- APPENDIX - A

FILED
United States Court of Appeals
Tenth Circuit

December 23, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

HILLIARD A. FULGHAM,

Petitioner - Appellant,

v.

SCOTT CROW, Director

Respondent - Appellee.

No. 20-5008
(D.C. No. 4:17-CV-00010-CVE-FHM)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Pro se Petitioner-Appellant Hilliard A. Fulgham[1] seeks a certificate of appealability ("COA") to challenge the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. His application for a COA raises two claims: (1) an alleged violation of his rights under the Interstate Agreement on Detainers Act ("IADA"), OKLA. STAT. tit. 22, § 1347, based on Oklahoma's

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* This Order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] Because Mr. Fulgham is proceeding pro se, we construe his filings liberally, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *accord Garza v. Davis*, 596 F.3d 1198, 1201 n.2 (10th Cir. 2010), but "we will not 'assume the role of advocate,'" *United States v. Parker*, 720 F.3d 781, 784 n.1 (10th Cir. 2013) (quoting *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008)).

APPENDIX - A

purported failure to timely bring him to trial, and (2) an alleged Sixth Amendment violation based on ineffective assistance of trial counsel. Exercising jurisdiction under 28 U.S.C. § 1291, we **DENY** Mr. Fulgham's application for a COA as to each claim and **DISMISS** this matter.

I

In April 2015, Mr. Fulgham was found guilty on two counts of first-degree murder and sentenced to life imprisonment without parole in relation to the stabbing deaths of two women in Tulsa, Oklahoma. On direct appeal to the Oklahoma Court of Criminal Appeals ("OCCA"), Mr. Fulgham argued his conviction should be overturned because (1) the trial court violated his rights under the IADA by failing to bring him to trial within the statute's 120-day timeframe; and (2) his trial counsel rendered ineffective assistance by failing to raise this IADA argument before trial. *See Fulgham v. State*, 400 P.3d 775, 778, 780 (Okla. Crim. App. 2016).[2]

Mr. Fulgham's first appellate argument turned on Article IV(c) of the IADA. Under Article IV(c), Mr. Fulgham's trial was to commence no later than 120 days after he was transferred to Oklahoma from Mississippi, absent a continuance "for good cause." *See* OKLA. STAT. tit. 22, § 1347 ("[T]rial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in

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[2] Mr. Fulgham does not include the OCCA ruling in the record, but we take judicial notice of the ruling as it appears on Westlaw.

the receiving state, but for good cause shown . . . , the court . . . may grant any necessary or reasonable continuance."). Further, Article V(c) of the IADA specifies that charges "not brought to trial" within this 120-day timeframe "shall" be dismissed "with prejudice." *Id.* Mr. Fulgham was transferred to Oklahoma on September 18, 2013, but his trial did not commence until April 6, 2015—565 days after his arrival in Oklahoma. Based on this delay, he argued Oklahoma's criminal charges against him should have been dismissed pursuant to the IADA and, therefore, his conviction should be overturned.

The OCCA rejected this argument, pointing out that Mr. Fulgham never raised any IADA-related issues prior to trial; indeed, the *trial court* raised questions pertaining to the IADA at Mr. Fulgham's sentencing hearing, "well after the completion of his jury trial." *Fulgham*, 400 P.3d at 778.[3] By failing to invoke his IADA rights pre-trial, Mr. Fulgham "acquiesced to treatment inconsistent with" the statute's time limitations and, thus, "waived any rights granted to him under the IAD[A]—along with his ability to subsequently complain such rights had been violated when he proceeded to trial." *Id.* at 779–80.

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[3] At Mr. Fulgham's initial sentencing hearing, the trial court noted it "discovered a Request for Temporary Custody filed pursuant to the IAD[A] in the record" and "directed the parties to 'look into this' and specifically research the issue of waiver." *Fulgham*, 400 P.3d at 778. When Mr. Fulgham was eventually sentenced, the trial court concluded that he had "effectively waived" his IADA rights. *Id.* at 778–79.

The OCCA also rejected Mr. Fulgham's ineffective-assistance-of-counsel argument. *See id.* at 780–81. At bottom, this argument was entirely speculative: in essence, Mr. Fulgham argued that, had his counsel asserted his IADA rights before trial, his case would have been dismissed, and that by failing to do so, his counsel rendered constitutionally deficient performance and prejudiced his defense. But the OCCA refused to "blindly make the leap necessary to find prejudice in [Mr. Fulgham's] case based on speculation alone." *Id.* at 780.[4] Thus, because Mr. Fulgham "failed to present any evidence demonstrating the reasonable probability of a different result in the proceedings," he did not establish ineffective assistance of counsel. *Id.* at 780–81.

Mr. Fulgham reasserted these arguments in his § 2254 petition, which the district court denied. While the district court agreed with the OCCA that Mr. Fulgham waived his IADA claim, it noted additionally that Mr. Fulgham was not automatically entitled to habeas relief based on a bare IADA violation. Rather, he needed to show that such a violation prejudiced his defense or constituted a miscarriage of justice. Having failed to make this showing, the court reasoned that Mr. Fulgham was not entitled to habeas relief based on his IADA claim. The

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[4] Even were it to speculate, the OCCA noted that it was not "unrealistic to assume that the trial court would have advanced the date of [Mr. Fulgham's] trial or otherwise ensured a proper record was made establishing good cause for delay," had Mr. Fulgham or his counsel "flagged th[e] issue some time prior to trial"—"either of which would have satisfied" the IADA's requirements. *Fulgham*, 400 P.3d at 780.

court also rejected Mr. Fulgham's ineffective-assistance-of-counsel claim, as Mr. Fulgham failed to "demonstrate[] a reasonable probability that the trial court would have dismissed [his] case" and, therefore, failed to show the requisite prejudice. R., Vol. I, at 251 (Dist. Ct. Order, filed Dec. 31, 2019). Finally, the district court denied Mr. Fulgham a COA. Mr. Fulgham timely applied for a COA before this court.

II

As a state prisoner proceeding under 28 U.S.C. § 2254, Mr. Fulgham must obtain a COA to be heard on the merits of his appeal. *See* 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). But he cannot obtain a COA without making "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which requires him to "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El*, 537 U.S. at 336 (alteration in original) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). In other words, Mr. Fulgham must show that the district court's resolution of his claims was "debatable or wrong." *Slack*, 529 U.S. at 484. This showing is "the only question" at the COA phase of habeas litigation; "a merits analysis" is improper. *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

If a state court has already addressed the merits of a habeas petitioner's claims—as the OCCA has done here with Mr. Fulgham's claims—the "deferential treatment of state court decisions" under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "must be incorporated into our consideration of [the] petitioner's request for a COA." *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004). "Under AEDPA deference, a federal court's habeas review is limited to determining whether the OCCA's conclusion[s were] 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States' or whether [they] 'w[ere] based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Lockett v. Trammell*, 711 F.3d 1218, 1230 (10th Cir. 2013) (quoting 28 U.S.C. § 2254(d)). This standard is "highly deferential . . . [and] demands that state-court decisions be given the benefit of the doubt." *Littlejohn v. Trammell*, 704 F.3d 817, 824 (10th Cir. 2013) (alteration and ellipsis in original) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

III

Mr. Fulgham seeks a COA on the same two claims he raised before the OCCA on direct appeal and before the district court in his habeas petition: (1) an alleged violation of his IADA rights and (2) an alleged ineffective assistance of trial counsel, essentially for failing to raise the first claim pre-trial. In seeking a COA, Mr. Fulgham largely rehashes his arguments made before the OCCA and

district court, while failing to substantively challenge the bases of the district court's denial of his habeas petition. We conclude that Mr. Fulgham is not entitled to a COA.

First, as to Mr. Fulgham's IADA claim, both the OCCA and the district court essentially concluded that Mr. Fulgham likely waived this claim by failing to raise it before his trial. *Cf. Reed v. Farley*, 512 U.S. 339, 352 (1994) (plurality opinion) ("[W]e conclude that a state court's failure to observe the 120-day rule of IAD[A] Article IV(c) is not cognizable under § 2254 when the defendant registered no objection to the trial date at the time it was set, and suffered no prejudice attributable to the delayed commencement."). But irrespective of any possible waiver, Mr. Fulgham's first claim does not warrant the issuance of a COA because he has failed to make a threshold substantial showing that any IADA-related error abridged or otherwise violated his constitutional rights.

We have held that "rights created by the [IADA] are statutory, not fundamental, constitutional, or jurisdictional in nature"—and, thus, an "IAD[A] violation might be 'grounds for collateral attack on a . . . conviction and sentence'" *only* "if 'special circumstances' exist[] in a particular case." *Knox v. Wyo. Dep't of Corrs.*, 34 F.3d 964, 967 (10th Cir. 1994) (quoting *Greathouse v. United States*, 655 F.2d 1032, 1034 (10th Cir. 1981)); *see Raifsnider v. Colorado*, 299 F. App'x 825, 827 (10th Cir. 2008) (unpublished) ("This circuit has held that an IADA violation does not 'rise to a constitutional deprivation' without, at the

very least, a showing that 'actual prejudice' resulted from the violation." (quoting *Dobson v. Hershberger*, 124 F.3d 216, 1997 WL 543370, at *2 (10th Cir. 1997) (unpublished table decision))).

"Special circumstances" or "actual prejudice," in turn, require "a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure." *Raifsnider*, 299 F. App'x at 827 (alteration in original) (quoting *Knox*, 34 F.3d at 968); *see also Reed*, 512 U.S. at 354 (recalling "the established rule with respect to nonconstitutional claims" in habeas proceedings: "[N]onconstitutional claims . . . can be raised on collateral review only if the alleged error constitutes a '"fundamental defect which inherently results in a complete miscarriage of justice."'" (alteration and ellipsis in original) (quoting *Stone v. Powell*, 428 U.S. 465, 477 n.10 (1976))).

Even if we assumed that an IADA violation occurred, Mr. Fulgham "has not alleged 'any prejudicial error that qualifies as a fundamental defect which inherently results in a complete miscarriage of justice, or an omission inconsistent with the rudimentary demands of fair procedure'"—and, thus, "has no claim that would support [habeas] relief." *Stallings v. Franco*, 576 F. App'x 820, 822–23 (10th Cir. 2014) (unpublished) (quoting *Knox*, 34 F.3d at 968). Thus, Mr. Fulgham cannot establish that the district court's denial of his habeas petition

concerning his IADA claim is debatable or wrong. He is not entitled to a COA on this claim.

Mr. Fulgham is likewise not entitled to a COA on his second claim, for ineffective assistance of counsel. "Under [the governing *Strickland*] standard, in order to prevail on a claim of ineffective assistance of counsel, Mr. [Fulgham] must show both that his counsel's performance 'fell below an objective standard of reasonableness' and that 'the deficient performance prejudiced the defense.'" *Byrd v. Workman*, 645 F.3d 1159, 1167 (10th Cir. 2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)). "The [prejudice] prong of *Strickland* . . . requires [Mr. Fulgham] to show 'that there is a reasonable probability'"—not "mere speculation"—"'that, but for [his] counsel's error, "the result of the proceeding would have been different."'" *Hooks v. Workman*, 689 F.3d 1148, 1187 (10th Cir. 2012) (quoting *United States v. Challoner*, 583 F.3d 745, 749 (10th Cir. 2009)). "Courts are free to address these two prongs [of deficient performance and prejudice under *Strickland*] in any order, and failure under either is dispositive." *Byrd*, 645 F.3d at 1168.

We conclude that reasonable jurists could not debate the correctness of the district court's resolution of Mr. Fulgham's ineffective-assistance claim and, therefore, he is not entitled to a COA on this claim. That is true because the district court rightly determined that the OCCA's ruling on the prejudice prong of

Strickland was not contrary to, nor an unreasonable application of, clearly established federal law.

More specifically, Mr. Fulgham merely speculates that the charges against him would have been dismissed had his trial counsel raised the IADA's time limitations pre-trial. But this contention rests on an entirely hypothetical—and implausible—factual scenario. As both the OCCA and district court pointed out, there is every reason to believe that, had Mr. Fulgham's trial counsel timely invoked the IADA's 120-day limit, the trial court would have made a good cause finding for delay or otherwise accelerated Mr. Fulgham's trial date. Mr. Fulgham's theory of *Strickland* prejudice, then, is too conjectural to warrant habeas relief. *See Harrington v. Richter*, 562 U.S. 86, 112 (2011) ("The likelihood of a different result must be substantial, not just conceivable."). Thus, as with his first claim, Mr. Fulgham fails to show the district court's rejection of his second claim is debatable or wrong; therefore, he is not entitled to a COA on this second claim.

IV

For the foregoing reasons, we **DENY** Mr. Fulgham's application for a COA and **DISMISS** this matter.

ENTERED FOR THE COURT

Jerome A. Holmes
Circuit Judge

- APPENDIX - B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

HILLIARD A. FULGHAM,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 17-CV-0010-CVE-FHM**
	)	
SCOTT CROW, Director,	)	
	)	
Respondent.	)	

JUDGMENT

This matter comes before the Court on petitioner's 28 U.S.C. § 2254 habeas corpus petition (Dkt. # 1). The issues having been duly considered and a decision having been rendered in the opinion and order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for respondent and against petitioner.

DATED this 31st day of December, 2019.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE

APPENDIX - B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

HILLIARD A. FULGHAM,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 17-CV-0010-CVE-FHM**
	)	
SCOTT CROW, Director,[1]	)	
	)	
Respondent.	)	

OPINION AND ORDER

Now before the Court is petitioner's 28 U.S.C. § 2254 habeas corpus petition (Dkt. # 1). For the reasons below, the petition will be denied.

I.

This cases arises from petitioner's murder convictions. The investigation began in 2006, when police discovered that two women had been stabbed to death in a Tulsa apartment. See Dkt. # 8-9, at 248; see also Dkt. # 8-16, at 58. Police collected blood samples from bathroom tissue and the apartment's window ledge, but the DNA did not match any known suspects. See Dkt. # 8-10, at 198-99. The case initially went cold. Id. In 2009, petitioner contributed his DNA to the Combined DNA Index System ("CODIS") after he was incarcerated in Mississippi. See Dkt. # 8-10, at 299-300. His DNA could not be excluded from the Tulsa murder scene, and, according to a forensic scientist, the statistical probability that an unrelated person contributed the blood on the window ledge was at least 1 in 3.3 billion. See Dkt. # 8-11, at 55-56.

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[1] Petitioner is incarcerated at the Lawton Correctional Facility (LCF), a private prison in Lawton, Oklahoma. See Dkt. # 1 at 1. Scott Crow, Director of the Oklahoma Department of Corrections, is therefore substituted in place of Joe Allbaugh as party respondent. See Habeas Corpus Rule 2(a). The Clerk of Court shall note the substitution on the record.

The State charged petitioner with two counts of first degree murder in violation of OKLA. STAT. tit. 21, § 701.7. See Dkt. # 8-17, at 26. Petitioner's defense theory was that he fought with the killer on the night of the crime; that petitioner bled into the killer's face, eyes, and ears; and that the killer then transferred petitioner's blood to the murder scene. See Dkt. # 7-1, at 11. However, petitioner's ex-girlfriend testified that he admitted to stabbing the victims. See Dkt. # 8-9, at 281-82. After a five-day trial, the jury convicted petitioner on both counts. See Dkt. # 8-12, at 88. The state court sentenced petitioner to life imprisonment without parole, in accordance with the jury's recommendation. See Dkt. # 8-14, at 13.

Petitioner perfected a direct appeal with the Oklahoma Court of Criminal Appeals (OCCA). See Fulgham v. State of Oklahoma, 400 P.3d 775 (Okla. Crim. App. 2016).[2] The OCCA affirmed the conviction and sentence. Id. Petitioner filed the instant § 2254 petition (Dkt. # 1) on January 9, 2017. He raises two propositions of error:

> (Ground 1): The state court violated the Interstate Agreement on Detainers Act ("IAD") by failing to commence a trial within 120 days of petitioner's transfer to Oklahoma; and
>
> (Ground 2): Trial counsel was ineffective for failing to pursue the IAD violation.

See Dkt. # 1, at 4, 6.

Respondent filed an answer (Dkt. # 7), along with copies of the state court record (Dkt. # 8). Respondent concedes, and the Court finds, that petitioner timely filed his federal habeas petition and exhausted state remedies. See Dkt. #7 at 2; see also 28 U.S.C. §§ 2244(d), 2254(b)(1)(A). However, respondent contends that both claims fail on the merits. The matter is fully briefed and ready for review.

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[2] Respondent failed to provide the OCCA ruling as part of the record. The Court, therefore, takes judicial notice of the opinion on Westlaw.

II.

The Antiterrorism and Effective Death Penalty Act (AEDPA) governs this Court's review of petitioner's habeas claims. See 28 U.S.C. § 2254. Relief is only available under the AEDPA where the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). However, because the OCCA already adjudicated petitioner's claims, this Court may not grant habeas relief unless he demonstrates that the OCCA's ruling: (1) "resulted in a decision that was contrary to . . . clearly established Federal law as determined by Supreme Court of the United States," 28 U.S.C. § 2254(d)(1);[3] (2) "resulted in a decision that . . . involved an unreasonable application of clearly established Federal law," id.; or (3) "resulted in a decision that was based on an unreasonable determination of the facts" in light of the record presented to the state court, id. at § 2254(d)(2).

"To determine whether a particular decision is 'contrary to' then-established law, a federal court must consider whether the decision 'applies a rule that contradicts [such] law' and how the decision 'confronts [the] set of facts' that were before the state court." Cullen v. Pinholster, 563 U.S. 170, 182 (2011) (alterations in original) (quotations omitted). When the state court's decision "identifies the correct governing legal principle in existence at the time, a federal court must assess whether the decision 'unreasonably applies that principle to the facts of the prisoner's case." Id. (quotations omitted). Significantly, an "unreasonable application of" clearly established federal law

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[3] As used in § 2254(d)(1), the phrase "clearly established Federal law" means "the governing legal principle or principles" stated in "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." Lockyer v. Andrade, 538 U.S. 63, 71–72 (2003) (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)); see also House v. Hatch, 527 F.3d 1010, 1015 (10th Cir. 2008) (explaining that "Supreme Court holdings—the exclusive touchstone for clearly established federal law—must be construed narrowly and consist only of something akin to on-point holdings").

under § 2254(d)(1) "must be objectively unreasonable, not merely wrong." White v. Woodall, 134 S. Ct. 1697, 1702 (2014) (quotations omitted). "[E]ven clear error will not suffice." Id. Likewise, under § 2254(d)(2), "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." Wood v. Allen, 558 U.S. 290, 301 (2010). The Court must presume the correctness of the state court's factual findings unless petitioner rebuts that presumption "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Essentially, the standards set forth in § 2254 are designed to be "difficult to meet," Harrington v. Richter, 562 U.S. 86, 102 (2011), and require federal habeas courts to give state court decisions the "benefit of the doubt." Woodford v. Visciotti, 537 U.S. 19, 24 (2002). A state prisoner ultimately "must show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 103.

A. Violation of Federal Detainer Law (Ground 1)

Petitioner, who was transferred from Mississippi to Oklahoma to stand trial, seeks habeas relief based on an alleged violation of the IAD. "The IAD provides cooperative procedures for transfers of prisoners between the federal and state jurisdictions that have adopted the interstate compact." Fulgham, 400 P.3d at 778. Article IV of the IAD provides that "trial shall be commenced within . . . 120 days of the arrival of the prisoner in the receiving state." OKLA. STAT. tit. 22, § 1347. Article V directs the state court to dismiss the indictment with prejudice if the trial is not timely commenced. Id. Because petitioner's trial commenced 565 days after his transfer to Oklahoma, he

urges this Court to vacate his murder convictions and dismiss all charges with prejudice. See Dkt. # 1, at 4, 13.

The OCCA considered this argument and determined that the IAD claim was waived. The OCCA noted that the IAD "was never acknowledged or raised until [petitioner's] formal sentencing hearing – well after the completion of his jury trial. And, even then, the issue was raised by the trial court – not [petitioner]." Fulgham, 400 P.3d at 778.[4] Therefore, the OCCA concluded that "[petitioner] acquiesced to treatment inconsistent with the IAD's time limits." Id. at 779. The opinion further noted that the protections of the IAD "had already terminated" at the time of sentencing, when the issue first arose. Id. at 779-80.

Under federal law, the "speedy trial rights guaranteed by the IAD may be waived either explicitly or by an affirmative request for treatment that is contrary to or inconsistent with those speedy trial rights." New York v. Hill, 528 U.S. 110, 118 (2000). In other words, "[a] defendant may waive his IAD rights by agreeing to a trial date that is later than the Agreement requires." United States v. McIntosh, 2013 WL 1490849, at * 11 (10th Cir. April 12, 2013) (citing Hill, 528 U.S. at 118).[5] The Supreme Court reasoned that, without implicit waivers, defendants could "escape justice by willingly accepting treatment inconsistent with the IAD's time limits, and then recant[] later on." Hill, 528 at 118.

Further, even if the issue is preserved, habeas relief is not automatically warranted based on a IAD violation. "[R]ights created by the [IAD] are statutory, not fundamental, constitutional, or

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[4] It appears that the state court discovered Oklahoma's IAD request for temporary custody in the case file while preparing for the sentencing hearing. See Dkt # 7-1, at 12.

[5] The Court cites this decision, and other unpublished decisions herein, as persuasive authority. See FED. R. APP. P. 32.1(a); 10th Cir. R. 32.1(A).

jurisdictional in nature." Greathouse v. United States, 655 F.2d 1032, 1034 (10th Cir. 1981). Only "special circumstances" permit collateral attack of a conviction under § 2254 based on alleged violations of the IAD. See Knox v. Wyoming Dept. of Corrections, 34 F.3d 964, 967 (10th Cir. 1994). Such circumstances exist where the alleged violation constitutes "a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure." Id. at 968 (quoting Reed v. Farley, 512 U.S. 339, 348 (1994)).

Having reviewed the record, the Court declines to grant habeas relief based on the IAD. Petitioner concedes he did not raise the issue or request dismissal prior to trial. See Dkt. # 1, at 6; see also Dkt. # 7-1, at 16. The OCCA, therefore, appropriately applied Hill in determining that petitioner waived his rights under the IAD. More importantly, petitioner has not alleged "that his ability to present a defense was prejudiced by the delay." Reed v. Farley, 512 U.S. 339, 353 (1994) (addressing IAD violations in the habeas context). He testified in his own defense, and the jury elected not to believe his story that the killer bled into his face during a fight. The Court, therefore, cannot find that the IAD violation constitutes a miscarriage of justice, and Ground 1 fails.

B. Ineffective Assistance of Counsel (Ground 2)

Petitioner next argues that trial counsel was ineffective for failing to timely seek dismissal under the IAD. See Dkt. # 1 at 6. The OCCA rejected this claim under the two-prong test announced in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, a defendant must show that his counsel's performance was deficient and that the deficient performance was prejudicial. 466 U.S. at 687. To satisfy the second prong, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." Hobdy v. Raemisch, 916 F.3d 863 (10th Cir. 2019) (quotations omitted). The OCCA concluded that petitioner "fail[ed] to show Strickland prejudice," explaining:

> [Petitioner] essentially asks this Court to assume that had his trial counsel asserted [petitioner's] IAD rights prior to trial, his case would have been dismissed with prejudice. . . . [D]uring the course of [petitioner's] case, [petitioner] was appointed three separate attorneys. We can only speculate what would have occurred if at some point one of these three attorneys had raised the issue. Moreover, had [petitioned] flagged this issue some time prior to trial, it is not unrealistic to assume the trial court could have complied with the IAD's requirements. Nor is it unrealistic to assume that the trial court would have advanced the date of the trial or otherwise ensured a proper record was made establishing good cause for delay, either of which would have satisfied Article IV(c).

Fulgham, 400 P.3d at 780.

Viewing the decision with double deference, Knowles v. Mirzayance, 556 U.S. 111, 123 (2009), the Court agrees that petitioner's ineffective-assistance claim is too speculative to warrant relief. The record reflects that: (i) petitioner sought some of the continuances and changed counsel multiple times; (ii) the prosecutor had difficulty locating an out of state witness; (iii) additional DNA testing was necessary; and (iv) a detective suffered a death in the family. See Dkt. # 8-17, at 10-11; 77; 114; and 118. Under these circumstances, the state court may very well have overruled any IAD objection and made a finding of "good cause," which tolls the 120-day period. See OKLA. STAT. tit. 22, § 1347. Petitioner has also not demonstrated a reasonable probability that the trial court would have dismissed the case with prejudice, rather than simply advancing the trial date. Petitioner was accused of brutally stabbing two women in their home, and such charges are not dismissed lightly. Therefore, the Court cannot find a substantial likelihood of a different outcome, had counsel raised the IAD violation. See Harrington v. Richter, 562 U.S. 86, 112 (2011) ("The likelihood of a different result must be substantial, not just conceivable."). The OCCA appropriately rejected petitioner's ineffective-assistance claim (Ground 2), and the petition (Dkt. # 1) must be denied.

III.

Habeas Corpus Rule 11 requires "[t]he district court [to] . . . issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate may only issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court rejects the merits of petitioner's constitutional claims, he must make this showing by "demonstrat[ing] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). For the reasons discussed above, petitioner has not made the requisite showing on any of his claims. The Court therefore denies a certificate of appealability.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Clerk shall substitute Scott Crow in place of Joe Allbaugh as respondent.

2. The petition for a writ of habeas corpus (Dkt. # 1) is **denied.**

3. A certificate of appealability is **denied.**

4. A separate judgment will be entered herewith.

DATED this 31st day of December, 2019.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE