and;
2. Added 4B1.1 Career Offender Guideline enhancements to Cash's 924(c) that was not announced at his initial sentencing hearing.

It should be noted that prior counsel only argued that the amended judgment "was a resentencing" rather than the effective argument that Mr. Cash was actually "entitled" to a resentencing due to the method in which the sentencing modifications were made.

2. RULE 35 CANNOT PROVIDE AUTHORITY FOR THESE TYPES OF MODIFICATIONS

This Honorable Court has consistently held that a district court does not have authority to use Rule 35 to have a "second bite at the sentencing apple". (See U.S. V. Hendrix, 630 Fed. Appx. 816, (10th Cir. 2015)). Here, 4B1.1 Career Offender enhancements are "discretionary" and according to this Honorable Court, "a district court may not invoke Fed.R.Crim.P. 35 to revisit sentencing decisions that are discretionary, not mandatory..." This Court also held: "a district court may not use Rule 35 to re-open issues previously resolved at sentencing or to alter a sentence for substantive reasons after it has been verbally imposed. As this language suggests, this does not afford the court or the parties a second bite at the sentencing apple".

Here, the decision not to apply the 4B1.1 "Guideline" enhancement to Cash's 924(c)/Count 2, is a discretionary matter that cannot be disturbed via Rule 35 without a resentencing hearing

3. THIS IS MR. CASH'S FIRST COLLATERAL ATTACK ON NEW SENTENCE

As argued within, the modifications made to Cash's sentence created a "new sentence/judgment". This 2255 is the first collateral attack on the new sentence/judgment for Mr. Cash and the district court has jurisdiction to entertain the motion on the merits. This action should be remanded back to the district court with instructions to decide the actual merits of the motion under the "MAGWOOD" standard.

4B1.1 CAREER OFFENDER ENHANCEMENT WAS ADDED
TO MR. CASH'S 924(c)

At sentencing, Mr. Cash was found to qualify for a 4B1.1 Career Offender enhancement. The sentencing court did not apply this discretionary enhancement to Cash's 924(c)-Count 2. Instead, the court imposed the very, very, common "60-months" for Mr. Cash's 924(c) with absolutely no mention of applying the enhancement to the 924(c) Count and only applied it to Count 1, Possession with Intent to Dist.

Because 4B1.1 Career Offender enhancements are "Guideline" and thus discretionary after "Booker", the district court was well within its authority to decline to apply the enhancement to the 924(c)/Count 2 at Mr. Cash's sentencing.

After Mr. Cash successfully argued the 924(e)/ACCA enhancement and had the ACCA classification and the 360-month sentence removed from his 922(g)/Count 3, via his first 2255, the district court held that at sentencing, a mistake was made and the 360-month term was placed on the wrong charge and that it was suppose to be placed on Cash's 924(c) -Count 2-. Mr. Cash argues that NOWHERE IN THE RECORD/SENTENCING TRANSCRIPTS DOES THE SENTENCING COURT ANNOUNCE ANY INTENT TO PLACE THE DISCRETIONARY ENHANCEMENT TO CASH'S 924(C)/COUNT 2. (See Sentencing Transcripts Ex.____) THIS IS AN UNDISPUTED FACT.

In other words, the district court added an enhancement to Mr. Cash's 924(c)/Count 2 via an amended judgment that was not announced at Cash's sentencing that denied Cash of any opportunity to present objections. These modifications deny basic due process and fundemantal fairness to Cash and should not be regarded as "correcting clerical errors".

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

November 2, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL LYNN CASH,

Defendant - Appellant.

No. 21-7033
(D.C. Nos. 6:19-CV-00126-RAW &
6:11-CR-00057-RAW-1)
(E.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES, McHUGH, and MORITZ**, Circuit Judges.

Michael Lynn Cash, proceeding pro se, seeks a certificate of appealability (COA) to appeal from the district court's order dismissing his 28 U.S.C. § 2255 motion because it was an unauthorized second or successive § 2255 motion. We deny a COA.

I. Background

In 2012, Mr. Cash was convicted of possession with intent to distribute methamphetamine (Count 1), possession of a firearm in furtherance of a drug trafficking crime (Count 2), and being a felon in possession of a firearm (Count 3). The probation office recommended a sentence of 360 months' imprisonment. The district court,

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

however, sentenced Mr. Cash to 420 months in prison as follows: 240 months on Count 1 and 360 months on Count 3, to run concurrently; and 60 months on Count 2, to run consecutively to the terms imposed on Counts 1 and 3. Mr. Cash did not object to his sentence and did not raise any sentencing challenges on direct appeal; he only challenged his convictions. We affirmed the district court's judgment.

In 2015, Mr. Cash filed a § 2255 motion, asserting that he received ineffective assistance from his trial counsel and that the district court erred when it enhanced his sentence on Count 3 pursuant to the Armed Career Criminal Act (ACCA) because his predicate convictions did not support that enhancement. In response, the government agreed that Mr. Cash did not meet the requirements for an ACCA enhancement and that the district court should not have imposed a 360-month sentence on Count 3. But the government argued that the district court should have sentenced him to a total of 360 months' imprisonment because he was eligible for a career offender enhancement on Count 2 under the Sentencing Guidelines.

The district court granted in part and denied in part the § 2255 motion. The district court agreed with the parties that Mr. Cash was not eligible for the ACCA enhancement on Count 3 because he did not have three prior qualifying convictions. The court noted that it had only cited to the Sentencing Guidelines in finding Mr. Cash eligible for a sentencing enhancement and the court concluded that it should have imposed a 360-month sentence. It therefore directed that the judgment be amended to impose a 360-month sentence as follows: 240 months on Count 1 (no change from initial judgment) and 120 months on Count 3 (decreased from initial judgment) to run

concurrently; and 120 months on Count 2 (increased from initial judgment), to run consecutively to the terms imposed on Counts 1 and 3. The district court denied the remainder of the § 2255 motion and Mr. Cash appealed.

We granted a COA to address whether the district court's amended judgment was a resentencing requiring the court to consider recent case law or was a correction of a technical error. We held that "[t]he effect of the district court's amended judgment was essentially a judgment nunc pro tunc to correct a technical error, and not a full-blown resentencing," and we affirmed the district court's ruling on the § 2255 motion. *United States v. Cash*, 727 F. App'x 542, 546-47 (10th Cir. 2018). We explained:

[T]he district court recognized upon review of the sentencing transcript that it had intended to impose a 360-month term of imprisonment based on Cash's classification as a career offender under the Sentencing Guidelines. To reflect its intended sentence, the district court applied the career offender enhancement to Count 2, and simultaneously reduced Cash's sentence on Count 3.

Id. at 546.¹

In 2019, Mr. Cash filed another § 2255 motion. He argued that (1) he was entitled to a resentencing like other defendants who successfully had their ACCA enhancements removed; (2) removing the ACCA enhancement and adding a career offender enhancement under the Sentencing Guidelines involved a substantive and significant modification; and (3) counsel was ineffective for failing to make the correct argument in seeking a COA to appeal the denial of his first § 2255. Although he recognized that he

¹ We declined to grant a COA on Mr. Cash's claim that he received ineffective assistance of counsel.

was filing a “second in time” § 2255 motion, Supp. R. at 43, he asserted that his motion was not second or successive under *Magwood v. Patterson*, 561 U.S. 320 (2010), because the district court “changed [his] sentence and entered an amended judgment following a partially successful §2255 motion,” Supp. R. at 44. In *Magwood*, the Supreme Court held that “where . . . there is a new judgment intervening between the two habeas petitions, an application challenging the resulting new judgment is not ‘second or successive’ at all.” *Magwood*, 561 U.S. at 341-42 (citation and internal quotation marks omitted).

The district court concluded, however, that the amended judgment did not constitute a new judgment for purposes of *Magwood*. Because Mr. Cash filed a second § 2255 motion without authorization from this court, the district court dismissed it for lack of jurisdiction. He now seeks a COA to appeal from that procedural ruling.

II. Discussion

To appeal the district court’s dismissal of his § 2255 motion as second or successive and unauthorized, Mr. Cash must obtain a COA. *See United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008). To obtain a COA where, as here, a district court has dismissed a filing on procedural grounds, the movant must show both “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). We need not address the constitutional question if we conclude that reasonable jurists would not debate the district court’s resolution of the procedural one. *Id.* at 485.

A prisoner may not file a second or successive § 2255 motion unless he first obtains an order from the circuit court authorizing the district court to consider the motion. 28 U.S.C. § 2255(h); *id.* § 2244(b)(3)(A). Absent such authorization, a district court lacks jurisdiction to address the merits of a second or successive § 2255 motion. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam).

In Mr. Cash's appeal from the denial of his first § 2255, we determined that the district court's amended judgment was intended to correct a technical error and did not constitute a resentencing. In our decision in *In re Martin*, 398 F. App'x 326, 327 (10th Cir. 2010), we distinguished the circumstances in *Magwood*—where “the state trial court held new sentencing proceedings and then entered a new judgment at the conclusion of those proceedings”—from the case at bar where “there were no new proceedings resulting in a new judgment” and “the amended judgment merely corrected a clerical error.” Relying on our decision in Mr. Cash's earlier appeal and our decision in *Martin*, the district court concluded that the amended judgment did not constitute a new judgment under *Magwood* because there were no new proceedings and the amended judgment was only a technical correction. Because Mr. Cash had not received authorization to file a second or successive § 2255 motion, the district court dismissed his second § 2255 motion for lack of jurisdiction.

In his COA brief, Mr. Cash argues that the amended judgment did not correct clerical or technical errors, although he concedes that this court found to the contrary in his earlier appeal. He asserts that this court relied on a “mistaken belief” about the sentencing proceedings, this error significantly prejudiced him, and prior counsel was

ineffective for failing to properly present the case. Aplt. COA Br. at 9. He continues to assert that the modifications that were made to his sentence created a new judgment and therefore the district court has jurisdiction to entertain his second-in-time § 2255 motion because it is his first collateral attack on his new judgment.

Mr. Cash sought rehearing of our decision on his earlier appeal, but we denied his motion. He did not file a petition for a writ of certiorari with the Supreme Court. But he now suggests that we should disregard our prior decision because it was “based on misinformation and ineffective assistance of counsel.” *Id.* at 6. He cites no authority that would permit us to do so. He also suggests in the alternative that “if this Court finds that it cannot revisit the prior decision that the modifications addressed clerical errors, Mr. Cash argues that those types of errors require resentencing nonetheless.” *Id.* Mr. Cash has not provided any authority that would permit him to raise a claim of sentencing error in a second § 2255 motion without first receiving authorization from this court.

III. Conclusion

Mr. Cash has failed to show that reasonable jurists would debate the correctness of the district court’s procedural ruling to dismiss his second § 2255 motion for lack of jurisdiction as an unauthorized second or successive § 2255 motion. Accordingly, we deny a COA and dismiss this matter.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

January 3, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL LYNN CASH,

Defendant - Appellant.

No. 21-7033
(D.C. Nos. 6:19-CV-00126-RAW & 6:11-
CR-00057-RAW-1)
(E.D. Okla.)

ORDER

Before **HOLMES**, **McHUGH**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition also is denied.

Appellant's motion to clarify is denied as moot.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

APPENDIX

G

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

<div style="border-bottom: 1px solid black; height: 1.2em; margin-bottom: 10px;"></div> <div style="text-align: center; padding: 10px 0;">Petitioner - Appellant,</div> <div style="text-align: center; padding: 10px 0;">v.</div> <div style="border-bottom: 1px solid black; height: 1.2em; margin-top: 10px;"></div> <div style="text-align: center; padding: 10px 0;">Respondent - Appellee.</div>	<div style="padding-top: 40px;">Case No.</div> <div style="padding-top: 100px;">Appellant's Combined Opening Brief and Application for a Certificate of Appealability</div>
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INSTRUCTIONS TO LITIGANTS PROCEEDING WITHOUT COUNSEL

The court will accept a completed copy of this form as a combined opening brief and application for a certificate of appealability. You may attach additional pages as needed. In the alternative, you may prepare your own combined opening brief and application for a certificate of appealability.

Your combined opening brief and application for a certificate of appealability must include all the arguments you intend to make on appeal. Citations to legal authorities (cases, statutes, etc.) are encouraged but not required. The purpose of an appeal is to determine if the district court erred in its decision-making based on the arguments, pleadings, and evidence that were submitted to that court. This court generally does not consider new evidence and will base its decision on the existing district court record. **Because you are proceeding without an attorney, the record of proceedings from the district court has been or will be prepared from the district court where your case was heard. You are not required to attach district court documents to your combined opening brief and application for a certificate of appealability.**

If the district court did not issue an order granting a certificate of appealability on an issue or issues you wish to raise with this court on appeal, you must show you are entitled to a certificate of appealability. To do so, you must make a "substantial showing of the denial of a constitutional right." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). This generally requires a "showing that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." 28 U.S.C. § 2253(c); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

APPENDIX H

10. Did you appeal the result of any action taken on your federal motion? (Use extra pages to reflect additional motions if necessary.)

(1) First Motion: NO () YES (☒) Appeal No. _____

(2) Second Motion: NO () YES () Appeal No. _____

(3) Third Motion: NO () YES () Appeal No. _____

11. If you did **not** appeal from the adverse action on any motion, explain briefly why you did not.

n/a

12. State **concisely** every ground on which you **now** claim that you are being held unlawfully. Summarize **briefly** the **facts** supporting each ground.

Ground One: See Memorandum of Law Please

Supporting **FACTS** (tell your story briefly without citing cases or law):

See Memorandum of Law Please

Was this claim raised in a prior motion? YES () NO (☒)