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United States Court of Appeals
For the Eighth Circuit

No. 24-3517

John Merced Lozano

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the Western District of Missouri - St. Joseph

Submitted: December 16, 2025
Filed: March 27, 2026

Before GRUENDER, KELLY, and ERICKSON, Circuit Judges.

GRUENDER, Circuit Judge.

In 2005, John Lozano was convicted of multiple federal felonies. Because he had prior convictions, including a Missouri marijuana-related felony conviction, he was a career offender under the sentencing guidelines and was subject to an enhanced advisory sentencing guidelines range. Lozano was sentenced to 322 months' imprisonment. In 2023, Missouri set aside his prior marijuana conviction. Less than one year later, Lozano filed a motion to vacate and correct his sentence

under 28 U.S.C. § 2255, arguing that in light of Missouri’s decision, his marijuana conviction should not have counted towards whether he was a career offender under the guidelines. The Government filed a motion to dismiss, which the district court¹ granted. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

In 2005, Lozano pleaded guilty to four federal felony counts.² Because of his prior felony convictions, Lozano’s Presentence Investigation Report (“PSR”) designated him as a career offender. Given this designation, the PSR calculated Lozano’s advisory sentencing guidelines range to be 322 to 387 months’ imprisonment. The district court adopted this calculation and sentenced Lozano to 322 months’ imprisonment. One of Lozano’s prior felony convictions was a Missouri marijuana-related conviction. Without that prior conviction, Lozano would not have been a career offender under the guidelines, and therefore he would not have been subject to an enhanced advisory sentencing guidelines range.

In 2022, Missouri ratified a constitutional amendment (the “Amendment”) legalizing certain marijuana-related activities and directing state courts to expunge convictions for certain nonviolent marijuana offenses. *See* Mo. Const. art. XIV, § 2.10. Specifically, the Amendment provides that certain marijuana-related activities “are not unlawful and shall not be an offense under state law.” Mo. Const. art. XIV, § 2.10(1). The Amendment then provides that: “[a]n expungement order shall be legally effective immediately and . . . the conviction and sentence shall be vacated as legally invalid.” Mo. Const. art. XIV, § 2.10(8)(b). Pursuant to the

¹The Honorable Gary A. Fenner, United States District Judge for the Western District of Missouri.

²These felonies were: conspiracy to distribute and possess with intent to distribute methamphetamine, 21 U.S.C. § 841(a)(1), (b)(1)(A); being a felon in possession of firearms and ammunition, 18 U.S.C. §§ 922(g)(1), 924(a)(2); carrying firearms during and in relation to a drug trafficking crime, 18 U.S.C. § 924(c)(1)(A)(I); and criminal forfeiture, 21 U.S.C. § 853.

Amendment, in August 2023, a Missouri court issued an expungement order, vacating Lozano’s marijuana conviction. Less than one year later, Lozano filed a 28 U.S.C § 2255 motion, asking the district court to vacate his federal sentence and resentence him because Missouri had set aside the conviction that had qualified him as a career-offender under the guidelines.³ That motion is the subject of this case.

The Government moved to dismiss Lozano’s motion. The Government argued that this motion was “second or successive” because Lozano had previously filed § 2255 motions in 2009 and 2016. Thus, the Government concluded, to file the motion, Lozano needed to satisfy certain additional statutory requirements, *see* § 2255(h), which he had not done. The Government also argued that the Missouri expungement order would not have affected Lozano’s advisory sentencing guidelines range because Missouri had issued the order not due to innocence, legal error, or constitutional invalidity, but to give Lozano a fresh start.

The district court granted the Government’s motion to dismiss, agreeing with the Government that (1) Lozano’s motion was second or successive, and (2) the Missouri expungement order would not have affected Lozano’s advisory sentencing guidelines range because the order was not based on innocence, legal error, or constitutional invalidity. We granted a certificate of appealability, enabling Lozano to bring this appeal of the dismissal of his § 2255 motion.⁴ *See* § 2253(c)(1)(B).

II. Discussion

As we indicated in the certificate of appealability, Lozano’s appeal raises two questions: first, whether his § 2255 motion is “second or successive” and therefore subject to § 2255(h)’s certification requirements; second, whether he is correct that the Missouri expungement order warrants that he be resentenced under § 2255. We

³Lozano’s motion was timely under § 2255(f)(4).

⁴Contrary to the Government’s characterization, our February 26, 2025 order constituted a certificate of appealability.

hold that Lozano’s § 2255 motion is not second or successive, but that the Missouri expungement order does not warrant that he be resentenced under § 2255.

A.

Under § 2255, a prisoner may file a motion to “vacate, set aside, or correct [his] sentence” if the sentence is “subject to collateral attack,” such as if it “was imposed in violation of the Constitution or laws of the United States.” § 2255(a). Through a § 2255 motion, a prisoner may challenge his sentence if the prisoner was sentenced as a career offender under the guidelines because of a subsequently vacated prior conviction. *See, e.g., Johnson v. United States*, 544 U.S. 295, 298-99, 303 (2005). In his § 2255 motion, Lozano seeks resentencing because his prior marijuana conviction—which made him a career offender under the guidelines—was “vacated as legally invalid” pursuant to the Amendment.

Lozano filed § 2255 motions in 2009 and 2016, making this his third § 2255 motion. If a prisoner’s § 2255 motion is a “second or successive” motion, then “a panel of the appropriate court of appeals” must certify that the motion contains either:

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

§ 2255(h)(1)-(2). Lozano’s current § 2255 motion—which centers on the Amendment and a Missouri court’s consequent expungement order—contains neither. Indeed, Lozano does not attempt to argue on appeal that his motion could survive if it were second or successive. Hence, our threshold question is whether Lozano’s motion is second or successive.

The district court determined that it was. We review that determination *de novo*. See *United States v. Sellner*, 773 F.3d 927, 931 (8th Cir. 2014). The phrase “second or successive” is “a term of art, which is not self-defining.” *Banister v. Davis*, 590 U.S. 504, 511 (2020). The phrase does not simply refer to all § 2255 motions made “second or successively in time” following an initial § 2255 motion. *Id.* Instead, as the Supreme Court instructs us, we interpret this phrase by “explor[ing] historical habeas doctrine and practice” and the purposes underlying the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). See *id.* at 512. “The statute’s design is to further the principles of comity, finality, and federalism.” *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007) (citation modified). Its restrictions on successive habeas petitions “constitute a modified res judicata rule, a restraint on what used to be called in habeas corpus practice ‘abuse of the writ.’” See *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998). Those provisions exist to “conserve judicial resources, reduce piecemeal litigation, and lend finality to state court judgments within a reasonable time.” See *Banister*, 590 U.S. at 512 (citation modified).

Applying these principles, the Supreme Court in *Panetti* established that a prisoner may raise a newly ripe *Ford* claim “for the first time in a petition filed after the federal courts have already rejected the prisoner’s initial habeas application.” 551 U.S. at 945. In a *Ford* claim, a prisoner sentenced to death alleges that he is incompetent to be executed because of his current mental condition. See *id.* at 934-35 (citing *Ford v. Wainwright*, 477 U.S. 399, 410 (1986)). A second-in-time application presenting a newly ripe *Ford* claim is not second or successive. *Id.* at 945. This is because “claims of incompetency to be executed remain unripe at early stages of the proceedings,” meaning that filing such an application does not constitute “an abuse of the writ.” See *id.* at 947. Further, filing such an application does not implicate “AEDPA’s concern for finality,” because federal courts would be unable to resolve a *Ford* claim at the time of a prisoner’s initial habeas application. See *id.* at 946. And “[i]nstructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not

conserve judicial resources, reduce piecemeal litigation, or streamline federal habeas proceedings.” *Id.* (citation modified).⁵

Contrary to the Government’s position, the Supreme Court’s reasoning applies to other newly ripe claims—like Lozano’s. As the Supreme Court later noted, *Panetti* created an exception “for a second application raising a claim that would have been unripe had the petitioner presented it in his first application.” *See Magwood v. Patterson*, 561 U.S. 320, 332 (2010) (citing *Panetti*, 551 U.S. at 944). Accordingly, we have broadly held—as we do again here—that “a petitioner’s § 2255 motion presenting claims that had not yet arisen at the time of his first § 2255 motion [is] not ‘second or successive’ for purposes of AEDPA.” *See Sellner*, 773 F.3d at 930-31; *accord Deroo v. United States*, 709 F.3d 1242, 1244 (8th Cir. 2013) (citing *Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003) (en banc)). Lozano’s current claim is based on his 2023 Missouri expungement; it only became ripe years after his previous § 2255 motion. Like a newly ripe *Ford* claim, Lozano’s claim “would not be barred under any form of res judicata,” because he “brought his claim in a timely fashion, and it has not been ripe for resolution until now.” *See Stewart*, 523 U.S. at 645. A court could not have resolved it at the time of his first § 2255 motion. And we must consider the “practical effects” of holding that Lozano’s only opportunity to bring his current claim was back when he filed his first § 2255 motion—in 2009. *See Panetti*, 551 U.S. at 945-46. Barring Lozano’s claim would “instruct[] prisoners to file premature claims,” giving rise to the same litany of judicial-resources concerns discussed in *Panetti*. *See id.* at 946.

⁵The Court in *Panetti* also noted that “frivolous” and “last-minute” *Ford* claims “can be dismissed in the regular course,” as, “for instance,” a *Ford* claimant must make a “threshold preliminary showing” that “his current mental state would bar his execution.” 551 U.S. at 946-47, 934. Although other newly ripe claims might not require any threshold preliminary showing, they too can be dismissed in the regular course. Indeed, the Court extended its interpretation of AEDPA to newly ripe claims generally, stating: “[w]e are hesitant to construe [the] statute . . . in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party.” *Id.* at 947.

The Government argues that *Ford* claims are unique because they involve “contingent facts” that “come into existence after sentencing.” The Government does not clearly define what contingent facts are, and we have found the term nowhere in AEDPA case law. Nevertheless, we imagine that if any claim involved contingent facts, it would be Lozano’s. When Lozano filed his first § 2255 motion in 2009, the fact that Missouri would eventually expunge his prior marijuana conviction was not just unknown to him, but *unknowable* to him. He had no idea when, or if, his conviction would eventually be expunged. Even on the Government’s own terms, Lozano’s claim falls squarely within the Supreme Court’s exception for second-in-time motions containing newly ripe claims.

The Government also argues that, in *Jones v. Hendrix*, 599 U.S. 465 (2023) and *Rivers v. Guerrero*, 605 U.S. 443 (2025), the Supreme Court reversed course from this exception and held that *any* § 2255 motion filed after an initial § 2255 motion is second or successive. In both *Jones* and *Rivers*, a prisoner who had already filed an application for habeas relief filed a subsequent application, and the Court labeled the subsequent application as second or successive. *See* 599 U.S. at 469-71; 605 U.S. at 459. To the Government, these cases indicate that the exception to second and successive claims recognized by *Panetti* no longer remains good law.

But if the Supreme Court overruled the *Panetti* line of cases, it certainly never said so in *Jones* and *Rivers*. In *Jones*, the Court evaluated the AEDPA provisions restricting second or successive motions. *See generally* 599 U.S. at 476-92. The Court did not discuss what makes a § 2255 motion second or successive in the first place. *See id.* at 469-71. The Government notes that Justice Thomas, who wrote *Jones*, had dissented in *Panetti* and expressed there that “the phrase ‘second or successive’ mean[s] . . . any subsequent federal habeas application.” *See* 551 U.S. at 964 (Thomas, J., dissenting). But it does not follow, as the Government concludes, that *Jones* implicitly adopted Justice Thomas’s *Panetti* dissent through shared authorship alone. Besides, Justice Thomas also wrote *Magwood*, where the Court concluded that a prisoner’s second-in-time application was not second or successive. *See* 561 U.S. at 342.

In *Rivers*, the Court focused on whether a prisoner’s second-in-time application is second or successive if the prisoner’s initial application is still on appeal. See 605 U.S. at 454-57. True, as the Government emphasizes, *Rivers* asserted that a “second-in-time application can only proceed” if it satisfies AEDPA’s restrictions on second or successive applications. See *id.* at 450. But “the language of an opinion is not always to be parsed as though we were dealing with the language of a statute.” *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 373 (2023) (citation modified). Instead, it “must be read with a careful eye to context.” *Id.* at 374. In context, *Rivers*’s broad assertion was not absolute. To wit, *Rivers* later discussed certain exceptions where a second-in-time motion would not be second or successive. See 605 U.S. at 453-54 (discussing amended habeas petitions filed before a judgment and motions filed under Fed. R. Civ. P. 59(e)). And contrary to the Government’s conclusion, *Rivers* did not suggest that these are the *only* such exceptions. *Rivers* also offered the more flexible holding that “[o]nce the judgment has been entered with respect to the initial habeas petition, a second-in-time filing that makes new habeas claims *generally* qualifies as a second or successive petition.” 605 U.S. at 457 (emphasis added). *Rivers* thus does not reject the Court’s previous exceptions to the general rule that second-in-time motions are second or successive.

Finally, the fact that the second-in-time applications in *Jones* and *Rivers* were second or successive does not mean that Lozano’s must be also. *Jones* and *Rivers* never discussed whether the prisoners’ claims in those cases, unlike Lozano’s here, had already arisen when the prisoners filed their earlier applications. See 599 U.S. at 469-71; 605 U.S. at 452-59. Even if the Government were correct that *Jones* and *Rivers* “appear[ed] to rest on reasons rejected in some other line of decisions,” we would still “follow the case which directly controls, leaving to [the] Court the prerogative of overruling its own decisions.” See *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Adhering to the Supreme Court’s directly controlling precedent, we recite our familiar refrain that a § 2255 motion containing a newly arisen claim, like Lozano’s motion, is not second or successive. See *Sellner*, 773 F.3d at 930-31.

B.

Although we disagree with the district court's determination that Lozano's § 2255 motion is second or successive, we nonetheless agree with the district court's decision to deny his motion. Because the district court denied Lozano's § 2255 motion without an evidentiary hearing, we affirm only if our *de novo* review persuades us that "the motion and the files and records of the case conclusively show that [Lozano] is entitled to no relief." *See Holloway v. United States*, 960 F.2d 1348, 1351 (8th Cir. 1992). Here, Lozano claims that because Missouri set aside his prior marijuana conviction, the conviction should not have counted towards his career-offender designation under the guidelines. But as the district court recognized, that simply is not true.

The guidelines prescribe which of a defendant's prior convictions count towards whether that defendant should be designated as a career offender. *See* U.S.S.G. §§ 4A1.2; 4B1.1(a); 4B1.2 cmt. n.3. In relevant part, § 4A1.2, cmt. n.10 (the "Application Note") instructs that convictions "set aside or . . . pardoned for reasons unrelated to innocence or errors of law . . . are to be counted" towards a career-offender designation. *See* § 4A1.2, cmt. n.10. The Application Note adds: "However, expunged convictions are not counted." *See id.* (citing § 4A1.2(j)).

"[T]he Guidelines do not expressly define the term 'expunged.'" *United States v. Townsend*, 408 F.3d 1020, 1023 (8th Cir. 2005). But we have observed that "when determining whether a conviction is 'expunged' under the guidelines, a court must examine the 'basis' for the expunction." *Id.* at 1024; *see also id.* ("[A] state's use of the term 'expunge' is not controlling in determining whether a conviction is properly included in calculating a defendant's criminal history category."). In *Townsend*, we drew on language from elsewhere in § 4A1.2 to define expunged convictions—for guidelines purposes—as those: "(1) reversed or vacated due to legal errors or later-discovered evidence exonerating the defendant, or (2) ruled constitutionally invalid." *See id.* at 1023 (citing § 4A1.2, cmt. n.6).

Lozano argues that under *Townsend*'s definition of expunged convictions, his prior marijuana conviction was expunged and that the conviction therefore should not count towards his career offender designation. This argument confronts an immediate obstacle: "the obvious purpose" behind Missouri's decision to set aside his conviction was "to give a defendant a fresh start, not to correct errors of law or vindicate innocence." *See United States v. Dubovsky*, 279 F.3d 5, 10 (1st Cir. 2002) (citation modified). Indeed, Lozano conceded at oral argument that Missouri's reasons for setting aside his prior conviction were unrelated to legal error or innocence. And so, Lozano argues that his conviction was expunged because it was "ruled constitutionally invalid"—first by the people of Missouri, who ratified the Amendment, and then by a Missouri court, which vacated his conviction pursuant to the Amendment.

But Lozano stretches the meaning of constitutional invalidity beyond what *Townsend* and the guidelines' plain language can bear. Constitutional invalidity, in this context, refers to constitutional *error*—a type of legal error. Although expunged convictions do not count towards a defendant's criminal history, we "[n]evertheless . . . must" count convictions set aside for reasons unrelated to innocence or errors of law. *See United States v. Martinez-Cortez*, 354 F.3d 830, 832 (8th Cir. 2004). *Townsend* did not carve an exception into this rule for convictions set aside by state constitutions. Instead, "*Townsend* is consistent with the vast majority of circuit court decisions that considered this issue and concluded that, 'expungement within the meaning of the Guidelines's structure is best determined by considering whether the conviction was set aside because of innocence or errors of law.'" *See United States v. Nelson*, 589 F.3d 924, 925 (8th Cir. 2009) (quoting *Dubovsky*, 279 F.3d at 8-9).⁶

⁶Several circuits have clarified that under the Application Note, expunged convictions do not include those set aside for reasons unrelated to innocence or error of law. *See, e.g., Dubovsky*, 279 F.3d at 8-10; *United States v. Ashburn*, 20 F.3d 1336, 1343 (5th Cir. 1994) *opinion reinstated in part on reh'g*, 38 F.3d 803, 807 (5th Cir. 1994); *United States v. Shor*, 549 F.3d 1075, 1078 (6th Cir. 2008); *United States v. Stowe*, 989 F.2d 261, 263 (7th Cir. 1993); *United States v. Hayden*, 255 F.3d 768, 770-71 (9th Cir. 2001); *United States v. Hines*, 133 F.3d 1360, 1363-65 (10th Cir. 1998); *United States v. McDonald*, 991 F.2d 866, 871 (D.C. Cir. 1993).

Indeed, each case Lozano cites as an example of constitutional invalidity describes an example of constitutional error. In *United States v. Dixon*, 360 F.3d 845 (8th Cir. 2004), a prisoner's prior convictions were constitutionally invalid because a prosecutor had violated the due process clause in obtaining them. *See id.* at 846-47. In *United States v. Williams*, 131 F.4th 652 (8th Cir. 2025), a prisoner's prior convictions were pursuant to a statute that violated the Second Amendment. *See id.* at 659-60. In *United States v. Moore*, No. 99-40436, 1999 WL 1338421 (5th Cir. Dec. 28, 1999), the court analyzed whether a prior conviction violated state and federal prohibitions on double jeopardy. *See id.* at *1 (concluding that it did not). And in *United States v. Tucker*, 404 U.S. 443 (1972), the prior convictions were obtained in violation of the prisoner's right to counsel. *See id.* at 447-48.⁷ Conversely, Missouri set aside Lozano's conviction not due to constitutional error, but to give him a fresh start. None of Lozano's cases indicate that his conviction was ruled constitutionally invalid as understood in *Townsend*.

Therefore, Lozano's prior marijuana conviction was not expunged for guidelines purposes, and his claim that he should not have been designated as a career offender under the guidelines is without merit.

III. Conclusion

For the foregoing reasons, we affirm.⁸

⁷Further, *Williams* and *Tucker* did not discuss the guidelines. *See generally*, 131 F.4th at 654-661; 404 U.S. at 443-49.

⁸We grant Lozano's Motion to Supplement the Record. *See* Fed. R. App. P. 10(e)(2)(C). Further, we take judicial notice of the materials contained in the Government's Motion to Supplement the Record, *see Stutzka v. McCarville*, 420 F.3d 757, 760 n.2 (8th Cir. 2005), and therefore deny that motion as moot.

KELLY, Circuit Judge, concurring.

I agree Lozano’s instant habeas petition is not second or successive, and thus, concur in Part A. I also concur in Part B, but only because precedent binds us to the result.

According to the Guidelines, “[s]entences for expunged convictions are not counted[.]” USSG § 4A1.2(j) (Nov. 2024). As the court notes, the Guidelines do not define “expunged.” We have said, however, that expunged convictions “appear to be those (1) reversed or vacated due to legal errors or later-discovered evidence exonerating the defendant, or (2) ruling constitutionally invalid.” Townsend, 408 F.3d at 1023 (citing USSG § 4A1.2, comment. (n.6)).

But this language comes from the Guidelines commentary addressing a specific set of prior sentences: sentences resulting from “Reversed, Vacated, or Invalidated Convictions.” USSG § 4A1.2, comment. (n.6) (“Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted.”). Commentary note 6 says nothing about “expunged convictions.”

Instead, § 4A1.2 carves out “expunged convictions” as a distinct category in the Guidelines provision itself. USSG § 4A1.2(j) (“Sentences for expunged convictions are not counted, but may be considered under [§] 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).”). Nothing in the Guidelines gives “expunged convictions” the same definition assigned to “Reversed, Vacated, or Invalidated Convictions.” See United States v. Johnson, 703 F.3d 464, 468 (8th Cir. 2013) (“We also consider the presumption against surplusage to be decisive. It is a ‘cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute.’” (quoting Williams v. Taylor, 529 U.S. 362, 404 (2000))).

There is also separate commentary about “Convictions Set Aside or Defendant Pardoned.” USSG § 4A1.2, comment. (n.10) (“A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, *e.g.*, in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted.”). This commentary acknowledges the various procedures by which a “conviction[] may be set aside” or a “defendant may be pardoned for reasons unrelated to innocence or errors of law.” *Id.* Sentences from these types of convictions do count in the calculation of a person’s criminal history under the Guidelines. But commentary note 10 expressly repeats that “expunged convictions” do not. *Id.* (“However, expunged convictions are not counted. § 4A1.2(j).”). And commentary note 10 does not define “expunged convictions” as only those listed in commentary note 6. Indeed, it does not reference note 6 at all.

In my view, this case highlights the problem with not giving “expunged convictions” its own definition in the Guidelines. Missouri has declared, by state constitutional amendment, that many activities related to marijuana “are not unlawful and shall not be an offense under state law[.]” Mo. Const. Art. XIV § 2.10(1). The Amendment also directed the state to “order the expungement” of many prior marijuana-related convictions. *Id.* § 2.10(8)(a). Pursuant to this directive, Lozano’s prior marijuana conviction was vacated and expunged. According to the Amendment, Lozano is thus “restore[d] . . . to the status [he] occupied prior to” his conviction, he is no longer “required to acknowledge” the prior conviction, and he “may deny the existence of the record [of the conviction].” *Id.* § 2.10(8)(c). In addition, the state court was required to “issue an order to expunge all records and files related to the arrest, citation, investigation, charge, adjudication of guilt, criminal proceedings, and probation related to [Lozano’s] sentence.” *Id.* § 2.10(8)(b).

The expungement of Lozano’s prior conviction may not have been related to innocence, error of law, exoneration based on later-discovered evidence, or federal

constitutional invalidity. But it is difficult to characterize it as anything other than an “expunged conviction.” See Expunge, Black’s Law Dictionary (12th ed. 2024) (“To remove from a record, list, or book; to erase or destroy[.]”). If not for Townsend, I would conclude that it is.

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

No. 24-3517

John Merced Lozano

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - St. Joseph
(5:24-cv-06077-GAF)

ORDER

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

June 03, 2026

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

/s/ Susan E. Bindler

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST JOSEPH DIVISION**

JOHN MERCED LOZANO,	)	
	)	
Movant,	)	
	)	Case No. 5:24-cv-06077-GAF
vs.	)	Crim. Nos. 5:05-cr-06032-GAF-1
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

**ORDER DISMISSING AND DENYING MOVANT’S MOTION UNDER 28 U.S.C. § 2255,
DENYING A CERTIFICATE OF APPEALABILITY, AND DISMISSING CASE**

Movant, who is incarcerated at the FCI Butner in Butner, North Carolina, pursuant to a conviction and sentence entered in the above-cited criminal case, has filed *pro se* a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Doc. 1. Respondent contends the motion is second or successive, and otherwise fails on the merits. Doc. 3. This case was previously dismissed without prejudice due to Movant’s failure to file a response as ordered. Doc. 6. Movant has since filed a response and motion to reopen this case. Docs. 8, 9. The Court grants Movant’s motion to reopen the case, dismisses and denies Movant’s § 2255 motion because it is an unauthorized second or successive motion and otherwise fails on the merits, denies a certificate of appealability, and dismisses this case.¹

I. Background

On December 22, 2005, Movant was sentenced following a guilty plea to: (1) conspiracy to distribute illegal drugs, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846; (2) felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and (3) carrying a firearm during a drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A). Crim. Doc. 103.² This Court sentenced Movant to 322 months’ imprisonment. Crim. Doc. 103. Movant appealed to the Eighth Circuit, which affirmed the judgment. Crim. Doc. 177. This Court

¹ Movant is not entitled to an evidentiary hearing. *See Roundtree v. United States*, 751 F.3d 923, 925 (8th Cir. 2014) (a Section 2255 movant is not entitled to an evidentiary hearing where “the motion, files, and record conclusively show he is not entitled to relief.”) (citation and internal quotation omitted).

² “Crim. Doc.” refers to the docket number entries in Movant’s criminal case, Case No 5:05-cr-06032-GAF-1. “Doc.” refers to the docket number entries in Movant’s associated civil case, Case No 5:24-cv-06077-GAF. Page number citations refer to the page numbers assigned by the CM/ECF electronic docketing system.

then denied Movant's first motion to vacate his sentence under 28 U.S.C. § 2255. Crim. Doc. 185. In 2016, Movant filed a second motion to vacate his sentence under § 2255, which this Court denied. Crim. Doc. 203. Movant also sought certification to file a second or successive § 2255 motion with the Eighth Circuit, which was denied. *Lozano v. United States*, No. 16-2939 (8th Cir. Oct. 24, 2017). Movant now brings a successive § 2255 motion contending that one of his prior convictions which qualified him as a career offender has been expunged.³

II. Discussion

Movant's sole ground for relief is that he should be resentenced because a felony considered to classify Movant as a career offender has been expunged pursuant to a change in Missouri law. Doc. 1, p. 4; Doc. 1-1, pp. 2-3. For the reasons set forth below, this Court agrees that Movant's motion is second or successive, and otherwise fails on the merits.

a. Movant's motion is second or successive

Movant has already sought § 2255 relief in the above-cited criminal case, which was denied. Crim. Doc. 185. Movant alleges his claims in this motion had not yet arisen, therefore it is not a second or successive motion to the claims he previously raised. Doc. 9, pp. 1-3. Movant relies on *Singleton v. Norris*, 319 F.3d 108 (8th Cir. 2003) and *Darville v. United States*, 447 F. App'x 94 (11th Cir. 2011), among other district court opinions for his contention. Respondent cites to *Jones v. Hendrix*, 599 U.S. 465 (2023), for the proposition that because Movant does not meet either of the two conditions allowing a second or successive § 2255 motion to proceed, it must be dismissed.

Before this Court may consider a successive motion for relief under § 2255, a prisoner "shall move in the appropriate court of appeals for an order authorizing the district court to consider the [motion]." 28 U.S.C. § 2244(b)(3)(A); *see also* § 2255(h)(1) and (2). Because Movant has not obtained the required authorization from the Eighth Circuit to proceed with his present claims, any claim for relief under § 2255 must be dismissed, without prejudice, for lack of jurisdiction.

In *Hendrix*, the Supreme Court held the **only** two conditions on which a second or successive motion may proceed is by the procedures set out in § 2255(h), and a movant may not use § 2241 as a "workaround" to these exclusive conditions. *Hendrix*, 599 U.S. at 476-77. Here, Movant argues the Court need not reach § 2255(h) because the expungement of his sentence is a

³ In 2022, Missouri passed the ballot initiative Amendment 3, which amended the Missouri constitution to: permit the purchase, possession, consumption, use, delivery, manufacture, and sale of marijuana for personal use for adults over the age of 21; allow individuals with certain marijuana-related offenses to petition for release from prison or parole and probation and have their records expunged; and enact a six percent tax on the retail price of recreational marijuana. *See* Mo. Const. art. XIV, § 2. (Nov. 8, 2022).

fact that was not available at the time of his original § 2255 motion, and therefore, the motion is not second or successive. Doc. 9, pp. 1-2. Further Movant argues that had the Court, not included the expunged conviction when imposing his sentence, Movant would have received a lesser sentence due to that conviction being one of two used to classify him as a career offender. *Id.* at 2.

Movant's argument fails, as the expungement of prior state court felonies by the grace of a state constitutional amendment does not constitute a "new fact" that was unavailable at the time of his original § 2255 motion.⁴ As discussed below, Movant's expungement of his prior conviction is not recognized by federal law; therefore, it cannot constitute a fact giving rise to a new and distinct § 2255 claim challenging the sentence imposed. Accordingly, the Court is without jurisdiction to hear this Motion unless it is first certified by the Eighth Circuit.⁵

b. Movant's motion otherwise fails on the merits

Even if Movant's motion was not a second or successive motion, Movant's ground is without merit. Respondent correctly argues that expungement of a prior state conviction is not sufficient grounds to retroactively alter a defendant's guideline range. Rather, "[f]ederal law, not state law, determines whether a prior sentence is counted for criminal history purposes." *United States v. Townsend*, 408 F.3d 1020, 1024 (8th Cir. 2005). Under federal law, a conviction is not expunged unless it was set aside "due to constitutional invalidity, innocence, or mistake of law as required under the Guidelines." *Id.* at 1025 (citing U.S.S.G. § 4A1.2 cmt n.6); *accord United States v. Nelson*, 589 F.3d 924, 925-26 (8th Cir. 2009) (per curiam). "[T]he federal question 'is whether the defendant was previously convicted, not the particulars of how state law later might have, as a matter of grace, permitted that conviction to be excused, satisfied, or otherwise set aside.'" *United States v. Jepsen*, 944 F.3d 1019, 1023 (8th Cir. 2019) (quoting *United States v. Dyke*, 718 F.3d 1282, 1293 (10th Cir. 2013) (Gorsuch, J.)).

Here, Movant's record expungement is provided by the grace of a state constitutional amendment passed after his convictions, not due to constitutional invalidity, innocence, or mistake

⁴ While not cited by the parties, in *Deroo v. U.S.*, 709 F.3d 1242 (8th Cir. 2013), the Eighth Circuit held the expungement of an administrative action created a new § 2255 claim, rather than a second or successive claim, because the claim had not yet arisen at the time of movant's first § 2255 motion. Thus, prior to determining whether a movant must seek leave from the Eighth Circuit to determine whether § 2255(h) applies, the Court must undertake an analysis to determine whether the motion itself is second or successive.

⁵ At least one other Court has taken this approach in regards to an expungement following Missouri's change in the state law that occurred here. *Griffen v. United States*, No. 1:20-cv-00054-SNLJ, 2024 WL 4466824 (E.D. Mo. October 10, 2024)(appeal pending).

of law. As such, even if the Court were to find the Motion is not second or successive, Movant's ground for relief is without merit.

III. Certificate of Appealability

Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, the Court must issue or deny a certificate of appealability when it enters a final order adverse to Movant. A certificate of appealability may be issued "only if [Movant] has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because Movant has made no such showing, the Court declines to issue a certificate of appealability.

IV. Conclusion

Accordingly, it is **ORDERED** that:

- (1) Movant's motion to reopen this case (Doc. 8) is GRANTED;
- (2) Respondent's motion to dismiss this case as being second or successive (Doc. 6) is GRANTED;
- (3) Movant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is DENIED and DISMISSED WITHOUT PREJUDICE because Movant did not obtain the required authorization from the United States Court of Appeals for the Eighth Circuit and the motion otherwise fails on the merits; and
- (4) a certificate of appealability is DENIED.

/s/ Gary A. Fenner
GARY A. FENNER
UNITED STATES DISTRICT JUDGE

Dated: November 5, 2024.



IN THE 15TH JUDICIAL CIRCUIT, SALINE COUNTY, MISSOURI

(Exhibit B)

Judge or Division: IV	Case Number: 15R040000142	
	Offense Cycle No. (OCN):	
	DOB: [REDACTED]	SSN: [REDACTED]
	Date of Offense: September 02, 2000	
State of Missouri		
Defendant:		
JOHN M LOZANO		
3835 MAIN ST #215		
KANSAS CITY MO 64111		
(Date File Stamp)		
To:		
☒ Circuit Court Division IV ☒ Saline County Sheriff's Dept.		
☒ Marshall Municipal Police Dept.		
☒ Missouri State Highway Patrol (MSHP)		
☐ Other (include name and address of agency)		
☒ Criminal Justice Information Services (CJIS) Division		
☒ Prosecuting Attorney(s) / Circuit Attorney(s) Saline County		

Judgment and Order of Expungement and Order to Vacate the Sentence Marijuana-Related Offense(s)

On this date, the court finds Defendant has been convicted of a marijuana-related offense(s) as shown below and is entitled to relief pursuant to Article XIV, Section 2, of the Missouri Constitution.

Therefore, it is so Ordered:

Defendant's sentence imposed on Count(s) 2 Charge Code(s) _____
 Charge Description(s) FELONY OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE: MARIJUANA
 (☐ Misdemeanor ☒ Felony) is/are hereby vacated pursuant to the provisions in Article XIV, Section 2, of the Missouri Constitution.

Defendant's records related to the arrest, plea, trial, and conviction for a marijuana-related offense are hereby expunged. The court orders each agency identified in this Judgment to expunge the arrest, plea, trial, and conviction record(s) of Defendant specified above.

Any records maintained by the courts or any agency shall be maintained as sealed records. A copy of this order shall be sent to the agencies which may have records related to Defendant's arrest, plea, trial, and conviction. The central repository shall provide notice of the judgment to the Federal Bureau of Investigation.

8/15/23
Date

[Signature]
Judge

Certificate of Expungement

COURT SEAL OF



SALINE COUNTY

I, Clerk of the Circuit Court, certify that the above offense(s) has been expunged and the sentence vacated, and a copy of this order has been mailed to agencies that have records related to such conviction.

Witness my hand and seal of court on 8/16/23

/s/ Rebecca Uhlich, Circuit Clerk
 by Dianne Bruce, Deputy Clerk

Clerk

Mo. Const. art. XIV, § 2, adopted November 8, 2022, is organized into numbered subdivisions. Subdivision 10 provides, in relevant part:

10. Personal Use of Marijuana.

...

(7) (a) Any person currently incarcerated in a prison, jail or halfway house, whether by trial or open or negotiated plea:

a. Who would not have been guilty of an adult or juvenile offense, had sections 1 and 2 of this Article been in effect at the time of the offense; or

b. Who would have been guilty of a lesser adult or juvenile offense had sections 1 and 2 of this Article been in effect at the time of the offense; or

c. Who is serving a sentence for a marijuana offense which is a misdemeanor, a class E felony, or a class D felony, or successor designations, involving possession of three pounds or less of marijuana, excluding offenses involving distribution or delivery to a minor, any offenses involving violence, or any offense of operating a motor vehicle while under the influence of marijuana;

may petition the sentencing court to vacate the sentence, order immediate release from incarceration and other supervision by the department of corrections, and the expungement of all government records of the case. Such expungement from all government records shall be granted for all of the person's applicable marijuana offenses, absent good cause for denial. The effect of such orders shall be to restore such person to the status the person occupied prior to such arrest, plea or conviction and as if such event had never taken place, and the conviction and sentence shall be

vacated as legally invalid. No person for whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of the person's failure to recite or acknowledge such arrest, plea, trial, conviction, or expungement in response to any inquiry made of the person for any purpose whatsoever, and no such inquiry shall be made for information relating to an expungement. The court shall not assess any filing fee for these filings. The office of the state public defender shall prepare and make readily available and accessible a pleading form that may be filed pro se for this purpose. The circuit courts of the state shall also make readily available and accessible this pleading form. Within ninety days of the effective date of this section, the sentencing court shall complete the adjudication for all cases involving only misdemeanor marijuana offenses. Within one hundred and eighty days of the effective date of this section, the sentencing court shall complete the adjudication for all cases involving class E, or successor designation, felony marijuana offenses and, if applicable, any additional marijuana misdemeanor offenses by such offenders. Within two hundred and seventy days of the effective date of this section, the sentencing court shall complete the adjudication for all class D, or successor designation, felony cases involving three pounds or less of marijuana, as well as any lesser marijuana offenses by such offenders, if applicable. This shall not apply to offenses while operating a commercial motor vehicle as defined in 49 CFR 390.5, or its successor provisions, in interstate or intrastate transportation unless otherwise exempted as found in section 307.400, RSMo, or its successor provisions.

(b) Any person currently on probation or parole for a marijuana law violation, whether by trial or open or negotiated plea:

a. Who would not have been guilty of an adult or juvenile offense, had sections 1 and 2 of this Article been in effect at the time of the offense; or

b. Who would have been guilty of a lesser adult or juvenile offense had sections 1 and 2 of this Article been in effect at the time of the offense; or

c. Who was convicted or plead guilty to a marijuana offense which is a misdemeanor, a class E felony, or a class D felony, or successor designations, involving the possession of three pounds or less of marijuana, excluding distribution or delivery to a minor or any offense of operating a motor vehicle while under the influence of marijuana;

shall, upon the effective date of this section, have their sentence automatically vacated by the sentencing court, which shall order the immediate termination of supervision by the department of corrections, and the expungement of all government records of the case. Such expungement from all government records shall be granted for all of the person's applicable marijuana offenses, absent good cause for denial. The effect of such orders shall be to restore such person to the status the person occupied prior to such arrest, plea or conviction and as if such event had never taken place, and the conviction and sentence shall be vacated as legally invalid. No person for whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of the person's failure to recite or acknowledge such arrest, plea, trial, conviction, or

expungement in response to any inquiry made of the person for any purpose whatsoever, and no such inquiry shall be made for information relating to an expungement. The court shall not assess any filing fee for these cases. This shall not apply to offenses while operating a commercial motor vehicle as defined in 49 CFR 390.5, or its successor provisions, in interstate or intrastate transportation unless otherwise exempted as found in section 307.400, RSMo, or its successor provisions.

(8) (a) Within six months of the effective date of this section, the circuit courts of this state shall order the expungement of the criminal history records of all misdemeanor marijuana offenses for any person who is no longer incarcerated or under the supervision of the department of corrections. Within twelve months of the effective date of this section, the circuit courts of this state shall order the expungement of criminal history records for all persons no longer incarcerated or under the supervision of the department of corrections but who have completed their sentence for any felony marijuana offenses and any marijuana offenses that would no longer be a crime after the effective dates of sections 1 and 2 of this Article, excluding distribution or delivery to a minor, any such offenses involving violence, or any offense of operating a motor vehicle while under the influence of marijuana. For all class A, class B and class C, or successor designations, felony marijuana offenses, and for all class D, or successor designation, felony marijuana offenses for possession of more than three pounds of marijuana, the circuit courts of this state shall order expungement of criminal history records upon the completion of the person's incarceration, including any supervised probation or parole. For the purposes of this

subdivision, “criminal history record” means all information documenting an individual’s contact with the criminal justice system, including data regarding identification, arrest or citation, arraignment, judicial disposition, custody, and supervision.

(b) An expungement order shall be legally effective immediately and the person whose record is expunged shall be treated in all respects as if he or she had never been arrested, convicted, or sentenced for the offense, and the conviction and sentence shall be vacated as legally invalid. The court shall issue an order to expunge all records and files related to the arrest, citation, investigation, charge, adjudication of guilt, criminal proceedings, and probation related to the sentence. The court shall provide notice of the expungement to the person who is the subject of the record at the person's last known address, the arresting agency, prosecuting attorneys, central state depository of criminal records, and any other entity that may have a record related to the order to expunge. The central state depository of criminal records shall provide notice of the expungement to the Federal Bureau of Investigation’s National Crime Information Center, or its successor agency. The court shall issue the person a certificate stating that the offense for which the person was convicted has been expunged and that its effect is to annul the record of arrest, conviction, and sentence.

(c) The effect of such expungement shall be to restore such person to the status the person occupied prior to such arrest, plea, or conviction and as if such event had never taken place. Such person shall not be required to acknowledge the existence of such a criminal history record or answer questions about the record in any application

for employment, license, or civil right or privilege or in an appearance as a witness in any proceeding or hearing, and may deny the existence of the record regardless of whether the person has received notice from the court that an expungement order has been issued on the person's behalf.

(d) No person shall be prosecuted again for any offense which has been vacated or expunged.

(e) The court shall keep a special index of cases that have been expunged together with the expungement order and the certificate issued pursuant to this subsection. The index shall list only the name of the person convicted of the offense, his or her date of birth, the docket number, and the criminal offense that was the subject of the expungement. The special index and related documents shall be confidential and shall be physically and electronically segregated in a manner that ensures confidentiality and that limits access to authorized persons. The court may permit special access to the index and the documents for research purposes pursuant to the rules for public access to court records. The index and documents made available by the court may not include any identifying information.

United States Sentencing Guideline § 4A1.2 reads, in relevant part:

(j) **EXPUNGED CONVICTIONS**

Sentences for expunged convictions are not counted.

Commentary

Application Notes:

...

6. **Reversed, Vacated, or Invalidated Convictions.**—Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (*e.g.*, 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

...

10. **Convictions Set Aside or Defendant Pardoned.**—A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, *e.g.*, in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. §4A1.2(j).

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

UNITED STATES OF AMERICA

-vs-

Case No.: 05-6032-01-CR-SJ-GAF

JOHN MERCED LOZANO

USM Number: 18611-045

Christopher Angles, CJA

JUDGMENT IN A CRIMINAL CASE

The defendant pleaded guilty to Count 1,2,3 and 4 on 12/22/05 of the Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
21 USC 841(a)(1),(b)(1)(A) and 846	Conspiracy to Distribute and Possess with Intent to Distribute Methamphetamine	September 3, 2005	1
18 USC 922(g)(1) and 924(a)(2)	Felon in Possession of Firearms and Ammunition	August 5, 2005	2
18 USC 924(c)(1)(A)(I)	Carrying Firearms During and in Relation to Drug Trafficking Crime	August 5, 2005	3
21 USC 853	Criminal Forfeiture	August 5, 2005	4

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

IT IS 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.

Date of Imposition of Sentence: April 20, 2006

/s/ Gary A. Fenner
GARY A. FENNER
UNITED STATES DISTRICT JUDGE

April 20,2006

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **322 Months**. 262 months on Count 1, 120 months on Count 2, and 60 months on Count 3. Counts 1 and 2 are to be served concurrently, Count 3 is to be served consecutive to the sentence imposed in Counts 1 and 2, for a total custody sentence of 322 months. This total custody sentence to be serve consecutively to Saline County, Missouri Case Nos. CR499-55F and CR400-142F.

The Court makes the following recommendations to the FBP:

Defendant be designated to an institution for participation in the 500 hour intensive drug treatment program. The defendant be designated to either Pekin, IL or Estill, SC.

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

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term **5 years**. 5 years on Counts 1 and 3, 3 years on Count 2, the terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency

without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following special conditions of supervised release:

1. The defendant shall successfully participate in a substance abuse counseling program, which may include urinalysis, sweat patch, or Breathalyzer testing, as approved by the Probation Office, and pay any associated costs as directed by the Probation Office.
2. The defendant shall not consume or possess alcoholic beverages or beer, including 3.2 percent beer, at any time, or enter any establishment where alcoholic beverages are the main items for sale.
3. The defendant shall satisfy all warrants/pending charges within the first 90 days of supervised release.
4. The defendant shall submit his person, residence, office or vehicle to a search, conducted by a U.S. Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

ACKNOWLEDGMENT OF CONDITIONS

I have read or have read the conditions of supervision set forth in this judgment and I fully understand them. I have been provided a copy of them.

I understand that upon finding of a violation of probation or supervised release, the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

Defendant

Date

United States Probation Officer

Date

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

Total Assessment

\$300.00

Total Fine

\$

Total Restitution

\$

The defendant shall pay interest on any fine or restitution of more than \$2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

Lump sum payment of **\$300.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The defendant shall forfeit the defendant's interest in the following property to the United States:

\$1,268.00 in United States currency

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution (7) penalties, and (8) costs, including cost of prosecution and court costs.