Case No. 21-5605

# IN THE SUPREME COURT OF THE UNITED STATES

MARK E. SELLS, *Applicant*,

-vs-

SCOTT CROW, Director, *Respondent*.

ORIGINAL

To the Honorable Neil M. Gorsuch,

Associate Justice of the United States Supreme Court and

Circuit Justice for the Tenth Circuit



ON PETITION FOR A WRIT OF CERTIORARI

FOR: UNITED STATES TENTH CIRCUIT COURT OF APPEALS,

CASE No. 21-5014 (En Banc rehearing denied 5-28-21)

PETITION FOR WRIT OF CERTIORARI

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Case No. _____

# IN THE
# SUPREME COURT OF THE UNITED STATES
# PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgement(s) below, as they were made in intentional error.[1]

## OPINIONS BELOW

The Opinion/Order of the United States Court of Appeals for the Tenth Circuit, denying 'En Banc' rehearing, in Case # 21-5014, appears at Appendix A, to the Petition and is unpublished.

The Opinion/Order of the United States Court of Appeals for the Tenth Circuit, denying 'Certificate of Appealability', in Case # 21-5014, appears at Appendix B, to the Petition and is unpublished.

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[1] *Yun Hseng Liao v. Junious, 817 F.3d 678, 692, 94 (9th Cir. 2016 )- saying, "**state court's** fact based decision **that Liao suffered No prejudice** from his counsel's error, **failed to acknowledge essential facts, inexplicably minimized facts contradicting state court's conclusions, discounted unimpeached evidence and improperly submitted [court's own] flawed understanding, and highlighted only those [facts] that [supported court's own conclusions], [while] omitting those that did not."** "But in this case, the facts omitted from the the court's discussion are so glaring and essential to a proper weighing and evaluation of the evidence that when exposed and viewed in context, they render objectively unreasonable the court's conclusion that ... Liao did not suffer and prejudice." "With all due respect to our colleagues..., **we do not see how any fair minded jurists could have arrived at such a faulty determination."***

The Opinion/Order of the United States District Court for the Northern District of Oklahoma, denying 'Petition for Habeas Corpus', in Case # 20-CV-323-CVE-CDL, appears at Appendix C, to the Petition and is unpublished.

## JURISDICTION

The date on which the United States Court of Appeals for the Tenth Circuit refused to issue a Certificate of Appealability for case (No. 21-5014), was: **4-23-2021;** and a copy of the Order appears in Appendix B.

A Petition for rehearing 'En Banc' was timely filed in case #21-5014.

A timely Petition for rehearing 'En Banc', in Case # 21-5014, was denied by the United States Court of Appeals for the Tenth Circuit, on 5-28-2021; and a copy of the Order Denying Rehearing appears at Appendix A.

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

The Pro Se Movant/Petitioner requests the protection of *Hall v. Bellmon, 935, F.2d 1106 (10th Cir. 1991); Gallagher v. Shelton, 587 F.3d 1063, 1067 (10th Cir. 2009); Haines v, Kerner, 404 U.S. 519-521, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972); Williams v. Kullman, 722 F.2d 1048 (2nd Cir. 2008).*

## CONSTITUTIONAL AND STATUTORY PROVISIONS

## INVOLVED QUESTIONS QUERIED

Statement: Petitioner holds that his Petition for Habeas Corpus overcomes the AEDPA time-bar (28 U.S.C. §2244(d)(1), THREE (3) separate ways! (**1**) Petitioner's Petition was 'timely' filed; (**2**) Petitioner is 'Actually Innocent'; (**3**) Petitioner's circumstances and U.S. Supreme Court law support the application of either 'Equitable Tolling', or 'Judicial Estoppel'.

The following questions of Constitutional Law are presented for consideration and adjudication by the United States Supreme Court:

*1.* Can the District Court[2] refuse to 'Hear' and Time bar under 28 U.S.C. § 2244 (d)(1), Petitioner's Actual Innocence claim #2, based upon Respondent's claim and the Court's ruling, "the evidence that was available to him at the time of his 'Direct Appeal'", on the admitted and confessed 'Brady'[3] violation by Respondent, who suppressed and 'destroyed' exculpatory evidence[4], thus the District Court, in refusing to consider Petitioner's claim, ruled **contrary to** U.S. Supreme Court law in '*McQuiggin v. Perkins, 569 U.S. 383, 392 (2013);* which says an actual innocence claim is a 'gateway' through the

[2] United States District Court, Northern District of Oklahoma

[3] *Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct.*

[4] Suppressed statement (Appendix F), and 'misplaced/destroyed' audio tapes (Appendix J)

AEDPA, also saying an actual innocence claim, can be raised at any time, and need not prove Due Diligence to cross a Federal Court's threshold. Further, Petitioner's claim is 'materially indistinguishable' from *Schlup v. Delo, 513 U.S. 298, 329 (1995);* and easily meets the 'Carrier' standard. See: *Murray v. Carrier, 477 U.S. 478, 495-496 (1986);*

2. Is Petitioner's Actual Innocence claim #1, a 'technical defense' as the District Court ruled, or is it as Petitioner claims, 'Actual Innocence', based upon the State's '*lack of any factual evidence*' upon which to prove the crime of 'shooting with the Intent to Kill'. *Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781, reh den., (US) 62 L.Ed.2d 126, 100 S.Ct. 195.* That, **coupled** with the fact the newly discovered evidence (Detainer- see Appendix I) required dismissal of all charges with prejudice at pre-trial hearing on 10-13-05 (I.A.D.A.[5] Art. IV (e); *Alabama v. Bozeman, 533 US 146, 150 L.Ed.2d 188, 121 S.Ct. 2079 (2001))* which would preclude the State from gaining a conviction through 'artful pleadings' (*Bros., Inc. v. W.E. Grace Mfg. Co., 261 F.2d 428, 1 Fed. R. Serv.2d (Callaghan) 862, 119 U.S.P.Q. (BNA) 401 (5th Cir. 1958), app. after remand, 320 F.2d 594, 7 Fed. R. Serv.2d (Callaghan) 1143, 138 U.S.P.Q. (BNA) 357 (5th Cir. 1963),* and highly debatable testimonial statements by the prosecution as to Motive and Intent.

[5] Interstate Agreement on Detainers Act

The suppressed statement (Appendix F) and **lost/destroyed audio tapes** (Appendix J), this suppressed evidence[6] raised in Actual Innocence claim #2, would raise 'Reasonable Doubt' in the mind of any fair minded jurist. *Jackson v. Virginia, supra.* Petitioner's Actual Innocence claim of suppressed evidence [statement and destroyed audio tapes] meet the 'Carrier' standard, as Petitioner's claim is materially indistinguishable from *Schlup v. Delo, 513 U.S. 298, 329 (1995).* See also*: Slack v. McDaniel, 529 U.S. 473, 483 (2000); Murray v. Carrier, 477 U.S. 478, 495-496 (1986);*

3. Is the start date under 28 U.S.C. § 2244 (d)(1)(D): the date Petitioner knew he NEEDED a detainer to have been filed, for the I.A.D.A.[7] to apply to him, as Respondent and the Federal Courts claim and so ruled; **OR**, Is the start date under 28 U.S.C. § 2244 (d)(1)(D), when Petitioner discovered the EXISTENCE of the Detainer (Appendix I), that Judge Delapp **lied**[8] in open court[9], saying, **did not exist/was not filed**, which Petitioner discovered on 5-15-19. See Appendix G, I. Petitioner holding that under *Banks v. Dretke, 540 U.S. 668 (2004);Banks v. Dretke, 2002 U.S. Briefs 8286, at 28, 30, 2003 U.S.*

[6] *Brady v. Maryland, supra; United States v. Agurs, 427 U.S. at 111-112, 49 L.Ed.2d 342, 96 S.Ct. 2392(1976); United States v. Bagley, 473 U.S. 667, 87 L.Ed.2d 481, 105 S.Ct. 3375(1985); Pyle v. Kansas, 317 U.S. 213, 215,216, 87 L.Ed. 214, 216, 63 S.Ct. 177(1984);*

[7] Interstate Agreement on Detainers Act

[8] 10th Cir. Court's Order (Appendix B) omitted Petitioner's supported claim that Judge Delapp lied in open Court about this. (Appendix H )

[9] Hearing on 10-13-05,(Appendix H)

*S.Ct. Briefs LEXIS 837, at 47, 49.;Strickler [v. Greene, 527 U.S. 263 (1999);*

Sells had NO 'good faith basis' to look for what was sworn in open court, 'did not exist'. Appendix H.

4. If Respondent Crow and Oklahoma have confessed the Constitutional violations claimed by Petitioner as TRUE, when they filed the Motion To Dismiss as Time-barred (*Walker v. True, 399 f.3d 315, 319 (4th Cir. 2005)(Luttig, J.)(Citation omitted), vacated on other grounds by, 546 U.S. 1086, 163 L.Ed.2d 849 (2006); Delgado v. Dennehy, 503 F. Supp. 2d 411 (D. Mass. 2007)*), **is** the Federal District Court obliged to consider these violations to determine if they rise to the level requiring relief under *Swain v. Pressley, 430 U.S. 372, 381, 51 L.Ed.2d 411, 97 S.Ct. 1224(1997); and United States v. Hayman, 342 U.S. 205, 223, 96 L. Ed. 232, 72 S.Ct. 263 (1952);* and qualifying for 'Equitable Tolling' or 'Judicial Estoppel[10]' to be applied, **as the failure to do so would violate the Suspension Clause**, Art. I, § 9, cl. 2, of the U.S. Constitution, rendering Habeas Corpus relief inadequate and ineffective to test the legality of Petitioner's confinement.

5. The Federal District Court to refused to consider the following questions of Constitutional violations of Petitioner's rights:

[10] Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 170 (2010); *Lyng v. Payne, 476 U.S. 926, 935, 106 S.Ct. 2333, 2339, (1986); SW Marine, Inc., v. Gizoni, 502 U.S. 81, 92 n.5, 112 S.Ct. 486, 494 n.5, (1991); New Hampshire v. Maine, 532 U.S. 742, 750, 112 S.Ct. 1808, 1815, (2001).*

a. The Court refused to Hear Petitioner's claims of severe Constitutional violations by the State Pre-Trial Court, which stripped the State Court of jurisdiction, based upon a violation of Federal law (IADA); Those being the suppression of evidence and the State Judge and District Attorney lying in open court to deny Petitioner a fair hearing; the defense attorney appointed by the court , conspiring with the district attorney and court to violate Petitioner's Constitutional rights and send Petitioner to prison instead of getting him released and the charges dismissed with prejudice. Alabama v. Bozeman, supra.

b. The District Court denied Petitioner an Evidentiary Hearing based upon his 'newly discovered' evidence, by making unreasonable application of *Johnson v. United States, 544 U.S. 295, 125 S.Ct. 1571 (2005);* to claim that when Petitioner was told the IADA didn't apply to him because NO Detainer (Appendix H, I) had been filed, was the actual start date for when Petitioner knew of the existence of the Detainer (that didn't exist), thus ruling contrary to Townsend v. Sain, 372 U.S. 293, 319(1963); and Petitioner's right to an Evidentiary Hearing. See: Rules Governing Section 2254 Cases in the Federal District Courts – Rule 8,5; Miller-El v. Cockrell, 537 U.S. 322 (2003); Miller-El v. Dretke, 545 U.S. 231, (2005).

c. In actual innocence claim #2, did the State commit a 'Massiah' violation when they put an informant, who was acting as an 'agent of the prosecution', in the cell next to Petitioner to elicit an admission of guilt from Petitioner, without Petitioner's attorney present. Further, the informant, on behalf of the State offered to commit first degree murder, trying to 'entrap' Petitioner in an illegal act. See: *Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246.* Appendix F, J,

6. Did the District Court deny Petitioner Sells a 'substantial benefit' available to the State, violating the 'Equal Protection Clause' and 'Fair Practice', when it denied Sells' Motion to appoint counsel. *Bearden v. Georgia, 461 U.S. 660, 665, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); Smith v. Robbins, 528 U.S. 259, 276, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).*

7. Did Sells act with appropriate 'due diligence' to warrant 'equitable tolling', considering that Judge Delapp's lies in open court convinced Petitioner Sells that no detainer existed/had been filed, for him to look for and find. Did the District Court rule contrary to and make unreasonable application of *Banks v. Dretke, 540 U.S. 668 (2004); Banks v. Dretke, 2002 U.S. Briefs 8286, at 28, 30, 2003 U.S. S. Ct. Briefs LEXIS 837, at 47, 49.; and, Strickler [v. Greene, 527 U.S. 263 (1999).*

8. Did the 10th Cir. rule incorrectly when it stated the District Court's ruling was not debatable, when the District Court ruled contrary to the evidence presented[11], saying that Sells failed to present clear and convincing evidence that the State Court's finding was incorrect (28 U.S.C. §2254(e); Appendix B, p.6; App. I), concerning the 'Detainer' (Appendix I), filed on 4-26-2005, that Sells presented to prove his claim, **which the State Court said was not filed** and therefore the I.A.D.A.[12] did not apply. *United States v. Mauro, 436 U.S. 340, 98 S.Ct. 1834,(1978); Brumfield v. Cain, 135 S.Ct. 2269 (2015)*

## STATEMENT OF THE CASE

Petitioner was tried by jury in November 6-9, 2006, and found guilty; was Sentenced on 12-20-2006; Petitioner filed for post-conviction in state district court on 7-1-2019, denied 12-2-2019; appealed to the OCCA on 1-6-2020, denied on3-2-2020, exhausting state remedies; then filed for Habeas Corpus on 7-6-2020, in the N.D. of Oklahoma, which was denied on 1-21-2021; with a COA being denied by the Federal Tenth Circuit Court on 4-23-2021; rehearing 'En Banc' denied on 5-28-2021. Now, on appeal to the U.S. Supreme Court, Petitioner argues the following issues:

[11] Appendix I; *United States v. Mauro, 436 U.S. 340, 98 S.Ct. 1834, 56 L.Ed.2d 329(1978);* Appendix C.
[12] Interstate Agreement on Detainer Act

1. Petitioner's Actual Innocence claim #2, ~~is~~ was denied based upon respondent's claim and the court's ruling, "the evidence that was available to him at the time of his 'Direct Appeal'", on the admitted and confessed 'Brady'[13] violation by Respondent, thus ruling **contrary to** U.S. Supreme Court law in '*McQuiggin v. Perkins, 569 U.S. 383, 392 (2013);* which says an actual innocence claim is not subject to the AEDPA. Also saying the claim, can be raised at any time and 'need not prove Due Diligence to cross a Federal Court's threshold'. See also: *Brumfield v. Cain, 135 S.Ct. 2269 (2015)'; Schlup v. Delo, 513 U.S. 298, 329 (1995).* Petitioner's claim is 'materially indistinguishable' from *Schlup v. Delo, 513 U.S. 298, 329 (1995);* and easily meets the *'Carrier'* standard. *See: Murray v. Carrier, 477 U.S. 478, 495-496 (1986);* The District Court makes the issue about **when** the claim is filed, which is in error. The Court also declined to acknowledge or to consider what weight to give the lost/destroyed tapes[13] (Appendix J,K) Petitioner states, and so now affirms, the tapes (plural) held hours of Petitioner talking about his 'intent' to send his father a 'message' to quit coming to his house, threatening Petitioner that he would get DHS to 'take' his son from him, by showing up unannounced at his parent's house and firing a 'shot' OVER his father's head and then leaving, with his parents very much alive to ponder the message.

[13] *Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. (1963); Mooney v. Holohan, 294 U.S. 103, 112, 79 L.Ed. 791, 794,55 S.Ct. 340, 98 ALR 406 (1935); Pyle v. Kansas 317 U.S. 213,215,216, S.Ct.177(1984); Giglio v. U.S., 405, U.S. 150, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972); United States v. Agurs, 427 U.S. at 111-112, 96 S.Ct. 2392(1976);*

Petitioner talked about disconnecting the phone line at the house to give him a head start in leaving before his parents called the police. The tapes showed that Petitioner NEVER had any intention of hurting either of his parents in any way, and certainly not trying to kill either of them. The informants written statement (Appendix F) contradicts his sworn testimony (Appendix J), and even his admissions on cross-examination are that Petitioner did talk extensively, just, not saying what the Prosecution wanted/hoped he would say (Appendix J). Petitioner holds that prompted the Prosecution to 'lose' exculpatory evidence (audio tapes) and put Mr. Milligan on the stand to intentionally lie for the prosecution.[14] Petitioner holds that the 'materiality' standard has been met, and the evidentiary value of the 'tapes' should be viewed in the light most favorable to Petitioner, and held to have held exculpatory evidence. *United States v. Agurs, 427 U.S. at 111-112, 49 L.Ed.2d 342, 96 S.Ct. 2392(1976); United States v. Bagley, 473 U.S. 667, 87 L.Ed.2d 481, 105 S.Ct. 3375(1985); Pyle v. Kansas, 317 U.S. 213, 215,216, 87 L.Ed. 214, 216, 63 S.Ct. 177(1984);*

2. Is Petitioner's Actual Innocence claim #1, a 'technical defense' as the District Court ruled, or is it as Petitioner claims, 'Actual Innocence', based upon the State's 'lack of any factual evidence' upon which to prove the crime of 'shooting

[14] *Mooney v. Holohan, 294 U.S. 103, 112, 79 L.Ed. 791, 794,55 S.Ct. 340, 98 ALR 406 (1935); Napue v. Illinois, 360 U.S. 264, 268, 79 S.Ct.1173,3 L.Ed.2d 121(1959);* Appendix K,

with the Intent to Kill'. Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781, reh den., (US) 62 L.Ed.2d 126, 100 S.Ct. 195. That, **coupled** with the fact the newly discovered evidence (Detainer- see Appendix I) required dismissal of all charges with prejudice at pre-trial hearing on 10-13-05 (I.A.D.A. Art. IV (e); *Alabama v. Bozeman, 533 US 146, 150 L.Ed.2d 188, 121 S.Ct. 2079 (2001))* which would preclude the State from gaining a conviction through *'artful pleadings' (Bros., Inc. v. W.E. Grace Mfg. Co., 261 F.2d 428, 1 Fed. R. Serv.2d (Callaghan) 862, 119 U.S.P.Q. (BNA) 401 (5th Cir. 1958), app. after remand, 320 F.2d 594, 7 Fed. R. Serv.2d (Callaghan) 1143, 138 U.S.P.Q. (BNA) 357 (5th Cir. 1963),* and highly debatable testimonial statements by the prosecution as to Motive and Intent. The suppressed statement (Appendix F) and lost/destroyed audio tapes (Appendix J, K), this suppressed evidence[15] raised in Actual Innocence claim #2, would raise 'Reasonable Doubt' in the mind of any fair minded jurist. *Jackson v. Virginia, supra; Slack v. McDaniel, 529 U.S. 473, 483 (2000); Murray v. Carrier, 477 U.S. 478, 495-496 (1986); Schlup v. Delo, 513 U.S. 298, 329 (1995)* **This issue brings before the Supreme Court what weight to give the lost/destroyed tapes (Appendix J, K)**. Petitioner demanded these tapes be played to impeach the State's witness/informant, whom the State put on

[15] *Brady v. Maryland, supra; United States v. Agurs, 427 U.S. at 111-112, 49 L.Ed.2d 342, 96 S.Ct. 2392(1976); United States v. Bagley, 473 U.S. 667, 87 L.Ed.2d 481, 105 S.Ct. 3375(1985); Pyle v. Kansas, 317 U.S. 213, 215,216, 87 L.Ed. 214, 216, 63 S.Ct. 177(1984);*

the stand to lie at the Sentencing Hearing (12-20-06) before learning/hearing the District Attorney's claim [off the record] the tapes had been 'misplaced' and were 'lost'. Petitioner holds the standard of materiality has been met, as the State called the informant to testify as to what was said [on these tapes] by Petitioner Sells. *United States v. Agurs, 427 U.S. at 111-112, 49 L.Ed.2d 342, 96 S.Ct. 2392(1976).* Petitioner states and so now affirms[16], the tapes (plural) held hours of Petitioner talking about his 'intent' to send his father a 'message' to quit coming to his house, threatening Petitioner he would get DHS to 'take' his son from him, by showing up unannounced at his parents' house and firing a 'shot' OVER his father's head. Petitioner talked about disconnecting the phone line at the house to give him a head start in leaving before his parents called the police. The tapes showed that Petitioner NEVER had any intention of hurting either of his parents in any way, and certainly not trying to kill either of them, and would have convinced ANY jury that Petitioner never had any [plan] intent to harm either of his parents, in any way! *Slack v. McDaniel, 529 U.S. 473, 483 (2000);*

3. Can the Federal District Court and Appellate Court deny that Petitioner's Habeas claim was timely filed under 28 U.S.C. § 2244 (d)(1)(D) by ruling 'Contrary to' and making very 'Unreasonable application of '*Johnson v. United States, 544 U.S. 295, 125 S.Ct. 1571 (2005)* 'and '*McClesky v. Zant, 499 U.S. 467, 111 S.Ct.*

[16] Appendix K; Petitioner's sworn Affidavit, as to the content of these misplaced/destroyed Audio Tapes

*1454, 113 L.Ed.2d 517 (1991)'; Pacheco v. Artuz, 193 F. Supp.2d 756 (S.D.N.Y. 2002)*', saying that **when** Petitioner learned in Court on 10-13-05, that IADA[17] Art. IV (c) and (e)[18] did not apply to Petitioner, because NO 'Detainer' had been filed (See: *United States v. Mauro, 436 U.S. 340, 98 S.Ct. 1834, 56 L.Ed.2d 329(1978))*, the Court ruling/saying, that at that time, Petitioner had knowledge of the EXISTENCE of the Detainer (Appendix I), that Judge Delapp and District Attorney Esser had just **sworn** in that very Court, at that very Hearing, **DID NOT EXIST**, was not filed (Appendix H); thus, the District Court[19] saying that 10-13-05 was the start date under 28 U.S.C. § 2244 (d)(1)(D) and therefore the Habeas Petition was time-barred by the AEDPA, and Petitioner was not entitled to have his Petition heard. They ruled thus (Appendix C), even when Petitioner offered the Post-Conviction Habeas Court irrefutable evidence (Appendix G)[20], that Petitioner did not know of the existence of the Detainer (Appendix I,) until 5-15-2019, thus setting the start date to timely file habeas Petition at 5-15-2019, making his Habeas Petition TIMELY FILED!!! See: *Brumfield v. Cain, 135 S.Ct. 2269 (2015); Miller-El v. Cockrell, 537 U.S. 322 (2003); Miller-El v. Dretke, 545 U.S. 231, (2005)*

[17] Interstate Agreement on Detainers Act
[18] These paragraphs mandating dismissal of all charges with prejudice for violation of these provisions
[19] Federal District Court for the Northern District of Oklahoma
[20] 28 U.S.C. § 2254(e); (*Brumfield v. Cain, 135 S.Ct. 2269 (2015)*).

4. If Respondent Crow and Oklahoma have confessed the Constitutional violations claimed[21] by Petitioner as TRUE, when they filed the Motion To Dismiss as Time-barred (*Walker v. True, 399 f.3d 315, 319 (4th Cir. 2005), (Luttig,J.) (Citation omitted), vacated on other grounds by, 546 U.S. 1086, (2006),* is the Federal District Court obliged to consider these violations to determine if they rise to the level requiring relief under *Swain v. Pressley, 430 U.S. 372, 381, 51 L.Ed.2d 411, 97 S.Ct. 1224(1997); and United States v. Hayman, 342 U.S. 205, 223, 96 L. Ed. 232, 72 S.Ct. 263 (1952);* as the failure to do so would violate the Suspension Clause, Art. I, § 9, cl. 2[22], of the U.S. Constitution, thus rendering Habeas Corpus relief inadequate and ineffective to test the legality of Petitioner's confinement, as supported by *Day v. McDonough, 547 U.S. 198, 126 S.Ct. 1675 (2006) reh'g denied, 549 U.S. 1261, 127 S.Ct. 1394 (2007);* and by the evidence submitted, the Detainer (Appendix I), the 10-13-05 Hearing Transcript (Appendix H), the Letter showing Petitioner trying to find out if a detainer or anything that could be construed as such, existed, on 5-13-19 (Appendix G);

[21] Petitioner was convicted by a court that had lost jurisdiction for violating Federal law (IADA Art. IV(c)(e)) due to the suppression of evidence and lies about the suppression by the State Dist. Judge and Dist. Atty., and the suppression of other evidence (Appendix F, J) that would have proved Sells innocent of all charges.

[22] It would strip Federal Court's of the power to grant Habeas relief (Act of Feb. 5, 1867, ch 28, § 1, 14 stat 385), as ANY 'crafty' Judge and/or Prosecutor able to hide their suppression of evidence and lies about it, long enough for a 'Time-Bar' to be applied, would be able to make a mockery of the Judicial process (New Hampshire v. Maine, supra) and illegally convict innocent people at will, with no repercussions and no recourse for those so convicted. See: *Teague v. Lane, 489 U.S. 288, 311-314, 103 L.Ed.2d 334, 109 S.Ct. 1060 (1989); Mackey v. United States, 401 US 667, 692-694, 28 L.Ed.2d 404, 91 S.Ct. 1160 (1971); Rose v. Lundy, 455 US 509, 544, 71 L.Ed.2d 379, 102 S.Ct. 1198 (1982).*

**ignoring all this in violation of** *Brumfield v. Cain, 135 S.Ct. 2269 (2015); Miller-El v. Cockrell, 537 U.S. 322 (2003); Miller-El v. Dretke, 545 U.S. 231, (2005);* Petitioner asked for 'Judicial Estoppel' to be applied 27 times in his Pleadings. The Tenth Circuit ruling 'contrary to' the evidence [Transcript of 10-13-05 Hearing (Appendix H)] submitted, saying "the doctrine (Judicial Estoppel) has no applicability to the question of whether his federal habeas petition was timely or not." *Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 170 (2010); New Hampshire v. Maine, 532 U.S. 742, 750, 112 S.Ct. 1808 1815, 149 L.Ed.2d 968 (2001); Lyng v. Payne, 476 U.S. 926, 935, 106 S.Ct. 2333, 2339,(1986); Brumfield v. Cain, 135 S.Ct. 2269 (2015);*

5. To The Federal District Court to refused to consider the following questions of Constitutional violations of Petitioner's rights:

   a. The Court refused to Hear Petitioner's claims of severe constitutional violations [suppression of detainer and lying in Court about the suppression] by the State Pre-Trial Court (Appendix H), which stripped the State Court of jurisdiction, based upon a violation of Federal law (IADA); Those being the confessed, suppression and destruction of evidence[23] (Appendix F, J) and the State Judge and District Attorney lying

[23] *Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct.; Mooney v. Holohan, 294 U.S. 103, 112, 79 L.Ed. 791, 794, 55 S.Ct. 340, 98 ALR 406 (1935); Napue v. Illinois, 360 U.S. 264, 268, 79 S.Ct.1173, 3 L.Ed.2d 121(1959); Pyle v. Kansas, 317 U.S. 213, 215,216, 87 L.Ed. 214, 216, 63 S.Ct. 177(1984);*

in open court (Appendix H), to deny Petitioner a fair hearing; the defense attorney appointed by the court, conspiring with the district attorney and court[24] to violate Petitioner's Constitutional rights and send Petitioner to prison instead of getting him released and the charges dismissed with prejudice. *Alabama v. Bozeman, supra.* Part of Petitioner's Ineffective Assistance of Counsel claim is materially indistinguishable from Terry Williams [upheld] claim in *Williams v. Taylor, 529 U.S. 362, 146 L.Ed.2d 389, 120 S.Ct. 1495 (2000). Strickland v. Washington, supra; United States v. Cronic, supra.*

*b.* The District Court denied Petitioner an Evidentiary Hearing (*Townsend v. Sain, supra; 28 U.S.C. § 2254(e); Rules Governing Section 2254 Cases in the United States District Courts – Rule 8*), based upon his 'newly discovered' evidence (Appendix I)[25], by making unreasonable application of *Johnson v. United States, 544 U.S. 295, 125 S.Ct. 1571 (2005); McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454 (1991)*; to claim that when Petitioner was told the IADA didn't apply to him **because** NO Detainer (Appendix H, I) had been filed, was the actual start date for when

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*United States v. Agurs, 427 U.S. at 111-112, 49 L.Ed.2d 342, 96 S.Ct. 2392(1976); United States v. Bagley, 473 U.S. 667, 87 L.Ed.2d 481, 105 S.Ct. 3375(1985);*

[24] *Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984); United States v. Cronic, 466 U.S.648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984);*

[25] Ruling 'contrary to': *Brumfield v. Cain, 135 S.Ct. 2269 (2015);*

*92(1976); United States v. Bagley, 473 U.S. 667, 87 L.Ed.2d 481, 105 S.Ct. 3375(1985); Mooney v. Holohan, 294 U.S. 103, 112,55 S.Ct. 340, 98 ALR 406 (1935);*

6. Did the District Court deny Petitioner Sells a 'substantial benefit' available to the State, violating the 'Equal Protection Clause[26]' and 'Fair Practice', when it denied Sells' Motion to appoint counsel. This applies under 'Fundamental Fairness', as Petition for Habeas Corpus relief was timely filed[27] and has MERIT, which could have been better presented by appointed counsel, as Petitioner claimed in his Motion to Appoint Counsel. *Bearden v. Georgia, 461 U.S. 660, 665, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); Smith v. Robbins, 528 U.S. 259, 276, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).*

7. Did Sells act with appropriate 'due diligence' to warrant 'equitable tolling', considering that Judge Delapp's lies in open court convinced Petitioner Sells that no detainer existed/had been filed, for him to look for and find. Did the District Court rule contrary to and make unreasonable application of *Banks v. Dretke, 540 U.S. 668 (2004); Banks v. Dretke, 2002 U.S. Briefs 8286, at 28, 30, 2003 U.S. S. Ct. Briefs LEXIS 837, at 47, 49.; and, Strickler [v. Greene, 527 U.S. 263 (1999),* when it said Sells did not exercise proper 'due diligence' in looking for and

[26] U.S. Constitution, Amendments VI, XIV
[27] 28 U.S.C.§2244(d)(1)(D)

finding the detainer (Appendix I). Petitioner Sells had no 'good faith basis' to look for [detainer] what he had been convinced, by Judge and Dist. Attorney, lying in open court, '**DID NOT EXIST**'. *Banks v. Dretke, supra; Strickler v. Greene, supra.*

8. Did the 10th Cir. rule incorrectly when it stated the District Court's ruling was not debatable[28], when the District Court ruled contrary to the evidence presented[29], saying that Sells failed to present clear and convincing evidence that the State Court's finding was incorrect (28 U.S.C. §2254(e); Appendix B, p.6;), concerning the 'Detainer' (Appendix I), filed on 4-26-2005, the State Court **said** was not filed and therefore the I.A.D.A.[30] did not apply. *United States v. Mauro, 436 U.S. 340, 98 S.Ct. 1834, 56 L.Ed.2d 329(1978)* Petitioner provided the 'newly discovered' ['detainer'] evidence to prove/validate his claim, with **ALL** the State and Federal post-conviction courts refusing to hold an evidentiary hearing to avoid having to admit that Appendix I is in fact, a detainer. This refusal violating *Townsend v. Sain, 372 U.S. 293, 319(1963),* proving that Petitioner did have 'clear and convincing evidence' (28U.S.C. §2254(e).

[28] Appendix B; *Slack v. McDaniel, 529 U.S. 473, 483 (2000);*
[29] Appendix I; *United States v. Mauro, 436 U.S. 340, 98 S.Ct. 1834, 56 L.Ed.2d 329(1978);*
[30] Interstate Agreement on Detainer Act

## REASONS FOR GRANTING THE PETITION [Brief]

The Tenth Circuit should not be allowed to diverge in its application of the law or rules, from the other Circuits who follow U.S. Supreme Court law; as "the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus," this, "in order to preclude individualized enforcement of the Constitution in different parts of the nation." *Brown v. Allen, 344 U.S., at 501-502, 73 S.Ct. at 443*; Petitioner holds that Federal Courts can also 'abuse' the Habeas Writ by being overeager to dismiss a Petition, being willing to rule 'contrary to' and to 'make unreasonable application of'[31] Supreme Court law in order to do so. *Brown v. Allen, supra.* Under the RULES [Law] (28 U.S.C. § 2244 (d)(1)(D), Petitioner holds that MY Petition for Habeas Corpus was TIMELY filed!!!, and should have been heard and adjudicated!!! That being said:

I don't expect you to grant this Petition, despite the Constitutional Questions about Actual innocence and suppressed evidence, and what weight to give destroyed evidence in proving actual innocence; despite the Tenth Circuit Court's setting the Precedent that, 'the date 'you' have knowledge of the NEED for a 'thing/factual predicate', **IS** the date 'you' have knowledge of the EXISTENCE OF the 'thing/factual predicate', to deny a 'Timely' filed Habeas Petition under 22 U.S.C.

[31] Williams v. Taylor, 529 U.S. 362, 146 L.Ed.2d 389, 120 S.Ct. 1495 (2000);

§ 2244 (d)(1)(**D**); despite the Tenth Circuit Court overruling Supreme Court precedent in '*Banks v. Dretke, supra*' and '*Strickler v. Greene*', *supra*, to deny Equitable Tolling; despite its refusal to consider or apply Judicial Estoppel, which this Court should consider whether to make a 'mandatory' doctrine when a Court itself takes a divergent, sworn position to the facts to the detriment of a Defendant; despite the long list of Supreme Court precedents the Federal District Court ruled 'contrary to' and/or 'made very unreasonable application of', to deny ME, a Human Being and U.S. Citizen, an Honorably Discharged United States Marine, who is not a piece of 'crap', the relief I am Due based on the Constitution. I 'paid' for my 'Civil Rights', but that doesn't seem to count for much nowadays. Appendix L

## CONCLUSION

Despite all the reasons listed above, **I KNOW YOU WON'T HEAR MY CLAIMS**, because the Federal Courts no longer uphold a person's Constitutional rights and Civil Liberties. You champion keeping a person incarcerated at the expense of the Constitution and its principles. So hurry up and deny me Certiorari, finish pissing down my neck, so I can go take a shower and wash the stench of American Justice off and go read a good novel in my 8 ½' X 12' cell, knowing that I followed the [rules] and tried to exercise my Constitutional rights, to the very END.

Mark E. Sells, U.S.M.C. – *Semper Fidelis (Always Faithful)*

I say that with my head held high, because I AM, and have always been [*faithful to the Constitution*]. The smile on my face comes from knowing that each of you in denying me Certiorari and refusing to correct these terrible Constitutional wrongs, cannot, are not and will never be. Ooh Rah, Marine Corps!!!

## PLEADING

**Comes now the Petitioner, Mark E. Sells, Pro Se, and asks, as a formality, the Supreme Court of the United States, for the 'good cause' shown repeatedly, Grant Petitioner Certiorari to settle the questions of Constitutional law raised, and to remedy the Constitutional violations of law stated herein.**

**IT IS SO PRAYED:**

Mark E. Sells

## CERTIFICATE OF VERIFICATION

I, Mark E. Sells, state under penalty of perjury under the law, that the foregoing is true and correct, to the best of my knowledge, per Title 28 U.S.C.A. § 1746.
I certify that this Document is apprx. 22 pages words long, not counting the Cert. of Verif. And Cert. of Serv. Page(s). I so swear:

Mark E. Sells

on, 8-24-21
Date